

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

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

CRIMINAL APPEAL NO. 340 OF 2014

JOHN S/O LUKOSI..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Ndunguru S.R.M. Ext. Jurisdiction)

Dated the 22nd day of September, 2014

in

Criminal Appeal No. 5 of 2014

JUDGMENT OF THE COURT

29th July & 1st August, 2016.

MJASIRI, J.A.:

The appellant John Lukosi was charged with rape contrary to sections 130 (1) and 131 of the Penal Code. He was convicted as charged and was sentenced to life imprisonment. Aggrieved by the decision of the trial court, he appealed to the High Court. His appeal was unsuccessful hence his second appeal to this Court.

It was the prosecution case that on the 26th day of April, 2006 at about 12:00 hours at Kalenga Village in Iringa Region the appellant did have carnal knowledge with Rosena Majinga, who was four (4) years old.

The appellant denied the charge. He presented a six-point memorandum of appeal challenging his conviction. His main ground of appeal is that the appellant did not receive a fair trial. His complaint was that there was a change of magistrates and the successor magistrate did not give the appellant a possible option of having the prosecution witnesses recalled.

At the hearing of the appeal, the appellant appeared in person and was unrepresented, while the respondent Republic had the services of Ms. Kasana Maziku, learned State Attorney.

The appellant opted to let the State Attorney submit first. Ms. Maziku had initially filed a notice of preliminary objection, but sought leave to withdraw the same. She did not support the conviction of the appellant. She submitted on ground No. 3 relating to the change of magistrates. According to her, the appellant did not have a fair trial. The magistrate who took over the case should have asked the appellant, whether or not he wished to have some of the witnesses recalled. The successor magistrate did not even advise the appellant why he was taking over from the previous magistrate. He only stated that "*the case will proceed from where it ended*". She therefore asked the Court to nullify the proceedings, quash the conviction of the District Court and set aside the sentence. This

means nullifying the proceedings and judgment of the High Court as well. She asked the Court to order a retrial. She relied on the case of **Salimu Hussein v Republic**, Criminal Appeal No. 3 of 2011 CAT (unreported).

The appellant being unrepresented, readily agreed with the learned State Attorney. She informed the Court that he was leaving the matter in the hands of the Court.

The pivotal issue for consideration is whether or not the appellant received a fair trial. In the District Court, the matter was initially being handled by Hon. S.K. Majinge District Magistrate. He heard the evidence of four (4) witnesses. The second magistrate Hon. F.N. Matogolo, then took over the conduct of the case. He addressed the appellant in terms of section 214 of the Criminal Procedure Act and informed him that the "*the matter will proceed from where it ended*". The prosecution case was closed and he proceeded with the defence case and subsequently composed the judgment.

This means, the second magistrate did not have any opportunity to hear the prosecution witnesses. He therefore composed the judgment without hearing the evidence. As the appellant was facing a grievous

charge with a heavy penalty of life imprisonment, it was of utmost importance for the second magistrate to recall the witnesses.

We therefore entirely agree with the learned State Attorney, that the appellant was highly prejudiced and did not receive a fair trial.

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

*“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 ours.]

Section 312 (1) of the CPA provides that every judgment under the provisions of section 311 shall be written by or reduced to writing under

the personal direction and superintendence of the presiding judge or magistrate.

In the instant case the second magistrate only heard the defence case and did not take the evidence of the four prosecution witnesses. He therefore did not adjudicate the case fairly.

In **Richard Kamugisha @ Charles Samson and Five Others v Republic**, Criminal Appeal No. 59 of 2002 the Court stated 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 court further stated that:-

"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."

In **Remebisele s/o Edison v R.** (1967) HCD No. 72 which was referred in **Salimu Hussein** (supra) it was stated thus:-

"the primary purpose of the hearing is to permit the Court to observe the demeanor and evaluate the credibility of all the witnesses."

In the present case, the second magistrate did not have the opportunity of hearing the witnesses and/or to observe their demeanor. He only heard the defence case. The proceedings of the District Court were therefore a nullity. See – **Elisamia Onesmo v Republic**, Criminal Appeal No. 160 of 2003 and **Shabani s/o Said v Republic**, Criminal Appeal No. 267 of 2009 CAT (both unreported).

In the light of what we have stated hereinabove, we hereby invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 to quash the proceedings and judgment of the District Court and set aside the sentence of life imprisonment meted out to the appellant. Having done that, the proceedings and judgment of the High Court are also hereby quashed.

Following our orders, the next step would have been to order a re-trial. However in the instant case the appellant has been in prison for a period of ten (10) years. This has taxed our minds a great deal. We are therefore of the considered view that we should leave the matter to the wisdom of the Director for Public Prosecutions (the DPP) to make a

decision as to whether or not to prefer a fresh charge against the appellant.

Order accordingly.

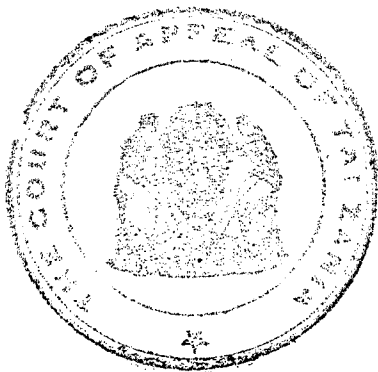
DATED at **IRINGA** this 30th day of July, 2016.

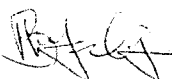
S. MJASIRI
JUSTICE OF APPEAL

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