

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 407 OF 2017

MAGITA ENOSHI @ MATIKOAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the Judgement of the High Court, at Mwanza]

(De-Mello, J.)

dated the 11th day of May, 2017

in

Criminal Sessions Case No. 181 of 2014

RULING OF THE COURT

27th & 30th April, 2021

LEVIRA, J.A.:

The appellant, MAGITA ENOSHI MATIKO appeals against the decision of the High Court of Tanzania sitting at Mwanza (the trial Court) in Criminal Sessions Case No. 181 of 2014 handed down on 11th May, 2014. In that case, the appellant was convicted of the offence of acts intended to cause grievous harm contrary to section 222 (a) of the Penal Code, (Cap 16 RE 2002) and sentenced to life imprisonment. Aggrieved by both the conviction and the sentence, he lodged the present appeal.

Briefly, the background of this appeal is to the effect that, on 20th August, 2010 the victim, one John Kichere @ Mwita (PW1) was together with his lover one Vicky Mwita Imori. They went to Kemakorere Market where PW1 sold his goat on auction and went back home. At around 7:30 pm they were inside the cattle shed which was empty and they had a lantern on. All of a sudden, four people from the family of Imori, the in-laws of Vicky from her late husband who were also familiar to the appellant, invaded them while equipped with clubs and machetes.

They questioned PW1's presence in that place but there was no response. Suddenly, they attacked him with those weapons and chopped off PW1's fingers and stabbed him on his back. PW1 raised an alarm for help and two people came to his rescue. Later, the police vehicle which was on patrol arrived at the scene of crime and PW1 was taken to Tarime District Hospital where he was medically examined by Juma Kisinza (PW3) and admitted for three days. He was later transferred to KCMC Hospital in Moshi for further medical treatment.

The appellant was arrested at the scene of crime, charged before the trial court but pleaded not guilty to the charge. To prove their case, the prosecution called a total number of three witnesses and tendered one exhibit. The appellant fended his case as a sole witness. Upon full trial, the appellant was found guilty, convicted and sentenced as

indicated above. Aggrieved by both, the conviction and sentence he has come to this Court with a six ground memorandum of appeal. However, for the reasons which will shortly come to light, we cannot reproduce them herein.

At the hearing of this appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Mr. Hemed Halidi Halifani, Senior State Attorney assisted by Ms. Sabina Choghoghwe, learned State Attorney.

Before commencement of the hearing, Mr. Halifani prayed for leave to first address the Court on procedural irregularities which he had discovered while preparing for the hearing of the appeal. There was no objection from the appellant and the Court granted the leave sought.

First, Mr. Halifani referred us to page 6 of the record of appeal, from the coram up to where PW1 started to testify and submitted that the trial court did not comply with the requirements of sections 265, 283 and 285 all of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) while conducting the trial. Explaining on what is required on those sections, he said, section 265 requires all trials before the High Court to be conducted with the aid of assessors and section 285 states that it is the High Court which is required to select assessors before commencing

the trial as per section 283 of the CPA. Also, he brought to light that from page 6 to 7 of the record of appeal, nothing indicates that assessors were present or selected by the trial court before commencement of the trial. He went further submitting that on page 7 of the record of appeal, the advocate for the appellant was the one who reminded the trial Judge that assessors were around and prayed for them to be allowed to take their position. The trial Judge invited them to take their position and proceeded to take PW1's evidence.

It was the argument by Mr. Halifani that the trial Judge did not discharge her duty of selecting the assessors as required by law and she as well failed to give the appellant an opportunity to either agree the assessors to sit in his trial or to tell the trial court if he had any objection on them. He added that the record of appeal does not indicate whether or not the trial Judge informed the assessors about their duty during trial. In the circumstances, he said, it is as if this trial was conducted without the aid of assessors and the effect of it is that the proceedings were vitiated as it was in **Godfrey William Matiko & Another vs Republic**, Criminal Appeal No. 409 of 2017 (unreported).

Second, Mr. Halifani submitted that another irregularity in the record of appeal is that the trial Judge did not sign after recording the evidence of the witnesses for both sides and responses to assessors'

questions. He argued that failure to sign proceedings is fatal because it created doubt on the authenticity of those proceedings. To support his argument, he cited the decision of the Court in **Yohana Mussa Makubi & Another v. Republic**, Criminal Appeal No. 556 of 2015 (unreported).

Third, it was contended by Mr. Halifani that the trial Judge did not conduct proper summing up to assessors. As such, he said, the learned Judge concentrated on justifying to the assessors why summing up should be done, instead of informing them about the ingredients of the offence which the appellant was facing, the burden and standard of proof in criminal cases and the conditions for proper visual identification as the offence was committed during the night. Mr. Halifani argued that, in her judgment, the trial Judge relied on the credibility of prosecution witnesses, but did not tell them what does it entail. According to him, by failure to address the assessors on vital legal points, the trial Judge contravened section 298 of the CPA. To buttress his argument, he cited the case of **Lazaro Katende v. The Director of Public Prosecutions**, Criminal Appeal No. 146 of 2018 (unreported). Finally, Mr. Halifani urged us to nullify the proceedings of the trial court and order retrial.

On his part, the appellant argued that since all the identified shortcomings were caused by the trial court, the case should be decided

in his favour. He objected to Mr. Halifani's prayer for retrial and urged the Court to set him free.

In determining the points of procedural irregularities raised by the counsel for the appellant we shall consider whether or not they exist in the record of appeal, their effect (if any) and the way forward. Starting with the **first** point, whether the assessors were not introduced to the accused person (appellant) at the commencement of the trial, the guiding law is section 265 of the CPA which we find it apposite to reproduce it hereunder:

"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit."

The proceedings of the trial before the trial court started on 9th May, 2017 as can be seen at page 6 of the record of appeal. On that date the appellant's plea to the charge was taken. The record of appeal neither indicates that the trial Judge explained to them their duty nor that the appellant was given an opportunity to comment on whether or not he had any objection to any of the assessors as correctly submitted by Mr. Halifani. The settled position in this regard was stated in **Monde Chibunde @ Ndishi v. Republic**, Criminal Appeal No.328 of 2017, where the Court quoted with approval the decision in the case of

Laurent Salu and Five Others v. Republic, Criminal Appeal No. 176 of 1993 (both unreported) in which the Court stated that according to the rule of practice, the accused person must be accorded the opportunity to say whether or not he objects to any of the assessors. Failure to do so is tantamount to denying him fair trial. In order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, the Court was of the view that it is of vital importance that he is informed of the existence of this right by the trial judge. (See also, **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017, **Chacha Matiko @ Magige v. Republic**, Criminal Appeal No. 562 of 2015 and **Fadhil Yussuf Hamid v. Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016. (all unreported).

In the instant case, the trial Judge did not inform the appellant about the existence of this right and did not address the assessors on their duty. This omission, in our opinion, amounted to an irregularity which we think, prejudiced the appellant and affected the assessors' opinion despite their unanimous verdict of guilty.

Regarding the **second** defect, we have thoroughly gone through the record of appeal and observed on pages 8, 9, 10, 11, 12, 13, 14, 15, 16 and 18, that the trial Judge did not append her signature after recording the evidence of each witness (PW1-PW2 and DW1). The

omission, in our considered opinion is an incurable irregularity as it renders the proceedings unauthentic. We are fortified in this finding by the Court's decision in **Yohana Mussa Makubi & Another** (supra) where it was held that:

"We are thus, satisfied that, failure by the Judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted." [See also: **Sabasaba Enos v. Republic**, Criminal Appeal No. 411 of 2017 and **Chacha Ghati Magige v. Republic**, Criminal Appeal No. 406 of 2017 (both unreported), the decisions we rendered in the ongoing sessions of the Court here at Mwanza].

In the light of the above decisions, we agree with Mr. Halifani that indeed, the trial Judge did not sign after taking evidence of all the witnesses and therefore the authenticity of the proceedings is questionable. We may add that such evidence cannot be relied upon by the court to ground a conviction to an accused person.

The **third** ground raised by Mr. Halifani was that there was insufficient summing up to assessors by the trial Judge contrary to the

requirement of the law. Our perusal of the record of appeal particularly from page 18 to 21 reveals that, the trial Judge did not address the assessors on vital points of law featuring in the proceedings which later guided her in reaching the decision against the appellant. For instance, the essential ingredients of the offence of '*acts intended to cause grievous harm*'; guiding principles in visual identification; the burden and standard of proof in criminal cases, meaning of '*malice aforethought*' and credible witness were not explained to the assessors. In the circumstances, it is clear that although the assessors were physically present during trial, the fact that they were not well guided during summing up makes their opinion questionable and in fact, it is as good as the trial was conducted without the aid of assessors. In the case of **Charles Karamji @ Masangwa and Another v. Republic**, Criminal Appeal No.34 of 2016 (unreported), the Court held that insufficient summing up to assessors is an incurable defect which cannot be cured under section 388 of the CPA nor by the overriding objectives principle. (See also **Marius Simwanza & Another v. Republic**, Criminal Appeal No. 389 of 2017 (unreported)).

That being the position, it is our finding that the cumulative procedural irregularities discussed in the current appeal cannot escape the same conclusion. Having so stated, we hold that, the proceedings of

the trial court from 9th May, 2017 to the end are a nullity. We invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, (Cap 141 RE 2019) and nullify the proceedings of the trial court from 9th May, 2017 to the end of the trial, quash the judgment and conviction, and set aside the sentence meted out to the appellant. We order a retrial of the case from 9th May, 2017 before another Judge with a new set of assessors. In the meantime, the appellant shall remain in custody.

DATED at **MWANZA** this 29th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Ruling delivered this 30th day of April, 2021 in the presence of the appellant in person and Ms. Mwamini Yoram Fyeregete, the learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.


E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL