IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MWARIJA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 240 OF 2015

NICODEMUS VALENTINO @ RASTA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

Dated the 30th day of October, 2013

In

Criminal Appeal No. 15 of 2011

JUDGMENT OF THE COURT

3rd May & 19th June, 2017

MWARIJA, J.A.:

The appellant and another person, Andrew Dotto were jointly charged in the District Court of Temeke with the offence of Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 14/5/2009 at about 21.30 hrs at Kisota Mjimwema area within Temeke Municipality, the appellant and the said Andrew Dotto did steal a motor vehicle with Reg. No. T 417 AYA make Toyota Corolla, the

property of Said Salum and immediately before stealing it, they used an iron bar and a screw driver to hit the driver of the stolen motor vehicle (hereinafter "the Motor Vehicle"), one Aman Abdallah in order to obtain and retain it.

After a full trial, the appellant was convicted of the offence and sentenced to 30 years imprisonment. Andrew Dotto was found not guilty and was as a result, acquitted. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. His appeal was dismissed hence this second appeal.

The facts leading to the case can be briefly stated as follows: On 14/5/2009 in the night, Amani Abdallah Mpangule (PW3) who was at the material time of the commission of the offence, the driver of the Motor Vehicle, had parked it at Mjimwema area, Kigamboni. While there, three persons appeared and asked him to drive them to Kisota area. They agreed to pay Shs. 5,000/= which PW3 would use to buy fuel. According to his evidence at the trial, PW3 testified that two of those persons sat on the rear seat while the other one sat on the front passenger seat. It was PW3's evidence that he identified one of the three persons to be one Nyoka, a

Bhajaj driver who conducted his business at Ferry area. The witness testified further that while on the way, the two persons who were on the rear seat did hit him with what appeared to him to be a metal bar. That act, he said, was followed by another attack from the person who was on the front seat. That person used a screw driver to hit him (PW3) on the head near his ear.

Realizing that the three persons were not genuine passengers but imposters who had an ill motive, he stopped the Motor Vehicle, switched off the engine and managed to run away. He reported the incident to the owner of the motor vehicle who in turn reported the incident to the Police. After a search, the motor vehicle was found stuck in the mud at Kisota area. A day later, on 15/5/2009, the appellant was arrested by No. D. 3139 D/CPL Made (PW6). The arrest was witnessed by PW3 and Aloyce Kisyoka (PW7); an attendant at Mkendo Kati Guest House. These three witnesses testified that upon his arrest, the appellant was searched and found with the Motor Vehicle's ignition key.

In his defence, the appellant denied the offence. He testified that on the material date of his arrest, he was on the way going to work. While at Mkendo Kati Guest House, he met a group of police officers who were on patrol. It was then that PW3 identified him as a person known as Rasta, a friend of one Nyoka and caused the appellant's arrest. It was the appellant's defence further that he had grudges with PW3 arising from the Motor Vehicle as they did compete for the job of a driver and at the end it was PW3 who succeeded to be employed.

In its judgement, the trial court was satisfied that the appellant was properly identified at the scene of crime because he was known before by PW3. It found also that the time which was spent in negotiating for the fare was sufficient to eliminate the possibility by PW3 of mistakenly recognizing the appellant. It found also that the appellant was found with the ignition key of the Motor Vehicle, the evidence which implicated him.

In upholding that decision, the learned first appellate judge observed that there was no dispute that the appellant was known to PW3. He agreed also with the finding of the trial court that, upon being searched by the police in the presence of PW7, the appellant was found in possession of the

Motor Vehicle's ignition key for which he failed to give a reasonable explanation for possessing it. The learned judge observed also in his decision that although the key could not start the Motor Vehicle's engine, the reason given by the prosecution that the switch had been damaged was plausible.

In his memorandum of appeal, the appellant raised ten grounds of appeal. The grounds can however be consolidated into five.

1. *That the learned High Court judge erred in upholding the conviction of the appellant which was based on an insufficient evidence of identification.*

2. *That the learned High Court judge erred in upholding the conviction of the appellant founded on evidence of the exhibits which were unprocedurally admitted.*

3. *That the learned High Court judge erred in failing to find that the trial court wrongly acted on the evidence of possession by the appellant, of the*

ignition key alleged to be of the stolen motor vehicle while the key was not seized from him in accordance with the law.

4. *That the learned High Court judge erred in failing to find that the omission by the trial court to conduct a preliminary hearing vitiated the trial.*

5. *That the learned High Court judge erred in upholding the appellant's conviction based on the proceedings which were irregular for having been conducted by two different magistrates without complying with the procedure as stipulated by the law.*

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Rose Chilongozi, learned Principal State Attorney. When he was called upon to argue his appeal, the appellant opted to hear first, the learned Principal State Attorney's response to the raised grounds of appeal and that he would thereafter make a rejoinder, if any.

Ms. Chilongozi informed the Court at the outset that the Republic was in support of the appeal. Following the stance taken by the learned Principal State Attorney, the appellant did not, at the end, have any rejoinder to make. He prayed to the Court to allow his appeal.

We intend here to begin with the submission on the fifth ground above. The learned Principal State Attorney conceded that the proceedings in the trial court were conducted by two different magistrates but the record does not show that the succeeding magistrate assigned any reason for taking over the case from his predecessor. Ms. Chilongozi argued that the omission contravened s. 214 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA). She submitted that the irregularity rendered the trial a nullity.

On our part, we find merit in this ground of appeal. The trial commenced on 27/8/2009 before Mzava, PDM (the predecessor magistrate). Between that date and 7/12/2009, the predecessor magistrate heard the evidence of the first six prosecution witnesses (PW1 – PW6). On 25/2/2010 however, hearing proceeded before Nzowa, RM (the Successor

magistrate) who recorded the evidence of PW7, the defence evidence and finally composed the judgment.

Under S. 214 (1) of the CPA, a magistrate may take over and continue to hear a case which is partly heard by another magistrate where that other magistrate is, for any reason, unable to continue with the trial. The provision states as follows:-

> *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 proceedings recorded by his*

predecessor and may in the case of trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings."

[Emphasis added].

According to this provision, a case which has been heard but not completed by one magistrate may only be re-assigned to another magistrate if the predecessor magistrate **is for any reason unable to complete the trial**. The reason for the predecessor magistrate's failure to complete the trial is a condition precedent for a successor magistrate to take over the proceedings. It is thus a requirement for the successor magistrate to state, before he continues or recommences the proceedings, the reason for the predecessor's magistrate failure to complete the trial. That this is the law has been stated by the Court in a string of decisions.

In the case of **Salim Hussein v. The Republic**, Criminal Appeal No. 3 of 2011 (unreported), the Court had this to say on that legal requirement:-

"We only wish to emphasise here that under this section, the second or subsequent magistrate can assume the jurisdiction to take over and continue the trial and act on the evidence recorded by his predecessor only if the first magistrate ***'is for any reason unable to complete the trial'*** *at all or* ***'within a reasonable time'****. Such reason must be explicitly shown in the trial Court's record of proceedings."*

[Underlining provided].

The rationale for complying with that requirement was stated by the Court in the case of **Priscus Kimaro v. The Republic**, Criminal case No. 301 of 2013 (unreported) in which the Court stated thus:-

"We are of the settled mind 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 the matter must be recorded. If that is not done it may lead to chaos in

the administration of justice. Anyone, for personal reason could just pick up any file and deal with it to the detriment of justice. That must not be allowed."

In this case, the successor magistrate did not state the reason for the failure by Mzava, PDM to conclude the trial. From the position stated above, we agree with Ms. Chilongozi that the omission renders the trial a nullity -See also the cases of **Abdi Masoud @ Ihoma & 3 Others v. The Republic**, Criminal Appeal No. 166 of 2015 and **Adam Kitundu v Republic**, Criminal Appeal No. 360 of 2014 (both unreported). As the proceedings in the trial court were a nullity, it follows that the proceedings and the judgment of the High Court are, as well, a nullity. As a consequence the proceedings and the judgments of the two courts below are hereby quashed. The appellant's conviction is, as result also, quashed and the sentence is set aside.

That said and done, the resulting issue for our consideration is whether or not we should order a retrial. Having scanned the available evidence on the record of appeal, it is our well considered view that the answer must be in the negative. We are of such a view because the

evidence by the prosecution was insecure to mount the appellant's conviction. As pointed out above, the appellant's conviction was based firstly, on the evidence of identification as tendered by PW3 and PW5, and secondly the evidence that the appellant was found with the Motor Vehicle's ignition key. Both PW3 and PW5 testified that they identified the appellant at the scene of crime. It was their evidence that they had known him before by the name of Nyoka, a Bhajaj driver carrying out his business at Ferry area. It is undisputable that the offence was committed in the night at 21.30 p.m. The identification was, for that reason, made under difficult condition.

Even though therefore, the witnesses alleged that they had known the appellant before the date of the incident, their evidence should have been subject to the objective test applicable to that kind of evidence before being used to found the appellant's conviction. It must have met the requisite test with a view of eliminating the possibility of a mistaken identity. The rationale for that requirement is as stated in the case of **Shamir s/o John v. The Republic**, Criminal Appeal No. 166 of 2004 (unreported). In that case, the Court stated as follows:-

"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

The objective test which must be used when the evidence of identification is at issue is clearly stated in the case of **Fadhili Khalfani & 2 Others v. The Republic**, Criminal Appeal No. 243 of 2012 (unreported) where the Court stated as follows:-

"...it is now settled that using the objective test, the Court should address itself as to whether the following pertinent conditions did exist so as to eliminate all possibility of mistaken identity of the appellant. The said conditions include but not restricted to the following. ***First****, the time under which the attacker was under observation by the victim.* ***Second****, under which condition the victim*

did observe his/her assailant – were they under normal approach or confrontational. ***Third****, the distance between the two–did it allow outright recognition/identification of each other.* ***Fourth****, if the robbery (or the crime with which the appellant was convicted) took place at night, what was the lighting condition at the scene so as to allow clear identification. That is, what kind of light did exist (e.g electricity, lantern moonlight etc.) and what was the intensity of the said light at the scene of crime.* ***Fifth****, whether the victim knew his/her assailant before the material day and time and if so, for how long has he known his assailant.* ***Sixth****, in the course of observation, was there any obstruction/impediment so as to distract the victim."*

In their evidence, PW3 and PW5 did not state anything as regards the above stated conditions other that stating that they knew the

appellant. According to the typed proceedings which, unfortunately, have many grammatical and typing errors, PW3 merely averred as follows at page 10 of the record of appeal:-

> *"I parked at ferry then they came Nyuoka and other two. They came there to hire a taxi as they want to go to Kisota. I knew them and they request me to drive them to Kisota and they gave me 5,000/= Tshs. for buying oil for the car...."*

In cross-examination at page 12, this witness stated as follows:-

> *"I know you as you the at Kigamboni and your name known to that area is Nyoka.... I know you as you drive Bajaji."*

On his part PW5 merely stated as follow at pages 17-18 of the record:-

> *"... at 9.00 night I was at Feri waiting passenger, ... at that time we was at Feri, after a, time I saw*

Amani with three guys people talking, one of them is accused thereafter I combined with my work...."

When he was cross-examined by the appellant, PW5 is recorded to have stated as follows:-

"I know him by name of Nyoka... first he was working in daladala as conductor, then he became a driver at bajaji.... I know only 1 persons other I do not know...."

In our considered view, since the recognition was made at night, without the description of the light, let alone its intensity, which aided the witnesses to recognize the appellant outside and inside the Motor Vehicle and the distance from which PW5 made the recognition, the possibility of a mistaken identity cannot be said to have been eliminated. Although it could be said that PW3 was closer to his assailants because they were his passengers, his evidence is doubtful because; firstly, he did not disclose who among the three persons negotiated the fare with him and secondly, according to his testimony, the appellant sat on the rear seat of the motor

vehicle. It is apparent therefore, that the evidence of recognition of the appellant by the two witnesses was not sufficient.

With regard to the evidence that the appellant was found with the ignition key of the Motor Vehicle, we do not find that evidence to be credible. We have taken that position for one main reason. The proper procedure after the witness had prayed to tender the ignition key was for the Court to ask the appellant to state if he had any objection to the prayer. If he did not have an objection, then the same would have been marked and admitted as an exhibit. In case of an objection by the appellant, the court would make an appropriate ruling admitting or refusing to admit the ignition key. Since the trial court did not follow that procedure, the appellant was obviously denied his right to be accorded a fair trial.

In the case of **Matatizo Bosco v The Republic**, Criminal Appeal No. 287 of 2014 (unreported) the Court considered a similar irregularity and observed as follows:-

"…. Another irregularity is that even before the exhibits were admitted in court the appellant was not given an opportunity to say whether he had any objection or not. The court insisted in the case of ***Alex John v. Republic****, Criminal Appeal No. 32 of 2003 (unreported) the importance of the trial courts adhering to the procedure for conducting a fair trial. The importance of affording equal opportunity to both parties in the case must always be observed by the trial Court…."*

From the above stated position, there is no gainsaying that the irregularity which was occasioned in this case, had the effect of denying the appellant a fair trial and for that reason, the evidence of the purported exhibit is, as a consequences, rendered invalid.

For the foregoing reasons, since as pointed out above, the appellant's conviction was based on the evidence of recognition and the possession by him of the ignition key alleged to be that of the Motor Vehicle, the

evidence which we have found it to be deficient, we agree with Ms. Chilongozi that a retrial is not appropriate. We are of the settled view that there was a misapprehension of evidence by the two courts below because, if they had taken into consideration the factors discussed above, they would have certainly arrived at a different conclusion. In the event, we order the release of the appellant from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 13th day of June, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL