IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM:MASSATI, J.A., ORIYO ,J.A., And JUMA,J.A.)

CRIMINAL APPEAL CASE NO. 215 OF 2015

1. **SHABANI SEIF**
2. **SAID ABDALLAH @ CHEKA CHEKA.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Korosso,J.)

Dated the 30th day of March, 2015
in
Criminal Appeal No. 152 of 2014

JUDGMENT OF THE COURT

24th July & 19th August, 2015

ORIYO, J.A.:

Shabani Seif, Salum Bakari @ Samicool and Said Abdallah @ Cheka cheka were arraigned and convicted of armed robbery contrary to section 287A of the Penal Code, Cap 16, R.E. 2002. They were each sentenced to thirty years imprisonment. Their first appeal to the High Court was partly successful in that Salum Bakari @ Samicool, had his conviction quashed, sentence set aside and he was set free. However, for the appellants, Shabani

Seif and Said Abdallah @ Cheka Cheka, their appeals were found devoid of merit and consequently dismissed. Still aggrieved the duo came to the Court on a second appeal. Each appellant lodged a separate memorandum of appeal. While Shabani Seif had four (4) complaints on the merits of the lower courts' decisions; Said Abdallah @ ChekaCheka had nine (9) grounds of complaints.

At the hearing, the appellants appeared in person while MsAnnunciata Leopold, learned State Attorney, represented the respondent Republic. For apparent reasons, weinvitedthe parties to address us on the 9th ground of appeal by Said Abdallah, which stated:-

> " *9. That on the alternative and notwithstanding the fore grounds the first appellate judge grossly erred in law and fact by not considering the fact that the appellant was not given opportunity to say as to whether they wanted the case to start* ***denovo****or not when the casechanged the venue almost thrice and neither the*

predecessor gave any reason for that contrary to the provisions of law."

Said Abdallah, was the first to address us on the point. He told us that the hearing proceedings at the trial court proceeded before different magistrates without any reasons being given why the previous magistrate was unable to proceed with the trial to the end. In his view, the procedure adopted by the trial court was illegal and so was the judgment derived from an illegal trial. He prayed that he be set free, because in view of the illegality in the proceedings, there was no lawful judgment against him in the courts below.

Then we sought the views of the first appellant on the same subject. He refrained from giving us his comments allegedly because the complaint in ground 9 of the second appellant does not feature in his memorandum of appeal.

The learned State Attorney supported the second appellant on the complaint in the 9th ground of appeal. She submitted that the trial was conducted by four (4) different magistrates without reasons being given for the changes, which contravened section

214(1) of the Criminal Procedure Act. She concluded that the appellants were subjected to an unfair trial. In support, she referred us to the decision of the Court in **Abdi Masoud @ Ibomba and 3 Others Vs Republic** Criminal Appeal No. 116 of 2015 (Dodoma Registry, Unreported), to fortify on the necessity of complying with the statutory requirements in section 214(1).

Underscoring the underlying dangers of frequent changes of trial magistrates, the learned state attorney submitted on the inherent dangers of not recording reasons for changes, which can be avoided. She pointed out someexamples, including the random markings of exhibits by successor magistrate without verifying on the previous proceedings. Another danger of change of trial magistrates is in the decision to be composed at the end of the trial by a magistrate who did not have an advantage of seeing the witnesses testifying and their demeanor in the witness box. In view of this the learned State Attorney urged us to exercise the powers of the Court under Rule 38 of the Court Rules, 2009, to order a retrial.

At the conclusion of the lucid submission by the learned State Attorney we invited the appellants for their responses. The first appellant stated that he was in agreement with the submissions and prayed that the appellants be given the benefit of doubt. However, the second appellant simply left it to the Court to decide on their fate.

Indeed, our perusal of the record bears testimony to the submissions by the learned state attorney in support of ground nine of appeal. The trial began before E. N. Kyaruzi, Resident Magistrate (RM), on 11/7/2013. He recorded the testimonies PW1 and PW2. On 27/11/2013, the trial was taken over by S.D. Msuya, SRM, who recorded the testimonies of PW3 and PW4. On 21/1/2014, S.W. Mwalusamba, R.M took over the trial and recorded the evidence of PW5 only, before S.B. Fimbo, RM came into take the evidence of the remaining prosecution witnesses, PW6, PW7 and PW8. Fimbo, RM proceeded to take the defence case as well from DW1, DW2 and DW3 before proceeding to compose the judgment.

We found no reasons on record as to why Kyaruzi, SRM, could not proceed with the trial until conclusion. Similarly, for the successor magistrates, no reasons were assigned for the random changes.

Section 214(1) of the Criminal Procedure Act is relevant in this respect. It provides the following:-

> *" Where any magistrate, after having heard and recorded the whole or part of or any part of the evidence in any trial or conducted in whole or part any committal proceedings* ***isfor any reasonunable 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 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)*

In view of the mandatory nature of the language employed by the draftsman in section 214(1) above, the reasons for reassignment of trial magistrates after Kyaruzi SRM had to be recorded for the obvious reasons; essentially to ensure a fair trial to those who are brought to courts of law. The absence of the reasons for the changes of trial magistrates thrice in a single case, impacts negatively in the mind of an ordinary person.

Under similar circumstances, in **Abdi Masoud @ Ibomba and 3 others Vs Republic** (supra), the Court made the following observation:-

> *" In our view, under section 214(1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrates. It is a requirement of the law and has to be complied with. It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case. Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings*

of the successor magistrate were conducted without jurisdiction, hence a nullity."

In an earlier decision of the Court in **Priscus Kimaro Vs Republic** Criminal Appeal No. 301 of 2013 (unreported), the Court stated as hereunder:-

".. where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."

We subscribe to the above views and find that ground 9 of appeal has merit.

All said and done, there is no gainsaying that the proceedings in the trial court were vitiated and therefore rendered a nullity.

The only remaining issue is whether we should order a retrial as urged by the learned state attorney or not. Our concern here is whether ordering a retrial will not amount to affording the

respondent an opportunity to fill in the gaps apparent in the evidence tendered in the trial court. For instance, we do not think that the doctrine of recent possession was properly invoked, in the circumstances of this case.

For the reasons stated, the appeals by Shabani Seif and Said Abdallah are therefore allowed. We quash their convictions and set aside the sentences of thirty years imprisonment. They are to be immediately released from prison unless otherwise lawfully held.

DATED at DAR ES SALAAM this 5th day of August, 2015

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H.JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL