

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO.543 of 2016

MANENO MUSSA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tanga)

(Aboud, J.)

Dated 12th day of August, 2016

In

Criminal Appeal No. 37 of 2016

RULING OF THE COURT

16th & 20th April, 2018

MWARIJA, J.A.:

The appellant was charged in the District Court of Korogwe with two counts under the Penal Code (Cap.16 R.E. 2002) (the Penal Code). In the 1st count, he was charged with the offence of burglary contrary to section 294 (2) and in the 2nd count, the offence of stealing contrary to section 265 of the Penal Code respectively. It was alleged that, on 20/8/2015 at night time in Majengo area within Korogwe district, Tanga

region, the appellant broke the house of Sofia Tupa and stole from therein, various items total valued at Tshs. 258,000/= the properties of the said Sofia Tupa. The appellant denied both counts.

The facts of the case are not complicated. The victim of the crime, Sofia Tupa (PW1) who owned a residential house situated at Mountain view/Mlimafundi in Majengo area within Korogwe district, was until the material time of the offence, operating a men's salon at her said house. On 20/8/2015 in the night, some of her neighbors went to inform her that they had seen some people running away from her house and that they suspected them to be thieves. When she inspected the house, she discovered that the door to the salon had been broken and various salon equipment, including hair cutting machine, had been stolen. She later reported the incident to the police.

In the same night while on duty at Maili Kumi at a road check point (road block) at 5:00 a.m, two police officers; No. E. 8443 Cpl Ntawilwa (PW2) and No. D. 5283 D/SSgt Elisante (PW3) stopped a motorcycle which was being ridden by Twarik Mohamed (PW3). The appellant was a passenger on that motorcycle and had carried with him a sack

containing items which included a hair cutting machine, a subwoofer and its two loud speakers as well as a small radio. According to PW2 and PW3, the appellant failed to give reasonable explanation as to how he came into possession of those properties. The properties were later allegedly identified by PW1 to be those which were stolen from her saloon. The appellant was, as a result, charged in court. According to the evidence of PW5 who was the investigator of the case, No. F. 4027 DC Ally, the police officer who recorded the statement of the appellant, the appellant confessed that he committed the offence. His cautioned statement was admitted in evidence as Exhibit P.5.

In his defence, the appellant contended, in essence, that he was neither found with the properties nor arrested at the road block. He said that he was arrested at his home on 21/8/2015 in the morning. He complained that after his arrest, he was taken to police station where he was beaten so that he could confess that he committed the offence, the demand which he did not heed to.

At the conclusion of the trial, the trial court found the appellant guilty of both counts. He was consequently sentenced to twenty (20)

years and seven (7) years imprisonment on the 1st and 2nd counts respectively. The sentences were, however, ordered to run concurrently. The appellant was aggrieved and thus appealed to the High Court against conviction and sentence. His appeal against conviction was unsuccessful. With regard to the sentences, whereas the sentence of twenty years imprisonment was upheld because it was the statutory minimum, the sentence of seven years imprisonment on the 2nd count was found to be excessive and, as a result, was reduced to three years imprisonment.

Aggrieved further, the appellant has preferred this second appeal raising in his memorandum of appeal, five grounds of his dissatisfaction. From the grounds of appeal, the appellant is basically challenging the decision of the High Court contending that it is erroneous in that it upheld the trial court's decision which was founded on contradictory and unreliable evidence. For reasons which will be apparent herein, we will not proceed to consider the grounds of appeal and decide the appeal on merit.

At the hearing of the appeal, the appellant appeared in person, unrepresented by a counsel. On its part, the respondent Republic was represented by Ms Rebecca Msalangi, learned State Attorney.

Before the appeal could proceed to hearing, we required the parties to address the Court on the effect of the procedural irregularity pertaining to the proceedings of the trial court. From the record, before he proceeded to take the appellant's defence evidence, the learned trial Senior Resident Magistrate did not comply with the provisions of S. 231(1) of the Criminal Procedure Act. [Cap.20 R.E. 2002] (the CPA). The provision states as follows:-

"231.-(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 sections 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 whether or not on oath or affirmation,
on his own behalf; and*
- (b) *to call witness 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.”*

In her submission, Ms Msalangi conceded that the learned trial Senior Resident Magistrate failed to comply with that provision of the law. With regard to the effect of the omission, at first, the learned State Attorney argued that the irregularity is curable on account that it did not occasion any injustice to the appellant. However, when asked whether or not, the provision, which is couched in mandatory terms, was not intended to avoid miscarriage of justice by affording an accused person a fair hearing as far as his defence is concerned, she agreed that the omission was fatal as it denied the appellant the right of knowing the available options of giving his defence. In the circumstances, she urged

us to exercise the Court's revisional powers under S.4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) and quash the proceedings and judgments of both the trial court and the High Court and set aside the conviction and the sentences imposed on the appellant.

On his part, the appellant did not have any substantive argument to make in response to the raised issue. Understandably, this is because he was unrepresented and the issue involved a point of law. He left the matter to the Court to determine it in the way it deemed fit.

Indeed, as submitted by the learned State Attorney, the trial court's failure to comply with the provisions of S. 231(1) of the CPA is a fatal omission. In the case of **Richard Malima & 4 Others v. The Republic**, Criminal Appeal No. 183 of 2010 (unreported), the Court emphasized the duty bestowed on trial magistrates of strictly complying with the provisions of S.231(1) of the CPA , particularly where an accused person is not represented by a counsel. It cited the case of **Juma Limbu @ Tembo v. The Republic**, Criminal Appeal No. 120 of 2005 (unreported) in which the Court stated as follows:

"...to avoid miscarriage of justice in conducting trials, it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings..."

As for the effect of non-compliance, the court stated as follows:-

"For the irregularity of non-compliance with section 231, we are of the view that all the proceedings appearing after the closure of the prosecution's case were null and void and vitiate all those proceedings thereafter."

That position was also taken in the cases of **Salum Nassoro v. The Republic**, Criminal Appeal No. 234 of 2009 and **Ally Juma Faizi @ Mpemba v. The Republic**, Criminal Appeal No. 401 of 2013 (both unreported).

On the basis of the foregoing reasons, we find that the trial court's failure to comply with the provisions of S.231 (1) of the CPA, which takes care of one of the aspects of a right to a fair trial, is a fatal omission. The irregularity renders the proceedings a nullity. As a result, we exercise the powers of revision vested in the Court by S.4 (2) of the AJA

and hereby quash the proceedings of the trial court which followed immediately after the ruling on a case to answer. We also quash the trial court's judgment and set aside the conviction and sentences which were imposed on the appellant. As a consequence, the proceedings and the judgment of High Court cannot stand. The same are hereby quashed and the substituted sentence is set aside. The record shall be remitted to the trial court for continuation of the case from the defence stage after due compliance with S.231 of the CPA.

DATED at TANGA this 19th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL