

**IN THE COURT OF APPEAL OF TANZANIA  
AT IRINGA**

**(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)**

**CRIMINAL APPEAL NO. 482 OF 2015**

**EMMANUEL JACKSON KAMWELA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania  
At Iringa)**

**(Kihwelo, J.)**

**Dated the 23<sup>rd</sup> day of September, 2015**

**in**

**DC. Criminal Appeal No. 10/2014**

-----

**JUDGMENT OF THE COURT**

26<sup>th</sup> & 29<sup>th</sup> July, 2016

**MJASIRI, J.A.:**

The appellant Emmanuel Jackson Kamwela and two others, Efuraim Mwambene and Edwin Mhagama were charged with the offence of armed robbery contrary to section 287A of the Penal Code. They were all convicted as charged by the District Court of Iringa District and were sentenced to 30 years imprisonment.

Aggrieved by the decision of the District Court they appealed to the High Court. The appellant's appeal was unsuccessful and hence this second

appeal to this Court. The other two appellants were found not guilty and their appeal was allowed by the High Court.

It was the prosecution's case that on or about the 23<sup>rd</sup> day of February, 2012 at Ipogolo area within the Municipality of Iringa, they stole a Toyota Corona motor vehicle with registration No T362 AVD valued at Shs. 8,000,000, being the property of Seraphino Atilyo Uhagile of Dar es Salaam and used violence against one Mubira Mpangala in order to obtain and retain the said motor vehicle.

The appellant lodged a six-point memorandum of appeal in Court seeking his conviction to be quashed.

At the hearing of the appeal, the appellant did not have the benefit of a legal counsel and was unrepresented. The respondent Republic was represented by Ms Blandina Manyanda, learned State Attorney. The appellant asked the Court to consider his grounds of appeal as part of his submissions. He opted to let the State Attorney submit first.

Before proceeding to hear the submissions by the learned State Attorney, she was asked to address the Court as to whether or not the appellant had a fair trial and was properly convicted. What led the Court to

pursue this avenue is that upon perusal of the record we found that the case in the District Court was handled by three different magistrates.

At the commencement of the trial, the case was presided by Hon. C.P. Mkeha, S.R.M. He heard the testimonies of PW1, PW2 and PW3. Subsequent to that, on August 29, 2012, Hon. F.S.K. Lwila R.M. presided over the matter. He duly addressed the appellant and the other two accused persons in terms of section 214 (1) of the Criminal Procedure Act (the CPA). He informed them that the case was assigned to him as the presiding magistrate was on leave. The appellants did not have any objection for him to proceed, and did not request for the witnesses to be recalled.

Hon. Lwila, P.D.M., therefore proceeded to hear the two remaining witnesses, PW4 and PW5 and the defence case. However strange as it may seem, on June 19, 2013 the judgment was composed and delivered by Hon. H.R. Mareng, R.M. He neither saw the parties nor informed them that he has taken over the matter. He opted to address the requirements under section 214 (1) of the CPA by writing a preamble in the judgment, where he stated thus:-

*"This matter was heard by my learned brother Magistrate (P.D.M.), the late F.S.K. Lwila, unfortunately he passed away before preparing the judgment, here is the judgment."*

Ms. Manyanda on her part submitted that it was wrong for Hon. Mareng, R.M. to compose the judgment without advising the accused persons of their rights under section 214 (1) of the CPA. The appellant did not therefore have a fair trial and was denied justice. She urged the Court to order a retrial. She also submitted that as the appellant has been in custody for four years, account should be taken of the time he spent in prison, in the event that he is found guilty in the new trial. The appellant on his part did not have much to say. He agreed with the submissions made by the learned State Attorney. He left the matter in the hands of the Court.

We on our part must state at the outset that the appellant did not have a fair trial, a right which is enshrined in the constitution of the United Republic of Tanzania under Article 13 (6) (a). The appellant was entitled to a fair hearing by an unbiased tribunal. The appellant was facing a serious charge of armed robbery which carries a mandatory minimum sentence of 30 years imprisonment. The case was heard by two different magistrates.

After the demise of the second magistrate, a third magistrate took over and simply composed the judgment, convicted the appellant and two others and sentenced them to 30 years imprisonment, without even informing them of what had transpired.

Section 214 (1) of the CPA requires that where there is a change of magistrate, a reason has to be provided by the succeeding magistrate and the accused person has to be informed accordingly.

Section 214 (1) of the CPA provides as follows:-

*"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 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 necessary, resummon the witnesses and recommence the trial or the committal proceedings.**"*

[Emphasis provided].

In **Salim Hussein v Republic**, Criminal Appeal No. 3 of 2011, CAT (unreported) this Court stated thus:-

*"We have no lurking doubts in the implications in law of the permissive language used in section 214 (1) of the Act. But this Court has time without number insisted that **the allowed discretion must be exercised judicially in the interests of advancing justice.***

[Emphasis provided].

In the case of **Richard Kamugisha @ Charles Samson and Five Others v Republic**, Criminal Appeal No. 59 of 2002 CAT (unreported), which was referred in **Salim Hussein** (supra), the Court succinctly held that:-

*"We have cited the above cases to illustrate 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. The word used in section 214 (1) of the CPA 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.”*

[Emphasis added].

In the instant case the situation is even more serious. The second magistrate died before writing the judgment. Therefore the magistrate who took over from him should not have composed the judgment before advising the parties on their rights. He did not take the evidence of any of the 5 witnesses nor the defence case. The third magistrate was therefore not mandated by section 214 (1) of the CPA to write a judgment in a case he never tried. He did not therefore reach a fair decision.

The appellant in the circumstance was denied his fundamental right to a fair trial under Article 13 (6) (a) of the Constitution, while the right to be heard being paramount. There was a breach of natural justice, that is the right to be heard and the rule against bias. By composing the judgment without hearing the parties, the magistrate defied the basic concept of impartiality. In **Salim Hussein** (supra) the Court held that a judgment which was not written by the trial magistrate was not a judgment at law.

For the foregoing reasons we are constrained to find that the appellant did not get a fair trial. We nullify the proceedings and judgment

of the District Court and the proceedings and judgment of the High Court. We set aside the sentence of 30 years imprisonment imposed on the appellant and order a retrial of the appellant before another magistrate. In the event that the appellant is found guilty in the subsequent trial, consideration should be given of the four (4) years, he spent in prison.

Order accordingly.

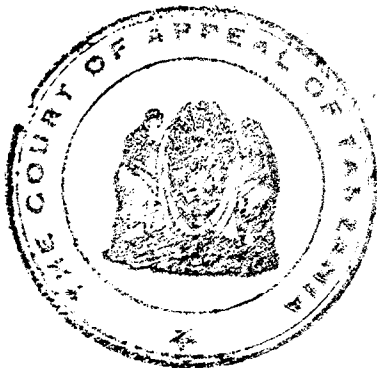
**DATED** at **IRINGA** this 27<sup>th</sup> day of July, 2016.

S. MIASIRI  
**JUSTICE OF APPEAL**

I. H. JUMA  
**JUSTICE OF APPEAL**

S. MUGASHA  
**JUSTICE OF APPEAL**

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



  
B. R. NYAKI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**