

**IN THE COURT OF APPEAL OF TANZANIA  
AT SUMBAWANGA**

**(CORAM: WAMBALI, J.A., KENTE, J.A. And MURUKE, J.A.)**

**CRIMINAL APPEAL NO. 434 OF 2019**

**GALULA S/O NKUBA @ MALANGO ..... 1<sup>ST</sup> APPELLANT  
NOGELE S/O MALIGANYA ..... 2<sup>ND</sup> APPELLANT  
SHILE S/O JILALA @ SHILE ..... 3<sup>RD</sup> APPELLANT  
ALEX MANYANZA @ ENOCK PETER ..... 4<sup>TH</sup> APPELLANT  
VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Sumbawanga  
sitting at Mpanda)**

**(Mashauri, J.)**

**Dated the 23<sup>rd</sup> day of October, 2019**

**in**

**Criminal Sessions Case No. 34 of 2017**

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**JUDGMENT OF THE COURT**

*27<sup>th</sup> September & 04<sup>th</sup> October, 2023*

**WAMBALI, J.A.:**

The current appellants, Galula Nkuba @ Malango, Nogeale Maliganya, Shile Jilala @ Shile and Alex Manyanza @ Enock Peter together with two others, namely, Maiku Pungate @ Samweli and Masunga Kashinje @ Kasala were on 15<sup>th</sup> November, 2017 committed by the Court

of Resident Magistrate of Katavi Region at Mpanda (the Inquiry Court) for trial before the High Court of Tanzania at Sumbawanga.

Following the committal order the appellants together with Masunga Kashinje @ Kasala (not party to the appeal) were arraigned before the High Court sitting at Mpanda in Criminal Sessions Case No. 34 of 2017 upon information for attempted murder contrary to section 211 (a) of the Penal Code, cap 16 R.E. 2002 (now R.E. 2022). It was alleged that the appellants together with two others on 14<sup>th</sup> May, 2015 at King'anda Mawiti Village within Mlele District, Katavi Region attempted to cause death of Limi d/o Luchoma, a person with albinism by chopping off her hand using a sharp instrument thereby causing her massive blood loss, the act which would have ended her life.

According to the record of appeal, an information dated 11<sup>th</sup> August, 2017 containing six accused persons was placed before the High Court judge (Mambi J.) for plea taking and preliminary hearing on 14<sup>th</sup> February, 2018. The first, second, third and fourth appellants in this appeal were listed as the third, second, fourth and first accused respectively, while Maiku Pungate @ Samweli and Masunga Kashinje @ Kasala were listed as the fifth and sixth accused respectively.

It is noteworthy that on the said date, after the information was read over and explained and the appellants and Masunga Kashinje @ Kasala pleaded not guilty, a plea of not guilty was entered. Moreover, upon information from the State Attorney concerning the death of Maiku Pungate @ Samweli (the fifth accused), the presiding judge proceeded to mark his case to have abated in terms of section 284A of the Criminal Procedure Act, Cap 20 (the CPA). It is further noted that though according to the record of proceedings on that date, there is no indication as to when the fifth accused passed away, the certificate of death in the record of appeal shows that he died on 3<sup>rd</sup> December, 2017. The preliminary hearing, therefore, proceeded in respect of the five accused persons, that is, the appellants and Masunga Kashinje @ Kasala (the sixth accused).

Despite the fact that the case of the deceased (the fifth accused) was marked abated during preliminary hearing, the information was not amended or substituted before and during the trial which commenced on 1<sup>st</sup> October, 2019 before Mashauri, J (as he then was). Thus, throughout the trial which was concluded on 17<sup>th</sup> October, 2019 when the assessors gave their opinions to the trial judge, no amendment to the information was made. Indeed, even the judgement of the trial court which was

delivered on 23<sup>rd</sup> October, 2019 contained the name of the deceased as the 5<sup>th</sup> accused.

Be that as it may, at the trial, the prosecution case was supported by twelve witnesses and six exhibits; the sketch map, PF3, extrajudicial statement and caution statement of Masunga Kashinje @ Kasala (exhibits P3 and P4) and the extrajudicial statement and caution statement of Alex Manyanza (exhibits P5 and P6) respectively. The appellants defended themselves and summoned three witnesses together with four exhibits which were tendered by Masunga Kashije @ Kasala (the sixth accused).

While the substance of the prosecution case was that the evidence on record tendered by its sides left no doubt that the appellants and Masunga Kashinje @ Kasala were guilty of the offence charged, the defence side emphasized that the case was not proved beyond reasonable doubt.

At the height of the trial, the trial judge evaluated the evidence for both sides and ultimately, he formed an opinion that the case against the appellants was proved to the hilt. He thus convicted and sentenced the appellants to life imprisonment. On the other hand, the trial judge found that the case against Masunga Kashinje @ Kasala (the 6<sup>th</sup> accused) was

not proved to the required standard and therefore not guilty. Consequently, he acquitted him.

Dissatisfied, the appellants have come to this Court to contest the trial court findings, convictions and sentences. Initially, the first and second appellants lodged separate memoranda of appeal containing eight grounds. The third and fourth appellants also lodged separate memoranda of appeal containing seven grounds.

Nonetheless, upon agreement with the counsel who were assigned to represent them at the hearing of the appeal, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), a joint supplementary memorandum of appeal in substitution of the four memoranda of appeal was lodged in Court on 18<sup>th</sup> September, 2023 comprising three grounds of appeal. However, before the hearing of the appeal, in terms of rule 4(2)(a)(b) of the Rules, counsel for the respondent, the Director of Public Prosecutions (the DPP) urged the Court to be allowed to submit on the point of law in respect of the propriety of the trial judge's summing up notes to the assessors. More importantly, upon dialogue between the Court and the counsel for the parties, an issue on the propriety of the information preferred against the appellants at the trial High Court which included the deceased (fifth accused) arose.

In this regard, it was agreed by the counsel for the parties and the Court that before considering the appellants' three grounds of appeal, the two points of law be argued for determination. It is for this reason that we do not deem it appropriate to disclose or reproduce the grounds in the joint supplementary memorandum of appeal nor revisit in detail the factual background of the case and evidence of witnesses for both sides.

At the hearing of the appeal, Messrs, Baltazar Chambi, Mathias Budodi and Peter Kamyalile jointly represented the appellants whereas, Mr John Mwesiga Kabengula, learned Senior State Attorney assisted by Ms. Safi Kashindi Amani, also learned State Attorney represented the respondent, the DPP. For the reason which will be apparent herein, we will start with the issue of propriety of the information laid at the High Court against the appellants.

Submitting with regard to the propriety of the information, Mr Kabengula readily conceded that since no amendment was done to the information in terms of section 276 (2) of the CPA, despite the case against the deceased having been marked to have abated, the same was defective. He submitted that according to the record of appeal, it is not disputed that Maiku Pungate @ Samweli died on 3<sup>rd</sup> December, 2017 before the appellants were called upon to take plea on 24<sup>th</sup> May, 2017

and the trial which commenced on 1<sup>st</sup> October, 2019. In his submission, since the case against the deceased abated under section 284A of the CPA through an order by the judge who conducted the preliminary hearing, it was wrong to maintain his name in the information and including him in the trial court proceedings as the fifth accused until the case was concluded as it transpired.

Nevertheless, Mr. Kabengula firmly submitted that despite the defect in the information, the appellants were not prejudiced because throughout the trial, they knew that they were only five accused and that the deceased was not part of the trial. Though he did not cite any authority to support his stand, he argued that the omission to cause the amendment of the information to remove the name of the deceased both by the prosecution and the trial court is curable under the provision of section 388 of the CPA. He thus concluded that the proceedings of the trial court were valid and no miscarriage of justice was occasioned to the appellants.

In reply, Mr. Chambi fully supported the submission of Mr. Kabengula to the effect that the information placed before the High Court was defective because it was not amended or substituted to remove the name of Maiku Pangate @ Samweli (the deceased) who was throughout

the trial retained as the fifth accused despite his case having been abated. However, Mr. Chambi did not wish to comment, even after being prompted by the Court, on whether the defect prejudiced or occasioned miscarriage of justice on the appellants. Nevertheless, he firmly stated that if the Court reached the decision to nullify the proceedings in respects of the irregularity in summing up to assessors in which counsel for the parties were at par that the omission on the respective issue occasioned injustice to the appellants, a retrial should not be ordered. Mr. Chambi was content that a retrial will not be in the interest of justice as the prosecution laid no cogent evidence at the trial to justify the appellants' convictions and thus at the retrial an opportunity will be seized to rectify the gaps in its case. However, Mr. Kabengula supported retrial based on the irregularity on summing up to assessors.

We wish to preface our deliberation on the issue of defective information by alluding to the settled position that a charge or information is the foundation of the trial of any person suspected to have committed the offence and thereby arraigned before the court. Thus, in order to ensure fair trial and to avoid prejudice or miscarriage of justice, a charge or information must be proper both in form and substance. It is in this regard that in trial before the subordinate court and the High Court, those

courts are enjoined to ensure that a defective charge or information is amended or substituted and thereby call upon the suspect to plea to it to bring it in conformity of the real allegation confronting him as prescribed by sections 234 (1) and 276 (2) of the CPA respectively. For the purpose of the case at hand, section 276(2) of the CPA provides that:

*"Where before a trial upon information or at any stage of the trial, it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendment cannot be made without injustice; and all such amendments shall be made upon such terms as the court shall deem just."*

Therefore, apart from citing the specific offence and the offended provisions of the law, the particulars must clearly give reasonable information as to the nature of the offence charged and whether the allegations involve one suspect or jointly with others.

It is apparent that, the information placed at the trial High Court indicated that the appellants and Masunga Kashinje @ Kasala were jointly and together charged with the deceased on allegation of attempted murder. Specifically, the particulars stated as follows:

*"ALEX S/O MANYANZA @ ENOCK PETER, NOGELE S/O MALIGANYA KAHINDI @ HAMBOHAMBO, GULILA S/O NKUBA @ MALAGO, SHILE S/O JILALA @ SHILE EMMANUEL DULUSHI, MAIKU S/O PUNGATE @ SAMWELI and MASUNGA S/O KASHINJE @ KASALA on 14<sup>th</sup> day of May, 2015 at King'anda-Mawiti Village within Mlele District in Katavi Region did attempt to cause death of LIMI D/O LUCHOMA, a person with albinism by chopping off her hand using a sharp instrument thereby caused her massive blood loss, the act which would have ended her life."*

Considering that the particulars left no doubt that the allegations contained all six accused persons, it is not known why the trial High Court continued to retain the name of the deceased not only in the information but also in the proceedings without causing the amendment as required under section 276 (2) of the CPA. This is notwithstanding the fact that on 14<sup>th</sup> February, 2018, the case against the deceased was marked abated in terms of section 284A of the CPA.

Indeed, considering the nature of the proceedings, it is difficult to comprehend if throughout the trial, the appellants knew the consequences of the fact that the case against the deceased had abated and whether they were still being jointly charged with him as per the particulars in the information. It is thus doubtful if the trial was fair on their part. This is

more so because, according to the record of appeal, throughout the trial, whenever hearing was adjourned, at the resumed hearing, the trial judge consistently caused the information to be read over and explained to the appellants and the response indicated that even the deceased pleaded not guilty though at the same time the word "dead" after his plea was inserted. Therefore, the record of appeal apparently shows that the appellants continuously pleaded to the defective information.

For avoidance of doubt, we better reproduce one incident in the trial court's proceedings to represent what transpired throughout the trial:

*"Date 2/10/2019...*

***HEARING CONTINUES***

*Charge read over and explained to the accused persons in the language they understand and they are required to plead thereto.*

***Plea by accused***

*1<sup>st</sup> accused – it is not true*

*2<sup>nd</sup> accused – it is not true*

*3<sup>rd</sup> accused – it is not true*

*4<sup>th</sup> accused – it is not true*

*5<sup>th</sup> accused – it is not true 'Dead'*

*6<sup>th</sup> accused – it is not true*

***Court:***

*Entered a plea of not guilty to all accused persons*

*Signed:*

*W.R. Mashauri*

*Judge*

*2/10/2019”*

Moreover, the judgement of the trial court contained the name of the deceased as the fifth accused though it was indicated in the title as dead while in the body it was only shown that his case had abated without further explanation.

We must emphasise that in a criminal trial the court should always ensure that the standard of fair trial in respect of an accused person are observed from the beginning to the end. In this regard, in **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387, the Court made reference to the case from New South Wales Court of Criminal Appeal in **Regina v. Hanley** (2005) NSWCA 126 where the following standards were stated:

*“(a) to understand the nature of the charge;*

*(b) to plead to a charge and to exercise the right of challenge;*

*(c) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;*

*(d) to follow the course of proceedings;*

*(e) to understand the substantial effect of any evidence that may be given in support; and*

*(f) to make a defence or to answer the charge."*

In the case at hand, considering the defect in the particulars of the information which was the foundation of the trial and the nature of the proceedings in general, it cannot be said that the appellants were fairly tried, convicted and sentenced in accordance with the standard of fair trial in a criminal justice system. It is our considered view that the appellants were prejudiced and thus a miscarriage of justice was occasioned since both the prosecution and the trial court did not cause the amendment of the information as required by law. We entertain no doubt that the particulars in the information which included the deceased must have confused and embarrassed the appellants as the same was continuously read over during the trial up to its conclusion. They thus continuously

pleaded to the defective information which was not amended as required by law.

From the foregoing, we are not inclined to the leaned Senior State Attorney's submission that the defect in the information is curable under section 388 of the CPA. On the contrary, considering the nature of the defect in the information and the proceedings, the prejudice was material rendering the trial a nullity.

The next question is on what should be the appropriate orders of the Court in the circumstances. We are mindful of the contending submissions of the counsel for the parties on whether we should order a retrial or otherwise.

We have seriously paid attention of the counsel's submissions for and against. We are aware that in considering whether to order a retrial of the case or otherwise, the Court has always been guided by the famous decision of the erstwhile Court of Appeal for East Africa in **Fatehali Manji v. Republic** [1966] 1 EA 343 in which it was observed that:

*"...in general, a retrial will 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 or for the purpose of enabling*

*the prosecution to fill up 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*

Therefore, the law allows the appellate court to order a retrial in exceptional circumstances to avert miscarriage of justice including where it is found that the impugned proceedings are shrouded in wanton irregularities that renders the legitimacy of the verdict reached by the trial court suspect or wanting. For our part, having considered the nature of defect in the information and weighed the factual material setting in the record of appeal, we are of the decided view that a retrial will be in the interest of justice.

In the event, since the decision we have reached above on the propriety of the trial court proceedings amid a defective information disposes of this appeal, it will be superfluous to deal with the concurrent submissions by counsel for the parties on the issue propriety of summing up to assessors by the trial judge.

Consequently, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, we revise and nullify the trial court's proceedings in Criminal Sessions Case No. 34 of 2017, quash convictions and set aside the sentences imposed on the appellants. We order for an expeditious retrial upon compliance with the law before another judge. We further order that the appellants be in custody pending a retrial.

**DATED at SUMBAWANGA this 04<sup>th</sup> day of October, 2023.**

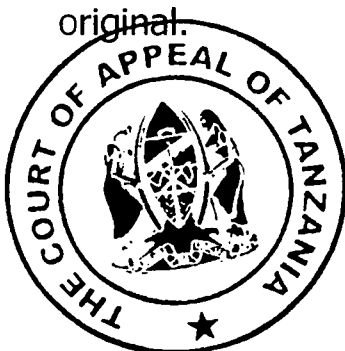
F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

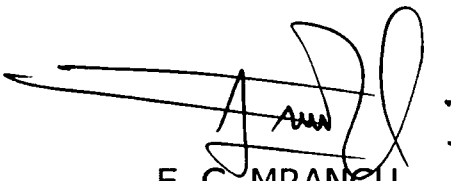
P. M. KENTE  
**JUSTICE OF APPEAL**

Z. G. MURUKE  
**JUSTICE OF APPEAL**

The Judgment delivered this 04<sup>th</sup> day of October, 2023 in the presence of Mr. Baltazar Chambi, Mr. Mathias Budodi, learned counsel for the appellants and Ms. Marietha Augustine Maguta, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the

original.



  
E. G. MRANGU  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**