IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 585 OF 2017

JUMA GULAKA ..... 1ST APPELLANT
JUMA KASANANA ..... 2ND APPEALLANT
BAHATI JOHN @ RUTATINA ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Gwae, J.)

Dated the 9th day of October, 2015
in
Criminal Sessions Case No. 136 of 2015

JUDGMENT OF THE COURT

16th & 25th February, 2022

WAMBALI, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Mwanza in Criminal Sessions Case No. 136 of 2015 dated 9th October, 2017. In that case, Juma Gulaka (the first appellant), Juma Kasanana (second appellant) and Bahati John @ Rutatina (the third appellant) who were the second, fourth and fifth accused together with two others, namely; Julius Kataha and Mbaraka Said @ Kasusura, the first and third accused, not party to this appeal, were arraigned before the High Court of Tanzania at Mwanza upon information for murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002 (now R.E.2019). The

particulars in the information alleged that the appellants and two others on 3rd February, 2010 at Samina forest in Geita Region jointly and together murdered January Kasuhuke.

According to the record of appeal, during the preliminary hearing which was conducted at the High Court on 1st July, 2015 they all pleaded not guilty. Consequently, the trial was commenced on 3rd July, 2015 whereby the prosecution relied on twelve witness and eleven exhibits to prove its case.

The appellants and the others defended themselves and summoned two witnesses to support their case.

At the height of the trial, the High Court convicted the appellants of the offence of murder and imposed a mandatory sentence of death by hanging. The two other accused persons mentioned above were acquitted.

Aggrieved, they have preferred an appeal to this Court. Initially, the appellants lodged a joint memorandum of appeal comprising six grounds of appeal. Later, counsel who were assigned to represent them, in terms of Rule 73(2) of Tanzania Court of Appeal Rules, 2009 (The Rules) lodged three distinct supplementary memorandum of appeal

in substitution thereof comprising eight, seven and four grounds of appeal for the first, second and third appellants, respectively.

Admittedly, for the reason which will be apparent shortly, we do not intend to preface our judgment with the detailed background facts of the case and the evidence adduced by both the prosecution and the defence. Equally important, we do not wish to reproduce the respective grounds of appeal contained in the memoranda of appeal.

At the hearing of the appeal, the first, second and third appellants were represented by Mr. Costantine Mutalemwa, Mr. Cosmas Tuthuru and Conrad Mtewele respectively, all learned advocates.

On the other side, the respondent Republic was represented by Ms. Mwamini Fyeregete and Mr. Moris Mtoi, learned Senior State Attorney and State Attorney respectively.

Noteworthy, at the commencement of the hearing, learned counsel were granted opportunity and submitted extensively in support of their respective positions concerning the merits or otherwise of the appeal. However, in the course of their submissions, it became apparent that in view of the trial court's proceedings in the record of appeal, there is no indication that before the trial commenced the appellants were called upon by the trial High Court judge to enter plea

to the information. Thus, this being a crucial legal issue, we invited counsel to submit on the patent omission accordingly.

As the record of proceedings of the trial court left no doubt that no plea was entered by the appellants, counsel for the parties conceded that the trial commenced without indication that on that particular day, that is 3rd July, 2015, the appellants and two others pleaded to the information. However, they held divergent views on whether the omission is fatal to the trial.

In this regard, the counsel for the first appellant was of the firm view that in the interest of justice a retrial should be ordered because failure of the trial court to cause a plea to be taken is fatal and renders trial a nullity, and thus it cannot be served by the provisions of section 388 (1) of Criminal Procedure Act, Cap 20 R.E. 2019.

The second appellant's counsel strongly contended that the omission is curable. Particularly, Mr. Tuthuru's stand was premised on the argument that the appellants were in court on 3rd July, 2015 and participated throughout the trial when witnesses for the prosecution testified and they also offered their defence. In this regard, he contended that the appellants were not prejudiced by the omission, the Court should proceed to hear and determine the appeal. In the event,

he implored the Court to scrutinize the irregularities in the trial proceedings and the alleged lack of evidence to support the conviction of the appellants and acquit them instead of nullifying the proceedings and ordering a retrial. He concluded his submission by emphasizing that, no miscarriage of justice was caused to the appellants and the prosecution by the omission of the trial court to ensure that a plea was taken by the appellants. Notably, the third appellant's counsel, supported the second appellant's counsel stance to urge the Court to review the irregularities in the trial court proceedings, analyse the evidence and find that the prosecution did not prove the case. He equally pressed the Court to acquit the appellants.

Most importantly, though the learned State Attorney held a view that the omission of the trial court to ensure that the appellants pleaded to the information before the trial commenced is apparent on the record of appeal, he forcefully argued that the omission is not fatal. This is because he emphasized the appellants pleaded to the information during the preliminary hearing which was conducted by the trial judge on 1st July, 2015. Mr. Mtoi explained that on that day the information was read over and explained to the appellants who pleaded not guilty and plea of "not guilty" in respect of each appellant and the two other accused

persons was entered. In this regard, Mr. Mtoi contended that the omission is curable under section 388 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). In the event he thus pressed us not to order a retrial. On the contrary he urged us to look into the irregularities in the proceedings and the evidence of the parties, and in the end acquit the appellants on the argument that the prosecution case has no basis to sustain the convictions. In essence, he supported the appeal.

At this juncture, we wish to preface our deliberation by revisiting the relevant provisions of the law in the CPA with regard to the procedure in trials before the High Court as prescribed under Part VIII.

Basically, part VIII (d) of the CPA concerns arraignment of the accused. Particularly, section 275 (1) of the CPA provides as follows:-

> *"275 (1) 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 he shall be required to plead instantly thereto, unless where the accused person is entitled to service of a copy of the information, he objects to the want of such service, and*

the court shall find that he has been duly served therewith."

On the other hand, section 279 of the CPA stipulates that:-

"279. Every accused person upon being arraigned upon information by pleading generally thereto the plea of "not guilty" shall, without further form, be deemed to have put himself upon his trial."

Moreover, section 281 (1) of the CPA prescribes the procedure which should be followed by the High Court on refusal by the accused to plead to the information. It states that:-

"281 (1) where an accused person being arraigned upon any information stands mute of malice, or neither will, nor by reason of infirmity can, answer directly to the information, the court if it thinks fit, shall order the Registrar or Officer of the court to enter a plea of "not guilty" on behalf of such accused person, and the plea so entered shall have the same force and effect as if the accused person had actually pleaded the same, or else the court shall thereupon proceed to try whether the accused person is of sound or unsound mind, and, if he is found to be of sound mind, shall proceed with the trial, and if he is found to be of unsound mind and

consequently incapable of making his defence shall order the trial to be postponed, and the accused person to be kept meanwhile insafe custody in such place and manner as the court thinks fit and shall transmit the court record to the Attorney General for consideration by the MInister, and the Minister may order an accused person to be detained in a mental hospital or other suitable place of safe custody.

(2) Any subsequent proceedings in relation to the accused shall be regulated by sections 217 and 218 of this Act.

Furthermore, sections 282 and 283 of the CPA stipulates as follows with regard to plea of "guilty" and proceedings after plea of "not guilty", respectively:-

"282. Where the accused person pleads "guilt", the plea shall be recorded and he may be convicted thereon."

"283. Where the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281, the court shall proceed to choose assessors, as provided in section 285, and to try the case."

Equally relevant, is section 285 (1) of the CPA which provides that:-

"285 (1) Where a trial is to be held by the aid of assessors, the assessors shall be selected by the court."

Lastly, section 288 of the CPA prescribes for the stage when the prosecution case is supposed to be opened. It stated thus:-

"288. Where the assessors have been chosen, the advocate for the prosecution shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge."

