IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 242 OF 2018

WARIOBA MWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ebrahim, J.)

dated the 6th day of July, 2018

in

Criminal Sessions Case No. 104 of 2013

RULING OF THE COURT

2nd & 12th May, 2022

RUMANYIKA, J.A.:

On 29/08/2013, before the High Court of Tanzania at Mwanza (the trial court) Warioba Mwita, the appellant stood charged with an offence of murder, contrary to sections 196 and 197 of the Penal Code [Cap.16 R.E. 2002; now R.E. 2019] (the Code). It was alleged by the prosecution that the appellant murdered Hilda Remi (the deceased) on 06/01/2012 at Nyakato area in the District of Nyamagana, Mwanza Region. After a full trial, where the evidence of six prosecution witnesses and that of the defence witness, the appellant himself was considered, on 06/07/2013,

the appellant was convicted as charged and, the mandatory sentence of death by hanging was meted upon him. He was aggrieved by that decision and lodged this appeal with two grounds. They are:

1. That, the trial court erred in law and fact in convicting the appellant based on weak prosecution evidence.
2. That, the trial judge erred in law and fact by imposing a custodial sentence to the appellant.

However, for the reasons that will shortly herein after follow, we will not narrate the evidence on record or consider any of the above grounds in this ruling.

At the hearing of the appeal, Ms. Lilian Meli Erasto, learned State Attorney appeared for the respondent Republic, whereas Mr. Emmanuel Sayi, learned counsel appeared for the appellant.

Just in the course of their oral submissions, this Court invited the learned attorneys to address it on one pertinent legal point. The issue was whether the appellant was at all committed for trial at the High Court and if he was not, whether the High Court had jurisdiction to try him. We think that the above point *suo motu* raised by the Court may sufficiently dispose of the appeal.

Setting the ball rolling, Ms. Erasto submitted that looking at page xiv of the record of appeal the proceedings do not suggest that the appellant was, by a court order, committed for trial by the High Court. The omission, she submitted, contravened the provisions of section 246 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) and that from its inception the High Court proceedings were vitiated for the latter court lacked jurisdiction. Consequently, Ms. Erasto prayed that in exercise of revisional powers conferred upon this Court by section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA), we nullify the High Court's proceedings from where it conducted preliminary hearing, quash the conviction and set aside the sentence meted upon the appellant. The learned State Attorney further urged us to remit the record to the subordinate court to carry out committal proceedings according to law.

On his part, Mr. Sayi readily conceded to the learned State Attorney's contention. However, he wondered if it is so ordered, whether the prosecution had no chances of taking advantage at the retrial to fill up gaps in the prosecution evidence, as, according to him, the appellant had been convicted on weak evidence.

According to law, for offences triable under Chapter XX of the Code, the High Court's jurisdiction is derived from section 246 (1) of the CPA, by an order of the subordinate court, and upon the accused being committed for trial by the High Court.

Section 246 (1) of the CPA reads as follows:

> *"S. 246 (1) –* ***Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person*** *from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under subsection (7) of Section 245* ***and commit him for trial by the Court; and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court****".* (Emphasis added).

From the above quoted provision of the law, we are settled in our mind that upon the Director of Public Prosecutions filing the information in the subordinate court, the mandatory committal proceedings and

order under section 246 (1) of the CPA follows. In the absence of a committal order, the High Court cannot legally simply assume jurisdiction and try the case before it.

With regard to the High Court's jurisdiction to try cases, where a subordinate court's committal order as mandatorily required, also in our statutes there is logical and closely equivalent provisions of section 178 of the CPA which reads as follows: -

> *"S. 178 - ... no criminal case shall be brought under cognizance of High Court unless it has been previously investigated by a subordinate and the accused person has been committed for trial before the High Court".*

Moreover, this is not our first time to test the provisions of sections 246 (1) and 178 of the CPA. For instance, in **Republic v. Nelson Mbalanji and 3 Others**, Criminal Revision No. 4 of 2015 (unreported), we stated as under:

> *...There is no gainsaying that an **accused person is not properly before the High Court in a murder trial in the absence of a formal committal order by the subordinate court where the accused was arraigned** ... Going by the record, there were **the***

subordinate court proceedings, which were sent to the High Court Mbeya and led to the premature birth of Criminal Sessions Case No. 6 of 2013*...Having observed that* ***the subordinate court of Mbarali did not commit the respondents for trial before the High Court, those proceedings were rendered a nuiiity.*** (Emphasis added).

However, in oversight of the application of the above stated mandatory committal proceedings rule, the learned District Resident Magistrate (DRM) only read over and explained to the respondents the information filed by the Director of Public Prosecutions and the appended witnesses' statements intended for the trial before the High Court. Then the accused were invited, if they wished, to comment anything. They had no comment and the committal court recorded them as such. Then the learned DRM simply recorded:

"COURT: *Committal proceeding closed.*
ORDER: *All accused be remanded in custody, pending the High Court sessions"*

SIGNED

DRM

10/4/2013

The case of **Wilson Mbalanji and 3 Others** (supra) and the instant case compared, with all intents and purposes we think the proceedings were equally flawed. In the case at hand, at page XIX of the record of appeal the learned resident magistrate recorded as follows:-

> *"**Court:** Accused is addressed that having heard the prosecution substance of evidence to be (sic) during trial (sic) at High Court is addressed to his right (sic) that he can reserve his defence if he chose so, or he can say anything he wishes to say that is relevant to the charge laid against him. And that whatever he says will be used against him during trial.*
> *S. 246 (3) of CPA Cap. 20 R.E. 2002 complied with*
>
> ***Sgd S.J. Mwajombe – RM***
>
> ***28/8/2013***
>
> ***Accused:** I reserve my defence for now.*
>
> ***Court:** 1) **Accused to remain in custody pending the High Court Session.***
>
> *2) P.I Bundle to be supplied free of charge before trial.*
>
> *3) Accused further remain in custody (sic)*
>
> ***Sgd: S.J. Mwajombe – RM***
>
> ***28/8/2013***

Looking at the most relevant part of her order, the learned Resident Magistrate did not commit the appellant for trial as required by law. We are saying so for two main reasons. **One**, if anything, she just assumed the appellant was committed for trial but ordered his detention until such appropriate time. **Two**, in effect subsection (3) of section 246 of the CPA referred by the learned Resident Magistrate just informed and gave the accused option to reserve his right of defence.

With respect, we have a word or two on Mr. Sayi's fear and contention that should this Court order a fresh trial there are chances for the prosecution to fill up the gaps in the evidence.

However, we have examined the entire record and we are convinced to hold that the justice of the case demands that a retrial be ordered, for the case was not tried in law.

Having observed that the subordinate court of Nyamagana did not commit the appellant for trial by the High Court, it follows therefore that, for the above stated reason, the trial court had no jurisdiction to try the appellant. The purported committal proceedings and the High Court's proceedings for that matter are hereby rendered a nullity. We quash the conviction and set aside the subsequent orders.

We further direct that the original record be remitted to the District Court of Nyamagana for the court to carry out the committal proceedings to allow trial by the High Court at the earliest possible opportunity. In the meantime, the appellant shall remain detained pending the ordered proper trial.

DATED at **MWANZA** this 12th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 12th day of May, 2022 in the presence of Mr. Emmanuel Sayi, learned counsel for the Appellant and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL