IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 116 OF 2015

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

1. **ABDI MASOUD @IBOMA**
2. **HASSANI JUMANNE**
3. **RASHID MWELA @ MWANGU** ..... **APPELLANTS**
4. **JUMANNE MJOI @ BANK**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mkuye, J.)

dated the 23rd day of February, 2015
in
Criminal Appeal No. 43 of 2012

JUDGMENT OF THE COURT

27th May, & 1st June, 2015

MASSATI, J.A.:

The four appellants, together with another, were jointly charged with the offence of Armed Robbery contrary to section 287 of the Penal Code in the District Court of Singida. At the end of the trial, their colleague was acquitted. The first appellant (ABDI MASOUD @ IBOMA) and the third appellant (RASHID MWEKA @ MWANGU), were convicted of receiving

stolen property contrary to section 311 of the Penal Code and sentenced to 10 years imprisonment each. The second appellant (HASSAN JUMANNE) and the fourth appellant (JUMANNE MJOI @ BANK) were convicted of the offences of theft, contrary to section 265 of the Penal Code, and burglary contrary to section 294 of the Penal Code and sentenced to 7 years and 14 years imprisonment respectively. Their appeals in the High Court were unsuccessful. They have now come to this Court on a second appeal.

The brief background of the case is that JISABA s/o JAJI (PW4) who resided at Makila Ward, owned a shop, at a business square. On 12/7/2011 at about 23.30 hours while on his way from his house to his shop, he saw a torch light at the top of his shop. He went closer and hid in a nearby unfinished building. With the aid of solar power that he had installed at the shop, he was able to see some properties outside his shop. Thanks to his sons who had raised an alarm, the place was soon crowded with people, while the culprits carted away stolen properties in bicycles. On taking stock, PW4 discovered that the thieves had stolen several pairs of Khanga (clothes) and Vitenge, bed sheets, a solar panel, a carton of batteries, some cigarettes, perfumes, cell phones, a dozen of pants, and cash Tshs.300,000/=.

Then a manhunt began. They traced the thieves by their footsteps to Mtamaa Village, where PW4 was able to spot the second, and third appellants, and one Sefu Ismail @ Ngura who was the sixth accused person in the trial court. With the help of other villagers and the police all the suspects were rounded up, and charged, as some of them were found with some of the alleged stolen properties.

In their defence all the appellants denied to have committed the offence alleging that they were tortured by the police. Some of them capitalized on the testimonial contradictions in the prosecution evidence.

It is with that background that the appellants have now come to this Court, each armed with a separate memorandum of appeal. They all appeared in person ready to take the assault. But before doing so, Ms. Rosemary Shio, learned Principal State Attorney who represented the respondent/Republic, stood up and sought the Court's indulgence to address it on some important point of law before hearing the appeal. We allowed her to address us on what she had in mind.

Ms. Shio pointed out that the Notices of Appeal of the second and third appellants were defective, in that, they refer to their having been

convicted of receiving stolen property contrary to section 311 of the Penal Code, instead of the offences of theft and burglary with which they were convicted. To that extent their appeals were incompetent and thus prayed that they be struck out.

When asked to respond, the second and third appellants said that as the notices had been drafted by the prison officers they knew nothing about the shortcomings.

After hearing the parties on the point of law raised by the respondent, the Court then asked Ms. Shio, to address it on two more issues. The first was, whether it was proper for the successor trial magistrate to have proceeded with the trial without recording any reason for the transfer of the case? The second was, whether the sentences imposed on the appellants by the trial court were legal?

On the first issue, the learned counsel submitted that, it was not proper for the second magistrate to take over and continue with the trial without assigning any reason for the change of hands. She said that this was contrary to section 214 (1) of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the CPA) and that the irregularity was incurable. She asked us to

invoke the Court's revisional powers and quash all the proceedings, from 12/4/2012 when Ndale RM, took over the conduct of the case, and those of the first appellate court. With regard to the second issue, Ms. Shio submitted that in terms of section 170 (1) of the CPA, the learned trial Resident Magistrate could not impose more than 5 years imprisonment, unless the sentence is confirmed by the High Court or the offence is scheduled under the Minimum Sentence Act (Cap 90 R.E. 2002). She submitted further that the offences with which the appellants were not convicted were not scheduled offences. So the sentences were illegal, she argued.

On their part, the appellants agreed with the views expressed by the learned counsel, and had nothing useful to add.

In view of the two points of law raised by the Court, Ms. Shio submitted that, it would not be in the interests of justice to order a retrial and for the appellants to continue to be incarcerated. She thus asked us to revise, and quash the proceedings of the lower courts and set the appellants free.

We would agree with the learned Principal State Attorney, that the Notices of Appeal for the second and third appellants are defective. Under ordinary circumstances, we would have struck out their appeals for being incompetent, but for the reasons that will follow shortly, we declined to do so.

The first reason is that, the trial, which was before Chugulu RM, who recorded the testimonies of seven (7) prosecution witnesses, was taken over by Ndale, RM, who recorded the testimony of the 8th prosecution witness and the defence, and composed the judgment. There was no reason on record for the take over. As rightly submitted by Ms. Shio, this was irregular.

Section 214(1) of the CPA, which is the governing provision here, provides as follows:

> *"(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."*
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> [Emphasis supplied]

As shown above, what is missing in the record, are the reasons for the predecessor trial magistrate's inability to complete the trial. In **PRISCUS KIMARO v. R** Criminal Appeal No. 301 of 2013 (unreported) this Court had occasion to comment on a similar situation and directed that:

> *". . . 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 entirely subscribe to that 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. We therefore agree with Ms. Shio that the irregularity was incurable and have to be quashed.

The second reason is that, as pointed out above, even if the trial magistrate had jurisdiction, under section 170 (1) and (3) of the CPA, a magistrate of the rank below a Senior Resident Magistrate cannot impose a sentence of imprisonment of more than five (5) years, unless such sentence is confirmed by the High Court or falls under the Minimum Sentences Act. In the present case, the sentencing magistrate was a mere Resident Magistrate. The offences of theft, burglary, and receiving stolen property were not scheduled offences under the Minimum Sentences Act.

The High Court, as it were, did not confirm the sentences, of 7, 10, and 14 years imprisonment imposed on the appellants. It follows therefore that the sentences are illegal, and have to be set aside.

It was for the above reasons that we thought that it would not be in the interests of justice, to strike out the second and third appellants' appeals, because once the proceedings leading to their convictions were quashed, and the sentences declared illegal and set aside, it would merely be academic to strike out the said appeals, because their continued detention would be illegal, and there would be nothing on the ground for them to appeal from.

That said, we exercise our powers under section 4 (2) of the Appellate Jurisdiction Act (Cap. 141 – R.E. 2002) and revise all the proceedings of the two courts below and quash them. The sentences imposed on them are also set aside. Since the appellants have served substantial terms of the illegal sentences, we make no order for a retrial. We direct that they be released from custody forthwith unless they are otherwise lawfully incarcerated.

It is so ordered.

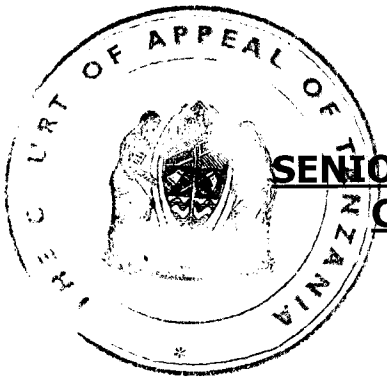
DATED at **DODOMA** this 29th day of May, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL