IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 332 OF 2017

ROBERT S/O MKABE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Kigoma at Kigoma)

(Awasi, Ext. Jurisdiction)

dated the 20th day of May, 2008
in
Criminal Session Case No. 16 of 2006

.....

JUDGMENT OF THE COURT

18th & 22nd October, 2021

LEVIRA, J.A.:

The appellant, Robert Mkabe was convicted of murder and sentenced to suffer death by hanging by the Resident Magistrates' Court of Kigoma (S. J. Awasi – Principal Resident Magistrate with Extended Jurisdiction) (the trial court) in Criminal Session Case No. 16 of 2006. The particulars of offence stated that on 15th January, 2002 at about 19:00 hours at Buhoro village within Kasulu District in Kigoma Region the appellant did murder one Samwel Bidadi (the deceased).

The prosecution called two witnesses to prove their case; these were, Ephrata Athumani (PW1) and Daudi Samwel (PW2). The appellant fended for himself as a sole defence witness. In his defence, he denied to have committed the offence with which he was charged. Upon full trial, the trial court was satisfied that the prosecution led evidence sufficient to convict the appellant.

The background of this case is to the effect that in the morning of the fateful day, the appellant went to the deceased's home complaining that the goats of the deceased destroyed his crops in his shamba. Thus, he asked them to remove the said goats. However, he did not receive a pleasant response from PW2 who was one of the deceased's family members. According to PW1 the appellant was aggrieved and he intimated to PW2 that he deserved death. A fight ensued and the appellant injured one Athuman who was also among the deceased's family members. They reported the incident to the Village Executive Officer (the VEO) where they were given a letter to go for treatment. PW1 testified further that on the same day in the evening while going to the market, she met the appellant carrying a parcel and a panga in his hand. At the same time, she met the deceased with 10 heads of cattle. Later, when she returned home, she was told that the deceased had

been killed by the appellant. She believed that the appellant killed the deceased because she had earlier met the appellant with a panga. PW2 corroborated PW1's evidence and added that, he saw the appellant while killing the deceased with a panga. The trial magistrate was satisfied that the prosecution evidence managed to prove the case against the appellant to the required standard. Consequently, he convicted and sentenced the appellant as intimated above. Aggrieved, the appellant has filed the current appeal against that decision of the trial court.

Initially, the appellant had filed a six grounds memorandum of appeal but later his advocate (Ms. Stella Nyakyi) filed a fresh memorandum of appeal on 12th October, 2021 comprising of four grounds. At the hearing of the appeal, Ms. Nyakyi sought leave of the Court to add and argue an additional ground of appeal. In essence the said ground challenged the transfer order of the High Court conferring jurisdiction to the trial magistrate with extended jurisdiction to entertain this case because the same did not mention the specific name of a magistrate upon whom the power was conferred contrary to the requirements of section 256A (1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). There was no objection from Ms. Juliana Moke,

learned Senior State Attorney who represented the respondent/Republic at the hearing regarding the additional ground. On our part, we had no justifiable reason not to grant the leave sought. Therefore, in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 we granted leave for the parties to argue the new ground of appeal together with four grounds filed by the counsel for the appellant. The grounds of appeal filed by the appellant were abandoned by Ms. Nyakyi at the hearing of the appeal.

The four grounds of appeal filed by the counsel for the appellant were as follows: -

1. *That the trial magistrate with extended jurisdiction erred in law to convict the appellant basing on the evidence of the incredible witnesses.*
2. *That the trial magistrate with extended jurisdiction erred in law to admit an exhibit which was tendered without his (sic) maker and it was never read out after its admission.*
3. *That the trial magistrate with extended jurisdiction erred in law to convict the appellant relying on the cautioned statement which was not evidence before the trial court.*
4. *That the appellant was convicted and sentenced on unfair trial as there was procedural irregularity and non-observance of the law.*

Ms. Nyakyi first submitted in support of the additional ground of appeal to the effect that in terms of section 256A (1) of the CPA, transfer of cases from the High Court for trial by the Court of Resident Magistrates with extended jurisdiction must mention the name of the magistrate upon whom the power is conferred. Failure to mention the name, she said, renders the proceedings conducted by the Resident Magistrates whose name is not mentioned in the transfer order, a nullity. In support of her argument, she cited the case of the **Republic v. Daud Jimmy Kimiti @ Mbugua and 2 Others**, Criminal Appeal No. 203 of 2017 (unreported).

Ms. Nyakyi argued that in the present case the transfer order did not mention the name of the trial magistrate with extended jurisdiction assigned to deal with the case. Therefore, she urged us to nullify everything that took place at the trial court because the trial magistrate had no jurisdiction to conduct the trial. As a way forward, Ms. Nyakyi submitted that the proper cause would have been for the Court to order a retrial of this case. However, having considered other shortcomings in this case, she was of the view that ordering a retrial will not be appropriate as she thought it will amount to giving the prosecution an opportunity to fill up the gaps in their case. She identified the said gaps

as follows: - **First,** that the post mortem report (exhibit P1) admitted at page 87 of the record of appeal was tendered by the State Attorney instead of the maker and it was not read after being admitted contrary to the requirements of the law. To support her argument, she cited the case of **Athumani Almas Rajabu v. Republic**, Criminal Appeal No. 416 of 2019 (unreported).

Second, she referred us to page 95 of the record of appeal where PW2 who was the key witness testified without being sworn contrary to the requirement of the law under section 198 (1) of the CPA. The effect of which, she submitted, is for the said evidence to be discarded from the record as per the decision of the Court in **Lazaro Daudi @ Manuel v. Republic**, Criminal Appeal No. 376 of 2015 (unreported). She thus urged us to follow suit in this case. According to her, if we take that position, it means that the remaining evidence will be that of PW1 which is basically hearsay evidence that cannot sustain the appellant's conviction.

Third, Ms. Nyakyi submitted that at page 96 of the record of appeal, it is indicated that there was an interpreter (Gervas Lucas) in the cause of trial but it is not shown from which language he was interpreting. In the circumstances, it was her view that the appellant

could not follow the proceedings properly because he did not know from which language to which language the interpretation was made. She went on to submit that it was the responsibility of the trial magistrate to ensure that the interpretation is properly conducted to enable the appellant follow his case.

Fourth, the learned counsel submitted further that another defect was that, the trial magistrate did not give a ruling on a case to answer after the closure of prosecution case contrary to the requirements of the law under section 231 of the CPA. In support of her argument, she cited the case of **Emmanuel Thomas @ Kasamwa vs Republic,** Criminal Appeal No. 183 of 2019 (unreported). In addition, she said, at page 107 of the record of appeal, the defence case was not closed.

Fifth, Ms. Nyakyi submitted that at page 152 and 153 of the record of appeal the provisions of the law under which the appellant was convicted and sentenced respectively where not mentioned contrary to section 312 (2) of the CPA.

Finally, it was Ms. Nyakyi's submission that the evidence of PW1 was not sufficient to ground the appellant's conviction. She urged us to consider all the shortcomings she highlighted, the fact that there is no

sufficient evidence on record and the time so far spent by the appellant in prison and set him free.

The appeal was supported by Ms. Moke together with the submission made by Ms. Nyakyi though with different approach. While Ms. Nyakyi concentrated on procedural irregularities to request the Court not to order a retrial upon finding that the trial court had no jurisdiction; on her part, Ms. Moke having fully concurred with Ms. Nyakyi that the trial court had no jurisdiction and that the procedural irregularities do exist, she urged the Court not to order a retrial due to insufficient prosecution evidence in the record of appeal. She was of the view that the effect of those other procedural irregularities may not necessarily lead to nullification of the whole proceedings or dispose of the case.

As regards the issue of post mortem report, Ms. Moke submitted that it was not wrong for the same to be tendered by the State Attorney during preliminary hearing. She argued that the case of **Athuman Almas Rajabu** (supra) cited by the counsel for the appellant is distinguishable from the present case as in that case, the exhibit was tendered by the prosecutor during trial which is not the case herein. However, she said that the post mortem report in the current case was not mentioned during committal to be among the exhibits to be

tendered during trial. She referred us to page 80 of the record of appeal where the prosecutor intimated to the trial court that the prosecution did not intend to produce any document as exhibit during trial. Therefore, according to her, the prosecution could not tender that exhibit unless they issued notice as per the requirements of section 289 (1) and (2) of the CPA but that was not the case. Besides, she concurred with Ms. Nyakyi that the post mortem report was not read over after being admitted contrary to the requirements of the law. In the circumstances, she urged us to expunge the post mortem report from the record as it was in **Daudi Papias @ Sabuni v. Republic**, Criminal Appeal No. 119 of 2010 (unreported). However, Ms. Moke submitted further that apart from the post mortem report, the death was proved by other evidence. She referred us to page 92 of the record of appeal where PW1 testified that the deceased passed away, a fact which was also confirmed by the appellant in his evidence.

Ms. Moke fully concurred with the line of argument by Ms. Nyakyi regarding the unsworn evidence of PW2, failure by the trial magistrate to give ruling on a case to answer and failure to close defence case. However, she said, the remedy for failure to give a ruling on a case to answer and close defence evidence is to remit the case file to the trial

court to comply with the requirements of the law but that was not her request following the reasons to come into light shortly.

In reply to the arguments that the trial magistrate did not mention the provisions of the law while convicting and sentencing the appellant, Ms. Moke did not consider the defect to be fatal. This is due to the fact that the offence with which the appellant was charged was mentioned and thus according to her, the appellant understood the offence he was charged with. As regards the sentence, she confirmed the position stated by the counsel for the appellant. But she submitted further that the Court can invoke its powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 R.E. 2019 (the AJA) to remit the case file to the trial court to rectify the defect. Nonetheless, she could not apply for such an order in the circumstances of the current case.

Ms. Moke went on to state that a retrial can only be ordered if it will not allow the prosecution to fill up the gaps. She highlighted that in this case the prosecution brought two witnesses, whereas PW2 is said to be the eye witness. According to her, the incident took place three hours after 7:00 pm, but he did not state how he identified the appellant and thus his evidence could not be relied upon to ground conviction. In

support of her argument, she cited the case of **Bendera Athumani v. Republic**, Criminal Appeal No. 285 of 2012 (unreported).

In conclusion, Ms. Moke urged use to exercise our powers under section 4 (2) of the AJA to nullify the proceedings of the trial court, quash conviction, set aside the sentence and set free the appellant. The counsel for the appellant had no rejoinder to make.

On our part, we agree with the submissions made by the learned counsel for the parties in respect of the defects in the trial conducted by the trial court. It is not in dispute that the order purporting to transfer the case to the Resident Magistrate with extended jurisdiction (Hon. Awasi) to try the case which ordinarily is triable by the High Court did not in fact, confer such power and it was given in contravention of Section 256A (1) of the CPA which stipulates as follows:-

> *"(1) The High Court may direct that the taking of a plea and the trial of an accused person committed for trial by the High Court, be transferred to, and be conducted by a resident magistrate upon whom extended jurisdiction has been granted under subsection (1) of section 173".*

The above provision implies that transfer of a case must be made to a specific resident magistrate with extended jurisdiction which is not the case herein. The transfer order in the current appeal is found at page 84 of the record of appeal. For easy reference we take liberty to reproduce it hereunder: -

"***ORDER***

This case is hereby transferred to KIGOMA Resident Magistrate's Court for hearing by a Resident Magistrate with Extended Jurisdiction as stipulated under the provision of Section 256A of the Criminal Procedure Act, 1985, as amended by Act No. 17 of 1996.

Sgd: D. M. Mwita

JUDGE

11/10/2006"

The above order, as it can be seen, did not specify the name of resident magistrate with extended jurisdiction to whom the case was transferred. Since the order of the High Court omitted to specify the name of the trial magistrate, it cannot be said with certainty that Hon. S. J. Awasi was clothed with jurisdiction to conduct the trial of the offence the appellant was alleged to have committed. We are fortified by a number of decisions of the Court in the position we take, that it was a

must for the name of a magistrate to be mentioned in the transfer order. The said decisions include: **Theophili Kamili v. Republic,** Criminal Appeal No. 100 of 2012; **Richard Sipriano & Another v. Republic,** Criminal Appel No. 50 of 2013; **Republic v. David Jimmy Kimiti @ Mbugna and 2 others**, Criminal Appeal No. 203 of 2017 (all unreported). In the case of **Theophili Kamili** (supra) the Court delt with an akin situation to the current case and had the following to say: -

> *"From the wording of Section 256A (1) of the Criminal Procedure Code, Cap 20 the transfer of the case from the High Court after the High Court had conducted the preliminary hearing, and* ***the omission to specify the name of the trial magistrate definitely denied Mr. Benedict Mwingwa, then Principal Resident Magistrate with Extended Jurisdiction the power to conduct the trial of the offences the appellant was alleged to have committed.*** *As already said, the section is specific. Not only that the transfer must be made before the High Court conducts the preliminary hearing, but the direction must also mention the particular name of the resident magistrate with extended jurisdiction who should conduct the trial".* [Emphasis Added].

In the light of the position of the law stated above, we find that Hon. S. J. Awasi conducted the appellant's trial without being clothed with requisite jurisdiction. Ordinarily, we could nullify the proceedings and exercise our powers of revision under section 4 (2) of the AJA to order a retrial, but we do not consider ordering a retrial to be a proper course in the circumstances of the current case. In **Fataheli Manji v. Republic** (1966) EA 341, circumstances under which a retrial can be ordered are stated as follows: -

> *"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 first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."*

Being guided by the above settled position and having thoroughly gone through the record of appeal, we agree with Ms. Moke that the

evidence of PW2, the sole key witness is not sufficient to sustain the appellant's conviction had it been that PW2 was sworn before adducing his evidence and the trial magistrate had jurisdiction to conduct the trial of the appellant. We hold so due to the fact that according to PW2, the incident occurred at night, three hours after 7:00 pm. Besides, he testified further that: *"I saw Robert hiding in the bush. He tackled down the deceased and cut him with a panga".* The record of appeal is silent as to how PW2 was able to identify the appellant at the scene of crime. The source of light and other conditions favouring proper identification were not explained by PW2. Therefore, we agree with Ms. Moke that ordering retrial under the circumstances will enable the prosecution to fill up the gaps identified in the first trial contrary to the interest of justice.

In addition, apart from insufficiency evidence, we also agree with the counsel for the parties that there were procedural irregularities explained at length above which in sum, if considered, we think it will be unfair to the appellant if we order retrial. Generally, we find that the appeal has merit.

In exercise of our revisional powers under section 4 (2) of the AJA, we nullify the proceedings of the trial court, quash conviction and set

aside the appellant's sentence. We order immediate release of the appellant from prison unless otherwise he is held therein for other lawful cause.

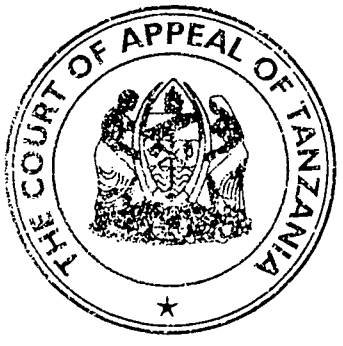
DATED at **TABORA** this 21st day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of October, 2021 in the presence of Ms. Stella Thomas Nyakyi, learned counsel for the Appellant and Mr. Tito Ambangile Mwakalinga, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL