IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., LILA, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 7 OF 2015

1. MATIMO SAGILA
2. MOHAMED HUSSEIN ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Sheikh, J.)

Dated the 30th day of October, 2014

in

Criminal Appeal No. 93 of 2013

JUDGMENT OF THE COURT

29th October & 31st Dec. 2018

MMILLA, J.A.:

Matimo Sagila and Mohamed Hussein (the first and second appellants respectively), were among the five (5) accused persons who were originally charged in the District Court of Kinondoni with two counts; conspiracy to commit an offence contrary to section 384 of the Penal Code Cap. 16 of the Revised Edition, 2002; and armed robbery contrary to section 287A of the same Act. The other accused persons were Ally Kassim Omary, Haji Rajabu, and Shukuru Mandwanga (first, second and third accused persons respectively). The trial court convicted the

appellants on both counts and sentenced each of them to five (5) years' imprisonment in respect of the first count; and a further term of thirty (30) years' imprisonment in respect of the second count. They appealed to the High Court of Tanzania, Dar es Salaam Registry, before which their appeal on the first count succeeded for which their convictions on that count were quashed and the sentences set aside, but their appeal on the second count botched, hence this second appeal to the Court.

The salient facts of the case were briefly that on 17.3.2011, PW5 Emmanuel Osward who was the driver of a heavy duty truck make Leyland DAF Reg. No. T. 564 BKN, with its trailer Reg. No. T. 548 BLA, and his turn-boy, were on their way to Dar es Salaam from Zambia. They had copper bars on board destined for Dar es Salaam. When they were at Kibaha Mailimoja area at around 9:00 pm, they realized that one of the tyres of that motor vehicle had a puncher. They looked for a convenient place and stopped in order to fix the problem. Around that time arrived at that place one person who introduced himself to PW5 as a police officer stationed at Kilwa Road in Dar es Salaam. He purported that he was on duty and was in the squad involved in prevention of offences of illicit drugs. That person ordered PW5 to alight from that motor vehicle on the

pretense that he wanted to conduct a search. PW5 obliged. Instantaneously, other people arrived at that spot in a Toyota Hiace motor vehicle and joined the purported police officer. PW5 and his turn-boy were harshly seized, kicked around, and had their hands and legs tied with ropes, after which they were consigned in the Toyota Hiace which as intimated, was under the possession and control of the bandits. While one of the bandits took control and drove the Leyland DAF towards Dar es Salaam, one of them drove the Toyota Hiace in which he and his turn-boy were kept. According to PW5, he and his turn-boy remained in that Toyota Hiace until when they were rescued by the policemen near Mbezi Bus Stand Area.

PW1 E. 2107 D/Cpl. Moris was among the policemen who were on patrol around Mbezi area on the night of 17.3.2011. When they were near Mbezi Bus Stand area around 9:00 pm, they spotted a Toyota Hiace which was parked on an idle road which was under construction. Suspicious, he and his colleagues approached that motor vehicle. They held a discussion with the persons they found thereat, and searched that motor vehicle. To their surprise, they found two of the five persons who were in that motor vehicle tied with ropes, something which raised doubts. Promptly, PW5

and his turn-boy raised their voices that they were kidnapped, and that the bandits' colleagues hijacked their Leyland DAF truck and its trailer with copper minerals on board, and was headed to the City center. PW1 and his team arrested the culprits. While other policemen took the arrested persons to Mbezi Police Station, PW1 and others, together with PW5 resolved to trace the hijacked truck.

As they approached Kimara Mwisho area, PW1 and his team, including PW4 No. D. 9003 D/Cpl. Robert, spotted the hijacked truck and ordered the driver to stop. The hijackers jumped from that truck and attempted to run away. Luckily however, they were pursued and arrested. Meanwhile, PW5 rushed to the abandoned truck and managed to stop it. The arrested hijackers and the recovered truck were taken to Mbezi Police Station.

According to PW1, the bandits who were arrested at Kimara Mwisho area were the first and second accused persons before the trial court, while the appellants, who were the fourth and fifth accused persons, along with the third accused, were arrested at Mbezi in a Toyota Hiace. All the accused persons, including the appellants, were eventually charged before

the District Court of Kinondoni as afore-mentioned, but they protested their innocence.

The first appellant told the trial court that he was arrested on 15.3.2011 at Ubungo area on account of a fracas which ensued between him and the conductor of the min-bus he boarded from Kariakoo enroute to Kimara. The fracas was sparked by a dispute between them over a change of money which the conductor twisted into an attempt to rob him his day's collections. He asserted that the problem was exacerbated by the fact that in the course of the said fracas, he accidently hit on the nose the police officer to whom the said incident was reported. He alleged that the angry policeman vowed to teach him a lesson, which is why he framed him with that charge of armed robbery.

On the other hand, the second appellant testified before the trial court that he was arrested on 17.3.2011 at Mwenge area and was sent to Kijitonyama Police Station. He alleged that the policemen who arrested him told him that he was suspected to be dealing in illicit drugs, and also buying stolen goods, which he denied. He contended that those policemen required him to give them Tzs 300,000/= to buy his release, but that because he had no money he was remanded in custody. On

18.3.2011 they forced him to sign a statement, and on 21.3.2011 he was charged before that court with those two counts as it were.

The appellants filed a seven point joint memorandum of appeal as follows; **one** that PW5 did not positively identify the first appellant; **two** that, the first appellate court improperly upheld the first appellant's conviction by the trial court because it was based on the second appellant's cautioned statement (Exht. P3) which was not corroborated by some other independent evidence; **three** that, the first appellate court erred in upholding the second appellant's conviction by the trial court since it was based on the cautioned statement that was admitted contrary to law; **four** that, both courts below did not resolve the contradictions which featured in the evidence of PW1, PW3 and PW4 in regard to where they were arrested; **five** that, the first appellate court erred in upholding their convictions while aware that the Toyota Hiace in which they were allegedly arrested was not tendered as an exhibit during trial; **six** that, the charge laid against them was defective; and **seven** that, the prosecution did not prove the case against them on the required standard.

When the appeal was placed before us for hearing on 29.10.2018, both appellants appeared in person, unrepresented, and fended for

themselves. On the other hand, the respondent/Republic enjoyed the services of Ms Honorina Munishi, learned Senior State Attorney.

At the commencement of hearing, both appellants urged the Court to adopt their grounds of appeal and chose for the Republic to submit first while reserving their right to submit in due course, if necessity would arise. We accepted their request and invited Ms Munishi to begin.

At the outset, Ms Munishi informed the Court that she was supporting the appeal. She opted to discuss the grounds raised generally, with particular emphasis on the first and the fifth grounds. She contended generally that the first appellant was not positively identified because PW5 did not mention the source of light with the aid of which he identified him. She also contended that the Toyota Hiace in which the appellants were allegedly arrested constituted vital evidence in the case, and that to have not tendered it as evidence during trial created doubt on the prosecution witnesses' assertion that the appellants were arrested in the said motor vehicle. For those reasons, she requested the Court to allow the appeal.

Upon Court's probe regarding the prosecution witnesses' evidence on how, and the circumstances under which the appellants were arrested, Ms Munishi conceded that she did not exhaustively consider those

circumstances. She also conceded that the evidence of PW7 was not received to its final stage, also that all the accused persons, including the appellants, were not given chance to cross-examine that witness as contemplated by law. She similarly admitted that it was the trial court magistrate who closed the prosecution case, instead of the public prosecutor who had the conduct of that case. Given these pitfalls which she said were grave irregularities, Ms Munishi pressed the Court to cloth itself with powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), quash the proceedings and judgments in both courts below, set aside the sentences, and eventually order a trial *de novo* before another magistrate with competent jurisdiction.

On his part, the first appellant maintained that he was not correctly identified because PW5 was not explicit on how he managed to identify him. He also submitted that he was wrongly convicted on the strength of the cautioned statement of the second appellant. Likewise, he argued that the evidence of PW1, PW3 and PW4 was contradictory regarding the place of his arrest, and that both courts below did not resolve those contradictions. He equally challenged that his conviction was founded on a

defective charge, but he did not elaborate his claim. He further asserted that the prosecution side did not prove the case against him beyond reasonable doubt and asked us to allow the appeal and order his immediate release from prison.

Unfortunately however, the first appellant did not say anything concerning the procedural defects which were probed by the Court on the unfinished evidence of PW7, the trial court's failure to grant them the right to cross examine that witness, as well as the prosecution case having been closed by the trial magistrate instead of the prosecution.

On the other hand, the second appellant recapped what is quipped in the third ground of appeal that his conviction was wrongly anchored on the cautioned statement attributed to him on the ground that the said document was admitted contrary to law. Since that was the only evidence available against him, he said, if that evidence is expunged, there will be no any other evidence to justify sustenance of his conviction. He urged the Court to allow his appeal and set him free. Like his colleague however, he did not advert to the procedural defects which were raised by the Court.

After carefully considering the rival submissions of the parties, as well as the procedural defects resulting from the Court's probing, we are

constrained to address the procedural irregularities we raised. We will begin with the defect touching on closure of the prosecution case by the trial court magistrate which we think, is capable of disposing of the entire appeal.

As earlier on hinted, the trial court magistrate conducted inquiry proceedings which were aimed at considering voluntariness or otherwise of the cautioned statement of the second accused before the trial court (Haji Rajabu) for purposes of determining whether or not to admit it as evidence. After completion of those proceedings on 12.12.2012, that court reserved its ruling and discharged PW8 No. E. 172 D/Cpl. Francis who had recorded it. In the ruling delivered on 24.12.2012, the trial magistrate upheld the second accused's objection and called upon the prosecution to call that witness so that he could proceed giving his evidence. The public prosecutor informed the trial magistrate that D/Cpl. Francis was on a three (3) month annual leave and prayed for adjournment. That prayer was resisted by the appellants and other accused persons, and the trial magistrate upheld their objection. He declined to grant it and closed the prosecution case. He composed a ruling on whether or not they had a case to answer. While he ruled that the third accused one Shukuru

Mandwanga had no case to answer and acquitted him, he directed for the rest of them, including the appellants, to prepare their defences, which they did.

In her brief submission on this scenario, Ms Munishi contended that it was a fatal irregularity which vitiated the entire trial court's proceedings, calling for invocation of the Court's revisional powers under section 4 (2) of the AJA with a view of nullifying those proceedings in both courts below, as well as the judgments thereof, and setting aside the sentences which were meted out against the appellants, and order a retrial.

While we agree with Ms Munishi that the irregularity was fatal, we nonetheless do not agree with her that such an irregularity affected the entire proceedings. We endeavour to elaborate.

There are a string of authorities in which the Court had the occasion to underscore that the trial magistrate has no right to close the prosecution's case. They include those of **Marwa Joel Gesabo v. Republic,** Criminal Appeal No. 198 of 2010, The **Director of Public Prosecutions v. Idd Ramadhani Feruzi,** Criminal Appeal No. 154 of 2011, **Abdallah Kondo v. Republic,** Criminal Appeal No. 322 of 2015

and **Frank Mgalla and 2 Others v. Republic,** Criminal Case No. 364 of 2015 (all unreported).

In **Frank Mgalla's** case, the record showed at page 86 that the prosecution did not close its case. It was rather the trial court which closed it after it refused to adjourn the case any further. In that regard, the Court said that:-

> *"The trial magistrate has no such authority to close the prosecution case for whatever reasons. The power to do so is exclusively vested . . . in the person who prosecutes the case as provided for under section 231 (1) of the CPA . . . Thus, the trial court was wrong to do so. In any case, there is a danger for the court being not seen as impartial."*

In that case, the Court quashed the relevant order closing the prosecution's case and the proceedings which followed the closure were set aside.

In our view, the above stand is correct. As was succinctly expressed in **Abdallah Kondo v. Republic,** Criminal Appeal No. 322 of 2015 (unreported), the rationale is perceptibly that such closure by the trial

court affects the prosecution significantly because it blocks them from calling further witnesses to prove their case, a prejudice which translates into unfair trial.

We would also like to point out that, if the trial magistrate felt that it was improper to adjourn the hearing of that case for whatever reasons, he ought to have dismissed the charge and discharged the accused – See the case of **Republic v. Deeman Chrispin and Others** [1980] T.L.R. 116, a case whose principle was approved by the Court in **Abdallah Kondo's** case.

In **Deeman Chrispin's** case, the accused persons were charged before the trial court on 2.1.1973. There were numerous adjournments at the instance of the prosecution on two notorious grounds that investigation was not complete and at times that the police record was missing. On 30.3.1979, which was almost after seven (7) years had elapsed, the subordinate court magistrate dismissed the charge and discharged the accused. An application for Revision was preferred in the High Court at the end of which it was held that:-

> *"1. A court was to have, within reason, the power to control or regulate its own proceedings in order to*

prevent itself from being emasculated or rendered impotent.

2. If a court refuses an adjournment and the prosecution is unable to proceed, a court does not have to rescind its order. It is clothed with inherent power and so, in such cases of emergency, it can dismiss the charge and discharge the accused. But except in the most exceptional circumstances, an order of acquittal is unnecessary and unsuitable for that purpose."

The significance of this approach is that the prosecution will at least be left with the option of recharging the accused, if need there be.

Having said that the closure of the prosecution case by the trial court affected the interests of the prosecution and/or was prejudicial to them, we hasten to say that the proceedings from the stage of the order of the trial court closing the prosecution's case to its end were a nullity, thus it affected the judgments of both the trial and the first appellate court. Consequently, we exercise the power vested on us under section 4 (2) of the AJA on the basis of which the trial court's order closing the prosecution's case is quashed, so too are the proceedings which followed the closure, including those of the High Court. We further order the trial court magistrate to rehear the case as far as all the accused persons who

were arraigned before it from that stage where he improperly closed the prosecution's case.

We accordingly order.

DATED at **DAR ES SALAAM** this 24th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL