

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

(CORAM: LUANDA, J. A., MMILLA, J. A., And MKUYE, J. A.)

CRIMINAL APPEAL NO. 464 OF 2015

BASHIRI IBRAHIM @ JOSEPH.....APPELLANT

VERSUS

**THE REPUBLIC RESPONDENT
(Appeal from the Decision/ Judgment of the High Court of Tanzania
at Mwanza)**

(De-Mello, J.)

**Dated the 7th day of September, 2015
In
Criminal Appeal No. 63 of 2014**

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JUDGMENT OF THE COURT

12th & 15th December, 2017

MKUYE, J.A.:

This is a second appeal. The appellant, BASHIRI IBRAHIM @ JOSEPH was charged with the offence of rape contrary to section 130 (1) and (2)(e), and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (the Code), in the District Court of Nyamagana at Mwanza. It was alleged that on 11/10/2011 at Mkolani area within Nyamagana District in the City and Region of Mwanza, did have sexual intercourse with Flora d/o Rojas, a girl aged 15 years old. At the end of the trial the appellant was convicted and sentenced to thirty years imprisonment. Aggrieved, he

appealed to the High Court but his appeal was dismissed. Still protesting for his innocence he has brought this appeal to this Court whereby he has raised six grounds of appeal.

The facts giving rise to this appeal are as follows:-

The victim Flora Rogers (PW3) was living at Mkolani area. On 11/5/2011 in the afternoon she went to fetch water at the well. While there she met the appellant who asked her if she could provide some water as a labourer to his mansions at his home PW1 agreed. Following her agreement to perform that job, PW1 took her bucket of water and joined the appellant to his home. On reaching there, she took the bucket of water down. Then the appellant asked her to take a drum out of one of the rooms but it appears it was a mere trick. His intention was to lure her to go inside. As PW1 went to the said room, the appellant followed her and felled her on the floor. When she tried to raised alarm, the appellant filled her mouth with some old clothes. He also tied her hands and legs and undressed her. He also undressed himself, applied three condoms on his penis and raped the victim who started bleeding. On realizing that PW1 was bleeding the appellant stopped the action and went outside while closing the door. The victim crawled from that room to the veranda, untied her hands and legs and she raised alarm. Some people, including PW2 responded to the alarm and upon being told the

story, they took her to the Police Station where the PF3 was issued and was taken to the hospital for treatment. There after the appellant was arrested and arraigned before the court.

In his defence the appellant denied involvement with the offence or even to know the victim.

When the appeal was called on for hearing the appellant appeared in person and was unrepresented; whereas the respondent Republic was represented by Ms Angel Nchalla, learned Senior State Attorney, assisted by Ms Mwanahawa Changale learned State Attorney.

Understandably, the appellant being a lay person opted to let the learned Senior State Attorney submit first and reserved his right to respond later if need arises.

From the outset, we wished to satisfy ourselves as to the propriety of the appeal, the focus being on page 18 of the Record as to whether it was proper for Mwambapa, RM to take over the trial of the case without assigning reasons for such taking over.

Ms Nchalla was quick to concede that section 214(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) was not complied with. She contended that, though Mwambapa, RM took over the trial from Ruhumbika SRM, no reason was shown for the previous

magistrate's failure to complete the trial. In that regard, she opined, that was an irregularity which renders the proceedings from when Mwambapa RM took over, a nullity. She therefore, prayed to the Court to quash those proceedings and direct the trial court to proceed from where Mwambapa, RM took over in accordance with the law.

Section 214(1) of the CPA which deals with transfer of magistrate 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 proceedings recorded by his predecessor and may, in the case of trial and if he considers it necessary resummons the witnesses and recommence the trial or the committal proceedings"

It is a requirement under the above cited provision to record the reasons for reassignment or change of magistrate where the magistrate who heard and recorded part of evidence becomes unable to complete the trial.

In the case of **Priscus Kimaro Vs. Republic**, Criminal Appeal No. 301 of 2013 the Court when faced with a similar situation had this to say:-

"Where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Any one, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed"

In this case, we agree with Ms Nchalla that the provisions of section 214(1) were not complied with. The record shows that the trial in Criminal Case No. 514 of 2011 at the District Court of Nyamagana at Mwanza commenced on 20/10/2011 before R. S. Ruhumbika, SRM and continued until on 27/6/2012 after he had recorded seven prosecution witnesses. From 24/7/2012 Mwambapa, RM took over and recorded the

defence evidence and composed the judgment. As it is the magistrate who took over the conduct of the case from Ruhumbika, SRM did not assign any reason(s) why the predecessor magistrate who heard and recorded the whole of the prosecution evidence was not able to complete the trial. Assigning reasons for a change of a magistrate is of utmost importance since failure to do so makes the successor magistrate who takes over the matter to have no jurisdiction to proceed and determine the case as required by section 214(1) of the CPA. In other words, the whole proceedings and judgment before the successor magistrate and High Court are rendered a nullity.

In the case of **Msami Ally Vs. Republic**, Criminal Appeal No. 280 of 2015, (unreported) this Court while quoting with approval the case of **Omari Juma Vs. Republic**, Criminal Appeal No. 413 of 2015 (unreported) had this to say:-

"In the absence of reasons for the change of the trial magistrate, the successor magistrate, was in our view, not vested with jurisdiction to proceed with the trial, consequently, the proceedings before the successor magistrate without reasons being assigned for the takeover, were rendered a nullity"

Even in this case, the taking over of the trial of the case by Mwambapa, RM from Ruhumbika, SRM without showing the reasons for such taking over rendered the proceedings by Mwambapa, RM a nullity. It also follows that the judgment and the proceedings of the trial court are a nullity and so of the High Court are also a nullity.

From the foregoing, in exercising our revisional powers vested on us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002, we quash all the proceedings before Mwambapa, RM from 7/8/2012 and set aside the judgments of the trial court and High Court and order a retrial from the date the successor magistrate took over the matter in accordance with the requirements of the law.

DATED at MWANZA this 14th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL