

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**HC. CRIMINAL APPEAL NO. 354 OF 2018**

(Arising from Judgment of the District Court of Nyamagana in Criminal  
Case No. 207 of 2014)

**ISAKA S/O GAINI @ MWASI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Last Order: 17.02.2020*

*Judgment Date: 25.02.2020*

**A.Z.MGEYEKWA, J**

The appellant ISAKA S/O GAINI @ MWASI is charged with Armed Robbery contrary to section 287 A of the Penal Code Cap.16 [R.E.2002] as amended by Act No.03 of 2011.

The particulars of the offence being that Isaka S/O Gaini @ Mwasi on 4<sup>th</sup> December 2014 at about 07:30 hrs at Uhuru Sreet – Mirongo area within Nyamagana District in Mwanza Region stole one (1) mobile phone make Ditel valued Tshs. 80,000/= the property of one Neema D/O Ladislaus. Immediately before and after such stealing, he threatened the said Neema D/O Ladislaus with a knife in order to obtain and retain the said property.

The appellant was brought before the District Court of Nyamagana, where he pleaded not guilty to the charges. Consequently, the appellant was convicted and sentenced as he stands now. Dissatisfied and aggrieved by both conviction and sentence, he appealed to this court.

At the hearing of this appeal, the appellant was fending for himself, unrepresented, whereas the Respondent Republic was represented by Ms. Fyeregete, learned State Attorney.

In support of the appeal the appellant filed four grounds of Appeal which can be crystallized as follows:-

1. *THAT, the manner of recording evidence in the case under appeal was contravened the Criminal Procedure Act. Cap 20 RE 2002.*
2. *THAT, the doctrine of recent Possession has been wrongly invoked as the basis for the appellant's conviction, so far as the Search and Seizure and ownerships of the alleged record stolen phones was predicated on contrived evidence.*
3. *THAT, the identification of the appellant was not well elaborated by the victim, so uncogent and unreliable.*
4. *THAT, the trial court had erred in law to convict and sentenced the appellant who is of a tender age – i.e. 18 years old, so a violation to the child Act.*

The appellant argue general that he is dissatisfied by the decision of the lower court thus he has decided to file an appeal. He prays this court to adopt this grounds of appeal.

Ms. Fyeregete, the learned State Attorney addressed the court that the appellant filed four grounds of appeal and she

submitted that the first ground of the appeal will dispose of the entire appeal. Ms. Fyeregete addressed the court on the procedural irregularities during trial. She briefly submitted that the trial Magistrate did not comply with section 210 (1) of the Criminal Procedure Act Cap.20 [R.E 2002].

She continued to submit that in the trial court's proceedings, the case was before Hon. C. Mushi, RM from the inception to hearing the testimonies of PW1 thereafter Hon. Chitepo, RM took over the matter. Ms. Fyeregete argued that PW2 to PW4 evidence were not in narrative form instead the same were written in reported speech which is not a usual practice. Ms. Fyeregete concluded that in the light of the said incurable irregularities the trial was vitiated and such she urged the court to nullify the evidence of PW2, PW3 and PW4 and order for a retrial.

As to the second and third grounds of appeal, Ms. Fyeregete submitted that the trial Magistrate decision based on identification and the evidence of PW1, PW3, and PW4. She

stated that PW1 narrated how she was robbed and was able to mention the make and colour of the phone. Ms. Fyeregete continued to state that PW1 testified how she and the auxiliary Police caught the appellant in possession of the stolen phone. She went on stating that it is in record how the appellant was arrested and a certificate of seizure was prepared and PW1 proved that the stolen phone belonged to her, therefore the issue of ownership is indisputable.

Submitting on the fourth grounds of appeal, Ms. Fyeregete stated that the appellant himself notified the court that he is 18 years old therefore according to the law he is an adult, the Law of the Child is not applicable in this case.

In conclusion, the learned State Attorney reiterated that the irregularities shortfalls vitiated a retrial.

The appellant in his rejoinder insisted that when the matter was called for hearing he was 14 years old as he is born on 31.12.1997 and was arrested on 05.02.2014, therefore the

applicable law was the Law of the Child. The appellant denied having recorded any statement. He lamented that an Identification Parade as not conducted. He lamented further that PW1 evidence was not supported by any other prosecution witnesses taking to account that the alleged incident occurred in the morning.

In conclusion, the appellant prays this court to do justice and set him free since he has been in prison for a long time.

I have carefully considered the appellant and the submissions of the learned State Attorney, the record of the lower court and the point of determination is whether the trial was flawed with procedural irregularities.

I wish to observe that the trial court recorded the evidence of four prosecution witnesses and the appellant who was the sole witness for the defence. It is in the record that during trial the Hon. Chitepo RM recorded the evidence in form of reported speech. The irregularity begins on page 16 of the

record whereby in respect to PW2 evidence the trial Magistrate began to record in form of reported speech and he continued to record the evidence of PW2, PW3, PW4 and PW5 using the same form of reported speech. The trial Magistrate repeatedly reported the accused evidence in the form of reported speech.

It is undisputed that in the matter under scrutiny, the trial Magistrate recorded the evidence of witnesses in form of reported speech. This was the trend throughout the trial starting from PW2, PW3, PW4 and DW. Part of the evidence of PW2 was recorded as follows:-

*"PW2 saying that now he lives in Sengerema District, Mwanza Region before he was living at Igoma, Mwanza City..."*

It should be noted that the recording of evidence in a criminal trial is regulated by section 210 (1) of the Criminal Procedure Act which provides that:-

*“ 210. -( 1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses 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; and*

*(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.*

In light of the cited provision of law, the recording of the evidence of the witnesses was not in compliance with the law. I and mindful that provision of section 210 of the Criminal Procedure Act Cap. 20 require the recording of the evidence be in narrative form. Now before ordering a retrial, I have gone through the evidence on record and I find no reason to dwell



much on the grounds of appeal as from the foregoing, it is enough to dispose of the appeal at hand. I agree with the learned State Attorney that, there is no any convincing matter which will make me decide otherwise.

Having found that there was an irregularity in recording the witnesses' evidence as mentioned above thus the trial is flawed. I have to nullify the said proceedings and judgment of the District Court of Nyamagana with respect to Criminal Case No.207 of 2014. I however and in the interest of justice I order, the case scheduling for trial be given priority, hearing to end within this 6 months from today, and in the interest of justice, the period that the appellants' have so far served in prison should be taken into account.

Order accordingly.

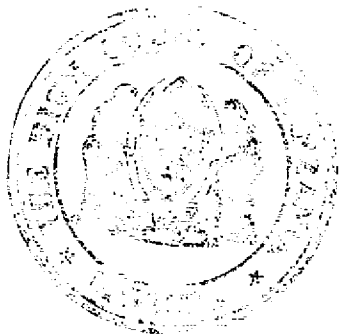
DATED at Mwanza this 25<sup>th</sup> day of February 2020.

  
A.Z MGEVEKWA

**JUDGE**

25.02.2020

Judgment Delivered on 25<sup>th</sup> day of February 2020 in the presence of Ms. Fyeregete, learned State Attorney for the Republic and the appellant.



  
A.Z MGEYEKWA

**JUDGE**

25.02.2020