IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

MZA. CRIMINAL APPEAL NO. 217 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

KISWAGA MITWANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 12th day of June, 2014
in
HC. Criminal Appeal No. 38 of 2012

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JUDGMENT OF THE COURT

3rd & 11th December, 2015
MJASIRI, J.A.:

In the District Court of Bunda District, the appellant Kiswaga Mitwango was charged and convicted of the offence of cattle theft contrary to sections 265 & 268 (1) (3) of the Penal Code Cap 16, R.E. 2002. He was sentenced to ten (10) years imprisonment. His appeal to the High Court was unsuccessful. In his quest for justice, he has now come to this Court on a second appeal.

It was the prosecution's case that on August 1, 2008 at about 5:00 hours at Nyatali Village within Bunda District, in Mara Region, the appellant did steal four (4) heads of cattle valued at Tshs. 1,100,000/= the property

of one Selasini. The prosecution relied on the evidence of PW1 Selasini Masunga, who was the complainant and PW2, E4392 D/CPL Juma, a police officer.

At the hearing of the appeal, the appellant appeared in person without the benefit of legal counsel while the respondent Republic was represented by Ms. Martha Mwadenya, learned Senior State Attorney.

The appellant being a layman and without legal representation did not have much to say, and he opted for the learned Senior State Attorney to submit first.

The appellant filed a five (5) point memorandum of appeal. However the learned State Attorney opted to argue ground No, 3 which is reproduced as follows:-

> *"That when the prosecution close their case the trial court did not inform the appellant's basic rights contrary to the Criminal Procedure Act."*

Ms. Mwadenya did not support the conviction of the appellant. She readily conceded to ground No. 3. She submitted that the trial court did not inform the appellant of his basic rights under section 231 of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). She stated that according to

the evidence on record the appellant was never advised of her rights to call witnesses and to produce exhibits. According to her, this was contrary to the principles of a fair trial.

She contended that this ground alone was sufficient to nullify the proceedings, the consequence of which is to order a re trial. She contended that the circumstances of this case do not justify a retrial, due to the following reasons:-

The sentence imposed on the appellant by the trial court was illegal. The appellant was sentenced to 10 years imprisonment which was contrary to section 170 (1) of the CPA. The maximum sentence which could have been imposed by the trial court was five (5) years imprisonment. She submitted further that the appellant has already served a five year sentence. The appellant was convicted and sentenced on October 26, 2011.

We on our part entirely agree with the submissions made by the learned Senior State Attorney. It is evident from the record that the appellant's rights to a fair trial as enshrined under Article 13 (b) (a) of the Constitution of the United Republic of Tanzania were infringed. We cannot over emphasise the need for our courts to ensure that the accused persons are accorded a fair hearing. An accused person who is not represented by a legal counsel is

already at a disadvantaged position. The only reason the accused is not having legal representation is that he is not in a position to engage the services of a lawyer. His position should not be worsened by the trial court denying him his rights which are explicitly stated under the law. Section 231 of the CPA provides as under:-

> *"(1) At the close of the evidence in support of the charge if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which under the provisions of section 300 to 309 of this Act, he is liable to be convicted* ***the court shall again explain the substance of the charge to the accused and inform him of his right***
>
> *(a) To give evidence on oath or affirmation, on his own behalf; and*
>
> *(b)* ***To call witnesses in his defence and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer;*** *and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*
>
> *[Emphasis provided].*

Upon a close and careful scrutiny of the record, it is not evident that the appellant was advised of his rights under section 231 of the CPA and what answers if any were given by the appellant. The relevant part of the record is reproduced as under:-

> *"Under section 231 of CPA Cap 20 R.E. 2002, the accused is given an opportunity to defend himself."*

It is unfortunate that this procedural irregularity was not noted and corrected by the first appellate court.

On the illegality of sentence, we would like to make reference to section 170 of the CPA which provides as under:-

> *"170 (1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences.*
>
> (a) *Imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of schedules to the Minimum Sentences Act which it has jurisdiction to pass the minimum sentence of imprisonment.*

Provided that this section shall not apply in respect of any sentence passed by a senior Resident Magistrate of any grade or rank."

The trial Magistrate in this case was a Senior District Magistrate so the proviso to section 170 (1) and (2) does not apply to him. In the circumstances the sentence of ten (10) years imprisonment was indeed illegal.

In the result, we nullify the proceedings of the trial court, quash the conviction of the appellant and set aside the sentence of ten (10) years imprisonment. The appellant should be set free forthwith unless otherwise lawfully held.

On the question of retrial, the appellant has already served a sentence of five years imprisonment. As stated above the sentence of ten (10) years imprisonment was illegal and the trial court did not have the mandate to impose it. No justice will be served by ordering a retrial. The criteria for ordering a retrial is succinctly stated in the case of **Fatehali Manji V. Republic** (1966) EA 343.

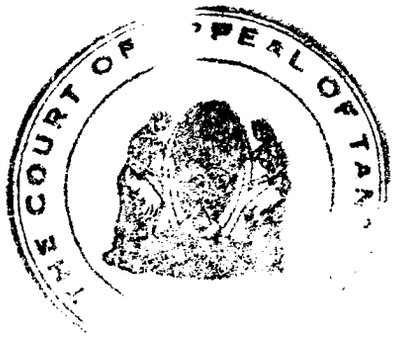
"In general a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency

of evidence or for the purposes of enabling the prosecution to fill gaps in its evidence at the first trial. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

We are clear in our minds that the interests of justice do not require a retrial in the present case. We are inclined to agree with the learned Senior State Attorney that the circumstances of this case do not warrant making an order for retrial.

Order accordingly.

DATED at MWANZA this 7th day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 315 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

MALIMA MAZIGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

Dated 21th day of July, 2014
in
HC. Criminal Appeal No. 11 of 2014

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JUDGMENT OF THE COURT

7th & 11th December, 2015
KAIJAGE, J.A.:

Before the District Court of Ukerewe at Nansio, the appellant was prosecuted in respect of the charge preferred under section 225 of the Penal Code, Cap 16 R.E. 2002.

At the trial, the prosecution led evidence to prove that on the 25th day of February, 2013 at about 08:00 hours, at Busangu Mugu Village within Ukerewe District in Mwanza Region, the appellant unlawfully caused grevious harm to one Mgufu s/o Yaya by cutting him with a panga on his left hand. At the conclusion of the trial, the trial court found the appellant guilty as charged, but no conviction was entered. All the same, the trial court

proceeded to mete out a sentence of seven years imprisonment. The appellant was aggrieved. His appeal to the High Court was unsuccessful, hence this second appeal predicated upon four (4) grounds listed in the memorandum of appeal.

Before us, like in the two courts below, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Revina Tibilengwa, learned Senior State Attorney.

When the appeal was called on for hearing, the learned Senior State Attorney sought, and we accordingly granted her leave, to present and argue a point of law affecting the competence of the appeal. In her brief, but focused submission, she pointed out that at page 26 of the record of appeal the trial court appear to have found the appellant guilty as charged without there being a conviction entered in terms of section 235 (1) of the Criminal Procedure Act, cap 20 R.E. 2002 (the CPA). She maintained that this constituted a fatal and an incurable procedural infraction rendering the trial court's judgment invalid and the appeals before the High Court and this Court incompetent. As to what should be a legal remedy, she invited us to exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act

Cap 141 R.E. 2002 (the AJA) by remitting the matter to the trial court for it to prepare and deliver a judgement that complies with sections 235 (1) and 312 (2) of the CPA.

On our part, we are, with respect, in entire agreement with the learned Senior State Attorney. We shall commence our discussion by examining section 235 (1) of the CPA which provides:-

> *"235 (1) The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused and pass sentence*** *upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."*
>
> *[Emphasis supplied].*

In this case, the trial court upon a clear violation of the provision of law hereinabove quoted, concluded its judgement thus:-

> *"Having so noted, I hereby find the accused guilty of the offence."*

Apart from the absence of a conviction entered against the appellant in terms of section 235 (1) of the CPA, the purported judgement of the trial

court does not as well conform to the mandatory provisions of section [illegible]

(2) of the CPA which reads:-

> *"S.312 (2) In the case of conviction the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

On the strength of the foregoing brief observation, we hold a firm view that since in this case there was no conviction entered against the appellant in terms of section 235 (1) as read with section 312 (2) of the CPA, no appeal against conviction and sentence could have been validly entertained by the High Court: (See, for instance, **JONATHAN MLUGUANI V.R;** Criminal Appeal No. 15 of 2011, **SHABANI IDDI JOLOLO AND THREE OTHERS V.R;** Criminal Appeal No. 200 of 2006 and **AMANI FUNGABIKASI V.R;** Criminal Appeal No. 270 of 2008 (all CAT, unreported).

Consistent with the foregoing, the learned Senior State Attorney rightly urged us to find the present appeal incompetent on account of the said fatal procedural irregularity. In the exercise of our revisional powers under section 4 (2) of the AJA, we nullify, quash and set aside the entire

proceedings of the High Court including its judgement. The purported judgement of the trial court is similarly hereby quashed and set aside.

In consequence thereof, we order that the record pertaining to the trial proceedings be restored back to the trial court with directions to expeditiously prepare and deliver a judgement that fully complies with the dictates of sections 235 (1) and 312 (2) of the CPA. In the interest of justice, we further hereby direct that upon entering conviction in accordance with the dictates of the law, the resultant prison term should start to run from the time the appellant was initially sentenced on 01/11/2013.

It is so ordered.

DATED at MWANZA this 9th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL