IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 206 OF 2017

(Originating from the decision of the District Court of Ilala at Samora Avenue, in Criminal Case No. 33 of 2015, by Hon. Tarimo-SRM dated 12th day of May, 2017)

GODFREY LAURENCE.. 1ST APPELLANT

SOPHIA RASHID .... 2ND APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

16th May, & 6th June, 2022

ISMAIL, J;

The appellants herein were jointly charged with a trio of counts, all of which were alleged to have been committed on 8th January, 2015. In the 1st and 3rd counts, the appellants were accused of inflicting grievous bodily harm on Sekela Mniwasa and Ricardo Duncan, using a stick and a machete. These two counts are contrary to section 225 of the Penal Code, R.E. 2019. In the 3rd count, the allegation is that on the same fateful day, the 2nd appellant, contrary to section 89 (1) Penal Code (supra), uttered abusive language to Sekela Mniwasa.

These offences were allegedly committed at Nahwa Pub, located at Tabata Kisukuru are, within Ilala District in Dar es Salaam Region.

Deducing from the trial proceedings, it is understood that the victims of the alleged incident were a mother and a son. On the fateful evening, one of the victims, Sekela Mniwasa, was home. Then her younger sister, known as Lea Mwambili came crying, alleging that she had been beaten by a bar attendant of the Nahwa Pub. They then left for the pub to enquire about the matter. On getting there, she met the owner of the pub, known as Mzee Itawa. They spoke and the matter was resolved. As she left the pub, the 2nd appellant hurled abusive words at the victim. As this was happening, the victim's children passed by and witnessed what was happening. Unable to hold, they intervened and attempted to remove the 2nd appellant from the pub. This enraged 1st appellant and attacked them using a stick and a machete. In the process, the victim and his son Ricardo Duncan sustained multiple head and arm injuries.

The victims were rushed to Stakishari Police Station where they were attended to, given Police Forms Form No. 3 (Exhibits P1 and P2). They were then taken to hospital for treatment.

The appellants were arraigned in court where they pleaded not guilty to the charges. Six witnesses testified for the prosecution against five who

featured for the defence. At the end of the proceedings, the District Court of Ilala District at Samora Avenue, in which the appellants were arraigned, was convinced that the prosecution had established the appellant's guilt. Consequently, it convicted the appellants and sentenced them to payment of fine or imprisonment. Further to that, the 1st accused was ordered to pay compensation to Sekela Mniwasa and Ricardo Dancun, in the sum of TZS. 5,000,000/- and TZS. 1,000,000/-, respectively.

The conviction and sentence bemused the appellants, hence their decision to institute the instant appeal. The petition of appeal contains five grounds of appeal, paraphrased as follows:

1. That the trial court grossly misdirected itself for failing to resolve the contradictions in the prosecution case in favour of the appellants;
2. That the trial magistrate grossly misdirected herself by relying on facts which were not supported by record and Exhibits P1 and P2 (PF3);
3. That the trial magistrate misdirected herself in law and in fact by admitting Exhibit P3 whose custody contravened the principle of chain of custody.
4. That the trial magistrate grossly misdirected herself by failing to consider the evidence adduced by the defence; and

5. That the trial magistrate misdirected herself for failing to comply with the provisions of section 214 of the Criminal Procedure Act, Cap. 20 R.E. 2019.

Hearing of the appeal was through written submissions the filing of which conformed to the schedule drawn by the Court. Whereas the appellants were represented by Ms. Anna Marealle, learned counsel, the respondent enjoyed the usual services of the Directorate of Criminal Investigations.

Ms. Marealle began by restating the principle that governs the burden of proof in criminal cases as set out in section 110 (1) of Evidence Act, Cap. 6 R.E. 2019, and as accentuated in various court decisions, including ***Ndege Marangwa v. Republic*** [1965] E.A.C.A. 156; ***Jonas Nkize v. Republic*** [1992] TLR 213; and ***Mohamed Said Matula v. Republic*** [1995] TLR 3. The learned advocate argued that the prosecution failed to prove their case beyond reasonable doubt.

Submitting on the 1st ground of appeal, the appellant's counsel contended that the evidence adduced by prosecution witnesses was tainted with inconsistencies and contradictions. She singled out a statement in the impugned judgment in which the trial court allegedly noted of the prevalence of doubts and contradictions which are unsafe to rely on. She bolstered her

position by citing the case of ***Rashid Kazimoto & Another v. Republic***, CAT-Criminal Appeal No. 458 of 2016 (unreported). A few instances of contradictions that are the cause for the appellants' concern are:

1. PW1's testimony at page 6 that Leah was beaten and that there were signs to that effect. She later said that she was beaten by Godfrey.
2. PW1's testimony at page 21 that Leah was fighting with Sofia, and that Leah was beaten and injured by Sofia.
3. PW1's testimony at page that Mr. Mshumbusi went to a Masai and took a knife and beat PW1's son on the head and on the right hand.
4. PW2's testimony that he was cut with a panga on several parts of his body.
5. PW3's testimony at page 37 that Godfrey took a knife from Masai but Ricardo was injured by a panga.
6. PW5's testimony at page 49 in which he was quoted as saying that Sekela (PW1) said she was cut by a sword and not a club.

The appellant took the view that these contradictions were irreconcilable and too dangerous to rely on.

With respect to ground two, the contention is that the extent of injury was not verified by witnesses and testimony adduced by the prosecution.

The appellants contended that the allegation that PW2 injured his fingers had not been proved. Besides that, the testimony in that respect is full of contradictions. The appellants argued that the prosecution had a chance of moving the successor magistrate to re-summon PW2 and other witnesses to testify on the contention of injury to PW2's fingers. In the absence of all this, the appellants contend, their conviction was unjustified.

On ground three the appellants take a serious exception to the manner in which the chain of custody was observed in this case. Ms. Marealle contended that Exhibit P3 was kept in a manner that did not observe the Police General Order (PGO) No. 229 (4) (c) and paragraph 6 (f) of PGO No. 282 (5) and the holding in ***Paul Maduka & 4 Others v. Republic***, CAT-Criminal Appeal No. 107 of 2007 (unreported). In this case, the contention is that PW5 did not tell the Court how he kept Exhibit P3 the moment he picked it from PW1 and PW2 to the point it was tendered in court. Learned counsel took the view that there was a serious breakdown of chain of custody, and that this resulted in an unfair trial against the appellants.

Regarding grounds four and five, the gravamen of complaint is that defence testimony was not considered and that the reasoning in the matter was based on the prosecution witnesses only. The appellants urged the Court to step in and evaluate the evidence. They premised their argument on the

case of ***Martha Michael Wejja v. Hon Attorney General & 3 Others*** [1982] TLR 35. There is also a question of not complying with section 214 of the Criminal Procedure Act, Cap. 20 R.E. 2019. The appellants take the view that after the takeover, the successor magistrate did not solicit the views of the parties on whether the proceedings should start afresh or proceed from where the predecessor judge left off.

The respondent's submission starkly holds a contrary view. With respect to contradictions raised in ground one, the argument by the respondent is that none exists, and that the collective message in the testimony of PW1 is that PW1 and PW2 both of whom constitute the family were injured by the appellants. While acknowledging that the trial magistrate expressed some injuries on the doubts allegedly suffered by the victims, the respondent took the view that the alleged contradictions, if any, are trivial and unable to shake or affect the prosecution's case. The respondent relied on the case of ***Mzee Ally Mwinyimkuu @ Babu Seya v. Republic***, CAT-Criminal Appeal No. 499 of 2017.

Regarding ground two, the respondent's argument is that PW1 and PW2 showed the trial court the injuries that they sustained, and that this is found at page 26 of the proceedings at which PW2 was quoted as saying that his fingers were unable to hold a pen. The respondent denied that there

was any misdirection by the trial court in this respect as the court was able to see marks of injuries suffered by PW2. She urged that this ground of appeal be dismissed.

With respect to ground three of the appeal, the respondent's contention is that there was no breakage of the chain of custody. She argued that exhibit P3 was recovered from the scene of the crime before police officers came, necessitating that the same be taken to police station by the victims themselves. The respondent further contended that PW5, the investigator in whose hands the exhibit was handed was the right person to tender the exhibit.

Ground four decries the trial court's failure to consider the defence evidence. The respondent's contention is that such evidence was factored in the decision of the trial court, as evidenced in pages 2, 4 and 5 of the judgment. She took the view that the evidence was not strong enough to shake the prosecution's case, hence the court's decision to hold that the prosecution had proved its case.

With regards to ground five, the respondent admitted that indeed there was a change of magistrates. The respondent argued, however, that reason for the takeover was given, as found at page 45 of the court proceedings and that, at page 46, the successor magistrate informed the parties that

there was a takeover and that the parties expressed their desire to proceed from where the predecessor magistrate left. It was the respondent's argument that the provisions of section 214 of the CPA were followed to the letter. The respondent further argued that compliance with section 214 of the CPA is not of any imperative requirement. This is in view of the use of the word "may", connoting that this is a discretionary requirement. The respondent took the view that where, as is the case here, no miscarriage of justice was occasioned, the recourse is to ignore the complaint.

Overall, the respondent urged the Court to dismiss the appeal and uphold the conviction and sentence imposed by the trial court.

The appellants' rejoinder was, by and large, a reiteration and amplification of what they submitted in chief. The appellants maintained that the appeal is meritorious. They prayed that the same be allowed.

The broad question to be deduced from these submissions is whether this appeal is meritorious. I prefer to address ground four of the appeal ahead of the rest. This ground complains that chain of custody of Exhibit P3, a sword allegedly used in inflicting injury on the victims was not observed.

The settled position is that courts are under obligation to ensure that an exhibit tendered in support of a charge is kept in a manner that is free from any possible tampering or manipulation, thereby losing its evidential

value in proof of the allegation against the accused person. This position has been emphasized in numerous court decisions.

In ***Zainabu D/o Nassoro @ Zena v. Republic***, CAT-Criminal Appeal No. 348 of 2015 (unreported), the Court of Appeal of Tanzania underscored the rationale for ascertaining a chain of custody for an exhibit. It held:

> *"All the above authorities reiterate through various circumstances, the underlying rationale for ascertaining a chain of custody, which is, to show to a reasonable possibility that the item that is finally exhibited in court evidence, has not been tampered with along its way to the court."*

While the cited decision and many others fortify the need for observing this imperative requirement, there are exceptions. One of such exceptions is where the evidence is not in any danger of being destroyed, polluted or tampered with. Thus, in ***Joseph Lenard Manyota v. Republic***, CAT-Criminal Appeal No. 485 of 2015 (unreported), it was held:

> *"It is not every time when chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted and/or in any way tampered with. Where circumstances may reasonably show the absence of such dangers, the*

court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

This position was resoundingly echoed in the subsequent holding of the superior Court in the case of ***The Director of Public Prosecutions v. Stephen Gerald Sipuka***, CAT-Criminal Appeal No. 373 of 2019 (unreported), in which it was held as follows:

"…. it is settled law that, thought the chain of custody can be proved by way of trail of documentation, this is not the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances in each particular case. In cases where relevant exhibit can neither change hands easily nor be easily compromised then principles laid down in the case of ***Paulo Maduka*** *(supra) can be relaxed."*

The circumstances in the instant case squarely fit in the exceptions stated in the two last excerpts quoted above. It is simply that Exhibit P3 was in a form that was not prone to any compromise or tampering as to require adherence to the stringent requirement set out in ***Paulo Maduka*** (supra) or any of the decisions that have set this as an imperative requirement. I do not see any possibility that Exhibit P3, a sword that is alleged to have been

used to injure the victims would be subjected to any form of tampering or change of its state and distort the position to the appellants' detriment.

I consider this ground hollow and I dismiss it.

Disposal of this ground takes me to ground five of the appeal. The appellants' consternation in this ground is that the provisions of section 214 (1) of the CPA were given a wide berth. The allegation is that the successor magistrate did not conform to the requirement of having the appellants choose if they wished to have the case start afresh or proceed from where the matter ended.

Looking at substance of section 214 (1) of the CPA, the general understanding is that compliance with this requirement is optional. However, the legal holdings are to the effect that compliance with this requirement is not a matter of choice. It is a mandatory requirement whose non-compliance brings an undesirable consequence. In ***James Maro Mahende v. Republic***, CAT-Criminal Appeal No. 83 of 2016 (unreported), it was guided that:

> *"The requirement of giving reason by the successor magistrate is necessary in order to provide semblance of order and to ensure that the accused person gets a fair trial. Apart from the fact that it is a requirement under the law, it is also good practice for the sake of transparency. The*

accused person has a right to know why there is a new presiding magistrate. In order for the accused person to have a fair trial, he has a right to know any changes relating to the conduct of his case."

The decision in the foregoing decision mirrors the superior Court's decision in an earlier decision in ***Abdi Masoud Iboma & 3 Others v. Republic***, CAT-Criminal Appeal No. 116 of 2015 (unreported), in which the trial court's conduct was abhorred. In the end, the proceedings which were conducted subsequent to the abhorrent takeover were quashed and the decision was set aside. The upper Bench stressed that:

"… under section 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrate. It is a requirement of the law and has to be complied with. It is prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case…. we therefore agree with Ms. Shio that the irregularity was incurable and have to be quashed."

Significantly, the right to inform the parties of the takeover of the proceedings must go hand in hand with an equally imperative requirement of ensuring that the parties, especially the accused person, are informed of their right to have the trial continue or start afresh. This includes the right

to recall witnesses. This was underscored in ***Gharib Ibrahim @ Mgalu & 4 Others v. Republic***, CAT-Criminal Revision No. 5 of 2019 (unreported). It was held:

> *"....it is therefore well settled principle of the law that, where a trial is conducted by more than one magistrate; the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses."*

The trial record indicated that Hon. Tarimo, SRM took over the conduct of the proceedings from Hon. Mkasiwa, SRM. At the time of takeover, i.e. 13th October, 2016, four witnesses had testified for the prosecution. The proceedings for the day read as follows:

"13/10/2016
Coram: Hon. R.G. Tarimo-SRM
PP: absent
CC: Mayalla
Accused-absent
Court: *Upon transfer of the trial magistrate. The case is re-assigned to Hon. Tarimo-SRM*

Sgd: Hon. Tarimo-SRM
13/10/2016

13/10/2016
Coram: Hon. R.G. Tarimo-SRM
PP: Glory SA

CC: Mayalla

Accused-present – Ms. Anna Mareale for

***Pros:** for hearing I have one witness.*

***Court:** I have gone through the file and I have been satisfied that I can proceed from where the previous magistrate left.*

Sgd: Hon. R.G. Tarimo-SRM

13/10/2016"

What comes out clearly is that the successor magistrate took upon himself and got satisfied that this was a fit case for proceedings from where the previous magistrate left. None of the parties and, most significantly, the appellants, was given the opportunity to choose the manner in which progression of the matter would be made. In my view, it doesn't get worse than this. It is an infraction of the biggest proportion and a serious travesty of a fair trial. In my humble view, these proceedings were fatally flawed and the only resultant consequence is to have the proceedings vitiated.

Consequently, I order that the trial proceedings, from the date of the take over from the predecessor magistrate, be and are hereby quashed and the resultant decision set aside. The matter is remitted back to the trial court for retrial before another magistrate. The retrial will only affect the proceedings of the predecessor magistrate.

The appeal is allowed to that extent.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

06/06/2022

DATED at **DAR ES SALAAM** this 6th day of June, 2022

M.K. ISMAIL,

JUDGE

06/06/2022