IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO.66 OF 2019

NGALABA LUGUGA @ NDALAWA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Ebrahim, J.)

Dated the 15th day of March, 2019
in
Criminal Session Case No. 33 of 2016

JUDGMENT OF THE COURT

5th & 18th July, 2022

KAIRO, J.A.:

In the High Court of Tanzania at Shinyanga, the appellant, Ngalaba Luguga @ Ndalawa was charged, tried and convicted of the offence of murder contrary to section 196 of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). He was sentenced to suffer death by hanging. According to the information filed against him, the appellant on 26th September, 2014 at Mbiti Village within Bariadi District in Simiyu Region did murder one Jackson s/o Nilla. The appellant denied the charge leveled against him, hence a full trial after which he was

convicted and sentenced as alluded to above. The appellant was not amused by the said decision hence lodged this appeal to protest his innocence. His memorandum of appeal contains eight (8) grounds of appeal lodged on 24th April, 2020 and two grounds in the supplementary memorandum of appeal filed on 4th July, 2022. However, for the reason to be apparent shortly, we shall not discuss them in this appeal.

When the appeal was called on for hearing, Mr. Audax Constantine, learned advocate appeared representing the appellant, while Ms. Verediana Peter Mlenza, learned Senior State Attorney assisted by Mr. Nestory Mwenda and Ms. Rehema Sakafu, both learned State Attorneys appeared for the respondent, Republic.

At the onset, Ms. Mlenza informed the Court that, the respondent was supporting the appeal on the grounds raised by the appellant. However, before proceeding to elaborate the reason for the said support, the Court referred her to the fifth line of page 34 of the record of appeal regarding the trial court's order to read over the amended charge sheet to the accused. The issue being whether or not the said order was complied with before proceeding with the trial. In other words, whether a fresh plea was entered by the appellant following the

amendment of the charge sheet. Ms. Mlenza right away told the Court that according to the record of appeal, the trial court's order was not complied with, the omission, which she argued to be fatal thus, rendered the whole proceedings of the trial court and the decision thereon a nullity. She therefore, invited the Court to exercise its revisionary powers bestowed on it under the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R. E. 2019] (the AJA) to nullify the trial court proceedings and the judgment thereon, quash the conviction and set aside the sentence imposed upon the appellant.

As a consequence, thereof, Ms. Mlenza went on to submit that, normally in such circumstances, the Court would order for a re-trial, but in the matter at hand, justice demands otherwise due to various procedural irregularities observed in the proceedings.

In elaboration, Ms. Mlenza submitted that PW1 who was 13 years old when testifying, being a child of a tender age did not promise to tell the truth in court before giving her testimony. She argued that the omission contravened the requirement of section 127 (2) of the Evidence Act [Cap 6 R.E. 2002, now R.E. 2022], as a result her testimony is to be discarded for having no evidential value.

She went on to argue that, another piece of evidence which the prosecution could have relied on to ground the appellant's conviction in case of re-trial is that of Happiness Masanja, the mother of PW1 who could not be procured so as to come and testify as her whereabouts was unknown. But further to that, her statement was rejected for having been recorded 20 days before the killing incidence occurred. Ms. Mlenza added that the rest of the prosecution witnesses' evidence was just hearsay which could not ground a valid conviction.

Elaborating further, Ms. Mlenza submitted on another irregularity with regard to a postmortem report admitted as exhibit P1 during preliminary hearing (PH). She argued that, the irregularity is twofold; **one,** the document was not read over to the appellant in court after it was admitted, and **two,** the appellant was not informed of his right to require a person who made the document be summoned to court for cross-examination. She went on to argue that the omission was in contravention of section 291 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002, now R.E. 2022] (the CPA).

In conclusion, Ms. Mlenza argued that with the pointed out procedural infractions, the order for retrial, even if issued, the prosecution will not be able to prove its case to the required standard.

Mr. Constantine supported the submission by Ms. Mlenza right away. He argued that, failure to read over the charge sheet after the amendments denied the appellant a right to a fair hearing.

He, further joined hands with the learned State Attorney that, in the case at hand justice demands not to order retrial after the Court exercises its revisional powers under section 4 (2) of the AJA, as to do otherwise is to afford the prosecution a chance to fill in the gaps of the irregularities pointed out. He concluded by praying the Court to order for acquittal of the appellant instead, unless retained in custody for other cause.

Having heard the submissions from both parties and going through the record of appeal, the issue for our determination is whether or not the information in the charge sheet was read over to the appellant after amending it and if not, what are the legal consequences.

Pages 33 – 34 of the record of appeal reveal that the prosecution prayed to amend the charge sheet in terms of section 276 (2) of the CPA. The prayer was granted and the charge sheet was accordingly endorsed after the amendment. It is further on record that the trial court ordered the amended information in the charge sheet be read over to the appellant (accused therein). Procedurally, the requirement is mandatory for the purpose of enabling the accused to know the nature of the amendment and enter a fresh plea thereof, see our decision in **DPP v. Danford Roman @ Karani,** Criminal Appeal No. 5 of 2018 (unreported).

Both parties are at one that failure to observe the said mandatory requirement vitiates the proceedings and the orders made thereon. In **Diaka Brama Kaba and Another v. Republic,** Criminal Appeal No. 211 of 2017 (unreported), the charge was formally against five accused, but in the course of trial, three accused persons were discharged on a *nolle prosqui* under section 91 (1) of the Criminal Procedure Act. However, the charge was not amended to reflect the said changes under section 276 of the CPA. On appeal the Court observed that to be improper as either the DPP ought to have effected the changes under

section 276 (2) of the CPA or the trial court could have made the order for the amendment. The Court further observed as follows: -

> *"It is also noteworthy that, had the charge/information been amended or substituted, it was required for such amended charge to be read over to the remaining accused persons for them to enter their fresh plea. Where such procedure is not conducted, it would render the trial a nullity ..."*

Though in the case at hand the prayed amendments were to the charge sheet made and the order to read over the amendment to the accused was given, but the order was not complied with. It followed that a fresh plea was not entered, rendering the trial a nullity as well.

The Court in the cited case further observed: -

> *"If we may add, the appellants cannot be said to have been accorded a fair trial where they did not plea to a charge to which they were convicted."*

In the same vein, the appellant in the instant case did not enter a fresh plea following the amendment done, as such, he was not accorded a fair trial to the charge he was convicted of. Legally, a conviction emanating from an unfair trial is a nullity. In the premise, we are

constrained to exercise our revisional powers bestowed on us under section 4 (2) of the AJA and nullify the proceedings and judgment of the trial court. We further quash the conviction and set aside the sentence meted on the appellant.

That being the position, we now move to consider the consequence and way forward having in mind the above findings.

Again, both parties had a common stand that a retrial order will not be appropriate in the circumstances of this case due to various procedural irregularities in the proceedings that gave rise to the conviction of the appellant. We wholly subscribe to the stated position. Indeed, there are various irregularities in the trial at issue as correctly pointed out by Ms. Mlenza. It is true that the testimony of PW1 was taken in contravention of the provision of section 127 (2) of the Evidence Act as the witness did not promise to tell the truth in court and not lies.

Legally the lapse is an incurable irregularity with a consequence of rendering the evidence of PW1 to have no evidential value. When faced

with alike circumstances, the Court in **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), observed as follows:

> *"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016. Hence the same has no evidential value."*

A similar stance was also taken in **Shaibu Nalinga v. Republic,** Criminal Appeal No. 34 of 2019 (unreported).

It is noteworthy that PW1 being a child of tender age when testifying might as well be above the age requiring *voire dire* test be conducted on her when the re-trial commences in the circumstances the retrial order is issued, which situation in our view will prejudice the appellant.

As noted above that the amended information of the charge was not read over to the appellant. With retrial order, the prosecution will definitely correct the said irregularity. That apart, we have also noted that exhibit P1 (Postmortem Examination Report) being not read over in court after admitting it. With the pointed-out anomalies, it is our conviction as rightly argued by both parties that the order of retrial will

afford the respondent an opportunity to lead evidence which did not feature in the original trial, thereby affording the prosecution with an opportunity to fill in the gaps, the action which would not only be unfair to the appellant, but also against the aim of an order for retrial as pronounced in our various cases.

The guidelines as to when the Court can order or refrain to order retrial was well articulated in **Fatehali Manji v. Republic,** [1966] E.A. 343 where in the defunct Court of Appeal for Eastern Africa observed:

> *"In general, a retrial may 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 as for purposes of enabling the prosecution to fill in 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 blame, it does not necessarily follow that a retrial should be ordered; Each case must depend on its own facts and circumstances and* ***an order for retrial should only be made where interest of justice require it and should not be ordered where it is likely to cause an***

injustice the accused person." [Emphasis supplied].

Applying the cited case to the facts at hand, we agree with the parties that it will not be in the interest of justice to order retrial in the circumstances of this case. Consequently, we order an immediate release of the appellant from prison unless otherwise lawfully held for some other cause.

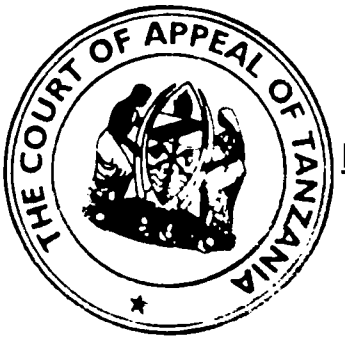
DATED at **SHINYANGA** this 16th day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 18th day of July, 2022 in the presence of Mr. Emmanuel Rugamila holding brief for Mr. Audax Constantine for the appellant who is also present and Ms. Verediana Peter Mlenza, Senior State Attorney assisted by Ms. Edith Tuka and Ms. Wampumbulya Shani, both State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL