

IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

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

CRIMINAL APPEAL NO. 238 OF 2019

MALOCHA S/O KALINJI @ VENANCE 1ST APPELLANT

MORRIS S/O TOGWA 2ND APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

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

(Mambi, J.)

Dated the 4th day of April, 2019

in

Criminal Sessions Case No. 2 of 2017

JUDGMENT OF THE COURT

26th September & 04th October, 2023

WAMBALI, J.A.:

The High Court of Tanzania sitting at Sumbawanga convicted the appellants, Malocha s/o Kalinji @ Venance and Morris Togwa of the offence of murder contrary to section 196 of the Penal Code. They were accordingly sentenced to death by hanging. The convictions followed the trial court's evaluation of the prosecution and the defence evidence in which it came to the conclusion that the appellants murdered Didas s/o

Felician @ Kauzeni on 9th May, 2016 at Mawenzusi Village within Sumbawanga Municipality in Rukwa Region.

The prosecution case depended on the evidence of seven witnesses and four documentary exhibits. The appellants were also accorded the opportunity to defend themselves and strongly disputed the allegations levelled against them by the prosecution side. For reason to be apparent shortly, we do not intend to revisit the substance of the evidence for both sides.

The dissatisfaction of the appellants with the findings and convictions by the trial High Court prompted them to lodge the present appeal. Initially, the first appellant lodged a memorandum of appeal comprising three grounds of appeal whereas the second appellant's memorandum of appeal had four grounds of appeal premised on distinct complaints from those of the first appellant. However, on 18th September, 2023, Mr. Mathias Budodi, learned counsel, who was assigned to represent the appellants, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 lodged a supplementary memorandum of appeal containing ten grounds of appeal in substitution of the appellants' memorandum of appeal. Nevertheless, as intimated above with respect

to the factual background of the case, we do not intend to reproduce the respective grounds of appeal herein.

Before hearing of the appeal on merit commenced, an issue arose on the propriety of the committal proceedings conducted by the District Court of Sumbawanga (the Inquiry Court) on 24th January, 2017. According to the record of appeal, it was questionable whether the District Court complied with the provisions of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA) during committal proceedings. Particularly, the relevant part of the proceedings of the District Court on 24th January, 2017 reflects the following:

"... PI Case No. 10/2016

REPUBLIC

VS

MALOCHA S/O KALINJI @ VENANCE & Another

COMMITTAL PROCEEDINGS

COURT

S. 243 CPA Cap 20 RE 2002 C/W

S. 245 (3) Cap 20 RE 2002 C/W

Charge read over to the accused persons who are not required to plead thereto."

The presiding Resident Magistrate (Adam B. Mwanjokolo) then listed names of ten witness and three exhibits for the prosecution side and stated:

"S. 246 (3) and (4) CPA Cap 20 RE 2002 C/W

Sgd:

(Adam B. Mwanjokolo – RM)

24/01/2017

***ACCUSED PERSONS CROSSEXAMINED BY
COURT***

Do you have any question or anything to say?

ACCUSED PERSONS

NO

COURT

NIL

ROFC

Sgd.

(Malocha s/o Kalinjl @ Venance)

24/01/2017

Sgd.

(Moris s/o Togwa)

COURT

S. 246 (5) CPA Cap 20 RE 2002 C/W

List of prosecution witnesses and exhibits are listed as above

COURT

Do you have Witnesses?

ACCUSED PERSONS

We don't have any witness

COURT

S. 247 CPA Cap 20 RE 2002 C/W

Sgd:

(Adam B. Mwanjokolo -RM)

24/01/2017

ORDER

- 1) Accused persons committed to the High Court for full trial.*
- 2) Accused persons to be supplied with copies of PI records.*

Sgd:

(Adam B. Mwanjokolo- RM)

24/01/2017'

Considering the nature of committal proceedings reproduced above,
we required counsel for the parties to submit on their propriety.

In response, Mr. Budodi, learned counsel for the appellants submitted that having regard to the nature of committal proceedings that were conducted by the District Court, it is beyond controversy that the provisions of section 246 (2) of the CPA was not complied with. He stated that the said provision requires that the information brought against the accused as well as statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial must be read and explained to the accused before being committed for trial to the High Court.

He emphasized that failure by the District Court to comply with the provisions of section 246 (2) of the CPA deprived the appellants the right to know the nature and substance of the evidence that the prosecution intended to produce at the trial to support the allegation of murder levelled against them. Besides, he added, the appellants could not properly prepare the defence against the allegation as they became aware of the nature and substance of the prosecution witnesses in the course of the trial at the High Court.

Moreover, he submitted that considering the nature of the committal proceedings, it cannot be concluded that the appellants were properly committed to the High Court for trial because the District Court

disregarded the mandatory provisions of section 246 (2) of the CPA. In his submission, though the District Court made an order committing the appellants for trial, the proceedings which followed at the High Court were unfair and occasioned miscarriage of justice, hence a nullity.

In the circumstances, Mr. Budodi submitted that the proper remedy is for the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to nullify the committal proceedings by the District Court conducted on 24th January, 2017 followed by those of the High Court in Criminal Sessions Case No. 2 of 2017, quash convictions and set aside the sentences. Consequently, he submitted, the Court should remit the case file to the District Court for conducting fresh committal proceedings before another magistrate in accordance with the law as soon as practicable.

The respondent's response was made by Mr. John Mwesiga Kabengula, learned Senior State Attorney assisted by Ms. Irene Godwin Mwabeza, learned State Attorney. At the very outset, Mr. Kabengula supported the submission made by Mr. Budodi with regard to the omission, its seriousness and the way forward. He emphasized that it is apparent as per the record of appeal that the District Court did not adhere to the requirement of section 246 (2) of the CPA and thus the committal

order was invalid. Ultimately, relying on the decision of the Court in **Alfan Apolinary @ Kyalubota and 3 Others v. The Republic**, (Criminal Appeal No. 164 of 2021) [2023] TZCA 17579 (31 August 2023, TANZLII), he joined hands with Mr. Budodi to pray that the matter be remitted to the District Court to conduct fresh committal proceedings before another magistrate.

It is acknowledged that until it is decided otherwise, the law requires that in serious offences including murder, committal proceedings should be conducted by an Inquiry Court (the District Court or Court of Resident Magistrate) before an accused is sent to the High Court for trial. In this regard, section 2 of the CPA defines committal proceedings as follows:

"Means proceedings held by a subordinate court with a view to the committal of an accused person to the High Court".

Moreover, the envisaged subordinate courts are defined under section 2 of the CPA to mean any court, other than a court martial, which is subordinate to the High Court. The respective courts are the District Courts and Courts of Resident Magistrate. The Magistrates at the Inquiry Court are therefore enjoined to oversee committal proceedings from the time the suspect is charged until he is committed for trial to the High Court for determination of his accusation levelled against him by the

prosecutor. Basically, during committal proceedings, the subordinate court concerned reads or causes to be read and explained the information, statements of the prosecution witnesses and documents intended to be relied at the trial. Indeed, the accused has also a right to make a statement or reserve it until the trial. It is for that reason that the accused is entitled to be availed with the respective statements for use at the trial. The magistrate's role thus is limited to overseeing the various steps outlined under section 246 of CPA and to ensure that the necessary and mandatory procedural steps are complied with before committing the accused for trial to the High Court. In essence, the magistrate performs a supervisory role intended to ensure there has been compliance with the procedural requirement to pave way for fair trial. It is at this stage that all materials and any other documents reasonably relevant to the case forming the basis of the prosecution case are laid to enable the accused appreciate and be informed of the task ahead in preparing the defence.

For appreciation of the requirement and the important steps to be followed during committal proceedings, we find it pertinent to reproduce the entire provisions of section 246 of the CPA hereunder:

"1. Upon receipt of the copy of the information and 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 and explain or cause to be read to the accused person the information brought against him as well as the statements on 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 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 whatever 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 follows that the Magistrate being the supervisor of the important steps during committal proceedings, must endeavour to make sure that

the requirement of the law is followed to facilitate and promote fair administration of justice in the judicial system. More importantly, the initial steps explained in subsections (1) and (2) are quite important to be substantially complied with at that stage because they are the prerequisite upon which compliance of other subsections, that is, 3, 4, 5 and 6 of section 246 of the CPA can come into play. In this regard, we are of the view that while the later subsections may be complied to the minimum, non-compliance with subsection 2 of section 246 of CPA materially prejudices and occasions miscarriage of justice on the accused. This is so because, its omission makes the accused to participate in the trial before the High Court while not being fully aware of what the prosecution had intended to put forward against him to prove the accusation. In essence, the accused intended defence might also suffer. In **Alfan Apolinary @ Kyalubota and 3 Others v. The Republic** (supra), the Court confronted an akin situation on non-compliance with subsection (2) of section 246 of the CPA. In that case despite non-compliance with that provision, the Magistrate who presided over committal proceedings indicated that the other provisions were complied with. It was stated thus:

"... 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”.

Moreover, 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 considered the import of non-compliance with subsection (2) of section 246 of the CPA with regard to the failure of a witness to disclose the content of the document at the committal proceedings 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”.

Indeed, in **Hamis Meure v. The Republic** [1993] T.L.R. 213, the Court observed, among others, that it is improper to allow a witness whose statement was not read and explained at the committal proceedings to testify at the trial without giving reasonable notice to the accused or his advocate as that is contrary to the requirement of the law. The evidence of that witness therefore suffers the consequences of being excluded in determining the case or appeal. For clarity, section 289 (1) (2) and (3) provides the conditions and procedure to be followed before a witness whose statement was not read at committal proceedings can be admitted in evidence 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 witnesses' evidence

and determined to call him as 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."

From the reproduced provisions, it is apparent that the compliance with subsection (2) of section 246 of the CPA is paramount, because no witness will be called to testify for the prosecution whose statement was not read over at the committal proceedings save where the prosecution has complied with the provisions of subsections (1) and (2) and the court has undertaken its duty of scrutiny under subsection (3) of section 289.

In the case at hand, despite non-compliance with section 246 (2) of the CPA, none of the prosecution witnesses complied with the provisions of section 289 (1) of the CPA and thus their evidence could not be allowed to stand.

Reverting to the case under consideration, the record of committal proceedings by the District Court conducted on 24th January, 2017 leave no doubt that there was total non-compliance with the provisions of section 246 (2) of the CPA and therefore the Magistrate could not have properly shown that the other subsections of that section were fully complied with. Besides, the reproduced part of the committal proceedings shows partial compliance of those subsections by the District Court.

In the circumstances, we entirely agree with the learned counsel for the parties that the apparent omission by the District Court to comply with the provisions of section 246 (2) of the CPA was a fatal irregularity which occasioned injustice not only to the appellants but also to the prosecution. The respective prosecution witnesses could not have therefore legally testified and tendered documentary evidence and other exhibits which were later relied on by the trial court to back its findings and ground convictions. In the event, the trial of the appellants was unfair.

Considering the nature and extent of the non-compliance by the District Court with the provisions of section 246 (2) of the CPA, we agree with the counsel for the parties that though the appellants were committed to the High Court for trial, the committal order was invalid. In the circumstances, the way forward is to nullify the proceedings of both courts below and remit the case to the District Court for conducting fresh committal proceedings in compliance with the law.

In the result, we invoke the provisions of section 4 (2) of the AJA to revise and nullify the proceedings of the District Court of Sumbawanga dated 24th January, 2017 and those of the High Court in Criminal Sessions Case No. 2 of 2017, quash convictions and set aside the sentences.

Consequently, we remit the case file in PI Case No. 10 of 2016 to the District Court of Sumbawanga to conduct fresh committal proceedings before another magistrate as soon as practicable. We further order that the appellants should remain in custody pending the holding of fresh committal proceedings and their ultimate trial before the High Court.

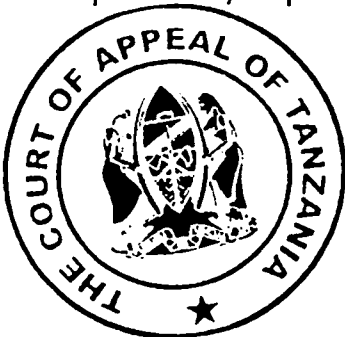
DATED at SUMBAWANGA this 04th day of October, 2023.

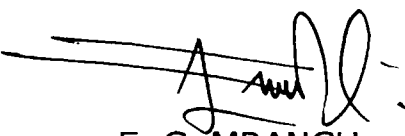
F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 04th day of October, 2023 in the presence of Mr. Mathias Budodi, learned counsel for the appellants and Mr. John Mwesiga, learned Senior 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