

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 23 OF 2017

**(ARISING FROM CRIMINAL CASE NO. 1182 OF 2009 AT ILALA
DISTRICT COURT AT SAMORA AVENUE IN DAR ES SALAAM)**

JACKSON ELINISA NKYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MAGOIGA, J.

The appellant, being 2nd accused person and 5 others were charged in the District court of Ilala on four penal counts of conspiracy contrary to section 384 of the Penal Code, go-down breaking contrary to section 297 of the Penal Code, stealing contrary to sections 265 and 258 of the Penal Code and negligence to prevent the commission of the offence to the first accused person only contrary to section 383 of the Penal Code, Cap 16 (R.E. 2002). The 1st, 3rd, 4th, 5th and 6th jumped bail and the proceedings proceeded under section 226 (1) of the CPA. In their absentia each was convicted and sentenced to 3 years' imprisonment and an order to compensate 10,000,000/= by each convicted person, the appellant inclusive. The appellant was sentenced to conditional discharged with a condition not to commit no offence for period of one year.

Aggrieved, by conviction, sentence and an order of compensation, the appellant appealed to this honourable court armed with six ground of appeal to fault the trial court's judgment and incidental orders thereon, which for purpose of this judgment I see no need to produce them here.

The facts of this case are that at unknown date and time in 2009, the appellant and 5 others not in this appeal at Ilala Sharifu shamba area within Dar es Salaam region did conspire to commit an offence of go-down breaking and stealing. On 7th November 2009, the appellant and his allies did break and enter the go-down of JUMA KIBONDEI and stole 102 boxes of watches namely Disco with a total value of Tshs.60,000,000/= the property of JUMA KIBONDEI. The matter was reported to police and thorough investigations led to prosecute 6 persons, the appellant inclusive. The trial court found them guilty and convicted them, hence, this appeal.

The appellant had the services of learned advocate, Taslima, of Taslima Law Chambers Advocates, in the lower court and which services he enjoying all along to this court. The Republic, respondent was represented by Ms Selina Kapange, learned State Attorney.

On 6/6/2018 this appeal was called before me for hearing. Mr. Taslima, advocate sought a short adjournment on reason that the notice of hearing was very short and to do justice he need more time to prepare. The republic had no objection and the court considering the circumstance accommodated the prayer and the same was ordered to be heard on 07/06/2018.

When this matter was called for hearing the court invited the parties to address the court on the competency of the judgment, conviction and sentences and compensation order resulting from the proceedings of the lower court which were presided over by two magistrates without complying to the mandatory provisions of section 214 (2) (a) of the Criminal Procedure Act, Cap 20, [R.E. 2002].

Mr. Taslima, learned advocate for the appellant, submitting on this point, was brief to the point and readily conceded that the proceedings in the lower court after the second learned Resident magistrate took over the case without following the said provisions was fatal. He left it to this court to make a finding and order what should be done in the circumstances. He

was, however quick to point out that in making the direction regards should to the fact that his client, the appellant, has already served the sentence of one year without committing an offence.

As for the Republic, the learned State Attorney at first submitted that she supports conviction and sentence, but she was quick to concede as well to the irregularity noted. The learned State Attorney submitted that the effect of non-compliance with the mandatory provisions of section 214 (2) (a) of the CPA is fatal. She submitted such omission renders the entire proceeding from the second magistrate a nullity, so is the judgment, conviction and sentence of the lower court.

This is the basis of this judgment given the circumstances as noted in the proceeding of the trial court and the competency of the appeal before me.

Obviously the record of the proceedings in the lower court shows that at the first instance the criminal case no. 1182 of 2009 was before hon. J. MINDE, Learned Resident Magistrate, from 03/12/2009 up to 28/11/2012, inclusive until she disqualified herself from the conduct of the matter. In between she was able to conduct Preliminary hearing. For that reason the file was reassigned to T.J. KISOKA, learned Resident Magistrate. On 29/01/2013, after four months and for unknown reasons the file was presided over by Hon. E. MWAKALINGA, learned Resident Magistrate without assigning reasons why trial could not be completed by Hon. KISOKA, RM. Hon. MWAKALINGA, learned Resident Magistrate, after several adjournments, on 21/02/2014 recorded the evidence of PW1, one inspector MAYAMBA, up to on 19/06/2014. Yet again for unknown reasons, this time around, the case file passed to Hon. F.E. HAULE, RM, who took over without complying to the mandatory requirement of section 214 of the CPA.

I have given this unusual checkered history of this case for clarity and for putting the record proper why this court invited the parties to address it on

this point and the legal requirement of section 214 of the CPA. For easy of reference I produce the provision of section 214 of the CPA:

"214- (1) Where any magistrate, after having heard and recorded the whole or any party of the evidence in any trial or conducted in whole or any part committal proceedings is for any reason unable to complete the trial or committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has 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 proceedings recorded by his predecessor and, may in case of a trial re-summon the witnesses and recommence the trial or committal proceedings or otherwise subject to subsection (2).

(2) whenever the provision of subsection (1) applies:-

(a) in any trial the accused 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 a 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 whole recorded by the magistrate before the conviction was had, if it of the opinion that the accused has been materially prejudiced thereby and may order a new trial"

There is no gainsaying that from the wording of section 214 of the CPA above the subsequent proceeding before Hon. F.E. HAULE, RM, who took over from hon. MWAKALINGA, RM, which ultimately led to the conviction and sentence of the appellant were flawed for non-compliance of failure to give reason and to address the appellant as the law requires. The record, like a day light, is clear out that the second trial magistrate did not comply

to the letter with the mandatory provisions of section 214 (1), (2) (a) and (b). This court and the Court of appeal of Tanzania have plethora of decisions interpreting the provisions of section 214 of the CPA and in most cases quashing the proceedings of the second magistrate which for no apparent reasons did not comply with the impugned provisions. Few examples are the cases of SHABAN SEIF and another versus REPUBLIC, criminal appeal no. 215 of 2015, (unreported) Dar es Salaam (CAT), STEPHEN NGONYANI versus REPUBLIC [1989] TLR 53, (HC) ELISAMIA ONESMO v. REPUBLIC, criminal appeal no. 160 of 2005, (Unreported) Arusha, (CAT) and LIAMBA SINANGA v. REPUBLIC [1994] TLR 97, in all these cases and many more the proceedings of the lower court were not spared. The court of appeal has unhesitatingly and deservingly declared them a nullity and that the said proceedings were recorded without jurisdiction.

Therefore, having found the proceedings and judgement of the lower was founded on flawed irregularity noted above, under the provisions of section 366 (1) (a) (i) of the Criminal Procedure Act, Cap 20 (R.E. 2002) do hereby declare the proceedings of the second trial magistrate a nullity and proceed to set aside judgment, conviction, sentence and consequential orders of compensation meted out against the appellant. The appeal is allowed to the extent I have endeavored to explain above.

Much as both the counsel for appellant and the learned State Attorney left to this court to make the right order in the circumstances. And given the nature of the offence and time taken and the fact that the appellant has already served the sentence, though based on incompetent proceedings and judgment as notified by the counsel for appellant, the wisdom of this court is to leave the matter upon the wisdom of the Director of Public Prosecutions to decide whether to institute new charges against the appellant and others who were at large to date.

It is so ordered.

Dated at Dar es Salaam this 11th day of June, 2018.




S.M. MAGOIGA, JUDGE

11/06/2018