

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**(HC) CRIMINAL APPEAL No. 53/2016**

*(Appeal Emanating from the Decision/Judgment of the trial District Court of  
Muleba at Muleba in Criminal Case No. 198/2014 )*

**SELEMAN JUMA @ TEGEMEO ----- 1<sup>ST</sup> APPELLANT**

**JUMA MBOGO @ SHABAN JUMA ----- 2<sup>ND</sup> APPELLANT**

**NICHOLAUS ERNEST @ BUBERWA ----- 3<sup>RD</sup> APPELLANT**

**MWITA KIHOGO @ EMMANUEL KIHOGO**

**@ MWITA MDOGO CHAWA ----- 4<sup>TH</sup> APPELLANT**

**MARTIN JOEL @ CHINGA ----- 5<sup>TH</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

**2/3/2018 & 15/3/2018**

**KAIRO, J.**

The Appellants jointly have preferred this appeal to challenge both the conviction and sentence in Criminal Case No. 198/2014 of Muleba District Court delivered on 30/03/2015. The Appellants were convicted of conspiracy as a first count c/s 384 and armed robbery c/s 287 as a second count, both of the Penal Code Cap 16 RE 2002. They were convicted to one year and thirty years with regards to the first and second count respectively. The sentences were ordered to run concurrently. They were not satisfied by the said decision and to protest their innocence they decided impugn the same raising 16 grounds of appeal.

With regards with the first count it was alleged that the Appellants on unknown date in Muleba District Kagera Region unlawfully did conspire to steal various properties from one Justina Hezron.

For the second count, the prosecution alleges that, on 9/4/2014 at Kyaibumba Kasharunga village within Muleba District in Kagera Region, the Appellants did steal cash money Tshs. 2,500,000/=, various mobile phones vouchers valued at Tshs. 65,000,000/= and various cigarettes valued at Tshs. 150,000/= all having a total value of Tshs. 65 million, the properties of one Justina Hezron. It was further alleged that the Appellants immediately before the said stealing used actual violence by threatening to cut the said owner using a machete so as to obtain and retain the stolen properties.

The Appellants denied both counts and the prosecution called six witnesses to prove its case. Upon adducement of evidence, all of the accused were found guilty, thus convicted and sentenced as afore said.

The Appellants are self represented while the Respondent Republic is represented by Ms. Chema Maswi, the Learned State Attorney.

When the parties were called for hearing, the 5<sup>th</sup> Appellant informed the court that the 1<sup>st</sup> Appellant is sick and admitted at Bukoba Government Hospital. He further informed the court that, the 1<sup>st</sup> Appellant has written a letter to the court with a copy to his fellow Appellants praying the court to proceed with the hearing of the appeal in his absence as he doesn't know when he can get well and be able to prosecute the appeal himself. Further to that he informed the court that he was ready for whatever out come of the said appeal.

The 5<sup>th</sup> Appellant submitted a copy of the said letter to authenticate his submission. The State Attorney didn't object to the prayer. The court after going through the submitted letter, granted the prayer to proceed with the hearing of the appeal in the absence of the 1<sup>st</sup> Appellant.

The 2<sup>nd</sup> Appellant then prayed the court to adopt their grounds of appeal and elected to let the Learned State Attorney to first reply on their grounds of appeal and that they will present their rejoinder, thereafter.

Arguing on the grounds of appeal, the Learned State Attorney supported them generally after finding them to have merits. The Learned State

Attorney argued that the six prosecution witnesses failed to establish the alleged armed robbery committed on 9/4/2014 to have been done by the Appellants while legally it's the obligation of the prosecution side to prove its case beyond reasonable doubt. To clarify the said contention, she went through the testimonies of the prosecution witnesses as follows:

Starting with Pw1 one Yustina Hezron who was at the scene of incidence, she testified that she did not identify any person who broke into the scene of incidence or who committed the alleged crime, thus her testimony didn't connect with any of the Appellants as far as the commission of the offence is concerned.

On the part of Pw2, one Edson Hezron, this one was not at the scene of incidence. He only explained the things stolen after being informed by Pw1. She went on that as for Pw3 who was Justice of the Peace, one Allen Lwiza, he basically testified in connection with the cautioned statement of the 3<sup>rd</sup> Appellant. The State Attorney went further that the cautioned statement was tendered against the required procedure. She clarified that, the law prohibits explaining the contents of the document before admitting the same lest it prejudice the court and make it admitted without following procedure. She cited the case of *Robison Mwanjisi VR [2003] TLR 218* wherein the Court of Appeal observed that

*"the document has to be first admitted in court before explaining its contents, short of it the same should be expunged from the record"*

The State Attorney concluded that exhibit 'P3' need to be expunged from the court record and this is the document that connects Pw3 with the offence.

The State Attorney went further to clarify how the prosecution witnesses failed to prove the offence to the required standard; that for Pw4 one Lukas Kitumbu Ulimwengu, whose testimony connects the 5<sup>th</sup> Appellant the witness stated that he was sold 1000 pieces of vodacom vouchers and 300 pieces of airtel vouchers which were alleged to be among the items stolen on the incident date.

But he went on that there was no special mark on the said vouchers to connect 5<sup>th</sup> Appellant with the incidence. Besides, the stolen vouchers were claimed to be 217 pieces of Airtel, 26 of vodacom while Pw4 claimed to have been sold 1000 of Vodacom and 300 of airtel which means the 5<sup>th</sup> Appellants has sold to Pw4 more vouchers than those claimed to have been stolen, which means some doesn't concern the said theft. Having in mind that there was no special mark on the vouchers, there is a possibility that all of the sold vouchers to Pw4 were not among those stolen. It is a cardinal principal of law that, where there are doubts, the same should be resolved in favor of the accused.

Pw5 was F. 2249 D/Cpl Hamisi who basically tendered the sketch map of the place of incidence thus his testimony didn't concern the Appellants. Pw6 was E. 219 D/Cpl Ally who basically gave hearsay evidence as he testified on

how the incidence occurred, how the Appellants were arraigned and their connection to the incidence. This witness basically connected the 3<sup>rd</sup> Appellant contending that he confessed before Dtc Flora but no cautioned statement to that effect was tendered.

The State Attorney reminded the court that Dtc Flora was testified as Pw3 and during her testimony; trial within a trial was conducted concerning the admission of the 3<sup>rd</sup> Appellant. However on 26/11/2014, the prosecution decided to withdraw the whole testimony of Pw3 which included the said admission.

She further went on that Pw6 also testified that they arraigned the 3<sup>rd</sup> Appellant having vouchers, but the said vouchers were not tendered in court nor identified by the owners (Pw1 & Pw2) to be among those stolen. According to record, Pw2 tendered exhibit P3 which were airtel and vodacom vouchers collectively. However there was no explanation in the court file as to whether the tendered vouchers were the ones found with the 3<sup>rd</sup> Appellant when arraigned.

The State Attorney went on and submitted that, the records show that Pw6 tendered the cautioned statement of the 4<sup>th</sup> and 5<sup>th</sup> Appellants which were admitted after conducting trial within a trial. However the records are silent with regards to the reading of the contents of the admitted cautioned statement and further Pw6 wasn't called to testify concerning them. The State Attorney argued that the omission has invalidated the procedure to

admit them as the same were not read over to the purported makers (Pw4 & Pw5).

In further support of the grounds of appeal, the State Attorney argued that there was non compliance with Section 214 (1) of Cap 20 RE 2002 as the records shows that the case was presided over by three Magistrates.

She went on that, according to the cited provision, the Magistrates were to give reasons for shifting hands of the case file and explain the same to the accused despite the fact that it is the court to decide whether to recommence the trial or not. However no reasons were given. She cited the case of *Salim Hussein vrs. R. Criminal Appeal No. 3/2011 CAT Tanga (unreported)* wherein the Court of Appeal gave guidance that;

*“where the requirement of the said provision was not followed, the appellate court has two options: order tri-denovo or acquit the accused depending on the evidence available”*. The State Attorney went further that in the case at hand the prosecution has failed to prove the case beyond reasonable doubt as such *tri de novo* order might not assist the interest of justice. She thus conceded that this appeal has merit and prayed the court to allow this appeal and release the Appellants. The 2<sup>nd</sup> and 5<sup>th</sup> Appellants when invited for their rejoinder, joined hands with the State Attorney’s submission and prayed the court to quash the conviction as well as the sentence imposed and release them accordingly. The rest had nothing useful to add.

Following the Respondent's submission which conceded to the grounds of appeal the court thoroughly went through the grounds of appeal, court records and found that this appeal has merit as rightly argued by the Learned State Attorney. After the said findings, the court delivered its judgment on 2/3/2018 by allowing the appeal. The court went further to quash and set aside the conviction and sentence of the trial court and ordered the release of all of the appellants immediately. However the court reserved the reason for the said judgment and scheduled to give them on 15/3/2018 as hereunder.

The arguments of the Appellants in this appeal is centered on; first the failure by the prosecution to prove its case beyond the standard required in criminal cases that is beyond reasonable doubt [**Refer the case of Said Hemed vrs R. [1987] TLR 117.** The State Attorney throughout her submission has narrated what the prosecution witnesses testified and how their evidence failed to prove the case beyond reasonable doubt. This court has seen no need of repeating the pointed out testimonies as were thoroughly narrated by the Learned State Attorney as can be depicted above. The court after going through the record found that the testimonies failed to establish that the alleged armed robbery occurred on 9/4/2014 was committed by the Appellants. For example the alleged stolen vouchers had no specific mark which could distinguish them from the rest as a result the owners (Pw1 & Pw2) couldn't to identify them. Besides the number of the vouches alleged to have been sold to Pw4 by the 5<sup>th</sup> Appellant was found to



be greater than the alleged number of vouchers stolen, coupled with the absence of specific marks in the said stolen vouchers it is difficult to conclude that the 5<sup>th</sup> Appellant sold the stolen vouchers to Pw4 thus he is associated with the armed robbery committed.

In this regards therefore, the evidence together with other testimonies as rightly narrated by the Learned State Attorney creates doubts which legally are to be resolved in favor of the Appellants. I thus concede to the argument by the State Attorney that the prosecution failed to prove the case beyond reasonable doubt.

Another ground to support this appeal as argued by the State Attorney was hinged on the change of presiding Magistrates. The court went through the record and observed that;

- The testimonies of Pw1 and Pw2 was Presided over by Hon. Waane
- The testimonies of Pw3 – Pw6 before the conduct of the trial within a trial and defence was presided over by Hon. Kabuuka.
- During the Judgment writing, the case was presided over by Hon. Nkomola.

The court further observed that no reasons were given to justify the change of presiding Magistrates. The Court of Appeal has persistently insisted on the requirement of giving reasons where the predecessor trial magistrate is unable to complete the trial. I got fortified in this stance in the case of **Priscus Kimaro Vrs R Criminal Appeal No. 301/2013 (unreported)** wherein

the Court of Appeal commented on a similar situation and directed as follows:

*“...where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If it is not done, it may lead to chaos in the administration of justice. Any one, for personal reason could just pick up the file and deal with it to the detriment of justice. This must not be allowed.”*

The Court has further observed that failure to comply renders the decision a nullity and the court has to order re-trial. However as rightly argued by the State Attorney that in the circumstance of this case, ordering re-trial will be a futile exercise in the light of what has been observed with regards to the evidence by the prosecution witnesses which failed to prove the case beyond reasonable doubt.

For the foregoing reason, I hereby allow this appeal, quash the Appellants conviction and set aside the sentence. Unless lawfully incarcerated, this court order release of the Appellants from custody forthwith.

It is so ordered.



L.G. Kairo

Judge

15/3/2018

**Date:** 15/03/2018

**Coram:** Hon. L.G. Kairo, J.

**1<sup>st</sup> Appellant:** Reported sick

**2<sup>nd</sup> Appellant:** Present in person

**3<sup>rd</sup> Appellant:** Present in person

**4<sup>th</sup> Appellant:** Absent

**5<sup>th</sup> Appellant:** Present in person

**Respondent:** Ms. Veronica Moshi, S/A

**B/C:** Gosberth Rugaika

**Court:** The matter is scheduled for the court to give reasons reserved following the Judgment it entered on 2/3/2018. The said reasons area ready and are given in open court today in the presence of 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Appellants but in the absence of the 1<sup>st</sup> Appellant who was reported sick, 4<sup>th</sup> Appellant and Respondent Republic.



  
L.G. Kairo

**Judge**

15/3/2018