

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

**AT DODOMA**

**(DC) CRIMINAL APPEAL NO. 53 OF 2019**

*(Original Criminal Case No. 132 of 2018 of the District Court of Mpwapwa  
at Mpwapwa)*

**1. RAPHAEL MKWAI @ MCHIWA**

**2. KENETH KOMBOZO**

**3. MSAFIRI MCHIWA**

..... **APPELLANTS**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**RULING**

*24/8/2021 & 31/8/2021*

**KAGOMBA, J**

The appellants RAPHAEL MKWAI @ MCHIWA KENETH KOMBOZO and MSAFIRI MCHEWA filed their petition of Appeal on 6<sup>th</sup> of May, 2019 challenging the decision of the District Court of Mpwapwa in Criminal Case No. 132 of 2017 where Hon. P. F. Mayumba, RM found them guilty of the offence of armed robbery contrary to Section 287 A of the Penal Code Cap 20 R.E 2019. Each of the appellant was accordingly sentenced to serve 30 years imprisonment as a lesson to the accused persons and the society at large.

The appellants were aggrieved by the said decision and in their petition of appeal they stated that the District Court ("Trial Court") had erred in law and

fact in several ways, namely, by convicting the appellants based on weak visual identification, the evidence of PW1, PW2 and PW3 did not address the time the offence was committed, by basing the conviction on the evidence of PW4 and PW5 which was hearsay and inadmissible evidence before the court, by the court not warning itself that conviction should be based on the strength of prosecution case and not weakness of the defence evidence and that in totality the prosecution case did not prove the case beyond all reasonable doubts against the appellants.

On the date set for hearing of the appeal the appellants appeared in person under custody, while the respondent (the "Republic") was resented by learned State attorney, Rachel Tuli. The learned State attorney raised to caution the court that there were issues of great concern in the judgment of the District court which the court may wish to look at and determine whether the hearing of the appeal should proceed or not. She said the judgment and the proceedings had so many defects that one cannot say there is a proper judgment and proceedings before the Court.

Ms. Tuli pointed out the defects to included exhibit P2 on page 14 of typed proceedings which was not read in Court, a mobile phone tendered by PW1 on page 19 of the proceedings which was not properly identified to show colour and make of the phone, an exhibit is given double allocation of numbers for identification, specifically on page 20 of the proceedings where PF3 of PW1 Charles Mkoni has been marked "P2" which is the same exhibit number as the letter of movement, and the same was not read in Court.

She further pointed other defects on page 32 of the proceedings as the sketch map of the scene of crime which was tendered by PW10 F 1739DC. John, which was admitted in evidence but was not marked with an exhibit number. On page 34 of the proceedings another mobile phone was tendered and admitted as exhibit P4 but has no specification for identification purpose by the court.

Furthermore, she said, on page 37 of the proceedings the court said EMEI number was read in court but nowhere it is shown in the proceedings who tendered and read the said EMEI number in court. On page 36 of the proceedings there is court record that on 15/1/2019 the court set defence hearing on 16/1/2019 and 16/1/2019 but that is when prosecution case was closed and ruling date was set. All this happened while defence case had been scheduled. And she pointed out another defect on page 34 of the proceedings where a prosecutor prayed to tender an exhibit instead of a witness.

The learned State Attorney notified the court that same defects came to the attention of Hon. Mansoor, J in this very case. She said, Hon. Mansoor, J in her Judgment dated 17/9/2018 ordered retrial of the case which has again came up with similar shortfalls. In the learned state attorney's opinion, the defects were not rectified because upon retrial the case was heard by the same Magistrate who committed the mistake before. She cited the case of ***Makumbi Ramadhani Makumbi and 4 others V. R 28 (Sic)*** to the effect that where there are errors committed by court, the court may order retrial.

The learned State Attorney further cited the provision of Section 388 of the Criminal Procedure Act Cap 20 R.E 2019 to support an order of retrial so that court record can be rectified accordingly. She thus prayed for retrial.

The appellants also commented on the defects in the proceedings. Their main concern was the delay in determination of their appeal. They prayed the court to do them justice.

Having gone through the submissions of the parties, it is my considered view that the defects and irregularities cited are such serious that they have in fact occasioned a failure of justice. I should state here that justice should be seen to be done for both parties to the case, prosecution and defence side alike. As it has been rightly pointed out by the learned state attorney, exhibits were not numbered, others were not properly identified. It is to be wondered that even under such circumstances the trial court was able to convict the accused persons.

Section 388 (1) of the Criminal Procedure Act provides:

*"388(1) subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or any inquiry other proceedings under this Act, save that where on appeal or revision, the court is satisfied that such error, commission or irregularity has in fact occasioned a failure of justice the court may order a retrial or make such other order as it may consider just and equitable."*

From this cited provision of the Act, as a general rule, the finding and sentence of trial court which has competent jurisdiction to try a case, as it were in this case, could not be reversed or altered by this court on account of errors, omission or irregularities. The exception to this general rule is where such errors, omissions or irregularities have actually occasioned a failure of justice.

I have already expressed my considered view that in fact the errors, omissions and irregularities in this case have occasioned a failure of justice. For this reason, the hearing of the appeal cannot proceed as the judgment being challenged is founded on defective proceedings. Having taken the concerns of the parties, I order speedy retrial of the case by the District court of Mpwapwa to be presided over by a different magistrate of competent jurisdiction.

It is ordered accordingly.



  
**ABDI S. KAGOMBA**  
**JUDGE**  
**31/08/2021**