IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 174 OF 2021

(Originating from Criminal Case No 457 of 2019 of Kinondoni District Court at Kindoni, before Jacob - RM*)*

ZOHARI HAMIS SALUM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11th July, 2022 & 5th August, 2022

E.E. KAKOLAKI J.

Before the District Court of Kinondoni at Kinondoni, the appellant Zohari Hamisi Salum and another not subject to this appeal were arraigned for 3 counts, all of **Armed Robbery**; Contrary to section 287 A of Penal Code, [Cap 16 R.E 2002] now 2019. Briefly it was prosecution's case in all three counts that, on the first day of August, 2018 at Kawe Mzimuni area within Kinondoni District in Dar es Salaam Region, the appellant and his fellow not subject to this appeal stole an assortment of things all properties valued at Tshs. 51,940,000=, for the first count, Tshs. 200,000/= for the second count, Tshs. 5,640,000/=, for the third count, the properties of **Leila Hussein Nathoo**, **Sepapion Alfred Kahuru** and **Hussein Abdul Nathoo** respectively and immediately before and after such stealing did

threaten one **Serapion Alfred Kahuru** with iron bar in order to obtain and retain the said stolen properties.

When called to answer the charge, the appellant pleaded not guilty to all counts, the plea which prompted the prosecution to parade eight (8) witnesses and one exhibit in a bid to prove its case, while appellant and his co-accused fended for themselves and had neither witnesses to call nor exhibits to tender. After full trial, the accused version was not bought by the trial court, as the Court was convinced that, the prosecution case was proved against the accused to the hilt, hence found both of them guilty as charged before convicting and sentencing them to a statutory sentence of 30 years imprisonment on each count, the sentence which was ordered to run concurrently.

In his quest to assail the conviction and sentence, the appellant lodged this appeal on six (6) grounds of appeal going thus:

1. That, the learned trial RM erred in law by convicting the appellant in a case that was conducted contrary to section 231(1) of CPA, Cap 20, RE 2019
2. That, the learned trial RM erred in law and fact to convict the appellant without considering that there is variance between the charge's particulars of offence and the evidence on record regarding

number and particulars of items alleged stolen during robbery incident in the first count.

3. That, the learned trial RM erred in law and fact to convict the appellant by adding extra words in his judgment while those words are not reflected in the record of appeal which is contrary to procedure of composing the same as expounded in case laws.
4. That the trial RM erred in law and fact in convicting the appellant relying on retracted and /repudiated cautioned statement of the appellant (P1) as
   (a) It was illegally recorded out of prescribed time
   (b) It was recorded in the presence of other police officers the act that made the appellant to be not free during that process.
5. That, the learned RM erred in law and in fact to convict the appellant in the 3rd count of robbing and stealing Hussein Abdul Nothoor while it was not proved beyond reasonable doubt that he was stolen with the alleged items and he didn't testify in court to substantiate the same.
6. That, the learned trial RM erred in Law and fact to convict the appellant in a case that was not proved beyond reasonable doubt as

(a) It was poorly investigated and badly prosecuted

(b) It was not proved at all if the appellant was an employee of the complainants as alleged

(c) The recognition evident of the appellant at the scene is not watertight

(d) It was not proved that the appellant participated in the robbery incident.

On the strength of the above grounds, the appellant prays this court to allow the appeal by quashing the conviction and set aside the sentence against him. At the hearing of the appeal which proceeded orally, the appellant appeared in person unrepresented, while respondent enjoyed the services of Mr. Adolf Kisima, learned State Attorney. Upon being invited by the court to expound on his grounds of appeal, the appellant requested leave of the court to adopt his six grounds of appeal as presented earlier on in his petition of appeal and the list of authorities he had lodged in support of his appeal. Then he prayed the court to consider them and allow his appeal by quashing his conviction and set aside the sentence meted on him.

On his side, Mr. Kisima notified the court from the outset of his resistance to the appeal, though in the course of his submission changed his stand

and in a way supported it. He prayed leave of the court to consolidate the 1st and 3rd grounds of appeal and argue them lastly. Nevertheless, in determining this appeal. I am intending to address first the first ground where the center of controversy is whether the trial court adhered to the requirements of the provisions of section 231(1) of Criminal Procedure Act,[Cap. 20 R.E 2019] (the CPA) as complained by the appellant. In addressing this ground Mr. Kisima admitted that, in fact the trial court did not comply with the provisions of section 231(1) of the CPA which requires the magistrate after has ruled out the appellant has a case to answer, to address him in terms of section 231(1)(a) and(b) of the CPA as to how he is going to defend himself and record his answers. He submitted that, since all procedures were not followed, the remedy is to quash the proceedings and remit the file to the trial magistrate to comply with the requirements of the law. He concluded by submitting that, since in this case there is ample evidence to prove the case, then this Court be pleased quash the proceedings from the date when prosecution case was closed, and remit the case to the lower court to comply with the requirements of the law. Appellant being a lay person had nothing useful to add than to maintain his prayer that, this court be pleased to allow the appeal and set him free.

I have dispassionately considered the submission by Mr. Kisima regarding the first ground of appeal and accorded it with weight it deserves. I have also extensively perused the available lower court records in a bid to satisfy myself with the appellant's complaint. As earlier on hinted, the center of controversy is on non -adherence to the provisions of section 231(1) of the CPA. For clarity, I find it prudent to reproduce the sections hereunder as I do:

> ***231***.*-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted* ***the court shall again explain the substance of the charge to the accused and inform him of his right****-*
> *(a)* ***to give evidence whether or not on oath or affirmation, on his own behalf****; and*
> *(b)* ***to call witness in his defence****, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights* ***and shall record the answer****; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.*

The law as stands is coached in mandatory terms that, the trial court shall do the following to the accused person, **one**, once again upon delivery to him the ruling of the case to the answer, explain to him the substance of the charge facing him, **second**, explain to him his rights of entering defence either under oath or affirmation or not, **third**, inform him of the right to call witness, **fourth**, put his answers in record. Any failure of the Court to comply with the requirement of the provisions of section 231(1)(a) and (b) of CPA, in my firm view is not only prejudicial to the accused right of fair hearing but also is a fatal and incurable irregularity. There is plethora of authorities expounding this legal stance. These include the cases of **Cleopa Mchirwa Sospeter Vs. R**, Criminal Appeal No.51 of 2019 [2020] TZCA 287 at ww.tanzlii.org, **Maduhu Sayi @Nigho Vs. R**, Criminal Appeal No 560 of 2016 [2020] TZCA 1723 at www.tanzlii.org, and **Ulilo Hassan Vs. R,** Criminal Appeal No 196 of 2018 CAT at DSM (unreported) and **Maneno Musa Vs. R**, Criminal Appeal No 543 of 2016 [2018] at www.tanzlii.org. In the case of **Maneno Mussa** (supra) the Court of Appeal on the issue akin to this situation observed that:

> *"…failure by the trial court to comply with the provisions of section* 231 (1) *of the CPA which safeguards accused persons' right to fair trial; is a fatal omission."*

Insisting on the importance of complying with the mandatory provisions of Section 231 of the CPA in order to provide the accused person with his right to fair hearing as guaranteed by the Constitution of United Republic of Tanzania, 1977, the Court of Appeal in the case of **Alex John Vs. R,** Criminal Appeal No. 129 of 2006 (unreported), cited with approval in the case of **Ulilo Hassan** (supra) and stated that:

> *This is because, in our view, this provision enshrining the fundamental right to hearing, must be given a liberal and purposive construction if it is to be in conformity with the provision of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977... In including this section in the Act, the legislature intended to impose a duty on a trial court to create or provide an environment for fair hearing or a fair trial.*

In this matter glance of an eye at pages 74 and 75 of the typed proceedings has unearthed the undisputed fact that, the trial court did not comply with the provisions of section 231(1) of the CPA to the letters. What transpired is that, after the prosecution had closed its case on 22/04/2021, the case was fixed for ruling on 05/05/2021 though the said ruling was delivered on 10/05/2021. Despite of the record showing the ruling was delivered, I could not find its copy in the record. However this Court still believe the same was composed but went misplaced in the record and therefore can be traced and properly be kept in the trial court

case file. To bring into picture what took place in the trial Court after its delivery, I find it imperative to quote an excerpt from that part of proceedings reading thus:

> ***PP**: For ruling we are ready*
> *Kikoga-RM*
> *10/05/2021*
> ***1st Accused**: I am ready*
> *Kikoga-RM*
> ***2nd Accused:** I am ready*
> *Kikoga-RM*
> ***Court**: ruling delivered in the presence of Esther Chale Learned state Attorney for prosecution and accused in persons.*
> *Kikoga -RM*
> *10/05/2021*
> ***Order***
> *Defence Hearing on 20/05/2021*
> *Proceeding to be typed*
> *AFRIC*
> *Kikoga-RM*
> *10/05/2021*

As reflected above, the record is barren on the manner in which the appellant elected to give evidence and whether or not he intended to call witnesses and tender exhibits in support of his defence, having in mind the fact that he was unrepresented. In my opinion it was a fatal defect to

let him enter his defence without knowing his right and I would hold, the omission prejudiced his rights as to fair trial as it was well stated in the case of **Maduhu Sayi @Nigho** (supra) where the Court of Appeal had this to say:

> *In the case at hand, as submitted by Mr. Katuga, the record does not show the manner in which the appellant elected to give his evidence and whether or not he intended to call witnesses. The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such rights after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel.*

The consequence of non-compliance with such mandatory provision of 231 of CPA as alluded to above is a fatal irregularity with the effect of vitiating the proceedings as it was well adumbrated in a number of cases including the case of **Cleopa Mchiwa Sospeter**(supra) where the Court of Appeal observed that:

> *"…this Court has often times held that failure to comply with the mandatory provisions of section 231 (1) of the CPA, vitiates subsequent proceedings."*

The Court went on to state at page 10 that;

> *"As a result, we agree with Mr. Katuga that the procedural irregularity he outlined calls for our intervention by way of*

our revisional jurisdiction under section 4(2) of the AJA. We as a result, quash and set aside all the proceedings after the last prosecution witness (PW7) in the trial of District Court of Dodoma in Criminal Case No. 16 of 2017 and all subsequent proceedings in the High Court at Dodoma in DC Criminal Appeal No. 4 of 2018."

With the above authority in mind, I thus, for the reasons given above enjoined to invoke the revisional powers conferred to this Court under section 373(1)(a) of the CPA, and proceed to nullify the proceedings from the date when the ruling of the case to answer was handed down onwards, quash appellant's conviction and set the judgment and subsequent orders thereto.

From the foregoing findings, I now turn to consider the remedy under the circumstances. In his submission, Mr. Kisima invited the Court to remit back the file to the trial court for it to comply with the requirements of the law. It should be noted that; there is no hard and fast rule on what should follow after the court has held that section 231(1) has been defied and subsequent proceedings nullified. Each case is decided in its own facts and circumstances prevailing at the time. This principle was well articulated in the case of **Ulilo Hassan** (supra). At page 15 of the Judgment where the Court of Appeal had this to say:

> *There appears to be no hard and fast rule on what should follow where part of the proceedings of the trial court have been nullified by the appellate court for impropriety. From the decided cases, the circumstances of each particular case seem to be the guiding factor. While, for instance, in Maneno Mussa case (supra) as well as in Cleopa Mchiwa case (supra) the court ordered for retrial of the case from the defence stage, in Mabula Julius and Another v. Republic Criminal Appeal No. 562 of 2016 and Maduhu Sayi @ Nigho republic Criminal Appeal No. 560 of 2016 (both unreported), the Court declined to order for a retrial.*

In the instant appeal, having considered the circumstances of the case and the already adduced evidence by the prosecution, it is my finding that an order for retrial would be a proper course. I thus hereby remit back the file to the trial court for compliance with section 231 of the CPA, from the stage or date when the ruling of the case to answer was delivered on 10/05/2021. In the meantime, the appellant should remain in custody to await the procedure of giving his defence after being addressed in terms of section 231 of CPA, and the same should be handled expeditiously. In case the file will be handled by another trial magistrate, section 214 of the CPA should be complied with. The appeal is allowed to that extent.

It is so ordered.

DATED at DAR ES SALAAM this 5th day of August 2022.

E. E. KAKOLAKI

JUDGE

05/08/2022.

The Judgment has been delivered at Dar es Salaam today 05th day of August, 2022 in the presence of the Appellant in person, Ms. Dhamiri Msinde, State Attorney for the Respondent and Mr. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

05/08/2022.