

TANZANIA / JUDGMENT

John M

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA CRIMINAL APPEAL NO. 9005 OF 2024 (Appeal from the decision of the
District Court of Ukerewe at Nansio (Nyahega, SRM) dated 22nd of February, 2024, in Criminal
Case No. 40711 of 2023.) JOHN MICHAEL CHIBUGA
APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

4th, & 30th October, 2024 CHUMA, J. The Appellant was arraigned in the District Court of Ukerewe for two offences namely armed robbery, contrary to section 287A, and grievous harm contrary to section 225 of the Penal Code, Cap.16 R.E. 2019. The appellant denied the charges but at the end of the trial, he was found guilty, convicted, and sentenced to imprisonment for thirty (30) years for the 1st count and seven (7) years for the 2nd count. The trial court's decision has utterly aggrieved the appellant. He has instituted this appeal, challenging both conviction and the sentence fronting about five grounds of appeal paraphrased as follows: 1

1. That, PW1 was of no evidential value hence if she did not know Swahili how did she manage to say his particulars and that was a Christian follower without being led by the interpreter? If that who was an interpreter at that moment?
2. That, the trial magistrate wrongly acted upon the poor visual identification, PW1 failed to describe the appellant before coming before the court, and astonishingly? Those features like attire and physical appearance of the appellant did not tell anybody. That was a dock identification.
3. That, the Exh. P2 (Certificate of Seizure) is nullity hence no search order was given to PW7 a required u/s 38 (1) (c) of CPA (Cap. 20 R.E 2022)
4. That, the Exh. P3 collectively admitted were of no evidential -value and, hence were not identified by the PW1 and PW2.
5. That, he does not pen off without saying that, the prosecution side failed to prove the offence beyond all reasonable doubts. The backdrop of the case is not complicated. They are to the effect that at around noon hours on 15th December, 2023, the victim was at her employer's house, which featured in the trial proceedings as PW3 when the appellant

knocked on the gate and asked about the whereabouts of the owner of the house. After knowing their absence, he took the victim's phone made ITEL black in colour valued at TZS. 25,000/= and unleashed terror by attacking her and injuring her on the forehead and left arm (left 2 hand) with a machete (bush knife). The appellant demanded to be shown the room where PW3 stored "Mabondo". Feeling threatened the victim showed the appellant the room. PW2 who saw the assault raised an alarm that alerted his mother and the rest of the neighbours who came and found PW1 bleeding. She informed them that she had been attacked by the appellant who had then run for cover. PW1 was taken to police where she was issued with a PF3 that enabled her to access medical services at Nansio Government Hospital. A police swoop managed to apprehend and arraign the appellant in court. After the trial proceedings that saw the prosecution marshal seven witnesses against one for the defence. In his defence testimony, the appellant protested his innocence, he denied that he injured or robbed PW1 at all. After the proceedings, the trial court convicted and sentenced on both counts. Kicking off the discussion of the matter was Ms. Diana Daniel, learned counsel, whose services were enlisted by the appellant, while the Respondent was represented by Ms. Martha Mtiti, learned State Attorney. Submitting in support of the appeal on grounds one, two, and five of the appeal were argued jointly to read as the case was not proved beyond a reasonable doubt, in her brief submission, contended that the prosecution evidence was not sufficient enough to convict the appellant on the crime he was charged with, this is so because first, the victim (PW1) gave evidence without taking oath as shown at page 9 of the trial court typed proceedings that she was sworn on but later on the same proceedings reveals that PW1 does not know how to speak Swahili and the interpreter came later. He prayed for such evidence to be expunged from the record for being unsworn evidence then the rest of the evidence remains as hearsay evidence. She submitted further by citing section 198 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019 which entails that any witness must take oath failure of which the testified evidence becomes valueless. Nonetheless stated that the record reveals the existence of communication between PW1 and the accused and the rest of the witnesses but it was not indicated on what language of communication was used. Hence the evidence of PW1 was taken in contravention of the law. She contended that there were contradictions in evidence on pages 15 to 16 of the trial court typed proceedings whereby PW3 the owner of the house where the victim used to stay, testified that on his arrival at his house, he found the victim bleeding but on page 16 when cross-examined stated that on his arrival at 4 his house, the victim was ready taken to hospital. Yet another contradiction is on PW4 a mother of PW2 at page 19 of the typed proceedings stated that she sent his son (PW2) along with his young sister to Leonard Mashaka to take lemon but PW2 in his evidence talks only about himself who saw the victim being cut by the appellant on page 14 of the typed proceedings. At the same time, PW4 alleged to have shouted out leading her neighbours to appear on page 19 of the typed trial proceedings, while PW2 alleged that PW4 called the neighbours on page 14 of the typed trial proceedings. The counsel submitted that the pointed contradictions create doubt on the prosecution case and PW1, PW3, and PW4 failed to identify the accused, she referred this court to the decision of the apex court in Omary Ndaki Vs. R Cr Appeal No 554 of 2015 CAT.

Also, in *Fahad Khalifa Vs. R Criminal Appeal No 573 of 2020 HC*, whereby the court insisted on the importance of identifying the accused as the one who did commit the alleged offence. She stated that the case was not proved to the required standard. Submitting in respect of grounds 3 and 4 of the appeal, contended that exhibit. P3 was admitted collectively on page 28 of the typed trial proceedings, contrary to what was held in the case of *Antony M. Masega 5 Vs. Pelina (Mama Mgesi) & Another, Civil Appeal No 118 of 2014* that curtails collectively admission of exhibits, she prayed to exhibit. P3 be expunged from the record as a result the remaining evidence will be hanging. She urges the court to allow the appeal by quashing the trial court proceedings and setting aside the conviction leading to a release of the appellant from prison. The respondent's reply was equally formidable. Ms. Mtiti's submission began with a preambular statement expressing her support of the trial court's decision that convicted and sentenced the appellant, while the appellant's advocate submitted by combining grounds 1, 2, and 5 as one ground and ground 3 and 4 as one, but the respondent without mentioning exactly number of grounds of appeal but she replied in a fashion which includes three grounds of appeal. Submitting on the first ground of appeal, she contended that what was argued by Ms. Dianna was baseless in language because, on page 9 of the typed trial proceedings, PW1 took oath contrary to what was submitted by Ms. Dianna, advocate for the appellant. She stated that the prosecutor informed the court that PW1 knew only Sukuma language as a result interpreter came into service in paragraphs 2 to 4 on page 9 of the typed 6 trial proceedings in terms of Section 211(1) of CPA, hence this provision was dully complied with. Failure to mention her particulars did not prejudice the adverse party because are not party of evidence. She further stated that although court proceedings are silent on this issue in practice the court is normally informed before in case one of the parties does not understand the language of the court. On page 11 of typed trial proceedings when cross- examined PW1 responded to the accused person that she can hear Kiswahili but can not speak Kiswahili. So, the issue of name, age, etc one can manage to explain even without an interpreter. She cited the case of *Michael Jindendele Vs. R Criminal Appeal No 136 of 2018 CAT at Shinyanga* on page 5 the court insisted on the importance of adhering to section 211(1) of CPA. In circumstance, the appellant was not prejudiced in any how. She stated that this ground wants of merit so it should be dismissed because the trial court considered the testimony of both sides. Concerning ground two of the appeal, the learned counsel held the view that the issue of poor identification by PW1 and PW2 lacks merit as the appellant was well identified by PW1 on page 10 of the typed proceedings in paragraphs 6 and 7 also, in cross-examination on page 11 on paragraph 2 last line of the typed trial proceedings identified the 7 appellant by physical appearance and attire. Referring to the testimony of PW1, Ms. Mtiti argued that the time when the crime took place was in broad light at noon hours hence it was very easy for PW1 to see and identify the appellant and testimony proved. The evidence of PW1 was corroborated by the evidence of PW2, and PW4 on pages 14 and 19 respectively, and PW5 on page 20, the appellant fled to the house of PW5 and stayed there for a while hence he was well identified while PW7 who arrested the appellant. She supported her contention by citing the decision of the Court in *Jibril Okash Mohamed Vs. R, Cr Appeal No 331 of 2017 CAT* at page 43, para 5, this ground is also bound

to fail. On ground last group of the appeal, the respondent was of the view that the appellant was arrested in a hurry or immediately after committing the offence hence the arresting officer couldn't prepare a search warrant. However, the absence of a search warrant can not vitiate the performed task. Non-compliance with section 38(1) (c) does not exonerate the appellant from the offence as it was held in the case of Juma Mzee Vs. R Cr. Appeal No 19 of 2017 on page 13. The facts of that case are similar to the instant one hence what is decided in that case will guide the instant case. 8 She further argued that in Section 40 of CPA, a search warrant can be issued and executed at any time, and Section 41 allows a police officer to search a suspect in immediate control, and that is what was done in this case. Section 42(2) of CPA was well exercised by PW7 in that incidence. This point again lacks merit and has to be dismissed. As to the issue of Exhibit P3, PW1 in her evidence explained how she identified the appellant and PW2 explained how he saw the incident. Who identified exhibit P3 is PW7 on page 28 because PW1 is not the one who seized exhibit P3. She stated that the elements of the offence were established on the required standard. Regarding the pointed-out contradictions by Ms. Diana especially on PW4 and PW2 never prejudiced the appellants' right, who entered the house in PW2 only after pushing the gate hence there is no contradiction. Also, the alleged PW4 and PW2 contradictions are not true as the submission by the appellant's counsel goes contrary to the proceedings on page 14. There is nowhere PW2 shouted, it was PW4 who shouted on page 19, this ground is misconceived as well as lacks merit. In sum, the respondent prayed for the dismissal of the appeal as it lacks merit. In rejoinder, the appellant submitted that Ms. Mtiti admitted that PW1 mentioned her particulars and that she never knew how to speak 9 Swahili above all the record reveals that the interpreter introduced later after those particulars. Hence it is as good as no oath was taken by PW1. On identification issue is that PW5 never identified the appellant which stated there is only that he entered the house without naming the person who entered on page 20 of the typed trial proceedings. PW1 in her evidence was not even shown the alleged bush knife exhibit P3. The last point is on contradiction where PW4 on page 19 two persons were sent to bring lemon and PW2 stated that one person entered there to take lemon. She contended that prosecution evidence was so contradictory. In the end, she reiterated her prayers. The parties' contending submissions bring out the pertinent question of whether the guilt of the appellant was established to support the conviction from which this appeal arises. To start with the issue of the victim (PW1) giving evidence without taking oath contrary to section 198(1) of the Criminal Procedure Act, Cap. 20 R.E 2019 (hereinunder CPA), it was the appellant's counsel's view that the evidence adduced by the victim is valueless for being taken without oath and it should be expunged from the records. This is because after the prosecution informed the court that the victim could not speak Swahili and 10 that she could only speak Sukuma language the court proceeded in swearing the interpreter without the victim. As shown on pages 9 and 10 of the typed trial proceedings. Also, the communication between the victim and the accused at the scene of crime was not described. Nonetheless, the prosecution held a firm view that the victim took oath inline with the law, so there is nothing to be expunged from the record as everything was in line with the law. Responding to this point I wish to quote the trial court proceedings. The record

on page 9 for ease of reference reads: - "PW1 MDALA D/O MANGU 29YEARS, SUKUMA, KAKEREGE, CHRISTIAN SWORN AND STATES AS FOLLOW: Public Prosecutor: The witness Mdala Mangu cannot speak Swahili. She speaks only Sukuma. The witness has come with her brother to be her interpreter. Court: The brother of Mdala Mangu one Malele Maduhu will be sworn to be the interpreter. Malele Maduhu.... Sworn and interpretes as follows; ... From the quoted lower court proceedings, no doubt the interpreter was arranged by the prosecution and not the court. The court was only notified by the prosecution on the presence of PW1's brother Malele Maduhu 11 for the purpose. And that the court informed about language barrier of PW1 after recording her oath. That immediately after being informed of the presence of PW1's brother by the prosecution, the trial court without further ado swore in the pre-arranged interpreter. In doing so, the trial court did not address the appellant if he had any objection or reservation against the named person intended to serve as an interpreter. More so, the trial court did not on its part inquire into whether such person had free from bias against the appellant and was a proper person to serve as an interpreter. The record does not reflect if such person was a regular court interpreter in terms of section 30 of the Magistrates Courts Act, [Cap. 11 R.E. 2022]. The omission means that chances of potential conflicts, appearance of impropriety and the likes were not eliminated before Malele assuming his role as an interpreter. Since it was not shown on the record that the supposedly interpreter was a regular court interpreter and the trial court did not at the outset inquire into whether such person was fit for the task, it is not in doubt that the trial court did not do what was expected of it, and in the result, the appellant was completely sidelined in the process which was unilaterally arranged by the prosecution side. 12 Kigundu Francis and Another Vs. Republic (Criminal Appeal No. 314 of 2010) the court gave provision of section 211 (1) a broader interpretation by including situations in criminal proceedings that require interpretation of evidence from a witness who does not understand the language of the court. The obligation to arrange for the provision of such interpreter to interpret evidence of an accused person or from witnesses who do not understand the language of the court. The court stated thus; "In Tanzania, by statute, the courts that are entrusted with the duty of administering justice and ensure fair trials, can only use two languages; Swahili and English. But that does not mean that people who do not know or understand the two languages cannot get fair trials. They can, because, under section 211 of the Criminal Procedure Act the court may, in such situations, arrange for some interpreter to translate the proceedings or evidence for the accused person or from witnesses who do not understand the language of the court. However, under section 4 (b) of the Oaths and Statutory Declarations Act (Cap 34 RE2002) such interpreters must take judicial oaths prescribed under the Act before embarking on any interpretation." From the foregoing authorities, it is a settled position of law that 13 section 211 of the CPA makes it mandatory for the court to arrange for provision of an interpreter to an accused person or a witness who does not understand the language of the court once needed. Failure to comply with section 211 (1) of the CPA, is a fatal irregularity which goes to the root cause of fair hearing. The omission may vitiate the entire proceedings or the evidence may be expunged depending on the circumstances of each case as the case may be. In the instant case, the

evidence of PW1 was interpreted by an interpreter arranged by the prosecution, there was a complete omission to provide an interpreter by the court. The omission denied the appellant a fair hearing considering the gravity of the charge he stood charged. The omission is, for reasons already endeavoured above, a fatal irregularity which vitiates the evidence of PW1. As indicated above the republic contended that section 198(1) of CPA complied with as per page 9 of the typed trial proceedings. It is very common that in court it is the Records Management Assistance (RMA) who leads the witnesses in taking oath i.e “sema kwa kutaja majina yako, mimi..., naapa mbele ya mahakama hii kuwa Ushahidi nitakaoutoa utakuwa wa kweli, kweli tupu, ewe Mungu nisaidie” In circumstance one may hardly 14 say this does not need someone to know Swahili to repeat those words believing the victim understands Swahili when someone speaks it. But the victim on page 11 stated that she cannot speak Swahili but she can hear it. The response takes me to a question how did she manage to follow proceedings when taking oath? Before taking oath the introductory party towards oath taking how did the witness communicate? Those questions remain unresolved. Since the oath of PW1 was taken before engaging an interpreter, then I consider that the evidence of PW1 was taken without oath contrary to the dictate of section 198(1) of CPA. I would have expunged the evidence of PW1 and consider the rest. However, considering the gravity of this offence, I will not opt so, rather I quash the proceedings involving the evidence of PW1 and the judgment set aside and order afresh recording or hearing of PW1 evidence by another magistrate with competent jurisdiction who will need to recompose another judgment. This ground suffices to dispose of this appeal without venturing to the rest grounds of appeal. In the upshot of all this, I find the appeal partly allowed to the extent here in above directed. 15 I so order. DATED at MWANZA this 30th day of October, 2024. W.M. CHUMA JUDGE 16 Judgment delivered in court before the appellant in person and Ms. Matha Mtiti State Attorney for the Republic this 30th day of October, 2024. W.M. CHUMA JUDGE 17

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