THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEAL NO. 29 & 45 OF 2021

(Arising from Criminal Case No. 100 of 2019, the District Court of Kilombero at Ifakara)

ALLY HAMAD MANYINJA ..... 1ST APPELLANT

SAULI LIGONJA AMBROSE @ AWEJE ..... 2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

REASONS FOR THE DECISION

Last Court Order on: 16/08/2022
Reasons for decision on: 11/10/2022

NGWEMBE, J

The appellants Ally Hamad Manyinja and Sauli Ligonja Ambrose @ Aweje filed separate appeals seeking to challenge their convictions and sentence meted by the trial court. For convenience, this court ordered the two appeals be consolidated. When this consolidated appeal came up for hearing on 16th of August, 2022, the Republic conceded to the appeal for inconsistences apparent on the face of trial court's judgement.

This court accepted the observation made by the Republic on serious irregularities founded in the proceedings, judgment, convictions and sentences. In turn the court, found justice to order an immediate release of both appellants from prison and reserved reasons for the

decision. Therefore, now these are the reasons for the decision arrived on 16th August, 2022.

Tracing the genesis of this appeal, the appellants as first and second accused, along with others; Hussein Abdallah (third accused) and Abdallah Mandimba (fourth accused) were arraigned before the District Court of Kilombero for three counts; Conspiracy to commit an offence contrary to section 284 of **the Penal Code, Cap 16 RE 2002 (Now RE 2022),** Armed robbery contrary to section 287A of **The Penal Code Cap 16 RE 2002** (for 1st, 2nd and 3rd Accused) and Neglect to prevent offence contrary to section 383 of **The Penal Code Cap 16 RE 2002** (for the 4th accused).

On 02/09/2019, when the charge was read over to the accused persons, all of them pleaded not guilty by words **"It is not true"** to all counts, the magistrate endorsed thereunder '**EPNG to the charge**' probably to mean all accused Entered Plea of Not Guilty. However, the Prosecutor told the court that the first accused (First appellant) had pleaded guilty to the charge. The hand written proceeding suggests, rectification was made on the first appellant's plea on the first count by striking the word ***'not'*** to read ***'It is true'*** and the Prosecutor proceeded to read statement of facts on which the First appellant was recorded to have admitted wholly. He was convicted for the 1st count purported to have admitted, and the 2nd count which he did not admit but was recorded to have admitted to both counts. Then the count sentenced the 1st appellant to 1 year and 30 years imprisonment respectively.

On 25/09/2019 the prosecutor successfully prayed to substitute the charge and removed the name of the third accused. To reflect the changes made therein, I find it more useful to quote the main content of charge: -

"IN THE DISTRICT COURT OF KILOMBERO

AT IFAKARA

CRIMINAL CASE NO..... OF 2019

REPUBLIC

VERSUS

1) SAULI S/O AMBROSE @ AWEJE

2) ABDALLAH S/O MANDIMBA

CHARGE

1ST COUNT: All Accused Persons Only

STATEMENT OF THE OFFENCE

Conspiracy to Commit an Offence contrary to section 384 of The Penal Code Cap 16 R.E. 2002.

PARTICULARS OF OFFENCE

SAULI S/O LIGONJA AMBROSE @ AWEJE and ABDALLAH S/O MANDIMBA, are jointly and together charged, on between 1st day of March 2019 and 14th day of March 2019 at working time within Kilombero district in Morogoro region did conspire to commit the offence of armed robbery to one ZUBERI S/O SALUM of Mikoleko Mang'ula.

2ND COUNT: For First Accused Person Only

STATEMENT OF THE OFFENCE

Armed Robbery c/s 287A of the Penal Code [Cap 16 RE 2002] as amended by Act No. 3 of 2011.

PARTICULARS OF OFFENCE

That SAULI S/O LIGONJA AMBROSE @ AWEJE is charged on 14th day of March 2019 at or about 02:00hrs at MIKOLEKO – MANG'ULA area within Kilombero district in Morogoro region did steal cash money Tsh 2,270,000/=, three mobile phones make Tecno valued at Tshs. 245,000/=, one mobile phone Itel, valued at Tshs. 45,000/=, airtime vouchers of Tigo, Halotel, Vodacom and Airtel valued at Tshs. 130,000/=, ten bundles of different types of cigarettes

valued at Tshs. 205,000/=, all total valued at Tshs. 2,895,000/= the properties of one ZUBERI S/O SALUM and immediately before and after stealing fired ammunition by using firearm make short gun, which injured the said ZUBERI S/O SALUM in order to obtain the said properties.

3RD COUNT: For 2nd Accused person only

STATEMENT OF THE OFFENCE

Neglect to prevent the offence c/s 283 of the Penal Code [Cap 16 RE 2002]

PARTICULARS OF THE OFFENCE

That ABDALLAH S/O MANDIMBA charged on 14th day of March at MIKOLEKO – MANG'ULA area within Kilombero district in Morogoro region being a watchman employed by ZUBERI S/O SALUM to watch him and his properties failed to use all reasonable means prevent the offence of Armed Robbery as a result the said ZUBERI S/O SALUM was injured after shoot with firearm make shotgun and said properties were stolen by the robbers"

Both accused pleaded not guilty. After full trial, the trial court convicted the first accused one SAULI LIGONJA AMBROSE @AWEJE for armed robbery in substituted charge, sentenced to 30 years imprisonment and acquitted the second accused ABDALLAH S/O MANDIMBA.

ALLY AHMAD MANYINJA and SAULI S/O AMBROSE @ AWEJE were the first and second accused persons in the first charge, while in the substituted charge ALLY AHMAD MANYINJA was not charged and SAULI S/O AMBROSE @ AWEJE was charged as the first accused person. In the trial court's judgment, the phrase "first accused person" was used to refer to both of them. In some places, the trial magistrate distinguished them as *"the first accused person already convicted and sentenced"* and *"the first accused person on the substituted charge".*

These two convicts, while in UKONGA Prison, filed their notices of intention to appeal, after securing extension of time before this court at Dar es Salaam registry. Sauli Ligonja (First appellant) filed Criminal Appeal No. 29 of 2021 with 8 grounds and 6 supplementary grounds, while Ally Ahmad Manyinja filed Criminal Appeal No. 45 of 2021 with 6 grounds. For the reason to be apparent in the course, I will not recap those grounds.

The two appeals were consolidated, and heard through Video Conferencing when appellants were at Ukonga Prison, unrepresented, while the respondent was represented by Mr. Edgar Bantulaki, learned State Attorney.

They both prayed for this court to consider their grounds of appeal and let them free. Mr. Bantulaki supported the appeal by pointing on procedural irregularities:- **One** – that the first appellant was convicted twice, on his own plea of guilty in the first charge and upon judgment on the substituted charge, while he was not among the accused persons. **Two** – after the substituted charge, the proceedings did not show if all the counts were pleaded to. **Three** – while the hearing was conducted by one magistrate, a judgment was composed and pronounced by another magistrate without reasons. **Four** – the second appellant was acquitted in the judgment, but was imprisoned. **Five** – on evidence, the prosecution's case was dependent upon visual identification. Considering that the offence was committed during night hours, identification was not established by following the principles laid down in the case of **Waziri Amani Vs. R [1980] T.L.R. 250.**

Having offered a brief detailed glance as above, and bearing in mind that the Republic conceded on serious irregularities committed by the trial court, therefore, I will deal with the first limb on procedural

irregularity. But before going into it, I wish to discuss a bit more on the observations made by the learned State Attorney regarding the second appellant. He contended that the second appellant was acquitted yet imprisoned. After serious scrutiny of the trial court's proceedings and judgment, I realised that the second accused in the trial court's judgment is not the second appellant. There was a kind of perplexity caused by proceedings and judgment. Therefore, both appellants herein were first accused persons according to the trial court's judgment. See for example parts of page 8 to 9 of the trial court's judgment: -

> *"Otherwise, the first accused person (already convicted and sentenced) falls prone still with the substituted charge since even by a glance on PE1 only the two of them were identified. However, on his own plea of guilty it follows then the case by the prosecution side has been proved against the first accused person on the substituted charge while the second accused person being a watchman had a primary duty to prevent offence commission but has said in his defence, he had no option than to run away since the accused persons were armed. On this observation I have no any other choice than to convict the first accused person on armed robbery (on a substituted charge sheet) but acquit the second accused person from the offence charged with."*

The second accused person acquitted in the trial court's judgment is Abdallah s/o Mandimba who is not a party to this case. Although all other observations are meritorious as I will demonstrate hereunder, the above clarity is important to clear the confusion caused by the trial court. I have observed many other irregularities in the proceedings of the trial court. *First:* The purported *plea of guilty* by the first appellant in the

second count of the first charge was not reflected in the proceedings. In all the proceedings, it is nowhere shown that the trial magistrate recorded the plea of guilty. It is the prosecutor who told the court that the first appellant pleaded guilty.

Second: Though the case was heard by Mashabara SRM, and the hand written proceeding shows that it is Mashabara SRM, alas the one who composed and pronounced the trial court's judgment as per the coram on 03/05/2020 was Hon. L.O. Khamsini without any explanation thereof.

Regarding transfer of the case file between one magistrate to another, the general rule is that, where a case is assigned to one magistrate, he should proceed with it to the end. The case file should not be transferred to another magistrate unless there is a justifiable cause. Relevant herein is section 312 of **The Criminal Procedure Act Cap 20 RE 2022** which is not different from Revised Edition of year 2002. Same is quoted hereunder: -

> **Section 312. -(1)** *"Every judgment under the provisions of section 311 shall... be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate ... and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*

Where there is a justifiable cause impairing the trial magistrate from proceeding with the case, another magistrate can succeed the trial to finality, but the record must clearly show. Given under section 214 (1) of the **Criminal Procedure Act** that: -

"Where any magistrate, after having heard and recorded the whole or part of or any part of the evidence in any trial or conduct 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."*

In the case at hand, though the trial and recording of the whole proceedings were substantively made before Hon. B. M. Mashabara, it is not positively clear as to who composed the judgment. The typed judgment shows that Hon. L. O Khamsin, SRM composed and pronounced the judgment. The law would require that reasons be given, this was held also in **Abdi Masoud Iboma and 3 Others Vs. R, Criminal Appeal No. 116 of 2015** and **Priscus Kimaro Vs. R, Criminal Appeal No. 301 of 2013 (unreported).** In **Priscus Kimaro,** by the Court of Appeal ruling *inter alia: -*

"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, ***the reason for the failure of the first magistrate to complete the matter must be recorded****. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."*

In this matter, no reason was given in the proceeding as to why and how **Hon. Khamsini** entered into the case file whose proceedings

were conducted by Hon. B. M. Mashabara. This was unprocedural illegal and makes administration of justice prone to chaos.

Another irregularity is found in the said plea of guilty by the first appellant. The statute and precedent, are very clear on the procedure to be adopted in plea taking. Under section 228 (1) (2) of **the Criminal Procedure Act**, the accused person shall be informed on the charge in the language he understands well. His reply should be recorded as follows: -

> *"Where the accused person admits the truth of the charge,* ***his admission shall be recorded as nearly as possible in the words he uses*** *and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary."*

In our case, it is recorded that the first appellant replied "It is true" in the first count. But in the second count he replied "It is not true". What the trial magistrate recorded is "EPNG to the charge", as earlier alluded this informal acronym meant Entered Plea of Not Guilty. There is no place where the trial magistrate acknowledged the first appellant's plea of guilty. Amazing is the fact that while the magistrate did not acknowledge any plea of guilty, the Public Prosecutor came this way: -

> *"PP: Inv. Incomplete. I pray for adj for other accused person but 1st accd person has pleaded guilty to the charge."*

It is unknown what happened, then followed statement of facts and eventually the first appellant was convicted for both counts. The plea on the first count in my reasoning was equivocal. I understand the rule as to sanctity of court record is intact, but in this appeal, the trial court's records left several unanswered questions. For instance, one the

trial magistrate himself did not recognize the said plea of guilty and thus recorded Plea of Not Guilty to accused persons. Two, Even assuming that he really pleaded as recorded, the plea was given in the words: *"It is True"*. Decades now, the court in Tanzania has established a position that, such phrase cannot be treated as unequivocal plea of guilty. Authorities are numerous, including the case of **R Vs. Yonasani Egalu & Others, (1942) 9 EACA 65; R Vs. Tarasha (1970) HCD 252; Buhimila Mapembe Vs. R, [1988] T.L.R. 174;** and **Daniel Shayo Vs. R, Criminal Appeal, No. 234 of 2007 (CAT Arusha).** The bottom line is as it was given in **Buhimila Mapembe's** case: -

> *"The words "it is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one"*

Also, assuming that the first appellant pleaded guilty on the second count when the record shows to the contrary, the question is why unjustifiable hurry which tempted the trial magistrate(s) to condemn and punish the first appellant unheard? This court and the Court of Appeal have seriously discouraged shortcuts in trials. See **Tarasha** and **Daniel Shayo** (supra) among others.

Where plea of the accused was improperly procured and the court based its conviction on such plea, a necessary implication is that the accused was convicted without being heard. The law is bold on recourse as per the cases of **D.P.P Vs. SabinaTesha and Others [1992] T.L.R 237; Bernard Matutu Vs. R, Criminal Appeal No. 13 of 2018** and **Ibrahim Said Mrabyo @ Maalim and another Vs. R, Criminal Appeal No. 256 of 2015** among others, has been the norm, that: -

"Right to be heard is so basic that a decision arrived at, in violation of it is a nullity even if the same decision would have been reached had the party been heard."

Apart from the above, I have observed that the substitution of charge was made without necessity under section 234 (1) of the **Criminal Procedure Act,** while also the trial court pronounced its judgment as if all accused persons as appeared in the first charge sheet were the same in the substituted charge sheet. More, by necessary implication, this court has observed that the respondent had contemplated not to prosecute the third accused. Wisdom brings to senses that amendment and substitution of charge should not be done so casually and by design. It should be from discovery or unexpected change of circumstance.

In this case, though no remarkable prejudice were surfaced, this design of amendment and substitution of charge are much discouraged for obvious reasons, if entertained the ends of justice may be at stack. Further, despite the fact that the first appellant was not included in the substituted charge, the trial court's judgement proceeded to convict him accordingly. For clarity it is observed at page 8 of the judgment as follows: -

"Otherwise, the first accused person (already convicted and sentenced) falls prone still with the substituted charge since even by glance on PE1, only the two of them were identified"

There is a lot of irregularities on the trial court's proceedings, those above are just few of the significant glaring irregularities. But in totality, the trial court's proceeding and judgement had serious irregularities. Taking the case as a whole, no iota of justice can be said to have been

done let alone being seen to be done especially in respect of the first appellant.

Considering the evidence adduced before the trial court, I have observed that an event of armed men having assaulted the complainant and his wife (PW3 Halima Kialilo) and shot him on parts of his body, yet the whole prosecution evidences left a lot of unanswered questions. It was well established that an offence of armed robbery was committed against the complainant, but the question is who committed the offence. The respondent seems to have depended on identification by PW1, PW3 and PW5 who were said to have identified the appellants at the scene of crime. The incident took place around 02:00 hours. However, PW2 and PW5 knew the appellants even before the incident, they testified appellants were their customers. Exhibit PE1 (identification parade) was conducted in respect of these two witnesses who testified to have known the appellants even before the incident (see page 11 and 14 of the typed proceeding). Yet the trial court relied on Exhibit PE1 as exhibited at page 7 and 8 of its judgment.

This court has considered deeply if identification parade had anything significant. In **Abdul Farijalah and another Vs. Republic, Criminal Appeal No. 99 of 2008 (unreported)** also followed in **Hamisi Ally and 3 others Vs. Republic, Criminal Appeal No. 596 of 2015, Baligola s/o Lupepo Vs. The Republic, Criminal Appeal No. 517 of 2017** the Court of Appeal stated the purpose of identification parade in the following terms: -

> *"The test in an identification parade is to enable a witness to identify a person or persons whom she or he had not known or seen before the incident"*

So, in our case where the complainant and other witnesses knew the appellants even before, there was no need for identification parade and the court was not entitled to base its decision on that parade, logically, they expected to have named them immediately after the event. The decision in **Waziri Amani Vs. R [1980] TLR 250** cited by Mr. Bantulaki, apart from establishing the factors to be considered in testing identification of the perpetrators at the crime scene, it sets a principle that: -

> *"No Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely watertight."*

The above is still alive, followed and refined in later days of **Raymond Francis Vs. R [1994] TLR. 100** and **Jaribu Abdallah Vs. R [2003] TLR. 271,** among others.

In this case, all the identifying witnesses just stated that there was light so they identified the appellants and that they used to see them before. Issues like source of light, intensity or descriptions were not given by them. Though I agree that PW3 may have been in a good position to identify the person who was assaulting her asking for the husband's whereabout, this witness did not state anything concerning identification. All other witnesses, including PW1 (the complainant) and PW5 would have no good chance to identify the appellants. PW1 said, he hid in the ceiling and when dropped, he ran away, at the same time he was shot. Even the identification parade, had nothing useful because the key witnesses in this case knew the appellants before. I will not even look at the propriety of the parade itself.

Grounding on the above, I am of the settled position that the prosecution did not establish identification of the appellants at the crime

scene and unfortunately even the trial court did not bother to test the purported identification against the established parameters.

To rest the analysis, this court found that the whole proceeding of the trial court had serious procedural ailment and the evidence laid against the second appellant was weak and so to say the case was not well investigated, prosecuted and proved to the standard required. More so, a smart prosecutor would expect and desired, to tender instrumentalities of crime found in crime scene. In such circumstances and upon proper application of Criminal Procedure and Law of Evidence, the trial court would have decided in favour of the appellants.

The proceeding that led to conviction of the first appellant were full of irregularities which occasioned serious miscarriage of justice. Therefore, I proceed to nullify the same, convictions in both offences are quashed and the respective sentences are set aside altogether. Conviction of the second appellant is as well quashed and sentence set aside.

It was in the light of the above considerations that I allowed the appeals of Ally Hamad Manyinja and Sauli Ligonja Ambrose @Aweje and ordered their immediate release from prison custody unless they were held therein for other lawful cause.

Order accordingly.

Dated at Morogoro in chambers this 11th Day of October, 2022.

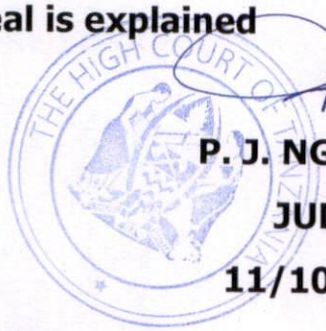
P. J. NGWEMBE

JUDGE

11/10/2022

Court: Reasons for the decision delivered at Morogoro in Chambers on this 11th day of October, 2022, in the Absence for Appellant and presence of Jamilah Mzirary, State Attorney for Respondent.

Right to appeal is explained



P. J. NGWEMBE

JUDGE

11/10/2022