Admittedly, in the light of the reproduced provisions above, the trial at the High Court which is held with the aid of assessors, who are selected by that court in terms of section 285 (1) of the CPA, starts after the accused has pleaded "not guilty" and a plea of "not guilty" is entered in terms of section 283 of that Act. Moreover, it is evident that the trial of a case begin after the High Court has chosen assessors as clearly stipulated under section 283 of the CPA. It is in this regard that the counsel for the prosecution opens the case against the accused person and calls upon witnesses to adduce evidence in support of the charge or information as per dictates of section 288 of the CPA, after compliance with section 283. It is thus our settled opinion that a trial before the High Court which commences in contravention of the clear provisions of

the law, causes miscarriage of justice not only to the accused but also the prosecutor and to the public at large. It is a requirement of the law that after a charge or information is read over to the accused, he must reply. Thus where no plea is taken the trial is a nullity.

In the case at hand, there is no dispute, in the light of the record of proceedings of the High Court in the record of appeal, and as conceded by the counsel for the parties that though on 3rd July, 2015 the trial judge indicated that "**the charge was re-read over to the accused"**, there is no evidence that the appellant and two others who were acquitted at the end of the trial, pleaded to the information. There is also no indication that a plea of "not guilty" was entered before the prosecutor opened the case for the prosecution as per the dictates of section 283 of the CPA.

Indeed, according to the record of proceedings of the particular day, there is no indication that the trial court selected assessors as required under section 285 read together with section 283 of the CPA.

At this point, we better let the record of appeal bear testimony to our observation as hereunder:-

> *"**Date**: 3/07/2015*
>
> ***Coram**: Hon M.R. Gwae, J.*

Mr. Mwasimba – State Attorney for the Republic

Miss Christina Chacha: State Attorney for Republic

Mr. Pauline Michael for 1st & 3rd accused persons

Mr. Lubango Dioniz for 5th accused person.

Mr. Adamu for the 4th accused person

Mr. Otieno for 2nd accused person

Accused names

1. *Julius s/o Kataha*
2. *Juma s/o Guluka*
3. *Mbaraka s/o Said @ Kasusura*
4. *Juma s/o Kasanana*
5. *Bahati s/o John @ Lutatina*
6. *C/C: B. France*

Court Assessors

1. *Sospeter Mukanza*
2. *Hawa Sweid*
3. *Mabula Lucas*

Mr. Mwasimba. The matter was set for hearing; we have witnesses to testify in court.

Defence counsels: We are ready for the scheduled hearing.

Court: Charge re-read over to the accused

Mr. Pauline Michael for 1st & 3rd accused persons

Mr. Lubango Dionis for 2nd accused person

Mr. Adamu for 4th accused person

Mr. Otieno for 5th accused person

***Signed** GWAE, J*

3/7/2015

Court: The accused are asked as to whether they have confidence over the court assessors.

1st accused: I have confidence in court.

2nd I have confidence in court presiding the case

3rd I have confidence in court presiding the case

4th I have confidence in court presiding the case

5th I have confidence in court presiding the case

***Signed** GWAE, J.*

3/7/2015

PROSECUTION CASE OPENS:

PW1:..."

We think it is not out of place to state that when we thoroughly perused the trial court's original record, the Court and counsel for the parties were in agreement that the typed copy of proceedings reflects

the true position of what was recorded by the trial judge on 3rd July 2015. Indeed, the counsel for the appellants are in agreement that in the light of the record of appeal, the trial court contravened the provisions of the law which requires the accused to plea to the information after it is read over and explained; and, that, if he pleads "not guilty" the trial court must enter it in the record and proceed to choose assessor and try the case.

From the foregoing, firstly, we have no hesitation to state that the trial court contravened the provisions of the law stated above with regard to the requirement to cause the accused to plea before the commencement of a trial held with the aid of assessors. Secondly, in view of the trial court's proceedings in the record of appeal, and considering the nature of the case which confronted the appellants, we are settled that the omission occasioned a serious miscarriage of justice to the parties, and therefore the trial was rendered a nullity. Indeed, failure to take plea of the accused person is against a rule of natural justice that a man must not be condemned unheard and he cannot be asked to participate and enter his defence which he is not made aware before the trial. In the circumstances, we hold the firm view that before the trial started on 3rd July, 2015, the trial court was bound to show that

the information was read over to the appellants and that they were called upon to plead and record their respective plea. We must emphasize that in a criminal court case, the accused plea of guilty or not guilty or no contest is his formal response to the charges or information against him.

