IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 360 OF 2014

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

ADAM KITUNDU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Makuru, J.)

dated the 26th day of November, 2014
in
Criminal Appeal No. 63 of 2012

JUDGMENT OF THE COURT

29th May, & 2nd June, 2015

MASSATI, J.A.:

Before the District Court of Iramba, the appellant and another person were charged with the offence of Armed Robbery contrary to section 287 A of the Penal Code. It was alleged there that, on the 4th day of August, 2008 at around 18.00 hrs, at New Kiomboi, within Iramba District, Singida Region, the duo robbed one REHEMA d/o IBRAHIM of her cash (27,000/=) a Nokia cell phone (worth 75,000/=), and a cellular battery (valued at

6,000/=) all total valued at shs.114,000/= by assaulting her with a bush knife.

At the end of the prosecution case, the appellant's co-accused was acquitted. After hearing the appellant's defence, he was convicted and sentenced to 30 years imprisonment. He unsuccessfully appealed to the High Court. Now, he has come to this Court on a second appeal.

Before us, the appellant appeared in person. He was all set to argue his two ground memorandum of appeal that he had earlier on filed. The respondent/Republic, was represented by Ms. Beatrice Nsana, learned State Attorney.

Before the hearing of the appeal, Ms. Nsana, sought the Court's indulgence to raise a point of law. When the Court allowed her, she went on to point out certain discrepancies in the appellant's notice of appeal whose effect would be to render the appeal incompetent and liable to be struck out.

However, before she rested her case, the Court took it with her, and asked her to address it on two irregularities that were apparent on the record. The first was, whether it was proper, for the trial to have been

handled by two magistrates, without there being any reason on record? The second one was, whether it was proper for one magistrate to compose, and another one to sign a judgment? Ms. Nsana, was quick to point out that what happened was, contrary to section 214 (1) of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the CPA) and resulted in a miscarriage of justice, so the irregularities were incurable. She therefore prayed that the Court revise those proceedings of the trial court and those of the High court, and quash them and order that the case be remitted to the trial court for it to proceed from the defence stage, when the successor magistrate took over; and that in case of another conviction, the trial court be directed to take into consideration, the period that the appellant has spent in custody so far.

On his part, the appellant said that he had nothing useful to say in response to the points of law, which he was leaving to the Court; but emphasized that he had already spent many years in prison already.

We appreciate the points of law raised by Ms. Nsana, and we would on that account, have ordinarily struck out the appeal. But the question, we asked ourselves was, would an order striking out the appeal be of any

practical effect if the appellant was to reinstitute the appeal? We thought not, and we give our reasons below.

It is true that the trial commenced before one M.J. Chaba RM, who took all the witnesses from the prosecution case, ruling at the end that the appellant had a case to answer, on 21/10/2008. He then adjourned the case for defence hearing, at least twice, the last time being 7/11/2008, when he fixed it for defence hearing on 21/11/2008. For some reasons which are not clear, the case was adjourned again at least twice until 30/12/2008, when the defence hearing began before C.M. Tengwa, RM. No reason is shown, why Chaba, RM, could not proceed with the trial.

Apparently, this would seem to have been done under the authority of section 214 (1) of the CPA. That provision is set out below:

> *"(1) Where any magistrate, after having heard and recorded the whole or part of or any part of the evidence in any trial or conduct in whole or part any committal proceedings, is* ***for any reason unable to complete the trial*** *or the committal proceedings or* ***he is unable to complete the trial or committal proceedings within a reasonable time,*** *another magistrate who has and who exercises jurisdiction may take over and*

continue the trial or committal proceedings, as the case may be and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial, and if he considers it necessary resummon the witnesses and recommence the trial or the committal proceedings."

[Emphasis supplied]

But as Ms. Nsana, has correctly submitted, what was done in the present case was contrary to section 214 (1) of the CPA. In a recent decision of this Court, in this same session, of **ABDI MASOUD IBOMA AND 3 OTHERS v. R**. Criminal Appeal No. 116 of 2015 (unreported) we held that, that provision requires that reasons be laid bare to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacked authority and jurisdiction to proceed with the trial and consequently all such proceedings before him were a nullity. Similarly, in the present case no reasons are on record, as to why the predecessor magistrate could not complete the trial. So, all the proceedings and judgment before Tengwa, RM are vitiated. As night follows the day, the subsequent proceedings before the first appellate court, are void.

But, there is another irregularity, and it is that, although the judgment was composed by Tengwa RM, it was signed by Chaba, RM but later Tengwa proceeded to record the mitigation and pass the sentence on the appellant. This is contrary to section 312 (1) of the CPA which provides as follows:

> *312 (1) Every judgment shall, except, as otherwise expressly provided by this Act,* ***be written or reduced to writing under the personal direction and superintendence of the presiding Judge or magistrate*** *. . . and* ***shall be dated and signed by the presiding officer as of the date on which it is pronounced*** *in open court. [Emphasis added]*

This provision must be read together with section 214 (3) of the CPA, which reads:

> *"214 (3) Nothing in subsection (1) shall be construed as preventing a magistrate who has recorded the whole of the evidence in any trial and who before passing the judgment, is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over*

and in the case of conviction for the sentence to be passed by that other magistrate."

So, section 214 (3) of the CPA comes into play only if, as in section 214 (1) for some reason, the predecessor magistrate is unable to complete the trial, but has recorded the whole of the evidence in such trial. In such a case the provision allows the predecessor magistrate to write the judgment, and the successor magistrate to read such judgment and pass sentence in case of a conviction. But this is not what happened in the present case.

In the present case, Chaba, RM heard the whole of the prosecution case (not the whole case) and without any known reason(s) Tengwa, RM took over and heard the defence case and proceeded to write the judgment. Then to cap it all, the original record reflects that Chaba RM, resurfaced in the picture, signed the judgment and passed it to Tengwa, RM to pass the sentence on the appellant. Without mincing words, these proceedings cannot be described in any other way, other than that they were highly irregular.

As the East African Court of Appeal observed in **EUSTACE v. R** (1970) EA 293, there must be an express statutory provision permitting

one magistrate to continue with a trial begun by another and such provision must be strictly complied with. There the Court, was considering section 196 of the Criminal Procedure Code, the predecessor of the current CPA. Like section 196, of the Criminal Procedure Code the only provision currently allowing such action is section 214 set out above, although the wording of the two provisions is slightly different.

In our view, on a true interpretation of section 214 (1) and (3) of the CPA, we are unable to read therein a situation where, without any reason, one magistrate can take over, continue and complete a trial begun by another magistrate, and then send back the judgment for the predecessor magistrate to sign and thereafter return the file to the successor magistrate to proceed with the sentencing process. We have no doubt therefore in declaring that the successor magistrate (Tengwa, RM) had no jurisdiction to do what he did.

So, for the above reasons, we decided that, rather than indulge in an academic exercise of striking out the appeal on account of the defective notice of appeal, and although that defect is not insignificant, the irregularities in the trial that we have shown above, are so fundamental, with far more reaching consequences to which we could not close our

eyes. So we exercise our revisional powers under, section 4 (2) of the Appellate Jurisdiction Act, revise and quash all the proceedings beginning with those conducted by Tengwa, RM and the first appellate court. We also set aside the sentence and order that the appellant be retried, beginning from the date the prosecution closed its case and the trial court found that he had a case to answer. We would add that if the new trial leads to a conviction, the time the appellant has spent in prison serving the sentence at present imposed on him, be taken into account when sentence is passed.

Order accordingly.

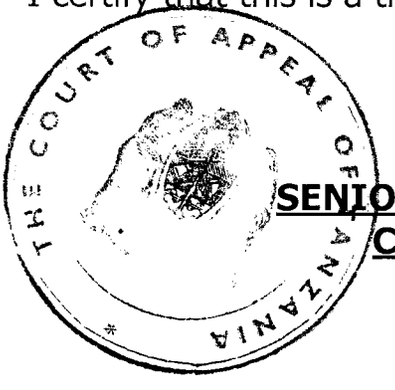
DATED at **DODOMA** this 1st day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEA

I certify that this is a true copy of the original.



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL