

4 IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 203 OF 2015

ABDALLAH SAIDI AKILIMALIAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mtwara)

(Mzuna, J.)

Dated the 3rd day of October, 2014

In

Criminal Appeal No. 27 of 2013

JUDGEMENT OF THE COURT

7th & 12th October, 2015

MJASIRI, J.A.:

The appellant Abdallah Saidi Akilimali was charged with the commission of unnatural offence contrary to section 154(1) (a) of the Penal Code, Cap 16 R.E 2002 (the Penal Code). He was convicted as charged and was sentenced to 30 years imprisonment. Aggrieved by the decision of the District Court he appealed to the High Court. His appeal was unsuccessful, hence the second appeal to this Court.

At the hearing of the appeal. The appellant appeared in person and did not have the benefit of having legal representation, while the

respondent Republic was represented by Ms Mwahija Ahmed, learned Senior State Attorney.

Before the commencement of hearing, the Court brought to the attention of the appellant and the learned Senior State Attorney the irregularity observed in the record of appeal relating to the trial in the District Court.

The trial in the District Court was conducted by Mr. S.G. Cleophas, Principal District Magistrate. According to the record Mr. Cleophas conducted the trial up to the final stage, when the defence case was presented by the appellant. However the judgment was delivered, by A.L. Chuwa, District Resident Magistrate. Although Mr. Chuwa did not feature at all at the trial and never heard a single witness he was the one who drafted and delivered the judgment. Mr. Chuwa never came up with any explanation as to why he took over the case and wrote the judgment. We were concerned that the abrupt involvement of Mr. Chuwa in the case was quite strange. We therefore wanted the parties to address us on this aspect.

Ms. Ahmed submitted that Mr. Chuwa should have provided valid reasons why Mr. Cleophas did not finalize the judgment. Ms. Ahmed

stated that section 214 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the Criminal Procedure Act) was not complied with. She asked the Court to nullify the proceedings of the District Court from the stage Mr. Chuwa took over the conduct of the case, that is the judgment of the District Court, and the proceedings and judgment of the High Court and to order a retrial.

The appellant on his part, informed the Court that he did not quite grasp the issue. Being a layman and having no legal representation it was not easy for him to comprehend since a point of law was involved.

The appellant has a right to a fair trial and this right is guaranteed under the Constitution of the United Republic of Tanzania.

As rightly pointed out by the learned State Attorney section 214 (1) and (2) of the Criminal Procedure Act was not complied with. Section 214 (1) and (2) of the Criminal Procedure Act provides as under:-

*"(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 of any committal proceedings **is for any reason unable***

*to complete the trial or the committal proceedings within a reasonable time, another magistrate who has and who 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 proceeding recorded by his predecessor and may in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.***

*(2) Whenever the provision of subsection (1) apply 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 provided].

In the instant case the magistrate who had taken over the conduct of the case (Chuwa DRM) did not state any reasons why the predecessor magistrate (Cleophas PDM) who had heard and recorded the whole prosecution evidence and the defence evidence was unable to complete the trial by writing the judgment. According to section 214 (1) of the CPA, it is absolutely necessary that the magistrate taking over the case should state the reasons for doing so. There must be some semblance of order to ensure that the accused person gets a fair trial. One magistrate cannot simply grab a file which has been handled by another colleague and simply write the judgment without stating the reasons for doing so. Apart from the fact that it is a requirement under the law, it is a good practice for the sake of transparency. The accused person has a right to know why there is a new presiding magistrate, after a case has been finalised by another magistrate. In order to ensure that an accused person has a fair trial, he has a right to know any changes relating to the conduct of his case.

In view of the blatant non compliance with the requirements under the law, the proceedings before the second magistrate are a nullity. Failure to give reasons for taking over the case, the successor magistrate lacked authority to proceed with the trial and to write the judgment.

Having said that it follows as the night follows day that the Court has to use its powers under section 4 (2) of the Appellate Jurisdiction Act, 1979 (the Act) to revise and quash the proceedings and judgment conducted by Chuwa, DRM.

See – **Adam Kitundu v Republic**, Criminal Appeal No. 360 of 2014 CAT and **Isaack Stephano Kilima v Republic**, Criminal Appeal No. 273 of 2011 CAT (both unreported).

In **Eustace v Republic** (1970) EA 393 it was stated thus:-

"In the absence of statutory provision one magistrate could not continue a trial begun by another."

Section 214 (1) of the Criminal Procedure Act requires reasons to be provided, this statutory requirement has to be met.

In the result, we hereby exercise our revisional powers under section 4(2) of the Act, to revise and quash all the proceedings beginning with those conducted by Chuwa DRM and those of the first appellate Court. We also set aside the sentence and order a re-trial with effect from the date the defence case was closed and the trial court adjourned for judgment.

case in the District Court. We hereby direct that the matter should be handled expeditiously taking into account that the charge against the appellant was brought since May, 26, 2009. The time the appellant spent in prison serving the sentence of 30 years imprisonment should be taken into consideration should the new trial result in a conviction.

Order accordingly.

DATED at **MTWARA** this 10th day of October, 2015.


M.S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is the true copy of the original.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL