

IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO.49 OF 2009

[Originating from DC Tanga Criminal Case No.1 of 2000]

SELESTINO BARNABA.....APPELLANT .

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last order:- 15/8/2010

Date of Judgment:11/11/2010

JUDGMENT

Mussa, J;

This appeal originates from Criminal Case No.1 of 2000; instituted in the Court of Resident Magistrate, Tanga. The appellant, along with two others, were arraigned there for malicious damage to property, contrary to sections 326, 6A(a) and 6B(a) of the penal code, chapter 16 of the laws. The appellant stood as the second accused below, whereas, his co-accused were, namely, Titus Andrea @ Mtemo and Kassim Mzungu @ Kassimu Mwatumbo, respectively, the first and third accused persons.

The particulars alleged that on the 5th January 2000; the party accused maliciously damaged 293 kilogrammes of aluminum electricity supply wires valued at a sum of shs.2,930,000/= and; 36 kilogrammes of copper wires valued at sum of shs.760,000/=; properties of Tanzania Electric Supply Company (TANESCO). All accused persons refuted the accusation, whereupon, the matter was gone upon full enquiry. The enquiry itself featured a host of disquieting factors; some of which may

turn on the outcome of this appeal. Being commenced as far back as January 13th, 2000; the proceeding underwent countless adjournments, mostly upon lame excuse. When, finally, hearing took off ground, it was presided over by three Magistrates in succession; as it were, without the respective successors taking a bother to explain the reasons behind their taking over. At some stage, the first accused jumped bail to become beyond reach but; his trial was, supposedly, continued in his absence.

At the close of the somewhat gruesome trial, the third accused was absolved of all responsibility; whereas, the appellant and the first accused were convicted- but; whilst the latter got a ten years jail term, the sentencing with respect to the former had to await his arrest. It is a verdict to which the appellant is, presently, all arms against upon a verbose petition comprised of six points of grievance. I do not deem it necessary to reflect on any of the grievances; much as, I believe, the turning point on this matter is the manner in which the proceedings were conducted. As hinted upon, this matter was presided by three Magistrates in succession. It was begun by a certain **E. Anangisye, RM**; whom recorded testimony of the first prosecution witness. Thereafter, another Magistrate, namely, **J.M. Minde, RM**; took over and was occasioned to record the testimonies of four more prosecution witnesses. The matter was adjourned upon a prosecution request but; much later, the case changed hands and it was now presided by **M.W. Goroba, RM**. It is quite

apparent that the case for the prosecution was caught short by the trial court upon failure to produce a witness. The appellant was then heard in defence and it was, finally, the latter presiding officer who pronounced judgment. As I said, in between the successions neither of those taking over took time to reflect on the reasons necessitating such change of hands. In this regard, I feel it is instructive to extract the provisions of section 214(1) of the CPA in full:-

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, re-summon the witnesses and recommence the trial or committal proceedings.

It is, perhaps, well worth recalling that prior to the amendment comprised in Act No.9 of 2002, there used to be a requirement; entitling an accused to demand the witnesses or any of them be re-summoned at the time of a succession. It was further required that an accused shall be informed of that right by the succeeding Magistrate. As is vividly evident

from the extract above, that requirement had been foregone. Nonetheless, it is noteworthy that the amendment was not extendent to trials obtaining in the High Court whereat section 299 of the CPA still speaks of the requirement. Whatever was the intention of the legislature in effecting the amendment; from where I am standing, it was, rather, anomalous to prescribe a different mode of treatment to accused persons standing trials in subordinate courts: That is, for no apparent, let alone, good cause. But that is by the way; my duty being to interpret the law as it presently stands.

Reverting aback to the provision extracted above; the bolding is mine to postulate beyond question the operative expression. That is to say, I deem it imperative for the succeeding presiding officer to manifest, upon record, as to whatever were the reasons that necessitated a take over; more so, as the person accused is entitled to be informed of the reasons. Having addressed the foregoing turning point, as I believe, thoroughly well; the only option I am left with is to nullify the entire proceedings below and order the immediate release of the appellant unless, of course, he be held in custody for some other lawful cause. Order accordingly.


K.M. MUSSA, J.
11/11/2010