IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KILEO, J.A., MUSSA, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 401 OF 2013

1. **ALLY JUMA FAIZI @ MPEMBA**
2. **ALLY RAMADHANI @ DOGO..... APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es salaam

(Mihayo, J)

Dated 7th day of May, 2009
In
Criminal Appeal No. 74 of 2007

RULING OF THE COURT

14th&16th July, 2015

KILEO, J.A.:

On 31/10/2006 in the Resident Magistrate's Court of Dar es Salaam the appellants were convicted of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989 and 27 of 1991. Their appeal to the High Court was rejected and they have filed their second and last appeal in this Court in search for redress.

The appellants who appeared before us in person without legal representation had filed an 8 point memorandum of appeal which for reasons that will soon become apparent we need not list here.

Having noted that there were some procedural irregularities with regard to the non-application of section 214 of the Criminal Procedure Act we first invited Ms. Cecilia Mkonongo, the learned State Attorney who represented the Republic at the hearing of the appeal to address us on this issue.

The learned State Attorney submitted that having gone through the record she noted that the matter which appears to have been first handled by Mutungi, SRM as he then was; was re-assigned to Mgetta SRM. Mgetta SRM heard one witness after which the case proceeded before Mutungi SRM who heard the rest of the prosecution witnesses. No reasons which are on record as to why the case proceeded before Mutungi SRM after Mgetta SRM had heard the testimony of PW1. Ms Mkonongo was of the view that there was non-compliance with the provisions of section 214 of the Criminal Procedure Act (CPA).The provision requires that a magistrate who has heard the whole or any part of the evidence continue with the case to its completion unless for

some reason that magistrate is unable to complete the trial in which case another magistrate of competent jurisdiction may take over and continue with the trial or committal proceedings as the case may be.

The learned state Attorney further pointed out that there was yet another flaw in the proceedings before the trial court. This had to do with non-compliance with section 231 of the CPA which requires that after a trial court has found an accused to have a case to answer explain to him that he has a right to defend himself either on oath or without oath or even keep silent. The provision also requires that the accused be informed that he has a right to call witnesses for his defence if he so wishes. In view of the irregularities which she found to be fatal Ms Mkonongo asked the Court to exercise its powers of revision, quash and set aside all the proceedings in the High court and the trial Court and order a re-trial.

The appellants while agreeing that there were some irregularities lamented that they had been in prison for so long and they should not be made to suffer due to irregularities caused by the court.

A perusal of the record bears out what Ms Mkonongo observed. The proceedings of 22/6/2004 show that Mutungi SRM took the plea. After he had done so he set the case for Preliminary hearing on the following day – 23/6/2004. On this day an order was made that the case proceeds before another magistrate. Mgetta SRM was assigned to hear the case. Mgetta SRM heard the testimony of PW1 on 29/9/2004 after which he set the case for continuation of hearing on 4/11/2004. On this day hearing for some reason did not take place and the matter was adjourned to 19/11/2004. Thereafter Mgetta ceased to handle the matter and Mutungi appears on the record as having taken it over. In order to appreciate the problem it befits that part of the proceedings from 29/9/2004 be reproduced. It is recorded at page 11-12 of the record as follows:

"*.....Order: hg on 12.10.04 at 11: am*

Hg. 4.11.04 at 11: am

Hg on 19.11.2004 at 11: am AFRC

ABE

20.01.05

Coram: Mutungi - SRM

Mr. Mbamba we are ready for 4th accused.

Accused persons are reminded of the chrge who are asked to plead thereto:

1st accused: It is not true

2nd accused: It is not plead

3rd accused: It is not true

4th accused: It is not true

Court: EPNG In respect for all the accused in regard to the offence. The accused persons are accused for addressed in terms of S. 214 of the CPA.

1st accused: Lets proceed for where we ended.

2nd accused: Lets proceeding for where we ended.

3rd accused: Mr. Mbamba lets proceed.

4th accused: lets proceed

Pros case continues

Though the learned trial magistrate recorded that section 214 had been complied with we are of the settled view that this did not suffice for proper compliance of the provision. It is important that the reasons for the takeover of a matter by a successor magistrate be recordedotherwise chaos may result in the administration of justice. There is no dearth of authorities on the application of section 214 of the CPA the relevant part of which provides:

> *"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 reasonunable 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 provided).*

Citing**Abdi Masoud Iboma and 3 Others v. R.** Criminal Appeal No. 116 of 2015 (unreported) **in Adam Kitundu versus the Republic** – Criminal Appeal No. 360 of 2014 (unreported) we held that section 214 requires that reasons be laid bare to show why the predecessor magistrate could not complete the trial. The Court further held that in the absence of any such reasons, a successor magistrate lacks jurisdiction to proceed with the trial and consequently all proceedings following the taking over of a partly heard matter without any reasons assigned thereto becomes a nullity. In another decision of this Court, in **Salimu Hussein v. The Republic,** - Criminal Appeal No. 3 of 2011 (unreported) we also held that the reasons for failure of a predecessor magistrate to complete a trial he/she has begun must be explicitly be shown in the trial court's record of proceedings. Also in **Priscus Kimario v. The Republic,** Criminal Appeal no. 301 of 2013 (unreported) we made the following statement:

> *"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."

Non- compliance with the provisions of section 214 in the matter before us rendered the whole proceedings from the trial court to the High Court a nullity. This was not the only problem in this case. As rightly pointed out by Ms. Mkonongo, section 231 of the CPA was not complied with as well. Mwangesi, SRM took over the matter from Mutungi SRM after the closure of the prosecution case following Mutungi's transfer from the station. Before he was transferred Mutungi had found the accused persons to have a case to answer. Mwangesi did not however address the accused persons in terms of section 231 of the CPA but instead went straight on to take down their defence testimonies. This anomaly formed the basis of the complaint in ground 8 of the memorandum of appeal which is to the following effect:

"The honourable Appellate judge grossly erred in law by convicting the appellants in a case where there were not fully addressed as per mandatory provision of the Criminal procedure Act.... before they were compelled to defend themselves."

We think the failure by the trial court to address the appellants in terms of section 231 was highly irregular. The accused persons ought to have been informed of their rights under section 231 (1) which states:

> **"231 (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right–**
>
> **(a) to give evidence whether or not on oath or affirmation, on his own behalf; and**
>
> **(b) to call witness in his defence,**
>
> **and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."**

This Court in Namashule Ndoshi v. The Republic – Criminal Appeal no. 120 of 2005 (unreported) had an occasion to address itself to section 231. In the course of so doing it made the following statement:

person: the right to be heard before they are adjudged. It directs that a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict. Not only is an accused entitled to give evidence in their defence but also to call witnesses to testify in their behalf. So, the section is an elaboration of the all-important maxim- ***audi alteram partem*** *and that no one should be condemned unheard."*

At the end of their defences the accused persons made a general statement saying: *"We close our defence".* We think this was irregular. Each appellant should have made a separate statement signifying that he was closing his case.

In view of our considerations above we hold the proceedings, judgment and orders in the High Court which had proceeded from irregular proceedings of the trial court to be a nullity. In the exercise of powers of revision conferred upon this Court pursuant to section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 we hereby quash and nullify

both the proceedings, judgment and orders in the High Court as well as the proceedings, judgment and orders of the trial court.

Ms. Mkonongo advised us to order a retrial. We have contemplated on this suggestion and considered the circumstances of the whole matter and in the end we consider it prudent to leave it to the wisdom of the Director of Public Prosecutions to decide on whether or not he should proceed with the prosecution of the appellants.

Dated at Dar es Salaam this 15th day of July, 2015.

E. A. KILEO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL