IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 42 OF 2009

ORIGINAL CRIMINAL CASE NO. 163 OF 2007

OF THE DISTRICT COURT OF URAMBO

AT URAMBO.

BEFORE: R.S. MUSHI, Esq; RESIDENT MAGISTRATE

SHABANI S/O JUMA @ ZUNGU.....APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGMENT

Date of last order 19th Oct, 2009

Date of Judgment 7th Dec, 2009

WAMBALI,J.

In the District Court of Urambo at Urambo the appellant Shabani Juma @ Zungu and six others were charged jointly and together with two counts; Burglary contrary to section 294 (1) of the Penal Code Cap. 16 R.E. 2002 and Theft contrary to section 265 of the Penal Code Cap. 16 R.E. 2002. It was laid in the charge in respect of both counts that on or about 17/9/2007 at about 03.30 hrs at Boma village within Urambo District in Tabora Region all accused

persons jointly and together broke and entered the dwelling house of one F. 3764 D/SGT. EL-Majid with intent to commit an offence and that immediately thereafter they stole various items all valued at Tshs. 942,000/= the property of the said police officer.

All accused persons denied the charges and the case proceeded for hearing in which five prosecution witnesses testified. It is on record that during the trial the 4th accused escaped while on bail and the case against him proceeded under section 226 of the Criminal Procedure Act, Cap. 20 R.E. 2002.

It seems that the second accused although he testified in defence of this case, on the judgment day he was not present as per the corram of the Court. The learned Resident Magistrate however did not say if the second accused was convicted in absentia, but it is presumed that he was so convicted as he has not appealed and it is not clear if he is currently serving his sentence.

Be that as it may, at the end of the trial the learned Resident Magistrate acquitted all accused in respect of the first count (burglary) but convicted the first accused (appellant) and the second accused in respect of the second count of theft. The 3rd, 4th, 5th, 6th and 7th accused were acquitted in respect of the second count. Both accused (1st and 2nd) were sentenced to 4 years imprisonment.

The appellant was aggrieved with both conviction and sentence and appealed to this court with several grounds. He appeared in person during the hearing and the Respondent was represented ably

by Miss Jane Mandago, learned State Attorney who supported both conviction and sentence.

During the hearing of the appeal apart from what the learned State Attorney had submitted in support of conviction and sentence of the appellant, after I had gone through the record of the court I was of the view that there was a mix up of the record and some procedure. In view of the fact that the case heard was heard by three Magistrate till judgment, the question was whether there was no failure of justice. The learned State Attorney conceded that there was change of magistrate and that there were no information to the accused on record but stated that there was no failure of justice on the part of the accused. She stated therefore that the court can be at liberty to see if the matter was currable under section 388 of the Criminal Procedure Act Cap. 20 R.E. 2002. She however in the course of her submission stated that it was suprising, why the second accused did not appeal against the finding of the court as in her view he was supposed to be prosecution witness like PW.4. Nevertheless the learned State Attorney prayed that the appeal be dismissed.

As I stated above the appellant has lodged about five grounds of appeal. However, I am of the considered opinion that in view of what I have point about the change of magistrate and mix up of the record, the complaint in ground 4 where he alleges that he was not found with the stolen properties but rather that they were found with PW.4 and the second accused, is sufficient to determine this appeal without going into other grounds.

It is noted from the record of the Court that the trial started with J.A. Khaliki, Principal District Magistrate who heard the evidence of the prosecution up to 16/6/2008 when the third prosecution witness (PW.3) testified.

It is also on record that from 24/7/2008 L.J. Mbuya learned Principal Resident Magistrate took over and heard the evidence of PW.4 and PW.5 and made a ruling that there was a case to answer in respect of all accused persons. He also heard the defence of DW.1 (appellant), DW2, DW,3 DW5. and DW.7. It is also apparent in the record that during the hearing of the defence of DW.1, only the second accused was recorded to have cross examined him. When it was the turn of DW.2 to testify it is only DW.1 (appellant) who is in record to have cross examined him. Equally DW.3 was only cross-examined by DW.2. It is my considered opinion that the magistrate concerned was supposed to indicate that the rest of co-accused present then were given chance but they had nothing to ask. The record is silent. The record is only clear that when DW.5 testified only DW.1 (appellant) asked him and the 2nd, 3rd, 7th accused had nothing to say. DW.7 was also cross examined by DW.1 (appellant) but the record does not show that others were given chance to cross examine him like they were given for DW.5. It is also on record that during the hearing of the defence of DW.1, DW.2, DW.3, DW.5, DW.6 was not on record how long he was not present as on 20/11/2008 the public prosecutor requested the court to shift the trial from Urambo to Tabora so that his (DW.6) evidence could be taken as he was in hospital. The name of the hospital was not mentioned.

The learned Principal Resident Magistrate granted the prayer and ordered that hearing would have taken place on 4/12/2008. From then the learned Principal Resident Magistrate did not continue with the trial and the case was adjourned by the Justice of the Peace A.M. Kivanda who adjourned it to 18/12/2008 for mention and hearing on 8/1/2009. On 18/12/2008 R.M. Mushi learned Resident Magistrate took over and set the hearing on 24/12/2008; On the date set for hearing above the learned Resident Magistrate heard the defence of DW.6 and the record indicate that accused who were present were given chance to cross-examined him and others had nothing to say. However the record is not clear whether the proceedings were conducted in Tabora as ordered before or otherwise. Thereafter judgment was prepared.

From the record of the court it is noted that on both oceassions when magistrate changed it was not indicated whether those who took over said anything to the parties concerning their opinion concerning the conduct of the case save for the coram which indicated the change. I am aware that the current section 214 of the Criminal Procedure Act, Cap. 20 R.E. 2002, unlike before the amendment does not compel the magistrate who takes over the trial heard partly by another to resummon witness and recommence trial but it is important that parties and especially accused persons should be informed of the change and they may give any opinion concerning the trial. This is so because under subsection (1) of that section the magistrate is still given discretion in the following terms ***"..may, in the case of a trial and if he considers it necessary resummon the witnesses and recommence the trial..."***

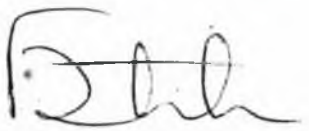
This is in my view important especially in the trial like the one in question in which there were more than one accused persons. In the case in question it is clear on the record that apart of the fact that some accused were not given chance to cross-examine their co-accused and it evidence that some were implicated by the appellant, it was important that the court should have looked at that problem and addressed it accordingly.

I am convinced that the change of magistrates and bearing on how the case was conducted as I have demonstrated above on what transpired, did materially prejudice the accused and the trial as a whole. Indeed as submitted by the learned State Attorney some who were treated as accused could have appeared as witnesses for the prosecution.

In view of what I have stated, under section 214 (2) of the Act stated above, I set aside the conviction and sentence passed on the proceedings and evidence recorded by the trial court.

Having arrived at that decision, under that section the court has discretion to order retrial of the case. However in the circumstances of this case and bearing in mind that ordering retrial will allow the prosecution time to fill the gaps at the trial and in view of the fact that the appellant has stayed in custody from the end of 2007 todate, I

hereby discharge the appellant absolutely. It is ordered that the accused be released forthwith. It is so ordered.

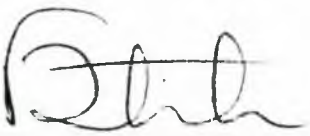


F.L.K. WAMBALI

JUDGE

7/12/2009

Judgment delivered today 7/12/2009 in the presence of Miss. Janeth Sekule – State Attorney for the Respondent and in the absence of the appellant who wished not to be present during he hearing of the appeal.

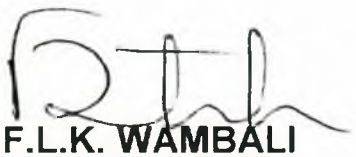


F.L.K. WAMBALI

JUDGE

7/12/2009

Right of Appeal explained.



F.L.K. WAMBALI

JUDGE

7/12/2009