IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA,J.A., LILA,J.A., And KWARIKO, J.A.,)

CRIMINAL APPEAL NO 422 OF 2016

MICHAEL S/O PAUL MWALIKO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Sumari, J)

dated 03rd day of October, 2016
in
DC Criminal Appeal No. 55 of 2016

JUDGMENT OF THE COURT

26th November & 6th December,2018

MWARIJA, J.A.:

The appellant was charged in the District Court of Moshi with the offence of stealing by servant contrary to section 271 of the Penal Code [Cap. 16 R.E 2002]. It was alleged that, on divers dates between the month of March 2013 and 15th December, 2013, the appellant stole a total of Tzs 187,830, 841.00 the property of a business entity known as Rafiki Mini Super Market.

After a full trial, the appellant was found guilty of having stolen Tzs 71,063,641.00 from the said entity, Rafiki Super Market. He was consequently sentenced to four (4) years imprisonment and in

addition, he was ordered to pay a compensation for the said amount of money which the trial court found him guilty of having stolen it. The appellant was aggrieved by the decision of the trial court. He unsuccessfully appealed to the High Court hence this second appeal.

The facts of the case are not complicated. The appellant was an employee of the said Rafiki Mini super Market, owned by one Fradmin Gabriel Mallya (PW1). The appellant was employed in the capacity of a Supervisor and according to the evidence of PW1, the former was responsible for collection and banking the money realized from the business on daily basis.

Following a suspicion by PW1 of theft at the Super Market, on 27/102014 he engaged a firm of auditors, Solani & Company, Tax Consultants and Certified Public Accountants to audit his accounts. According to the audit report dated 26/2/2014, the auditors showed that a total of Tzs 187,830, 841.00 realized for the business was not banked. Upon that report, the appellant was charged as shown above.

At the trial, the prosecution's case was anchored on the evidence of five witnesses. In his evidence, PW1 testified on how he

discovered that there was an amount of cash which was realized from the business but which was not banked by the appellant who had, as one of his duties, the responsibility of banking the amount realized from daily sales. He discovered from the bank statement dated 16/1/2014 that the collections from 1st -15th December,20-13 was not banked.

Itesh Solan (PW3) who owned the said audit firm, was the auditor who conducted the auditing of PW1's business accounts. He tendered the report which shows that the amount of Tzs 187,959,141.00 was realized by PW1's business between March and 15/12/2013 but that amount was not banked.

The allegation that the appellant was responsible for banking the daily proceeds of the business was supported by PW4, Andrea Gervas Tarimo who was at the material time, the procurement officer at the Super Market. That evidence was also supported by PW2, Sabrina Shoki who was one of the cashiers. It was her evidence that, although she used to hand over the money realized from the business to the appellant to take it to the bank, whenever the appellant was absent, she used to hand the money to PW4.

The prosecution relied also on the evidence of D. 7295 D/Sgt Barnabas (PW5), the Police officer who investigated the case. He interrogated the appellant on 22/1/2014 and recorded his statement. On 24/1/2014, he wrote the appellant's additional statement in which, according to this witness, the appellant admitted that he committed the offence and promised to pay back the amount of the money in question.

In his defence, the appellant did not deny that he was employed by PW1. He testified however, that he was employed as a casual employee but admitted that he was a supervisor of the other employees at the business. According to his evidence, it was the duty of cashiers who included Emmiliana Mushi and Leah Mbise, to send money to the bank. He also challenged the correctness of the audit report stating that the same was not prepared in accordance with auditing principles. He pointed out that the failure by the auditor to show the purchases expenses as one of the irregularities in the audit report.

His evidence was supported by Thomas Assenga (DW3) who described himself as a person having expertise in auditing. He testified that the audit report was not done in accordance with the auditing principles. He contended that the same does not include the purchases expenses, sales and expenditures.

The appellant's mother, Anna Mbelwa (DW2) testified on the confession which was allegedly made by the appellant as testified by PW5. She said that upon the agreement with the appellant that they would sale her house, the appellant decided to admit that he was responsible for the loss of the amount allegedly stolen by him and promised to pay it. It was her evidence that the appellant's decision to admit the offence resulted from threats made against him by PW1 who promised to ensure that the appellant perishes if he did not pay the money in question.

In his decision, the learned trial Principal Resident Magistrate was satisfied with the evidence that the collection of the sales between 1/12/2013 and 15/12/2013 was not banked. He was satisfied also that it was the appellant who stole the money. In his finding, the learned trial magistrate states as follows:-

"The issue is where did the money go? There is no documentary answer as to where did these money go? However, there was a person who was supposed to provide the answer, and looking at the Responsibility of the Accused in the Super Market, as a supervisor of all staffs of the Supermarket, and the person in charge of all the transaction (sic) and who was supposed to be the one taking the money to the Bank and deposit or who was sending the other staff to deposit but receive the feedback and deposit slip, he is the one who is supposed to answer this question".

Relying on the above stated finding and the appellant's cautioned statement (Exh.P6) the learned trial magistrate concluded as follows:-

" In the additional statement he said he did not admit to steal the money but he said and admitted that the money got lost under his supervision, and he promised to reply (sic) the money, on the next day on 25/1/2014... The evidence against the accused person is both, direct and circumstantial. It is direct in the sense that, he was one with the money, he was required to bank them (sic) and he did not do so, and he is unable to show the money

to the owner. It is circumstantial because the surrounding circumstances suggests and prove that he is the one who has the money."

It was on the basis of the above stated findings that the trial court found the appellant guilty and consequently convicted and sentenced him as shown above.

The appellant's appeal to the High Court was supported by the respondent who was represented by Mr. Kassim Nasir, learned State Attorney. That notwithstanding, the appeal was however, dismissed by the learned first appellate judge. She was of the view that the case against the appellant was proved beyond reasonable doubt. She relied firstly on the cautioned statement of the appellant which she found that it was properly admitted and secondly, the evidence of the prosecution witnesses to the effect that the appellant was responsible for collection and banking the money. She was further of the view that the tendered exhibits had sufficiently proved the case against the appellant beyond reasonable doubt. She states as follows in her judgment:-

" *the prosecution side in their evidence stated clearly how the appellant stole the money. The*

bank statements, pay slip and Zed report showed clearly that in some dates the money was not banked, in other dates the amount of money in Zed report and that in bank statements did not tally, thus at the end of the day loss of money was discovered."

In this appeal, the appellant has raised four grounds of appeal as follows:-

" *1. THAT, the learned Judge erred in law and in fact in not finding that the trial of the appellant offended the mandatory provisions of section 214(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*

2. THAT, the learned Judge erred in law and in fact in not finding that the exhibit P6 was recorded outside the prescribed by law (sic) and thus inadmissible.

3. THAT, the learned Judge erred in law in not finding the evidence on record is at variance with the charge sheet.

4. THAT, the learned Judge erred in law and in fact in holding that the charge against

the appellant was proved as required by the law."

At the hearing of the appeal, the appellant, who has completed serving his sentence, was represented by Mr. John Materu assisted by Mr. Sheikh Mfinanga, learned advocates. On its part, the respondent Republic was represented by Mr. Kassim Nasir assisted by Mr. Ignas Mwinuka, learned State Attorneys.

Submitting in support of the 1st ground of appeal, Mr. Materu argued that the trial of the appellant was a nullity because it was conducted in contravention of S. 214 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002], (the CPA). His argument was based on the fact that the proceedings were conducted by two different magistrates. He submitted that, according to the record, the reason for the predecessor magistrate's failure to complete the trial was not given. Section 214(1) of the CPA relied upon by the learned counsel states as follows:-

" 214 (1) where any magistrate, after having heard the whole or any part of the evidence in any trial or conducted in whole or conducted in whole or part any committal proceedings ***is for any reason***

unable to complete the trial or the committal proceedings or his 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 proceedings recoded by his predecessor and may, in the case of a trial and if he considers it necessary, resummons the witness and recommence the trial oar the committal proceedings." [Emphasis added].

Mr. Materu argued firstly, that failure to assign the reason why the predecessor magistrate was unable to complete the trial and secondly, the omission by the successor magistrate to show whether or not he considered it unnecessary to resummon the witnesses offended the said provisions of the CPA. In support of his argument, the learned counsel cited the cases of **Issac Stephano Kilima v. The Republic,** Criminal Appeal No. 273 of 2011 and **Hatwib Salim v. The Republic,** Criminal Appeal No. 372 of 2016 (both unreported).

In response to the submission made in support of the 1st ground of appeal, Mr. Nasir who had at the outset, indicated that he supported all the grounds of appeal except the 1st ground, contended that the reason for change of magistrate is contained in the record of the trial court. He stated that the successor magistrate took over the proceedings following re-assignment of the case to himself in his capacity as the Resident Magistrate In-charge.

It is indeed a correct position that the trial was conducted by two different magistrates. It started before Massati, RM on 13/11/2014. She recorded the evidence of two witnesses (Pw1 and Pw2). On 1/9/2015 however, Tiganga, PRM who was at the material time the Resident Magistrate In-charge, re-assigned the case to himself. It is also a correct position that no reason was given as to why the predecessor magistrate was unable to try the case to its conclusion.

We wish to state here that the decision whether or not to resummon witnesses is at the discretion of the successor magistrate. It is not a requirement of the law and therefore, where the magistrate did not find it necessary to resummon the witnesses and

recommence the hearing, the proceedings will not be vitiated on the ground that an accused person was not informed of that decision – See the case of **Issack Stephano Kilima** (supra).

It is, however, 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. The rationale for this requirement was aptly stated by this Court in the case of **Priscus Kimaro v.R,** Criminal Appeal No. 301 of 2013 (unreported). The Court stated as follows:-

> " *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. Any one for personal reasons could pick up any file and deal with it to the detriment of justice".*

Mr. Nasir contended that the reason for the change of magistrate was assigned. 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.

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 for example the cases of **Issac Stephano Kilima and Hatwilo Salim** (supra), **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 last case, the court cited a passage in the case of **Abdi Masoud Iboma and 3 Others v. Republic**, Criminal Appeal No. 116 of 2015 (unreported) where the Court stated as follows on the effect of non-compliance with S. 214(1) of the CPA:-

> " *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 magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity."

The effect of the breach as stated above is the same in the present case. We thus hereby find that the proceedings before Tinganga PRM, were conducted without jurisdiction.

Ordinarily, where the proceedings are nullified for non-compliance with the provisions of S. 214 of the CPA, an order directing the trial court to recommence the trial from the stage where the first magistrate ended follows. However, in the particular circumstances of this case, we refrain from doing so.

As stated above, the appellant has since been released from prison. Furthermore, the Republic has all along declined to support the appellants conviction for the reason of insufficiency of evidence.

In the circumstances therefore, we find it appropriate, in the interest of justice, to be seized of the record deeming it to have been called under S. 4(3) of the Appellate Jurisdiction Act [Cap. 141

RE 2002] (the AJA) so as to exercise the Court's revisional powers under the said section with a view of satisfying ourselves as to the legality or propriety of the findings of the two courts below leading to the appellant's conviction. This procedure has been sparingly resorted to by the Court for the purpose of intervening *suo motu,* to remedy the situations which would otherwise not be cured in cases like the one at hand - See for example the cases of **Ezra Mkota & Another v The Republic ,** Criminal Appeal No. 23 of 2013, **Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu,** Criminal application No. 6 of 2012 and **The Director of Public Prosecutions v. Liku Mangu,** Criminal Appeal No. 49 of 2009 (all unreported).

As stated above, the appellant's conviction was founded on the prosecution evidence to the effect that he was the person who was responsible to supervise the other employees, to collect the proceeds of sales and send the same to the bank. Both the trial court and the High Court believed that the amount of money found to have been stolen by the appellant, had come into his hands but

did not bank it. The two courts below also relied on exhibit P6 which was found to have been properly admitted in evidence.

We are of the considered view that both the trial court and the High Court misapprehended the evidence. In the first place, Exhibit P.6. was admitted unprocedurally. Having conducted a trial within a trial, the trial magistrate did not make a ruling on the admissibility or otherwise of the document. He proceeded to admit it and promised to make the decision thereof in his judgment but did not do so. He also allowed the prosecution to use the document without letting its contents read over after its admission in evidence.

Furthermore, the relevant part of the statement (Exhibit P.6) which was relied upon to found the appellant's conviction was recorded on 24/1/2014, outside the period of four hours from the time when the appellant was placed under restraint on 22/1/2014. That was done in contravention of S. 50(1)(a) of the CPA. The finding by the High Court that the said section does not apply because the statement was made in addition to the one which was recorded by the appellant on 22/1/2014 is, with respect, erroneous. We are not aware of any provision of the law which precludes the

recording of a second statement from compliance with S. 50(1)(a) of the CPA merely because an accused person had previously recorded another statement. The prosecution was bound to seek extension of time under the relevant sub-section of S. 51 of the CPA before it recorded the statement.

With regard to the evidence of the prosecution witnesses, it is clear that, apart from the allegations that the appellant was the one who collected the amount of money in question for banking, nothing was produced in evidence to show that he was handed over that amount or any part of it. Such evidence was vital because according to PW2, matters of banking were also being done by other persons including PW4.

On the basis of serious deficiencies in the prosecution evidence as shown above, we hold the view that the appellant was wrongly convicted. In the exercise of the powers vested in the Court by S.4(3) of the AJA therefore, we hereby revise the proceedings and the judgment of the High Court and hold that the appellant was erroneously convicted. In the event, we quash the conviction and

set aside the sentence and the order of compensation made by the trial court. Since the appellant has already been released from prison, we make no order to that effect.

DATED at **ARUSHA** this 5th day of December, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL