IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUSSA, J.A, MWARIJA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 169 OF 2017

KILIMO MSISI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mohamed,J.)

dated the 29th day of March, 2017
in
Criminal Appeal No. 88 of 2016

JUDGMENT OF THE COURT

10th & 13th July ,2018

MWARIJA, J.A.:

The appellant, Kilimo Msisi, who was the 1st accused person at the trial and other two persons who are not parties to this appeal, Fabian Mgunga and Stamili Steven, (the 2nd and 3rd accused persons respectively at the trial), were charged jointy and separately in the District Court of Kongwa with three counts under the Penal Code [cap. 16 R.E. 2002] (the Penal Code). In the first count, the appellant and Fabian Mgunga were jointy charged with the offence of armed robbery contrary to section 287 A of the Penal Code. It was alleged that on 22/7/2015 at about 20.00 hrs at

Kibaigwa village in Kongwa district, Dodoma region, the said persons stole eight mobile phones, recharge vouchers and cash, all total valued at Tshs. 72,122,000/= the properties of Charles Machimbi and immediately before and after such stealing, they threatened the said Charles Machimbi with a bush knife in order to obtain and retain the said properties.

In the second count, Fabian Mgunga was separately charged with the offence of being found in possession of goods suspected to have been stolen or unlawfully acquired contrary to Section 312 of the Penal Code. That on 12/8/2015 at about 15.00 hrs at the same place mentioned in the 1st count, he was found in possession of one motor vehicle make Toyota Carry, Reg. No. T. 987 CAL, one motorcycle make Bhajaj Boxer, Reg. No. MC 683 ATP and cash, all total valued at Tshs 7,600,000/= the properties which were reasonably suspected to have been stolen or unlawfully acquired.

On his part, Stamili Steven was also separately charged in the 3rd count with the offence of receiving property or goods suspected to have been stolen or unlawfully acquired contrary to Section 311 of the Penal

Code. The particulars of that count are that, on 23/7/2015 at unknown time at Dodoma Municipality within Dodoma region, the said person received one bank teller machine belonging to Equity Bank and recharge vouchers, all total valued at Tshs. 2,300,000/= the properties of Charles Machimbi knowing or having reason to believe that the properties were stolen or unlawfully acquired. All the charged persons denied their respective counts.

At the trial, the prosecution relied on the evidence of eight witnesses while the appellant and the other two persons were the only witnesses for the defence. At the conclusion of the trial, the appellant was found guilty of the 1st count. He was as a result, convicted. Fabian Magunga was acquitted of that count. He was however convicted of the 2nd count. Stamili Steven was also found guilty and convicted of the 3rd count. As a consequence, the appellant was sentenced to thirty years imprisonment whereas Fabian Magunga and Stamili Steven were sentenced each to two years imprisonment. The appellant unsuccessfully appealed to the High Court, hence this appeal.

The facts giving rise to the appeal can be briefly stated as follows: Charles Machimbi (PW1) was until the material date of the incident an employee of one Edie Paulo who operated M-Pesa business at Kibaigwa area, near a bar owned by one Kassim Usafi. On 22/7/2015 at about 20.00 hrs (erroneously shown is the typed proceedings as 00.00 hrs) while on the way from his workplace, he was confronted by three persons who attacked and robbed him of a bag which according to his evidence, contained cash, mobile phones and recharge vouchers, and a bank teller machine, all total valued at Tshs 72,122, 000/=. The robbers injured him by cutting him with a panga (machete) before they robbed him of the said properties. Twenty minutes after the robbery, PW1's employer, Edie Paulo Nyisaba (PW2), was informed about the incident. He went to PW1's home and assisted to take him to the police where he was issued with a PF. 3 and later to hospital for treatment. While at the hospital at about 23.00 hrs, PW2 saw an unconscious person being brought there by the police for treatment. PW1 identified that person to be the appellant.

On the same date of the incident, the police had received information that there was a person who was being attacked by villagers. A police

officer No F 4129 DC Masunga (PW4),was one of the police officers who went to the scene, near Alaska Guest House. He found the appellant already in an unconscious state. PW4 had accompanied the OC/CID, Charles Mwenda (PW5). They took the appellant to Kibaigwa Health Centre for treatment. After PW1 had lodged a complaint to police, the appellant was arrested. He was interrogated by PW4. The appellant's statement was admitted in evidence by the trial court as Exhibit PE2. According to PW5 and PW4, the appellant admitted the offence and mentioned his collaborators. The police traced the named persons but did not succeed to arrest them.

Later on 12/8/2015, after further investigation, the police got information that some of the stolen money was kept in the house of Fabian Mgunga. His house was searched by PW5 and the properties, including those named in the 2nd count were found. On 13/8/2015, the police also searched the room of Stamili Steven in her absence at Ipagala, Dodoma in her parents' house. This followed information given by Fabian Mgunga that other properties connected to the robbery were there. Upon the

search, the properties mentioned in the 3rd count were found. The appellant and the other two named persons were later charged as shown.

In their defence, they denied the allegations that they committed the offences charged. In his defence evidence, the appellant contended that he was arrested on 28/7/2015 at his home in the night by two police officers. They required him to show the money which he had hidden. He denied that he had in his possession any suspicious money. He was arrested and before he was taken to police station, he was severely tortured and later charged in court.

Fabian Magunga testified also in his defence that after his arrest, he was tortured. He was required to confess that he used the money stolen from PW1 to buy the properties which were found in his possession. It was his defence that he picked the money and used it to buy those properties, the motor vehicle and motorcycle.

On her part, Stamili Steven testified that she was arrested on 13/5/2015 and on 14/8/2015 she was interrogated in connection with

recharge vouchers that were found in her possession. She testified that the vouchers were left at her home by her sister's child. It was her defence that she did not have knowledge that recharge vouchers were stolen properties.

In convicting the appellant, the learned Resident Magistrate relied on the identification evidence of PW1 to the affect that, he identified the appellant and Fabian Magunga at the scene of crime and that he also later recognized the appellant at the hospital when was taken there for treatment. It was his evidence further that the appellant, who was in the company of three robbers, was the one who instructed the other culprits to cut him (PW1) with a machete when he resisted to surrender the bag which contained the stolen properties. The learned trial Resident Magistrate relied also on the cautioned statement of the appellant (Exhibit PE2). With regard to identification of Fabian Magunga, the trial court found that the same identification evidence was insufficient to found his conviction. Furthermore, acting on the evidence of the search conducted by PW5 in the room which was being occupied by Stamili Steven at her parent's house, the trial court found her guilty as charged.

Aggrieved by conviction and sentence, the appellant appealed to the High Court. His appeal was unsuccessful. Although the learned High Court judge expunged the appellant's cautioned statement on the ground of invalidity for having been recorded outside the prescribed time, he upheld the finding that the appellant was properly identified by PW1 at the scene of crime. The learned first appellate judge relied also on the evidence leading to the arrest of the appellant by the villagers immediately after the robbery. On that finding, the High Court dismissed the appeal.

Undaunted, the appellant preferred this second appeal raising three grounds of appeal as follows:-

" 1. *That both Trial and Appellate court erred in law by convicting the Appellant basing on defective charge sheet.*

2. *That the Trial and Appellate Court erred in law and fact convicting (sic) the Appellant without considering that prosecution side failed to prove their case beyond reasonable doubt.*

3. That the whole proceedings marred (sic) by procedural irregularities."

At the hearing of the appeal, the appellant was represented by Mr. Godfrey Wasonga, learned counsel whereas the respondent Republic was represented by Ms Judith Mwakyusa, learned State Attorney.

Before the learned counsel for the parties could proceed to argue the grounds of appeal, at the prompting of the Court, they submitted on the apparent irregularity in the proceedings of the trial court concerning non-compliance with S.214 (1) of the Criminal Procedure Act [Cap.20 R.E.2002] (the CPA). The proceedings were conducted by two different Resident Magistrates and in so doing, the successor magistrate did not comply with the provisions of S. 214 (1) of the CPA which requires *inter alia,* that reasons be given for the predecessor magistrate's failure to complete the proceedings. The section provides as follows:-

" 214 (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, resummon the witnesses and recommence the trial or the committal proceedings."

Both Mr. Wasonga and Ms Mwakyusa submitted that non-compliance with that requirement renders the proceedings a nullity. Indeed, since under that provision, it is a mandatory requirement that the reason why the predecessor magistrate was unable to complete the trial must be assigned, the proceedings conducted in violation thereof becomes a nullity. In the case of **Abdi Masoud @ Iboma & 3 Others v. The Republic,** Criminal Appeal No. 116 of 2015 (unreported) the Court stated as follows:-

" In our view, under section 214(1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrates. It is a requirement of the law and has to be complied with. 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. Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity."

The rationale for this requirement is based on the court's duty to ensure that parties to a case are afforded a fair trial. In the case of **Priscus Kimario v. The Republic,** Criminal Appeal No. 301 of 2013, the Court stated as follows:

" we are of the settled mind that where it is necessary to reassign 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 reasons could just pick up any file and deal with it to the detriment of justice.*** *This must not be allowed."* [Emphasis added].

As stated above, the irregularity renders the proceedings of the trial court a nullity. As a result, in the exercise of the powers of revision vested in the Court by S. 4(2) of the Appellate Jurisdiction Act [Cap.141 R.E. 2002], we hereby quash the proceedings and judgments of the trial court and set aside the sentence. As a result, the proceedings and the judgment of the High Court which arose from irregular proceedings of the trial court are also hereby quashed.

Having decided on the effect of the non-compliance by the trial court, of S 214(1) of the CPA in the manner stated above, the remaining issue is on the way forward. Ordinarily, when proceedings of a trial court are nullified an order of trial *denovo* follows. A retrial should however, be ordered only if it would be in the interests of justice. It would not be

ordered if it will occasion injustice. In **Fatehali Manji v. The Republic** [1966] I EA 343 that principle was underscored in the following words:

> *" in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the trial; even where a conviction is vitiated by a mistake of the trial for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should be made where the interests of justice require it."*

In this case, both Mr. Wasonga and Ms Mwakyusa submitted that a retrial order will not be appropriate because the identification evidence relied upon to found the appellant's conviction did not meet the reliability test for that kind of evidence. We agree with them. As pointed out above the appellant's conviction was based on the identification evidence of PW1 and the appellant's cautioned statement.

After the High Court had expunged the cautioned statement for having been recorded outside the prescribed period of four hours from the time when the appellant was put under restraint as provided under S.50 (1) (a) of the CPA, the only remaining crucial evidence is the identification evidence tendered by PW1.

We are of the view that such evidence was improperly acted upon to convict the appellant. Since identification was made in the night hence under difficult conditions, it ought to have met the test stated in the case of **Waziri Amani v. Republic** [1980] TLR 250. One of the conditions is that the identifying person must state the source and the intensity of the light which aided him to make identification. In his evidence, PW1 merely said that:-

> *" ... I am familiar with the first accused. He was my customer, I also once bought shoes from him. On the date of incident he came to buy a voucher of Tigo of Tshs 1,000/=."*

PW1 did not state whether there was light at the scene of crime and if so, whether the intensity of that light was sufficient to enable him to identify any of his assailants. Even if he had known the appellant before, he could not be able to recognize him unless there was enough light to enable him to do so.

Furthermore, PW1 should not have failed to mention the appellant to PW2, the first person who arrived at the former's home after the incident or PW7 who responded to the alarm made by PW1 at the scene of crime. According PW7, PW1 was shouting that he was being killed by bandits. There is no evidence that he mentioned any of them by name. PW1's failure to name the appellant at the earliest opportunity casts doubt on the reliability of his identification evidence. In **Marwa Wangiti Mwita & Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported) the Court stated as follows:-

> " *The ability of a witness to name a suspect at the earlies opportunity is an all important assurance of his reliability; in the same way as*

un-explained delay or complete failure to do so should put a prudent court to inquiry."

On the basis of the above stated shortfalls in the prosecution evidence, we find that an order of a retried will not serve the interests of justice. At most, it will allow the prosecution to feel up the gaps in its evidence. In the event, we order that the appellant be released immediately from prison unless he is otherwise lawfully held.

DATED at **DODOMA** this 12th day of July,2018.

K. M. MUSSA
CHIEF JUSTICE

A.G.MWARIJA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL