IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 31 OF 2022

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 148 of 2017)

JOSEPH MUGESI @ MTONGORI ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

12.09.2022 & 13.09.2022

Mtulya, J.:

Section 210 (1) (a) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act), was enacted, in brief, in the following words:

> *In trials before a magistrate,* ***the evidence of each witness shall be taken down in writing*** *in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and* ***shall be signed by him*** *and shall form part of the record.*
>
> (Emphasis supplied).

This section gives guidance in imperative terms on appendance of signatures after closure of every witness' testimony. According to our superior court, the Court of Appeal (the Court) the provision requires the presiding magistrate to ensure that he append his

signature at the end of each witness' evidence. There is a bundle of precedents of the Court in support of the course (see: **Amir Rashid v. Republic**, Criminal Appeal No. 187 of 2018; **Chacha Ghati Magige v. Republic**, Criminal Appeal No. 406 of 2017; **Moses Edward v. Republic**, Criminal Appeal No. 599 of 2017; **Sabasaba Enos @ Joseph v. Republic**, Criminal Appeal No. 411 of 2017).

The reason of cherishing the thinking is based on authentication of the evidences recorded by presiding magistrates (see: **Yohana Mussa Makubi v. Republic**, Criminal Appeal No. 556 of 2015 and **Amir Rashid v. Republic** (supra). In **Yohana Mussa Makubi v. Republic**, (supra) the Court reasoned that:

> *We are thus satisfied that the failure by the judge to append his signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country.* ***The rationale of the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted.***
>
> (Emphasis supplied).

The Court had arrived into the statement after a long drawn history of the applicability of the cited section in other common law jurisdictions, including borrowing a leaf from the interpretation of

section 356 of the **Indian Criminal Procedure Code**, which is *pari materia* to section 210 (1) (a) of the Act. After consultations of the practice in India and other common law jurisdictions, the Court finally stated that the practice on the section has already been established as proper procedure in the suitable administration of criminal justice in States which are following the common law legal traditions. Similarly, the palate of the Court, in this State, has been in place since 1993 and was awaiting for a full capacity of establishment of the practice to be considered as long-established rule of practice (see: **Laurent Salum v. Republic**, Criminal Appeal No. 176 of 1993). It is now the long-established rule of criminal law and procedure (see: of **Ligwa Bulunda v. Republic**, Criminal Appeal No. 256 of 2018).

With the available remedies in such circumstances, the Court has issued directives in **Mohamed Nuru Adam & Six Others v. Republic**, Criminal Appeal No. 130 of 2019, to the effect that the proceedings must be nullified, conviction be quashed and sentence against appellants be set aside in favour of the cited section and practice of the Court. Finally, the Court had considered an order for the matter to be tried *de novo* by another judge or magistrate is appropriate one and will deliver justice to the parties.

Of recent, on 13th May this year, 2022 the Court reiterated the same position and available remedies in the precedent of **Ligwa Bulunda v. Republic** (supra). The Court after full hearing of the appeal, before it, at page 9 of the judgment, stated that:

> *We are satisfied that the trial judge erred in not appending her signature at the end of testimonies of PW1, PW2, PW3, PW4 and DW1.* ***This means that the assurance of the authenticity of the trial court's proceedings is missing.*** *It cannot be ascertained whether the same are authentic and therefore not tainted. Such proceedings cannot be taken as material for determination of this appeal.* ***It goes without saying that the trial judge's failure to append signatures after recording the witnesses' evidence amounted to an irregularity which is incurable in terms of section 388 of the CPA.*** *It is without question that the omission has vitiated the entire proceedings of the trial court and hence a nullity.* ***In the result, we allow the appeal and nullify the proceedings and judgment, quash the conviction and set aside the sentence meted out against the appellant.*** *We further order that, given the circumstances of the case,* ***the matter be retried by***

another judge in accordance with the law. *In mean time, the appellant shall remain in custody.*

(Emphasis supplied).

In the present appeal, Mr. Joseph Mugesi @ Mtongori (the appellant) was arrested and arraigned before **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case No. 148 of 2017** (the case) for allegation of rape contrary to section 130 (1) (2) (a) and 13 (1) of the **Penal Code [Cap. 16 R.E. 2002]** (the Code). During the hearing of the case, it was narrated by prosecution side that the offence was committed against an adult women in morning hours of 3rd July 2027 at Machochwe Village within Serengeti District in Mara Region.

In order to establish the allegation against the appellant, the prosecution had marshalled a total of four (4) witnesses (PW1 to PW4) and the defence had brought only one (1) witness (DW1). However, during the hearing proceedings conducted on 4th August 2017 to 8th November 2017, as reflected at page 7 to 16 of the proceedings, the learned magistrate did not append his signature after recording the evidences of PW1 to PW4 and DW1.

Yesterday afternoon, when the appeal was scheduled for hearing, Ms. Agma Haule, learned State Attorney for the Republic, raised up and spotted the fault and finally prayed this court to remit

the case for retrial before another learned magistrate at the district court. In order to bolster her argument, Ms. Haule cited the authority of the Court in **Ligwa Bulunda v. Republic** (supra).

I have perused the record of the instant appeal and found that the testimonies of four (4) prosecution witnesses, namely PW1, PW2, PW3 and PW4 and the defence witness (DW1) were not authenticated by the signature of the learned magistrate at every end of their testimonies. This is vivid from the hearing proceedings conducted on 4th August 2017 to 18th October 2017 for the prosecution witnesses, as reflected at page 7 to 14 of the proceedings of the district court, and on 8th November 2017 for the defence witness DW1, as reflected at page 16 of the proceedings of the district court.

This is interpreted to mean that the assurance of the authenticity of the proceedings of the district court in the case is missing. It cannot be ascertained whether the same are authentic and therefore not tainted. Such proceedings cannot be taken as material for determination of this appeal. The trial magistrate's failure to append signatures after recording the witnesses' evidences amounted to an irregularity which is incurable in terms of section 388 of the Act. It is without question that the omission has

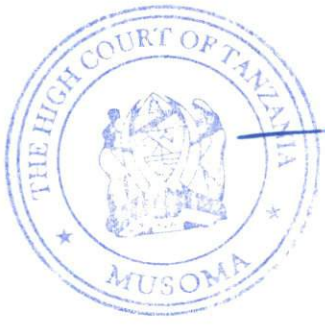
vitiated the entire proceedings of the district court and hence a nullity.

In the end, there is obvious breach of section 210 (1) (a) of the Act and a well-established practice of the Court in a bundle of the cited precedents. This appeal will follow the course taken by the precedent in **Ligwa Bulunda v. Republic** (supra). Having said so, I allow the appeal and nullify the proceedings and judgment, quash the conviction and set aside the sentence meted out against the appellant by the district court in the case.

I further order that, given the circumstances of the present case, the dispute be retried by another learned magistrate in accordance with the law and established practices of our courts in criminal proceedings. In mean time, the appellant shall remain in custody awaiting retrial, to be conducted within six (6) months from today without any delay.

It is so ordered.

Right of appeal explained to the parties.



F. H. Mtulya

Judge

13.09.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Ms. Agma Haule and in the presence of the appellant, Mr. Joseph Mugesi @ Mtongori, through teleconference placed at this court in Bweri area within Musoma, Kwitanga Prison in Kigoma and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F. H. Mtulya

Judge

13.09.2022