

TANZANIA / JUDGMENT

kapama hamisi juma others vs republic 2023 tzca 17412 17 july 2023

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17 July 2023

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IN THE COURT OF APPEAL OF TANZANIA AT SHINYANGA (CORAM: MWARI3A. 3.A., KITUSL 3.A., And MGEYEKWA. 3.A.1 CRIMINAL APPEAL NO. 591 OF 2020 KAPAMA HAMISI 3UMA ,..... Ist APPELLANT MUSSA ATHUMAN BUBERWA 2nd APPELLANT LUCAS VICENT MABELA 3rd APPELLANT AMOS MATHAYO NDUHIYI..... 4TH APPELLANT VERSUS THE REPUBLICRESPONDENT (Appeal from the judgment of the High Court of Tanzania, at Shinyanga) (MdemUr 3.1 dated the 27th day of October, 2020 in Criminal Appeal No. 29 of 2019 JUDGMENT OF THE COURT 10th & 17th July, 2023 KITUSL 3.A.: Five persons, including the four appellants, were charged in the Resident Magistrates' Court of Shinyanga at Shinyanga with offences allegedly arising from a bank robbery at National Microfinance Bank (NMB), Maswa branch. In the first to fourth counts, they were jointly charged with Armed Robbery contrary to section 287A of the Penal Code; it being alleged in respect of the first count that on 23rd June, 2010 at about 10.00 hours at Mwalatu village in Maswa District, the appellants stole Tshs 100,000/= and a motor vehicle Reg. No. T. 393 AHU, a Toyota Landcruiser from Saka Basali and Emmanuel Sita. In the second, third and fourth counts respectively it was alleged that at NMB Maswa branch premises the appellants allegedly stole Tshs. 7,974,454.68/= the property of NMB Maswa, two mobile phones belonging to Neema Lusasi and one wallet belonging to Queen Jonathan. In the 5th and 6th counts the appellants were charged with contravening section 4 (1) and section 34 (2) of the Ammunition Act Cap

223. It was alleged in respect of the 5th count that the appellants were, within Maswa District found in possession of firearms that is, SMG No. UC 09639988, SMG No. UC 14071998, a Chinese Pistol with serial No. 3009521 and a hand grenade. In relation to the 6th count the appellants were alleged to have been found in possession of nine round of ammunition for SMG, and seven round of ammunition for pistol and that in both counts the appellants did not have in their possession valid arms licences. The 7th, 8th and 9th counts charged the appellants with grievous harm contrary to section 225 of the Penal Code alleging that on the same date at NMB Maswa branch premises, the appellants maimed and caused Saada Kungulilo, Erasto Nang'ele and PC Abbas respectively, grievous harm. When the appellant denied all charges, trial commenced before Chaba Senior Resident Magistrate, but not without a bit of a drama, as the event shall unfold in due course. A total of 24 witnesses

testified for the prosecution before the appellants mounted their defence, strongly challenging the evidence that had been presented against them by the prosecution. What comes out of the testimonies by the prosecution witnesses is that a day before 23/6/2010, the appellants had negotiated with Saka Bakari (PW1) and Emmanuel Sita (PW2) to hire their motor vehicle Reg. No. T. 393 AHU, Toyota Land Cruiser (the Vehicle) for it to take them from Maswa township to Kabondo village for funeral of a relative. On 23/6/2010 in the course of being driven to the funeral, the appellants took Saka Bakari and Emmanuel Sita hostage and sedated them by forcing them to take sedative drugs then proceeded to use the vehicle to facilitate the robbery at NMB Maswa branch. DC Abbas (PW3) and DC Kelvin (PW4) who were sentry on duty at the bank on 23/6/2010 described the arrival of people in the vehicle initially appearing as just ordinary customers, until shortly later when a loud blast suspected to be of a bomb was heard. That is when it occurred to PW3 and PW4, who were in a guard shed, that the passengers in the vehicle were not ordinary customers but armed bandits. A shoot out ensued between PW3 and PW4 on the one hand and the bandits on the other in the course of which PW3 was shot on the arm, subject of the ninth count. When PW3 and PW4 had ran out of ammunition the bandits moved into the bank building sticking their guns. PW3 and PW4 were candid that they did not identify any. The arrival of the bandits caused panic to customers who were in the banking hall as well as bank employees who were attending them. Some of them claimed to have identified the bandits and later picked the appellants during identification parades conducted by police officers. For instance, Emmanuel Mang'ere (PW8) testified that he identified the first, second and third appellants. He said he was confronted and injured by the first appellant although he admitted during the trial, that he did not look much the same as he had previously looked in the first encounter. Saada Kingulilo (PW13) also a bank official said she identified the first appellant as the person who hit her by a hammer causing her grievous harm relevant to the seventh count. PW23 was a police officer who was hanging about outside the bank premises at a photo studio on his own personal business and testified that he saw all the bandits and identified them as the appellants. He said he even saw them remove their clothes and abandon them at the scene as they remained in different outfits. Those clothes, we must note, were subsequently forwarded to the Chief Government Chemist for DNA .analysis whose report was testified to by Gloria Thomas Machuve (PW10). Some people were able to escape from the bank during the frenzy. Bank employees such as PW8, Queen Jonathan (PW11) and Emmanuel Garubindi (PVV12), escaped from the bank premises. Some bank customers escaped too and there was total confusion within the bank and its vicinity as everyone was running for his life. It is relevant to interpose here, that we shall hear the first appellant say in his defence later, that he was one of the innocent people running in fear, but he ended up being mistaken for one of the bandits. D/CPL Elly (PW5) was one of the police officers who took action by trying to identify and arrest the culprits. He positioned himself at a point from which he could see those running. PW5's sixth sense made him suspect a person so he levelled his gun towards him, yet that man walked towards the policeman. PW5 over powered and arrested that man who turned out to be the first appellant. When searched, the first appellant was found to be in possession of a wallet and

mobile phones. The wallet was later identified by PW1, as her property. When later, PW1 and PW2 came over the effect of sedation, they identified the appellants in identification parades that were separately conducted. The prosecution relied on the evidence of identification, cautioned statements and recent possession of stolen property in pressing for the conviction of the appellants. In defence the first appellant said he had nothing to do with the alleged bank robbery but that he had heard gun shots and panicked like the other innocent people. However, when he saw PW5 and identified him to be a police officer, he walked towards him feeling safer to be with that law enforcement man. That is when, as hinted earlier, PW5 mistook the first appellant for a bandit. The second appellant said that the case was a result of bad blood between him and a policeman stationed in Mwanza where he lived and operated his business. The third appellant also accused a policeman for being the architect of his arrest because he had an eye on his lover. Similarly, the fourth appellant said he had a conflict with D/GPL Emmanuel (PW16) who recorded his cautioned statement (Exhibit P'19), PW16 was, according to the third appellant, using him to run errands of selling khats and their illicit business relationship went sour. All appellants repudiated the cautioned statements for having been obtained through torture. This was accepted by Kasabile, learned Resident Magistrate who decided to attach no evidential value to them. She was however, satisfied by other threads of evidence, that the prosecution had proved the appellants' guilt on all nine counts having rejected the defence of concoction of the case by policemen as well as the defence of alibi. She sentenced the appellants to 30 years imprisonment on each count of armed robbery and to shorter terms in the remaining counts. The trial court ordered the sentences to run concurrently. Mdemu, J. (as he then was) dismissed the first appeal, hence this second appeal. Each appellant has raised his separate memorandum of appeal, from the contents of which there is no mistaking that the appellants are determined to fight. However, one aspect of the case caught our eye although it was not raised by the appellants nor by Ms. Ajuaye Bilishanga Zegell, learned Principal State Attorney who represented the respondent. It is about the drama which we had earlier promised to revert to. Trial had commenced before Chaba, SRM (as he then was) as earlier shown, who managed to record testimonies of PW1 to PW13 but he could not proceed. This is because the appellants raised an oral motion for his recusal, and he granted it after considerable oscillation. Subsequently the case was reassigned to Mwakihaba, RM who declined, stating reasons for that course of action. It was then reassigned to Ilunda, RM who also declined for reasons that are on record. Gasabile, RM was seized with the case upon yet another re-assignment and she was determined to proceed with it, The appellants prayed for her order to rehear the testimonies of PW1 to PW13 but the learned trial magistrate neither granted the prayer nor refused it. She undertook to consider that prayer later upon closure of the prosecution case. The full text of the ruling goes thus:- "Court: today is my first day to see this case file which [has been] re-assigned to me. However, a lot of complaints have been given by accused persons and the learned Advocate Mr. Beda regarding the matter at hand that has stayed in court for a long time without witnesses to be called up. Moreover, the other accused persons 1st - 4th ones are asking for the hearing to start afresh and this to me is one of the reasons to make the proceedings not to go ahead

instead of staying where it reaches. Nevertheless, I heard the complaints by the accused person and consider them as important to their case at hand but I am of the view that, since the case has a list of 50 witnesses and only 13 witnesses have testified in full, let me leave the prayers pending the hearing of other witnesses who are not shown up to give their evidence and at the closure of the prosecution case the prayer to be ruled out. That is my considered view, [emphasis ours]. N. Gasabile - RM 8/4/2013" Trial proceeded before Gasabile, RM who recorded eleven more witnesses. On 4/3/2014 the prosecution closed its case. The learned magistrate rendered the following ruling:- 9 "RULING; It is true that on 8/4/2013 the accused's prayer was put pending so that the remaining witnesses i.e. uncalled witnesses may have time to give their evidence first before the ones already testified. However the accused's prayer depends on court findings if necessary to do so or the matter to proceed by holding the evidence and exhibit already adduced. Again; the findings of this court will also base on the nature of the case which is armed robbery at NMB bank to mean different witnesses, individuals to policemen called to testify from different parts of this nation and also this court has already incurred costs of paying the witnesses and to date some of them might be transferred from one place to another and that will make difficulties on getting them easily. Nevertheless, the provision of the law does not give mandatory order as stated under section 214 of the Criminal Procedure Act, Cap. 20 R.E. 2002. Therefore, this court sees no reasons to recall PW1 to PW13 together with their exhibits since the recorded evidence by Honourable Chaba is readable, understood and clear to be marked as proper evidence adduced at the trial. Therefore, the accused's prayers denied total. N. GASABILE RESIDENT MAGISTRATE 4/3/2014" We asked the parties to address the propriety of these proceedings from where Gasabile, RM took over, especially in view of her differed ruling on whether or not to recall the thirteen witnesses who had testified before Chaba, SRM (as he then was). Ms. Zegeli was quick to respond that the learned trial magistrate proceeded wrongly because the ruling declining to rehear PW1 to PW13 was made without hearing the parties. She submitted and prayed that we should nullify the proceedings from when the appellants prayed for recalling of witnesses. She prayed for an order of retrial. The appellants prayed for their release, citing the fact that they have been in prison for 13 years. They complained that an order of retrial will only cause more injustice to them. 11 Rejoining on whether or not a retrial should be ordered, Ms. Zegeli submitted that as the substance of the evidence and merit of the appeal have not been addressed so far, there will be no basis for the Court doubting the strength of the prosecution case if a retrial is ordered. Our determination of this matter depends on our interpretation of section 214 (1) and (2) of the Criminal Procedure Act, (The CPA). That provision states:- "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 reason, unable 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 proceeding. 12

- (2) Whenever the provisions 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 new trial." The provision of subsection (1) of Section 214 of the CPA above reproduced, requires the magistrate who takes over the case to decide whether to proceed with the evidence that had been recorded by his predecessor or not but in this case Gasabile, RM did not make up her mind whether to recall the witnesses or not. This was utterly wrong for two reasons, in our view. The first is that the order did not give reasons for differing such decision to an unknown future date. [See the case of *Ikindila Wigae v. Republic*, [2005] TLR 365 which insisted that court decisions should not be by a flip of the coin but must assign reasons. Secondly, the court kept the appellants in limbo, uncertain of what lied ahead. Even the prosecution must have been equally uncertain as to whether the witnesses who recorded their evidence before Gasabile, RM were building on the evidence adduced by PW1 to PW13 or not. It is not that this is the first case in which we deal with violation of section 214 (1) of the CPA. In *Charles Yona v. Republic*, Criminal Appeal No. 79 of 2019 we reproduced the following paragraph from the Director of Public Prosecutions v, Laurent Neophitus Chacha & 4 Others, Criminal Appeal No. 252 of 2018 (both unreported). "...change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new magistrate to take over from a previous one, he must record the reasons for doing so and invite the accused person to express his position if he will require that the witnesses whose evidence had been taken by the previous magistrate be recalled to testify before a new magistrate. It is also settled law from the cases cited that non-compliance with section 214 (1) of the CPA renders the proceedings before the new magistrate a nullity for lack of jurisdiction" It follows that the proceedings before Gasabile, RM were, with respect, worse because the appellants then accused had requested that the witnesses be recalled to testify. The learned magistrate ignored the 14 request and proceeded. Sub section (2) of section 214 of the CPA mandates the High Court to nullify such proceedings even where there is no appeal, but that was not done, either. We need to observe that the subsequent order of the trial court refusing to recall the witnesses, not only proceeded without hearing the parties also, but it was based on many extraneous matters such as costs and unavailability of some witnesses. For all those reasons, we invoke our powers under section 4 (2) of the Appellate Jurisdiction Act (AJA) and hereby nullify the proceedings before Gasabile, RM and those before the High Court. We quash the judgments and set aside the sentences. Should we order a retrial as maintained by the learned Principal State Attorney? With respect, we must guard against offending the principles in *Fatehali Manji v. Republic* (1966) 1 E.A. 343 one of which being not to cause prejudice to the other party, and so we will not go along with the learned Principal State Attorney's prayer. This is because, such an order will highly prejudice the appellants who have been in prison for over 13 years, as submitted by them. Even without going into the details of evidence, the injustice

of a retrial after 13 years of serving sentence, dictates that we should not take such a course. Since the course we have taken is sufficient to dispose of the matter before us, we shall neither reproduce, nor address the grounds of appeal. Consequently, we order the appellants' release from prison unless they are lawfully held for some other cause. DATED at SHINYANGA this 14th day of July, 2023. A. G. MWARIJA JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL A. 2. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 17thday of July, 2023 in the presence of the Appellants in person and Mr. Louis Boniface, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. .4a y R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL

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Prepared on 13 October 2026 · Esheria