]IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 08 OF 2023

(Originating from Criminal Case No. 122 of 2021 in the District Court of Mpwapwa at Mpwapwa)

1. ANDERSON MDOGO MNGHUMBI
2. DAUDI JACKSON LENG'AHIS
3. GASTON MENGI KINUKA
4. NELSON MILTON **.....APPELLANTS**
5. SAIMON MBEZWA MLALI
6. YOHANA MBEZWA MLALI
7. PAUL MENGI KITAMIKA
8. HADSON MBEZWA MLALI

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

31th August & 14th September, 2023

HASSAN, J.:

The appellants herein were arraigned and prosecuted before the District Court of Mpwapwa at Mpwapwa where they were serverally and jointly charged with four offences, first offence, Malicious Damage to Property contrary to section 326(1) of the Penal Code, Cap 16 [R. E

2019], second offence, Assault Causing Actual Bodily Harm Contrary to section 241 of the Penal Code, Cap 16 [R. E 2019], third offence of Arson contrary to section 319 (a) of the Penal Code, Cap 16 [R. E 2019] and fourth offence, Malicious Damage to Property contrary to section 326(1) of the Penal Code, Cap 16 [R. E 2019].

When the charge was read over to the appellants at the trial court, they all denied the charge. The prosecution thereafter, called a total of seven (7) witnesses, who testified against the appellants who entered their defence without calling any witness on their case. At the conclusion of the trial, the appellants were convicted as charged and sentenced to serve two (2) years imprisonment each for the first count, one (1) year imprisonment each for the second count, three (3) years imprisonment each for the third count and two (2) years imprisonment for the fourth count.

Aggrieved, the Appellants jointly preferred an appeal in the court. The joint appellant's petition of appeal comprised of 6 grounds in which they essentially argue that the prosecution side had failed to prove the case beyond reasonable doubt.

When the appeal came for hearing, the Appellants were all unrepresented, while the respondent Republic had the service of Ms. Prisca Kipagile, Learned State Attorney. Wherefore, before hearing commenced in earnest, the court observed some irregularity in the record

of the District Court of Mpwapwa involving injustice, whereby, section 214(1) of the Criminal Procedure Act, Cap 20 [R. E 2019] seems to have been violated by the trial magistrate who took over the case from his predecessor magistrate for not recording the reason for the change.

Seeing that, instead of hearing the appeal on the grounds frosted by the laymen appellants, I invited the parties to address the court on the issue raised *suo motu* by the court. Starting with the learned State Attorney she readily conceded to the anomaly observed and she further submitted that, they have also observed the irregularity as raised by the court, that there was a change of Magistrate as at page 103 of the proceedings and the successor Magistrate did not give the reason for change of earlier Magistrates.

Thus, the case was firstly tried by Magistrate L. M. Mutua and later Magistrate L. J Nassari took over and there was no reasons given for the change. She added that, the first magistrate had heard three witnesses before the change, that are PW1, PW2 and PW3. On the other hand, the second magistrate took the evidence of the PW4, PW5, PW6, PW7 and the defence evidence together with composition of judgment.

The Respondents counsel further submitted that, this change of Magistrate was conducted contrary to section 214(1) of the Criminal Procedure Act, Cap. 20. Therefore, due to that irregularity the appellants

were materially prejudiced for not being informed the reason for the change of the trial Magistrate. She finally prayed to the court to nullify the proceedings from where the new Magistrate took over the case and the file to be remitted back to the trial court to proceed with hearing from where new magistrate took over the case.

On their part, the laymen appellants all prayed to be acquitted for the reason that, the error was the court's error and they have been in jail for nine (9) months.

Having gone through the submissions by both parties, there is no dispute that, this case was tried by two magistrates and no reason for change thereto was recorded. Section 214(1) of the Criminal Procedure Act, Cap 20 gives requirement that whenever there is a change of magistrate during trial then, there must be the reason for the change. Thus;

> *" 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."

[Emphasis added].

Therefore, it is the requirement of the law as shown above that, whenever there is a change of magistrate, the reason for the first magistrate's failure to complete the trial must be recorded. There are a number of decisions of the court giving guidance on the matter, in the case of **Priscus Kimaro v. R, Criminal Appeal No. 301 of 2013** (unreported). The Court held;

"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 must be recorded. If that is not done, it must lead to chaos in the administration of justice. Anyone for personal reasons could pick up any file and deal with it to the detriment of justice"

It was also decided by the court in **Abdi Masoud @ Iboma & 3 Others v The Republic, Criminal Appeal No. 116 of 2015** (unreported), thus;

"In our view, under section 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrates. It is a requirement of the law and has to be complied with. It is a 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."

I am also aware of the Court of Appeal decisions regarding the matter, directing the courts bellow to consider if the parties would have been prejudiced by such violation. For instance in **Huang Qin & Another v The Republic, Criminal Appeal No. 173 of 2018** (unreported) thus;

"Although the trial magistrate may not have recorded the reasons for taking over the matter to the appellants, we are of the considered view that the appellants were not prejudiced by such omission 30 considering that appellants were represented by an advocate."

However, it is my considered view that, this position is distinguishable from the circumstances in the instant case since in the instant case, the appellants had no legal representation hence they were not aware of the procedural requirement of the law concerning the anomaly. Thus, in my view they were prejudiced by such violation. Having said so, the

consequences of not recording the reasons for taking over the case by a successor magistrate renders the trial a nullity as it was stated in **Michael S/O Paul Mwariko v The Republic, Criminal Appeal No. 422 of 2016** (unreported);

> *"The effect of the failure to record the reasons why the first magistrate could not proceed with the trial is to render the subsequent proceedings a nullity"*

See **Ally Juma Faizi @ Mpemba & Another v. Republic Criminal Appeal No. 401 of 2013** and **Said Sui v. Republic, Criminal Appeal No. 266 of 2015** (both unreported).

In the original court file there is a typed proceeding dated the 13th day of September, 2022. The coram shows the parties were absent and the proceeding shows re-assignment of the case from the former magistrate to the successor. Bearing in mind that the last adjournment was on the 16th day of August, 2022 where the matter was set for hearing on the 15th day of September, 2022, thus on the 13th day of September, 2022 when the case was re-assigned to another magistrate the parties were absent since the matter was not scheduled on that day, and the same was just done administratively and can not be regarded as giving the reasons for re-assignment of the case. In **Michael S/O Paul Mwariko v The Republic** (Supra) the court held;

"With respect, from the clear provisions of S. 214(1) of the CPA, what is required to be stated is the reason why the predecessor magistrate was unable to continue with the trial, not re-assignment. Giving reasons for change of magistrate and re-assignment of a case are two distinct matters, the former being a legal requirement whereas the latter is an administrative function of a magistrate exercising that function."

From the above authority I am of the position that, the appellants were prejudiced since the re-assignment was done on a date not scheduled by the court, thus they were absent and they were not given the reasons for the re-assignment on the next date they appeared in the court, contrary to the mandatory requirement of the law.

Having said so, I here by invoke the my revisionary powers to nullify, quash and set aside the proceedings of the trial court from where the successor magistrate took over the trial, that is, on 15th day of September, 2022 up to the conclusion of the trial, the judgment, conviction, sentences and orders thereto.

Ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial, however, in the instant case I will not make an order for retrial the

reason that, upon scrutinizing the entire evidence on record from either side, I was able to note other irregularities and unfolded deficiencies in the prosecution evidence which shade doubts that if given the opportunity, there is likelihood for the prosecution filling in gaps. The irregularities being, the Medical Examination Report (PF3) was not read as a mandatory requirement of the law, and the appellants were omnibusly convicted of the four offences without considering the strength of the evidence of the prosecution witnesses in respect of the identification of the appellants. The stance taken by the defunct East African Court of Appeal in the case of **Fatehali Manji v. Republic, [1966] EA 343** was that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;* ***even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances*** *and an order for retrial should only be made where the interests of justice require it and should not*

be ordered where it is likely to cause an injustice to the accused person." ***[Emphasis added].***

Also see **Selina Yambi and 2 Others vs Republic, Criminal Appeal No. 94 of 2013** (unreported) in which the Court held stated that:-

> *"We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that an order should only be made where the interest of justice require."*

Following the above reasoning and the authority thereto, my position is that, this is not a fit case to make an order for a retrial. Thus, since the conviction and sentence met to the Appellants are quashed and set aside, I order release of the Appellants unless, lawful held.

Ordered accordingly.

DATED at **DODOMA** this 14th day of September, 2023.

S. H. Hassan

JUDGE