IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 186 OF 2017

(Originating from Criminal Case No.62 of 2015 in the District court of Temeke)

MASUMBUKO S/O KITIME LOGOLO..... APPELLANT.

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

MAGOIGA,J

In the district court of Temeke at Temeke in Dar es salaam, the appellant was charged of one count of Armed robbery contrary to section 287A of the Penal Code [cap 16, R.E 2002] as amended by Act no 3 of 2011 and was convicted and sentenced to custodial imprisonment for 30 years. Dissatisfied by conviction and sentence, the appellant has come to this court contesting his innocence with four grounds of appeal. Going through them, the first, second and third are revolving on torture, un- procedural admission and failure to prove his handwriting in the cautioned statement and yet the trial court heavily relied on such cautioned statement to convict the appellant. The forth ground is on motorcycle which was admitted as exhibit P1 without proper identification by the owner in court but which was the basis of his conviction and sentence.

The facts of this case are that on 21st day of February 2015 the appellant hired a boda boda driven by one, JUMA HAMISI KILUNGI to take him to Moris Secondary School, located at Mbagala area within Temeke District in

Dar es salaam. Upon reaching the intended destination, the appellant gave the bodaboda man two thousand shilling and the bodaboda man bend to see the value of money paid as the agreed fair was ths 1000/=. Suddenly the appellant took advantage of that and hit the appellant with a heavy object on the head twice causing the bodaboda man loose conscious. Immediately, the appellant made away with the motor cycle with registration number T.640 DAM Felan type, ten thousand shillings and a mobile phone tecno make all the property of JUMA HAMISI KILUNGI. Following thorough police investigations, the appellant was arrested on 26/2/2015 at Keko and other investigative procedures were done and on the same day the cautioned statement of the appellant was duly recorded. He confessed before a police officer to have committed the offence as charged. And as such he was charged, convicted and sentenced; hence this appeal.

When this appeal was called for hearing the appellant was unrepresented but ready to proceed. The respondent, republic was represented by Ms. SELINA KAPANGE, Learned State Attorney. The learned State Attorney did support conviction and sentence by the trial court, however, she was quick to point out that there is one incurable irregularity which require the intervention of this court to put proper the record namely; the change of the magistrate without giving reasons and failure to address the appellant of such change and his rights as provided under section 214 (2) (a) of the Criminal Procedure Act, Cap 20 {R.E.2002} vitiated the entire proceeding.

I then invited the parties to argue their appeal and in the course address me on the on the raised irregularity.

The appellant fended himself, briefly and to the point he attacked the cautioned statement that same was taken outside the statutory period provided by law. Though never cited any law but being a layman he was preferring to the provision of section 51 of the Criminal Procedure Act, Cap 20[R.E.2002] which mandatorily guide the police officer of time within which a statement of the accused must be taken, and if, it cannot be taken within such a period of four hours what he is supposed to do. For easy of reference, if need be, section 51 provide that:

Section 51. Where custodial investigation cannot be completed within four hours

(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may–

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period.

(2) A police officer shall not frivolously or vexatiously extend the basic period available for interviewing a person, but any person in respect of whose interview the basic period is extended pursuant to paragraph (a) of subsection (1), may petition for damages or compensation against frivolous or vexatious extension of the basic period, the burden of proof of which shall lie upon him.

(3) Where a magistrate to whom application has been made by a police officer under subsection (1), after having afforded the person, or a lawyer acting on his behalf, an opportunity to make submissions in relation to the application, is satisfied–

(a) that the person is in lawful custody;

(b) that the investigation of the offence by the police officer has been, and is being carried out as expeditiously as possible; and

(c) that it would be proper, in all circumstances to extend the relevant period,

the magistrate may extend that period for such further period as he may deem reasonable.:

On the second ground of appeal the appellant faulted the trial court that during the inquiry the two witnesses for Republic never took oath before their testimony is taken as such vitiated the admission of the same. As to the third ground the appellant faulted the trial court on failure to call a handwriting expert to prove that it was the appellant and not any other person who signed the cautioned statement.

Lastly but not least, the appellant faulted the trial court that the said motorcycle was not identified by the complainant and it was hence wrong to rely on exhibit P1 to convict him. He subsequently invited this court to find his appeal merited, proceed to quash and set aside the conviction and sentence meted out of him and set him free.

On the other hand, the learned State Attorney opposed this appeal by submitting that the raised ground of appeal was of no merits as all procedure were followed before writing and admission of the cautioned statement by conducting inquiry and the court was satisfied that the same was voluntarily made and admitted the same according to law. The learned State attorney went on submit that accused was afforded all his rights and as such his complaint are unmerited in the circumstances. As to failure to call an expert in handwriting the learned state attorney was of the strong view that it was uncalled for in the circumstances of this case. Lastly, on ground 4 the learned state attorney submitted that the conviction was not based on exhibit P1 but on cautioned statement and other oral testimonies of the prosecution witnesses.

But before winding up the learned state attorney submitted on legal issue concerning the competency of the trial record that there are incurable irregularities committed during the trial of the case, which vitiate the entire trial and judgement. That is, this case was tried by two magistrates but the record is silent as what reasons necessitate such a change of the magistrate. Worse still the second magistrate never addressed the accused in mandatory terms of section 214 (2) (a) of the Criminal Procedure Act, Cap 20 [R.E. 2002]. In the circumstances, she invited this court to quash

and nullify the proceedings, judgement of the trial court and order for retrial before another magistrate with competent jurisdiction to try it.

In reply the appellant had nothing important to add rather he reiterated his earlier submission and said if there is any incurable irregularity that has nothing to do with him. All he wants is justice to be done in his appeal.

The legal issue of incurable irregularities of the proceedings and the resultant judgement versus the merits of the appeal, I must admit, have considerably tasked my mind a great deal. However, I resolved to look into the competency of the proceedings before resolving to merits. According to record of the trial court the first time the case was on 2/4/2015 assigned to PENDEKEZI, PDM. On 14/05/2015 the case was assigned to MBONAMASABO, learned Resident Magistrate. The learned Resident Magistrate, MBONAMASABO presided over the matter by conducting Preliminary hearing, took and recorded the evidence of Pw1, PW2, PW3, PW 4. He disappeared from the record for unknown reasons on 30/05/2016. According to the record of the court the matter was reassigned to the learned Resident Magistrate, one KIHAWA, who without due regards to the mandatory provisions of section 241 of the Criminal Procedure Act, cap 20 [R.E.2002] proceeded to take the evidence of PW5 and that of the DW 1. Later composed a judgment the subject of this appeal.

It is crystal clear from the court proceedings and as correctly pointed by the learned state attorney that the trial proceedings were presided over by the two learned magistrates but the successor magistrate utterly failed to address the appellant in terms of the provisions of section 214 (2) (a) of the CPA. This irregularity is not new in our jurisdiction and on a number of cases both the Court of Appeal and the High Court have similar approach for such irregularity. In the cases of LIAMBA SINANGA VERSUS REPUBLIC [1994] TLR 97 (CA) AND STEPHEN NGONYANI VERSUS REPUBLIC [1989] TLR 53 (HC) held that:

> **" the language in section 214 (2) (a) of the Criminal Procedure Act is mandatory in that the second Resident Magistrate was obliged to inform the appellant of his rights**

that witnesses who testified before the first magistrate be summoned to testify before the second magistrate if the appellant so wished."

In both cases the proceedings were quashed and an order for retrial was ordered. In the instant appeal the record is silent that the accused was addressed in accordance with the mandatory provision of section 241 of the CPA. However, the said approach and stance may look very long but for the interest of justice and taking into account the intention of the parliament to ensure a fair trial and play. Therefore, in order to remove all prejudices to the accused and the second trial magistrate in his /her decision, it is my considered opinion that, the best option in the circumstances of this case is to order a retrial before another magistrate with competent jurisdiction to try the matter. This will give the trial magistrate an opportunity to assess the credibility and demeanor of the witnesses. In the instant appeal the charge was grave, of armed robbery which attracts 30 years' imprisonment.

Having so decided, and given that the irregularity vitiated the proceedings, and the resultant judgement, conviction and sentence, I found no reason to go into the details of the merits of the appeal.

In the upshot and for the reasons given above I hereby under the provisions of section 366(1)(a) (i) of the CPA, declare the proceedings in the lower court quashed and the judgment set aside. It is hereby ordered that the appellant be re-tried in the district court of Temeke but before another magistrate with competent jurisdiction to try the case.

It is so ordered.

Dated in Dar es salaam this 08th day of June 2018.

S.M. MAGOIGA

JUDGE