

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A. MWARIJA, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 541 of 2016

**HAMISI MIRAJI APPELLANT
VERSUS**

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tanga)**

(Masoud, J.)

dated 6th day of June, 2016

in

Criminal Case No. 50 of 2015

JUDGMENT OF THE COURT

16th & 18th April, 2018

MBAROUK, J.A.:

In the District Court of Muheza at Muheza, the appellant and four others (not subject to this appeal) were jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002. Thereafter it was the appellant and another (not subject to this appeal) alone who were

convicted by the trial court and hence each was sentenced to thirty (30) years imprisonment. Dissatisfied, the appellant and Mhina Hassan @ Kambangumu (not subject to this appeal) appealed to the High Court of Tanzania at Tanga (Masoud, J.) where Mhina Hassan's appeal was allowed but the appellant's appeal was dismissed in its entirety. Undaunted, the appellant has preferred this second appeal.

In this appeal, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Ms. Shose Naiman, learned State Attorney.

At the hearing of the appeal, we were constrained not to proceed with the hearing on merit after we found a pertinent issue as to whether the appeal was competent before the Court or not. This was to the effect that, according to the proceedings before the trial court, the record shows that, initially the evidence of PW1 Ally Nassoro was taken by S.O. Msigiti, SDM on 28-05-2013. However, thereafter on 11-07-2013 E.R. Makabwa, RM took

over the conduct of the proceedings of the trial without giving any reasons as why the predecessor magistrate was unable to proceed with the hearing of that case. This was contrary to the requirement of the provisions of section 214 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA).

Knowingly that the appellant was a lay person not knowledgeable with legal technicalities, we allowed the learned State Attorney to react first as to whether non-compliance with the provisions of section 214 (1) of the CPA is fatal or not.

On her part, the learned State Attorney outrightly submitted that, failure to give reasons by a successor magistrate of a partly heard matter re-assigned to him/her is fatal. She therefore urged us to invoke our revisional powers conferred upon us under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) and nullify the proceedings from where the successor magistrate took over the case without giving reasons of re- assignment of the case to him and nullify the proceedings and

judgment of the High Court. Also, she prayed for us to quash the conviction and set aside the sentence imposed on the appellant.

She added that, ordinarily, the case ought to have been ordered to be remitted back to the trial court so that reasons of re-assignment to be given by a successor magistrate. But, the learned State Attorney further submitted that, it will be a futile exercise, because remitting the case back will enable the prosecution to fill in the gaps. She proceeded by submitting that, the evidence on identification adduced by both PW1 Ally Nassoro and PW2 Farid Ally Nassoro was weak as the incident occurred at night but conditions for correct identification were not met. She added that, PW1 failed to mention about the intensity of the light at the scene of crime, whether it was bright enough or poor. As to PW2, the learned State Attorney said he totally failed to show as to which type of light he was able to identify the appellant at the scene of crime.

For that reason, the learned State Attorney prayed for the appellant to be set free.

On his part, the appellant being a lay person not knowledgeable in legal technicalities simply agreed with the submissions made by the learned State Attorney and left the matter to the hands of the Court to be decided.

As pointed out earlier, there is nothing on record showing as to why the matter which was partly heard by S.O. Msigiti, SDM was re-assigned to E.R. Makabwa, RM. This situation where for one reason or another a magistrate is unable to complete a matter before him/her is covered under the provisions of section 214(1) of the CPA which provides as follows:-

*" (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conduct in whole or part any committal proceedings, is **for any reason unable to complete the trial** or the committal proceedings or*

he is 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 it necessary, resummon the witnesses and recommence the trial or the committal proceedings.

(Emphasis added).

Currently, there is a plethora of authorities which have interpreted section 214(1) of the CPA and have given the effect of its non-compliance. For example in **Priscus Kimario vs Republic**, Criminal Appeal No. 301 of 2013 (unreported), this Court stated as follows:-

"...where it is necessary to re-assign 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. Anyone, for personal reasons could just pick up any file and deal with it to detriment of justice. This must not be allowed."

Expounding further on the importance of giving reasons of re-assignment of a partly heard case from one magistrate to another, this Court in the case of **Salimu Hussein vs Republic**, Criminal Appeal No. 3 of 2011 (unreported) stated as follows;-

" under this section, the second subsequent magistrate can assume the jurisdiction to take over and continue the trial ... and ... act on the evidence recorded by his predecessor only if the first magistrate is for any reason unable to complete the trial at all, or within a reasonable time. Such reason or reasons

must be explicitly shown in the trial court's record of proceedings".

Again in the case of **Abdi Masoud @ Iboma and Three others vs Republic**, Criminal Appeal No. 116 of 2015 (unreported) the following was emphasized:-

"In our view under s. 214 (1) of the CPA it is necessary to record the reasons for re-assignment or change of trial magistrate. It is a requirement of the law and has to be complied with. It is a pre requisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try case." (Emphasis added.)

Also see, **Donatus Yustad @ Begumisa v. Republic**, Criminal Appeal No. 365 of 2016, **Issaya Mato @ Issa And Another vs Republic**, Criminal Appeals No. 66 & 188 of 2015, **Mathias**

Kalonga and James Moshi vs Republic, Criminal Appeal No. 438 of 2015 and **Barnabas Leon v. Republic**, Criminal Appeal No. 309 of 2014 (all unreported) to name a few.

In view of what has transpired herein above, we fully agree with the learned State Attorney that this is not a fit case for it to be remitted back to the trial court for correction of the error found by the Court. We therefore, exercise our revisional powers conferred upon us under section 4 (2) of the AJA and nullify all the proceedings of the successor magistrate at the trial court after the testimony of PW1, quash the conviction arising there from and set aside the sentence imposed on the appellant. That outcome renders the proceedings and the judgment of the High Court to have no basis. Hence, we therefore quash the same.

Furthermore, we agree with the submissions made by the learned State Attorney that remitting the case file back to the trial court will allow the prosecution to fill in the gaps identified and that will not serve the interests of justice. This was for the reason

that the evidence adduced by PW1 and PW2 on identification has not met the conditions to avoid mistaken identity. We are therefore constrained not to remit the file back.

All said and done, we therefore order the appellant to be released from prison forthwith unless he is lawfully held.

DATED at **TANGA** this 17th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL