IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

CRIMINAL APPEAL NO. 234 OF 2020

MHAJIRI ULADI..... 1st APPELLANT
MTARAZAKI ULADI.....2nd APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Kigoma)

(Matuma J.)

dated the 4th day of May, 2020
in
Criminal Sessions Case No. 17 of 2019

.....

JUDGMENT OF THE COURT

12th& 16th July, 2021

SEHEL, J.A.:

The appellants, Mhajiri Uladi and Mtarazaki Uladi together with Joseph Chubwa, not party to this appeal were arraigned before the High Court of Tanzania sitting at Kigoma (the trial court) for an offence of attempted to murder contrary to section 211 (a) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). The appellants and Joseph Chubwa stood as 1st, 2nd and 3rd accused persons before the trial court. It was alleged by the prosecution that the appellants and Joseph Chubwa attempted to murder one Mahamud Halfan @ Butene (PW2) on 18th February, 2018 at Kalinzi village within the District and Region

of Kigoma by beating him with an axe on the face and stabbed him with a spear and a matchet on the stomach. Suffices to point out here that at the time the appellants were arraigned, the 1st appellant was a child of 14 years, the 2nd appellant was aged 17 years and Joseph Chubwa was 82 years old. After the appellants had refuted the accusation contained in the information, the prosecution lined up two witnesses and tendered one exhibit, PF3. On their part, each appellant gave his sworn evidence. They did not call any witness. Neither did they tender any exhibit.

According to PW2, on 18th February, 2019, he was at Mlangala Kalinzi Market having coffee with his colleagues. At around 22:30 hours he began his journey back to his home situated at Kivuma "A" hamlet in Kalinzi Village. On his way, he met the appellants and Mzee Joseph Chubwa standing on his way. The trio blocked him and Mzee Joseph Chubwa who had a blanket on his hand threw it at his face. Then and there, a fight ensued. In the scuffle, PW2 managed to disarm the 1st appellant wielding a machete. After the 1st appellant was disarmed, he quickly ran home to pick another weapon. The house

was close to the scene of crime, about five paces away. He returned with a spear and stabbed PW2 on his left side of his body at the ribs. PW2 fell down and lost consciousness. He was taken to the police station, issued with PF3 and referred to Matyazo health centre.

PW2 elucidated to the trial court the circumstances which enabled him to identify his assailants. He said that on that night there was a bright moon light, he had conversed with them before the scuffling, the assailants were familiar to him because they are close relatives and reside in the same neighbourhood. He then described the attire which the appellants had put on that night. He said that the appellants had on that day wore white shirts with long sleeves.

Doctor Ute Trautwein (PW1) who attended PW2 at Matyazo health centre told the trial court that on that particular night at around 23:45 hours while at home, she received a call from the medical officer who was on duty on that night that he had received a seriously injured patient. Upon receipt of the information, PW1 went to the health centre and found PW2 on a drip. He was covered with a dirty and dusty African cotton sarong (Kitenge) full of blood. He examined PW2

and discovered that he had a wound near his belly button on the left-hand side. The width of the wound was about 4 cm and there was a protrusion of small intestine of about 1 cm. The patient seemed to have lost a lot of blood, hence, an emergency operation was performed. After operation, PW2 was admitted for almost 10 days, that is, from 18th February, 2018 to 3rd March, 2018.

In response to the prosecution's evidence, the appellants in their sworn evidence, completely denied the allegation and each raised a defence of alibi. The 1st appellant claimed that he was at home with his mother and the next day he went to the farm. He said, he was arrested on the 22nd February, 2018 on allegation of assaulting PW2. The 2nd appellant claimed that he was at home resting after retiring from his hard work schedule.

At the end of the trial, the learned trial judge summed up the case to the two gentle assessors who unanimously returned a verdict of not guilty. They were of the opinion that the prosecution witnesses, PW1 and PW2 sufficiently established that PW2 was injured and

sustained grievous harm which could have caused his death. However, they doubted the identification of the appellants.

In his twenty-two pages judgment dated on 4th May, 2020, the learned trial Judge joined hands with the gentle assessors that the prosecution discharged its duty by establishing without doubt the actus reus, that is, the prosecution proved beyond reasonable doubt the occurrence of the crime. In that, PW2 was attacked and seriously injured. Hence, he sustained grievous harm that could have led to his death.

He, however, differed with the assessors' opinion on the appellants' responsibilities. After he had correctly directed his mind on the position of the law regarding recognition and visual identification, he held that PW2 positively identified his assailants because: -

> *"PW2 knew the accused persons prior to the crime. The former 3rd accused was his blood grandfather and the other two accused persons desplte of denying any blood relations with PW2, they admitted to have known each other very weil. Before the attack there*

was some conversations between the attackers and the victim, PW2. The crime was then committed in five minutes. There was moonlight. PW2 described the clothes which the accused persons wore at the time of the crime."

The learned trial judge then went on to consider the issue of credibility of PW2, the victim and the only key witness for the prosecution. He found him to be the witness of truth and credible. Acting on the evidence of PW2, the appellants and Joseph Chubwa were found guilty as charged hence they were accordingly convicted for an offence of attempted murder contrary to section 211 (a) of the Penal Code.

After entering the conviction, the learned trial judge did not end up there. He proceeded in the same judgment to consider sentence. After, he had heard the aggravating and mitigating factors he passed the sentence to the appellants and Joseph Chubwa. The appellants were each sentenced to serve a custodial sentence of four (4) years while due to his old age and that since the law does not provide a

minimum sentence, Joseph Chubwa was sentenced to pay fine of one million shillings or in case of default, to suffer custodial sentence of four (4) years too.

Aggrieved, the appellants lodged a joint memorandum of appeal comprised of two main grounds of appeal to the effect that the prosecution failed to prove the offence of attempted murder beyond reasonable doubt against the appellant and the learned trial judge erred in imposing custodial sentence to each of the appellants who were minors at the time of the commission of the offence.

At the hearing of the appeal, Mr. Method G. Kabuguzi, learned advocate appeared for the appellants whereas Messrs Robert Magige and Raymond D. Kimbe, both learned State Attorneys appeared for the respondent /Republic.

Before Mr. Kabuguzi began his submission on the grounds of appeal, we requested him to focus on the second ground of appeal where the appellant complained about sentences. He initially argued that the custodial sentences meted out to the appellants who were minors were illegal. However, after he had carefully revisited the

proceedings, specially, the proceedings of 7th May, 2020 where the learned trial Judge heard the aggravating and mitigating factors, he noted that it is not indicated in the proceedings that the sentences were passed on that date. Instead, they were passed in the judgment that convicted the appellants. He pointed out that the judgment appearing at page 93 – 114 of the record of appeal shows that it was dated 4th May, 2020 and therein the learned trial judge passed sentence against the appellants. It was the submission of Mr. Kabuguzi that the learned trial Judge ought to have first heard the aggravating and mitigating factors before passing any sentence. He argued that since the sentences were passed on 4th May, 2020 where there was no hearing of aggravating and mitigating factors, the sentences meted out to the appellants were illegal and invalid. He thus urged the Court to invoke the revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (henceforth the AJA) by quashing the judgment, set aside the sentences and the appellants be set free from prison custody.

We further invited him to address the Court on the propriety of the record of the trial court where the learned trial judge did not append his signature after recording the evidence of the witnesses. Mr. Kabuguzi outrightly conceded that the omission to sign after taking down the evidence of every witness was an incurable irregularity that vitiated and nullified the trial court proceedings. He pointed out that the omission happened to all witnesses for the prosecution and defence. He therefore prayed for the Court to invoke its revisional powers under section (4) (2) of AJA to nullify the proceedings and judgment of the trial court, quash the conviction and set aside the sentences. He added, that generally, a retrial would have been ordered but given the circumstances of the present appeal where there is insufficient evidence to uphold the conviction and sentence, the appellants were minors at the time of the commission of the crime and they had already served most part of their sentences it would not be in the interest of justice to order a retrial. He thus prayed for the appellants to be released from the prison custody.

In reply, Mr. Kimbe supported the submission made by the learned advocate for the appellants that the proceedings of the trial court were marred with the procedural irregularities. He conceded that the learned trial judge did not sentence the appellants after having heard the aggravating and mitigating factors. He further agreed with his learned friend that the omission was fatal. However, unlike his learned friend, he invited the Court to invoke revisional powers under section 4 (2) of AJA and step into the shoes of the trial court by sentencing the appellants in accordance with the law.

On the failure to append signature after reception of witnesses' evidence, Mr. Kimbe agreed that the learned trial judge did not sign after the conclusion of the testimony of every prosecution and defence witness. It was his submission that the effect of failure to sign evidence rendered the proceedings null and void. He therefore concurred with the prayer made by Mr. Kabuguzi for the Court to invoke revisional power to nullify the proceedings, quash the conviction and judgment and set aside the sentences. On the way forward, he joined hands with the submission made by the learned

counsel for the appellants that since the appellants had served most part of their sentences an order of the retrial would not be appropriate.

On our part, we wish to start with the irregularity on the failure by the learned trial judge to sign the proceedings after recording the evidence of the witnesses. There is a concensus by counsel for both parties that the learned trial Judge did not append his signature at the end of the testimony of every witness. On our part, we have critically reviewed the proceedings of the trial court and noted that PW1 testified on 5th May, 2020. His evidence appears at pages 54 to 57 of the record of appeal. However, after he had completed his testimony, at page 57 of the record of appeal, the learned trial Judge did not append his signature at the end of his testimony. Similarly, the learned trial Judge did not append his signature at page 63 of the record of appeal after he had finished to record the evidence for PW2.

The same omission is repeated for the defence witnesses whose evidence appears at page 65 - 74 of the record of appeal. The learned trial Judge did not append his signature after he had finished to take

down the testimonies of each defence witnesses, that is, he did not sign at pages 66, 68, 70, 73 and 74 when he finished to record the evidence for DW1, DW2, DW3, DW4 and DW5, respectively. The importance of appending signature was stated in the case of **Yohana Mussa Makubi and Another v. The Republic**, Criminal Appeal No. 556 of 2015 (unreported) that:

> *"In the light of what the Court said in Walii Abdallah Kibitwa's and the meaning of what is authentic, can it be safely vouched that the evidence recorded by the trial judge without appending her signature made the proceedings legally valid? The answer is in the negative. We are fortified in that account because, in the absence of the signature of the trial at the end of the testimony of every witness:* ***Firstly,*** *it is impossible to authenticate who took down such evidence.* ***Secondly,*** *if the maker is unknown then, the authenticity of such evidence is put to question as raised by the appellants' counsel.* ***Thirdly,*** *if the*

authenticity is questionable, the genuineness of such proceedings is not established and thus; ***fourthly,*** *such evidence does not constitute part of the record of trial and the record before us."*

The Court then held that such an omission is fatal to the proceedings and it cannot be left to stand. In particular it held: -

"We are thus satisfied that the 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. Besides, this emulates the spirit contained in section 210 (1) (a) of the CPA and we find find no doubt in taking inspiration therefrom."

The above position was further echoed by the Court in **Sabasaba Enos @ Joseph v. The Republic,** Criminal Appeal No. 411 of 2017, **Chacha s/o Ghati @ Magige v. The Republic,**

Criminal Appeal No. 406 of 2017 and **Magita Enoshi @ Matiko v. The Republic**, Criminal Appeal No. 407 of 2017 (all unreported).

As demonstrated in this appeal, the testimonies of all witnesses were not signed by the learned trial Judge not only the authenticity of the testimonies of the witnesses but also the veracity of the trial court record itself is questionable. In absence of the signature of the person who recorded the evidence, it cannot be said with certainty that what is contained in the record is the true account of the evidence of the witness since the recorder of such evidence is unknown. On account of such omission, the entire trial court proceedings recorded after the conduct of the preliminary hearing are vitiated because they are not authentic.

We now revert back to the failure to sentence the appellants. We discerned from the record of appeal that the judgment that convicted the appellants is dated 4th day of May, 2020. It is in that judgment where the learned trial Judge convicted the appellants with the offence of attempted murder, discussed the aggravating and mitigating factors and consequently sentenced each appellant to serve a custodial

sentence of four (4) years. However, according to the proceedings of 4th May, 2020, the learned trial Judge did not conduct a hearing on the sentencing of the appellants. The hearing on sentencing was done on 7th May, 2020 where the learned trial Judge heard the aggravating and mitigating factors but he did not sentence the appellants on that date.

Section 298 (3) of the CPA mandatorily requires the learned trial Judge to pass sentence to the convicted person after the delivery of the judgment. Normally, sentence is passed after the trial court has called upon and heard the convicted person on the sentence to be passed. This requirement is provided under section 314 of the CPA which reads as follows: -

> *"Where the judge convicts the accused person or if he pleads guilty, it shall be the duty of the Registrar or other officer of the court to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings."*

Therefore, reading through sections 298 (3) and 314 of the CPA, the learned trial Judge ought to have passed sentence to the appellants on 7th May, 2020 after he had called and heard the appellants but he did not. Obviously, the irregularity is curable but since we have found that the proceedings of the trial court were vitiated for failure to append signature after the reception of the evidence of every witness, we are constrained to invoke section 4(2) of the AJA and nullify the proceedings of the trial court that commenced after the conduct of the preliminary hearing.

The next issue for consideration is whether or not a retrial should be ordered. On this, we wish to restate the general principle for ordering a retrial as stated in **Fatehali Manji v. The Republic** [1966] 1 EA 343 that: -

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at*

the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to be blamed, it does not necessarily follow that a retrial shall be ordered; ***each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*** [Emphasis added].

Having closely considered the circumstances of the present appeal that the appellants were minors at the time of the commission of the offence and they have served almost half of their custodial sentences, we agree with the counsel for the parties that the interest of justice is not in favour of a retrial.

Accordingly, we invoke revisional powers bestowed on us under section 4(2) of the AJA and nullify the proceedings of the trial court recorded after the conduct of the preliminary hearing, quash the conviction and set aside the sentences meted to the appellants. As a result, the conviction and sentence of **Joseph Chubwa** cannot remain on record. They are also hereby quashed and set aside. In the end, we

order for the immediate release of the appellants, **Mhajiri Uladi** and **Mtarazaki Uladi**, from custody unless otherwise held for other lawful reasons.

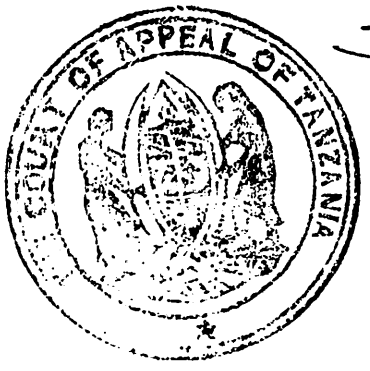
DATED at **KIGOMA** this 16th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Judgment delivered this 16th day of July, 2021 in the presence of the appellants in person by video link from Bangwe Prison in Kigoma and Mr. Raymond Kimbe, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL