

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 469 OF 2020

SITTA JAMES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ismail, J.)

dated 3rd day of August, 2020

in

Criminal Sessions Case No. 227 of 2016

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JUDGMENT OF THE COURT

5th & 12th February, 2024

MKUYE, J.A.:

The appellant, Sitta James together with a co-accused (not subject to this appeal) were charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2019 (the Penal Code). It was alleged in the particulars of offence that, on 3rd July, 2012 during night hours at Bukandwe Village within Mbogwe District in Geita Region, they murdered one, Meshack Kapesa. After the charge was read over to them, each pleaded not guilty where upon a full trial was

conducted. The prosecution marshalled five witnesses and produced three exhibits, to wit the Postmortem Examination Report (Exhibit P1), Sketch Map (Exhibit P2) and the cautioned statement of the appellant (Exhibit P3). Upon the conclusion of the trial, the appellant was convicted while his co-accused was acquitted. The appellant was sentenced to death by hanging. Aggrieved by the outcome, he has now preferred the appeal to this Court.

The facts leading to this appeal are very simple and they go thus: Martha John Maganga (PW1) was a wife of the deceased, Meshack Kapesa. According to PW1, the deceased and the appellant had known each other and that the two had met some few days prior to the incident in which it was alleged that the latter convinced the deceased to engage in the maize vending business. The deceased bought the idea. PW1 withdrew money from her account and gave the deceased TZS. 970,000/= for that business. On 1/7/2012 the deceased and the appellant left together but that was the last day PW1 saw her husband alive.

On 3/7/2012, a human torso whose head had been severed was discovered in a forest by a local mining artisan. The matter was reported to the police and on arrival at the scene, some contents from the trouser worn by the deceased with some identity cards were found. The identity card revealed the torso to be that of the deceased. A search was mounted for the severed head and it was discovered at a quarry site nearby.

The information relating to the deceased's death was relayed to PW1. Following a tip off from an informer, the appellant was arrested. According to PF 19817 Insp. Kalilo (PW4), after his arrest, he recorded his cautioned statement confessing his participation in killing the deceased. On the basis of the cautioned statement, he was convicted and sentenced as alluded to earlier on.

On 21/10/2020, the appellant lodged a self-crafted memorandum of appeal consisting five grounds of appeal which for a reason to be apparent shortly, we do not intend to reproduce. Nevertheless, at the hearing of the appeal the learned counsel representing the appellant prayed, and we granted him leave to add a new ground of appeal as per

Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009. The said ground is to the effect that:

"The appellant's trial, conviction and sentence were a nullity due to non-compliance with section 246 (2) of the Criminal Procedure Act, Cap. 20, R.E. 2019".

When the appeal was called on for hearing, Mr. Constantine Mutalemwa, learned advocate appeared representing the appellant whereas the respondent Republic was represented by Mses. Jaines Kihwelo and Naila Chamba, both learned State Attorneys.

At the outset, Mr. Mutalemwa informed the Court that he was abandoning the grounds of appeal filed by the appellant on 21/10/2020 and that he would only argue the new ground introduced by him.

He prefaced his submission by arguing that the hearing or trial of this case before the High Court was marred with irregularities warranting their nullification. He contended that the provisions of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA) requiring the subordinate court/committal court to read out the statements of the

intended prosecution witnesses and exhibits was not complied with. He took us at pages 5 and 6 of the record of appeal to show that the committal court just listed the prosecution witnesses and exhibits without having the statements of the listed witnesses read over to the accused. He was of the view that, this contravened section 246 (2) of the CPA. To amplify his argument, he referred us to the case of **Alfan Apolinary @ Kyalubata and 3 Others v. Republic**, Criminal Appeal No. 164 of 2021 (unreported) where the Court when confronted with a similar scenario stated that:

"...mere listing of the names of witnesses and exhibits for the prosecution does not amount to compliance with those subsections of section 246 of the CPA. On the contrary compliance with those subsections presupposes that there is compliance with subsections (1) and (2) of the same section. Moreover, subsections (3), (4), (5) and (6) could not come into play while subsection (2) which lays the foundation was not complied with'.

Mr. Mutalemwa went on submitting on the effect of failure to read out the statements in that, **one**, it denied the appellant the opportunity to know the nature of the intended prosecution evidence to enable him prepare his defence case. **Two**, the prosecution witnesses were not qualified to testify without a prior notice of calling additional witnesses being issued under section 289 (1) of the CPA showing the substance of their evidence. To buttress his argument he referred us to the same case of **Alfan Apolinary Kyalubata** (supra).

The learned counsel concluded that, this infraction did not only prejudice the appellant for unfair trial but also the Republic.

Ultimately, he prayed to the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2019 (the AJA) and nullify the proceedings of the committal court and the High Court, quash the conviction and set aside the sentence meted out against the appellant and order that the committal proceedings be conducted afresh before another magistrate expeditiously.

On the issue of PW4 who was not even listed but testified in court, it was Mr. Mutalemwa's argument that a restriction be issued for his statement not to be read in the fresh committal proceedings to avoid the prosecution to fill gaps in the prosecution evidence.

In response, Ms. Kihwelo readily conceded to the infraction relating to non-compliance with section 246 (2) of the CPA. She contended that, as shown at page 5 of the record of appeal, the prosecution prayed to read and to list out the intended prosecution witnesses and exhibits necessary to be produced but what followed was a list recorded by the trial court without showing if they were read out as per section 246 (2) of the CPA. She added that even section 246 (3) of the Act was not complied with.

Ms. Kihwelo argued that since the purpose of committal proceedings is to enable the accused to understand the nature of evidence and prepare his defence, it cannot be said that there was a fair trial. She also relied on the case of **Alfan Apolinary Kyalubata** (supra) to fortify her argument adding that failure to comply with section 246 (2) of the CPA was a fatal irregularity. Ultimately, like her

counterpart, she urged the Court to nullify the proceedings of the committal court and High Court, quash the conviction and set aside the sentence with an order for a fresh committal proceedings to be conducted before another magistrate.

Regarding the issue of PW4 who was not listed during committal proceedings, she did not take it as an issue since, she argued, section 289 (1) of the CPA can be invoked to call him as an additional witness.

In rejoinder, Mr. Mutalemwa was doubtful if PW4's statement could be read over during a fresh committal proceedings.

Having heard the arguments from both sides we are now in a position to deliberate on the matter. The issue for our consideration is whether section 246 (2) was not complied with during committal proceedings and, if the answer is in the affirmative, what would be the way forward.

Section 246 of the CPA provides for a procedure in relation to committal of the accused for trial by the subordinate court. The relevant

provisions in our case are subsections (1), (2) and (3) of section 246

which read:

“(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 this Court.

(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

(3) *After complying with the provisions of subsections (1) and (2) the Court shall address the accused person in the following words or words to the like effect:*

"You have heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial"

(4)

(5)

(6)"

[Emphasis added].

Our understanding of this provision of the law, particularly subsections (2) and (3), is that the committal court is mandatorily required to read and explain or cause to be read to the accused person not only the information levied against the accused but also the statements or documents containing the substance of the evidence of

witnesses who are intended to be called by the Director of Public Prosecutions. This spirit of subsection (2) is emphasized in subsection (3) which makes reference to the fact that the accused has heard the substance of evidence intended to be used by the prosecution at the trial.

The purpose of this requirement, basically, is to provide a fair trial by giving the accused an opportunity of understanding the nature of prosecution evidence and prepare a sound defence. This means that a witness whose statement or substance of evidence is not read out during the committal proceedings as per section 246 (2) of the CPA will not be qualified to be called by the prosecution to adduce evidence unless the prosecution issues a reasonable notice to call such witness in terms of section 289 (1) of the CPA which stipulates as follows:

"(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.

(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give".

In this case, both counsel are at one that the provisions of section 246 (2) of the CPA were not complied with. As was rightly contended by both Mr. Mutalemwa and Ms. Kihwelo, the record of appeal at page 6 shows how the appellant was committed for trial to the High Court. As to what transpired in relation to the statements of the intended witnesses and exhibits, we leave the portion of the record at page 5 - 6 to speak for itself as hereunder:

"Pros. Your honour, I pray to read and list out all the intended prosecution witnesses and exhibits necessary to be produced during trial before the High Court.

LIST OF PROSECUTION WITNESSES

- 1. Martha John Maganga of Buhangija, Shinyanga.*
- 2. Henry Alphonse, the Councilor for Bukandwe Ward and Resident of Kanengeie Village.*
- 3. H. 811 PC Busilili of Police Masumbwe.*
- 4. ASP Nemes Kapufi of Police Masumbwe.*

5. E. 133 D/Cpl Malasa of Police Masumbwe.
6. Alex Makoye of Masumbwe.

LIST OF EXHIBITS

1. A copy of cautioned statement of the 1st accused one Sitta Shamba @ James.
2. A copy of Extra Judicial Statement or confession of the 1st accused one Sitta Shamba @ James recorded on 17/7/2012.
3. A copy of the sketch plan of the scene of crime drawn on 03/07/2012.
4. A report on postmortem examination of the deceased body of one Meshack Kapesa of 05/05/2012.
5. A copy of PF3 of all accused persons one Sitta s/o James and Alexander Masanja @ Mwahu.

Sgd: G.N. Kurwijila

RM

21/03/2017

Court: That the accused person are asked whether they have witnesses to call during their defence in the trial and have replied as follows:

1st accused one Sitta James:

I have no witnesses to call during my defence.

2nd accused Alexander Masanja @ Mwahu:

I have no witness to call nor exhibit to tender”.

From the above excerpt, it is plain that following the prayer by the public prosecutor to read and list the intended witnesses, the committal court merely listed the names of the intended witnesses and exhibits without reading the statements and documents as required by section 246 (2) of the CPA. It is also notable that PW4 was not even listed as among the intended witness. The committal court then proceeded to inquire from the accused persons if they had witnesses to call during their defence or exhibits to tender and they responded that they had none. However, the appellant indicated to produce a document (PF3) as an exhibit (which was also listed) while the co-accused did not. Thereafter, after asking them if they intended to engage their advocates and denied, the committing court recommended for them to have a free legal aid on Government expenses. In the end the committing court ordered for the accused persons to be provided with copies of typed committal proceedings and they were committed for trial by the High Court.

In answering the first limb of the issue, we are in agreement with both learned counsel that section 246 (2) of the CPA was not complied with. Looking at the excerpt that was quoted earlier on, it is crystal clear that the committal court did not read or cause to be read to the accused persons the statements or documents which were intended to be used in the trial but it just listed the names of the intended witnesses and documents which was in contravention of the requirement of the law. However, it is a position of the law that mere listing of names of intended witnesses and exhibit for the prosecution does not mean that section 246 (2) of the CPA was complied with. - See **Alfan Apolinary Kyalubata** (supra).

Moreover, subsection (3) of that section presupposes that subsection (2) must have been complied with, for it to be effective, when looking at the manner it is couched. It comes into play after subsections (1) and (2) are complied with and that is why the “committal statement” makes reference to the fact that the accused has heard the substance of the evidence which the prosecution intends to call.

In this case, five witnesses testified for prosecution. Among the five witnesses, four of them were listed as shown earlier on but in relation to PW4, PF 19817 Insp. Kalilo, he was neither listed nor his statement was read over to the accused person. Although he was listed during preliminary hearing, he testified without being called as an additional witness under section 289 (1) of the CPA. In this regard, there is no doubt that his evidence was taken irregularly which in effect caused miscarriage of justice. - See **Seif Salum and Another v. Republic**, Criminal Appeal No. 119 of 2015 (unreported).

In relation to all the prosecution witnesses who testified in court without having their statements read over to the accused persons during committal proceedings, which means that the substance of their statements was not known to the accused persons, without a notice to call them as additional witnesses being issued to call them, then their evidence was illegally received. They ought not to be allowed to testify unless there was compliance by the prosecution with the provisions of section 289 (1) of the CPA. - See **Mawazo Mohamed Nyoni@ Pengo**

v. Republic, Criminal Appeal No. 184 of 2018 (unreported). In other words, they were not competent witnesses to testify in court.

As to the effect of such infraction, we think that in the circumstances, the trial of the appellant was unfair for the reason of failure by the committing court to read out the witnesses' statements and exhibits which were intended to be used by the prosecution. Essentially, the irregularities committed were fatal and occasioned miscarriage of justice not only to the appellant but also to the prosecution (see **Paschal Mhangwa @ Ngohoboyo and 2 Others v. Republic**, Criminal Appeal No. 149 of 2020 (unreported). This is so because the appellant was denied the opportunity of knowing and understanding in advance the case for the prosecution to enable him mount a meaningful defence. Even the documents which were produced during trial without being read over to the accused prejudiced him - see **Masamba Musiba @ Musiba Masai Masamba v. Republic**, Criminal Appeal No. 138 of 2019 (unreported).

As for the way forward, in essence both Mr. Mutalemwa and Ms. Kihweio are at one and, rightly so in our considered view, that the Court

should nullify the proceedings of the committing court and the High Court, quash the conviction and set aside the sentence since none of them contributed to the infraction but the court. However, while Mr. Mutalemwa maintains that there be an order prohibiting the reading of the statement of PW4 who was not listed in the committal proceedings, Ms. Kihwelo holds a view that even if there is such a restriction, he can still be called under section 289 (1) of the CPA.

On our part, having considered the rival submission, we are of the view that restricting the reading of PW4's statement or listing him as among the intended witnesses cannot be of any assistance in view of the provisions of section 298 (1) of the CPA which permits the calling of an additional witness and more so, considering that the cautioned statement of the appellant purportedly recorded by him was listed.

In the final analysis, we invoke the provisions of section 4 (2) of the AJA to revise and nullify the proceedings of the committing court of Bukombe District Court dated 21/3/2017 and those of the High Court in Criminal Sessions Case No. 227 of 2016, quash the conviction and set aside the sentence meted out against the appellant.

Consequently, we order that the case be remitted to Bukombe District Court, the committing court, in order to conduct a fresh committal proceedings before another magistrate which is to be done expeditiously. Meanwhile, we order that the appellant should remain in custody pending being committed to the High Court for trial.

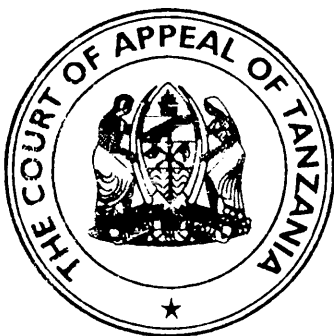
DATED at **MWANZA** this 9th day of February, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of February, 2024 in the presence of the appellant appeared in person and Mr. Mahembega Elias Mtiro, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL