IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL CASE NO. 211 OF 2021

(Originating from Criminal Case No.15 of 2021 in the Resident Magistrate's Court of Kibaha at Kibaha)

RIZIKI OMARI MATIMBWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 05/10/2022

Date of Judgment: 07/10/2022

Kamana, J:

Before this Court is an appeal filed at the instance of one **Riziki Omari Matimbwa,** hereinafter to be referred to as the Appellant. Records of the trial Court are to the effect that the accused person was arraigned before the Resident Magistrate's Court of Kibaha charged with an offence of trafficking in Narcotics Drugs Contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, Cap. 95 [R.E. 2019].

It was the Prosecution's case that on 18th November, 2020 at Ngarambe area within Rufiji District, Coast Region, the Appellant was found trafficking

in narcotics drugs known as Cannabis Sativa (Bhangi) weighing 21.86 Kilograms using a motorcycle with Registration No. MC 870 ACK.

The Appellant denied the charges and after a full trial he was convicted of the said offence and sentenced to serve thirty years in prison. Further, the trial Court ordered confiscation of the motorcycle and forthwith destruction of the Cannabis Sativa (Bhangi) unless the appellant lodges an appeal.

Aggrieved by such decision, the Appellant preferred this appeal armed with eighteen grounds of appeal. At the hearing of this Appeal, the Appellant fended for himself whilst the Respondent was ably represented by Ms. Sopha Bimbiga, learned State Attorney. Suffice to note that the Respondent was in opposition against the appeal.

After hearing both parties, the matter was scheduled for the judgment on 5th October, 2022. However, in the course of drafting the said judgment, it came to the attention of this Court that the trial Magistrate in recording evidence of witnesses from both Prosecution and Defence did not append his signature as per the requirements of the provisions of section 210(1) (a) of the Criminal Procedure Act, Cap. 20 [RE.2019). In view of that, the Court thought it prudent to invite the parties to address it on the effect of

non-compliance with the provisions of section 210(1) (a) of the Criminal Procedure Act.

The Appellant, being a lay person, could not argue on that issue. He pleaded to be released from prison. On the other hand, Ms. Dhamiri Masinde, learned State Attorney who entered appearance on that day was of the view that appending signature after taking the testimony is a mandatory requirement of the law. She conceded that after her perusal of the records, she found that the trial Magistrate did not append signature after recording the evidence adduced by witnesses.

In augmenting her arguments, the learned State Attorney submitted that under normal circumstances she would ask this Court to order a retrial. However, she contended that in the circumstances of the case at hand, ordering a retrial is not in the interest of justice as the Prosecution could use that opportunity to fill gaps in its evidence. She submitted that the Appellant should be released on account of that errors.

After hearing both parties, the issue for determination is the effect of non – compliance with section 210(1) (a) of the Criminal Procedure Act, Cap. 20.

However, before determining that matter, I think it is pertinent at this juncture to reproduce that section as follows:

> *'(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record;'*

From the above excerpt, it is undoubtedly that appending signature is a mandatory requirement when recording evidence in criminal trials. The evidence of a witness which lacks the signature of the trial Magistrate is valueless and cannot form part of the records.

The rationale behind such a requirement is to ensure that the signature of the recorder of the testimony is present so as to ascertain that what has been recorded is a true testimony of the witness which has been recorded by a known person. In view of that, the proceedings which are short of this

requirement as per section 210(1) (a) of the Criminal Procedure Act, Cap. 20 are considered to be vitiated for being not authentic.

The Court of Appeal in the case of **Yohana Mussa Makubi v. Republic**, Criminal Appeal. No. 556 of 2015 (Unreported) stresses on the rationale behind the requirement that a trial Magistrate must append his signature after recording the testimony of every witness. The Court stated:

> *'…failure by the judge to append his/ her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted.'*

This position of the Court was also echoed in the case **of Mhajiri Uladi v. Republic**, Criminal Appeal No. 234 of 2020 (Unreported).

It is clear from the proceedings of the trial Court that the Magistrate did not append his signature after recording the evidence of both parties specifically the one provided in examination in chief and cross examination.

That being the case, I am of the considered position that failure of the trial Magistrate to append his signature after recording the evidence offends the provisions of section 210(1) (a) of the Criminal Procedure Act. Further, that omission vitiates the proceedings. I hold that view on the ground that by not affixing his signature, the main purpose of ensuring that the recorded evidence is authentic is defeated. This is a fatal and incurable defect as the records of the Court are not supposed to be characterized by doubts as to their authenticity. In this regard, I am fortified by the decision of the Court of Appeal in the case of **Yohana Mussa Makubi, (Supra)**. In that case, the Court stated:

> *'We are thus satisfied that, failure by the Judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides; this emulates the*

spirit contained in section 210 (i) (a) of the CPA and we find no doubt in taking inspiration therefrom.'

In view of the foregoing, I hold that the proceedings of the trial Court were defective and hence a nullity. That being the case, there is no appeal before this Court. Therefore, I invoke the revisional powers of this Court to quash the proceedings and judgment of the trial Court.

In such circumstances, I would have borrowed a leaf from the Court of Appeal in the case of **Sigwa Bulunda v. Republic**, Criminal Appeal No. 256 of 2018 by ordering a retrial by another Magistrate in accordance with the law. However, I am refrained to order the retrial in the interest of justice as elucidated in the case of **Fatehali Manji v. Republic** (1966) EA 343, where in that case, the then Court of Appeal, provided guidance on determination of situations when a retrial can be ordered by an appellate court.

As the learned State Attorney pointed out that a retrial will provide the Prosecution with an opportunity to fill gaps in its evidence, I surely subscribe to that position. In his fifteenth ground of appeal, the Appellant contended that the trial Court erred in law and fact by convicting the

Appellant without considering that the chain of custody of the alleged exhibit PE6 (a sack of bhangi) was broken when the alleged sack was handed over by Assistant Inspector Emmanuel Ambilikile PW3 to SP John Mwakalukwa PW8.

It was contended by the Applicant that the alleged sack of bhangi was handed over by PW3 to PW8 on 18th August, 2020 for safe custody and retrieved by the former on 24th August, 2020 without any documentation to that effect. In view of that, the Appellant was of the firm position that the chain of custody was broken.

Replying, the learned State Attorney submitted that the chain of custody was established as all witnesses who came across the exhibit PE6 testified with regard to such exhibit depending on their roles and circumstances.

With due respect to the learned State Attorney, I differ with her sharply. It is untenable in my mind that two senior police officers can handle a sack of bhangi without any kind of documentation. I am further flabbergasted by the evidence of the PW8 that he kept the sack of bhangi in his office for almost six days without causing the same to be stored in an exhibit room within the police station. In such circumstances, an exhibit which was

improperly handled and stored could be tempered with by an any person taking into consideration that when the sack was taken to PW8 no scientific examination had been conducted to establish whether the leaves contained in the sack are bhangi or otherwise.

At this juncture, I invite the Court of Appeal in the case of **Ramadhani Mboya Mahimbo v. Republic**, Criminal Appeal No. 326 of 2017 in which the Court quoted with approval its observation in the case of **Illuminatus Mkoka v. Republic** [2003] TLR 245 as follows:

> *'In view of those missing links in the instant case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 an P4 leaves open the possibility for those exhibits being concocted or planted in the house of the appellant.'*

In view of the above and taking into consideration that the alleged sack of bhangi was kept under the supervision of PW8 without any documentation for almost six days and mindful of the fact that it was kept in a place not designed for keeping exhibits, I am of the firm belief that the chain of

custody was not intact. In those six days anything could happen to the exhibit to the detriment of the Appellant.

That being the position, I order the Appellant be released from prison unless otherwise he is held for other lawful cause. Further, the order with regard to the confiscation of motor cycle with Registration Number MC 870 ACK is reversed.

It is so ordered.

Right to appeal explained.

DATED at **DAR ES SALAAM** this **7th** day **of OCTOBER, 2022**

KS Kamana

JUDGE

This Judgment delivered on this 7th day of October, 2022 in the presence of Mr. Riziki Omari Matimbwa and Ms. Dhamiri Masinde, learned State Attorney for the Respondent.