

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MJASIRI, J.A, MUGASHA, J.A And LILA, J.A) CRIMINAL APPEAL NO. 83 OF 2016 JAMES MARO MAHENDE APPELLANT ~ ·,;;: . · · ; VERSUS THE REPUBLIC-..... RESPONDENT (Appeal from the decision of the High Court of Tanzania · at Dar es Salaam) {Shangwa, J.) dated the 4 th day of December, 2013 in Criminal Appeal No. 162 of 2012 JUDGMENT OF THE COURT sth March & 4th April, 2018 MJASIRI J.A.: This is one of the many cases where section 214(1) of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA) was not complied with. The appellant was charged with armed robbery contrary to section 287A of Penal Code [Cap 16 R.E. 2002] (the Penal Code). He was convicted as charged and was sentenced to 30 years imprisonment. The case was conducted by two different Resident Magistrates. Initially the case was presided by W. Hamza RM (page 18-59 of the record). She heard all the prosecution witnesses. After that Nsana RM took over the conduct of the case and proceeded with 1 · · the defence case. No reasons were given by her as to why Hamza RM, did not finalise the case. Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful hence his second appeal to this Court. It was the prosecution case that on 9th February, 2010 at about 00.20 hours at Melela Village within the District of Mvomero in Morogoro Region, the appellant and four others who were acquitted by the trial court did steal the following items, from Boniphace s/o Simon; one Pistol make Browning M. 7. 765, No. 05543 valued at Shs. 1,200,000/= with fourteen (14) rounds· of ammunition, one computer (Laptop) NO HP NO NV 908225 valued at Tshs. 2,500,000/=, Mobile phones of different types valued at Tshs. 3,000,000/= and cash amounting to TShs. 1,500,000/=. The-appellant injured the victim's right arm with a bush knife and threatened him with a pistol in order to obtain the said properties. At the hearing of the appeal the appellant appeared in person and had no legal representation. The respondent Republic had the services of Ms Zawadi Mbegela, learned State Attorney. 2 · ·~ The appellant being a layman opted for the".State Attorney to submit first. The Court brought to the attention of the learned State Attorney the non-compliance of section 214(1) of the CPA by the trial magistrate. Ms Mbegela, learn_ed State Attorney readily conceded to the non-compliance of section 214(1). She submitted that given the circumstances, the proceedings conducted by Nsana RM and the judgment were a nullity, rendering the proceedings and judgment of the High Court a nullity. The way forward would have been to nullify the proceedings and judgment of the High Court and the proceedings conducted by Nsana RM in the District Court and the judgment, and to remit the file back to the Distdct

Court to finalize the matter in accordance with the requirements under the lavv. However, she pointed out that there were other serious anomalies. For instance, there were glaring variances between the charge sheet and the evidence, from the description and serial number of the pistol, to the amount that was alleged to have been stolen. She also pointed out that the identification evidence which was relied upon by the two courts below was weak, and the appellant was not properly identified. She informed the Court that the appellant has been in custody since 2010. Given the circumstances, she asked the Court to nullify the proceedings and judgment of the High 3 " Court and those of the successor magistrate. She did not pray for a re-trial as she was of the view that it would serve no purpose to remit the file to the trial court given the nature of the evidence on record. The appellant did not have much to say in reply, being unrepresented, he simply asked the Court to set him free. We on our part, are inclined to agree with the learned State Attorney on the way forward given the circumstances. It is evident from the record that the successor magistrate did not comply with requirements under section 214(1) of the CPA. Hon. Hamza heard all the prosecution witnesses. Then Hon. Nsana took over the defence case and drafted the judgment. She never came up with any explanation as to why she took over the case at the defence stage and wrote the judgment. Therefore section 214(1) of the CPA was not complied with. Section 214(1) provides as follows:- "{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 of any committal proceedings is for any reason unable to complete the trial or the committal proceedings within a reasonable time/ another 4 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 recorded by his predecessor and may in the case of a trial and if he considers it necessary resume the witnesses and recommence the trial or the committal proceedings." Section 214 (2) of the CPA provides that:- "{2) Whenever the provision of subsection (1) apply the High Court may whether there be an appeal or not set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had if it is of the opinion that the accused has been materially prejudiced thereby and may order a retrial." [Emphasis ours]. The requirement of giving reason by the successor magistrate is necessary in order to provide a semblance of order and to ensure that the 5 :., accused person gets a fair trial. Apart from the fact that it is a requirement under the law, it is also a good practice for the sake of transparency. The accused person has a right to know why there is a new presiding magistrate. In order for the accused person to have a fair trial, he has a right to know any changes relating to the conduct of his case. In view of the non-compliance with the requirements under the law, the proceedings before the successor magistrate are a nullity. She lacked authority to proceed with the trial and to write the judgment. See *Adam Kitunda v Republic*, Criminal Appeal No. 360 of 2014, *Isaack Stephano Kilima v Republic*, Criminal Appeal No. 273 of 2011 and *Abdalla Said Akilimali v Republic*, Criminal Appeal No. 203 of 2015 (all unreported). In cases of non-compliance with section 214 (1) the Court using its powers under section 4(2) of the Appellate Jurisdiction Act [Cap 141, R.E. 2002] (the Act), would quash the proceedings and judgment of the High Court and those of the successor magistrate and order a retrial from the time the successor magistrate took over. In the instant case in view of the nature and quality of the evidence on record and anomalies in respect

of the variances between the evidence and the charge sheet and the absence of 6 water tight evidence that the appellant was properly identified, we are of the considered view that it is not in the interest of justice to order a re trial. In the result, we hereby exercise our revisional powers under section 4(2) of the Act to revise and quash all proceedings and judgment of the High Court and the proceedings and judgment of the successor magistrate. The appellant is to be released from custody with immediate effect unless otherwise lawfully held . . . Order accordingly. DATED at DAR ES SALAAM this 29 th day of March, 2018. I S. MJASIRI JUSTICE OF APPEAL S. E.A. MUGASHA JUSTICE OF APPEAL S.A. LILA JUSTICE OF APPEAL I certify that this is a true copy of the original. DEPUTY REGISTRAR COURT OF APPEAL 7

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