IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 235 OF 2021

HAMDU ABDALLA ABDALLA.....APPELLANT

VERSUS

THE DPP..... RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar at Vuga)

(Mahmoud, J.)

dated the 23rd day of November, 2020
in
Criminal Case No. 03 of 2003

JUDGMENT OF THE COURT

1st & 17th June, 2022

MASHAKA, J.A.:

This appeal arises from the decision of the High Court of Zanzibar (Mahmoud, J.) at Vuga which sentenced Hamdu Abdalla Abdalla, the appellant to life imprisonment upon conviction for the offence of manslaughter contrary to sections 179 and 182 of the Penal Decree [Cap 13 of the Laws of Zanzibar] (the PD).

Before the trial court it was alleged that on the 1/10/2000 at or about 20.30hrs at Bwejuu, in the South District within the South Region of Unguja,

the appellant unlawfully beat one Hudhaifa Suleiman Abdalla with strokes causing her death.

The prosecution sought to prove their case through nine witnesses and tendered three documentary exhibits. The brief factual settings which led to this appeal is as follows. The deceased, Hudhaifa Suleiman Abdalla was the daughter of Suleiman Mtumwa Vuai (PW1) and Mtumwa Mohamed Ali (PW5). The record shows that the appellant requested PW1 and PW5 to take her under his care and stay with their daughter Hudhaifa (the deceased) because they were related. They accepted his request and the deceased went to stay with the appellant and his wife Rahila; sister to PW5. On 3rd October, 2000 Habiba Ali Mgana (PW3) grandmother to the deceased, visited the appellant's residence and was informed that the deceased had high fever. Upon inquiring on what had befallen her as she had wounds on her arm and back, Rahila (the appellant's wife) informed her that the appellant beat her badly. PW3 took the deceased to Bwejuu dispensary where she was attended to by Halima Mohamed Ali (PW2) and Ujudi Ali Salmin (PW6), a nurse and doctor respectively who found the deceased with wounds and had

a fever. Due to her condition, she was transferred to Mnazi Mmoja Hospital where she was admitted.

The information on the incident reached PW1 and PW5 and according to their testimonies, their daughter had wounds and bruises on her back. She could not sit, walk and eat. PW1 and PW5 were told by the deceased that the appellant used to beat her using a wire. On 4th October, 2000 the deceased died. Before her burial, Dr. Mkoko Hassan Makungu (PW9) conducted a post mortem on the body of the deceased and observed that the inflicted wounds produced poisonous bacteria which infected the brain and caused her death.

The appellant in his defence on affirmation admitted the fact that he was living with the deceased. He strongly denied to have beaten the deceased. It was also his defence that the charges against him were falsely made up for two reasons; that they were well-off than others and he failed to secure a job for the complainant. He relied on the evidence of three (3) witnesses to support his case.

After the end of trial, the High Court found that the prosecution witnesses were credible and the charge was proved to the hilt that the

appellant inflicted injuries which caused the death of the deceased. It also relied on the evidence of PW9 that the deceased's death was not natural. The trial court convicted the appellant of manslaughter and sentenced him to life imprisonment.

Protesting his innocence, the appellant preferred an appeal to this Court premised on five grounds of complaint.

At the onset before hearing of the appeal, Mr. Ussi Khamis Haji, learned advocate representing the appellant prayed to add two grounds of appeal to the memorandum of appeal in terms of rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The two additional grounds are: **one** the High Court erred in convicting of the appellant under section 177(1) of the PD while he was charged under section 179 of the PD and **two**, the High Court erred to conduct the trial of the appellant without taking his plea which was in contravention of section 250 of the Criminal Procedure Act [No. 7 of 2004 of the Laws of Zanzibar] (the CPA). Unopposed by the respondent, we allowed the two additional grounds of appeal.

At the hearing of the appeal, Mr. Haji, learned advocate, as indicated above, represented the appellant who was present in person. The

respondent was represented by Messrs. Ali Rajab Ali and Hamad Kombo Zidikheir, learned Principal and Senior State Attorneys, respectively.

Certainly, we do not intend to preface our judgment with the detailed factual background of the case, the evidence adduced by the prosecution and the defence. Similarly, we will not reproduce the respective grounds of appeal contained in the memorandum of appeal, for reasons which will be apparent shortly.

Both learned counsel submitted in support of their respective stance on the merits or otherwise of the appeal. In the course of his submissions, Mr. Haji argued that the appellant did not plead to the charge before the trial court thereby contravening section 250 (1) of the CPA. He underscored that such failure by the trial court to read over the information or its substance to the appellant, ask him to plead and record his plea before the commencement of trial was a fatal irregularity. Furthermore, it was the argument of Mr. Haji that such omission is an incurable irregularity and the consequence is that the whole trial was a nullity, urging us to nullify the proceedings, conviction and sentence of the trial court and the appellant to be set free.

Mr. Zidikheir in his further reply, conceded to the complaint that the trial court failed to comply with section 250 of the CPA, describing the chronological sequence of how the events unfolded from the subordinate court to the trial High Court. He coherently submitted that the case was brought before the subordinate court on the 9/10/2000 as gleaned from page 3 of the record of appeal. On 7/08/2007 the case was forwarded to the trial court and the charge was not read over to the appellant. When hearing of the prosecution case commenced on the 24/04/2012, the charge had not been read over to the appellant and a plea had not been taken.

Referring to the cases of **Jumanne Gulaka and Two Others v. The Republic**, Criminal Appeal No. 585 of 2017 and **Zefania Ndeisaba and Yussuf Rafael v. Republic**, Criminal Appeal No. 423 of 2016 (both unreported), Mr. Zidikheir implored the Court to invoke its power in terms of section 4 (2) of AJA and set aside the conviction and sentence and order a retrial before another judge and a new set of assessors. In support of his argument for retrial, supported by the cited cases, he argued that it is the position of the Court that where there is such non - compliance to section 250 of the CPA, the Court is empowered to order retrial and not to acquit

the appellant. Stressing on this aspect, he maintained that the prosecution had evidence strong enough against the appellant to enable a retrial to be conducted. He relied on the evidence of PW1 that he was told by the deceased that she was beaten by Baba Hamdu (the appellant) corroborated by PW2 and the evidence of PW9 on his assessment and findings on the cause of death. Upon serious consideration on the failure of PW9 to read out the contents of the post mortem report after being cleared for admission as exhibit X3, Mr. Zidikheir contended that even without the exhibit X3, the prosecution can prove the offence against the appellant and reiterated his prayer for a retrial.

In his rejoinder, Mr. Haji recapitulated that the evidence of the prosecution is grounded on hearsay evidence while section 65 of the Evidence Act No. 9 of 2016 of the Laws of Zanzibar, lays emphasis that oral evidence must in all cases be direct evidence, which is lacking. He further argued that there is no direct evidence by the prosecution witnesses to have seen the appellant beating the deceased. It is all hearsay evidence. He wondered that if there was a dying declaration by the deceased, which had not been taken, on the opinion of PW9, it was their observation that he failed

to testify on his qualifications and expertise as an expert on what particular field of medicine; it was not known. He concluded that it would not be fair for the appellant to stand retrial taking into consideration the weak prosecution evidence as it would benefit them the prospect to fill in the gaps to strengthen their case and reiterated his prayer that the appellant to be set free upon the nullification of the proceedings, conviction and sentence.

The issue for determination is whether the High Court conducted arraignment of the accused in compliance to section 250 of the CPA. As adequately argued by Mr. Haji and supported by Mr. Zidikheir it is undisputed, and we are totally in agreement that the record of appeal has vividly shown that the appellant was never arraigned before the trial court.

To begin with, much as we would have liked to consider the grounds of appeal and determine them on merits, having heard the submissions by the learned counsel for the parties, it is our view that the crux of the concurring arguments by learned counsel is that the trial was a nullity on account of the irregularity on how the appellant was arraigned hence there will be no need for us to consider the remaining grounds of appeal. The anomaly will sufficiently dispose of the appeal. We shall demonstrate.

Having perused the record of appeal and considered the submissions made by the parties, the main issue for our consideration is whether the omission to call upon the appellant to plead to the information renders the proceedings and judgment of the trial court a nullity. Pursuant to section 250 of the CPA (No. 7 of 2004 of the Laws of Zanzibar), it is a mandatory requirement that when the accused person appears in court before the trial commences, he shall be asked whether he admits or denies the truth of the charge. For ease of reference, we reproduce it: -

> *" The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the court, and explained if need be, by that officer or interpreted by the interpreter of the court and such accused person shall be required to plead instantly thereto, ..."*

Furthermore, section 258 of the CPA categorically prescribes the effect of a plea of not guilty by an accused person upon being arraigned on any

information by pleading thereto and that after the plea of not guilty has been entered, he shall be deemed to have put himself ready to face his trial.

It is mandatory for the trial court to state the substance of the charge to the accused person and ask him whether he admits or denies the truth of the charge. The cited provisions have been couched in mandatory terms giving no option to the trial court not to comply with it. Section 250 of the CPA is in *pari materia* to section 228 (1) of the Criminal Procedure Act [Cap 20 Revised Edition 2019] on the procedure on how an accused person should be arraigned. Cognizant of the above requirement, in **Akber Alii Mohamed Damji v. Republic** 2 TLR 137 held that arraignment is not complete until the accused pleads to the charge levelled against him. In essence therefore, a trial commences with the arraignment of the accused and no court is permitted to proceed with the hearing of a case before the plea of an accused is taken. Any failure to do so is fatal and renders the proceedings illegal and the whole trial a nullity. (See **Athuman Mkwela and Two Others v. Republic,** Criminal Appeal No. 173 of 2010, **Shabani isack @ Magambo Mafuru and Another v. Republic**, Criminal Appeals Nos. 192 & 218 of 2012 (both unreported) and **Naoche Ole Mbile v. Republic** [1993] TLR

253. The rationale is not farfetched. The charge or information enables the accused to know the nature of the offence together with allegations facing him.

In the case at hand, it is on record that the appellant was first brought before the Regional Court at Vuga which read over the charge but was not asked to plead as the offence was triable by the High Court. When the accused was committed for trial before the High Court and upon the filing of the information, he was not formally arraigned as required by the law. Guided by the above cited authorities, we are in agreement with both Mr. Haji and Mr. Zidikheir that failure by the trial court to comply with the mandatory requirement imposed under the said provision vitiated the entire trial hence rendering it and the proceedings as well as the judgment a nullity. It is a fundamental procedural irregularity which went to the root of the case and incapable of any cure. See: **Shaban Isack @ Magambo Mafuru and Another v. Republic** (supra). The net effect is that there was no arraignment of the appellant as mandatorily required by the law.

The next issue is whether this case is fit for retrial or not. In the case of **Fatehali Manji vs Republic** [1966] E. A. 341, the defunct East African Court of Appeal stated: -

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, 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 when the interest of justice require."*

The principles set in **Fatehali Manji vs Republic** (supra) have been reiterated in many of the Court's decisions including the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) where the Court had this to say: -

> *"We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial*

is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that; an order should only be made where the interest of justice require. "

Taking into account the above position, a retrial can be ordered when the original trial was illegal or defective and that the prosecution will not take advantage to fill the gaps or shortfalls in the prosecution evidence as we will show the possibility of such instance in this case. We have taken into consideration that there was no dying declaration recorded of the deceased, PW9's failure to lay out his expertise as required, the irregular admission of the post mortem report which may make its way into evidence during retrial with the potential that the prosecution will strive not to repeat the mistakes made in the first trial and fill up the gaps. Therefore, we are satisfied that it is not fit for retrial.

For those reasons, we are of the considered opinion that in the circumstances, we find the appeal with merit.

That being the position, we invoke our power of revision under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) by

quashing the proceedings, and setting aside the conviction and sentence of the High Court against the appellant which we hereby do. In the event, we order the immediate release of the appellant from the Correction Institute (Chuo cha Mafunzo) unless otherwise lawfully held.

It is so ordered.

DATED at **ZANZIBAR** this 16th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of June, 2022 in the presence of the Mr. Omar Mzee, learned counsel for the appellant and Mr. Hamad Kombo, learned Senior State Attorney for the respondent is hereby certified as a true copy of original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL