

TANZANIA / JUDGMENT

20161025 TZHC Arusha

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TZHCDECIDED
25 October 2016

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AT ARJUS!rH~ CRIMINAL APPEAL NO. 78 Of 2016, (Originating from Residei:,t Magistrate Court of Arusha, Criminal Ca_se No. 1557/2014) t THADEI MSUYA AND 8 OTHERS ,,. APPELLANTS VERSUS THE REPUBLICRESPONDENT .."

JUDGMENT ON APPEAL S.M. MAGHIMBI, l The appellants herein along with three other persons not in this court were charged with the offence of Armed Robbery c/s 287 A of the Penal Code, Cap 16 R.E 2002. The first to fifth appellants were convicted with the same t offence of Armed Robbery and sentenced to serve the sentence of 30 years imprisonment. The sixth appellant on his part was convicted of the cognate offence of receiving stolen properties c/s 311 of the Penal Code and was sentenced to serve an imprisonment term of five years. Aggrieved by both the conviction and sentence so passed against them, the six appellants have lodged this appeal raising six grounds of appeal that:

1. That the trial magistrate erred in law and fact to convict the appellants basing on the defective charge sheet. 1 i :: :; ,;i)f{{{ -.. . .. ,; , · · · · · : : : : 2. That the thai 'm.agistrate erred in :bi; and fact by "falHhg· to ietognlze. that the accused were not taken into court- within 24.hours from they . . have been arrested as the law directs . 3. The trial magistrate erred in law and fact to rely on defective police identification parade to sustain conviction of the appellants.
4. The trial magistrate erred in la~ and fact to convict the appellants while they were not properly identified.
5. That the trial magistrate erred in law and fact by using caution statement of the 2nd , 3rd and 4th accused persons while the statements were not properly taken and therefore defective. . . . 6. That, :the trial Magistrate erred both in law and fact to enter a conviction of appellants whil'e the offence was not proved beyond reasonable doubt. .. I The appellants were represented by Mr. Allan Godian, learned Counsel while the respondent, the· republic was represented by . . Ms. Mary Lucas, learned State Attorney. . . While I· was going through the records of the appeal,· there is a material procedural irregularity that I have observed. The effect of the irregularity renders the whole proceedings a nullity. As per the records, at the trial, the matter was heard before two succeeding magistrates after the then 1st accused person prayed that the first trial magistrate withdraw herself from proceeding with the case. The first trial magistrate recorded the evidence of PW1 to PW9. It was during the recording

of this evidence that procedural irregularities are observed. The recording of the evidence 2

- ...I, • . _ : _ ::! : _/y ;':particularly PVV2 . to .PVV9 vva~ ln ·total contr~ventlon of Section. 210. (i)' (a) ·of the Criminai Procedure Act, Cap 20 RE 2002~ ·,he Section provides that: · '1210.-(1) In-trials, other than trials under section 213, by or before a magistrate, the evidence of the witnes5es shall be recorded in the following manner-
- (a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; (Emphasis supplied) The object of the section 210(1)(a) is to maintain a correct record of the testimony of the witnesses. The provisions of this Section are therefore imperative. Where the Magistrate omitted to record evidence in the mode prescribed by this Section, it is a material error sufficient to set aside the proceedings. The non-compliance with the requirements of this Section would, therefore, not only be an irregularity but an illegality which would vitiate the tria I. · In the current case, the records of the case are clear that this Section was not complied with as the first trial magistrate, while recording the evidence of PW1, upon completion of the testimo~y of the witness, she wrote: "Section 210 of CPA complied with'~ The trial magistrate did not sign the evidence but continued to record the statement of State Attorney on other matters incidental to the proceedings before her. As for the subsequent witnesses, PW2-PW9, not only didn't the trial magistrate sign the testimony of the witness, she did not even put it 3· , statem-ent wou19· not .have cured the irregularity. The effect. to this omission is·that no evide_nce apart from that of PW10-PW12 was re·corded during the trial. To that effect, since we cannot have the proceedings of PW10-PW12 in isolation of the· preceding witnesses as this will prejudice the case of the prosecution; the whole proceedings are hereby nullified. From what is observed in this case, the entire proceedings of the trial court have to be nullified for non~compliance with the Section 210(1) (a)(i) of the CPA. Consequently the judgment, conviction and sentence emanating from the nullified proceedings are also nullified.Having so nullified the next question here ·is~what" is- the--available remedy to· the ·~irregularity? It ·is pertinent to note at this point that the irregularity so observed should not be construed as to warrant acquittal of the accused person. Without prejudice to the outcome thereto, the matter is remitted back to the trial court, under the provisions of Section 361(1)(a)(i) of the CPA, to be heard de-novo before another magistrate. It should be further . noted that the. original Criminal Case No. 1557/2014 was heard by two different magistrates; hence none of the two magistrates should conduct the re-trial of this case. It is so ordered. Dated at Arusha this 13th day of October, 2016 SGD: S.M MAGHIMBI JUDGE 13/10/2016 4! ~· . . ,Co~rt J~d~i-hent is ~vrlt~n by.Hon. 5j;1, M:ag.hlmbl,· Jud6e .. and· denvered ·. today 13/10/2016 by Hon. A.K .. Rumisha/ Deputy Re·gistrar i.n the presence · bf Ms. Msaw.a, State Attorney for the Respondent and .ML Allan Godwin, advocate for the appellant. All appellants ·are present iri person.

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- Right of Appeal is fully explained. ' A.K. R.UMISHA DEPUTY REGISTRAR · 13/10/2016 · I hereby certify that this to be a true copy of the original. DEPUTY REGISTRAR HIGHI COURT ARUSHA ;2q10/a" 5
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