**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., MWANDAMBO, J.A., And KEREFU, J.A.,)**

**CRIMINAL APPEAL NO. 282 OF 2017**

**DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT**

**VERSUS**

**1. WAMBURA MAHEGA @ KISIROTI.....1st RESPONDENT**

**2. HASSAN OTHMAN HASSAN @ HASSANOO.....2nd RESPONDENT**

**3. DR. NAJIM MSENGA.....3rd RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam).**

**(Dyansobera, J.)**

**dated the 29th day of December, 2016**

**in**

**HC. Criminal Appeal No. 116 of 2016**

**.....**

## JUDGMENT OF THE COURT

20th April & 7th May,2021

**LILA, J.A.:**

**WAMBURA MAHEGA @ KISIROTI, HASSAN OTHMAN HASSAN @ HASSANOO** and **DR. NAJIM MSENGA,** the 1st, 2nd and 3rd respondents, respectively, were jointly and together arraigned before the Resident Magistrates' Court of Dar es Salaam at Kisutu (henceforth the trial court) in Criminal Case No. 209 of 2011. As for the nature of the accusations raised by the prosecution against them, we reserve its discussion to a later stage for the same is central to the determination of this appeal. Suffice it to say that, upon their denial of the accusations, trial

ensued and at its conclusion, the respondents were acquitted from all accusations.

The Republic was aggrieved by the findings of the trial court consequent upon which they preferred an appeal to the High Court. The petition of appeal comprised of seven (7) grounds of grievances. Given their relevance in the determination of this appeal, we take pain to recite them as follows: -

*"1. That the trial magistrate grossly erred in law and fact by acquitting respondents with all counts they stood charged despite glaring strong evidence which warranted their conviction on each count.*

2. *That the trial magistrate erred in law and fact by failure to comprehend and properly evaluate the evidence hence she arrived at a wrong decision.*
3. *That the trial magistrate grossly erred in law and fact by her failure to properly analyse and evaluate evidence to determine the 4th count which was charged in the alternative to 2nd count.*
4. *That the trial magistrate erred in law and fact by holding that failure to call as a prosecution witness one SALIM MUHIDIN SHEKIBULA against whom the charges had been terminated by way of nolle prosequi was a fatal omission.*
5. *That the trail magistrate erred in law and fact by holding that no evidence was adduced by the prosecution to prove how the said copper was stolen.*

6. *That the trial magistrate erred ion law and fact by holding that the prosecution failed to bring the driver of the truck which carried the said copper either as a witness or accused while it is in evidence that the said driver escaped.*
7. *That the trial magistrate erred in law and fact by holding that no evidence was adduced by the prosecution to show how accused persons received the said stolen copper."*

The appeal before the High Court (Dyansobera, J.) was unsuccessful hence the present appeal. There are seven areas of complaints by the appellant the Director of Criminal Prosecutions (the DPP) which, for ease of reference at a later stage of this judgment, we find compelled to reproduce them as under: -

"*1. That, the learned High Court judge erred grossly both in law and fact by not faulting the trial court for acquitting the respondents with both counts of conspiracy to committing an offence and stealing*
2. *That, the learned High Court judge erred grossly both in law and fact by not faulting the trial court for acquitting the respondents with the count of receiving stolen property or unlawfully obtained which was charged in alternative to the 2nd count of stealing*
3. *That, the learned High Court judge erred grossly both in law and fact by holding that the 4th count namely, neglect to prevent the commission of an offence on the ground that the Prosecution failed to prove both knowledge and failure to prevent it on the part of the 2nd and 3rd respondents without*

*making analysis and his on consideration of the entire prosecution evidence on record.*

4. *That, the learned High Court judge erred grossly both in law and fact by holding that there was no evidence from the prosecution on how stole the said copper cargo and how without making analysis and his own consideration of the entire prosecution evidence on record.*
5. *That, the learned High Court judge erred grossly both in law and fact by holding that there was no evidence which proved that the stolen property was found in possession of the respondents.*
6. *That, the learned High Court judge erred grossly both in law and fact by his failure to discharge his duty of the first appellate court when he failed to re-evaluate the entire evidence of the trial court against the applicable law and make his own consideration and his own decision thereon."*

Before us were Mr. Tumaini Kweka, learned Principal State Attorney and Ms. Christina Joas, leaned Senior State Attorney who represented the DPP. On the other hand, Mr. Nehemia Nkoko, learned advocate, represented the 1st and 2nd respondents and Mr. Majura Magafu, learned advocate, appeared for the 3rd respondent.

Before the hearing could begin in earnest, Mr. Kweka sought leave of the Court to bring to the attention of the Court a novel issue apparent in the conduct of the trial and the appeal by both courts below to which he was of the view that the determination of the appeal on merits may be

rendered unnecessary. Mr. Magafu and Nkoko had no qualm with the prayer. We granted the unopposed prayer.

Addressing the Court, Mr. Kweka quite humbly and precisely took the Court through a series of amendments of the charge and ultimate substitution of the same with sanction of the trial court. To begin with, he pointed out that the respondents were first arraigned in the trial court on 2/9/2011 on a charge dated 2/9/2011 consisting four (4) accused persons including one Salim Muhidin Shekibula who featured as the 4th accused and had two counts with the third one being in the alternative thereof. On 25/1/2012, through a *nolle prosequi*, the appellant withdrew the charge against the 4th accused and was accordingly discharged. That meant three accused persons remained. Again, on 6/9/2012, the prosecution sought and were granted leave to amend the charge. A substituted charge comprising three (3) accused persons and three (3) counts were read over and the respondents pleaded to it. Lastly, in terms of section 234(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), the prosecution was, again, permitted by the trial court to amend the charge and a new charge was substituted on 13/9/2012 with three accused persons but with four counts. Arguing forcefully, Mr. kweka was firm that this last charge was the one on which the respondents were tried. Somehow looking surprised, he argued that the record of appeal, at page 40 and 41 is to the effect

that when the respondents were arraigned, only three counts were read over to the respondents to which they pleaded not guilty.

Mr. Kweka unveiled another anomaly in the learned trial magistrates' judgment found at pages 214 to 240 of the record of appeal. This time, he asserted, the learned trial magistrate made reference to a charge consisting four (4) accused persons and three counts in which she acquitted them all. Based on his earlier arguments, he was insistent that such charge was not the one against which the appellants were tried.

The learned Principal State Attorney went further to submit that aggrieved, the Republic appealed against the trial court's decision to the High Court (first appellate court). With a remarkable humbleness, he readily conceded that even the Republic was wrong to raise a complaint in ground 3 of appeal faulting the trail court's finding on the 4th count to which the respondents did not plead and hence not tried against. He was, however, defensive in that he claimed that the prosecution was not in a position to know whether or not the respondents' plea against the 4th count was not recorded.

The above was not all. Mr. Kweka went further to submit that like the trial court, even the High Court (Dyansobera, J.) strayed into the same error when it entertained an appeal which was founded on a charge consisting four counts when it was clear that the 4th count was not laid

down for the appellants to plead thereto. More so, he submitted, the learned judge considered the evidence in respect of the 4th count and was satisfied that there was no evidence proving knowledge of offence being committed so that they could take steps to prevent such offence from being committed.

Given the elaborated anomalies, it was the learned Principal State Attorney's view that the infractions are fatal and cannot be cured. Mr. Kweka invited the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) to revise the proceedings and judgments of both courts below and quash and set aside the orders of acquittal and direct the record to be remitted to the trial court so that the case can be tried *de novo* before another magistrate of competent jurisdiction.

Mr. Magafu and Mr. Nkoko formed a united front and were of the decided decision that the former should respond to the salient issues raised by Mr. Kweka. Apart from appreciating the existence of the anomalies pointed out by Mr. Kweka which are material and vitiated the trial, Mr. Magafu hastened to agree with him that generally, the ultimate remedy should be to remit the record to the trial court for it to try the matter afresh. Arguing eloquently, he pressed that the prosecution (appellant herein) should not be allowed to benefit from its own wrongs.

Elaborating on the point, he took the Court through the undisputed background the matter that culminated in the appellants' acquittal from the offences they stood charged with. In his view, being the one who had sought leave of the trial court to amend the charge, the appellant bore the blame for not notifying the trial court that the 4th count had not been read over and pleaded by the respondents at the trial court. Such silence, Mr. Magafu argued, amounted to acquiescing with what the trial court did hence they cannot be heard complaining today. They led evidence in respect of three counts hence they are estopped from faulting the trial magistrate. More so, Mr. Magafu further argued, the High Court was, again, invited by the appellant to determine the appeal on four counts for which it could not disregard the 4th count but pronounce itself on it as it did.

In respect of whether or not an order for re-trial should be made, Mr. Magafu stoutly opposed the idea of the matter being retried. He advanced three reasons in support of his position. **First**; that the matter has taken too long in court in that the respondents have been dragged in court since 2011 quite against a public policy that litigation must come to an end. **Two**; that upon determination of the case, the trial court ordered disposal of exhibits particularly the allegedly stolen copper to be returned to the owner. He was therefore doubtful if they will be available during the

second trial. **Third** and last, some witnesses who did not testify during the first trial which were found to be crucial by both courts below will be called to do so. This, he insisted, will prejudice the respondents. In all, he was inclined not to support Mr. Kweka's proposal that the respondents be retried on the reason that there is sufficient evidence to prove the charge.

In his rejoinder submission, the learned Principal State Attorney reiterated his earlier submission with an addition that the exhibits were not yet disposed because the case was yet to be concluded due to the appeals that have been in court. While referring to the factors to be considered before granting an order for re-trial as propounded by the defunct East African Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] E. A. 341, he submitted that the procedural flaws committed by the trial court render the trial illegal and defective hence the remedy is to order a re-trial. He made a serious undertaking that the prosecution will not use the opportunity to fill in the gaps in the prosecution case.

To begin with, much as we would have liked to consider the grounds of appeal and determine them on merits, having heard the submissions by the learned counsel for the parties, it is our view that the epicentre of the concurring learned counsel's arguments are that the trial was a nullity on account of the pointed out irregularity on

how the respondents were arraigned hence there is no need to consider the grounds of appeal. To them, the anomaly sufficiently disposes of the appeal. Upon our objective consideration, we unreservedly agree with them. We shall demonstrate.

We deem it instructive, as a starting point, to be clear of when does trial commences. Section 228 of the CPA lays out the mode how accused persons should be arraigned. Of particular relevance to our case is subsection (1) which for ease of reference we reproduce it as under: -

> *"The substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge."*

It is plain that the above provision enjoins the court before which the accused is charged to ensure that the charge is read over, fully explained and the accused person is called upon to plead.

Cognizant of the above requirement, the Court in the case of **Akber Alli Mohamed Damji vs Republic** 2 TLR 137 pronounced that arraignment is not complete until the accused pleads to the charge levelled against him. In essence therefore, trial commences with the arraignment of the accused and no court is permitted to proceed with the hearing of a case before the accused's plea is taken. Failure to do so is

fatal and renders the proceedings illegal and the whole trial a nullity (see **Athuman Mkwela and Two Others vs Republic**, Criminal Appeal No. 173 of 2010 (unreported) and **Naoche Ole Mbile vs Republic** [1993] TLR 253. The rationale is not farfetched. The charge enables the accused to know the nature of the case facing him (see **Mussa Mwaikunda vs R** [2006] TLR 387).

Even when a charge is amended and a new charge is substituted in terms of section 234 of the CPA, still the court is imperatively required to ensure that the accused persons plead to the new or altered charge. That section provides: -

> "234 (1) *Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for* ***alteration*** *of a charge either by way of* ***amendment*** *of the charge or by* ***substitution*** *or addition of a new charge as the court thinks necessary to meet the circumstances of the case uniess, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this*
> *Sub-section shall be made upon such terms as the court shali deem just.*
> *(2) subject to subsection* (1), *where a charge is* ***altered*** *under that subsection -s*

*(a)* ***the court shall thereupon call the accused person to plead to the altered charge;"***

[Emphasis is ours.]

In the case of **Aidan Mhuwa @ Aidan Nchemeka vs Republic**, Criminal Appeal No.139 of 2014, the Court was faced with a situation where the substituted charge under section 234 of CPA was not read over to the appellant for him to plead. The Court stated that: -

> *"The law as it presently stands, allows charges to be altered or amended. A trial court is enjoined under section 234 of the CPA to take a new plea after substitution...In this case, we are settled in our minds that failure by the trial court to perform its mandatory duty imposed on it by the provisions of section 234 (2) (a) of the CPA is not a mere procedural lapse, but a fundamental procedural irregularity going to the root of the case. The irregularity cannot be cured under section 388 (1) of the CPA. (See, for instance,* ***SHABANI ISACK @ MAGAMBO MAFURU AND ANOTHER V. REPUBLIC;*** *Criminal Appeal No. 192 & 218 of 2012* (unreported)."

The Court made reference to its earlier decision in **TLUWAY AKONNAY V. REPUBLIC** [1987] T.L.R. 92 in which it stated that: -

*"It is mandatory for a plea to a new or altered charge to be taken from an accused person, failure to do so renders a trial a nullity."*

In the matter under our scrutiny, the record shows, and luckily, counsels for the parties are agreed, that the respondents were first arraigned in court on 2/9/2011 on a charge dated 2/9/2011 consisting four (4) accused persons including one Salim Muhidin Shekibula who featured as the 4th accused and had two counts with the third one being in the alternative. On 25/1/2012, the charge against Salim Muhidin Shekibula was withdrawn and was accordingly discharged. The charge was not amended. Three accused persons remained. On 6/9/2012, the charge was amended and a new one substituted comprising three (3) accused persons and three (3) counts. The last amendment and a new charge being substituted was on 13/9/2012. It comprised three accused persons but with four counts. While in the first two occasions when the charge was amended and a new one substituted all three accused persons (the respondents herein) were called upon to plead to all the counts, in the last moment the respondents pleaded to only three counts. They did not plead to the 4th count.

It is clearly discernible from the foregoing facts that there was failure by the trial court to cause the respondents enter a plea on the 4th count. Mr. Kweka and Mr.Magafu, on this point, therefore, are right.

Although the principles in the cases cited concerned failure to plead to the whole charge, we are of the view that they equally apply even where no plea is taken on a part of the charge. That is the spirit inherent in section 228(1) of the CPA. To that extent, we are inclined to hold that the learned trial magistrate acted contrary to the mandatory requirements of section 228(1) of the CPA. By that omission there was no proper arraignment. In the light of the foregoing, we hold that the respondent's trial was a nullity.

Should we order a re-trial? Certainly is the question which asks for an immediate answer. It is Mr. Kweka's contention that since the trial was illegal and defective, there is overwhelming prosecution evidence which has no holes to fill in and the exhibit (copper) is yet to be disposed of, the case befits an order of re-trial.

Mr. Magafu is strongly opposed to Mr. Kweka's proposal being taken on board. The case has taken too long to be finalised, crucial witnesses namely; the watchman and the yard manager who received the copper and stored the same in the yard were not called as witnesses hence weakening the prosecution case, he contended. To him, therefore, an order for re-trial will afford an opportunity to the prosecution to fill up the yawning gaps in their case at the respondents' jeopardy. That, in essence, will amount to letting them to benefit from their own wrong which is not proper, he insisted. Pointing out the alleged wrongs, Mr. Magafu was

forthcoming that when the 4th count was omitted from being laid down for the respondents to plead to, the prosecutors were present but they remained silent which meant that they were comfortable with the omision. He added that, even in the appeals to the first appellate court and to this Court, the appellant has still maintained his dissatisfaction with the decision in respect of the 4th count. They wrongly moved the High Court to adjudicate on that count. Even here, had the anomaly gone unnoticed, they would have similarly moved this Court to adjudicate on that count. They cannot be heard faulting the learned judge, he concluded.

For our part, we think, as our starting point, we should first expound the factors guiding our courts in determining whether or not to make an order for re-trial. The factors were, with lucidity, elaborated in the case of **Fatehali Manji vs Republic** (supra). In that case it was stated that: -

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

***be made when the interest of justice require."***
(Emphasis added)

The principles were adopted by the Court in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated: -

> *"We are alive to the principle governing retrials. Generally,* ***a retrial will be ordered if the original trial is illegal or defective****. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps.* ***The bottom line is that; an order should only be made where the interest of justice require."*** (Emphasis added)

Viewed from this perspective, illegality and defectiveness of the trial are not the only factors to be considered. Instead, it seems clear to us that the overriding factor is interest of justice. Going by our findings above, we have no difficulty in agreeing with Mr. Kweka that the trial was tainted with a material procedural irregularity which rendered the trial illegal. We also have no any qualm with his contention that the copper, the subject of the charge, may still be not yet disposed of. We also appreciate that the duty lies on the court to ensure that the charge is read over to the accused in full and the accused persons plead to all counts in the charge and the pleas are properly recorded. But, the record bears out

that the respondents were represented by learned advocates before both courts below. Being officers of the court, learned counsel for both sides are obligated to bring to the attention of the trial magistrate or judge any omission in reading the charge. The prime cause of their presence in court, apart from representing their respective parties, is to ensure that the case is fairly tried. Pointing a finger to any one serves no any useful purpose. That is why, in terms of the holding in **Fatehali Manji's** case (supra), whether or not the court bears the blame is not a relevant factor to be considered in the determination of whether or not to order a re-trial.

We are now called to answer whether or not it will be in the interest of justice to order a re-trial. We have given due consideration to the rival submissions of the counsel for the parties. It is plain that the case has taken too long in court. Neither of the respondents was found in possession of the stolen copper. It is clear as to how the copper reached the yard owned by the 3rd respondent as the driver of the truck that carried the copper vanished into thin air. In the absence of his evidence, it becomes difficult to tell with certainty, as amongst the respondents who was behind the diversion of the copper. Again and crucial, those who received the copper at the yard were not called by the prosecution to testify on how the copper found its place in the yard and who was behind it too. Above all, it was not established that the 3rd respondent, **first**; had

knowledge of the nature of the luggage sought to be kept in the yard and **second**; whether the communication he made to allow storage of the copper in the yard was with the 1st respondent not another person who pretended to be the one. From the evidence on record and particularly the cooperation offered by the 1st and 2nd respondents during investigation which is inconsistent with the conduct of a guilt person, it seems clear to us that the 1st and 2nd respondents were linked with the offences for being dealers in scraps only. Although the learned Principal State Attorney has shown commitment not to capitalize the opportunity to strengthen the prosecution case by filing the gaps in it, we don't think if such a guarantee is worthwhile because an order of re-trial means that there should be a fresh trial in which the respondents should be called upon to plead to the charge and the prosecution should lead evidence afresh. The pleas and proceedings in the previous trial shall not be regarded as part of the proceedings of the new trial. Nothing will therefore stop both sides from calling any witness or introducing into evidence anything they shall deem essential. The prosecution, in particular, shall no doubt, ensure that they lead evidence proving the charge by addressing all the glaring weaknesses pointed out. It is therefore our view that it will, definitely, be unjust to order a re-trial. We accordingly refrain from ordering a re-trial.

All said, as urged by both counsel for the appellant and respondent, we invoke our power of revision under section 4(2) of the AJA and quash the proceedings and judgment of the trial court and set aside the orders consequential to it. In the same manner, we quash the proceedings and judgment of the High Court as they arise from a nullity. And, we make no order for re-trial.

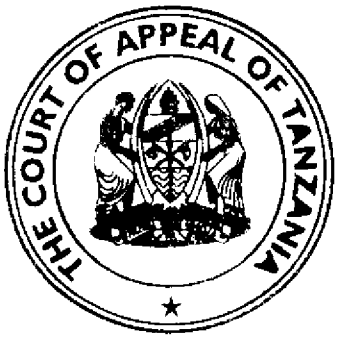
**DATED** at **DAR ES SALAAM** this 6th day of May, 2021.

S. A. LILA
**JUSTICE OF APPEAL**

L.J.S. MWANDAMBO
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Judgment delivered this 7th day of May 2021, in the Presence of Ms. Haika Temu, learned State attorney for the appellant/DPP, and Mr. Nehemia Nkoko, learned state attorney for the 1st & 2nd respondents, and Mr. Majura Magafu, learned state attorney for 3rd the respondent is hereby certified as a true copy of the original.




D.R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**