IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., KITUSI, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 592 OF 2017

ENOCK LWENGE.....APPELLANT

VERSUS

THE REPUBLIC.....REPUBLIC

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

(Mansoor, J)

Dated the 14th day of April, 2017

in

Criminal Session Case No. 103 of 2012

JUDGMENT OF THE COURT

22nd November & 2nd December, 2021

KAIRO, JA.:

The appellant, Enock Lwenge and the deceased person, one Samuel s/o Mathias are half-brothers born from the same mother. The appellant was the first accused. He was charged together with other four persons who are not subject to this appeal with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2002.

It was alleged by the prosecution that on 27th day of February, 2011 at Nyamikoma village within Magu District in Mwanza Region, the

appellant and the said other four persons did murder the deceased. They all denied the charge and the case proceeded to a full trial.

Subsequently, the respondent entered *nolle prosequi* in favour of the 4th and 5th accused and later, the 2nd and 3rd accused were discharged at a no case to answer stage. Thus, only the appellant was prosecuted to the end. Eventually, he was found guilty of the offence charged and sentenced to a mandatory punishment for murder, which is death by hanging.

Aggrieved by both the conviction and sentence, the appellant lodged his memorandum of appeal on 15th April 2019 consisting of nine (9) grounds of appeal. For reasons to become apparent later, we shall not reproduce them. To prove the case, the prosecution paraded three (3) witnesses namely; Mr. Feleshi Mathias, Mr. Bernard Simon and No. E1301 D/CPL Sandu who testified as PW1, PW2 and PW3 respectively. The prosecution also tendered a sketch map of the scene of crime and a post-mortem examination report which were admitted as exhibits P1 and P2 respectively. On the defence part, the appellant was the sole witness and tendered no exhibit.

A brief factual background of the case is that, on the fateful date around 20.00hrs, PW2 who was a neighbour and a close friend of the

deceased, went to the deceased home and invited him for dinner as his wife had travelled. On arrival, PW2 found the 2nd and 3rd accused playing guitar. He invited them for dinner as well but they declined. Thus, he went to dine with the deceased. The deceased returned to his home after dinner around 21.00hrs. Just half an hour later, PW2 heard the deceased crying for help claiming that he was dying. He wanted to go out to offer an assistance but he found an unknown person standing near his door who threatened him that, he would die if he got out. PW2 then shouted for help from inside his house which shouts gathered the neighbours. They together went to the deceased house where they found his body in the guest room of his house having three cut wounds on his ear and face, already dead.

PW2 phoned PW1, the deceased's brother and informed him about the incident. He arrived at the scene immediately and together they inspected the house but did not find anybody except the body of the deceased. They went outside, locked the door and waited for the police who came an hour later accompanied by a doctor who conducted an autopsy on the deceased body. Among the police officers who came to the scene was PW3 and together with other police officers started to inspect the house. Their inspection discovered the appellant who was

hiding under the mattress in the deceased's bed room and dressed in underpants. His trouser was hanging and wet with blood stains. When asked, the appellant confessed that he had killed his brother and climbed to the roof to retrieve the panga (machete) that he had used to kill him. The panga was also soaked with blood.

The appellant was then taken to the police station. He recorded his cautioned statement wherein he mentioned the 2nd and 3rd accused. The statement was not admitted as evidence during trial after the court found that the same was not given voluntarily following the conduct of trial within a trial. Later the appellant was taken to the Justice of peace where he recorded his extra judicial statement, but was also not tendered during trial.

In his defence, the appellant denied killing the deceased but admitted that he was with him at his house on the material date and time. That he heard him talking with some people at the sitting room while he was in the bathroom bathing and shortly thereafter, he heard him shouting for help, pleading that he was being attacked. The appellant was scared and went hiding under the mattress in the deceased's room. He did not come out until when discovered by the

police. The appellant further denied to have confessed to the police nor to have mentioned other accused persons.

At the end, basing on circumstantial evidence, the trial court found the appellant guilty as charged thus, convicted and sentenced him accordingly as earlier intimated. Aggrieved, he is now before the Court to challenge both the conviction and sentence.

At the hearing, the appellant was represented by Mr. Constantine Mutalemwa, learned counsel whereas the respondent Republic had the services of Ms. Rehema Mbuya, learned Senior State Attorney assisted by Ms. Georgina Kinabo, learned State Attorney.

Mr. Mutelemwa abandoned all grounds of appeal filed earlier and decided to argue only one ground contained in the supplementary memorandum of appeal dated 18th November, 2021 couched as hereunder:

1. *The trial court erred in law for convicting the appellant based on*

   unauthenticated evidence of PW1, PW2 and PW3 whose evidence were not signed by the trial Judge at the end of every testimony.

Submitting on the said ground, Mr. Mutalemwa argued that, it was an error on the part of the trial Judge to convict the appellant on the basis of the evidence of PW1, PW2 and PW3 which was not authentic. He went on to elaborate that the trial Judge did not append her signature after recording the evidence of each witness, which he argued to be contrary to the requirement under section 210 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). Mr. Mutalemwa went on submitting that, though the wording of the said provision suggests its applicability is confined to subordinate courts, it is a settled legal practice that, the requirement is equally applicable in trials conducted by the High Court, like the one at hand. To substantiate his complaint, Mr. Mutalemwa took us through the evidence of the said prosecution witnesses as well as defence witness which was not signed by the trial Judge after she completed recording their testimonies.

The learned counsel took us through the pages on which the respective testimonies of PW1, PW2, PW3, and DW1 appear drawing out attention to specific points that the trial Judge ought to have appended her signature, but did not. According to him, the pointed-out defects are incurable and renders the whole evidence a nullity for lack of authenticity. Mr. Mutalemwa referred us to the cases of **Chacha s/o**

Ghati @ Magige vs. Republic, Criminal Appeal No. 406 of 2017 and **Magita Enoshi @ Matiko vs. Republic**, Criminal Appeal No. 407 of 2017 (both unreported) to bolster his argument. He added that in both cited cases, the Court found the evidence unauthentic thus, a nullity and invoked its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (AJA) to nullify the proceedings of the trial court, quash the judgment and conviction and set aside the sentences meted out to the appellants therein. The Court further ordered retrial of the said cases.

Mr. Mutalemwa invited us to take similar position except, the order for retrial of the case at hand. He gave the following reasons for the said departure; **one**, that there is no *primafacie* evidence to ground conviction of the appellant at the retrial. He elaborated that; the appellant's conviction is hinged on circumstantial evidence which he argued to be shaky with a lot of doubts. As such, it cannot lead to an irresistible conclusion that, it was the appellant who committed the offence; **two**, that a retrial order would afford the prosecution with an opportunity to fill the gaps. He gave an example of the caution statement which its admission was rejected by the trial court for the reason that it was tendered by a Senior State Attorney whom the trial

court found to be an incompetent witness to do that. Further to that, the available extra judicial statement of the appellant which was not tendered during trial could be tendered at retrial; **three,** that originally there were five (5) accused in this case. In the circumstances a retrial order would be prejudicial to the appellant and may cause an imbalance in criminal justice since the other four accused persons who were discharged at various stages of the proceedings, are not part to this appeal.

Mr. Mutalemwa pleaded with the Court to consider the submitted reasons cumulatively and implored us not to order retrial arguing that in the circumstances of this case, justice demands to allow the appeal and set the appellant free.

In reply, Ms. Mbuya conceded to the defects as pointed out by Mr. Mutalemwa. She subscribed that the learned trial Judge omitted to append her signature after recording the evidence of all witnesses who testified in the case. She was also at one with the consequences for the omission as submitted by Mr. Mutalemwa. However, she was of a different view with regards to the way forward.

Ms. Mbuya contended that, there is enough evidence to ground conviction against the appellant basing on the circumstantial evidence and the conduct of the appellant exhibited following the incident.

Disputing the argument by Mr. Mutalemwa that the prosecution would fill the gaps if a retrial order would be preferred, Ms. Mbuya argued that the procedure with regards to the trial *de novo* order requires the parties to base on the same evidence with no addition. As such, the fear of filling the gaps is superfluous. She concluded by praying the Court to order retrial as a way forward in this appeal.

In rejoinder, Mr. Mutalemwa mainly repeated his arguments in chief. Dismissing the explained procedure of basing on the same evidence, Mr. Mutalemwa argued that, retrial order cannot be premised on such a promise. He maintained that there is no guarantee that the prosecution will not correct the procedural defects that occurred during the trial, the act which will amount to filing the gaps. He insisted that, the case has peculiar circumstances and thus the retrial order is not a proper course to take. He pleaded with the Court to decline the invitation by the respondent to order retrial, instead order the release of the appellant.

