IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 201 OF 2015

1. **ONESMO S/O JOSEPH @MANYORO .....1ST APPEALNT**
2. **PRISCUS S/O EDES KIONDO @ KACHAA.....2ND APPEALNT**
3. **INNOCENT S/O JULIUS @NYERA.....3RD APPEALNT**
4. **EDWARD S/O MSHONE TARIMO @BOB CHRIS.....4TH APPELLANT**
5. **KELVIN S/O KAUNDA MWANYAMA @ JEVI.....5TH APPEALNT**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 22ND day of January, 2015
In
Criminal Appeal No. 78 of 2014

JUDGMENT OF THE COURT

9th & 13th October, 2015

JUMA, J.A.:

This is a second appeal by Onesmo Joseph @ Nanyaro (the 1st appellant), Priscus Edesi Kiondo @ Kachaa (the 2nd appellant), Innocent Julius @ Nyera (the 3rd appellant), Edward Mshone Tarimo @ Bob Christo (the 4th appellant) and Kelvin Kaunda Manyama @ Kevo (the 5th appellant), against the dismissal by the High Court of their Criminal Appeal No. 78 of 2014 following their conviction and sentence of thirty years

imprisonment by the trial District Court of Arusha/Arumeru for armed robbery contrary to section 287A of the Penal Code, Cap 16.

The particulars of the charge were that on 13/12/2011 at an area near the Tropical Centre College in the Municipality of Arusha they jointly stole a total of 150,000 United States dollars, and 10,165 Euros all being the properties of the Kibo Palace Hotel. It was further alleged that immediately before and after the stealing, they used a pistol to threaten Agatha d/o Jackson and Elitumaini Gadiel Kihedu in order to obtain and retain the stolen properties.

When this appeal came up for hearing on 9th October, 2015, Ms. Elizabeth Swai, who was assisted by Ms. Sabina Silayo and Ms. Tarsila Asenga, all learned State Attorneys, raised a preliminary issue of law which she prayed for our determination. She contended that during the course of the trial proceedings in the District Court of Arusha/Arumeru in Criminal Case No. 303 of 2012, there occurred a change of trial Magistrates from C. Magesa-RM to G.A. Mwankuga-RM, which took place without recording any reason for that change. Ms. Swai referred us to section 214 (1) of the

Criminal Procedure Act, Cap 20 **(CPA)** which in a mandatory language, requires such change of magistrates to be explained.

Ms. Swai drew our attention to a decision of the Court in **Adam Kitundu vs. R.**, Criminal Appeal No. 360 of 2014 (unreported) to support her stance that the failure of the successor magistrate (G.A. Mwankuga-RM) to comply with section 214 (1) of CPA, makes subsequent proceedings before him, right to the proceedings and the judgment of the High Court on first appeal, to be anything but a nullity. The learned State Attorney urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 **(AJA)** to revise and quash all the proceedings from 30/05/2013 when G.A. Mwankuga took over the conduct of the trial right up to the Judgment of the High Court when the matter went on first appeal. Ms. Swai urged the Court to direct the trial court to consider the time the appellants have spent in prison should the continuation of their trial end in conviction.

All the five appellants appeared in person without learned Counsel. When he was given the chance to respond, the 1st appellant confirmed that indeed there had been a change of magistrate. He thought that change

was designed to exert more misery to the appellants. The 2nd appellant urged us, in whatever decision we make on this point of law, we should take into account the time they are still languishing in prison serving their current sentences. On his part, the 3rd appellant thought that since the two magistrates who changed places are very knowledgeable and experienced in legal matters, they must have deliberately made that mistake to detain the appellants longer in prison. The 4th appellant argued that since it is the trial court which made the mistake, the remedy should be an order releasing the appellants from prison. The 5th appellant joined hands with the 4th appellant to request for their immediate release from prison.

Upon our perusal of the record of the proceedings before the trial court, we ascertained that indeed there was a change of trial Magistrates which was done without any assignment of reasons why the learned trial magistrate, C. Magesa-R.M., was unable to complete the trial after hearing a total of five witnesses. Page 39 of the record reflects what transpired on 30/05/2013 when G.A. Mwankuga-RM continued with the hearing from where his predecessor had left to hear a sixth witness (PW6) after taking over the conduct of the trial:

"Date: 30/05/2013

Coram: G.A. Mwankuga—RM

Prosecution: Muhalila S/A

Accused: all present

Inter: Monica

Mr. Kinabo F.S. for 1st accused.

State Attorney— We have a witness, we are ready to proceed.

Mr. Kinabo: I am ready

Accuseds: We are ready too

Court: ***Section 214 CPA explained to accused***

Mr. Kinabo for 1st accused: we are ready to proceed.

Accused: We [are] all ready to proceed.

Court: ***Section 214 complied with.***

Sgd: G.A. Mwankuga—RM

30/05/2013" [Emphasis added]

Apart from the words **"section 214 complied with"** the above record shows, there is no reason shown why C. Magesa-RM was unable to

complete the trial. We agree with Ms. Swai that this failure to give reasons violates section 214 (1) of CPA which states:

> *214.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings* ***is for any reason unable to complete the trial*** *or the 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, re-summon the witnesses and recommence the trial or the committal proceedings****.* [Emphasis added].

The case of **Adam Kitundu vs. R.** (supra) which Ms. Swai cited to us, aptly describes the consequence which should follow from the failure to give reason of change of magistrates. It discussed the question *'...whether*

it was proper, for the trial to have been handled by two magistrates, without there being any reason on record?' The Court stated:

> *"...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..."*

Finally, in this matter we are minded to exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby declare a nullity and quash all the proceedings from

30/05/2013, including the judgment and sentence in Criminal Case No. 303 of 2012 in the District Court of Arusha/Arumeru District right up to the Judgment of the High Court in Criminal Appeal No. 78 of 2014.

We order a resumption of the trial of the appellants from where PW5 ended before another magistrate of competent jurisdiction. For the avoidance of doubt, the time the appellants have spent in custody so far after their conviction and sentence imposed by G.A. Mwankuga-RM, shall be deducted from their sentence should the trial court convict them. It is so ordered.

Dated at **Arusha** this 12th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL