

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 85 OF 2017

(Originating from the decision of the Court of the Resident Magistrate's Court of Arusha at Arusha in Criminal Case No. 489 of 2016 before Hon. B.K. Nganga, RM)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

ALLEN S/O LOISHOOKI.....1ST RESPONDENT

OLAIS S/O LOSHILAARI.....2ND RESPONDENT

HERMAN S/O LONGOINE.....3RD RESPONDENT

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

At the Arusha Resident Magistrates Court (Hon. Nganga R.M) the respondents were charged with the offence of Armed Robbery c/s 287A of the Penal Code, Cap 16 R.E 2002 (The Penal Code) as amended by Section 10A of the Written Laws (Misc. Amendments) Act No. 3 of 2010. At the conclusion of trial, the trial court acquitted all the respondents. Aggrieved by the said acquittal, the appellant, the Director of Public Prosecutions has lodged this appeal raising four grounds of appeal that:

1. That, the learned trial Magistrate erred in law and fact by acquitting the Respondents while the case against them was proved beyond reasonable doubt.

2. That, the learned trial Magistrate erred in law and facts by defaulting in analyzing the evidence before him instead he directed himself on the matters which were not before his Honourable Court.
3. That, the trial Court Magistrate erred both in law and facts by not stating clearly in his judgment the point or points for determination, the decision thereon and the reasons for the decision.
4. That, the learned trial Magistrate erred in law and facts by dismissing the case before him at the Judgment stage.

The Appellant prayed that this Court allow his appeal by quashing the decision of the trial court and setting aside the acquittal/dismissal order and find the respondents guilty as charged accordingly.

In this appeal, the appellant was represented by Mr. Khalil Nuda, learned Senior State Attorney while the respondents were represented by Mr. Nelius Lugakingira. By an order of this court dated 22/11/2017 this appeal was disposed by way written submissions.

Before I go into venturing into the substance of this appeal, I have noted a fatal irregularity in the judgment of the trial court. while making his conclusion upon making his findings, the trial magistrate wrote:

*"For the reasons, I found the first accused **and two others** not guilty of the offence. I hereby **dismiss this case** accordingly".*

To begin with, the magistrate made its findings by creating characters who are not part of the record of those accused by the appellant herein. In his charge sheet, the appellant, then Director of Public Prosecutions accused

three people namely Allen Loishooki, Olais Loshilaari and Herman Longone. In the principle of criminal proceedings, where there is more one than one accused person, these were to be referred by their subsequent numbers in sequential order appearing on the charge sheet which is the 1st, 2nd and 3rd accused respectively. There is no such thing as two others in making such a crucial conclusion of the finding in a criminal trial. The magistrate did not hence make any decision against the 2nd and 3rd accused who are now the 2nd and 3rd respondent. He instead simply referred to "two others" which were never charged by the appellant.

The other irregularity observed is the final order made by the trial magistrate. In his judgment he found the first accused and two others not guilty of the offence and proceeded to **dismiss the case** accordingly. Section 235(1) of the Criminal Procedure Act, Cap. 20 R.E 2002 (CPA) provides that:

*" The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law **or shall acquit him or shall dismiss the charge under section 38 of the Penal Code.**"*

Furthermore, the Section 38 of the Penal Code provides:

(1) Where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not

appropriate, the court may make an order discharging him absolutely or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified in the order.

(2) An order discharging a person subject to the condition referred to in subsection (1) is hereinafter referred to as "an order for conditional discharge" and the period specified in any order as "the period of conditional discharge"

(3) Before making an order for conditional discharge the court shall explain to the offender in ordinary language that if he commits another offence during the period of conditional discharge he will be liable to be sentenced for the original offence.

(4) Where an order discharging an offender is made under this section the court may order him to pay any compensation adjudged under section 31 or any costs ordered under section 32 of this Code

Looking at the provisions of the Section 38, it is obvious that what the trial magistrate intended to do was not to discharge the respondents herein. This is evidenced by his own finding that the accused and two others were not guilty of the offence. What he was hence required to do after finding them not guilty of the offence was to acquit the accused persons u/s 235(1) of the CPA and not to dismiss the case as he so did. For that reason, the respondents have never been acquitted by the trial court because no such order was ever passed. Furthermore, the judgment of the

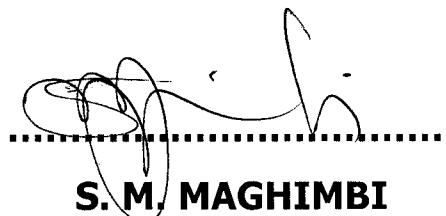
trial court only addressed the first respondent who was then the first accused and not the remaining two respondents.

Having made those findings, I hereby invoke my revisional powers, revise the judgment of the trial court and set aside. I further order that this file is immediately remitted back to the trial magistrate for him to construct a proper judgment IN STRICT ADHERENCE to the law and procedure and pass proper orders as are provided under the CPA. The right of appeal shall accrue upon the delivery of the judgment so written according to the order of this court and the computation of time for the purpose of appeal shall commence on the date upon which such judgment shall be pronounced.

It is so ordered.

Dated at Arusha this 31st day of August, 2018.




S. M. MAGHIMBI
JUDGE