IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 494 OF 2019

MOHAMED HASSAN OMARY JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mtwara)

(Ngwembe, J.)

dated 19th day of October, 2019
in
Criminal Sessions Case No. 48 of 2016

JUDGMENT OF THE COURT

31st May & 7th June, 2021.

KITUSI, J.A.:

This appeal arises from a trial and conviction of the appellant for murder under section 196 of the Penal Code. Right from the preliminary hearing stage to the trial that followed, there was no dispute that the appellant and the deceased were acquaintances. It was also common ground that on the fateful date the two met at a joint within Chikonji village where soup was being sold, and that a brawl ensued between them.

The prosecution's case is that when the deceased met the appellant, he was in the company of one Barnabas Anthony (PW1). It is PW1 who tells the story as to what took place at the soup and subsequently.

PW1 stated that he and the deceased went to *Bintiwawilidawa* (presumably the person selling soup) on 7/4/2016 at around 9:00 p.m. and the deceased ordered chicken soup for the two of them. Shortly later, the appellant arrived at the place. He asked the deceased to buy soup for him but the deceased refused on the ground that he had no money. A brawl ensued because the appellant was not pleased with the deceased's refusal to buy him soup. Out of anger, the deceased poured down the soup he had earlier ordered for himself. The appellant allegedly used swear words against the deceased promising future revenge, and then left for home.

Thereafter, as the deceased and PW1 were riding their respective bicycles towards home, they ran into the appellant standing by the road side. The appellant is said to have ordered the deceased to stop but the deceased refused. Instead, he dropped the bicycle and took to his heels with the appellant in hot pursuit. According to PW1, the deceased did not make it, for he stumbled and fell down. The appellant reached the deceased and cut him on various parts of his body as the terrified PW1 watched from a close range. He further stated that the appellant was dressed in the same clothes he had earlier been dressed at *Bintiwawilidawa*.

The testimony of PW1 was supported by Issa Abdallah Mtoroka (PW2) who stated that he was walking home during that time of the night when he heard somebody cry that he was dying. PW2 arrived at the scene only to find the appellant attacking the deceased. According to him, the appellant ran clear of the scene on seeing him.

PW1 and PW2 took the deceased to a Dispensary where he was pronounced dead on arrival. On the strength of the evidence of Dr. Mwanaisha Mtumweni (PW3) who performed a post mortem examination on the deceased's body, there is no dispute that he died an unnatural death resulting from cut wounds. The case for the prosecution based on the evidence of PW1 and PW2 is that the appellant is the one who administered the fatal cut wounds.

In his defence, the appellant decided to sit on the fence, so to speak. He confirmed the fact that there was a brawl between him and the deceased at the soup joint as stated by PW1. Although the cause for the misunderstanding between the two escapes us, it is enough for us to make a finding that there was a brawl. The appellant's line of defence was that the deceased is to blame for whatever happened because even when he, appellant, retreated home to avoid more fight, the deceased followed him and continued with the fight at his home. The appellant avoided alluding to how the fight ended.

Anyhow, the High Court was satisfied that the appellant is the one who caused the death of the man he had earlier fought with at the soup joint. It convicted and sentenced him to death. Dissatisfied, the appellant has appealed to the Court to challenge the conviction and sentence, on eight grounds of appeal.

At the hearing, the appellant who was electronically linked from Lindi Resident Magistrates Court at Lindi, was also represented by Mr. Ali Kassian Mkali, learned advocate. The respondent Republic appeared through Mr. Abdulrahaman Mshamu, learned Senior State Attorney who was assisted by Mr. Yahya Gumbo, learned State Attorney.

However, at the very outset, Mr. Mshamu sought permission to address us on two legal points which, he argued, could call for our determination before looking into the substance of the appeal. Incidentally, both points are not opposed by Mr. Mkali.

The first point relates to the authenticity of the testimonies of PW1, PW3 PW4 and DW1. It was submitted on this point, that it is a legal requirement for a trial Judge or Magistrate to append his signature at the end of a testimony of each witness, which was not done in relation to PW1, PW3, PW4 and DW1 in this case. Mr. Mshamu submitted that the omission rendered the testimonies of the four witnesses unauthentic and ultimately vitiated the proceedings. Citing the

case of **Magita Enosh @ Matiko v. Republic**, Criminal Appeal No. 407 of 2017 (unreported), the learned Senior State Attorney moved us to nullify the proceedings from the stage where recording of evidence commenced up to the judgment. As intimated earlier, Mr. Mkali towed the line.

Mr. Mshamu submitted that after nullifying the proceedings, quashing the judgment and setting aside the resultant sentence, we should order a retrial. On this latter submission, Mr. Mkali took a different view, and submitted that we should not order a retrial. We will come to the issue of retrial at a later stage, if we will need to.

Frist and foremost, we have to consider the position of the law as regards the duty of a Judge to append a signature at the end of testimonies of every witness. It is now settled law that the signing of proceedings by a Judge after recording evidence of each witness renders assurance as to the authenticity of the proceedings. In occasions where omission to comply with this requirement was detected, the Court has tended to consider it to be an incurable one and proceeded to nullify the proceedings. The case of **Magita Enoshi @ Matiko v. Republic** (*supra*) cited to us by Mr. Mshamu is but one example. There have been many other decisions on this. In **Sabasaba Enos @ Joseph v. Republic**, Criminal Appeal No. 411 of 2017

(unreported) the Court referred to the Criminal Procedure (Record of Evidence) (High Court) Rules, GN Nos. 28 of 1953 and 286 of 1956 on the manner of recording evidence in the High Court, but noted that nowhere is there a requirement for a Judge to sign after the testimony of every witness.

In the case of **Yohana Mussa Makubi and Abuubakar Ntundu v. Republic,** Criminal Appeal No. 556 of 2015 (unreported), cited in **Magita Enoshi @ Matiko** (*supra*), the Court appreciated that in trials before the High Court the requirement is not statutory, yet it traced the rationale for appending signature, when it held: -

> *"The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit contained in section 210 (1) (a) of the CPA and we find no doubt in taking inspiration therefrom."*

Section 210 (1) (a) of the CPA referred to in that case, requires a magistrate to append a signature after the testimony of each witness. It provides: -

> *"210 – (1) (a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and"*

Since the learned Judge in this case omitted to sign after recording testimonies of PW1, PW3, PW4 and DW1, the proceedings in respect of those witnesses are unauthentic.

Next is whether or not we should order a retrial. Mr. Mshamu submitted that except for the omission by the Judge to sign after testimonies of the four out of five witnesses, the prosecution has a strong case against the appellant and that on that basis, we should order a retrial. Mr. Mkali took a different view, arguing that the prosecution cannot prove murder against the appellant. He submitted that in view of that fact, we should not subject the appellant to the rigours of a retrial.

We are aware of the principles in the case of **Fatehali Manji v. Republic** [1966] 1 EA 343 cautioning courts when not to order a retrial in a case. In this case however, we are inclined to order a retrial, so as, among other reasons, not to deny the prosecution the right of prosecuting a person they have reasons to believe they have a case against.

The second point that was raised by Mr. Mshamu is insufficient summing up to the assessors, a complaint that is increasingly becoming common. However, in view of the position we have taken in relation to the first point, we have decided not to address and deliberate on the

second point raised. In our view, since there is going to be a retrial as per our order, there is no point for us proceeding to determine on the alleged insufficiency of summing up in the proceedings we have just nullified.

In fine, and as this point was not a ground of appeal, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 and nullify the proceedings, quash the judgment and conviction and set aside the sentence. We order an expedited retrial before another Judge sitting with a different set of assessors. The appellant shall remain in custody to await the retrial.

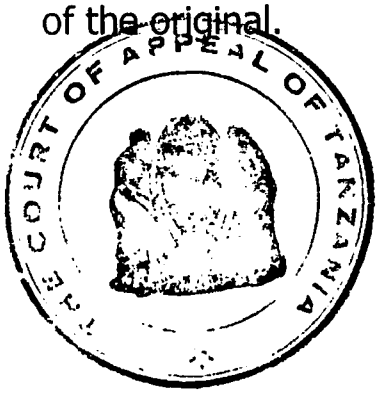
DATED at **MTWARA** this 4th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 7th day of June, 2021 in the presence of the appellant in person electronically linked from Lindi Resident Magistrates Court at Lindi was also represented by Mr. Ali Kassian Mkali, learned advocate and Mr. Kauli George Makasi, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL