

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

**(CORAM: MWARIJA, J.A., GALEBA, J.A. And KENTE, J.A.)**

**CRIMINAL APPEAL NO. 99 OF 2019**

**YOHANA MUSSA MAKUBI.....APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania  
at Mwanza)**

**(Siyani, J.)**

**dated the 21<sup>st</sup> day of March, 2019**

**in**

**Criminal Session Case No. 97 of 2012**

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**JUDGMENT OF THE COURT**

14<sup>nd</sup> & 24<sup>th</sup> February, 2023

**MWARIJA, JA.:**

In the High Court of Tanzania at Mwanza, the appellant Yohana Mussa Makubi and another person, Abuubakar Ntundu were jointly charged with the offence of murder contrary to s. 196 of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that, on unknown date and time in December, 2009 the duo murdered one Judith John. On 4/12/2012 when they were arraigned, the appellant and the said Abuubakar Ntundu (hereinafter the co-accused), pleaded not guilty to the charge. As a consequence, the case proceeded to a

full trial before Bukuku, J. The trial commenced on 5/3/2014 and on 4/11/2015, the learned Judge handed down her judgment. She convicted both the appellant and his co-accused and in terms of s. 197 of the Penal Code, she sentenced them to suffer death by hanging.

Aggrieved, the appellant and his co-accused person appealed to this Court vide Criminal Appeal No. 556 of 2015. The Court nullified the proceedings of the trial court on the ground that, the recorded evidence of the witnesses was not authenticated by the learned trial Judge. The judgment was as a result, quashed, sentence set aside and a retrial before another judge and a different set of assessors was ordered.

The case was heard *de novo* before Siyani, J. (as he then was). Having considered the evidence of nine prosecution witnesses, the learned Judge ruled that a prima facie case had been established against the appellant who was consequently required to make his defence. As for the appellant's co-accused, he was found to have no case to answer and was thus acquitted. At the conclusion of the trial, the appellant was again, convicted of the offence and awarded mandatory death sentence. The learned trial Judge found that the evidence tendered by the prosecution witnesses was sufficient to

prove the case against the appellant beyond reasonable doubt. He also acted on the appellant's cautioned statement in which he gave the details on how the offence was committal. Dissatisfied, he has appealed to this Court against the decision of the High Court.

The facts giving rise to the appellant's arraignment and ultimately his conviction, may be briefly stated as follows: Before she met her brutal death, the deceased resided at Kirumba area in Mwanza City having rented a room in the house owned by one Umyy Juma (PW4). As for the means of living, the deceased was working as a bar maid at the bar owned by a woman known as Julieth Christopher. The last time that the deceased was seen alive at her residence was on 3/12/2009 in the morning. After about three days of her absence, on 6/12/2009 her decapitated body was found in an unfinished building stuffed in a blue polythene bag. On the same day, her head was found at Kiunga 'B' Street (later on known as Mlimani Street) in Kirumba area. The head was found in a pit, wrapped up in a blue plastic bag. After a follow up, PW4 was made to understand that the appellant, who was the deceased's boyfriend, was a major suspect. The police was informed and after his arrest, he was charged in court.

In her evidence, PW4 told the trial court that, on the second day of the deceased's absence from home, her workmate went to inquire about her whereabouts because she had similarly been absent from work. The door to the deceased's room was closed thus it was not possible to gain access in the room. They however, peeped through the door's narrow opening and found that there was no body in the room but noticed that the household items were scattered all over. On the following day, when PW4 looked in the room, she found that all the household items were missing. Being aware of the relationship between the deceased and the appellant, PW4 went to Mama Amon's house where the appellant had rented a room. When she inquired about the appellant, she was informed that he had been absent for three days. However, since the door of the appellant's room was open, she saw a pillow and a table mat which she identified to be some of the properties she used to see in the deceased's room.

Later on, that day, news spread that a decapitated human body had been found in the neighbourhood. Immediately after that news, PW4 became suspicious and thus went to police station to report about the incident that her tenant had been missing for three days. Furthermore, upon the information that the body had been taken to

Sekou Toure Hospital, she went to the mortuary to identify it. Having seen the body, she identified it to be that of the deceased, PW4 went back to the police. At the police station, she mentioned the appellant as the suspect because she saw the deceased's properties mentioned above in his room. The body was also identified by the deceased's ex-husband, Mohamed Hassan Ismail (PW5). It was PW4's further evidence that the police went to the appellant's residence and when questioned, although he described the deceased as his wife, he denied having any knowledge of her whereabouts adding that, she might have travelled to Bukoba because she once informed him about that journey. Upon further questioning however, he admitted to be in possession of the deceased's properties. He was thus arrested and taken to police station.

Muhoji Iddi Bitalilo (PW1) was at the material time the Mtaa (Street) Chairman, Mlimani. He testified that, on 6/12/2009 at about 8:30 a.m. he was informed about the discovery of a decapitated body at the area. The body, which had started to decompose, was found in an unfinished building belonging to one Bibi Abdu. He immediately informed the police at Kirumba. The body was taken by No. 5655 Sgt

Diwani who was in the company of other police officers. It was sent to Sekou Toure Hospital (the hospital) for post-mortem examination.

The witness went on to state that, later on at 16:45 hrs, he received a call. He was required to accompany the police and witness the recovery of a human head. He added that, the police were being led by the appellant to the area where, according to him, the head was hidden. When they arrived at the area, which had long grasses, a head of a woman was found. The head was identified to be of a woman because it had bleached hair.

The ten-cell leader of Songambe Street, Emelda Festus (PW3) was among the local leaders who witnessed the recovery of the head. Her evidence was to the effect that, it was the appellant who led the police to where the head was found. The deceased's head was sent to the Hospital by XC 149 D/Sgt Gaspar (PW7). At the hospital, a post-mortem examination was conducted by Dr. Mgendi Mbagala (PW6). It was his evidence that, the head and the body matched and therefore, they were the parts of one and the same person. As to the cause of death, it was his evidence that the same resulted from severe haemorrhage shock caused by decapitation.

In his evidence, PW7 stated that, he was one of the police officers who, upon the directions of the OC/CID, conducted investigation after the incident was reported to the police. He said that, while in the company of PW4, he inspected the deceased's room and found it empty. They then proceeded to the appellant's room where they found the items identified by PW4 to be the properties of the deceased. He went on to state that, when the appellant was asked about the properties, he replied that he took and kept them in his room after the deceased had left for Bukoba.

At the police station, the appellant was interrogated by No. D 8674 D/Sgt Agidius (PW8). According to his evidence, the appellant admitted the offence and thus proceeded to record a cautioned statement in which, he said, the appellant confessed that he killed the deceased in collaboration with two other persons, Rasi and Abuu. It was PW8's further evidence that, according to his confession, the appellant stated that, he killed the deceased so as to sell her head to a certain witchdoctor who was in need of a woman's head. The appellant then arranged with the said Rasi and another person whereby, after the deceased had been intoxicated, they took her to the appellant's room. Thereafter, Rasi sent the appellant and that

other person out of the room. When they returned, they found that Rasi had already separated the deceased head from her body. The appellant took the head to that witch doctor who had promised to buy it for TZS 1,000,000.00 but the appellant ended up receiving initial payment of TZS 170,000.00. The witchdoctor chopped a little flesh from the cheek and returned the head with direction to the appellant to take and hide it in a pit.

In his defence, the appellant (DW1) who testified on oath told the trial court that, he was arrested on 6/12/2009 while in his room with his aunt. Thereafter, he was taken to Kirumba Police Station where he was tortured by being beaten so that he could confess that he killed the deceased. Later on, he was taken to the place where there was a human head. He testified farther that it was at that place that he met Abuubakar Ntundu for the first time. As for the witchdoctor to whom, according to the prosecution, the deceased's head was sold, the appellant said that he did not know him prior to the date of the incident but that he came to meet him for the first time in Butimba prison. He also denied to have known one Leonard @ "Rasi", the person named in the cautioned statement as one of those who were involved in the killing of the deceased. It was the



appellant's further evidence that, at the police station, he was taken into a room in which there were five police officers who, according to his contention, tortured and forced him to thumb print what was later tendered in court as his cautioned statement.

As pointed out above, the appellant was aggrieved by the decision of the trial court hence this appeal. In his memorandum of appeal lodged on 31/7/2019, he raised six grounds. However, on account of what will be apparent herein, we do not intend to reproduce those grounds of appeal in this judgment.

At the hearing of the appeal, the appellant was represented by Mr. Constantine Mutalemwa, learned counsel while the respondent Republic was represented by Ms. Martha Mwadenya, learned Senior State Attorney assisted by Ms. Naila Chamba, learned State Attorney.

Before the appeal could proceed to hearing, Mr. Mutalemwa made a prayer which was not opposed by the learned Senior State Attorney. In his prayer, which was based on Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009, the learned counsel sought the leave of the Court to argue some grounds of appeal which were not specified in the memorandum of appeal. The Court allowed the prayer

and after having been granted leave, the learned counsel raised the following grounds:

1. That the trial was faulty as it was based on the evidence which was not preceded by authenticated oath and affirmations dully signed by the trial Judge.
2. That the trial and conviction of the appellant was illegal as it was based on his cautioned statement marked as exhibit P2 whose substance was not read and explained to the appellant during committal proceedings contrary to section 246 (2) of the Criminal Procedure Act, Chapter 20 of the Revised Laws.
3. That the trial and conviction of the appellant was faulty because the committal proceedings were not signed by the appellant.

Mr. Mutalemwa abandoned the grounds of appeal filed by the appellant and proceeded to argue the three grounds stated above.

Submitting in support of the first ground, the appellant's counsel started by referring us to s. 198 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA) which provides that, every

witness in a Criminal case shall be examined upon oath or affirmation. He went on to submit that, according to the record, although it is shown that the witnesses who testified in this case were sworn or affirmed, the learned trial Judge did not append his signature immediately after the record showing that the witness had taken oath or affirmation, that is to say; after each witness had finished to take oath or affirmation and before he starts to give evidence. According to the learned counsel, even though there is no provision which requires a trial Judge or Magistrate to do so, it is by practice, a mandatory requirement intended to ensure authenticity of the record as far swearing or affirming a witness before he testified is concerned. When he was asked by the Court if he had any authority to support his argument, Mr. Mutalemwa admitted that he did not have any at the moment but made a prayer, which was granted by the Court, to submit it after the hearing of the appeal. Later on, he submitted the decision in the case of **Geoffrey Raymond Kasambula v. Total Tanzania Limited**, Civil Appeal No. 320 of 2019 (unreported).

Responding to the arguments made by the appellant's counsel in support of the first ground of appeal, Ms. Mwandenywa argued that, there is no law which requires a trial Judge or Magistrate to sign

immediately after recording the particulars of the witness and that oath or affirmation was administered. She submitted that, the mandatory requirement as provided for under s. 198 (1) of the CPA is for the witness to be sworn or affirmed, which in this case, was complied with as every witness was sworn or affirmed before he or she gave evidence.

We have considered the arguments made by the learned counsel for the appellant and the learned Senior State Attorney on the first ground of appeal. We do not, with respect, find merit in that ground. In the **first** place, there is no law which provides for that requirement. **Secondly**, the learned trial Judge appended his signature at the end of the recorded evidence of each witness. In our considered view, that is sufficient authentication of all that was recorded before the witnesses started to give evidence, including the record to the effect that he or she was sworn or affirmed. **Thirdly**, in the cited case of **Geoffrey Raymond Kasambula** (supra), the Court merely observed in passing that, in a trial before the Commission for Mediation and Arbitration, inscription of Arbitrator's signature immediately after recording that a witness was sworn or affirmed, though not

mandatory, is important to authenticate that part of the record. The court stated as follows at page 8 of that decision:

*"This is important, in our view, to authenticate that the purported witness had undertaken to speak the truth before the Court ahead of adducing his/her evidence. In this regard, in the matter at hand, despite that the record shows that the respective witnesses were sworn or affirmed, we still emphasize that the arbitrator ought to append his signature thereafter."*

It is clear therefore, that the statement by the Court was *obiter* not decisive. In the circumstances, we find that the proceedings in this case were not vitiated merely because the trial Judge did not append his signature before the witnesses started to give their evidence. This ground thus lacks merit.

On the second ground, Mr. Mutalemwa argued that the cautioned statement of the appellant was improperly acted upon to found the appellant's conviction because the same was not read out at the committal proceedings stage. The learned counsel relied on s. 246 (2) of the CPA.

He went on to submit that, as a result of the failure by the committing Magistrate to read out the appellant's cautioned statement which was listed as one of the exhibits to be relied upon by the prosecution, the document which was later admitted in evidence as exhibit P2, should be expunged from the record.

In reply, Ms. Mwandinya admitted that the document was not read out to the appellant during the committal proceedings. She however, argued that the omission does not have the effect of invalidating it. According to the learned Senior State Attorney, the appellant had the knowledge of the contents of the document. Furthermore, she went on to argue, the same was read out after its admission in evidence. It was her submission therefore, that the appellant was not prejudiced and thus the irregularity, if any, is curable under s. 388 of the CPA.

This ground does not challenge the finding of the trial court that the document (exhibit) P2) is a statement which was made by the appellant. The complaint is that, during the committal proceedings, the same was not read out. In the circumstances, we hasten to agree with the learned Senior State Attorney that, failure to do so did not prejudice the appellant and therefore, the irregularity in the committal

proceedings is curable under s. 388 of the CPA. We hold that view because of the nature of the document, that the same is the appellant's statement. The document was not only the subject of the trial within a trial but the same was read out after its admission in evidence. So, even though the appellant retracted it, he had the knowledge of its contents before he gave his defence. We thus agree that the omission is for that reason, curable under s. 388 of the CPA. The second ground is thus equally found to be devoid of merit.

The third ground need not detain us much. The complaint is that the learned Resident Magistrate who conducted committal proceedings did not comply with the provisions of s. 246 (6) of the CPA. Making reference to page 29 of the committal proceedings, the learned counsel for the appellant submitted that the learned Resident Magistrate ought to have caused the appellant to sign the proceedings.

In response to the arguments made by the appellant's counsel, Ms. Mwadenya submitted briefly that, the requirement under s. 246 (6) of the CPA applies only where the accused person makes a statement after being addressed in terms of s. 246 (3) of the CPA. It was her submission that, since in the case at hand, the appellant did

not make any statement, the committal Magistrate was not obliged to require the appellant to sign the committal proceedings.

The issue which arises for our determination in this ground is whether the Committal Magistrate was enjoined to require the appellant to sign the committal proceedings. The provisions of s. 246 (3), (5) and (6) of the CPA state as follows:

"246 – (1) ....

(2) ....

(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 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) ....

(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 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 accused person; and the accused person shall sign or 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 plain that the accused person would be required to sign the record where, upon being asked whether he would reserve his defence or say anything, he decides to give a statement and that such a statement of the accused person was taken down by the committal court.

In this case, the appellant did not say anything and therefore, the requirement of signing the record did not arise. The provisions of s. 246 (6) was not, in the circumstances, breached. This ground is, for that reason, also devoid of merit.

In the event, we find no merit in the appeal and thus hereby dismiss it.

**DATED** at **MWANZA** this 24<sup>th</sup> day of February, 2023.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

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

This Judgment delivered this 24<sup>th</sup> day of February, 2023 in the presence of Appellant in person and Mr. Morice Mtoi, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.



J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**