

TANZANIA / JUDGMENT

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. . IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: LUBUVA. J.A..
RUTAKANGWA. J.A. • And KIMARO, J.A.) . CRIMINAL APPEAL NO. 1§..0 Of ~003 ~USAMIA
ONESMO 'RESPONDENT (Appeal from the conviction of the High Court of
Tanzania _at Moshl) · (Munuo. J.) ~ . - . ~ .. ' · dated the 7 th day of January, 2.003 · · in . . J
Criminal-Appeal· No. 65 of 209.2 . JUDGMENT OF THE COURT 21 September & 4 October 2006
RUTAKANGWA.,JA: , t' This is an appeal against the judgem~nt of the High Court of ' , . Tanzania
which dismissed the.appeal.of the appellant. ~n that appeal the appellant was challenging the
judgement of the District Court of Moshi in Criminal case No. 1118 of 2000. .. Before the trial
District Court the appellant an~ fiye others, namely Fulgence Fortunatus, Michael R. Mushi,
Ewald G. Lekule,.

- Stephen , Kimaro and Justine Kimaro · Sariko were charged with the 2 offence of armed robbery contrary to sections 285 and 286 of the ~ . 11 'l Penal Code. They all denied the charge and a trial proceeded before !f Ms. Moshi, learned Resident Magistrate. Ms. Moshi heard and recorded the evidence of all the prosecution witnesses who were six in total. The prosecution side closed its case on 15th October, 2001. The learned trial Resident Magistrate then reserved" her ruling on whether or not the accused persons had a case to answer. Apparently, before she prepared the reserved ruling, she was transferred to another station and could not continue with the trial to its logical conclusion. The case was then assigned to another , Magistrate Mr. P. Bampikya, learned Resident· . . M~~istrate, for ·continuation of the trial, under section 214 (1) of the Criminal Procedure Act, 1985 (the C.P.A.) before it was alJlended by Act No. 9 -of 2002 which came into force after the commission of the offence ' . and trial subject of this appeal. Mr. Bampikya formally took over the case for the purpose of continuing the trial on 10th December, 20~1. We find it appropriate at this juncture to reproduce the relevant provisions of the said section 214 of the C.P.A. • i l . \ i · · 1 · ~: 3 , f 'i These' are subsections (1) and (2) which read as follows before ! the section was amended by Act No. 9 of 2002:- "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 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 re-summon the witnesses and recommence the trial or the committal proceedings or otherwise subject to subsection (2).

(2) Whenever the provision of subsection

(1) applies:- 4

(a) in any trial the accused may, when the (sic) such other magistrate commences his proceedings demand that the witnesses or any of them be re- i summoned and re-heard and j shall be informed of such right by the second magistrate when he commences his proceedings.

(b) 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." (emphasis is ours). In the subsequent proceedings which eventually led to the conviction of the appellant, the learned second trial Resident Magistrate did not comply at all with the provisions of section 214 (1) and (2) of the C.P.A. extracted above. Needless to over emphasize here is the fact that subsection (2) (a) is couched in mandatory '., (I <, ' ' ll f 5 f' terms. Instead, upon taking over the trial of the case, without much 'j 1 ado, the second trial Resident Magistrate proceeded to write the l I } reserved ruling which he delivered on 7th February, 2002. The appellant, Fulgence Fortunatus and Michael R. Mushi were found to have a case to answer while the rest were acquitted under section 230 of the C.P.A. Thereafter, acting on the evidence wholly recorded by his predecessor, the second trial Resident Magistrate found the three accused persons guilty . as charged, convicted them and sentenced them to thirty (30) years imprisonment each and twelve

(12) strokes of the cane each. The convictions of the appellant and his colleagues were based primarily on the visual identification evidence of some of the prosecution witnesses whom the second trial magistrate found to have been truthful. Being aggrieved by the conviction and sentence the trio appealed, but separately. to the High Court at Moshi. The appeal of the appellant which was heard t first by a different judge was found wanting in merits. It was accordingly dismissed in its entirety. Again he was dissatisfied with the outcome of the appeal and hence this appeal. 6 At his trial and in the High Court the appellant was advocated for by Mr. Urrio, learned advocate. In this appeal he is being i I .. ! I., j represented by Mr. Njau, learned advocate. Mr. Njau has filed a r memorandum of appeal, containing four (4) grounds of appeal. At lt the hearing of the appeal Mr. Njau abandoned the third ground. The t' I remaining grounds of appeal attacked the trial Resident Magistrate and the appellate judge for erring in law and on the facts in convicting the appellant as charged in the absence of any credible evidence incriminating him and on the basis of the identification parade evidence which parade was allegedly conducted unlawfully. The other ground of complaint is that the learned second trial :, 'l' magistrate never complied with the

mandatory provisions of section 214 of the C.P.A. as it stood at the time he took over the trial. In this appeal, the respondent Republic was represented by Mrs. Lyimo, learned Principal State Attorney. We shall first deal with the legal consequences of the failure by the trial Resident Magistrate to comply with the provisions of section 214 (1) and (2) (a) of the C.P.A. as it stood on 10th December 2001, an issue which was never considered by the learned judge on first appeal in the High Court. Submitting in support of this ground of appeal, Mr. Njau urged us to accept it as a fact that the second trial magistrate did not

- address his mind on the provisions of the said section 214 (1) of the C.P.A.. As a result, Mr. Njau submitted, the second trial magistrate did not inform the appellant of his right to demand the witnesses who testified before Ms. Moshi, Resident Magistrate, to be re-summoned and re-heard. To him, the second trial magistrate had a duty to do so as the provisions of the then section 214 (2) (a) before its amendment were couched in mandatory terms. According to him failure to do so was fatal to the subsequent proceedings before Mr. Bampikya, Resident Magistrate. He urged the Court to declare the proceedings a nullity including the judgement of the trial court. carrying his argument further Mr. Njau submitted that since the proceedings in the High Court were premised upon invalid proceedings before Mr. Bampikya, Resident Magistrate, the subsequent proceedings in the High Court and the judgement of the High Court therefrom should also be declared a nullity, quashed and set aside and a re-trial to be ordered. On her part, Mrs. Lyimo who had earlier supported the conviction candidly conceded to this glaring procedural irregularity. She accordingly supported Mr. Njau and urged us to nullify part of the proceedings in the trial District Court from the stage where Mr. Bampikya, Resident Magistrate took over and order a re-trial from that stage. That the learned second trial Resident Magistrate did not comply with the mandatory provisions of section 214 (2) (a) of the C.P.A. is beyond dispute. That the High Court on appeal overlooked this irregularity and did not decide on it is also not disputed. The issue here is what are the legal consequences of the second trial Resident Magistrate's failure to comply with section 214 of the C.P.A. This issue becomes more pertinent and pressing when it is considered that the case was decided on the basis of the credibility of the prosecution witnesses whom the second trial Resident Magistrate had not seen testify. Recently, this Court, in the case of Richard Kamugisha @ Charles Simon and 5 Others v. R., Criminal Appeal No. 59 of 2004 observed that "the courts have been cautious in situations where a single trial is presided over by more than one magistrate". The Court cited with approval the holding in the case of Remebisele s/o Elisaro v. R. (1967) HCD n.72 to the effect that: "The discretion given to a magistrate by the Criminal Procedure Code section 196 (now section 214 of the Criminal Procedure Act,

- [1985] should be exercised with great care, for the primary purpose of the hearing is to permit the court to observe the demeanour and evaluate the credibility of all the witnesses. In the present case the charges were grave and the accused persons vigorously contested the allegations of the prosecution witnesses ... " As the appellant in that case was never informed of his right to re-summon the witnesses, the conviction was quashed and a re-

trial was ordered. In more or less similar circumstances this Court in Richard Kamugisha's case (supra), held as follows:- "We have cited the above cases to illustrate that where a trial is conducted by more than one magistrate, the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses. The word used in section- 214 (1) of the Criminal Procedure Act, 1985 is 'may' which indicates discretion but in view of the fact that the right to a fair trial is fundamental, the court has an obligation to conduct a fair trial in all respects. We are hesitant to say that where, as is the case here, the third magistrate only heard 3 defence witnesses and did not take the evidence of the five prosecution witnesses such magistrate adjudicated upon and determined the case fairly". (emphasis is ours). Finally, the Court found that the non-compliance was a fundamental irregularity. Consequently, the proceedings of the trial, judgement and appeal therefrom were nullified. The Court, however, did not order a re-trial because the Republic did not support the conviction. ; In the present appeal we are satisfied that as the law stood then, the second trial magistrate had no discretion to inform the accused persons, including the appellant, their statutory rights to have the prosecution witnesses re-summoned and re-heard if it were so demanded by the accused after being informed of the right. That he did not do so was a fatal and incurable irregularity. The appellant and his co-accused as already shown were convicted in a case whose determination entirely depended upon an evaluation of the credibility of the prosecution witnesses. As the second magistrate who convicted the appellant never saw these witnesses, it cannot be safely held that the appellant and his co-accused were not materially prejudiced by this procedural irregularity. We accordingly nullify and set aside the proceedings in the trial district court from 10th December 2001 onwards and the judgement therefrom. As the proceedings before the High Court in the appeal filed by the appellant were based on void proceedings before Mr Bampikya, Resident Magistrate, the same as well as the judgement therefrom, are also nullified, quashed and set aside. Given the serious nature of the charge and the undisputed fact that the proceedings before Ms. Moshi, Resident Magistrate were not flawed in any way, we think it is in the interests of justice to order a re-trial in the same court under a magistrate of competent jurisdiction, from the stage where the second magistrate took over in compliance with the provisions of the law as it was on 10th December, 2001. In view of the course of action we have taken, the conviction and sentence ... are also quashed and set aside. We are aware of the fact that the appellant was first arraigned in the year 2000. Before his conviction and sentence on 22nd March, 2002, he was in remand prison. In view of this the re-trial should commence as early as possible and expeditiously conducted. It is so ordered. DATED at ARUSHA this 4th day of October, 2006. D.Z.LUBUVA . JUSTICE OF APPEAL E.M.K. RUTAKANGWA JUSTICE OF APPEAL N. P. KIMARO JUSTICE OF APPEAL . . . , _ , ... ~ ~ 1 ; 13 . I certify that this is a true copy of the original. MANYIKA) REGISTRAR . . I I ; iM ~ ' I

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