**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: WAMBALI, J. A., MAIGE, J.A. And MGONYA, J.A.)**

**CRIMINAL APPEAL NO. 164 OF 2021**

**ALFAN APOLINARY @ KYALUBOTA ........................................ 1ST APPELLANT**

**APAFULA ZACHARIA @ MAPINDA .........................................2ND APPELLANT**

**HASHIMU SHARIFU @ ISSA .................................................3RD APPELLANT**

**KULULINDA BWIRE @ RICHARD BWIRE ...............................4TH APPELLANT**

**VERSUS**

**THE REPUBLIC** ......................................................................... **RESPONDENT**

**(Appeal from the decision of the Resident Magistrate Court of Geita Region with Extended Jurisdiction at Geita)**

**(Mahimbali, SRM. EXT.JUR)**

**Dated the 24th day of December, 2020**

**in**

**RM Criminal Sessions Case No. 9 of 2019**

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# JUDGMENT OF THE COURT

22nd & 31st August, 2023

**WAMBALI, J.A.:**

The Resident Magistrate Court of Geita Region at Geita (the committal court), committed the appellants together with Habibu Feruzi @ Issa, not party to this appeal, for trial to the High Court of Tanzania at Mwanza on 25th February, 2020. At the High Court, the case was registered as Criminal Sessions Case No. 8 of 2020. Later, it was transferred to Kingwele, Senior Resident Magistrate with extended jurisdiction for trial at the Court of Resident Magistrate of Geita. He immediately conducted preliminary hearing

and adjourned the hearing for trial on a date to be scheduled. The case was however, assigned to Mahimbali, Senior Resident Magistrate with extended jurisdiction (as he then was) who conducted the trial.

Thus, the appellants and Habibu Feruzi @ Issa were tried upon information for murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2019 (the Penal Code). It was alleged that on 14th November, 2015 at about 12.35 hours, at Ludete – Katoro Village, in the District of Geita in Geita Region, the appellants and Habibu Feruzi @ Issa, murdered one Alphonce Mawazo. Each denied the allegations hence, a full trial was held. The prosecution's case depended on thirteen witnesses and five exhibits. The defence which included all the appellants had a total of seven witnesses with no exhibit.

It is noteworthy that after the prosecution closed its case, the trial Senior Resident Magistrate with extended jurisdiction found the appellants with the case to answer and required them to defend the allegations. However, he acquitted Habibu Feruzi @ Issa as he formed an opinion that the prosecution had no sufficient evidence to prove the case against him beyond reasonable doubt.

At the end of the defence case which involved the appellants and the three witnesses they summoned, the trial court evaluated the evidence for both sides. Ultimately, the Senior Resident Magistrate with extended

jurisdiction conclusively found the appellants guilty, convicted and imposed a sentence of death by hanging on them. Dissatisfied, they have appealed to the Court advancing several grounds. We wish to make it clear at the outset that, for the reason to be apparent shortly, we do not intend to revisit the background facts of the case nor evaluate the evidence of the parties' witnesses herein.

The appellants initially jointly lodged a memondarum of appeal comprising six grounds. Later, counsel who were assigned to represent them, except for the first appellant, lodged three separate supplementary memoranda of appeal in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) comprising a total of nine grounds of appeal. Nevertheless, before the hearing of the appeal, the respective counsel prayed to add one more ground in terms of rule 81 (1) of the Rules. We accordingly granted leave as there was no objection from the respondent's counsel.

In the end, counsel for the appellants agreed to pick only one ground from the memoranda of appeal together with the one they added and urged us to determine the appeal on those grounds. The respective grounds are coached as follows:

1. *That the committal proceedings of the appellant by the committal court was improper for non – compliance with the provisions of section 246 of the Criminal Procedure Act.*

2. *That the trial court had no jurisdiction to try the appellants' case.*

At the hearing of the appeal, Mr. Deocles Rutahindurwa, Mr. Cosmas Tuthuru and Mr. Anthony Nasimire, all learned advocates, represented the first, second and fourth appellants, respectively. Mr Constantine Mutalemwa, Mr. Edwin Aron and Mr. Emmanuel M. John represented the third appellant. On the adversary side, the respondent Republic had the services of Mr. Castuce Ndamugoba, learned Senior State Attorney assisted by Ms. Naila Chamba and Ms. Jaines Kihwelo, both learned State Attorneys.

Submitting in support of the first ground of appeal, Mr. Mutalemwa argued that gauging from the record of proceedings of the committing court, there is indication that there was no compliance with the provisions of section 246 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (the CPA). He submitted that it is apparent in the record of appeal that the statement and substance of the evidence of all prosecution witnesses who testified at the trial together with the exhibits were not read over to the appellants as required by the law. He added that what the committing court did was simply to list down the names of nineteen witnesses and five exhibits and no more.

In the learned counsel's view, the said failure disabled the prosecution witnesses to testify and tender exhibits at the trial court. The failure, he added, rendered the trial unfair not only to the appellants but also to the

respondent and thus the proceedings from that stage were as nullity. He therefore, urged the Court to nullify the proceedings from the stage of committal proceedings together with those of the trial court, quash convictions and set aside the sentences of death against the appellants. Besides, he argued, considering the circumstances of the case, the matter be remitted to the committing court for compliance with the law before committing the appellants for trial.

Mr. Mutalemwa's submission on the irregularity in committal proceedings and the way forward was out rightly supported by all counsel for the appellants. Nevertheless, Mr. Tuthuru, learned advocate for the second appellant differed with his colleague on the way forward. In his opinion, the proper order after nullifying the tainted proceedings is for the Court to acquit the appellants.

On his part, Mr. Ndamugoba, joined hands with the appellants' counsel to express his disappointment for the failure of the committing court to comply with the requirement of the law before it committed the appellants for trial. Indeed, he agreed that the said failure rendered the trial unfair to both sides of the case. In his opinion, since the irregularity was mainly caused by the trial court, the said committal proceedings should be nullified followed by those of the trial court in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA). He also agreed that

the case be remitted to the committing court to conduct fresh committal proceedings in accordance with the law. However, he differed with the proposal by the second appellant's counsel who urged the Court to acquit the appellants.

Having heard the submissions of counsel for both parties on the first ground, we wish to start our deliberation by reflecting on the law. Section 246 the CPA provides as follows:

> *"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 provisions of subsections (1) and (2) the court shall address the accused person in the following words or words to the like effects:*

> *"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 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.*

6. *When the record of the statement, if any, made by the accused person is confirmed to be what he declares is the truth, the record shall be attested by the magistrate who shall certify that the statement was taken in his presence and hearing and contains accurately the whole statement made by the accused person; and the accused person shall sign and attest the record by his mark but if he refuses the court shall record his refusal and the record may be used as if the accused had signed or attested it."*

[Emphasis Added]

It is in this regard that any witness whose statement or substance of evidence was not read at committal proceedings as required under section 246 (2) of the CPA cannot be called upon by the prosecution to testify at the trial unless a reasonable notice to call such witness has been given under section 289 (1) of the same Act. For clarity, section 289 of the CPA provides thus:

*"1. No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.*

*2. The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.*

*3. The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called."*

In the case at hand, as correctly submitted by counsel for the parties, the record of the committing court contained in the record of appeal at page 54, leaves no doubt that there was no compliance with the provisions of section 246 (2) before the appellants and Habibu Feruzi @ Issa, not party to the appeal, were committed to the High Court for trial on 25th February, 2019. We better let the record of proceedings reveal what transpired:

*"PP: Matter is for P.I I pray to proceed in reading the information.*

***PRELIMINARY INQUIRY***

*Court:*

*The information of murder is read over and explained to accused person who are "NOT ASKED TO PLEA"*

*S. 245 OF CPA C/W*

***SGD: N. R. BIGIRWA – RM***

***25/2/2019***

*PP: I pray to list out the intended prosecution witnesses and exhibit necessary to be procured during trial at the High Court..."*

It is noteworthy that after the reproduced statement of the public prosecutor, the committing magistrate recorded the list of 19 prosecution witnesses and 5 exhibits and indicated thus:

*"S. 246 (4) (6) of the CPA C/W*

***SGD: N. R. BIGIRWA – RM***
***25/2/2019"***

Thereafter, the committing magistrate required the appellants to disclose their witnesses and exhibits and when they responded, he recorded the respective names accordingly. He also asked them if they had intention to engage advocates to represent them at the trial and when they jointly replied that they had no such intention, he ordered that they should be provided with legal aid at the government expenses.

Finally, the committing magistrate ordered that the appellants should be provided with committal proceedings after they were typed and ultimately, he committed them for trial to the High Court.

From the reproduced relevant part of the committal proceedings, it is evident that no indication is shown that the committing court complied with subsection 246 (2) of the CPA. Indeed, though the committing magistrate indicated that section 246 (4) and (6) of the CPA were complied with, that cannot be correct. This is so because mere listing of the names of witnesses and exhibits for the prosecution does not amount to compliance with those subsections of section 246 of the CPA. On the contrary, compliance with those subsections presupposes that there is compliance with subsections (1) and (2) of the same section. Moreover, subsections (3) (4) (5) and (6) could not come into play while subsection (2) which lays the foundation was not complied with.

It is therefore unfortunate that, though the appellants were committed to the High Court for trial and later the case was transferred to the Senior Resident Magistrate with extended jurisdiction at the Court of Resident Magistrate of Geita, the statements and substance of evidence of all prosecution witnesses and the admitted exhibits were not read over at the committal proceedings. This was a fatal irregularity that occasioned miscarriage of justice not only to the appellants but also to the prosecution. In this regard, the appellants' trial was unfair.

In essence, all witnesses for the prosecution were incompetent to testify at the trial for non – compliance with the provisions of sections 246

(2) and 289 (1) of the CPA. Therefore, the testimonies of all prosecution witnesses and the exhibits were wrongly tendered, admitted and relied upon by the trial Senior Resident Magistrate with extended jurisdiction.

It instructive to note that the committal order committing the accused for trial is the basis for the accused trial by the High Court and the reason behind the scheme and spirit of the law in making provisions for holding a preliminary inquiry in cases of this nature as stated by the Court in **The Republic v. Asafu Tamwine,** Criminal Revision No.1 of 2006 (unreported). However, in the inquiry under our consideration, that is, P.I. Case No. 56 of 2015, though the committing court made an order committing the appellants for trial, there was no compliance with the provisions of section 246 (2) of the CPA. It follows that since the statements and the substance of the evidence of all 13 prosecution witnesses and 5 exhibits were not made known to the appellants, they could not be relied upon in evidence at the trial. Indeed, it is not disputed that the prosecution did not also comply with the provisions of section 289 (1) of the CPA before the respective witnesses testified and tendered exhibits.

In **The Director of Public Prosecutions v. Sharif s/o Mohamed @ Athuman and 6 Others** (Criminal Appeal No. 74 of 2016) [2016] TZCA 635 (5th August 2016, TANZLII), the Court dealt with the failure of the witness to disclose the contents of the document at the committal

proceedings as required under section 246 (2) of the CPA and stated as follows:

> *"Our understanding of this provision is that, it is not enough for a witness to merely allude to a document in his witness statement, but that the contents of that document must be made known to the accused person(s). If this is not complied with the witness cannot later produce that document as an exhibit.*
>
> *The issue is not on the authenticity of the document but on non-compliance with the law. We therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage."*

The Court therefore dismissed the appeal and upheld the ruling of the trial judge who had sustained the defence preliminary objection that the witness could not be competent to tender the exhibit because it was not in conformity with the provisions of section 246 (2) of the CPA.

Similarly, in **Hamis Meure v. The Republic** [1993] T.L.R. 213, the Court observed, among others, that it is wrong to allow a witness to give evidence at the trial while his statement had neither been read at the committal proceedings nor reasonable notice given to the appellant or his advocate before such witness is allowed to give evidence. It further observed that the evidence taken in contravention of the respective provisions of the CPA is liable to be expunged.

In the case at hand, it is apparent in the record of the appeal that there was total non-compliance with the provisions of section 246 (2) of the CPA. It is clear that not only the statements and the substance of the intended witnesses were not read over but also the contents of the exhibits were not revealed to the appellants.

We are aware that ordinarily the Court has been excluding the witness's evidence and exhibit from consideration for failure to comply with the requirement of the law on this aspect. For instance, in **Samwel Henry Juma v. The Republic**, Criminal Appeal No. 211 of 2017 [2016] TZCA 813 (5th May 2016, TANZLII), the evidence of the witness together with the extra judicial statement were expunged from the record.

However, in the present case, we are of the view that since the irregularity was to a large extent caused by the committing court and that both sides were prejudiced, it is in the interest of justice that we nullify the respective proceedings of the committal court and those of the trial court followed by an order of a retrial before the High Court.

In the event, we allow the first ground of appeal. Indeed, as this ground suffices to dispose of the appeal, we do not deem it appropriate to determine the second ground of appeal.

Consequently, in terms of section 4 (2) of the AJA, we nullify the proceedings of the committing court from 25th February, 2020 and those of

the trial court in RM Criminal Sessions Case No. 9 of 2020, quash convictions and set aside the sentences.

Ultimately, we order that the matter be remitted to the committing court for conducting fresh committal proceedings expeditiously before another magistrate. Meanwhile, the appellants are to remain in custody pending being committed to the High Court for trial.

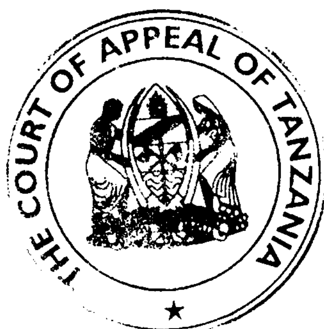
**DATED** at **MWANZA** this 30th day of August, 2023.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

L. E. MGONYA
**JUSTICE OF APPEAL**

The Judgment delivered this 31st day of August, 2023 in the presence of Mr. Deoclas Rutahindurwa, Mr. Cosmas Tuthuru, Mr. Constantine Mutalemwa, and Mr. Anthony Nasimire, all learned advocates represented the 1st, 2nd, 3rd, and 4th Appellants and Ms. Martha Mwadenya, learned Senior States Attorney for the respondent, is hereby certified as a true copy of the original.




A. L. KALEGEYA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**