IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CRIMINAL APPEAL NO. 14 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Criminal Appeal No. 76 of 2021)

BETWEEN

KARUME JEREMIAH MGUNDA ..... APPELLANT

VERSUS

ZILPA ROBERT ..... RESPONDENT

JUDGMENT

14th November & 21st December, 2022

M. L. KOMBA, J.:

The appeal at hand is the second. It emanates from the decision of the District Court of Tarime (the first appellate court) in Criminal Appeal No. 76 of 2021. Initially, before the Primary Court of Riagoro at Tarime (the trial court), the appellant herein was charged and convicted of an offence of common assault contrary to section 240 of the Penal Code. He was sentenced to three (3) months conditional discharge.

Unsuccessful, the appellant appealed to the District Court of Tarime. Despite of dismissing the appeal, the District Court went further and alter the sentence imposed by the Primary Court to twelve (12) months imprisonment.

Dissatisfied with the decision of the first appellate court, the appellant has now lodged the appeal at hand with three grounds intended to challenge the said decision. The three grounds of appeal advanced by the appellant can be summarized as follows;

1. *That the first appellate court Magistrate relied on the evidence of the PF3 which was not collaborated by the evidence of medical practitioner.*
2. *That the first appellate court Magistrate relied on hearsay evidence of PW2, PW3 and PW4.*
3. *That the first appellate court Magistrate relied on the Exhibit Z-1 without read it out after its admission.*

At the hearing of the appeal, the appellant was represented by Mr. Baraka Makowe, the learned advocate whilst the respondent fended for herself.

Before submitting in support of the appeal, Mr. Makowe prayed and granted the leave to submit on the two legal issues he observed upon perusing the proceeding of the trial court. Referring to paragraph 35 (6) of the Third Schedule to the Magistrate Court Act [CAP 11 R.E 2019] (the MCA) Mr. Makowe argued that the trial court Magistrate failed to read and sign the evidence adduced by the witnesses. The counsel was of the views that the law directs after hearing the evidence which includes examination in chief, cross examination and re-examination, the trial Magistrate ought to read out the evidence to the witness so that he/she can put a comment

and then the Magistrate should sign it. Mr. Makowe contended that the said procedure was not observed by the trial Magistrate to all witness. He argued further that the evidence of the same nature is invalid and prayed the court to nullify it.

On the second observed issue, Mr. Makowe submitted that on page 8 of the trial court proceedings it evidenced that, when trial court found the accused with a case to answer, the assessors were not involved. Referring to section 7 (2) of the MCA, Mr. Makowe was of the opinion that the assessors were needed to agree or to provide opinion. He proceeded further that the law requires finding in any issue the assessors should be involved. In conclusion he prayed the court to nullify the decision that found the appellant has the case to answer.

On his part, being a lay person, the respondent had no much to submit on the legal issues raised by the appellant's counsel. She leaves the matter at the hands of the court to decide what is just.

Upon submissions by both parties, it is now the duty of this court to determine whether the legal points raised by the appellant's counsel has merit to such effect that this appeal can be disposed of.

Starting with the first issue that the trial court Magistrate failed to read the evidence adduced by the witnesses, I would like first go direct myself

to provisions of the law cited by the appellant's counsel that the trial Magistrate contravened. Paragraph 35 (6) of the Third Schedule to the Magistrate Court Act [CAP 11 R.E 2019] read as follow: -

> 35. *(6) The magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections and thereafter the magistrate shall certify at the foot of such evidence, that he has complied with this requirement.*

Scrutinized from above excerpt, it is clear that the Primary Court Magistrate should read evidence of every witness before he or she appended his signature. The provision also provides the rationale behind the concept. It is for purpose of making corrections or any amendment to make sure what recorded is what desired by the witness. See **Elia Wami vs The Republic,** Criminal Appeal No. 30 of 2008 CAT at Arusha. In the said case the Court of Appeal was dealing with akin situation but only the error was committed by the District Court which governed by section 210 (3) of the Criminal Procedure Act which have similar context with Paragraph 35 (6) of the Third Schedule to the MCA. The Court of Appeal held that: -

> *"Every law is made or enacted for a purpose. The purpose of Section 210 of the Criminal Procedure Act as a whole, is to ensure that the trial court records the testimonies of the witnesses correctly. Section 210 (3) is intended to give witnesses opportunities to put right what*

was wrongly recorded of their evidence. In order to do so, the court is enjoined to inform the witness of such right."

After I perused the trial court record, I noticed that soon after each witness finished adducing his/her evidence in chief, the trial Magistrate adhered to Paragraph 35 (6) of the Third Schedule to the MCA. But he did not do so after cross examination and re-examination. The questions here is when did the witness evidence ends or complete? For me the answer is simple, it is when cross examination and re-examination are concluded. This is so because in deciding the case we take all stated in cross examination and re-examination as the part of evidence adduced by a witness. Thus, omission by trial Magistrate to read the witness evidence after cross examination and re-examination has the same weight as he did not read in examination in chief. But it has been held out in a numerous decision of the Court of Appeal that the omission will be fatal if the appellant explained how he prejudiced by the omission. See **Elia Wami vs The Republic** (supra), **William Kasanga vs The Republic,** Criminal Appeal No. 90 of 2017 and **Peter Sagadege Kashuma vs The Republic,** Criminal Appeal No. 219 of 2019.

In my opinion, whether or not the appellant was prejudiced would depend on him pointing out the faults in the evidence of any witness including his. In this case the appellant has not shown whose witness, including his

own, was not recorded correctly. Therefore, I find that the appellant was not prejudiced by the omission of the trial court to comply with Paragraph 35 (6) of the Third Schedule to the MCA, but this being a court of record I should deal with the issue to put clear record for lower courts because this **court is incumbent to ensure that the law is complied with. See. Adinardi Iddy Salimu and Another vs. Republic,** Criminal Appeal No. 298 OF 2018 (unreported).

As to the second issue that the trial Magistrate erred not to involve the assessors on determining whether the appellant had the case to answer, it is the appellant's counsel contention that in a case before the Primary Court finding in any issue the assessors should be involved. The counsel was of the views that the assessors have to agree or to give opinions on the issue whether the appellant has the case to answer before the trial court. His argument was backed with section 7 (2) of the MCA. For easy analysis of the issue at hand I will reproduce the section. It read as follow;

> *7. (1) .....*
>
> *(2) All matters in the primary court including* ***a finding in any issue,*** *the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award* ***and all questions and issues whatsoever shall,*** *in the event of difference between a magistrate and the assessors or any of them, be decided by*

the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.

As it evidenced from the law, I totally agree with Mr. Makowe that the Primary Court Magistrate should involve the assessors in finding of any issue before the court. Again, in our case, I am at one with the counsel argument that, the trial Magistrate should have involved the assessors upon determining whether the appellant had the case to answer. The question is, how will we know that the trial court Magistrate involved the assessors or not. It is my opinion that, as it was submitted by Mr. Makowe, there should be assessors' opinions or records that shows their agreement on the issue. Or at the end of the trial court Magistrate's findings there should be signatures of the Magistrate and assessors to show that they are all responsible on making such findings. It was held by the Court of Appeal in the case of **Neli Manase Foya vs Damian Mlinga,** [2005] T.L.R 176 that: -

"As for the Assessors opinions, it is nowadays not necessary to write Assessors opinion provided they sign the judgment of the Court to certify that they agree with it."

In this case, the trial court record shows no opinions or any agreement in any how that the assessors were involved in determining whether the appellant had the case to answer. The record show that after the

prosecution closed their case, the court pronounce the ruling that the appellant has the case to answer and it is the trial court Magistrate who signed the ruling only. That makes me believe it was the Magistrate decision only, the assessors were not involved to determine whether the appellant had the case to answer. Therefore, I find the second issue as observed and raised by the appellant's counsel has merit. Assessors were not involved in determining whether the appellant (accused) had a case to answer before defence case started.

Having being found so, I agree with the appellant's counsel that the proper remedy is to nullify the proceedings and the judgments emanates to of the lower courts as I hereby do. On the way forward, I should have remitted the file back to the trial court for retrial starting from where the prosecution closed their evidence. But does this case fit for retrial? I do not think so.

The appellant was sentenced to serve 12 months jail term by the first appellate court and he has already spent almost eight months in custody by now, therefore to bring the case in the courts corridors again I do not think it is a need of criminal justice.

I therefore allow the appeal and I proceed to quash the conviction, set aside the sentence and order that the appellant be released from prison unless held there for some other lawful cause.

It is so ordered.

Right of appeal is fully explained.

DATED **at MUSOMA** this 21st day of December, 2022.

M. L. KOMBA

Judge

21st December, 2022

Judgment delivered in chamber in the presence of respondent who appeared in personal and the counsel for appellant was remotely connected from his office.

M. L. KOMBA

JUDGE

21st December, 2022