

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 406 OF 2017

CHACHA S/O GHATI @ MAGIGE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

[Appeal from the decision of the High Court Tanzania at Tarime]

(De- Mello, J.)

dated the 05th day of May, 2017

in

Criminal Appeal No. 181 of 2013

JUDGMENT OF THE COURT

21st & 27th April, 2021

LEVIRA, J.A.:

In the High Court of the United Republic of Tanzania at Mwanza the appellant was charged with murder contrary to sections 196 and 197 of the Penal Code, (Cap 16 RE 2002). He was prosecuted, convicted of that offence and sentenced to suffer death by hanging. It was alleged by the prosecution that on 2nd July, 2012 the appellant murdered one Mackrina Issaya (the deceased) at Mrito Village within Tarime District in Mara Region. On the material day the appellant left his home and came back around 5:00pm. Upon arriving there he asked the deceased whom

they were living together to hand over the phone which he left with her to him but the deceased refused to do so claiming first to be refunded Tshs. 1,000,000/= which she had advanced to the appellant. The appellant left that place and came back at around 6:15 pm and attacked the deceased in the presence of Neema Isaya Josiah (PW1) by slashing off both of the deceased hands, one after the other using a sword which he was carrying. He also stabbed her on her ribs and back head. As a result, the deceased fell down and became unconscious. PW1 raised an alarm for help and someone identified by a single name Esther and PW1's aunt responded to the alarm. On their way to the scene of crime, they met the appellant running away and disappeared. Later the police arrived at the scene, drew a sketch plan and recorded PW1's statement.

The body of the deceased was collected from the scene and sent to the hospital for examination and preservation. The appellant was later arrested and charged as indicated above. On his defence, the appellant admitted to have killed the deceased but he advanced a defence of provocation. Upon a full trial, the appellant was convicted and sentenced as earlier on indicated. Aggrieved by both the conviction and sentence, he has preferred the current appeal.

At the hearing of this appeal, Mr. Geoffrey Kange, learned advocate entered appearance for the appellant, whereas the respondent had the services of Mr. Emmanuel Luvinga, learned Senior State Attorney assisted by Ms. Ghati Mathayo, learned State Attorney.

It is to be noted at the outset that on 27th February, 2019 the appellant lodged a seven-ground memorandum of appeal with the Court. Apart from that, on 13th April, 2021 his advocate filed a Supplementary Memorandum of Appeal comprising the following four grounds: -

- 1. That as the trial Judge did not address the assessors on all vital points of law; the trial was not conducted fully with the aid of assessors and therefore a nullity.*
- 2. That the trial Judge erred in law by convicting the appellant basing on the evidence which was recorded in contravention of the requirements of the law.*
- 3. That the trial Judge erred in law by convicting the appellant on evidence which did not prove the case beyond reasonable doubt.*

4. That the Honourable trial Judge failed to arrive at a conclusion that the appellant was guilty of manslaughter as the evidence on record reveal that the death of the deceased arose out of a fight.

Before commencement of the hearing of the appeal, the appellant's counsel informed us that he had agreed with the appellant to abandon all the grounds of appeal raised by the appellant in his memorandum of appeal. In lieu thereof, the grounds of appeal in the Supplementary Memorandum of Appeal quoted above should be argued except the third ground. Therefore, the counsel for the appellant argued those three grounds in the alternative as demonstrated hereunder.

Submitting on the first ground of appeal, Mr. Kange argued that the trial Judge did not direct assessors on the vital points of law and thus, the trial was conducted without the aid of assessors. This, he said, contravened the requirement of the law under Section 265 of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E 2019), (the CPA). He went on submitting that the law under Section 298 (1) of the CPA requires the trial Judge to sum up to assessors after hearing of the case.

He argued further that in summing up to assessors, the trial Judge is required to explain to the assessors all legal points to enable them make sound opinion but that was not the case in the present appeal. He identified some of the legal points which the trial Judge failed to address the assessors to include; **one**, who is required to prove the case (the burden of proof); **two**, what is the standard of proof in criminal cases and **three**, what are the ingredients of the offence of murder.

Mr. Kange referred us to page 27 of the record of appeal where while addressing assessors, the trial Judge stated as follows: -

"my duty is to elaborate albeit briefly but detailed on vital points pertaining to murder vis a vis, manslaughter. With intent vis a vis without intentional and proof without living any shadow of doubt. Your duty is to share your sincere opinion based on evidence adduced".

It was Mr. Kange's argument that the above quoted words of the trial Judge were not sufficient to enlighten the assessors on the above mentioned vital legal points as required by the law. He argued further that it was not correct for the trial Judge to tell the assessors that the case was supposed to be proved without living any "shadow" of doubt

because the standard of proof in criminal cases is beyond reasonable doubt. In support of his arguments, he cited the decision of the Court in **Respicius Patrick @ Mtanzangira v. Republic**, Criminal Appeal No. 70 of 2019 (unreported) where the Court insisted on the importance of making proper summing up to assessors as failure to conduct it properly is tantamount to a trial without the aid of assessors rendering it a nullity.

Mr. Kange invited us to find that the trial Judge failed to conduct proper summing up to assessors, nullify the proceedings, quash the conviction and set aside the sentence against the appellant. Thereafter, order a retrial before another High Court Judge with different set of assessors.

In the alternative, he argued the second ground of appeal to the effect that, the trial Judge did not append her signature after recording the evidence of each witness. Failure to do so contravened section 215 of the CPA read together with its Rules, he insisted. Besides, Mr. Kange submitted further that the trial Judge did not sign even after closure of prosecution and defence cases. According to him, the effect of failure to

sign proceedings is to render the proceedings not authentic as stated in **Yohana Mussa Makubi & Another v. Republic**, Criminal Appeal No. 556 of 2015 (unreported). Therefore, he urged us to follow what was decided in the above case and nullify the proceedings and judgment of the High Court because it is as good as the appellant was convicted without evidence. Further that the Court should proceed to quash the said proceedings and conviction, set aside the sentence and order a retrial before another High Court Judge with different set of assessors.

The fourth ground of appeal was also argued in the alternative by Mr. Kange by submitting that the trial Judge erred in convicting the appellant of murder instead of manslaughter. He argued that the appellant killed the deceased unintentionally as the death occurred in the course of a fight. He referred us to page 12 of the record of appeal where the appellant defended his case by stating that he did not intend to kill the deceased but it was due to the fight occurred between them. The Court was further referred to page 50 of the record of appeal where the trial Judge made reference to PW1's evidence and stated that on the material day there was scuffle, but went on concluding that the killing was malicious. It was Mr. Kange's further argument that having found

that there was a scuffle on the material day, the trial Judge ought to have concluded that the killing was without intention. He cited the decision of the Court in **Minani John & 2 Others v. Republic**, Criminal Appeal No. 435 of 2018 (unreported) where it was held that murder can be reduced to manslaughter if death occurs as a result of a fight.

According to Mr. Kange, since the trial Court Judge did not reduce murder to manslaughter in the circumstances of the present case, her decision was wrong in law. Therefore, he urged us to substitute the appellant's charge of murder to manslaughter, consider the period of time spent by the appellant in prison and set him free as he said, eight years spent by the appellant in prison is a long period of time.

In reply, Mr. Luinga supported the appellant's first and second grounds of appeal and agreed with the submission made thereof. He added that the present case was not only heard without the aid of assessors during summing up, but also from the start. It was his submission that Section 285 of the CPA provides for the procedure on how assessors are supposed to be appointed and the same was well

stipulated in **Godfrey William @ Matiko & Another v. Republic**, Criminal Appeal No. 409 of 2017 (unreported) to include; indicating in the proceedings the names and age of the chosen assessors for the appellant to make a meaningful objection, if any. That, the selection of assessors must be patent on the record to give comfort and assurance to the accused person that the selection was done fairly, impartially and with open mind.

Mr. Luvinga referred us to page 12 of the record of appeal and argued that the trial Judge therein did not follow the procedure of appointing assessors; she only stated that she ascertained whether the three court assessors were conversant with their role and that they should not cross examine witnesses. He submitted further that even the names of assessors were not recorded in the proceedings as required. He said, the effect of the identified shortcomings is to render the proceedings a nullity and thus urged us to so hold. He concluded in regard to the first and second grounds of appeal by joining hands with the appellant's counsel in his submission.

Regarding the fourth ground of appeal, Mr. Luinga had a different argument from the appellant's counsel. According to him, the appellant was correctly charged with, convicted of and sentenced for murder. He thus supported the decision of the High Court as he said there was no fight between the appellant and the deceased as argued by the counsel for the appellant. It was his argument that the evil intention of the appellant can be seen when he used a 'panga' to cut and chop off both hands of the deceased who was not having any kind of weapon. As for him the appellant intended to kill the deceased. He referred us to page 15 of the record of appeal where, when PW1 was responding to the question by one of the assessors, she said that, she heard the appellant uttering the following words: "*Acha nikuue mshenzi wewe*", meaning "*let me kill you idiot*". According to Mr. Luinga, the quoted appellant's words show vividly that he intended to kill the deceased, and in the circumstances, murder cannot be reduced to manslaughter as requested by the counsel for the appellant.

Finally, Mr. Luinga prayed in respect of the first and second grounds of appeal that the proceedings and judgment of the trial court be nullified, conviction quashed and the sentence set aside. The Court

should order retrial of the case from where hearing started, on 2nd May 2017 to the end before another Judge and different set of assessors and other initial proceedings should remain intact.

As far as the fourth ground of appeal is concerned, Mr. Luvinga prayed for the Court to dismiss that ground for being unmerited.

In a brief rejoinder, Mr. Kange urged the Court to consider the appellant's defence evidence in respect of the alleged fight between him and the deceased. He further urged the Court that if it will find that there was a fight, the appellant's charge of murder be reduced to manslaughter and reiterated his prayers made while submitting in chief.

We have dispassionately considered the submissions by the counsel for both parties. As intimated earlier, three grounds of appeal were argued by the parties. However, we think the second ground of appeal is capable of disposing of this appeal. In the second ground, the main complaint raised in the Supplementary Memorandum of Appeal and conceded by the respondent's counsel was that, the trial Judge did not sign the proceedings after recording the evidence of the witnesses. We had an opportunity of going through the original record of trial court

and we had a similar observation. In the circumstances, there is no dispute that the trial Judge did not sign after recording witnesses' evidence.

It is our observation from page 16 of the record of appeal that the trial Judge having recorded the evidence of PW1 did not sign. Immediately thereafter, she recorded the prosecutor saying: "*This is the only witness I have and I pray to close the case for prosecution madam Judge.*" No signature was appended after closure of the prosecution case. Besides, just as it was the case with the evidence of PW1, the trial Judge did not sign after recording the appellant's evidence. The only signatures in the record of appeal are found after the order fixing Judgment date on page 28 of the record of appeal and after the appellant's sentence. The effect of failure to append signature in the proceedings was stated by the Court in **Yohana Mussa Makubi** (supra) as follows:

*"In light of what the Court said in **WALII ABDALLA KIBWITA'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 signature of trial Judge at the end of 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 appellant's 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."*

The Court went on stating that:

"We are thus, satisfied that, failure by the Judge to append his/her 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 for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit

contained in section 210 (1) (a) of the CPA and we find no doubt in taking inspiration therefrom."

In the light of the above quoted decision, we entertain no doubt that since the proceedings of the trial court were not signed by the trial Judge after recording evidence of witnesses for both sides, they are not authentic. As a result, they are not material proceedings in determination of the current appeal. In the circumstances, we wish to reiterate what is stated in the quoted decision in **Yohana Mussa Makubi** (supra), that failure by the trial Judge to append her signature after taking down the evidence of both PW1 and the appellant is an incurable irregularity in the proper administration of criminal justice in this country.

As we intimated earlier, we shall not venture to determine other grounds (1 & 4) of the appeal argued by the counsel for the parties. Therefore, we allow the second ground of appeal, nullify the proceedings and judgment of the trial court starting from 2nd May, 2017, quash the conviction and set aside the appellant's sentence. We order a retrial of the case starting from the proceedings of 2nd May, 2017 before

another judge with a different set of assessors. In the meantime, the appellant shall remain in custody.

DATED at **MWANZA** this 23rd day of April, 2021.

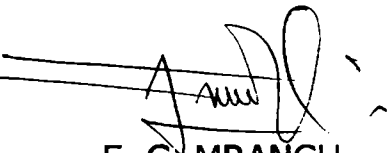
R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 27th day of April, 2021 in the presence of the appellant in person and Ms. Sabina Choghoghwe, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL