

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LUANDA, J.A., MMILLA, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 60 OF 2016

SEBASTIAN S/O SIRIRI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Rwakibarila, PRM-Ext Juris)

**dated the 14th day of December, 2006
in**

Criminal Session Case No. 13 of 1997

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JUDGMENT OF THE COURT

27th February & 12th March, 2018

LUANDA, J.A.:

The appellant, SEBASTIAN S/O SIRIRI and four others, were charged with murder in the Resident Magistrate's Court of Dar-Es-Salaam at Kisutu following the order of transfer made by the High Court and the same to have been specifically assigned to Rwakibarila, PRM – Ext Jurisdiction (as he then was). On 26/6/2006 Rwakibarila PRM-Ext Jurisdiction commenced the trial after he had conducted a preliminary hearing and sat with two assessors in compliance with the law.

The prosecution called eleven witnesses and closed its case. The trial court made a ruling to the effect that the prosecution had established a *prima facie* case against all five accused persons and then addressed them their right of calling witnesses and the manner in which they would give their evidence. That was on 2/5/2003.

On 16/8/2004 when the trial resumed, it was reported that one assessor expired. An attempt was made to replace not only the assessor who passed away but also the one who was still alive. That move was resisted by defence counsel who pressed the case to start afresh. At long last, the trial learned Principal Resident Magistrate Ext-Juris. agreed with the defence counsel. He made the following order which reads as follows:-

"ORDERS

- 1. A de – novo trial before this magistrate or another judicial officer with competent jurisdiction is ordered.*
- 2. Three new assessors for this case to be recruited
De-novo hearing to be on a date to be fixed by the Registrar.*

*Rwakibarila – PRM-Ext Juris.
17.8.2004"*

On 13/12/2005 the trial commenced afresh before Rwakibarila, PRM-Ext-Jurisdiction with a new set of three assessors. This time the prosecution paraded five witnesses and closed its case. At the close of the prosecution case, the trial court made a ruling in that the appellant and one of those four whom he was charged with had a case to answer. As to the other three, the court ruled that the prosecution did not establish a *prima facie* case against them. So, the charge against them was dismissed and the three were acquitted. The appellant and his colleague gave their evidence. Then the trial court summed up the case to the assessors, took their opinions and handed down judgment on 14/12/2006. The appellant was convicted as charged. He was convicted and sentenced to suffer death by hanging; whereas his colleague was acquitted. Dissatisfied with the finding of the trial court, he has come to this Court on appeal.

Before Mr. Daniel Welwel, learned counsel who represented the appellant started to argue the grounds of appeal raised, the Court on its own motion desired to know first whether following the death of one assessor, the trial learned Principal Resident Magistrate – Extended Jurisdiction who vacated the proceedings he had conducted, re-assigned the case to himself and heard it had jurisdiction to do so. Mr. Welwel told

the Court that the procedure adopted by the trial PRM-Ext Jurisdiction is not correct. He did not elaborate.

On the other hand Ms Neema Haule, learned Senior State Attorney who appeared for ~~the~~ respondent/Republic told the Court that the trial PRM-Ext Jurisdiction had no such jurisdiction. As such the proceedings are a nullity.

It is not in dispute that the High Court made an order for the transfer of the case to the Resident Magistrate's Court of Dar Es Salaam at Kisumu for trial before Rwakibarila, PRM, Extended Jurisdiction. Unfortunately, in the course of hearing of the case, one assessor passed away. Indeed, in terms of S. 265 of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) criminal trials in the High Court are required to be conducted with assessor the number of whom shall be not less than two. The trial court therefore, was unable to proceed with the trial following that death. The learned PRM-Extended Jurisdiction made an order for a retrial reproduced *supra*. He did not say from where he got such powers of ordering a retrial. Ordinarily, retrials are ordered by higher courts when the first trial is a nullity and quashed. By ordering a retrial, the trial learned PRM-Extended

Jurisdiction must be understood to have clothed himself with powers which he lacked. Such powers are vested in this Court.

We agree with Mr. Welwel as well as Ms Haule that the trial learned PRM-Extended Jurisdiction had no such powers and the procedure adopted was not correct. It follows therefore, that the entire proceedings of the trial court is a nullity. In the exercise of our revisional powers as provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, we quash the entire proceedings and conviction and set aside the sentence of death by hanging.

We have given a deep thought to the issue whether we should order a retrial. Mr. Welwel vigorously opposed it saying the appellant is not to blame; he has been in custody for a long period and the evidence on the prosecution case is weak. The weakness of the prosecution case was supported by Ms Haule.

On our part, we have taken into account that this is a serious offence in that the life of a human being is lost. We have also taken a note that the appellant is still in custody. However, in view of the seriousness of the offence we think that the interest of justice demand that there should be a

retrial in the High Court of Tanzania. (See **Fatehali Manji vs R.** [1966] EA 343).

We order the appellant to be tried afresh as soon as practicable. The appellant to remain in custody as a remandee pending his new trial.

Order accordingly.

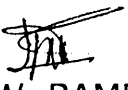
DATED at **DAR ES SALAAM** this 9th day of March, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL