

TANZANIA / JUDGMENT

20181211 TZCA Mwanza

COURT
TZCADECIDED
11 December 2018

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: MUSSA, J.A., MWANGESI, J.A., And NDIKA, J.A. ^ CRIMINAL APPEAL NO. 128 OF 2015 ANDREA BERNARDO-] APPELLANTS CHARLES MICHAEL J VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mwanza) (De-Mello, J. ^ dated the 6th day of March, 2016 in Criminal Sessions Case No. 31 of 2007 JUDGMENT OF THE COURT 4th & 11th December 2018 NDIKA, J.A.: The appellants, Andrea Bernardo and Charles Michael, were condemned to death by the High Court of Tanzania, Mwanza Registry, following their conviction for murdering Lucas s/o Shigani at Butwa Village in Geita District, Mwanza Region on 20th July, 2004 at 23:00 hours. The aforesaid conviction and the sentence came about following a trial in which the prosecution produced seven witnesses and three documentary exhibits that included a cautioned statement of the first i appellant and a post-mortem examination report on the deceased. In their respective defences, the appellants gave sworn testimony but produced no other witnesses. Upon the whole of the evidence on record, the trial court (De-Mello, J.) found the charge of murder proven beyond reasonable doubt. In so holding, the trial Judge rejected the appellants' defences whose thrust was the common claim that they were not at the crime scene that fateful night when the deceased was killed. The appellants now appeal against both conviction and sentence. At the hearing before us, Mr. Paulin R.K. Rugaimukamu and Mr. Geoffrey Kange, both learned counsel, appeared for the first and second appellants respectively. Mr. Hemed Halid Halfan and Ms. Ghati Mathayo, both learned State Attorneys, joined forces to represent the respondent Republic. In support of the appeal, each appellant had initially lodged a separate Memorandum of Appeal. However, at the hearing Mr. Rugaimukamu prayed to argue the appeal upon a three-point Memorandum of Appeal that he filed in substitution of the initial Memorandum of Appeal lodged by the first appellant. Mr. Geoffrey Kange took the same course on behalf of the second appellant as he argued the appeal upon a Memorandum of Appeal containing four grounds that he filed in substitution of the earlier one lodged by the second appellant. As Mr. Kange also abandoned the third ground of appeal he had raised, the appeal was essentially argued on three common grounds of complaint as follows:

1. That the trial Judge erred in law for failing to give the appellants an opportunity to participate in the selection of assessors which rendered the trial to be conducted without the aid of assessors.

2. That the recording of evidence at the trial was irregular due to the failure by the trial Judge to append her signature at the end of the testimony of every witness.
3. That the trial Judge erred in law for failing to hold that neither direct nor circumstantial evidence was adduced by the prosecution to prove the case beyond reasonable doubt. Arguing the first ground of appeal, Mr. Rugaimukamu assailed the trial court's selection of assessors contending that the appellants were not afforded an opportunity to state if they had any objection to any of the proposed assessors before they sat at the trial. Referring to pages 8A and 21 of the Record of Appeal, the learned counsel stated that the trial court basically mentioned the names of the chosen assessors and omitted to invite the appellants to express if they had any objection to any of them sitting at the trial. Relying on the recent decision of this Court in *Chacha Matiko @ Magige v. Republic*, Criminal Appeal No. 562 of 2015 (unreported), Mr. Rugaimukamu submitted that it was a rule of practice that accused persons must be invited to express their objections to any of the chosen assessors, if any, before commencement of the trial. He added that non-compliance with that requirement implies that the trial was conducted without the aid of assessors rendering it a nullity. In the premises, the learned counsel urged us to nullify the trial proceedings and proceed to quash the conviction and set aside the sentence against the appellants. He was, however, averse to a retrial of the appellants on the reason that the case concerned an allegation of murder committed fourteen years ago and that witnesses might not be available to testify at a fresh trial. On the second ground of appeal, Mr. Rugaimukamu criticized the learned trial Judge for failing to append her signature at the end of the testimony of each witness so as to authenticate the recorded testimony. He sampled the testimonies of PW1 at pages 25 to 29 of the record, PW6 at pages 45 to 52 and PW7 at pages 53 to 57, saying that none of the said testimonies was duly signed. While acknowledging that so far no rules had been made under section 215 of the Criminal Procedure Act, Cap. 20 RE 2002 to regulate the manner of recording evidence in the High Court, he contended that a testimony that is not duly signed by the presiding Judge is unauthentic and that the failure to authenticate a testimony is an incurable irregularity. To buttress his submission, he referred us to the recent decision of the Court in *Yohana Mussa Makubi & Another v. Republic*, Criminal Appeal No. 556 of 2015 (unreported). Addressing us on the third ground, apparently in the alternative, Mr. Rugaimukamu sought to impress upon us that there was no direct evidence linking the first appellant to the alleged murder as none of the prosecution witnesses claimed to have seen him committing the crime. He said the circumstantial evidence against the first appellant that he was one of the last persons to be with the deceased alive was weak and that it was at war with the testimony of the star witness - PW6 Seleli Konge - who adduced, as shown at page 50 of the record, that he saw a crowd of people stoning the deceased as he ran to the lakeshores, with his body in flames, so as to save his life. It was his submission, therefore, that there was no proof beyond reasonable doubt against the first appellant. 5 Mr. Kange, for the second appellant, associated himself with most of the argument made by Mr. Rugaimukamu. However, unlike his learned colleague, he urged that a retrial be ordered once the trial proceedings are nullified due to the infraction raised in the first ground of

appeal. As regards the alleged trial Judge's failure to sign recorded testimonies of the witnesses, he pressed that the said testimonies be discounted or expunged from the record. On that basis, he argued that there would remain no evidence on record on which the appellants could be convicted of the charged offence. Finally, on the third ground, he contended that the evidence of the key witness - PW6 - was also insufficient against the second appellant. On his part, Mr. Halfan conceded, with notable rectitude, to the existence of the omissions or irregularities raised and argued in the first and second grounds of appeal. On the authority of the two cases cited by Mr. Rugaimukamu - that is, *Chacha Matiko @ Magige v. Republic* (supra) and *Yohana Mussa Makubi* (supra) - the learned State Attorney agreed that the aforesaid irregularities rendered the trial proceedings irredeemably vitiated. Accordingly, he prayed that the conviction against the appellants be quashed and the sentence set aside. As regards the way forward, he urged us to order a retrial on the reason that none of the parties were to blame for the infractions that rendered the trial vitiated and that the evidence against the appellants was overwhelming. As regards the third ground of appeal, Mr. Halfan disagreed with the appellants that the circumstantial evidence against the appellants was weak. He fervently argued that the evidence of PW2 and PW6 provided sufficient proof in that the appellants were the last persons to be with the deceased alive. With leave of the Court, Mr. Halfan drew our attention to a further procedural infraction apparent on the face of the trial proceedings. He submitted that one of the assessors chosen for the trial, named Ms. Bernadetha Makelemo, was absent from the initial stage of the trial but was erroneously allowed to give an opinion on the case at the close of the trial. He elaborated that while the trial commenced on 25th November, 2013, the said assessor only participated in the trial from 2nd March 2015 as shown at page 45 of the record and that she only heard the testimonies of the last two prosecution witnesses as well as the defence evidence but missed out the testimonies of the first five prosecution witnesses. Despite not participating in the most part of the proceedings, Ms. Makelemo gave her opinion to the trial court as shown at page 72 of the record. Relying on the decision of the erstwhile Court of Appeal for Eastern Africa in *Joseph Kabui v. Reginam* (1954) 21 E.A.C.A 260, the learned State Attorney submitted that the trial was a nullity for allowing Ms. Makelemo to give an opinion on the case without having heard all the evidence adduced at the trial. Concluding, Mr. Halfan prayed that the trial proceedings be nullified on account of the irregularities alluded to earlier and urged that the appellants be retried. He added that the contention that witnesses cannot be found due to the passage of a long time since the commission of the alleged murder holds no water. Both counsel for the appellants had nothing much to say by way of rejoinder apart from reiterating their earlier submissions. On our part, we have duly considered the learned submissions of the parties. To begin with, we deal with the first ground of appeal, which faults the trial court's selection of assessors. On this issue, the parties are concurrent that the appellants were denied the opportunity to express if they had any objections to any of the chosen assessors sitting at the trial before the said trial commenced and that the said denial amounted to a violation of a rule of practice. Indeed, the record does not indicate whether the appellants were invited by the trial court to express objections to the assessors. That was obviously an irregularity as was held by the

Court in *Laurent Salu and Five Others v. Republic*, Criminal Appeal No. 176 of 1993 (unreported), a decision referred to and followed in *Chacha Matiko @ Magige* (supra). In *Laurent Salu* (supra), the Court observed that: "Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing." Then, the Court went on to hold that: "In the instant case, it is not known if any accused persons had any objection to any of the assessors and to the extent that they were not given the opportunity to exercise that right, that clearly amounted to an irregularity. "[Emphasis added] It is troubling that the trial court failed to accord the appellants the opportunity to air their views on the chosen assessors thereby abrogating their right to a fair hearing. Accordingly, we find substance in the first 9 ground of appeal but we shall revert later to this issue when determining the appropriate order to make in view of this irregularity. On the second ground, the parties are also unanimous that the trial Judge omitted to append her signature at the end of the testimony of each witness so as to authenticate the recorded testimony and that the said omission was, yet again, a breach of a rule of practice. Certainly, the original record confirms that, indeed, none of the recorded testimonies were authenticated by the trial Judge by appending her signature. In this regard, we wish to refer to our recent decision in *Yohana Mussa Makubi* (supra), cited to us by Mr. Rugaimukamu, where we discussed at length the issue under consideration and held that: 'We are thus, satisfied that, failure 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 there from.' 10 In the above case, the Court concluded that the omission by the presiding Judge to sign the testimonies recorded at the trial vitiated the recorded testimonies. We subscribe to that position and in the instant case we would, accordingly, discount all the recorded testimonies on account of this infraction. It means, therefore, there is no evidential material upon which the appellants' respective convictions could be examined or sustained by this Court. We recall that Mr. Halfan drew our attention to yet another disquieting procedural infringement that Ms. Makelemo, one of the assessors, gave her opinion to the trial Judge on the case despite having not participated in the most part of the proceedings. Certainly, it is undisputed that although Ms. Makelemo was chosen to sit as an assessor she was initially absent from the trial and did not hear the testimonies of the first five prosecution witnesses (PW1 to PW5). She only sat at the later stage of the trial when the last two prosecution witnesses (PW6 and PW7) and the appellants gave their testimonial accounts. We agree with the learned State Attorney that it was wrong to allow her to give an opinion to the trial Judge on the case at the close of the hearing as she had not heard all the testimonies. Indeed, in *Joseph Kabui* (supra) relied upon by Mr. Halfan, the Court of Appeal for Eastern Africa held a trial a nullity after an assessor who had not heard all the evidence

was allowed to give an opinion of the case. The relevant part of that holding reads thus: "We were of the opinion that in taking the third assessor back into service and taking his opinion on a case in which he had not heard all the evidence, the learned trial Judge had acted unlawfully and that the defect in the trial was not a mere irregularity, but rendered it a nullity." [Emphasis added] Recently, this Court took the same stance in *Sabasaba Enosi v. Republic*, Criminal Appeal No. 135 of 2015 (unreported) where it held: "In our considered view, since none of the two sets Of assessors heard all the evidence, it was illegal for any of the assessors to give an opinion on the case. Therefore, it cannot be safely vouched that the trial was conducted with the aid of assessors as required under section 265 of the Criminal Procedure Act and the trial becomes a nullity." See also *John Masweta v. General Manager MIC (T) Ltd*, Civil Appeal No. 113 of 2015 (unreported). We think the effect of the irregularities we have dealt with so far is to render the entire trial proceedings a nullity. What remains to be determined is whether or not an order ought to be issued for the retrial of the appellants. In considering whether an order for retrial in this matter would be justified or not, we think it is necessary to pay homage to the celebrated decision in *Fatehali Manji v Republic* [1966] 1 EA 343, in which the erstwhile East African Court of Appeal enunciated, at page 344, the principles for determining such an issue: "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 the 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 retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person." [Emphasis added] We recall that while Mr. Rugaimukamu implored us to refrain from ordering a retrial on the reason that witnesses might not be available to testify at a fresh trial, his two learned friends took the contrary view and advised that a retrial be ordered. We are cognizant that the initial trial was rendered defective due to the mistakes or omissions committed by the trial court, but that in itself is not a ground for ordering a retrial. Even though we anticipate that any fresh trial of the appellants will face difficulties in procuring the appearance of witnesses, we cannot speculate at this stage whether witnesses will be available or not. Moreover, looking at the "evidence" on record we take the view that the vitiated trial was equally contested. In the circumstances, we think that the interests of justice require that an order for a retrial be made. All told, we are constrained to allow the appeal on the basis of the first and second grounds of appeal and, for the purpose of addressing the irregular reception of the opinion of the absentee assessor, we simultaneously invoke our powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 to rectify that error by way of our revisionary powers. Thus, we nullify the entire proceedings and judgment of the trial court thereby quashing the conviction and setting aside the sentence against the appellants. We further order that the appellants be retried as expeditiously as possible before another judge of competent jurisdiction and a new set of assessors. In the meantime, the appellants shall

remain in remand custody pending retrial. Our disposal of this matter in the above terms renders it unnecessary for us to deal with the third ground of appeal. Order accordingly.
DATED at MWANZA this 10th day of December 2018 K. M. MUSSA JUSTICE OF APPEAL S. S. MWANGESI JUSTICE OF APPEAL G. A. M. NDIKA JUSTICE OF APPEAL I certify that this is a true copy of the original, E. USSI DEPUTY GISTRAR COURT PPEAL 15

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/320821/source_file/cce455b553d816e1/20181211_TZCA_Mwanza.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/andrea-bernardo-v-the-republic-murder-tzca-2018>

Prepared on 28 October 2026 · Esheria