

TANZANIA / JUDGMENT

20170830 TZHC Dar es Salaam1

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
CRIMINAL APPEAL NO. 292 OF 2016 (Original Criminal Case No 216 of 2003, of the Resident
Magistrates' Court, Dar es Salaam at Kisutu)

1. SAM SEMPEMBWA 1 st APPELLANT
2. HERMAN FRANCIS SARIA2 nd APPELLANT VERSUS THE
REPUBLIC RESPONDENT Date of last Order: 26/7/201 7
Date of Judgment: 30/8/2017

JUDGMENT

Munisi, J. Sam Sempembwa and Herman Francis Sario, the appellants herein above were arraigned before the Resident Magistrates' Court of Dar es Salaam Region at Kisutu, charged with the offence of Armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 RE 2002. According to the prosecution, on 27 I 1/2003 at Crown Finance Union Bank, along Indira Gandhi/Mosque Street within Ilala District in Dar es Salaam Region, the two appellants did steal one fire arm make short gun 12 bore Mossberg with serial No. L. 662246 and car No. 66875 valued at Tshs. 600,000/= the property of crown Finance Union Bank and immediately before such stealing did shoot one Emmanuel S/O Mbande. To prove the allegation, the prosecution called six witnesses while the appellants testified on their own behalf and did not call any witness. At the conclusion of the trial, the presiding magistrate was satisfied that the prosecution had proved their case against the appellants to the required standard and 1 convicted them as charged, sentencing them to 30 years imprisonment. Aggrieved by the decision, the appellants filed an appeal comprised of four grounds of appeal which revolved mainly on factual issues charging that the evidence was too weak to sustain the conviction. On 26/7/2017, when the appeal was called on for hearing, the two appellants appeared in person fending for themselves, while Miss Aziza Mhina, learned State Attorney appeared for the respondent/Republic. The 1st appellant addressed the court on behalf of his colleague and expressed their readiness to proceed with the hearing. Miss Mhina on her part invited the court to first address the issue of the regularity of the trial court's proceedings in that the trial was presided over by more than one magistrate and it was not clear whether the provisions of 214 of the Criminal Procedure Act, Cap 20 RE 2002 (CPA) were complied with. Miss Mhina elaborated that the record shows that the trial was initially conducted by Hon. Revocati RM who recorded the whole of the prosecution case. The defence

case was however conducted by another magistrate, Hon. Msongo. The learned State Attorney contended that the record does not show that the provisions of section 214 of the CPA were complied with when the successor magistrate took over the proceedings. She elaborated that the record is silent whether the successor magistrate informed the appellants of their rights prescribed under the said section and that she did not record the reasons for the takeover of the proceedings. She thus invited the court to nullify the trial court's proceeding from 24/6/2005 when Hon Msongo took over proceedings and the judgment prepared thereof and order for a new trial on the part of the proceedings that had been quashed. The appellants objected to the prayer for a retrial on the ground that they had stayed in custody for a long time hence it will not be to the interest of justice if this court is to order a retrial. 2 I have gone through the trial court's proceedings and considered the arguments put forward by both sides. Having gone through the record carefully, I subscribe to Miss Mhina's views that the record discloses serious anomalies. The trial seems to have passed through several hands before its conclusion in 2009. The record shows that the case started with Hon Revocate - RM who had the conduct of the case from June 2003 to June 2004 and she recorded all the prosecution evidence. On 21/6/2004, a different magistrate one F. Nkane - RM presided over the matter and made a ruling that appellants had a case to answer. Thereafter the record reveal a series of adjournments before different magistrates until 24/6/2005 when Hon. Msongo - RM took over the conduct of the trial and partly recorded the evidence of the 1st appellant. From there, a spell of adjournments by different magistrates is observed until March 2009 when again Hon. Msongo - RM resurfaced and continued with the remaining defence evidence and concluded the trial. It is not clear why Hon Msongo - RM did not prepare the judgment, instead, the judgment was prepared and delivered by one O. H. Kingwele - RM on 22/7/2009 I have no doubt the above chronology of events show that the appellants' trial traversed through a really chequered route before it was concluded. Four magistrates had their hands in the trial at different times; i.e. Hon Revocate, Hon. Nkane, Hon. Msongo and Hon Kingwele. Unfortunately the record is dead silent on the reasons for the change of magistrates that occurred. One of the requirements stipulated under section 214 of the CPA is for the reasons to be recorded whenever there is change of trial magistrate. Another requirement set out under the said section is for the successor magistrate to inform the accused persons of the right to rehear or resummons witnesses. The provisions of section 214 provides: 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 3 L 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 subject (2).

(2) Whenever the provision of subsection (1) applies:-

- (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-summoned and re-heard and 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. From the express wording of the above provision, it is clear that in any trial, a successor magistrate is duty bound to inform the accused person/s of the right to re-summon or re-hear any witness before he commences his proceedings. In the instant proceedings the record is very silent on whether at all the appellants were informed of this right. From this factual situation I have no doubt the trial .. offended the provisions of section 214(1) and (2) of the Criminal Procedure Act above. The Court of Appeal in the case of *Elisamia Onesmo VR*, Criminal Appeal No. 160 of 2005 (unreported) cited with approval its earlier position in *Richard 4 Kamugisha @ Charles Simon and 5 Others VR*, Criminal Appeal No. 59 of 2004 (unreported) where it observed that "the courts have been cautious in situations where a single trial is presided over by more than one magistrate." In the latter case the Court quoted with approval an observation made in the case of *Remebisele s/o Elisaro VR* (1967) HCD 72 to the effect: "The discretion given to a magistrate by the Criminal Procedure Code section 196 (now section 214 of the Criminal Procedure Act) 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 case of *Kamugisha*, the Court insisted 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. It further emphasized, thus: "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 " Undoubtedly from the above authoritative decisions, I have no doubt failure to observe strictly the provision of section 214 constitutes a serious irregularity which renders the proceedings and the judgment thereof a nullity. Having found as I have done above and considering the number of magistrates involved in the determination of this case, I have no option but to nullify the whole proceedings. Admittedly, it has challenged my mind as to whether it is in the interest of justice to order a retrial under the circumstances of this case. However, taking regard to the time that had lapsed since the offence is alleged to have been committed in 2003, about 14 years ago and the practicability of a new trial, I am hesitant to order a new trial. I will leave it to the prosecution if they wish to pursue the matter further.

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