IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

CRIMINAL APPEAL NO. 28 OF 2022

(From the Resident Magistrate Court of Singida at Singida ,

Criminal Case No. 1 of 2021)

DPP..... APPELLANT

VERSUS

SAID KAULA SUSWI .....RESPONDENT

JUDGMENT

Date of last Order; 06/10/2022

Date of Judgment: 08/11/2022

Mambi, J.

In the Resident Magistrate Court of Singida at Singida the respondent **Said S/O Kaula** was charged with the offence of corrupt transaction contrary to section 15(1) (a) and (2) of the Prevention and Combating of Corruption Act No.11 of 2007 as revised in 2019. The Trial Court found the respondent not guilty as charged. He was acquitted from the charges.

Aggrieved, the appellant (DPP) appealed to this court challenging the decision of the trial court.

In its appeal the appellant (DPP) preferred one main ground that it was wrong for the trial court to acquit the respondent since the prosecution proved the case beyond reasonable doubt. In his brief submission the learned State Attorney also prayed the matter to be referred de novo to the trial court since there were irregularities. One of the irregularities was that the trial court did not make the decision on the prima facie case to answer.

Responding to the grounds of appeal, the learned State Counsel for the respondent briefly submitted that, the trial court was right in its decision since the prosecution did not prove the case beyond reasonable doubt.
Before addressing the ground of appeal I wish to address the legal issue as to whether there were irregularities at the trial court before the defence made their case. The prosecution briefly argued that the trial court did not comply with section 231 of the Criminal procedure Act. They argued that the trial magistrate did not make any order or ruling on the case to answer as per the requirement of the law.

I have thoroughly gone through the trial records such as proceedings and did not find any order or ruling that indicates the accused had case to answer. It appears the magistrate found that the prosecution had established a prima facie case against the accused but there is no order or ruling made by the magistrate. There was one document on the file that show the magistrate made the ruling but that purported ruling was not

signed. Failure to sign the purported ruling meant that ruling was not valid as per the provisions of section 312 of CAP 20 [R.E.2019]

That section provides that:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the persona direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall*** *contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and* ***signed*** *by the presiding officer as of the date on which it is pronounced in open court.*
>
> *(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*
> *(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty.*
>
> *(4) Where at any stage of the trial, a court acquits an accused person, it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court shall record or cause it to be recorded".*

The position of the law is clear that the judgment or ruling must be signed and dated. The record show there was a document that looks like a ruling but it was not signed. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. It is trite law that every judgment/ruling must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must be signed and dated. This can be

reflected from section 312 of CAP 20 [R.E.2019] on the mode and content of the judgment

As I alluded, that the provision is clear that any decision such as judgment or ruling must be signed by the judicial officer who made that decision. The word "shall" implies mandatory as per the Interpretation of Laws Act, Cap 1. Failure to sign the ruling or order it as good as saying there was no ruling.

In my view failure to sign the ruling made that purported ruling fatally defective for contravening section 231 of the Criminal Procedure Act Cap 20 [R.E.2019]. Now if the trial magistrate did NOT make an order or ruling can it be that the accused/respondent had case to answer. The law is clear that once the prosecution has closed its case, the magistrate or judge must make the findings and make an order or ruling (that is signed) as to whether the prosecution has established the prima facie case or not. Having found that the accused has case to answer the court must address the accused to section 231 (for the District or Resident Magistrate Court) or 293 (in case of the High Court) of the Criminal Procedure Act Cap 20.

For instance section 231 provides that:

> *(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.

(2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution.

(3) If the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

(4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses.

Reading between the lines from the above provision it is clear that the word shall under the provisions of the law mandatorily requires the magistrate to make the ruling. Failure to do so implies that the trial Magistrate acted on wrong principles of the law.

Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the

interest of justice. In my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019] which empowers this court to exercise its revision powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. The Court is also empowered in the case of any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

> *"**372.** The High Court may call for and **examine** the record of any criminal proceedings before any subordinate court for **the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,** and as to the regularity of any proceedings of any subordinate court.*
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> Furthermore, section 373 of the same Act provides that:
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> *"(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise **comes to its knowledge**, the High Court may–*

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence*; or*

(b) in the case of any other order other than an order of acquittal, ***alter or reverse such order,*** *save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and*

inspect or direct the inspection of the records of such courts and give such directions as it considers ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney. The law is clear it is proper for this court to invoke revisional powers instead of appeal save in exception cases.

I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

"...In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where ***the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person...****"*

In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is a fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for retrial would be more justice and it is in the interests of justice for me to do so. I am of the considered view that, an order for retrial will not cause any likely of injustice to the appellant.

In the circumstances I therefore remit the file back to the trial court for it to properly prepare the ruling on the case to answer against the respondent and that ruling must be signed and must have the official seal of the court. Once the court has prepared such ruling, the accused person must be addressed in terms of 231 which dictates the accused rights to make defence and call his witnesses and right to an advocate if he wishes to do so.

Where it appear that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with matter. The Trial Court should consider this matter as priority on and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay. It should be noted that all appeals that are remitted back for proper conviction or sentencing need to be dealt expeditiously within a reasonable time.

Depending on the outcome of the new judgment, the appellant shall be at liberty to start afresh the process of appeal.

A. J. MAMBI

JUDGE

8/11/2022

Judgment delivered electronically this 8th day of November, 2022 in presence of both parties.

A. J. MAMBI

JUDGE

8/11/2022

Right of Appeal explained.

A. J. MAMBI

JUDGE

8/11/2022