IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.191 OF 2021

(Originating from Criminal Case No. 114 of 2021 in the Resident Magistrate's Court of Dar es Salaam at Kisutu)

GAHUNGU IGOR..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 27/09/2022

Date of Judgment: 03/10/2022

Kamana, J:

Gahungu Igor has filed this appeal against the decision of the Resident Magistrate's Court of Dar es Salaam in Criminal Case No. 1 of 2020. In that case, he was convicted and sentenced to pay a fine of Tshs. 500,000/- and imprisonment for a term of three years for each count after the trial Court finds him guilty of two counts of unlawfully entry and unlawfully presence in the United Republic of Tanzania contrary to section 45(1)(i) and (2) of the Immigration Act, Cap.54 [RE.2016]. The custodial sentence was ordered to run concurrently.

Aggrieved by the conviction and the sentence thereon, the Appellant preferred this Appeal. His Petition of Appeal contains grounds as follows:

1. That the trial Court erred in law and fact by declaring the Appellant as an illegal immigrant and convicting him without considering that the Appellant's application for refugee's status was not determined by a competent authority.
2. That the trial Court erred in law and fact by sentencing the Appellant to serve 3 years imprisonment and a fine of Tshs. 500,000/= on each count without considering that he is a first time offender.
3. That the trial Court erred in law and fact by sentencing the Appellant to a maximum period in prison and a fine without considering the mitigating circumstances advanced by the Appellant.
4. That the trial Court erred in law and fact in convicting the appellant without considering that the Prosecutions failed to prove its case beyond reasonable doubt and that the trial was vitiated by irregularities and nullities.
5. That the trial Court erred in law and fact in convicting the Appellant without considering that it failed to explain the substance of the charge and give him rights before defending himself contrary to Section 231(1)(a) and (b) of the Criminal Procedure Act, Cap.20 as the records are silent about this.
6. That the trial Court erred in law and fact by convicting the Appellant without considering his defence (Exh.2) which recognized him as an asylum seeker.

When the appeal was called on for hearing, the Appellant had the services of Mr. Richard Kimaro, learned Counsel. The Respondent was represented by Ms. Dhamiri Masinde, learned State Attorney. The Respondent opposed the appeal in its entirety by supporting the conviction and the sentence meted out against the Appellant.

At this point, I should make it clear that for the purpose of this Judgment, I will not delve into details relating to the facts and evidence adduced in the trial Court and the merits of the grounds of appeal as filed by the Appellant for a reason to be reflected in this Judgment.

In the course of hearing this Appeal, Mr. Kimaro, learned Counsel for the Appellant was of the view that there was a serious irregularity which vitiates the whole trial, conviction of and sentencing against the Appellant. It was submitted by him that the trial Magistrate failed to append his signature after taking the evidence of PW1 and PW2 during examination in chief and cross examination. To him, such failure was fatal and incurable.

To buttress his position, the learned Counsel referred this Court to the decision of the Court of Appeal in the case of **Yohana Mussa Makubi v. Republic**, Criminal Appeal No.556/2015 (Unreported). He contended that in the cited case, the Court of Appeal stated that a signature must be appended at the end of the testimony of every witness and a failure to append a signature as such is fatal to the proceedings. The learned

Counsel was of the position that in the absence of the signature of the trial Magistrate or Judge at the end of the testimony makes it impossible to authenticate as to who recorded the evidence. He submitted that if the recorder of the evidence is unknown, the authentication of such evidence is put in question and that evidence is supposed to be expunged from the records.

Responding to this issue raised by the learned Counsel for the Appellant, the learned State Attorney submitted that the issue was misconceived by the learned Counsel. The learned State Attorney was of the view that the trial Magistrate did append his signature at the end of each testimony he recorded.

After hearing rival arguments as submitted by the legal minds before me, the issue for determination is whether the trial Magistrate appended his signature after recording evidence of PW1 and PW2. Before delving into that issue, I think it is of utmost importance to explore the legal position with regard to the raised issue and its effect.

Recording of evidence in criminal trials that are conducted in the subordinate courts is regulated by the provisions of section 210(1)(a) of the Criminal Procedure Act, Cap.20 [RE.2019]. The said section provides, among other things, the mandatory requirement that the evidence of the witness should be signed by the trial Magistrate and form part of the record. It reads:

'(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) 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 added).

The rationale behind this requirement was elaborated by the Court of Appeal in the case of **Yohana Mussa Makubi (Supra),** In that case, the Court stated.

'In the light of what the Court said in WALII ABDALLAH KIBITWA's and the meaning of what is authentic, can it be safely vouched that the evidence recorded by the trial judge without appending her signature made the proceedings legally valid? The answer is in the negative. We are fortified in that account because, in the absence of the signature of the trial at the end of the testimony of every witness: Firstly, it is impossible to authenticate who took down such evidence. Secondly, if the maker is unknown then, the authenticity of such evidence is

put to question as raised by the appellants' counsel. Thirdly, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and the record before us.'

This position of the Court of Appeal was echoed in the case of **Mhajiri Uladi and Another Vs. Republic, Criminal Appeal No.234 of 2020 (Unreported)**. In that case, the Court of Appeal observed that in the absence of the signature of the person who recorded the testimony, such testimony cannot be considered with certainty that is a true testimony of the witness since its recorder is unknown. In view of that stance, it was held that the proceedings were vitiated as they were not authentic.

From the records of the trial Court, it is undoubtedly that the trial Magistrate did not append his signature after taking the evidence of not only Prosecution but also of the defence. In pages 10 and 11 of the typed proceedings, the trial Magistrate did not append his signature after recording the evidence of PW1 in examination in chief and cross examination. In the same vein, the trial Magistrate did not affix his signature after taking the testimony of PW2 in examination in chief and cross examination in pages 15 and 16. Likewise, the evidence of the Appellant in pages 19 and 20 was not appended with the signature of the trial Magistrate.

In view of that, I am of the settled mind that failure of the trial Magistrate to append his signature after recording the evidence not only offends the provisions of section 210(1)(a) but also vitiates the whole proceedings. This is due to the fact that such failure defeats the whole purpose of appending signature which is to ensure that the records are authentic. That omission is an incurable defect on the ground that records of the court are not supposed to be tainted with any doubts with regard to their authenticity. In the case of **Mohamed Nuru Adam and Others Vs. Republic, Criminal Appeal No. 130 of 2019 (Unreported)**, the Court of Appeal observed as follows:

> *'It is indeed true that from the record, the learned trial Judge did not authenticate the recorded testimonies of not only the prosecution witnesses but also the defence witnesses. With regard to the effect of the omission, we agree with both the learned counsel for the appellants and the learned Principal State Attorney that the omission is an incurable defect.'*

Since the proceedings of the trial Court were tainted with defectiveness, such proceedings are a nullity and in view of that there is no a valid appeal before this Court. I therefore invoke the revisional powers of this Court to quash the proceedings and judgment of the trial Court.

Ordinarily, the way forward was to order the retrial. However, considering the fact that the Appellant was convicted and sentenced on

14th July, 2021 and has already served more than a year in a three year imprisonment, it will be unjust to subject him to a retrial. In view of that, I set aside the sentence. Consequently, I order the immediate release of the Appellant unless he is held for another lawful cause.

It is so ordered.
Right to appeal explained.

DATED at **DAR ES SALAAM** this 3rd day of October, 2022.

KS KAMANA

JUDGE

This Judgment delivered this 3rd day of October, 2022 in the presence of the Appellant in person and his Advocate Mr. Richard Kimaro and Ms. Dhamiri Masinde, learned State Attorney for the Respondent.