

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MMILLA, J.A., MUGASHA, J.A., MWANGESI, J.A.**

**CRIMINAL APPEAL NO. 565 OF 2016**

**SHABANI MOHAMED @ ONDITI.....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania**

**at Mwanza)**

**(De-Mello, J.)**

**dated the 2<sup>nd</sup> December, 2015**

**in**

**Criminal Appeal No. 83 of 2015**

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**RULING OF THE COURT**

9<sup>th</sup> & 11<sup>th</sup> July, 2018

**MUGASHA, J.A.:**

In the District Court of Musoma, the appellant was charged with Armed Robbery contrary to section 287A of the Penal Code, [**CAP 16. RE. 2002**]. It was alleged that, on 27/06/2014 at Sokoni Street within the District and Municipality of Musoma within the Region of Mara, the appellant stole one cellular phone make TECNO from REHEMA ABDI. In

order to obtain the said cellular phone, the appellant assaulted her with an iron bar.

The appellant refuted the charge consequent to which to prove its case, the prosecution paraded three witnesses. The prosecution evidence was to the effect that, on the fateful day at 1.00 am, PW1 a bar tender was at Embassy Bar her place of work. She went to a nearby kiosk to buy chips. While waiting for the chips to be ready, she retired to attend the call of nature around the furniture shop. While urinating, the appellant appeared and demanded her cellular phone. PW1 resisted and argued with him as to why she should give him the cellular phone. The appellant warned her not to argue with him. Unexpectedly, the appellant grabbed her took the cellular phone and Tshs. 15,000/=. Thereafter, the appellant using a piece of iron bar struck PW1 on the head and she became unconscious. Some hours later she regained consciousness only to find herself lying in trench. She was assisted and taken to the police where she was given a PF3, went to the hospital and upon examination by the Dr. Rita Byabato who testified as PW2, it was established that she had a cut wound on the head caused by a blunt object. PW3's account was to the

effect that, having recorded the statement of the victim he established that she managed to identify the appellant to be the assailant. The appellant was arrested and arraigned with armed robbery.

After a full trial, the appellant was found guilty, convicted and given a statutory minimum jail term of thirty (30) years plus twenty four (24) strokes of the cane. Dissatisfied, the appellant preferred an appeal before the High Court which was dismissed in its entirety hence this second appeal.

The appellant impugns the decision of the High Court in the Memorandum of Appeal which contains six (6) grounds of complaint. However, we shall not dwell into the respective details on account of what we shall unveil in due course relating to the propriety of succession of magistrates.

At the hearing of the appeal the appellant appeared in person whereas the respondent Republic was represented by Ms Angelina Nchalla, learned Senior State Attorney who was assisted by Ms Magreth Mwaseba learned State Attorney who addressed the Court in arguing the appeal.

We wanted to satisfy ourselves on the propriety of the trial by the successor magistrate who did not hear the evidence of PW1 but heard the evidence of PW2, PW3, the appellant and composed the judgment and if he had jurisdiction to do so.

In the District Court, the first Magistrate who conducted the preliminary hearing and presided over the trial was E.L. Ngigwana, RM (predecessor magistrate). On 7/8/2014, he recorded the evidence of PW1 the complainant and at the end he adjourned the hearing to 21/08/2014. On that day, the matter was before J.S. Musaroche RM who adjourned the hearing to 18/9/2014. On the 18/9/2014 and 24/09/2014 on account of absence of witnesses, the predecessor magistrate adjourned the hearing and the case was scheduled for hearing on 29/9/2014. However, on 20/09/2014 the case file was before Musaroche RM who on account of absence of witnesses adjourned the hearing to 13/10/2014.

Thereafter, Maganga SDM (successor magistrate) on 5/3/2015 took over and heard the remaining prosecution evidence of PW2, PW3 the defence and composed the judgment. Before proceeding to take the said

evidence what transpired is reflected in the trial proceedings at page 17 of the record of appeal as follows:

*"Date: 05/03/2015*

*Coram: R.B. Maganga, - SDM*

*Pross: Harry Mbogoro*

*Accused: Is present on custody*

*Inter: M. Chai*

***Prosecutor:*** *Your honour the case is for continuation of hearing today and I have one witness ready to proceed.*

***Court:*** *Section 214 of the CPA, Cap 20 RE.2002 has been complied with accordingly:-*

***Accused in reply:*** *Your honour, I have no any objection at all, since the last witness has testified before Hon. Ngigwana-RM, and today we have another new witness before you, I have nothing more to say, as there is no need to re-call the former witness who already testified, and let us proceed with the case. That is all.*

***Court:*** *All considered, now we can proceed as usual, upon the accused's consent of not re-calling witness.*

*Order accordingly*

*Sgd. R.B. Maganga*

*SDM*

*05/03/2015*

Subsequently, R.B. Maganga, SDM proceeded to hear the evidence of PW2, PW3 and the appellant who was the only witness for the defence and delivered the judgment on 19/3/2015.

Having invited Ms. Mwaseba to address the Court, she submitted that the successor magistrate did not comply with section 214 (1) of the Criminal Procedure Act [**CAP 20 RE.2002**] (the CPA). She thus, urged us to invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**] (the AJA) to quash the judgments of the lower courts and order the case file to be remitted to the trial court for continuation of the trial.

On the other hand, the appellant being a lay person had nothing useful to add apart from complaining that, the change of magistrates at the trial was not the fault of his making. He thus urged us to determine the appeal and set him free.

Having carefully considered Ms Mwaseba's submission we begin with the legal provision which regulates the succession of magistrates in a trial

and the underlying circumstances whereby section 214 (1) of the CPA which among other things 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 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 supplied].*

In the light of the emphasized expressions, a successor magistrate can only assume jurisdiction and take over if the predecessor magistrate is for any reason unable to complete the trial, or as the case may be within a reasonable time. Also the accused must be addressed on his right to have the trial continue or start afresh.

In the case of **RICHARD KAMUGISHA @ CHARLES SAMSON AND FIVE OTHERS VS REPUBLIC**, Criminal Appeal No.59 of 2002 (unreported), the trial was nullified since, it was conducted by three magistrates without complying with section 214 (1) of the CPA. Moreover, the Court, emphasized that, the allowed discretion must be judicially exercised in the interests of justice having said that:

*"....The word used is in section 214 (1) of the Criminal Procedure Act 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 respect...."*



The rationale for this stance, was underscored in the case of **REMEBISELE S/O EDISON VS REPUBLIC** (1967) HCD n. 72 which we find as good law and we adopt, where the court said, such discretion given to a magistrate should be exercised with great care because the primary purpose of the hearing is to permit the court to observe the demeanour and evaluate the credibility of all the witnesses. Moreover, as far as assessment of credibility is concerned, a magistrate who sees and hears the witness is placed in a better position than the successor. The case of **REMEBISELE S/O EDISON VS REPUBLIC** (supra) was followed in the cases of **ELISAMIA ONESMO VS REPUBLIC**, Criminal Appeal No. 160 of 2003 and **SHABANI S/O SAID VS REPUBLIC**, Criminal Appeal No. 267 of 2009) and later in the case of **SALIMU HUSSEIN VS REPUBLIC**, Criminal Appeal No. 3 of 2011 (all unreported) where the Court making reference to section 214 (1) of the Criminal Procedure Act (supra) categorically 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."***

[Emphasis supplied]

We wish to restate that, the taking over by the successor magistrate without assigning reasons puts to question the jurisdiction of the successor as we intimated in the case of **ABDI MASOUD @ IBOMA AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No. 116 of 2015 (unreported). Among other things we said:

***"In our view, under s. 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrate. It is requirement of the law and has to be complied with. It is a prerequisite 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 the case."***

[Emphasis supplied].

In the case at hand, mere mentioning that section 214 (1) of the CPA has been complied with was not sufficient as reflected on the record whereby, the successor magistrate only complied with one limb having only addressed the accused on his rights under the section but never stated reasons for the taking over which is fatal. In this regard, the successor magistrate did not assume jurisdiction to take over the hearing of the case from predecessor. This adversely impacted on fair hearing which is a fundamental right enshrined in article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. This occasioned a gross miscarriage of justice. (See the case **RICHARD KAMUGISHA @ CHARLES SAMSON AND FIVE OTHERS VS REPUBLIC, (supra)**).

Apparently, the said anomaly affecting the trial could have been timely remedied by the first appellate court which could have invoked section 214 (2) of the CPA which provides:

*"Whenever the provisions 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”.*

However, it is unfortunate that the anomaly missed the eye of the first appellate court, only to be spotted three years later by the Court. We wish to point out that, whenever such an occasion arises, it has to be addressed timely by the High Court for the sake of prompt delivery of justice.

In the light of the above, we are satisfied that, the appellant was dully prejudiced by the unilateral succession of the magistrates. As section 214(1) of the CPA was not complied with, the proceedings conducted by the successor magistrate and its judgment are a nullity. Consequently, we proceed to hold that, since no appeal could stem on a null judgment, the appeal in the High Court was misconceived in law.

In view of the aforesaid, we hereby invoke the provisions of section 4(2) of the AJA and accordingly, nullify the proceedings and the judgment composed by Maganga – SDM including the sentence. We quash the entire proceedings and the judgment of the High Court. In the interest of justice,

the record is remitted back to the trial court for the continuation from where the predecessor magistrate left. The succeeding magistrate if any, should ascertain, inform the accused persons and put on record the reasons which disabled the predecessor to continue with the trial and proceed with the matter according to the dictates of section 214 (1) of the CPA. In case of conviction, the period spent by the appellant behind bars should be taken into account. Meanwhile, the appellant should remain in custody to await the course of action directed above.

**DATED** at **MWANZA** this 9<sup>th</sup> day of July, 2018.

B. M. MMILLA  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**