It is settled law that the arraignment of an accused is not complete until he has pleaded. Besides, the main function of arraignment is for an accused to enter a plea after hearing or learning of the charges that have been filed. Besides, where no plea is taken before the commencement of a trial, the proceedings is rendered a nullity. Indeed, the omission is not an irregularity which can be cured by section 388 (1) of the CPA as it goes to the root of the trial.

At this point, it is instructive to make reference to the decision of the Court in **Naothe Ole Mbila v. The Republic** [1993] T.L.R. 253, where it was emphasised among others that:-

> *"1. One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, that is, the court has to put the charge or charges to him and to require him to plead.*

2. *Non-compliance with the requirement of an arraignment of an accused person renders the trial a nullity."*

For similar stance, see also the decisions of the Court in **Joseph s/o Masaganya v. The Republic,** Criminal Appeal No. 77 of 2009 (unreported) and **Thluway Akonaay v. The Republic** [1987] T.L.R. 92, in which, though the issue involved the interpretation of section 228 (1) of the CPA pertaining to the procedure applicable before trial at subordinate court, and the applicability of the then section 346 of Criminal Procedure Code (now section 388 (1) of the CPA), the principles of law enunciated therein equally applies to the instant matter.

On the other hand, we are alive to the argument of the learned State Attorney that the appellant's plea during the preliminary hearing which was conducted on 1st July, 2015 constituted a plea before the commencement of the trial on 3rd July, 2015.

Besides, we are aware that the appellant's plea at the preliminary hearing was taken in accordance with section 275 (1) of the CPA. However, with profound respect, we are unable to agree with the learned State Attorney's argument. This is because the accused's plea taken during the preliminary hearing cannot be equated to the plea

which is envisaged under section 283 (1) of the CPA as contended by the learned State Attorney. The plea taken before the commencement of the trial envisages the presence of assessors who are chosen by the trial court and informed of their role and responsibility during the trial. This is legally done after the accused pleads "not guilty" and the court records the plea. It is at this stage that the accused is asked if he has any objection to the participation of any of the assessor. On the contrary, assessors are not entitled to be present during the preliminary hearing. That is why section 192 of the CPA makes reference to section 283 of the CPA. Besides, preliminary hearing is aimed to determine matters not in dispute. For clarity section 192 (1) provides as follows:-

> *"192 (1) Notwithstanding the provisions of sections 229 and 283, if an accused person pleads not guilty the court shall as soon as is convenient hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial."*

In **Issa Bakari and 4 Others v. R.**, Criminal Appeal No. 121 of 2008 (unreported). The Court stated among others that:-

"We are aware of the provisions of section 192 (1) of the CPA. It is lucidly provided there in that, where an accused person pleads not guilty, the court shall hold a preliminary hearing to consider such matters as are not in dispute between the parties and which will promote a fair and expeditions trial. It is clear, therefore that a preliminary hearing was never meant to extinguish an accused person's right to a fair and/or full hearing. It was meant to preserve it and promote it."

Moreover in **Efraim Lutambi v. R.** [2006] T.L.R. 265, the Court had this to say:-

"We wish to observe that the provisions of section 192 of the CPA are very useful in the administration of the criminal justice. They were intended by the legislature not only to reduce the costs of criminal trial in the courts, but also to ensure that those trials are, without prejudice to the parties conducted expeditiously."

Similarly in **Tundubali Yumba v. Republic,** Criminal Appeal No. 70 of 2008 (unreported), the Court stated as follows;-

"It is common ground that the purpose of conducting a preliminary hearing is to accelerate trial and disposal of cases. Towards this end, by conducting a preliminary hearing, matters which are not in dispute are identified so as to reduce the number of witnesses to be called at

the trial. In so doing, fair and expeditious trial is facilitated.

