

IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 588 OF 2020

JUMA NDODI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Kibella, J.)

dated the 23rd day of October, 2018

in

Criminal Sessions Case No. 12 of 2016

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JUDGMENT OF THE COURT

12th & 17th July, 2023

MWARIJA, J.A.:

The appellant, Juma Ndodi was charged in the High Court of Tanzania at Shinyanga with the offence of murder contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. The prosecution alleged that on 27/2/2015 at Buyange village within Kahama District in Shinyanga Region, the appellant murdered one Modester Kilijiwa.

When he was arraigned, the appellant denied the charge and as a result, the case proceeded to a full hearing. The prosecution relied on the

evidence of two witnesses, two documentary exhibits and the written statement of persons who did not appear in court to testify. The same were received under section 34 B of the Evidence Act, Chapter 6 of the Revised Laws. It also relied on the extrajudicial statement of the appellant. On his part, the appellant gave evidence on his own behalf without calling any witness.

In its judgment, the High Court (Kibella, J.) was satisfied that the prosecution had proved its case beyond reasonable doubt. It therefore convicted and sentenced him to the mandatory sentence of death by hanging. Dissatisfied with the decision of the High Court, the appellant appealed to this Court raising six grounds of appeal. Later on, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009, his advocate filed a substituted memorandum of appeal consisting of five grounds. However, for reasons to be clear shortly herein, we do not intend to state those grounds of appeal.

At the hearing of the appeal, the appellant was represented by Mr. Jacob Somi, learned counsel while the respondent Republic was represented by Ms. Wampumbulya Shani, learned State Attorney assisted

by Mr. Jukael Jairo and Ms. Caroline Mushi, both learned State Attorneys. Since the appellant did not understand Kiswahili, the service of an interpreter (Kiswahili – Kisukuma and vice versa) was provided through one Juma Masali.

Before the appeal could proceed to hearing, Mr. Jairo raised the issue concerning legality of the committal proceedings in the District Court of Kahama and preliminary hearing in the High Court. He argued that, from the record, it transpired in the High Court, when the case started to be heard on 26/9/2018, that the appellant did not understand the language of the court but only his native language, Kisukuma. As a result, from that date, an interpreter was made available. Mr. Jairo went on to argue that, as from the date of his arraignment in the District Court and during the committal proceedings, the court proceeded without an interpreter, the omission which, according to the learned State Attorney, prejudiced the appellant. He thus urged us to nullify the committal proceedings and all subsequent proceedings of the High Court, quash the judgment and conviction and set aside the sentence. On the way forward, he prayed for a retrial.

Mr. Somi agreed with the submission made by the learned State Attorney. He contended that, the appellant had the right of knowing all that which took place during the committal proceedings and preliminary hearing. Thus, because he was denied that right, Mr. Somi argued, the proceedings which were conducted without the service of an interpreter, were a nullity. He agreed with Mr. Jairo that the same be nullified with an order directing a retrial of the case.

From the submissions of the counsel for the parties, there is no dispute that the appellant does not understand Kiswahili. He was arraigned in the District Court of Kahama on 12/3/2015. The charge was read over to him in the absence of an interpreter. Later on 3/2/2016, committal proceedings were conducted, again without the service of an interpreter. Since the purpose of holding committal proceedings is, *inter alia*, to enable an accused person to understand the nature of the case against him and substance of the evidence which the prosecution intends to rely upon at the trial, we agree with both the learned State Attorney and Mr. Somi that, the omission to provide the appellant with an interpreter prejudiced him.

Under section 245 (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA) the charge is required to be read over and explained to an accused person. Section 245 (1) (2) and (3) of the CPA states:-

"245-(1) After a person is arrested or upon the completion of investigation and the arrest of any person in respect of the commission of an offence triable by the High Court, the person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.

(2) Whenever a person is brought before a subordinate court pursuant to subsection (1), the magistrate concerned shall read over and explain to the accused person the charge or charges set out in the charge sheet in respect of which it is proposed to prosecute the accused but the accused person shall not be required to plead or make any reply to the charge.

(3) After having read and explained to the accused the charge or charges the magistrate shall address him in the following words or words to the like effect...."

Furthermore, after the information has been received by the subordinate court, such information must be read over to the accused person and so is the substance of the evidence of the intended witnesses and the documents which the prosecution intends to rely upon at the trial. The accused person may also make his statement if he wishes. The relevant provisions of the CPA to that effect is section 246 (1) - (5) which provides as follows:-

"246-(1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under subsection (7) of section 245 and commit him for trial by the court; and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the

accused person from prison on the specified date and to facilitate his appearance before the court.

(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

(3) After complying with the provision of subsections (1) and (2) the court shall address the accused person in the following words or words to the like effect: "You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial."

(4) Before the accused person makes any statement the court shall state to him and make him

understand clearly that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to him to induce him to make any admission or confession of his guilt, but that whatsoever he then says may be given in evidence on his trial notwithstanding the promise or threat.

(5) Everything that the accused person says shall be recorded in full and shall be shown or read over to him and he shall be at liberty to explain or add to anything contained in the record thereof."

We have reproduced in extenso those provisions of the CPA to accentuate the position that, an accused person has a right to be made to understand the charge or information and the nature of the evidence to be encountered by him at the hearing. Since therefore, the appellant did not understand the language of the court, there is no gainsaying that he was denied that right. In the circumstances, it cannot be said that, in this case, the committal proceedings were properly conducted.

In the case of **The Republic v. Elias Michael @ Luhiye and Three Others**, Criminal Revision No. 2 of 2018 (unreported), the Court

had occasion to consider the effect of the failure by the committing court to conduct committal proceeding in compliance with the provisions of sections 245, 246 and 247 of the CPA. It held that, where the non-compliance prejudices the accused person, the trial following therefrom becomes vitiated. – See also the cases of **Castor Mwaijunga v. Republic**, Criminal Appeal No. 268 of 2017 and **The Republic v. Asafu Tumwine**, Criminal Appeal No. 1 of 2006 (both unreported). As observed above, in the case at hand, the committal court did not avail an interpreter to the appellant. It thus denied him the right to know the nature of the charge preferred against him and the substance of the evidence intended to be relied upon by the prosecution. We are of the settled mind therefore, that the omission rendered the committal proceedings fatally defective.

The finding on the defect in the conduct of the committal proceedings alone suffices to dispose of the appeal. Thus on the basis of the foregoing, in terms of section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, we nullify the committal proceedings. As a result, the proceedings of the High Court emanating from the committal proceedings which were a nullity, are also hereby nullified, the judgment and conviction are quashed and the sentence set aside.

On the way forward, we agree with the learned counsel for the parties an order retrial is appropriate. We find that, in the particular circumstances of this case, the interests of justice requires that a retrial be ordered. In the event, the record is remitted to the committal court for it to conduct committal proceedings afresh with the use of an interpreter. We direct that the proceedings should be expedited. Meanwhile, the appellant should remain in custody.


DATED at SHINYANGA this 17th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of July, 2023 in the presence of Mr. Jacob Somi, learned counsel for the Appellant and Mr. Louis Boniface, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.


R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL