

IN THE HIGH COURT OF TANZANIA

DODOMA SUB - REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 136 OF 2023

(Originating from Criminal case No. 87 of 2022 of the

District Court of Singida at Singida)

SAMWEL MATHEW.....APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

23/05/2024

Hassan, J.:

The appellant, one Samwel Mathew was tried, convicted and sentenced to serve a jail term of three (3) years by the District Court of Singida at Singida in the Criminal Case No. 87 of 2022. The brief account of the facts leading to the charge was such that, the appellant together with his fellows, one Isaya Shabani and Frank Ernest were charged under one roof as follow; the appellant and one Isaya Shabani were jointly charged

with the offence of theft contrary to section 258 (1) and 265 of the Penal Code [Cap. 16 R.E. 2022]. The particulars of offence as portrayed in the charge sheet were that, Samwel Mathew and Isaya Shabani, on 4th day of July, 2022 at 20:00 hours at Mtukula Godown at Misuna area, Misuna ward, Mungumaji Division, Within the Municipal, District and Region of Singida fraudulently and without any claim of right did steal one (1) motorcycle with registration number Mc 556 CJF make SINORAY with chassis number LD3PCK6JXK2007641 and engine number SR162FMJ19087641, red in colour valued at Tzs 2,200,000/= the property one John Nanza for the first count. On the other hand, one Frank Ernest stands charged with the offence of Being in Possession of Property Suspected of having been Stolen or Unlawfully acquired contrary to section 312 (1)(b) of the Penal Code [Cap. 16 R.E. 2022]. The particulars of the offence presented in the charge sheet depicted that, Frank Ernest on 6th day of July, 2022 at Ilamoto village Mwengeza ward, Kirumi Division within District and Region of Singida, was found in possession of one (1) motorcycle with registration number Mc 556 CJF make SINORAY with chassis number LD3PCK6JXK2007641 and engine number SR162FMJ19087641, red in colour valued at Tzs 2,200,000/= the property one John Nanza.

In nut shell, the story leading to these offences is that, on the night of 04/07/2022, a complainant one John Nanza Rutha went to Misuna area to fetch medicine from his aunt namely Janeth Kisoo. After he reached at his aunt's house, he parked his motorcycle outside and entered inside. He remained inside for almost 15 minutes. No sooner, when he went out, the motorcycle had been missing. With support from his fellow friends, he looked for it but in vain. Seeing that, he reported to the police station. Thus, on 08/07/2022 at 2300 hours, Assistant Inspector Lucas Makaya (PW2) received the news about the theft, and on his efforts, he managed to arrest the accused person (the appellant herein) and took him to the police station. During interrogation, the appellant admitted to have stolen the motorcycle and he further revealed that, the stolen motorcycle had been retained in the house of Frank Ernest (2nd accused) at Hilamoto village. Then, Police officers went to the Frank Ernest's house where they arrested him and seized the said motorcycle. The complainant was summoned by police for identification of his stolen motorcycle. On his arrival at police station, he confirmed to be the one. Further investigation was conducted, and finally, three accused persons were arraigned as aforementioned.

As a result, after trial completed, the appellant was convicted and sentenced to serve three (3) years imprisonment for the 1st count. The 2nd accused (Frank Ernest) was also convicted and sentenced for three (3) years imprisonment for the 2nd count. Whereas, the 3rd accused (Isaya Shabani) was acquitted under section 235 of the Penal Code, [Cap. 16 R.E. 2022].

Aggrieved by the decision of the trial District Court, the appellant has appealed to this Court lodging five (5) grounds of appeal. However, for the reason to be apparent soon, I reserve them to be unrecited at this juncture.

At the hearing, the appellant stood unrepresented. Whereas, Ms. Nancy Rugaihuruzza, learned State Attorney appeared for the respondent Republic, and the matter proceeded orally.

However, before the hearing of the appeal could proceed in earnest, the Court invited parties to address it on the competency of the appeal regard being to the fact that, there was a change of the trial Magistrate and there was no reason for the predecessor trial magistrate's inability to complete the trial. Hence, I invited the parties to address the court on the same, as to the position of the law.

To kick start, the appellant averred, that it is true that during trial he was initially heard by a different Magistrate. And later on, his case was transferred to Hon. Swallo, and on that day, he asked the court to start afresh from where the first Magistrate has commenced, but the second trial Magistrate refused and the case proceeded with hearing. Thus, because the fault was not his own, he prayed to be set free.

The appellant further contended that, looking on the judgment, there is nowhere the court has pronounced that, he has to serve his prison term for how long, though he has been convicted.

In addition to that, he succumbed that prosecution had not brought to the attention of the court, a witness who could have testified to have seen him stealing or to have arrested him with the stolen property. Provided that, an exhibit P1 (motorcycle) was seized from Frank Arnest who had also mentioned Samwel Mathew Jule to be the person who sold the motorcycle to him.

In furtherance, he accused police to have mixed him up in the lock up with other Samwel Methew Pinga. And also, that, the trial court has failed to

consider his evidence when it composed the judgment. Therefore, for those reasons, he prayed the court to set him free.

On her side, Ms. Rugaihuza readily conceded to the defects and she therefore submitted that, it is true that this case was heard and finally determined by the trial court in violation of section 214 (1) of the Criminal Procedure Act, Cap. 20 R.E 2022. Where it appears that the first trial Magistrates Hon. Kahamba (SRM) had changed when two witnesses had already testified namely PW1 and PW2. And later on, the case was transferred to Hon. Swallo (PRM) who also heard PW3 and PW4 for prosecution side. He also continued with defence case for evidence of DW1. On the said exchange, reason for the transfer of the case from one Magistrate to another Magistrate was not explained by the predecessor Magistrate.

She therefore cemented that, in such circumstance, failure to record reason (s) for transfer of case from one presiding Magistrate to another Magistrate is a fatal omission. Thus, she prayed this case be remitted to the trial court for retrial *de novo*.

In the context, she reasoned out her prayer for retrial that, there were strong evidence to convict the appellant. She further submitted that, based on the testimony of PW1 thus, the appellant was the one who led to the discovery of the stolen motorcycle. And thus, after discovery the appellant and his fellows friends were arraigned. She further pressed that, evidence of PW1 is supported by the evidence of PW2 and exhibit P.5 (a VEO statement of evidence); together with the appellant's cautioned statement (exhibit P.6).

Moreover, Ms. Rugaihuza disputed to the claim made by the appellant that, there were two different Samwel Mathew and that, his name was mixed up. She therefore succumbed that, the appellant did not give much detail to the court to enable the court to inquire as how he was arraigned, and who else was that Samwel Mathew.

On the point that the court did not consider his evidence when it composes the judgment, she admitted, that it is true the trial court had failed to consider the defence evidence. Thus, this court can step into the shoes of the trial court for its being the first appellate court and analyse the same. However, she added that, based on the appellant's evidence, his defence was weak on the point that, he was not at the scene of crime when the offence was committed. On that defence, he was ought to file notice in the

court that he will rely on the evidence of *alibi* as provided in the case of **Kubezya John v. R**, Criminal Appeal No. 488 of 2015 at page 21 (unreported), where the court of appeal provides; that, where accused intends to rely on an alibi in his defence, he shall give to the court and the prosecution, a notice of his intention to rely on such defence.

Therefore, she contended that, failure to comply with this requirement, the appellant has deprived his right of defence on *alibi* by himself and thus, the court has convicted him based on the strength of the prosecution's evidence.

Finally, challenging the hint raised by the appellant that, he was not sentenced after being convicted as he drew reference from the judgment. She pointed out that, looking at page 46 of the proceedings, the appellant was sentenced for three (3) years imprisonment. At the end, she prayed that, the case should be remitted to the subordinate trial court to be tried *de novo*.

Undoubtedly, this case was flawed during trial. As rightly submitted by the learned State Attorney, an exchange of Magistrates during trial was in

contravention of section 214 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2022], which I will reproduce the whole section:

*" 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.*

(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly

recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.

(3) Nothing in subsection (1) shall be construed as preventing a magistrate who has recorded the whole of the evidence in any trial and who, before passing the judgment is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to the magistrate who has succeeded him for the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate."

In view of the mandatory nature of the language employed by the draftsman in section 214(1) above, the reasons for reassignment of trial magistrates after Hon. Kahamba (SRM) had to be recorded for the obvious reasons; essentially to ensure a fair trial to those who are brought to courts of law. The absence of the reasons for the changes of trial magistrates thrice in a single case, impacts negatively in the mind of an ordinary person.

Under similar circumstances, in **Abdi Masoud @ Ibomba and 3 others Vs Republic (supra)**, the Court made the following observation:

"In our view, under section 214 (1) of the CPA it 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. Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity."

In an earlier decision of the court in the case of **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported), the Court stated as hereunder:

"Where it is necessary to reassign 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 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 the circumstance thereof, I subscribe to the above views and find that the appeal has merit. All said and done, since similar error was committed by the two trial magistrates, there is no gainsaying that the proceedings in the trial court were vitiated, and therefore rendered a nullity.

At this juncture, the only remaining issue is whether I should order a retrial as urged by the learned state attorney or not. My concern here is whether ordering a retrial will not amount to affording the respondent an opportunity to fill in the gaps apparent in the evidence tendered in the trial court.

For instance, the witness statement of Ramadhani Amiri was admitted in evidence under section 34B the Evidence Act as exhibit P5 without being properly certified by the maker for failure to append his signature. Also, registration card of the motorcycle was not tendered and admitted in

evidence to confirm the unique features of the said motorcycle, to wit; chassis number and engine number, though the same was relied by PW1 to identify his motorcycle and also appeared in the certificate of seizure. Again, by observing the cautioned statement of 2nd accused (Frank Ernest) which was admitted as exhibit P4, on the time of which recording started and ended, numbers were arbitrarily altered. Similarly, the vehicle inspection report which was admitted in evidence as exhibit P3 was altered by white-out without justification as to who and why the alteration was made.

For the reasons stated above, as initially held, that the appeal is allowed and thus, I am certain that, this is not a fit case to order for retrial. That said, I quash the conviction and set aside the sentence of three (3) years imprisonment. Ultimately, I order for immediate release of the appellant from prison unless otherwise lawfully held.

Ordered accordingly.

DATED at **DODOMA** this 23th day of May, 2024.

S. H. HASSAN
JUDGE
23/05/2024

This Judgment delivered this 23th day of May, 2024 in the presence of
the parties.



S. H. Hassan
S. H. HASSAN

JUDGE

23/05/2024