IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MBAROUK, J.A., LUANDA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 152 OF 2014

NAGUNWA PETER @ TYSON.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Sambo, J.)

Dated 27th day of June, 2012
in
Criminal Session No. 4 of 2012

JUDGMENT OF THE COURT

15th & 21st October, 2014.

MBAROUK, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Sambo, J.) in Criminal Session case No. 4 of 2012 dated 27th June, 2012 sitting at Arusha, where the appellant was originally charged with the offence of murder contrary to section 196 on the Penal Code, Cap. 16 of the Revised

Edition, 2002. The original record shows that, when the charge was read over to the appellant on 27-6-2012, the appellant pleaded not guilty. Just thereafter, the record shows that, Mr. Ngereza, learned advocate for the appellant informed the trial High Court that, his client offered a plea of guilty to a lesser offence of manslaughter. Without substituting the charge, and without reading the charge to the appellant, the record does not show the appellant to have pleaded to the lesser offence of manslaughter. The record also shows that, the trial Judge recorded as follows:-

" ***FACTS***

The facts as per its memorandum filed in Court and marked "A", forming part of these proceedings, are read over and explained to the accused in Swahili."

However, the record of appeal does not contain the said memorandum of facts marked as exhibit "A".

After the facts were read over to the appellant, the record shows that he replied as follows:-

> " *The facts are correct, only that the hummer was not used, but a stone."*

Thereafter, the appellant was convicted of the offence of manslaughter contrary to section 195 of the Penal Code Cap. 16 Revised Edition, 2002 allegedly upon his own plea of guilty.

After mitigation, the trial court sentenced the appellant to serve thirty five (35) years imprisonment and pay costs of prosecuting the case to the tune of T. Shs. 500,000/=. The

appellant appears to have been aggrieved by the decision of the trial High Court, hence he preferred this appeal.

In this appeal, the appellant was represented by Mr. John Materu, learned advocate, whereas the respondent/Republic had the services of Mr. Oscar Ngole, learned State Attorney.

Initially, the appellant lodged a memorandum of appeal containing three grounds of appeal, but at the hearing, Mr. Materu opted to abandon it and he preferred another memorandum of appeal of his own with one ground of appeal and another ground which he indicated to be in the alternative if the Court disallows the first ground. The said memorandum of appeal reads:-

> **"1. That**, *the learned trial judge erred in law and in fact in convicting the appellant of the offence of*

manslaughter without reading the relevant information to him and without recording his plea.

IN THE ALTERNATIVE AND WITHOUT PREJUDICE to the above ground:-

2. ***That,*** *in the circumstances of the case the learned trial judge erred in law and in fact in sentencing the appellant to serve an imprisonment term of thirty five (35) years and to pay T. Shs. 500,000/= as costs of prosecuting the case."*

At the hearing, arguing for the first ground of appeal Mr. Materu started by giving a brief background of the proceedings of the case conducted by the trial judge on 27-6-2012. He then pointed out the defects found in those

proceedings. **Firstly**, he submitted that, the trial judge convicted the appellant of the offence of manslaughter without reading the relevant information to him. **Secondly**, Mr. Materu submitted that, the trial judge failed to record the plea of the appellant. In support of his argument, the learned advocate for the appellant cited to us sections 275 (1) and 282 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (CPA). He said, both sections are couched in mandatory terms by directing that the information should be read over to the accused person and the recording of his plea of "guilty" in case the accused pleads guilty. Mr. Materu also referred us to the decision of this Court in the case of **Khalid Athumani v. Republic** [2006] TLR 79 at page 83, where the procedure has been stated after an accused person is brought before a court for the first time after being charged. He said, the case of **Khalid Athumani** (*supra*) emphasizes the importance of reading the information to the accused person and also the

importance of recording the accused's plea. He further submitted that, in the instant case, the trial judge failed to read the information of the alleged substituted lesser offence of manslaughter to the appellant, and he also failed to record the appellant's plea contrary to the mandatory requirements of sections 275 (1) and 282 of the CPA.

For those defects, Mr. Materu urged us to quash all the proceedings conducted by the trial judge on 27-6-2012 and order a re-trial.

Responding on the first ground of appeal, Mr. Oscar Ngole, supported the appeal. He briefly and concisely submitted that, there is no doubt that the mandatory requirements under sections 275 (1) and 282 of the CPA were offended. He added that, the irregularities are fatal and they are not curable under section 388 of the CPA. For that reason,

he urged us to nullify all the proceedings in this case conducted by the trial court, quash the conviction and set aside the sentence. Thereafter, he prayed for an order of re-trial of the case.

On our part, we fully agree with both counsel, Mr. Materu and Mr. Ngole that the trial judge offended the mandatory provisions of sections 275 (1) and 282 of the CPA. At this juncture, we see it proper to reproduce the said provisions. For example, section 275 (1) of the CPA provides as follows:-

> *"The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the*

court, and explained, if need be, by that officer or interpreted by the interpreter of the court and shall be required to plead instantly thereto, ..."

As pointed out earlier, the information was not read over to the appellant at the trial court after the charge of murder was allegedly substituted by a lesser offence of manslaughter. With due respect, we are increasingly of the view that, it was wrong for the trial court to have not read the substituted information to the accused/appellant and require him to plead instantly thereto. That failure, surely contravened the mandatory requirements of section 275 (1) of the CPA. The general procedure after an accused is brought before a court has been clearly stated in the case of **Khalid Athumani** (*supra*) where the case of **Adan v.**

Republic [1973] EA 445 page 446 was quoted. In that referred case of **Adan** (*supra*), the erstwhile East African Court of Appeal stated as follows:-

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The*

magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The

statement of facts and the accused's reply must, of course, be recorded."

In the instant case the procedure of reading the information of the alleged substituted lesser offence of manslaughter to the appellant was not followed. The record also shows that, his plea was not recorded, hence those irregularities render the whole proceedings before the trial court a nullity.

On the other hand, section 282 of the CPA was also not complied with. The same reads as follows:-

"If the accused person pleads "guilty", the plea shall be recorded and he may be convicted thereon."

In the instant case, the record of proceedings also does not show that the trial judge recorded the appellant's plea.

We agree with Mr. Materu and Mr. Ngoie that such an irregularity is fatal and is not curable under section 388 of the CPA.

In the upshot, we find that the irregularities pointed out herein above are fatal and such a fatality has vitiated all the trial court's proceedings conducted on 27-6-2012. For that reason, we are forced to nullify all the proceedings conducted by the trial court on 27-6-2012. Having nullified the proceedings, we also quash the conviction and the sentence imposed on the appellant by the trial court and order a re-trial before another judge with competent jurisdiction.

Having examined the first ground of appeal and having reached to the decision which we have already made, we see no reason to indulge ourselves to examine the other ground which has been preferred in the alternative, because that

ground alone is enough to dispose of the appeal. It is so ordered.

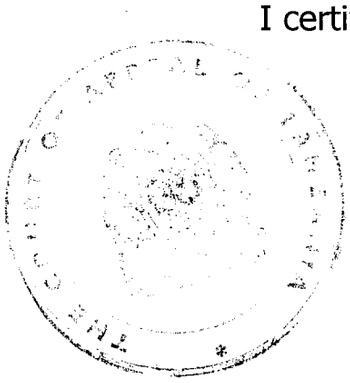
DATED at **ARUSHA** this 20th day of October, 2014.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL