IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MMILLA, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 61 OF 2016

1. MASHAKA PASTORY PAULO MAHENGI @ UHURU
2. JOHN APPELES MNDASHA
3. PHILIPO CHARLES MUSHI ..... APPELLANTS
4. RASHID ELIAKIM LEMBRES
5. MARTINE HARRISON MNDASHA

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

dated the 30th day of October, 2012

in

HC. Criminal Appeal No. 65 of 2012

JUDGMENT OF THE COURT

18th & 28th October, 2016

MMILLA, J.A.:

The appellants, Mashaka Pastory Mahengi @ Uhuru, John Apelesi Mndasha, Philipo Charles Mushi @ Mpolee, Rashid Eliakim Embres and

Martin Harrison Mndasha, were among the seven persons who were originally charged before the Resident Magistrate's Court of Kisutu with two counts; conspiracy to commit an offence contrary to section 384 of the Penal Code Cap. 16 of the Revised Edition, 2002; and armed robbery contrary to section 287A of the same Code as amended by GN No. 4 of 2004.

The sequence of events leading to this case began on 20.9.2005. On that day, armed bandits invaded Macsons Bureau de Change situated along Indira Ghandhi Street within Ilala District in the City of Dar es Salaam. They stole there from large sums of money made up of different currencies. The investigation by the police culminated into the arrests of the appellants, among other persons. After trial, the appellants were found guilty on both counts and convicted. Each one of them was sentenced to serve 7 years imprisonment term in respect of the first count, and a further term of 30 years in respect of the second count. The sentences were ordered to run concurrently. They were aggrieved and appealed to the High Court of Tanzania at Dar es Salaam. Their appeals were dismissed, hence this second appeal to the Court.

Before us, the first and fourth appellants appeared in person and fended for themselves, while the rest of them were represented by advocates. Mr. Barnabas Luguwa, learned advocate, appeared for the second appellant, while Mr. Majura Magafu, learned advocate, appeared for the third appellant. Mr. Samson Mbamba, learned advocate appeared for the fifth appellant. On the other hand, the respondent Republic enjoyed the services of Mr. Mohamed Salim, learned Principal State Attorney, assisted by Ms Grace T. Komba and Ms Derreck Mkabatunzi, learned Senior State Attorneys.

The appellants filed separate memoranda of appeal ranging from 8 to 11 grounds. However, their complaints were similar.

Before we proceeded with the hearing of the appeal on merit, we sought to satisfy ourselves on the correctness of the proceedings before the trial court. We were prompted by the fact that the trial at that level was handled by three different resident magistrates without assigning reasons why it took that trend. The requirement is dictated under section 214 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA).

The posed trepidation was first responded to by Mr. Magafu who, without any hesitation, conceded that the demands of section 214 (1) of the CPA were flouted during the takeover of the trial by one magistrate from another. He was express that the reasons ought to have been given why any particular magistrate was taking over from another, and that failure to do so rendered the proceedings irregular, null and void, liable to be quashed. He relied on the cases of **Ramadhani Mohamed & Another v. Republic,** Criminal Appeal No. 59 of 2011 CAT and **Msami Ally v. Republic,** Criminal Appeal No. 280 of 2015 CAT (both unreported). In those cases, the Court emphasized that failure to comply with section 214 (1) of the CPA was a fatal irregularity, the consequence of which is to declare those proceedings and judgment null and void, calling for their being quashed and the sentences set aside.

At another stage, Mr. Magafu requested the Court to release the appellants instead of ordering a retrial on the ground that their convictions were based on improperly received evidence. He pointed out that the appellants' conviction was predicated on the cautioned statement of the third appellant without first having been read to them.

On their part, Mr. Luguwa and Mbamba absolutely supported the submission of their learned brother, Mr. Magafu. Mr. Mbamba however, added one more case of **Shaban Seif & Another v. Republic**, Criminal Case No. 215 of 2015, CAT (unreported) in which, he said, the Court allowed the appeal and released the appellants. He persuaded the Court to do the same.

On the other hand, the first and fourth appellants who are laymen had nothing to say.

On his part, like his learned friends, Mr. Salim conceded that failure to assign reasons when the trial was being succeeded by other trial magistrates contravened the provisions of section 214 (1) of the CPA. Mr. Salim submitted further that except for the proceedings before S. D. Msuya, the Resident Magistrate who commenced the trial, the subsequent proceedings, and hence the judgments of both the trial court and the High Court, were a nullity. Unlike the advocates for the appellants who asked for the release of the appellants, Mr. Salim urged the Court to order retrial.

On our part, we share the views of the learned counsel for the parties that the trial from which this appeal arises was tainted with

irregularity for failure to assign reasons when one magistrate was taking over the trial of the case from another magistrate. We endeavour to illustrate.

It is incontrovertible that three resident magistrates were, at different times, involved in the trial of this case. As the record will show, trial was commenced on 4.4.2007 before S. D. Msuya – Esq. Resident Magistrate, who recorded the evidence of two witnesses; PW1 Ashraf s/o Khan and PW2 Fakiri Mohamed. On 17.3.2009, the trial of the case was taken over by E. H. Mingi – Esq. Principal Resident Magistrate. Regrettably, she did not record why the previous magistrate was not able to proceed with the trial. This magistrate recorded the evidence of four witnesses; PW3 F. 29 D/C Lugano, PW4 Fazle Abbas Haidary, PW5 F. 5371 PC Issa Kazimoto and PW6 A/Insp. Venon. Likewise, this magistrate too did not carry the trial to its end because on 7.12.2009 it was taken over by A. Katemana – Esq. Resident Magistrate. Again, no reasons were assigned why there was such a take over from the previous magistrate. Apart from recording part of the evidence of PW6, this magistrate recorded the evidence of PW7 SP Diwani Nyanda, PW8 Orshe Mgonja, PW9 Godfrey Elisha Mollel, PW10 Chrisant

Christopher Tibaijuka, and PW11 ASP Godfrey Augustino Luhamba. He also recorded the evidence of the defence side and composed the judgment.

The above trend considered, it is obvious that there was no compliance with the provisions of section 214 (1) of the CPA. In such a situation, the Court had the occasion to stress that non – compliance with that provision is a fatal irregularity. In **Ally Juma Faizi @ Mpemba & Another v. Republic**, Criminal Appeal No. 401 of 2013, CAT (unreported) the Court held that:-

> *"Non- compliance with the provisions of section 214 in the matter before us rendered the whole proceedings from the trial through the High Court a nullity."*

This was re-emphasized in **Abdi Masud @ Iboma & 3 Others v. Republic,** Criminal Appeal No. 116 of 2015 CAT (unreported) in which the Court said:-

> *"In our view, under section 214 (1) of the CPA, it is necessary to record the reasons for reassignment or change of trial court magistrates. 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."

The rationale for the requirement in section 214 (1) of the CPA was expounded in the case of **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 CAT (unreported) in which the Court said that:-

". . . where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete (sic) 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."

In conclusion on the point therefore, since the provisions of section 214 (1) of the CPA were not complied with in the present case, the proceedings which followed after S. D. Msuya - Esq. Resident Magistrate ceased the conduct of that case, and the judgment thereof were fatally irregular, null and void. Also, because the proceedings and judgment of the first appellate court were founded on the void proceedings and judgment of the trial court, they were equally irregular, null and void. In

consequence, in terms of section 4 (2) of the AJA, we nullify and quash the proceedings and judgment of the trial court and first appellate court, and set aside the sentences which were imposed on the appellants. That takes us to another level; what is the way forward?

The usual practice is that where the proceedings and judgment in a case have been declared a nullity and quashed, the Court is expected to order a retrial. In the circumstances of this case however, we have preferred to take a different approach for reasons which we will unfold in the course.

A careful reading of the proceedings of the trial court together with other materials connected to it as well as the judgments of the trial court and the High Court has shown that the appellants were not identified at the scene of crime by any of the witnesses, but that the decision of the trial court, which was upheld by the High Court, was anchored on Exhibit P5, which has reference to the cautioned statement of the third appellant, Philipo Charles Mushi @ Mpolee. In fact, that statement was in relation to a murder incident that occurred at Ubungo Traffic Lights area on 20.4.2006. At the stage of putting that statement in evidence, the defence

raised an objection that it was recorded after he had been in police custody for a long time.

In its ruling on the point, while appreciating that the statement was recorded after the third appellant had been in police custody for a long time, the trial court overruled the objection on the ground of public interest because his confession led to the discovery of a gun which was allegedly used in the commission of the charged incident of armed robbery. It regarded that statement as good evidence and relied on it. It also found that the said "confession," established the involvement of the third appellant and his colleagues in the commission of that offence.

On our part, after carefully going though the proceedings before the trial court, we find that it was improperly regarded as good evidence on the ground that it was not read in court before it could be admitted in evidence to permit the appellants to know its contents. Reading it would have been useful to them during the preparation of their defences. Where this is not done, the Court has often held that such omission is fatal – See the case of **Sumni Amma Awenda v. Republic**, Criminal Appeal No. 393 of 2013 CAT (unreported).

In **Sumni Amma Awenda's** case, the point raised was that at the time the cautioned and the extra judicial statements were tendered in evidence, the trial court did not require the respective witnesses who produced them to read them in court to afford opportunity to the appellant, his advocate and the assessors to hear what they were all about. The appellant's advocate had submitted that failure to read those documents in court constituted a fundamental irregularity. In that regard, the Court held that:-

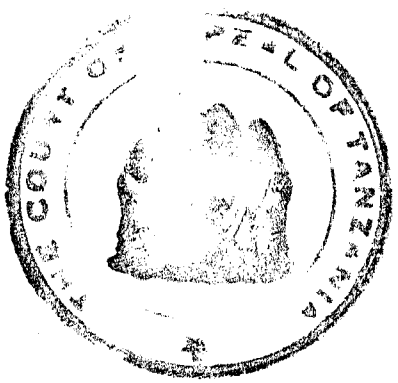
> *". . . to have not read those statements in court deprived the parties, and the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission . . . constituted a serious error amounting to miscarriage of justice and constituted a mistrial."*

We wish to emphasize therefore that, in order for any such document to become legitimate evidence, the trial court is duty bound, and it must make sure that the witness tendering it reads over the same to the parties.

That said and done, since exhibit P5 was the sole evidence on which the appellants' conviction was based, for the reason we have amply

demonstrated, we find that it was wrongly relied upon. In the circumstances, it is useless to order retrial because there is no viable evidence to support the charge. Consequently, we direct for the appellants' immediate release from prison unless they are being continually held for some other lawful cause.

DATED at **DAR ES SALAAM** this 26th day of October, 2016.



N. P. KIMARO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL