

**IN THE COURT OF APPEAL OF TANZANIA  
AT SHINYANGA**

**(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 232 OF 2017**

**VICENT KIJA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania  
at Shinyanga)**

**(Ruhangisa, J.)**

**dated the 17<sup>th</sup> day of March, 2017**

**in**

**DC Crimina Appeal No. 12 of 2016**

**RULING OF THE COURT**

13<sup>th</sup> & 17<sup>th</sup> August, 2021.

**KITUSI, J.A.:**

Two people were charged under section 287A of the Penal Code for Armed Robbery. The appellant Vicent Kija was convicted by the District Court of Kahama and sentenced to 30 years imprisonment. His appeal to the High Court was unsuccessful, hence this second appeal.

Before the trial court, it was alleged that on 18<sup>th</sup> August, 2015, at 22:00 hours, the appellant and another who was acquitted, stole a motorcycle Reg. No. Mc 593 AUJ make sunlg the property of one Fredy Ruben, by threatening one Marco Shija by using a club in order to obtain and retain it.

Marco Shija (PW1) was the star witness. He said he had borrowed the motorcycle from Fred his neighbor, for him to transport people who had visited him. After he had parted with his visitors and while at a place known as social, the appellant, a person he knew well, approached and asked him to take him to an area known as Nyasubi. PW1 obliged on the ground that he was a person he knew. When they reached at stop over area, the appellant attacked him by strangulation, and another person joined the attack by using a bush knife and a big stick. The appellant and his colleague made away with the motorcycle, leaving the wounded PW1 helpless.

A good Samaritan riding a motorcycle past the scene, helped PW1 to the police station where he obtained a PF3 and was attended at Kahama District Hospital, from where he was referred to Kolandoto Hospital in Shinyanga, because his condition got worse.

On 6/8/2015, presumably after his discharge from hospital, PW1 mounted a search for the appellant at Muungula area. He got the appellant and turned him over to the police. According to a police officer (PW3), the appellant made a cautioned statement confessing to the robbery.

Fred Ruben (PW2) testified too, but according to him the motorcycle belonged to one John, who did not testify. PW2 stated that he visited PW1 at the hospital where he found him unconscious and bleeding from his mouth. The appellant was however, discharged after two days and told PW2 that it

was Vicent, the appellant, who robbed him. PW2 further testified that he assisted PW1 in looking for and arresting the appellant on 6/9/2015.

In defence, the appellant confirmed the fact that he was arrested on 6/9/2015 on allegation of robbery of a motorcycle which he knew nothing about.

The trial court was satisfied that PW1's evidence of visual identification was impeccable and the appellant's cautioned statement sealed his fate. It convicted and sentenced him as earlier indicated. The High Court took a similar position when it took PW1's word as representing the truth. It dismissed the appellant's complaint against the prosecution's failure to produce the PF3 in exhibit.

The appellant raised five grounds to challenge that decision of the High Court but before embarking on them, we brought to the attention of the learned State Attorneys and the appellant, an unexplained succession of magistrates who presided over the matter. The respondent Republic was represented by Ms. Wampumbulya Shani and Ms. Immaculate Mapunda, both learned State Attorneys. Ms. Mapunda conceded that section 214 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002] (the CPA) was violated. That provision reads: -

*"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 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 a trial and if he considers it necessary, resummons the witnesses and recommence the trial or the committal proceedings."*

She proceeded to argue that the proceedings and judgment were, for that reason, a nullity. She called upon us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002] (the AJA) to nullify the proceedings, quash the judgment and set aside the sentence.

The appellant appeared in person. Without legal representation he could not comprehend this technical discussion so he had nothing to offer.

With respect, we agree with Ms. Mapunda that the provisions of section 214 (1) of the CPA were simply ignored. Trial commenced with Kyaruzi, RM who recorded evidence of PW1, PW2 and partly of PW3. When PW3 was testifying, a trial within a trial had to be conducted but before that was done, Oguda, RM took over. The appellant had objected to the admissibility of his cautioned statement making Kyaruzi, RM order a trial within a trial. However, when the matter was before Oguda, RM, the appellant withdrew his objection. Oguda, RM proceeded with the trial almost to the end. He prepared the

judgment but then left the sentencing to be done by Batenzi, RM without the barest of explanation.

In many of our decisions we have always insisted that succession of trial magistrates should be explained. In **Mathias Kalongo And Another vs. Republic**, Criminal Appeal No. 438 of 2015, (unreported) the Court held;

*"Our reading and understanding of section 214 (1) of the CPA which governs the taking over of a partly heard case in subordinate courts, district and resident magistrates' courts by another magistrate require the magistrate who takes over to assign the reason for taking over in the proceedings and not anyone else."*

This case was cited in another case of **Method Deogatias vs. Republic**, Criminal Appeal No. 116 of 2018 (unreported).

We entirely agree with the learned State Attorney and find that there was violation of the procedure stipulated under section 214 (1) of the CPA. As for the way forward, Ms Mapunda prayed that we should order a retrial because, she submitted, the prosecution has a solid case that can sustain a conviction of the appellant. However, before addressing on the strength of the prosecution case, the learned State Attorney conceded that the appellant's cautioned statement (Exhibit P2) was irregularly admitted because it is the prosecutor who tendered it. This complaint was raised in ground 5 of appeal.

She cited the case of **Robinson Mwanjisi & 3 Others vs. Republic** [2003] T.L.R. 218 for the procedure of introducing and tendering exhibits in court.

Once again, we agree with Ms. Mapunda that the procedure was muddled. The law requires exhibits to be tendered by witnesses, obviously so that they can be cross-examined by the other side. Since the prosecutor was not a witness, he could not be cross examined on Exhibit P2 therefore he was not competent to tender it. We expunge the said cautioned statement, Exhibit P2.

Despite that concession, Ms. Mapunda held on to her ground that on the basis of the evidence of PW1 that he recognized the appellant and that he named him to PW2 at the earliest opportunity, a conviction can still be sustained. When he was invited to submit on this he prayed to be released. With respect, we are unable to go along with the learned State Attorney. The only remaining evidence now is that of PW1 and PW2, having expunged the cautioned statement. According to PW2, the victim was discharged from hospital after two days, that is on 20<sup>th</sup> August, 2015. There is no explanation why the arrest was done 15 days later, despite Ms. Mapunda's vain attempts to rationalize the delay.

We also think the complaint by the appellant against the omission to tender the PF3 deserved a closer scrutiny. This is because the charge alleges that robbery was executed by "threatening" PW1. How then is the evidence in

support of that charge referring to attack by use of a big stick and bush knife?

In the absence of a PF3, how is this doubt cleared?

We are aware of the principle, just as Ms. Mapunda is, that a retrial should not be ordered if by doing so it will provide the prosecution with an opportunity to rectify defects. See the celebrated decision in the case of **Fatehali Manji vs. Republic** [1966] EA, 343. In this case there is a glaring variance between the charge alleging armed robbery by threatening the victim, and the evidence alleging that the victim was actually maimed by use of a club and bush knife. Such variance of charge and evidence, if not amended, may lead to an acquittal. See the case of **Anania Turian vs. Republic**, Criminal Appeal No. 195 of 2009 and **Oswald Makiwa @ Sudi vs. Republic**, Criminal Appeal No. 190 of 2014 (both unreported).

This means that if a retrial is ordered as prayed by Ms. Mapunda, the prosecution may do what is necessary to harmonize the charge and the evidence, which, going by **Fatehali Manji** (*supra*), must not be allowed to happen.

On those grounds, we do not agree with Ms. Mapunda that the prosecution has a strong case to sustain a conviction of the appellant. Instead if a retrial is ordered the prosecution will fill in gaps in their case. We are not losing sight of the fact that the appellant has served close to six years in jail since 2015. We therefore invoke our revisional powers under section 4 (2) of

the AJA, to nullify the irregular proceedings, quash the judgment and conviction and set aside the sentence. The justice of the case requires us to order, as we do, the appellant's immediate release, unless his continued incarceration is for another lawful cause.

**DATED** at **SHINYANGA** this 17<sup>th</sup> day of August, 2021.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

This Ruling delivered this 17<sup>th</sup> day of August, 2021 in the presence of the Appellant in person, unrepresented and Mr. Jukael Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**