IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

CRIMINAL APPEAL NO. 539 OF 2015

(CORAM: KILEO, J.A., MJASIRI, J.A., And MMILLA, J.A.)

1. **HAVYALIMANA AZARIA**
2. **NIYOGELE SABUNI**
3. **ERIC CRAVERY**

.....APPELLANTS

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

(Appeal from the **Judgment of the High Court of Tanzania at Bukoba)**
(Khaday, J.)

dated the 30th day of November, 2015
in
Criminal Appeal No. 52 of 2014

JUDGMENT OF THE COURT

Date 9th & 16th February, 2016

MMILLA, J. A.:

Havyalimana Azaria, Niyogele Sabuni and Eric Cravery (the first, second and third appellants respectively) were amongst the four accused persons who were charged in the District Court of Ngara at Ngara in Kagera Region with four (4) counts; being unlawfully present in the United Republic of Tanzania contrary to section 31 (1) and (2) of the Immigration Act Cap. 54 of the Revised Edition, 2002; unlawful possession of a hand

grenade contrary to sections 4 (1) and 34 (2) of the Arms and Ammunition Act Cap. 223 of the Revised Edition, 2002;being in unlawful possession of firearms contrary to sections4 (1) and 34 (2) of the same Act; and being in unlawful possession of rounds of ammunition contrary to sections 4 (1) and 34 (2), also of the Arms and Ammunition Act. While they all pleaded guilty to the first count in respect of which each of them was sentenced to pay a fine of T. shs 100,000/=, or to serve five years in jail, they nonetheless pleaded not guilty to the other counts. At the end of trial the court found them guilty and convicted them on those grounds too and sentenced each one of them to ten (10) years imprisonment term in each count. Of course, the sentences were ordered to run concurrently. Except for the third appellant at the High Court whose appeal was allowed, the present appellants' appeal to the High Court of Tanzania at Bukoba was unsuccessful, hence this second appeal to the Court.

The facts of the case were brief and straight forward. On 1.12.2008, robbery was committed at Kigarama village which borders Kumwendo village. The people from those two villages searched for the robbers without success. On 2.12.2008 around 16.00 hrs, PW2 Nuru Bahandwa

saw four strangers passing by in Kumwendo village. On suspecting that they were not good persons, he called his brother Abbas Bahandwa (PW3)and Juvenalle Kajugusi (PW1) who was the Ward Executive Officer and informed them of his suspicion. On the strength of that information, PW1 passed the information to other villagers as a result of which the appellants were surrounded and apprehended. They searched them and recovered a hand grenade, a gun and rounds of ammunition. They interrogated them and found that they were foreigners. They also found that they had no permits to own those items. The matter was referred to the police, subsequent to which they were charged as afore stated.

On their part, the appellants protested their innocence. They said in defence that they came to Tanzania looking for jobs, but were arrested in the course and falsely accused of having committed those offences.

Before us, all the appellants appeared in person and fended for themselves, while Mr. Athuman Matuma, learned Senior State Attorney represented the respondent Republic. He expressed support of the appeal.

The appellants filed a joint memorandum of appeal which comprised of four (4) grounds; **one** that the first appellate judge erred by failing to

consider contravention of section 214(1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA); **two** that the first appellate judge botched to consider the trial court's failure to conduct trial within trial in order to determine the admissibility or otherwise of the cautioned statement constituted in exhibit P3; **three** that the first appellate court misdirected itself in not probing the identification of items in exhibit P1; and **four** that the first appellate judge erred by ignoring the third appellant's complaint regarding his right to have a translator during the recording of exhibit P3. They elected for the Republic to begin, intimating to say something later on if need be.

Mr. Matuma began with the first ground. He conceded that section 214 (1) of the CPA was not complied with when the second trial magistrate one B. B. Nkomola took over from the previous trial magistrate, J. A. Mpuya. He submitted that because of that, the judgment which resulted violated the provisions of section 312 of the CPA which requires a judgment to be written by a magistrate who tried the case unless there are cogent reasons to the contrary for which the magistrate taking over is required, under section 214 (1) of the CPA to give reasons thereof. He relied on the case of **Salim Hussein v. Republic**, Criminal Appeal No. 3

of 2011, CAT (unreported) in which the omission was held to be fatal. He urged the Court to allow this ground.

Mr. Matuma hastened to add that aware though that the above ground would have been sufficient to dispose of this appeal for which the Court could have ordered a retrial, he felt compelled to submit on the other grounds too because he discovered that the trial was tainted with several serious irregularities which denied the appellants a fair trial, and that if upheld, may destine the Court to a different conclusion.

To begin with, he showed concern on the way the exhibits were handled, from when they were allegedly seized from the appellants up to when they were tendered in court. He pointed out that evidence had it that after they were allegedly seized from the appellants, PW1 handed them over to the police. However, the record shows that it was that very witness who tendered in court items in exhibit P1 (the gun and rounds of ammunition). His problem is that how did those items revert to PW1 after they were handed over to the police? Also, evidence was led that upon receiving the hand grenade from PW1, the police handed it over to a Army officer (PW6) for destruction. That witness produced in court a document to show that the hand grenade was destroyed (exhibit P4). On

this basis, Mr. Matuma submitted that the chain of custody of those items was doubtful. In the circumstances, he submitted, the presumption is that those items were not necessarily the ones which were allegedly seized from the appellants. He referred us to the case of **Samwel Marwa @ Ogonga v. Republic**, Criminal Appeal No. 74 of 2013, (at page 15) CAT (unreported). He thus prayed the Court to hold that justice was not done in the case.

On the other hand, Mr. Matuma supported the appellants' complaint in the third ground that the first appellate court misdirected itself in not probing the identification and description of items constituted in exhibit P1 by PW1, PW2, and PW3 at the time they gave their testimonies, therefore that their evidence was wanting.

According to Mr. Matuma, the other crucial point was failure of justice because when the first appellate court ignored the third appellant's complaint that he was denied his right to have a translator during the recording of exhibit P3 – a cautioned statement, this particularly so because the record clearly shows (see page 18 of the record) that the appellants made it known that they were not conversant with Kiswahili, therefore that they were incapable of following the trial. He also contended

that the first appellate court ought to have found that it was improper for the trial court to have said that the duty to look and produce the translator lay on the prosecutor. He stressed that it was the duty of the court to look for an interpreter. He referred us to the case of **Kigundu Francis and another v. Republic**, Criminal Appeal No. 314 of 2010, CAT (unreported).

Further, after the interpreter was found and presented to court, Mr. Matuma submitted, the oath taken by that person was not according to law. He cited the case of **Marko Patrick Nzumila and another v. Republic,** Criminal Appeal No. 141 of 2010, CAT(unreported). In view of these glaring irregularities, he concluded that the appellants were not fairly tried. He pressed the Court to allow the appeal and set free the appellants.

When their turn came to take the stand, the appellants said in common that they had nothing to say but were entirely supporting the submission of the learned Senior State Attorney for the Republic.

We wish to begin with the first ground concerning non – compliance with section 214 (1) of the CPA.

Admittedly, the case was initially assigned to, and tried by J. A. Mpuya, Resident Magistrate. He recorded the evidence of five witnesses

out of the six who testified in the case. On 12.4.2013, B. B. Nkomola, Resident Magistrate, took over the conduct of the case and recorded the evidence of the sixth witness after which he prepared the judgment. However, the second trial magistrate did not give reasons why he took over from the previous trial magistrate as demanded by section 214 (1) of the CPA. That section provides that:-

> "(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 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, re-summon the witnesses and recommence the trial or the committal proceedings." [Emphasis provided].

As was stated in **Elisamia Onesmo v. Republic**, Criminal Appeal No. 160 of 2005, CAT (unreported), observance of this provision is necessary because the primary purpose of the hearing is to permit the court to observe the demeanour and evaluate the credibility of all the witnesses. This is the reason why that section encourages trial to be handled by the magistrate who commenced trial to its end, and requires reasons to be assigned where another magistrate takes over the trial.

In the present case however, the second trial magistrate gave no reasons before the takeover as demanded by section 214 (1) of the CPA, and that the omission offended also the provisions of section 312 (1) of the CPA which, as correctly submitted by Mr. Matuma, requires the judgment to be written by the magistrate who tried the case. Thus, it was a fundamental irregularity entitling the Court to declare the proceedings, judgment and the appeal therefrom a nullity, resulting into ordering a retrial. See the case of **Salim Hussein v. Republic** (supra). In the circumstances of this case however, we have felt it improper to follow that approach in view of the reasons we will shortly assign.

First to be considered is the aspect of chain of custody of the items which formed the basis of charges in the second, third and fourth

counts. We wish to reaffirm that chain of custody is the sequence of activities connected with **collection, custody**, **transfer, examination** and **deposition of evidence** used in legal proceedings – See **Julius Matama @ Babu Mzee Mzima v. Republic**, Criminal Appeal No. 137 of 2015, CAT (unreported).It must include detailed information on the persons collecting and handling the items in issue, timing of various actions by such persons, and **the precautions taken to prevent tempering with the evidence.** The intention is to avoid the use of evidence that could be the subject of tempering, substitution or contamination. See also **Paulo Maduka& 4 Others v. Republic**, Criminal Appeal No. 110 of 2007, in which the Court underscored the significance of a proper chain of custody of exhibits to be:-

> *"... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty. "*

This was re-emphasized in **Samwel Marwa @ Ogonga v. Republic** (supra) cited to us by Mr. Matuma.

In the present case, evidence had it that after the exhibits P1, P2 and P4 were allegedly seized, PW1 handed them over to the police. It is inconceivable however, that PW1 was the very witness who tendered in court the items in exhibit P1 (the gun and rounds of ammunition); how did they revert to him? Worse more, PW1, PW2 and PW3 neither identified nor described those items in court. Given such a situation, we agree with Mr. Matuma that the presumption that those items were not necessarily the ones which were allegedly seized from the appellants is convincing.

The same applies to the hand grenade which, after receiving that item from PW1, the police handed it over to a military officer (PW6) for destruction. That witness produced in court a document (exhibit P4) to show that it was destroyed. The question becomes; how can one know that the allegedly hand grenade handed over to PW6 was the very one that it was allegedly recovered from the appellants? Surely, it is uncertain. Once again, the chain of custody of that item was doubtful. In all, we agree with Mr. Matuma that such an irregularity occasioned injustice to the appellants.

Next to be considered is the complaint that the first appellate judge improperly ignored the third appellant's complaint that his right to have a translator during the recording of exhibit P3 was ignored.

After intently considering the submission of Mr. Matuma on the point, we unreservedly agree that the complaint is well founded. We will make an effort to illustrate.

It is incontrovertible that the appellants were foreigners and were not conversant with Kiswahili. On page 18 for example, the court record shows that the second appellant requested to be afforded a translator because he did not know Kiswahili. The trial magistrate allowed the prayer, though he strangely said **it was the duty of the prosecution side to look for and produce the translator**. We are saying it was strange because for sure, that duty is cast by law on the court. We have in mind the provisions of section 211 of the CPA which in such situation requires the court to arrange for an interpreter to translate the proceedings or evidence for the accused person or for the witnesses who do not understand the language of the court – See the case of **Kigundu Francis and another v. Republic** (supra).

It is also reflected on page 38 of the court record that the third appellant raised to PW5 ASP Evarist John Lusambo the question of his having been not conversant with Kiswahili during the recording of the cautioned statement which was attributed to him. In fact, he repudiated it during trial. Although PW5 insisted that the appellant knew Kiswahili, we think that the trial court ought to have doubted the genuinity of that document in view of the fact that it had already satisfied itself that they needed a translator, and actually afforded them such service. As such, the appellants' fourth complaint that the first appellate court ought to have considered this point meritorious.

We also wish to comment on the error concerning the translator's oath appearing on page 19 of the record. On that page the record reads as follows:-

> *"Translator: ZELIDA MUGANGA, TZ, 52 YEARS, XTIAN sworn and states she will tell the court only truth as a translator."*

With all due respect, that kind of oath was wrong in the circumstances thereof because Zelida Muganga was not a witness in that case. Although it is curable under section 9 of the Oaths and Statutory Declarations Act

which stipulates that an oath in any judicial proceedings is not invalid merely because there is an irregularity in the administration or the taking of the said oath, we feel duty bound to point out that the translator ought to have sworn that she was going to truthfully and faithfully translate Kiswahili into Rundi and vice versa. We are saying so because **the concern was not for her to tell the truth as such**, but **to faithfully translate the proceedings and/or evidence for the benefit of the appellants**. We urge the magistrates to be careful when it comes to situations such as the present.

We have found that there was a doubtful chain of custody of exhibit P1 and the hand grenade. We have also satisfied ourselves that the police officer did not afford the third appellant an interpreter at the time he recorded his cautioned statement. We find and hold that those omissions were fundamental irregularities which denied the appellants a fair trial. Since fair trial is one of the cornerstones of a just society and the best means of separating the guilty from the innocent and protecting against injustice in the case, to have denied them such right caused injustice for which we think, the appellants are entitled to regain their liberty. In the circumstances, we think it is proper to restrain from ordering a retrial for

violating the provisions of section 214 of the CPA as earlier seen. In its stead, we allow the appeal, quash the convictions in respect of all the appellants and set aside the sentences thereof. We order their immediate release from prison unless they are continually held for some other lawful cause.

Dated at **Bukoba** this 15th Day of February, 2016.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL