

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

(CORAM: MUSSA, J.A., LILA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 353 OF 2016

NKUBA SHIMBA @ ALFREDY APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated 17th day of June, 2016

In

DC. Criminal Appeal No. 40 of 2015

JUDGMENT OF THE COURT

31st August & 6th September, 2018

LILA, J.A.

The appellant was charged before the District Court of Shinyanga with the offence of rape contrary to section 130(1) and (2) (e) and 131(2) (a) of the Penal Code Cap.16 R.E. 2002 (the Penal Code). He denied the charge. Trial ensued. Finally, he was found guilty, convicted and sentenced to serve 30 years imprisonment with corporal punishment of 12 strokes to be administered in two equal portions at the time of reception into the prison and when exiting. In addition the appellant was ordered to pay Tshs. 300,000/= as compensation to the victim.

Aggrieved, he unsuccessfully appealed to the High Court, hence this appeal.

In his memorandum of appeal, the appellant has raised five grounds of complaint seeking to impugn the concurrent findings of guilt by the two courts below. We will not recite them on account of what will very soon be apparent.

Our careful examination of the record revealed that two magistrates dealt with the case without the reason for that happening being disclosed. The record bears out that Mwakihaba, RM presided over the case by hearing evidence of both sides and composed the judgment. That judgment which ended in the appellant being convicted is dated 20/01/2015 which is a clear indication that she composed it on that date. Thereafter, N. Gasabile, RM proceeded to record the previous records, mitigation and finally imposed the sentence to the appellant. That raised our curiosity consequent upon which we raised, *suo motu*, the issue whether what happened is procedurally proper. We invited the parties to address us on that issue.

Before us, at the hearing of the appeal, were the appellant who appeared in person and unrepresented and Miss Margareth Ndaweka, learned Senior State Attorney who was assisted by Mr. Shaban Juma

Massanja, learned State Attorney, who represented the respondent Republic.

Submitting on the issue raised by the court, Miss Ndaweka quickly faulted the procedure adopted by the two learned magistrates. Elaborating, she said that the succession of magistrates was improper for want of reasons for such change as mandatorily required in terms of the provisions of section 214(1) of the Criminal Procedure act, Cap. 20 R.E.2002 (the CPA). On that account, she said, the successor magistrate lacked jurisdiction to preside over the case and the proceedings of such magistrate were a nullity. In that accord, she urged the Court to invoke the powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2002(the AJA) and thereby nullify the proceedings conducted by Gasabile, RM and thereafter remit the trial court record to the trial court for it to continue with the case from where Mwakihaba, RM ended according to law.

Such a legal issue was beyond the appellant's comprehension he being a layperson on legal matters. He left it to the Court to decide. But, considering the long period he has spent in prison, he was reluctant to agree that the trial court record be remitted to the District Court for it

to proceed with it from where Mwakihaba, RM had ended. He proposed the Court be pleased to set him free.

We have given due consideration to the brief but focused arguments by the learned Senior State attorney. Admittedly, it is apparent that there was succession of magistrates as explained by the learned Senior State Attorney and no reason was assigned for that. As demonstrated above, the trial was conducted to its conclusion by Mwakihaba, RM who also composed the judgment but previous records of the appellant, mitigation and the sentence was imposed by another magistrate (Gasabile, RM) without disclosing the reasons why Mwakihaba, RM could not conclude the matter. This was highly irregular in terms of section 214(1) of the CPA which imperatively requires reasons be given for the succession - see **Abdi Masoud and Three Others Vs. Republic**, Criminal Appeal No. 116 of 2015 (unreported) where, after citing with approval the Court's decision in **Prismus Kimaro Vs. Republic**, Criminal Appeal No.301 of 2013 (unreported), the Court stated:-

"...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. Anyone for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed”.

Regarding succession of magistrates at the sentencing stage, we are not sailing in an unchartered vessel, for, in the case of **Juma Kuyani and Another Vs. Republic**, Criminal Appeal No.525 of 2015 (unreported), the Court faced almost a similar situation. In that case, Chaungu, SRM conducted the trial, composed a judgment and delivered it but for undisclosed reasons, the trial court record passed to G. P. Ngaeje, RM who imposed the sentences. The Court stated that:-

“As shown at the outset, the appellants were sentenced to seven years imprisonment by the sentencing magistrate. We have chosen to use the phrase “sentencing magistrate” instead of the phrase “trial magistrate” deliberately. This is because, although the trial was conducted by one “R. W. Chaungu, Senior Resident Magistrate”, who also composed and delivered the trial court’s judgment, the sentences, for unknown reasons, were passed by one “G. P. Ngaeja – Resident Magistrate” We have found this to be highly irregular in terms of section 214(1) of the C.P.A. Reasons must always be given and recorded, in case of change of trial magistrates, even for the

*purposes of passing sentence, for that matter. See, for instance, **Shabani Seif & Said Abdallah @ Cheka Cheka Vs. R**, Criminal Appeal No. 215 of 2015, **M/S Georges Centre Ltd v. The Hon. Attorney General and Another**, Civil Appeal No. 12 of 2015(both unreported), etc.”*

Although the Court, in the above cited case, did not find it necessary to go further and tell the consequences of failure to comply with the imperative requirements of section 214(1) of the CPA, it is now settled law that where there is change of trial magistrates without reasons being given and recorded the successor magistrate lacks jurisdiction and the proceedings subsequent to the predecessor magistrate are a nullity. This was insisted by the Court in the case of **Abdi Masoud and Three Others Vs. Republic** (supra) where the Court said:-

"Since there is no reason on record in this case as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity".

We, ordinarily, would have also, in the present case, made a finding that the succession between the two magistrates was irregular for want of reasons for doing so, nullified the proceedings by Gasabile,

RM and remitted the record to the trial court for it to proceed from where Mwakihaba, RM ended as proposed by the learned Senior State Attorney. We would have ended there. Despite the fact that we are not seized with the trial court record in the case of **Juma Kuyani and Another Vs. Republic** (supra), we are convinced that the present case presents some peculiar circumstances which must be looked at differently. We will explain.

The trial Court record explicitly shows that Mwakihaba, RM, after conducting the whole trial, composed the judgment on 20/01/2015 and, according to the proceedings of that day, judgment was pronounced by Gasabile, RM on that very day (20/01/2015). We have asked ourselves as to why Mwakihaba, RM who was present on that day, failed to pronounce the judgment as well as impose the sentence to the appellant? Unfortunately the record does not provide for the reason. On our prompting, the learned Senior State Attorney was also not sure what befell on Mwakihaba, RM. She, given the circumstances, was of the view that the appellant was thereby prejudiced and did not receive a fair trial. She did not, however, suggest the way forward.

We are, like the Senior State Attorney, certain that the appellant was prejudiced and hence did not receive a fair trial. Transparency in

the conduct of judicial proceedings is one of the significant pillars in the administration of criminal justice. Every step taken whether it is an action or omission by judicial officers in conducting any trial must be explained for and the same must be recorded. Unless this is observed, the appellant will be dragged into uncertainties as to why such change and the appellate court will be denied of the material facts for it to consider on appeal hence unfairly determine the same.

In the case at hand, the appellant was not told why the one who conducted the trial and composed the judgment that day could not pronounce it and impose the sentence despite being present. This, no doubt, prejudiced the appellant. We entertain a lot of doubts as to why the predecessor magistrate avoided concluding the matter that day. In essence, that conduct mounts doubts on the conduct of the whole trial. We hope the appellant had the same feelings.

For the interests of justice and given the peculiarity of the matter, we are inclined to invoke our powers of revision under section 4(2) of AJA and hereby quash the proceedings and judgments of both courts below and set aside the sentence meted by the trial court and upheld by the first appellate court. We hereby order the trial court record be immediately remitted to the trial court and a trial *de novo* be

commenced before another magistrate of competent jurisdiction. In the event of a conviction being entered, the sentence be taken to have commenced from the date the appellant was first sentenced by the trial court.

Meanwhile, the appellant to remain in remand custody waiting for fresh trial which we direct that it should be held as soon as practicable.

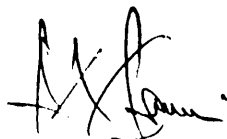
DATED at **TABORA** this 5th day of September, 2018.

K. M. Mussa
JUSTICE OF APPEAL

S. A. Lila
JUSTICE OF APPEAL

J. C. M. Mwambegele
JUSTICE OF APPEAL

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



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL (T)