See also **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387.

From the foregoing deliberation, we find that the omission of the trial court is against the spirit of the provisions of the law alluded to above, and in essence it vitiated the entire proceedings.

Accordingly, we are constrained and hereby invoke our revisional powers under section on 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to declare the trial court's proceeding a nullity, quash convictions and set aside the sentences of death by hanging imposed on the appellants.

Next for our consideration is what should be the way forward. As alluded to above, while the counsel for the first appellant urged us to order a retrial for the interest of justice and in view of the circumstances of the case at hand, the counsel for the second, third appellants and the learned State Attorney for the respondent Republic pressed the Court to abstain from doing so on the contention that the omission is not fatal and therefore curable under Section 388 (1) of the CPA. They thus urged us to consider the pitfalls in the trial and the sufficiency of the

evidence and find that the prosecution did not prove the case, thereby acquit the appellants.

On our part, since we have firmly found that the omission is fatal as it rendered the entire trial a nullity, we respectfully decline the prayer. Indeed, section 388 (1) of the CPA contemplates a situation where on appeal or revision the court is satisfied that the disclosed error, omission or irregularity has infact occasioned failure of justice, it may order a retrial or make such order as it may consider just and equitable. Consequently, as in the circumstances of this case as miscarriage of justice was occasioned, we are settled that an order of retrial will be in the interest of justice. We wish to reiterate what we stated in **Mohamed Jabir v. The Republic,** Criminal Appeal No. 352 of 2017 (unreported) that:-

> *"The court's urge to dispense real or substantial justice in the case is rooted in the confidence the people have in the court."*

Indeed, in **Hatibu Gandhi and Others v The Republic** [1996] T.L.R. 12, the Court considered the position in **Hammond's** case [1941] 3 ALL ER 318 and stated as follows:-

> *"We think the position in **Hammound's** case is more appropriate to this count where criminal*

justice is required to be administered not as a game of football but as a serious business of acquitting the innocent and convicting the guilty in a reasonable and feasible manner according to law. This court has emphasized this approach in a recent case, that is, the case of ***DPP v. Peter Rowland Vogei*** *[1987] T.L.R.4. Since the authority of the court depends ultimately upon public confidence in the courts, it is important that a proper balance be maintained between the rights of an accused person on the one hand and the rights of the public on the other."*

To this end, it is important to note that where the court substantially omits to perform a prescribed obligation in accordance with the law, depending on the circumstances of the case, a retrial is in the interest of justice. Generally, a retrial in a fit case, like the one at hand, aim to strike a balance by weighing the right of the accused against that victim right as we observed in **Omary Abdallah @ Mbwangwa v The Republic**, Criminal Appeal No. 127 of 2017 (unreported), in which we relied and approved a position taken by the Kenyan Court of Appeal in the case of **Obedi Kilonzo v. Republic** (2015) found at http:IIwww. Kenyanlaw.org) in similar situation.

Ultimately, we decline the request to refrain from ordering a retrial advanced by counsel for the second and third appellants and the respondent Republic and agree with the stand taken by the counsel for the first appellant.

In the end, we order that a retrial be conducted before another judge with a new set of assessors expeditiously. In the meantime, the appellants shall continue to be in remand custody pending the intended retrial.

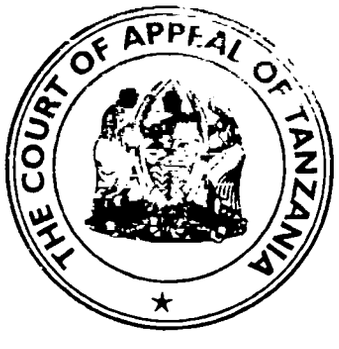
DATED at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of Mr. Costantine Mutalemwa, learned counsel for the 1st Appellant also hold briefs for Mr. Cosmas Tuthuru, learned counsel for 2nd Appellant, Mr. Fidelis Mtewele, learned counsel for the 3rd Appellant and Ms. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL