

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA
(REVISIONAL JURISDICTION)**

CRIMINAL REVISION NO. 1 OF 2021

THE REPUBLIC APPLICANT

VERSUS

JOSEPH OREST LUHWA 1ST RESPONDENT

BASHIRI HAMADI GOSSORI 2ND RESPONDENT

***(Revision from the Resident Magistrate's Court of Musoma at
Musoma in Corruption Case No. 1 of 2019)***

RULING

3rd June and 6th July, 2021

KISANYA, J.:

The respondents, Joseph Orest Luhwa and Bashiri Hamadi Gossori stand charged before the Resident Magistrate's Court of Musoma sitting at Musoma with one count of corrupt transactions contrary to section 15(1) (a) and (2) of the Prevention and Combating of Corruption Act No. 11 of 2007. It was alleged by the prosecution that, on 28th October, 2019 around 1300 hours at Rest House lake belonging to JWTZ at Makoko ward within Musoma Municipality, the respondents being municipal fisheries officers did corruptly obtain the sum of TZS 150,000/= from Bakari Makunja Mirimu who is a

businessman as an inducement to release a fishing vessel with Registration No. TZRMN 150 which had been seized for want of relevant licence, a matter which was in relation to their principal affairs.

The case was assigned to Hon. V.T. Bigambo, RM who took the respondents' plea, conducted the preliminary hearing and heard evidence of PW1, PW2, PW3, PW4, and PW5. Later on Hon. T. Swai, SRM took over the matter and heard evidence of PW6 and PW7. The prosecution closed its case after parading the said seven witnesses and tendering five (5) exhibits. In the course of composing a ruling on whether the respondents have a case to answer, the succeeding magistrate noticed two irregularities *First*, the evidence adduced by the prosecution witness was not read over to the respondent as required by section 210 (3) of the Criminal Procedure Act, Cap. 20, R.E 2019 (the CPA). *Second*, during the preliminary hearing, the prosecution was not called upon to read the facts and that the trial court did not record the facts and read over the undisputed facts to the respondents.

In that regard, the succeeding trial magistrate found it apposite to forward the case file to this Court for guidance and direction. That is when this Court, *suo motu*, initiated the revision at hand, under section 372 of the CPA.

When the matter was assigned to me, I noticed the following irregularities in the proceedings of the trial court:

1. The charge was not read over and explained to the accused persons (respondents) during the plea taking.
2. The facts read by the prosecution during the preliminary hearing were not recorded and that the memorandum of agreed facts were not read over to the respondent.
3. The learned trial magistrate did not read over to the respondents the evidence adduced by PW1, PW2, PW3, PW4 and PW5.
4. The learned trial magistrate did not append his signature after recording evidence of PW1, PW2, PW3, PW4 and PW5.

At the hearing of this matter, the prosecution was represented by Mr. Nimrod Byamungu and Mr. Yahya Mwinyi, learned State Attorneys. On the other side, the respondents appeared in persons. I probed both parties to address the Court on the above irregularities and advise on the way forward.

Mr. Byamungu readily conceded to the irregularities pointed out by this Court. Save for an irregularity in respect of the preliminary hearing, the learned State Attorney was of the view that other irregularities vitiated the proceedings of the trial court and urged me to nullify the proceedings and order for retrial. On the other hand, the respondents were of the view that this was not a fit case for retrial. They asked me to discharge them.

For the reasons to be noticed later, I find that this matter can be disposed of by addressing the issue related to plea taking. Referring the Court to section 228 of the CPA, Mr. Byamungu submitted that the charge was not read over and explained to the respondents. The learned State Attorney went on to argue that the said omission vitiated the proceedings before the trial court. He bolstered his argument by citing the case of **Thuway Akonaay vs R**, (1987) TLR 92.

I am at one with the learned State Attorney that, the procedure for plea taking is well stated under section 228 (1) of the CPA. The trial court is required to read over and explain the substance of the charge to the accused person before probing him to state whether he admits or denies the charge levelled against him. Section 228 (1) of the CPA reads:-

"The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."

The above cited section aims at ensuring that the accused person is made aware of the charge preferred against him by the prosecution. It is after understanding the nature of the case when the accused person will be in a better position of asking the questions to the prosecution's witnesses and prepare for his defence. The law is settled that failure to comply with section 228 of the CPA renders the trial a nullity. This position was stated in **Naoche Ole Mbile v. R**, (1993) TLR 253) where the Court of Appeal held as follows:

- (i) One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, i.e. the Court has to put the charge or charges to him and require him to plead;*
- (ii) Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity.”*

In yet another case of **Thuway Akonaay vs R**, (1987) referred to by Mr. Byamungu, the Court of Appeal cited with approval the case of **Akbarali Damji v R**, 2T.L.R. 137, where it was held that:

The arraignment of an accused is not complete until he has pleaded. Where no plea is taken the trial is a nullity. The omission is not an irregularity which can be cured by section 346 of the Criminal Procedure Code.

At this juncture, for better understanding of the sequence of events on what transpired during the conduct of the proceedings subject to this revision, I find it useful to reproduce the relevant proceedings on the plea taking. This is what transpired on 11 November, 2019 when the respondent appeared before the trial court for the first time:

Date: 11/11/2019

Coram: V.T. Bigambo-RM

Prosecution: Chuwa SA

Accused: Present

B/Clerk: Mgaya-

1st accused: Not true

2nd accused: Not true

Court: EPNG

The learned trial magistrate went on to set the bail conditions and adjourn the matter to mention on 6th December, 2019. As that was not enough, the respondents' plea is purported to have taken when the matter was called on for preliminary hearing on 11 February 2020. The relevant part of the preliminary hearing is reproduced hereunder:

Date: 11/2/2020

Coram: V.T. Bigambo-RM

Prosecution: Present

Accused: Present

Inter: J.M. Malima-RMA

PP: The case is coming for PH, ready to proceed with

Accused: Ready to proceed with the PH.

1st accused: Not true

2nd accused: Not true

Court: I adopt the typed copy of PH

Thereafter, the learned trial magistrate proceeded to record what he termed as "Memorandum of Facts".

Having imported the above record pertaining to the plea taking, it is apparent that the substance of the charge was not read over and explained to the respondents. Although the respondents are recorded to have replied "not true", it is not known as to whether they were responding to the charge or something else. Nothing on record showing that the respondents were made aware of the charge levelled against them. In that regard, section 228 of the

CPA was not complied with. This implies that the respondents' arraignment before the trial court is incomplete due to failure to read to them the charge preferred against them. In consequence, the omission to read over and explain the charge to an accused person is the same thing as not taking the plea.

In view of the position stated in the above cited cases, the failure to comply with section 228(1) of the CPA in taking the plea is a fundamental irregularity. It cannot be cured by section 388 of the CPA because the respondents were not informed of the nature of the case they are facing for purposes of cross-examining the seven witnesses called on by the prosecution.

In the premises, the entire proceedings before the trial court were a nullity and I find it not necessary to address other irregularities which stemmed from the nullity proceedings.

For the reasons I have assigned, I invoke the revisional powers under section 373 of the CPA, on the basis of which, the proceedings of the trial court are hereby nullified, quashed and set aside.


On the way forward, Mr. Byamungu urged me to order retrial while the respondents were of the view that this is not a fit case for retrial. It settled law in this country that, a retrial will only be ordered when the original trial was illegal or defective, or where the interests of justice so require. The law is

also clear that an order for retrial will not be issued for the purposes of allowing the prosecution to fill in the gaps in its case. See **Fatehali Manji vs. Republic** [1966] E.A. 343 where it was expounded that:-

"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame: it does not necessarily follow that a retrial shall be ordered: each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require".

In the case at hand, the prosecution had paraded seven witnesses and tendered five exhibits including the respondents' cautioned statements. Upon considering that the nullification of the proceedings was occasioned by fundamental defects in the trial, I am of the opinion that, the public interests demand this Court to, and I hereby order a retrial before a different magistrate having the jurisdiction to try the case. Having considered that the case was instituted in 2019, I direct for the trial to be expedited. It is so ordered.

DATED at MUSOMA this 6th day of July, 2021.

 E.S. Kisanya
JUDGE

COURT: Ruling delivered this 6th day of July, 2021 in the presence of Mr. Nimrod Byamungu, learned State Attorney for the applicant and both respondents




E. S. Kisanya
JUDGE
6/07/2021