

IN THE HIGH COURT OF TANZANIA

AT TABORA

DC CRIMINAL APPEAL NO. 12 CF 13 CF 14 OF 2019

(From Original Criminal Case No. 199 of 2017 of Nzega District

Court at Nzega)

SAMIKE BUNELA @ NURU1ST APPELLANT

KASHINDYE SHIJA @ MASAKA 2ND APPELLANT

ELIAS KENYA @ MRABU 3RD APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 16/07/2021

Date of Delivery: 19/07/2021

AMOUR S. KHAMIS, J.

Before the District Court of Nzega the appellants were charged with the offence of armed robbery contrary to Section 287 A of the Penal Code Cap 16 [RE 2002].

The offence was alleged to have been committed on 14th day of May, 2017 at or about 21:00 at Itobo Village within Nzega District in Tabora region.

It was alleged that the appellant stole one motorcycle make SANLG Reg No. MC 343 BJC, engine No. SL157FM16931016

valued at Tshs: 2,100,000/= and one mobile phone make TECNO valued at Tshs: 35,000 the property of one Hussein Shamba.

The prosecution alleged further that immediately before, during and after such stealing, the appellants did use a gun known as Sub-Machine Gun by firing one bullet and attacking the said Hussein Shamba in order to Obtain and retain the said properties.

The appellant pleaded not guilty to the charge and after a full hearing, the trial Court found the appellants guilty of the offence and each was sentenced to serve thirty (30) years in jail.

Dissatisfied with conviction and sentence, the appellants filed this appeal having the following grounds: -

1. *That, Hon. E.R. Marley -RM wrongly assumed jurisdiction to entertain the case since section 214 of the CPA, Cap 20 R.E 2002 was not complied with.*
2. *That, the presiding magistrate erred for convicting and sentencing the appellant without taking into account and considering the defence evidence of the appellant and accord the same any weight when composing the judgment.*
3. *That, PW3 (the victim) was not descriptive on the circumstance obtaining at the scene of crime and its surrounding which enabled him to identify the appellant vis-à-vis the following.*
 - i. *The intensity of the alleged solar light was not described.*
 - ii. *The distance between where light was, the point of confrontation and the observer was not disclosed.*
 - iii. *PW3 did not describe the culprits to the next person he met in the aftermath of the robbery instead, he*

described the appellant when he found him and others at the police station.

- 4. That, the ingredients of the offence of armed robbery was not congenitally established as there was no other witness summoned to support the allegation by PW3 on the use of gun. No spent cartridges was recovered at the scene of crime and the impounded gun was not proved to be the one used at the scene of crime by a ballistic expert.*
- 5. That, the presiding magistrate erred in law for invoking on me the doctrine of recent possession in total disregard to the fact that.*
 - i. I he was not found in possession of the stolen motorcycle nor was it found in his homestead.*
 - ii. The motorcycle allegedly stolen at the scene of crime was not positively identified by the alleged owner both at pre-trial and trial stage.*
- 6. That, there was a break in chain of custody when PW3 tendered exhibit P1, the alleged stolen motorcycle.*

When the appeal was called up for hearing, Mr. John Mkonyi, learned State Attorney championed the respondent's case whereas the three-appellants appeared in person under the aid of a video conference technology.

Submitting for the respondent, Mr. Mkonyi partly supported the appeal by stating that, Section 214 (1) of the Criminal Procedure Act Cap 20 R.E 2002 was not complied with.

The learned counsel contended that record showed that from the time the appellants were arraigned to date of preliminary hearing, the presiding magistrate was Hon. Nsana but later on

Hon. Marley RM proceeded with trial without complying with the named provision of the law which requires a magistrate to state to the accused as to why the case changed hands.

Mr. Mkonyi cited the case of Shabani Seif & Said Abdallah Chekacheka vs Republic Criminal Appeal No. 215 of 2015 where it was held that: - "if section 214(1) is not complied with, the proceedings become a nullity". He urged this Court to nullify the proceedings and judgment of the trial Court.

According to Mr. Mkonyi, the trial Court in convicting the appellant relied on identification and circumstantial evidence which indicated that PW3 (victim) testified on how she identified the first and third appellants, and explained about the source of light, and that, they were known to her prior to the date of incident.

Mr. Mkonyi, referred to testimony of PW4 who said that, search was conducted on 2nd appellant and found with stolen motorcycle. He contended that despite the weakness in failing to adhere to Section 214 (1) of CPA the evidence against the appellants was tight and overwhelming. Mr. Mkonyi urged this Court to remit the case to the trial Court for retrial.

Finally, Mr. Mkonyi informed this Court that, the fourth accused, Kashindye Shija Dotto was acquitted by the trial Court and therefore was not a party to this appeal.

Supporting the appeal, the first appellant Samike Bunela contended that, he was in prison for three years and that the defective proceedings were caused by the learned magistrate who convicted them.

As to the issue of identification, the 1st appellant submitted that, there was no proper identification of appellants by the

prosecution witnesses and there was no corroboration in the testimony of PW1 as regards to the scene of crime. He contended that the circumstantial evidence was not established contrary to what was submitted by the State Attorney. The first appellant urged this Court to order for his release.

The second appellant Kashindye Shija Masaka opposed a proposition for trial on the ground that the trial magistrate exhibited weaknesses in the proceedings.

The third appellant Elias Kenya Mrabu requested to be released by this Court for the reason that he knew nothing about the alleged incident. He said that he was only joined in the case and was not familiar with it.

Basing on the submissions made by both parties, the issues for consideration and determination are whether the requirements under Section 214(1) of The Criminal Procedure Code were fulfilled and whether the appellants were properly identified at the scene of crime.

Starting with the first issue, on whether the trial magistrate adhered to the requirement set forth under Section 214 of CPA, the respondent's counsel conceded that the procedure set forth under that provision of law was not complied with by the trial magistrate.

It is trite law that whenever a magistrate or judge changes in the course of hearing, the reasons for that change must be recorded and communicated to the accused person.

Section 214 (1) of the Criminal Procedure Act (supra) provides that, where a case is partly heard and a trial magistrate changes, the successor magistrate may take over and continue with trial or

committal proceedings. The successor magistrate may act on the evidence or proceedings recorded by his predecessor and where he considers it necessary may resummon the witnesses and recommence the trial or the committal proceedings.

In **JUMA KUYANI & MUSA DAUDI VS REPUBLIC CRIMINAL APPEAL NO. 525 OF 2015 (unreported)** the Court of Appeal insisted that:

“in terms of Section 214 (1) of the CPA, reasons must always be given and recorded, in case of change of trial magistrate even for purpose of passing sentence”

In the instant case, both parties conceded that the proceedings are silent as to what reasons made Hon. Marley take over the case from Hon. Nsana.

In the case of **JUMA KUYANI and MUSA DAUDI VS REPUBLIC** (supra) the Court of Appeal held that failure to disclose reasons for change of magistrates was highly irregular in terms of Section 214 (1) of the Criminal Procedure Act and allowed the appeal.

Having gone through the trial Court's Proceedings, It is clear that Hon. Marley took over the case when it was at the stage of inquiry. That was after the 1st accused had objected to a prayer for admission of his cautioned statement.

It is on record that, the matter went through several adjournments and later on the magistrate decided to admit the cautioned statement of the 1st accused. Proceedings further show that after admitting the said statement, it was not read over to the accused as required by the law.

Considering the seriousness of the offence and severity of the sentence, the trial magistrate ought to have considered adherence to important legal procedures to ensure fair trial. The said cautioned statement is thus hereby expunged from the records.

As to the issue of identification, case law provides guidance as to what should be done. The appellants rightly stated that PW 3 did not state that the intensity of solar light that was alleged to be in his house was sufficient or strong. Further he never mentioned the proximity and length of time the appellant stayed in the crime scene.

If I deploy the guidelines set forth in the case of **WAZIRI AMANI V R [1980] TLR 250** it is evident that the identification of appellants as portrayed by the prosecution casts doubt since the important guidelines were not fulfilled to the required standard. Nevertheless, none of the prosecution witnesses corroborated the testimony of the victim.

Basing on the above stated reasons, I allow the appeal, quash the conviction, set aside the sentence of 30 years imprisonment imposed on the appellants and order their immediate release from prison unless otherwise lawfully detained.



A handwritten signature in blue ink, appearing to read "Amour S. Khamis", is written over the printed name.

AMOUR S. KHAMIS
JUDGE
19/07/2021

Judgment delivered in chambers in presence of Ms. Juliana Moka, Senior State Attorney for the Republic. The three appellants are present in person under custody. Right of Appeal explained.



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AMOUR S. KHAMIS

JUDGE

19/7/2021