Having heard the submissions by counsel for both parties, and going through the record of appeal, we absolutely agree with their arguments that there is a procedural irregularity regarding the legal requirement imposed under section 210 (1) (a) of the CPA requiring the trial Judge to sign at the end of the testimony of each witness. The Court has observed that in the entire record of appeal, the trial Judge did not sign the proceedings after recording the evidence of each witness who testified in the present case. The importance of appending signature was underscored by the High Court's decision of **Richard Mebolokini vs. Republic** [2000] TLR 90 at page 94 when discussing section 210 (1) of the CPA which we endorse. It states:-

> *"The signing is not a mere formality which can be dispensed with impunity. It signifies not only that the said evidence was written by the magistrate himself or herself or in his presence, hearing and under his personal impeccable assurance to its authenticity.*
> *Such evidence, in my considered opinion, can form part o f the record of proceedings if so recorded and signed. It is therefore highly dangerous to act on unsigned evidence (at least on appeal) because there is no guarantee that it was the very evidence which was recorded by the trial*

magistrate in the presence of the parties concerned. When the authenticity of the record is in issue, noncompliance with section 210 may prove fatal"

Basing on the above cited case, we cannot over emphasize the fact that the pointed-out defects in the case at hand is incurable and therefore fatal. Its fatality was articulated by the Court in **Yohana Mussa Makubi and Another vs. Republic**, Criminal Appeal No. 526 of 2015 (unreported) wherein it was stated as follows:-

"In light of what the Court said in WALII ABDALLA KIBWITA's and the meaning of what is authentlc, 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. [Emphasis supplied]*

The above cited case confirms that the requirement is as well applicable to the High Court when conducting trails, as correctly submitted by Mr. Mutalemwa.

See also; **Chacha Ghati Magige vs. Republic** (supra) and **Mhajiri Uladi and Another vs. Republic**, Criminal Appeal No. 234 of 2020 (unreported). Going by the cases above cited, we are indeed satisfied that the evidence of PW1, PW2, PW3 and DW1 in this case was

vitiated for failure by the trial Judge to append her signature after the receipt of their respective evidence.

With regards to the consequences of the pointed-out omission, both parties are at one and invited the Court to invoke section 4 (2) of AJA and nullify the said proceedings, to which again we wholly agree to be the consequence in this case. However, the issue which made the counsel for parties' part ways is on the way forward whereby the rival arguments are centred on whether or not a retrial should be ordered. This is the issue we are called upon to determine.

As a starting point, we wish to restate the general principle for ordering a retrial as stipulated in **Fatehali Manji vs. Republic** [1966] 1EA 343 that:-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective/ it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not. to blame, it does not*

necessarily follow that a retrial should be ordered; ***each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".*** [emphasis supplied]

We have dispassionately considered the arguments for and against the retrial order. Further to that, we have critically considered the peculiarity and circumstances of this case. In our firm conviction; we think the fear expressed by Mr. Mutalemwa cannot be discounted.

In her argument Ms. Mbuya seems to agree that there were some procedural shortcomings pointed out during the trial, but promised that no new evidence shall be adduced at retrial. We are alive to the fact that parties adduce their evidence afresh during retrial and therefore, in our view, they cannot be precluded from leading evidence which did not feature at the original trial. Having all those in mind coupled with the above stated principle in **Fatehali Manji** (supra); we are of the view that, retrial may not be the just option in the circumstance of this case. Accordingly, we invoke revisional powers bestowed on us under section 4 (2) of the AJA and nullify the proceedings of the trial court with regards to PW1, PW2, PW3 and DW1 testimonies. We further quash the conviction and set aside the sentence meted to the appellant. In the

end we order for the immediate release of the appellant, Enock Lwenge from custody unless otherwise held for other lawful causes.

Appeal allowed.

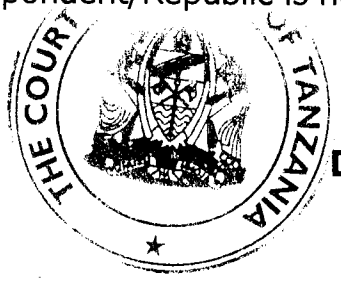
DATED at **MWANZA** this 30th day of November, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the Presence of Mr. Constantine Mutalemwa, learned Counsel for the appellant and Ms. Georgina Kinabo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL