IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 235 OF 2020

YOHANA FILIPO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Matuma, J.)

dated the 4th day of May, 2020

in

Criminal Sessions Case No. 19 of 2019

JUDGMENT OF THE COURT

12th & 16th July, 2021

GALEBA, J.A.:

Yohana Filipo, the appellant was charged and convicted of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002] now (R.E. 2019) (the Penal Code). It was alleged that on 23.10.2017 at Nyakafyeka Village within Kasulu District in Kigoma Region he murdered Scholastica James, (the deceased). The appellant was, subsequent to the conviction, sentenced to the capital punishment of suffering death by hanging.

Aggrieved by both conviction and sentence, he has appealed to this Court, raising seven (7) grounds of appeal to challenge the decision of the

trial High Court. However, for reasons that will be obvious in due course, we shall not reproduce the grounds in this judgment.

At the hearing of this appeal on 12.07.2021, the appellant was represented by Mr. Thomas M. Msasa learned advocate, whereas the respondent Republic had the services of Mr. Robert Magige and Ms. Happiness Mayunga, both learned State Attorneys.

Prior to commencement of hearing, and upon our probing counsel on the propriety and legality of the evidence as recorded by the trial High Court, Mr. Magige submitted that indeed the proceedings were tainted with irregularities as the trial Judge did not append his signature after recording evidence of each witness. He contended that the omission rendered the entire proceedings irregular and vitiated authenticity of the recorded evidence. In the circumstances, he implored us to invoke this Court's powers under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA), and nullify the proceedings and the judgment, quash the conviction and set aside the sentence imposed upon the appellant. As a way forward, he contended that we should make orders that the appellant's case be tried *de novo* before another judge aided by different assessors. He submitted that, other than the above anomaly, the respondent was in possession of sufficient evidence to mount a successful fresh trial, given the chance.

In response, Mr. Msasa was in agreement with his counterpart for the respondent on the vitiated status of the proceedings and the appropriate remedy proposed. Nonetheless, he opposed Mr. Magige's view as for the way forward. His position was that his client ought to be released from prison on account that the evidence available cannot lead to a valid conviction. Other reasons for the appellant's release, according to him, were that his client is a Burundian national and has stayed in prison for a relatively long time.

On our part, we have thoroughly studied the proceedings of the trial High Court particularly from 28.04.2020 when the trial court started to record the evidence, and we have observed and noted that indeed no signature of the trial judge was appended after recording the evidence of Shamini Moshi (PW1), Tumaini Anthony (PW2), James Fupi (PW3), Dr. Magenyi Pondamali (PW4) and D. 6163 D/Sgt Ladislaus (PW5). This was in respect of the prosecution case. As for the defence, the experience was the same, the evidence of Yohana Filipo (DW1), the sole witness for the defence has no appended signature of the trial judge at the end. Counsel for both parties were therefore right that the trial judge did not sign at the end of any of the witnesses' evidence. They are equally right, as to the appropriate remedy they proposed, because where a judicial officer recording evidence in a judicial proceeding omits to append his signature

after recording it; he commits an error that vitiates the proceedings rendering them a nullity. Where the evidence on record is not signed by the judicial officer who recorded it as such, the evidence is short of authenticity and cannot form part of the court record. That is the line of reasoning this Court adopted in **Yohana Mussa Makubi and Abuubakar Ntundu v. R,** Criminal Appeal No. 556 of 2015 (Unreported), where it held: -

> *"We are thus satisfied that failure by the judge to append his or 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 not tainted. Besides, this emulates the spirit contained in section 210(1) of the CPA and we find no doubt in taking inspiration therefrom."*

Other decisions in which the above position has been adopted and upheld as the law on the subject in this jurisdiction include **Chacha Ghati Magige v. R**, Criminal Appeal No. 406 of 2017, **Magita Enoshi Matiko v. R,** Criminal Appeal No. 407 of 2017 and **Sabasaba Enos Joseph v. R,** Criminal Appeal No. 411 of 2017 (all unreported).

The significance of appending a signature to the evidence after recording it is also to positively affirm that indeed the evidence was recorded by an appropriate magistrate or judge that purported to have recorded it, see **Richard Mebolokini v. R**, [2000] TLR 90.

We are therefore satisfied that, as the evidence of all witnesses in this case were not appended with the signature of the trial judge, the same does not constitute the record of the court or to put in a better perspective, the unsigned evidence is no better than the evidence that was not taken.

In view of the above stated erroneous omission, we invoke this Court's powers under section 4(2) of the AJA and nullify all the proceedings recorded immediately after the preliminary hearing was completed including the judgment. We quash the conviction of the appellant and set aside the sentence. For purposes of clarity, the proceedings nullified are all those recorded from 28.04.2020 onwards. As the proceedings from which this appeal sprang are a nullity, no valid appeal could have emanated therefrom. Accordingly, this appeal is struck out.

As for the way forward, Mr. Magige beseeched us to order a trial *de novo*, whereas Mr. Msasa for the appellant implored us to order his client's immediate release from prison. However, we have considered all relevant

circumstances of this case and we think that as the case was not legally tried especially after preliminary hearing was completed, guided by the principles in **Fatehali Manji v. R,** [1966] EA 343, we hold that the interests of justice demand that a proper trial be carried out and the appellant be availed an ample opportunity to defend himself. In the circumstances, we order a retrial of the appellant before another judge aided with a new set of assessors. In the meantime, the appellant shall continue to be detained in prison as a remandee, pending his trial.

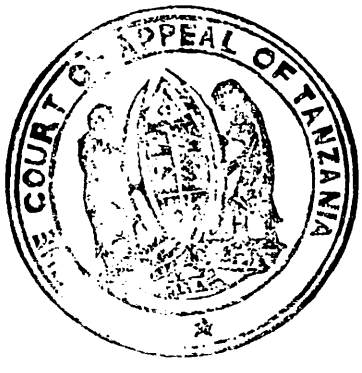
DATED at **KIGOMA** this 16th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This judgment delivered this 15th day of July, 2021 in the presence of the Appellant in person via video link from Bangwe Prison in Kigoma and Mr. Robert Magige, 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