**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**IN THE DISTRICT REGISTRY OF BUKOBA**
**AT BUKOBA**

**CRIMINAL APPEAL No. 108 OF 2021**
*(Originating from Criminal Case No. 182 of 2020 of the District Court of Muleba)*

**EVODIUS PETRO.....APPELLANT**

***VERSUS***

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

**JUDGMENT**

*19th August & 24th August 2022*

***Kilekamajenga, J.***

The appellant preferred this appeal challenging the decision of the District Court of Muleba in Criminal Case No. 182 of 2020. In the District Court, the appellant, together with Steven Stephano (herein after referred as the first accused), were charged with the offence of gang robbery contrary to **section 285 (2) and 287C of the Penal Code, Cap. 16 RE 2019**. The particulars of the offence show that, on 16th Day of October 2020, at Rukunya - Ngenge village within Muleba District in Kagera region, the appellant together with the first accused, robbed a motorcycle with Registration Number M C 375 CNF and chassis number MD2A18AY8LWL98705 from Jovine Jeremia. The motorcycle, being under ownership of Mzamiru Buruani, was valued at Tshs. 2,500,000/=. It was further alleged that, before robbing the motorcycle, the appellant and the first accused threatened to use violence against Jovine Jeremia.

In this case, the prosecution case was hinged on the evidence of seven witnesses thus: PW1 (Jovine Jeremia) who worked for gain as a motorcycle rider (bodaboda), testified that, on 16th October 2020, while at the motorcycle parking station at Katoro with Bukoba Rural District, he received two passengers who wanted a ride to Ngenge village in Muleba. He charged them Tshs. 30,000/= and fuelled the motorcycle ready for the trip. Upon arriving at Ngenge village, the appellant ordered him to stop alleging that, an insect stuck in the eye of the first accused. PW1 stopped the motorcycle and the first accused told him (PW1) that his life was on the motorcycle's key. The first accused pulled an iron bar from his jacket and ordered PW1 to surrender the key. Both PW1 and the appellant stepped down from the motorcycle and the first accused disappeared with the motorcycle. PW1 turned against the appellant and raised an alarm and a herdsman appeared to assist. The appellant tried to run away but was arrested and taken to Kishuro police station. The first accused was later arrested with the motorcycle at Kagoma in Muleba District.

PW2 testified that, he was informed about the robbery and rushed to the place of scene and witnessed the appellant who was taken to the police. PW2 also participated in the search for the first accused who was arrested at Muleba on 17th October 2020. Also, PW3 who was the police officer

received information about the robbery of the motorcycle; he participated in the search for the first accused who was finally arrested by angry citizens before PW3 rescued him. PW4 was approached by the first accused who wanted to change the motorcycle's plate number. PW5 (H. 3714 PC Joseph) received the appellant at Kishuro police station from a group of people who accused him of stealing a motorcycle. PW5 recorded the appellant's cautioned statement; in the statement, the appellant stated that, him together with the first accused went to Kagera sugar to seek for employment but they did not succeed. Upon returning back to Muleba, while they had no money for fare, they decided to hire a motorcycle. On the way, the first accused decided to rob the bicycle. The appellant, however, did not join the first accused's evil intention hence decided to remain behind with PW1. When PW1 shouted for help, the appellant was afraid and decided to run away though he was arrested. PW6, who was the owner of the motorcycle, was informed by PW1 about the incident. He went to Kishuro and found the appellant already in the police custody. PW7 (G. 3005 DC Peter) investigated the case and the accused persons in that case were Steven Stephano and the appellant. PW7 interrogated the first accused who confessed to rob the motorcycle from PW1.

During the defence, the first accused had already jumped bail hence only the appellant was present. In his defence, the appellant denied to r o b the motorcycle. He stated that, when the first accused left with the motorcycle, he promised to assist PW1 in finding as he knew the first accused.

The prosecution evidence led to the conviction and sentence of both the appellant and the first accused. However, the first accused had not been arrested at the time of this appeal. The appellant was sentenced to serve thirty years in prison. Being aggrieved with the decision of the trial court, the appellant approached this Honourable Court for justice. He coined six grounds to impugn the decision of the trial court thus:

1. *That, the victim (PW1) had mentioned his assailant as Evodius Petro then the police officers made a reversal after arresting Evodius Alistides the appellant and forced to accept the wanted name due to the similarity of the first name of the appellant to the person wanted.*
2. *That, the trial court fatally erred in law and fact to convict and sentence the appellant relying on the cautioned statement which was improperly admitted without being read out aloud as required by section 211 (3) of the Criminal Procedure Act, Cap. 20 RE2019.*
3. *That, the appellant was highly perverted of Justice to be convicted and sentenced while he was not found in possession of the property allegedly said to be stolen from the victim.*
4. *That, it was an incurable fatal omission to admit the cautioned statement of the 1st accused (exhibit PE5) without being read out*

*loudly as required by the law so as to afford the appellant the right to know the contents of the statement.*

5. *That, since it was the first time for the victim to meet the appellant where was crucial need to conduct an identification parade to enable the victim to identify his assailant to as to avoid and eliminate possibility of mistaken identity.*
6. *That, the trial magistrate misdirected himself to discard the appellants defence evidence and accord it no weight*

When the appellant appeared in person to argue the appeal, he submitted that, PW2 did not testify in court and PW7 failed to tender the motorcycle plate number. Also, the iron bar allegedly held by the first accused was not tendered in court. He impugned the prosecution evidence for failing to prove whether he was found with the stolen motorcycle. He blamed the trial court for an unfair trial as he is currently serving prison for the offence he never committed. He urged the court to set him at liberty.

The learned State Attorney for the respondent objected the appeal arguing that, PW2 arrived at the crime scene and participated in the arrest of the appellant. Also, the prosecution tendered the plate number and the chassis number of the motorcycle. The iron bar disappeared with the first accused and could not, therefore, be found. He insisted that the appellant's cautioned statement was admitted and read in court. Generally, the

prosecution evidence was strong enough to sustain a conviction. He finally invited the court to the case of **Raymond Laurian v. James Emmanuel**, (PC) Criminal Appeal No. 16 of 2021 and urged the court to dismiss the appeal.

When rejoining, the appellant stated that, he reported the incident at the police station because he knew the first accused and he consistently denied to have committed the offence. He prayed to be set free as he did not commit the offence.

Having considered the submission from the appellant and the learned State Attorney, there are two pertinent issues worth consideration in this appeal. **First**, whether the prosecution proved its case beyond reasonable doubt that the appellant and not any other person committed the offence. This being a criminal case, the law requires the prosecution to prove beyond reasonable doubt that the accused committed the offence charged. See, **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019.** See, also the case of **Hemed v. Republic [1987] TLR 117** where the Court stated that:

> *'...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance of probabilities.'*

In this case, the prosecution evidence shows that the appellant and the first accused, who are residents of Muleba District, went to Kagera Sugar Company in Missenyi District to seek job opportunity. They were, unfortunately, unlucky to get the employment as planned. While without any money to ferry them back to Muleba, they trekked back to Muleba. On the way at Katoro, they formed an idea to hire a motorcycle (bodaboda) to take them to Muleba hence they got the services of PW1. At some point, the first accused formed an evil intention to rob the motorcycle as he did not know how he could pay the motorist at the end of their route.

However, the appellant did not know the intention of the first accused. Therefore, in furtherance of his intention, the first accused stopped PW1 and robbed the motorcycle in the presence of the appellant and the victim. The appellant who had no common intention with the first accused was left behind wondering what his fellow job seeker had done. The victim, who did not know both of them, turned against the appellant while raising an alarm and many people gathered. The appellant was beaten by the crowd despite promising that he could assist PW1 in getting the motorcycle as he knew the first accused's place of resident. The appellant was later taken to Kashuro police station where his statement was recorded. Some few days later, in cooperation with the appellant and the police, the first accused was arrested with the motorcycle.

The appellant and the first accused were both jointly charged with gang robbery. Before the final trial of the case, the first accused jumped bail leaving behind the appellant. Both the appellant and the first accused were convicted and sentenced to serve thirty years in prison. However, the first accused has never been re-arrested until the time of writing this judgment.

Under these circumstances, I fail to invoke the provision of **Section 23 of the Penal Code Cap. 16 RE 2019** against the appellant. This section provides for common intention of two or more accused persons thus:

> *'23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'*

In my view, the appellant both lacked common intention with the first accused; he also lacked both *mens rea* and *actus reus* for the offence of gang robbery. Therefore, the conviction of gang robbery against the appellant could not stand in absence of these two vital elements of criminal liability.

The **second** issue in this case is whether the change of trial magistrate without assigning reasons vitiated the proceedings and decision thereof. The

proceedings of the trial court show that, the case commenced before Hon. Mwambeleko where the appellant entered plea of not guilty for the first time. The case came for preliminary hearing before Honourable Hamza where again, the appellant entered plea of not guilty. The prosecution's case commenced before Honourable Hamza up to the last witness. Thereafter, Honourable Hamza recorded the absence of the first accused who jumped bail and the case shifted to Honourable Mwetindwa who only heard the defence case and composed the judgment. In all these transactions, there are no reasons given why the file kept on changing from one trial magistrate to the other. The transfer of the case from Mwambeleko to Hamza might have no fatal consequences because the hearing had not commenced. But the transfer of the case from Honourable Hamza to Honourable Mwetindwa ought to be coupled with reasons. In other words, Honourable Mwetindwa only heard the defence witness and had no opportunity to hear and evaluate the prosecution's witnesses and their demeanour. Under such circumstances, the taking over of the case violated the provision of **section 214(1) of the Criminal Procedure Act, Cap. 20 RE 2019**. The section provides that:

> *'214.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who*

*has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.'*

Apart from the above provision of the law which allows a successor judge or magistrate to take over and proceed with the hearing of a case which was partly heard, there is a plethora of judicial authorities which demand the successor judge or magistrate to assign reasons for taking over the case. Failure by the successor magistrate or judge to give reasons for taking over a case, the proceedings recorded by the successor judge or magistrate and decision thereof becomes a nullity for lack of jurisdiction. In the case of **Mariam Samburo v. Masoud Mohamed Joshi and two others**, Civil Appeal No. 109 of 2016, CAT at Dar es salaam, the Court of Appeal while deciding a case which was tried by different judges without assigning reasons had the following observation:

*'failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity.'*

The rationale for giving reasons when taking over a case from a predecessor magistrate or judge was stated in length in the case of **Ms Georges Centre**

**LTD v. The Attorney General and Another**, Civil Appeal No. 29 of 2016, CAT (unreported) thus:

> *'The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so...the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised.'*

Before a successor judge or magistrate takes over a case, as a matter of practice, the file must be assigned to him/her. In absence of the reason for taking over the case which was partly heard, it is not clear how the file landed into his/her hands. For the purposes of transparency and proper administration of justice, reasons must be given. As stated in the above principle of the law, a judge of magistrate who did not have the opportunity to hear the evidence from both sides, he/she may not be well placed to compose a judicious judgment. In the case at hand, the successor trial magistrate only heard the defence of the appellant while the rest of the evidence was heard by another magistrate.

Unless reasons were given, the successor trial magistrate lacked jurisdiction and therefore the proceedings and decision thereof were null. I hereby allow the appeal, quash the proceedings and set aside the conviction and sentence against the appellant. There is no strong evidence against the appellant to order retrial hence the appellant should be released from prison unless held for other lawful reasons. Order accordingly.

Dated at Bukoba this 24th Day of August 2022.

**Ntemi N. Kilekamajenga**
**JUDGE**
**24/08/2020**

**Court:**

Judgment delivered this 24th of August 2020 in the presence of the learned Stated Attorney, Mr. Amani Kirua and the appellant present in person via virtual court from Kwitanga Prison in Kigoma. Right of appeal explained.

**Ntemi N. Kilekamajenga**
**JUDGE**
**24/08/2020**