IN THE HIGH COURT OF TANZANIA

AT SUMBAWANGA

DC CRIMINAL APPEAL NO. 23 OF 2012

(Appeal from the decision of the District Court of Sumbawanga in Original Criminal Case No. 132 of 2010)

ELIAS MWAKIPESILE ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

26th June & 22nd August, 2013

JUDGMENT

MWAMBEGELE, J.:

The Appellant Elias Mwakipesile was the second accused in Criminal Case No. 132 of 2010 in the District Court of Sumbawanga, at Sumbawanga in which he was jointly charged with Yeremia Abraham and Phillemon Mahenge (who were respectively the first and third accused) with the offence of breaking into a building and committing an offence therein c/s 296 (a) of the Penal Code, Cap 16 of the Revised Edition, 2002 of the Laws of Tanzania. The Appellant together with the first accused at the trial; the said Yeremia Abraham were convicted and

sentenced to ten years imprisonment. Phillemon Mahenge, the third accused at the trial, was acquitted.

The conviction and sentence aggrieved the appellant. He thus filed in this court six grounds of appeal through a Memorandum of Appeal filed on 29.06.2012. As the six grounds of appeal in the memorandum of appeal have been written in a discursive style, I have felt it apposite to summarise them in four grounds of complaint as follows:

(a) The Appellant was not found in possession of any incriminating stolen items;
(b) The Appellant never confessed to have committed the offence;
(c) the master keys allegedly found in possession of the appellant were not tendered in evidence; and
(d) that the sentence imposed against the Appellant was excessive.

On perusal of the record, I have, *suo motu*, realised a number of procedural irregularities apparent on record and felt that I should address them first. Reverting or not reverting to the grounds of appeal, as summarised, will depend on the conclusions to be reached as a result of the discussions of the said procedural irregularities. These are:

(a) inquiry into the admissibility of the cautioned statement was not properly conducted;

(b) noncompliance of the provisions of section 214 of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2002 of the Laws of Tanzania (henceforth the CPA); and

(c) the prosecution never closed its case.

I will discuss these procedural irregularities one after another in the order they appear above. The first one is about the inquiry into the admissibility of the first accused person's cautioned statement. The evidence on record shows that out of the three accused persons, the first accused made a cautioned statement to the police following his arrest. At the trial, No. F 1333 D/Sgt Onaeli who testified as PW4 wanted to tender in evidence the cautioned statement but faced an objection from the defence, more especially from the first accused who allegedly made it. On the basis of this objection, the trial magistrate, quite correctly, felt it apposite to conduct an inquiry (in the High Court it is called trial within a trial), on the admissibility into evidence of the first accused person's cautioned statement. However, in a bizarre twist of things, in the inquiry the said No. F 1333 D/Sgt Onaeli did not testify. No. F 774 D/C Andrew testified in his stead. No. F 774 D/C Andrew was a policeman who had the conduct of the case but could not write the accused person's cautioned statement for the obvious reason that he, not being a policeman of the rank of corporal or above, within the meaning of section 27 (1) and 3 (1) of the Evidence Act, Cap 6 of the

Revised Edition, 2002 of the laws of Tanzania, would not qualify to record such a statement. He thus, quite correctly, took the Appellant to PW4; a qualified police officer under the law to have the statement recorded. The question that I pose at this stage is who, in the circumstances of this case, was a proper witness to testify in the inquiry on the admissibility or otherwise of the cautioned statement?

It is my considered opinion that the relevant witness to testify in the inquiry on the admissibility or otherwise of the cautioned statement was No. F 1333 D/Sgt Onaeli who recorded it; not No. F 774 D/C Andrew. In an inquiry as to whether a cautioned statement is admissible into evidence or not, the best evidence is that of a police officer who recorded it. If the prosecution felt No. F 774 D/C Andrew's evidence was also relevant, it could have called him to cement what the recorder of the statement would have said. A documents admitted as exhibit in an inquiry, must be readmitted in the main trial as evidence (as exhibit) to form part of the evidence to be considered when writing a judgment. Admitting it in the inquiry without readmitting the same in the main trial, as was the case in the present case, is fatal for it is tantamount to not having the document as part of evidence of the main trial.

The purpose of the inquiry was to decide upon the admissibility or inadmissibility of the cautioned statement of the accused person which he sought to recant by retracting or repudiating it, as the case may be, because it is not clear on record whether the accused person was saying

he did not voluntarily make the statement in which case it would be said he was retracting it or that he never ever made it in which case we would be saying he was repudiating it (see ***Tuwamoi Vs Uganda*** [1967] 1 EA 84).

In my considered opinion, if the making of the statement falls within the purview of sections 57 of the CPA, the inquiry should seek to answer, *inter alia*, the following questions that emanate from the provisions of this section:

(a) Does the statement contain particulars of the accused person?
(b) Was the statement voluntarily made?
(c) Was the statement cautioned?
(d) Was the statement shown to and read over to the accused person?
(e) In cases where the statement run for more than one page, did the accused person initial every page of the statement?
(f) Did the accused person sign the certificate at the end of the statement?
(g) Was the accused person asked whether he would like to correct or add anything to the statement? If so, was he allowed to make any alterations to the statement?
(h) Did the police officer certify under his hand compliance of the provisions of section 57 of the CPA?

(i) Et cetera

If the statement was made under the provisions of section 58 of the CPA, the court should seek to answer, *mutatis mutandis,* questions emanating from this provisions. I hasten to point out that the list of these questions is by no means exhaustive.

If the court is satisfied during the inquiry that the provisions of sections 57 or 58, as the case may be, of the CPA were complied with to the letter before, during and after the making of the cautioned statement, it will rule out that the statement is admissible. That will be the concluding remark of the ruling. The main trial will then resume during which the police officer who recorded the statement and whose testimony was cut short by the inquiry, will be recalled to testify and ultimately tender it in evidence. This was not done and in my view the cautioned statement by not so doing was not part of evidence. The whole exercise of the inquiry was therefore a useless endeavour.

There is another anomaly in the inquiry; the prosecution did not direct itself to the ingredients of the inquiry. No such issues as to whether the statement was voluntarily made, or whether, at the making of the statement, the accused person was told his rights *et cetera*. It should be kept in mind that the aim of conducting an inquiry was to verify whether or not the relevant provisions of the law were complied with so as to make the statement admissible or inadmissible in evidence. The

reason why the statement was objected to being tendered in evidence was that the maker; the first accused objected to its being tendered. The record is silent why. What is obvious is that the first accused objected to its being introduced in evidence but, as per record, never assigned any reasons why. An inquiry was held at the end of which the trial court ruled that it was admissible. And before objection of the statement being tendered, in the main trial, PW4 is recorded to have said as follows:

> *"Before interrogating the accused I did introduce myself ... and I did explain to him about his rights like calling his advocate or his relative at the time when I was recording his statement ..."*

One would therefore deduce that the first accused objected to its being tendered on, *inter alia*, grounds of its inadmissibility; that PW4 did not introduce himself to the accused, did not tell the accused person his rights such as his requesting the presence of his advocate or relative while making the statement, *et cetera*.

In his ruling, the trial magistrate, in admitting the statement, had this to say:

> "In deciding this ruling I have considered the evidence of PW1 and PW4 I find that they are credible as I find that there was no reason for them to plot the case against the 1st accused person.
> Also 1st accused himself did not assign any reason as to why he thought the case was plotted against him. This made this court to believe that what was being said by the accused was an attempt to escape the charges which were facing him. For that reason the defence by the accused person is dismissed and **the cautioned statement is admitted as exhibit in this case**".
> [Bold supplied].

I find two anomalies in the foregoing quotation. First, the prosecution in the inquiry fielded only one witness. Where did the trial magistrate get PW4 in the Inquiry Proceedings? I guess the trial magistrate might have been referring to No. F 1333 D/Sgt Onaeli who testified as PW4 in the main trial and who wanted to tender the relevant statement but was objected to. Let me remind the trial magistrate and whoever will encounter such a scenario that an inquiry, like a trial within a trial in the High Court, is a separate mini trial intended to determine whether the statement under discussion was made in accordance with the guidelines

of the law so as to make it admissible or inadmissible in evidence. Determination of the issue whether the statement is admissible or inadmissible at law will entirely depend on the evidence adduced in the Inquiry or trial within a trial, as the case may be, and not otherwise. Going back to the testimony of PW4 in the main trial to prove admissibility or inadmissibility of evidence in the Inquiry was, in my considered view, inappropriate and made the cautioned statement so admitted devoid of the requisite probative value and must therefore be expunged from the record.

The second anomaly in the quotation above is, as already said, the fact that the statement was not tendered and admitted in the main trial. This was not proper. After the trial magistrate found in the Inquiry that the statement was admissible at law, it was imperative upon him to go back to the main trial and proceed with the witness who wanted initially to tender the same, in this case No. F 1333 D/Sgt Onaeli PW4, who would then tender it in evidence in the main trial.

As bad luck would have it, there is, to the best of my knowledge, a dearth of binding decisions in this jurisdiction which elucidate how an Inquiry should be conducted. As far as I am aware, there is only one decision to this effect. Or put differently, there is one decision on which I could lay my hands on. This is ***Selemani Abdallah and two others Vs Republic*** DSM Criminal Appeal No. 384 of 2008 (unreported). This case is the decision of the Court of Appeal which provided guidance on

how should an Inquiry be conducted. Having said the procedure in an inquiry is akin to a trial within a trial in the High Court, the Court of Appeal proceeded to provide guidance in the Inquiry in the following terms:

"The procedure entails the following:-

i) When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.

ii) The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap 20.

iii) Whenever a prosecution witness finishes his evidence the accused or his advocate should be given opportunity to ask questions.

iv) Then the prosecution to re-examine the witness.

v) When all witnesses had testified, the prosecution shall close its case.

vi) Then the court is to call upon the accused to give his evidence and call witness, if any. They should be sworn or affirmed as the prosecution side.

vii) Whenever a witness finishes, the prosecution to be given opportunity to ask questions.

viii) The accused or his advocate to be given opportunity to re-examine his witnesses.

ix) After all witnesses have testified, the accused or his advocate should close his case.

x) Then a Ruling to follow.

xi) **In case the court finds out that the statement was voluntarily made (after reading the Ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an**

exhibit. The court should accept and mark it as an exhibit. The contents should then be read in court.

xii) In case the court finds out that the statement was not made voluntarily, it should reject it".

[Bold supplied].

In the light of the bold part in above decision, it follows that, in the case at hand, having found the statement admissible, the learned trial Resident Magistrate should have resumed the proceedings by reminding PW4, who was testifying before the proceedings were stayed, that he was still on oath and should have allowed him to tender the statement as an exhibit. The court should, subsequently, have accepted and marked it as an exhibit and then the contents thereof should have been read to the Appellant.

Another glaring procedural irregularity in this case is the noncompliance of the provisions of section 214 of the CPA. Section 214 of the CPA as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 9 of 2002 reads:

"(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.

(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, **if it is of the opinion that the accused has been materially prejudiced thereby** and may order a new trial.

(3) Nothing in subsection (1) shall be construed as preventing a magistrate who has

recorded the whole of the evidence in any trial and who, before passing the judgment is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate".
[Emphasis mine].

It is not provided for anywhere in this provision that would suggest that its noncompliance is fatal. The whole thing has been placed in the hands of this court to see to it that no injustice was occasioned thereby prejudicing the accused person. The position was different before the amendment of this provision.

Before the amendment the provision read:

"**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.

(2) Whenever the provisions of subsection (1) applies:-

(a) In any trial the accused may, when the (sic) such other magistrate commences his proceedings demand that the witnesses or any of them be re-summoned and re-heard and **shall be informed of such right by the second magistrate when he commences his proceedings**.

(b) The High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused

has been materially prejudiced thereby and may order a new trial.

(3) Nothing in subsection (1) shall be construed as preventing a magistrate who has recorded the whole of the evidence in any trial and who, before passing the judgment is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate".

[Bold mine].

Before the amendment, the law was therefore clear that in terms of section 214 (2) (a) of the CPA quoted above, it was imperative upon a trial magistrate to inform the accused person of his right to have the witnesses who had testified before the first trial Magistrate re-summoned and re-heard if he so wished. There is, as well, a line of authorities that supported this position - see ***Richard Kamugisha @ Charles Simon and 5 Others Vs R.,*** Criminal Appeal No. 59 of 2004 (unreported), ***Fulgence Fortunatus & Another Vs the Republic*** *Criminal Appeal No. 20 of 2005* (unreported), ***Elisamia Onesmo Vs the Republic*** Criminal Appeal No. 160 of 2005 (unreported) and

Selemani Abdallah and two others Vs Republic (supra) and decisions of the Court of Appeal and ***Remenisele s/o Elisawo Vs R.*** (1967) H.C.D. n. 75].

In the instant case, it is not disputed that the hearing of this case was commenced by Matembele, RM since 01.06.2010 when the accused was first brought before a court of law in respect of this offence. Matembele RM presided over the case until 30.08.2011 when he ordered, *inter alia*, to proceed with the defence hearing on 15.09.2011. That is the last day Hon Matembele RM is seen on record. The record is silent on the reason why but, on the fixed 30.08.2011, the case was mentioned before Mwanjokolo RM. On 15.09.2011 Mugissa RM proceeded with the defence hearing until judgment. Let the court record paint the picture starting with Matembele RM'S last order:

> "1. DHG 30.08.2011
> 2. ABE/AFRIC
> 3. DW3 to call his witness
>
> Sgd: Matembele - RM
>
> 23.08.2011"

For the avoidance of doubt, those who are not familiar with these otherwise commonly used abbreviations in the recording of proceedings in the judiciary, DHG, ABE, AFRIC and DW3 stand, respectively, for

"Defence Hearing", "Accused Bail Extended", "Accused Further Remanded in Custody" and "Third Defence Witness".

When this matter came up for defence hearing on the slated date; 30.08.2011, the matter was presided over by another magistrate. This is what transpired in court on the slated date for defence hearing:

> "30/8/2011
> Coram: Hon A. B. Mwanjokolo - RM
> PP: Insp. Matiku
> CC: Rehema Mallongo
> Accused: All present
>
> PP: The case was coming for defence hearing before Hon. Matembele. We pray for hearing date.
>
> Order: DHG on 15.09.2011
> Sgd: Mwanjokolo - RM
> 30/8/2011"

And on the slated 15.09.2011, the matter was yet presided over by another magistrate. Again, this is what transpired:

> "15/9/2011

Coram: R.M Mugisa, RM

PP: Insp Thomas

CC: A. K. Sichilima

Accused: All present

PP: The matter is for Dhg. I am ready.

1st accd: I am ready also

2nd accd: I am ready also

3rd accd: I am ready also

Court: Defence case to proceed as scheduled

Sgd: Mugisa, RM

15.09.2011"

And on that day the case proceeded with the defence hearing. Anold Samoyo DW4 testified. The defence case was closed on the same day. Judgment was slated for delivery on 29.09.2011 and indeed it was delivered on the scheduled date during which, as said at the beginning of this judgment, the Appellant and Yeremia Abraham who were, respectively, the first and second accused persons at the trial, were convicted as charged and sentenced to ten years imprisonment while Phillemon Mahenge; the third accused person at the trial was acquitted.

The record is therefore positive that the case changed hands before it was finalised. The last defence witness and judgment were finalised by Mugissa RM while the rest of the case was heard and presided over by Matembele RM. As already said, the record is silent as to why the change of the presiding magistrate. There is no endorsement on top of the case file to suggest whether or not the file was reassigned either.

It is obvious that when Mugissa RM took over, he had, in terms of section 214 (1) of the CPA (as amended), a discretion to act on the evidence or proceeding recorded by his predecessor or if he considered it necessary, re-summon the witnesses and recommence the trial. I assume this pertinent position was observed and the second trial magistrate proceeded with the defence hearing. This was not fatal and, in the circumstances of this case, in my considered view, the accused person; the Appellant herein was not prejudiced by such a course. Otherwise, if he was prejudiced he would have said so at the trial and, as if to clinch the matter, in the Memorandum of Appeal there is no iota of complaint to this effect.

I wish to stress here that despite the fact that subsection (1) of section 214 of the CPA has imposed discretion onto the magistrate, the same must be exercised judiciously. The manner in which the discretion under this provision (then section of 196 of the repealed Criminal Procedure Code) should be exercised was well articulated by the ***Remenisele s/o Elisawo*** case (supra) in the following terms:

> "The discretion given to a magistrate by Criminal Procedure Code section 196 should be exercised with great care, for **a primary purpose of the hearing is to permit the court to observe the demeanor and evaluate the creditability of all the witnesses**. In the present case the charges were grave and the accused vigorously contested the allegations of the prosecution's witnesses..."
> [Emphasis mine].

On this provision; the court discretion under section 214 (1) of the CPA, the Court of Appeal, in the ***Richard Kamugisha*** case (supra) it was emphasised:

> "The word used in section 214 (1) of the Criminal Procedure Act, 1985 is 'may' which indicates discretion but in view of the fact that the right to a fair trial is fundamental, the court has an obligation to conduct a fair trial in all respects".

This said, I wish to point out that had it not been for the amendment, I, for one, would have held the proceedings of the trial before the second trial magistrate court a nullity. I wonder what mischief the amendment intended to address. For, it seems to me that a fair trial manifested itself in the law before the amendment that after it. A fair trial is done and seen to be done when, in my view, the accused person is informed by the second magistrate, when he commencing his proceedings, if he (accused person) wishes the witnesses or any of them who testified before the first magistrate be re-summoned and re-heard rather than putting such discretion in the hands of the court only. As already said, had it been for the present binding position of the law, I would have held that the proceedings were a nullity but so long as I am bound by these provisions of the law, I now hold that the noncompliance of section of section 214 of the CPA (as amended) was not fatal as the accused person was not prejudiced by the noncompliance thereof.

There is yet another anomaly in this case as pointed out hereinabove. This is the third procedural irregularity in the list enumerated hereinabove. This is a glaring fact that the prosecution did not close its case. It was the court which closed the case for the prosecution after it felt the case was kept on being adjourned on account of nonattendance of prosecution witnesses and there were no certificates issued from the Regional Crimes Officer and/or the Director of Public Prosecutions in terms of section 225 (4) of the CPA. Let the record speak for itself:

"02/6/2011

Coram: Hon. Matembele - RM

PP: Insp Matiku

CC: Mwandambo

Accused: Present

PP: this matter is for the hearing, however my witness has not turned up. Hence, I pray that this matter be fixed for another hearing date

Court: the way I see the prosecution side is not serious to call their witness so that we can proceed with the hearing as it is now third time the public prosecutor is asking for adjournment ... this matter has been pending in court for one year by now...

It is my considered opinion that ... [the prosecution has] violated the requirements of section 225 (4) CPA RE 2002 ... to tender the certificate for extension of time from the RCO , after expiry of 180 days, and after that the certificate from the DPP

> ...**For the interest of justice I hereby order that the prosecution case is closed and I fix a date for ruling of whether the accused have a case to answer or not**".
> [Emphasis added].

Indeed, the gist of the provision of the law referred to by the trial Resident Magistrate; that is section 225 (4) CPA is to provide no further adjournment after the prescribed time has elapsed unless the Regional Crimes Officer or the Director of Public Prosecutions files a certificate stating the need for and grounds for further adjournment. The law prohibits the court to grant further adjournment and does prescribe what to do in case the court refuses such further adjournment; to proceed with the hearing of the case or discharge the accused. The direction is found under the provisions of subsection (5) to section 225 of the CPA in the following terms:

> "Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused in the court ...".
> [Bold mine].

The words "the court shall proceed to hear the case" as emphasised supra might have met a different interpretation by the trial magistrate. In my view, the words are meant to permit the court to proceed with the case according to law; that is, to hear the prosecution case just in case it proceeds fielding its witness or witnesses or if the prosecution decides to close the case or if the prosecution decides to terminate the case under section 90 of the CPA or by entering a *nolle prosequi* under section 91 of the CPA. However, if the prosecution is unable to proceed with the case in the manner shown hereinabove, the court is required to either grant an adjournment or discharge the accused person. Closing the prosecution case by the court, as was done in the present case, was not called for and was not a desirable path to take. What the trial magistrate ought to have done, in the circumstances in which it felt not to grant any further adjournment, was to discharge the accused person.

An identical situation appeared in Malaysia in a case reported in the Law Reports of Commonwealth. This is ***Public Prosecutor Vs Sulaiman and Another*** (1986) LRC. Crim. 320. In this case the Supreme Court referring to the powers of the Attorney General (in Tanzania these powers are under the Director of Public Prosecutions) to institute, conduct and discontinue criminal proceedings [in Tanzania the DPP has such powers under section 90 (1), (2) and (3)] held:

> "since the Attorney-General has this power exercisable at his discretion, it is not for the court to say when the prosecution has to close its case or that the case has to come to an end merely because it is unable to obtain a postponement in order to produce evidence which will prove the offence against the accused ... the court has no power to stop the prosecution from performing its duty [of proving the guilt of the accused]"

The Supreme Court gave a word of caution to courts in case of refusal of adjournments in the following terms:

> "Magistrates must appreciate that the refusal to postpone trials must inevitably result in discharge of the accused and this power should, therefore, be used sparingly as a last resort only".

The ***Sulaiman*** case was followed by the Court of Appeal in the recent past in a judgment delivered at Zanzibar on 27.01.2012 at Zanzibar in ***Director of Public Prosecutions Vs Iddi Ramadhani Feruz***, Criminal Appeal No. 154 of 2011 (unreported). This is a case emanating from the sister High Court jurisdiction in Zanzibar. The relevant facts of

the case are that in the High Court of Zanzibar, the prosecution had been asking for adjournments of the case on the ground that they could not find its witness. Having adjourned the case on that ground for about five months, the court (Mwampashi, J.), on the prayer from defence, felt that that was beyond tolerance; it then observed and ordered as follows:

> "Crt: It is a fact that for about five (5) months, since the last prosecution witness appeared before this court on 19.05.2010, the prosecution has failed to proceed with the case. The hearing has been adjourned four times and the prosecution's excuse has been that the remaining witness could not be found. It is hard to believe that if given more time the prosecution will be able to find the alleged remaining witness. Because the prosecution has failed to call the remaining witness since May, 2010 and since no good ground or reason is being given for further adjournments, **it is hereby taken that the prosecution has failed to prosecute the case and the case for the prosecution is hereby closed** ..."
> [Bold not mine].

The Court of Appeal of Tanzania, speaking through Bwana, J.A, held:

> "It is settled that the prosecution has control over all aspects of criminal prosecutions and proceedings (***Public Prosecutor v Sulaiman and Another*** (1986) SC, LRC. Crim. 320 followed). **It is not therefore for either the court or the Defence to determine when the prosecution should close it case, or in respect of the court to make an order for such closure"**.
> [Except for the case cited, the rest of the bold is mine].

Having analysed the relevance of granting adjournments to the prosecution so that further injustice does not occur to the accused by his being subsequently brought again before the court for trial after discharge, the Court of Appeal concluded:

> "The Judge ... had no power to order for the closure of the prosecution case"

The Judge's order was consequently quashed and set aside and the High Court was directed to proceed with the hearing of the case according to law.

The above decision, in my considered view, rests this issue in the present case. It is crystal clear therefore that the court has no mandate at law to order closure of the case for the prosecution as happened in the instant case. What the court ought to have done, in the instant case, was to discharge the accused persons under the provisions of 225 (5) of the CPA. The course taken by the first trial magistrate was fatal. It was contrary to this provision of the CPA and robbed the prosecution of its duty to prove the guilt of the accused beyond any reasonable doubt and, in effect it, also robbed the prosecution of its right to be held thereby abrogating the principle of natural justice enshrined in the *audi alteram partem* rule. As the order was fatal, it vitiated all the proceedings after it.

The sum total of what I have endeavoured to discuss hereinabove is that the proceedings in the present case have been marred with three main irregularities, two of which are fatal. First is that the cautioned statement was improperly admitted thereby making it not part of evidence of the main trial. It was therefore wrong to convict on the strength of the cautioned statement because it was not part of evidence of the main trial. Secondly, which irregularity I have held as not fatal, it is clear from the record that the second trial Resident magistrate did not

address his mind on the provisions of section 214 (1) of the CPA as a result of which he did not inform the appellant and his co-accused of their right to demand the witnesses who testified before his predecessor Resident Magistrate, to be re-summoned and re-heard if they so wished. As the law stands now, the second trial magistrate had discretion to act on the evidence or proceeding recorded by his predecessor or, if he considered it necessary, re-summon the witnesses and recommence the trial. Failure to inform the accused persons on the path he opted to take was fatal to subsequent proceedings before the second trial Resident Magistrate. Thirdly, the prosecution never closed its case; it was the first trial Resident Magistrate who did so on his own volition having realised that the prosecution was delaying the case for failure to bring and field its witness. This course was fatal to the proceedings and all the proceedings after the order were vitiated. In sum, the first and third procedural irregularities, as numbered above, were fatal and incurable.

Having held the third procedural irregularity as fatal to the proceedings of this case, it follows that all the proceedings from the close of the prosecution case were null and void. Under normal circumstances, if it were not for the improper admission of the cautioned statement, I would have ordered a retrial from the moment immediately before the prosecution's case was closed. That is, I would have vacated the order that closed the prosecution and would have ordered the prosecution to bring its remaining witnesses and field them. But it seems this appeal,

even without the irregularities discussed above, stands or falls on the cautioned statement. Now that I have expunged it and held the same to be not part of evidence, the remaining evidence is oral which, in my considered view, is very weak to ground any conviction. I will therefore give the appellant a benefit of doubt and allow the appeal in its totality. The conviction of the Appellant is quashed and the sentence is set aside. The appellant should be set free from custody unless he is held for some other lawful cause.

DATED at SUMBAWANGA this 22nd day of August, 2013.

J. C. M. MWAMBEGELE
JUDGE