

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: NDIKA, J. A., RUMANYIKA, J.A And MDEMU, J.A.)**

**CRIMINAL APPEAL NO. 149 OF 2020**

**PASCHAL MHANGWA @ NGOHOBOYO ..... 1<sup>ST</sup> APPELLANT**

**PASCHAL MABULA ..... 2<sup>ND</sup> APPELLANT**

**LUTONJA MHANGWA ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

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

**(Appeal from the Judgement of the High Court of Tanzania at Geita)**

**(Madeha, J.)**

**dated the 20<sup>th</sup> day of September, 2019**

**in**

**Criminal Sessions Case No. 163 of 2015**

**.....**

**JUDGMENT OF THE COURT**

8<sup>th</sup> & 14<sup>th</sup> December, 2023

**MDEMU, J.A.:**

In the High Court of Tanzania sitting at Geita, the three appellants were arraigned, tried and ultimately convicted of the murder of Agnes Peter contrary to the provisions of sections 196 and 197 both of the Penal Code, Cap.16. According to the particulars of the offence, the tragic event

happened in the evening of 18<sup>th</sup> January, 2014 at Namsenga Village within Bukombe District in Geita Region.

The facts which we have briefly appreciated from the record of appeal are such that; on the fateful evening, the deceased was with her husband one Sylivester Mashindikwa seated at their compound and warming themselves from fire commonly known in that locality as "kikome". While in the course, three people invaded them. The said Sylivester Mashindikwa fled from the crime scene leaving the deceased alone, but by that hour, he had already identified the first appellant. The three assailants then hacked the deceased in various parts of her body, chopped off one of her breasts and disappeared with it.

It is stated in the record of appeal further that, the appellants were arrested and made their confessions in their cautioned statements to E.3977 D/Sgt. Alestides (PW2), Daniel Mwisala (PW4) and E. 5179 Cpl. Gosbert (PW5) in respect of the cautioned statements of the 1<sup>st</sup>, 3<sup>rd</sup> and 2<sup>nd</sup> appellants respectively. Later, the appellants were taken to justices of the peace where they repeated such confessions in their extrajudicial statements recorded by Damasi Gakwaya (PW3) for the 1<sup>st</sup> appellant and Sungu Emmanuel Machala

(PW6) for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants. That besides, during trial, all the appellants denied their involvement in the tragedy.

With this evidence, as said, the appellants were charged with the murder of Agnes Peter and, basing on those cautioned and extra judicial statements, the trial court then convicted them of murder and in consequence thereof, they were sentenced to suffer death through hanging. This was on 20<sup>th</sup> September, 2019.

Contesting both conviction and the death sentence, the three appellants filed their joint memorandum of appeal containing five grounds on 6<sup>th</sup> March, 2020. Later, through their advocates, a supplementary memorandum of appeal comprising of two grounds of appeal was filed on 5<sup>th</sup> December, 2023 by Advocate Vedastus Laurian, for the 3<sup>rd</sup> appellant. Two days later, that is, on 7<sup>th</sup> December, 2023 another supplementary memorandum of appeal was filed by Mr. Emmanuel John, learned advocate for the 2<sup>nd</sup> appellant. This one had seven grounds of appeal.

At the hearing of this appeal on 8<sup>th</sup> December, 2023, Mr. Constantine Mutalemwa, learned advocate who represented the 1<sup>st</sup> appellant sought

leave of the Court to state orally supplementary grounds of appeal on behalf of the 1<sup>st</sup> appellant. Leave was granted in which four grounds of appeal were stated orally. For reasons soon to follow, only one ground of appeal raised by the learned counsel for the 2<sup>nd</sup> appellant is hereby reproduced, which in our view, disposes of the whole appeal in respect of all the appellants. It reads as hereunder:

*That the 2<sup>nd</sup> appellant's trial was a nullity due to an egregious violation of section 246 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019*

The hearing of the appeal, as alluded to was on 8<sup>th</sup> December, 2023 at which the appellants appeared before us represented by Mr. Constantine Mutalemwa, Mr. Emmanuel John and Mr. Vedastus Laurian for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants respectively. On the respondent's part, Ms. Jaines Kihwelo, Mr. Frank Nchanila, Ms. Sara Perias and Mr. Sileo Mazullah, learned State Attorneys appeared to argue the appeal.

Submitting briefly on the foregoing reproduced ground of appeal regarding noncompliance of the provisions of section 246 (2) of the Criminal Procedure Act, Cap. 20 (the CPA), Mr. John referred us to page 8 of the

record of appeal where the appellants herein were committed by the District Court of Bukombe, the committing court to the High Court of Tanzania for trial. In those proceedings, according to the learned counsel, the committing court simply listed documentary evidence intended to be relied upon at the trial of the appellants instead of listing and reading them as per the dictates of the law. The learned counsel therefore faulted the committing magistrate for such violation and urged us to expunge from the record the committal proceedings record. He asked us to exercise our powers banking on principles stated in the case of **Alfan Apolinary @ Kyarubota & Three Others v. The Republic**, Criminal Appeal No.164 of 2021 (unreported).

When it was the turn of the respondent to submit, Ms. Kihwelo who led the Republic team, supported the appeal on this ground. She readily conceded to the complained irregularity in committal proceedings record because, in terms of the provisions of section 246 of the CPA, documents to be deployed in the trial, must be read by the committing court to the accused persons before they are committed. She emphasized that, the rationale for the exercise is for the committed accused to be aware of their contents thereof. She added that, going by the record of appeal, even subsection (3)

of section 246 of the CPA requiring rights of the accused to state anything or to have any reservation, has not been complied with because the record is silent. She finally remarked to us that, in terms of the principles stated in **Alfan Apolinary @ Kyarubota & Three Others v. The Republic** (supra), the remedy available is retrial. Her stance rested on the fact that the respondent Republic should not be condemned on the irregularities committed by courts.

In rejoinder, Mr. Mutalemwa also joined forces. He submitted that, failure to read documents during committal is evidence of improper committal proceedings, thus joined hands with the learned State Attorney in her argument to have a retrial ordered. Mr. John, on his part, had a different argument on the way forward. His was that, as the offence was committed in the year 2014, any order of retrial will afford an opportunity to the prosecutions to fill in gaps in the evidence regarding the cautioned and extra judicial statements. On his part, Mr. Laurian was in all fours with Mr. John regarding the way forward.

Having examined the record of appeal and duly considered the submission of learned counsel for the parties, we find it convenient to

reproduce the provisions of section 246 (2) of the CPA which the counsel for the parties are at one that it was violated. It is in this way:

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

Our understanding of the above quoted subsection is that, the subordinate court is duty bound to read or cause to be read all statements and documents which the Director of Public Prosecutions intends to rely upon at the trial prior to committing the accused person for trial by the High Court. Was the requirement envisioned in that subsection complied with by the committing court? Let the record of appeal at page 18 speak for itself as follows:

*List of exhibits*

- 1. Sketch map of the scene area*
- 2. Postmortem report*

*3. Cautioned statements of the accused persons*

*4. Extrajudicial statements of the accused persons*

*That is all.*

In the reproduced passage of the record of appeal above, it is obvious that the District Court of Bukombe before which the three appellants appeared for committal to the High Court for trial, did not read or cause to be read the sketch map, postmortem report, cautioned statements and extrajudicial statements of the appellants herein. What it did for that matter was a mere listing of those documents. In **Alfan Apolinary @ Kyarubota & Three Others v. The Republic** (supra) cited to us by Mr. John, the Court held at page 11 regarding listing of documents by the committing court that:

*“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.”*

What now should be the way forward? Parties parted their ways. In the first place, the trial of the appellants was unfair following failure by the

committing court to read the listed documents because the committed irregularities were fatal and in essence occasioned miscarriage of justice to the appellants as well as the prosecution. In **Masamba Musiba @Musiba Masai Masamba v. the Republic**, Criminal Appeal No.138 of 2019 (unreported) at page 16 through 17, the Court held that:

*“The spirit behind such requirement is to guarantee an accused person facing a homicide case a fair trial by affording him the opportunity to know and understand in advance the case for the prosecution for him to mount a meaningful defence. Since the documents were introduced during the trial of the case obviously the appellant was highly prejudiced hence are liable to be expunged.”*

Secondly, since the appellants were committed for trial by the High Court regardless of the committed irregularities during committal proceedings, it is obvious under the circumstances that the said committal order was invalid. See **Malocha Kalinji @ Venance & Another v. the Director of Public Prosecutions**, Criminal Appeal No. 238 of 2019 (unreported).

Reverting to the way forward, Mr. John and Mr. Laurian on that account were in favor of acquittal of their clients for want of evidence after having expunged the listed unread documentary evidence. They did not however go further to state the gaps within which the prosecution would fill given an order of retrial by this Court. Mr. Mutalemwa for the 1<sup>st</sup> appellant and the prosecution team were in favour of the order towards retrial.

On our part, and as we were not guided by the two learned counsel in favour of acquittal of the appellants on allegation that a retrial will result into allowing the prosecution to fill in gaps, we find it appropriate to disassociate ourselves with that line of argument. Instead, as the irregularities were committed by the committing court, we thus nullify the respective proceedings of the committing court dated 8<sup>th</sup> September, 2015. We also nullify the proceedings of the High Court in Criminal Sessions Case No.163 of 2015, quash the convictions thereof and set aside the death sentences in respect of the three appellants.

In consequence thereof, we remit the matter to Bukombe District Court for conducting a fresh committal proceeding before another magistrate

having jurisdiction for the purpose. As of now, the three appellants herein are to remain in custody pending their being committed to the High Court.

**DATED at MWANZA** this 13<sup>th</sup> day of December, 2023.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

G. J. MDEMU  
**JUSTICE OF APPEAL**

Judgment delivered this 14<sup>th</sup> day of December, 2023 in the presence of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants who appeared in person, and Mr. Adam Murusuli, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



*F. A. MTARANIA*  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**