

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

(CORAM: MUGASHA, J.A., MKUYE, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 227 OF 2016

MELI MASHEMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 8th day of April, 2016

in

Criminal Sessions Case No. 104 of 2012

JUDGMENT OF THE COURT

17th & 20th July, 2018

MKUYE, J.A.:

The appellant, Meli Mashema, was arraigned before the High Court of Tanzania at Mwanza on a charge of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code). After a full trial, he was found guilty convicted and sentenced to suffer death by hanging. Aggrieved by the judgment and sentence, he has lodged the appeal to this Court.

At this juncture we feel appropriate to state albeit briefly the facts leading to this appeal. They are as follows:

On 8/8/2016 at 20.00 hrs the deceased, Regina Daudi, was seated outside the house with her family members taking their evening meal (dinner). While there they were invaded by two people. Those people who were holding a panga, axe and a torch immediately, put the family members under arrest and started to harass them. They beamed torch light in search of the deceased. This led to the members of family to take refuge in the cassava farm to save their lives. They also shouted for help (mwano). While hiding, Suzana Tuluzila (PW1), testified to have seen the bandits cutting her mother with a panga and dragging her. She also said to have heard the deceased crying. When they came back from their hiding, they found their mother cut by pangas and was dead. The bandits fled away. Search for the bandits was commenced where upon the appellant was arrested in the paddy farms in his attempt to escape. He was taken to the police and later charged with the offence. Meanwhile, PW1 testified to have identified one of the bandits who goes by the name of Meli (the appellant) with the aid of a bright moonlight.

In defence the appellant denied involvement with the offence. However, as hinted earlier on, upon a full trial he was found guilty, convicted and sentenced to suffer death by hanging.

At the hearing of the appeal the appellant was represented by Mr. Anthony Nasimire, learned advocate; whereas the respondent Republic enjoyed the services of Mr. Robert Kidando assisted by Ms. Gisela Alex both learned State Attorneys.

During the hearing of the appeal we *suo motu* called upon the parties to address us on the propriety of the procedure used in this case. The reason for the inquiry is that we observed that the trial was initially conducted by Makaramba, J. (predecessor judge) and completed by Mlacha, J. but no reasons were assigned for the transfer of the case to successor judge.

Mr. Nasimire in the first place submitted that the successor judge had informed the accused person of his right to have the witness who testified resummoned or to continue with hearing from where the predecessor judge left. However, after a short dialogue he readily admitted that the takeover of the trial from predecessor judge by the successor judge without assigning reasons

contravened the provisions of section 299(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). In the circumstances, he pointed out that the successor judge lacked jurisdiction to continue with the proceedings. On that account, he said, the proceedings from when successor judge took over, the judgment he composed and the sentence which resulted therefrom were a nullity. He, therefore, urged the Court to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and quash the proceedings from where the successor judge took over and the judgment thereof, set aside the sentence and order a retrial.

On the other hand, Mr. Kidando, conceded to what was submitted by Mr. Nasimire. He joined hands in arguing that, by failing to assign reasons for taking over the trial by the successor judge, the subsequent proceedings from page 20 of the record of appeal up to the judgment should be nullified.

Our anxious examination of the record of appeal has revealed that the trial of the case at hand started by Mwangesi, J who on 13/12/2012 dealt with plea taking and preliminary hearing. The hearing of the case commenced on 13/8/2015 before the

predecessor judge whereby he recorded the evidence of PW1. From then trial resumed on 29/3/2016 when the successor judge took over the trial. From there the successor judge recorded the evidence of PW2, PW3 and DW1. He also summed up to the assessors the facts of the case and composed the judgment thereof which was handed down on 8/4/2016. It would appear that this case was heard to its finally during Criminal Sessions Schedule. What is notable is that when the trial was taken over by the successor judge on 29/3/2016, no reasons were assigned for such taking over. This was in contravention of section 299(1) of the CPA which states:-

*1) Where any judge after having heard and recorded the whole or any part of the evidence in any trial, **is for any reason unable to complete the trial or he is unable to complete the trial within a reasonable time**, another judge who has and who exercises jurisdiction may take over and continue the trial and the judge so taking over may act on the evidence or proceedings*

recorded by his predecessor, and may, in the case of trial re-summoned or re-heard and shall be informed of such right by the second judge when he commences proceedings.
[Emphasis added].

Our understanding of the above provision is that it has two limbs. **One**, where the successor judge takes over the trial of the case from the predecessor judge, the successor judge is required to assign reasons to be recorded, for such taking over. This is to enable him to have jurisdiction to try it. **Two**, the successor judge is also required to inform the accused on his right of requiring re-summoning the witness(es) already testified or not. See **Sabasaba Enos vs Republic**, Criminal Appeal No. 135 of 2015 (unreported). The record of appeal shows that Mlacha, J. did inform the accused of that right when he took over the trial on 29/3/2016. However, informing the accused of his right to require re-summoning of the witness(es) or not, is not a substitute to assigning reasons for taking over the trial as Mr. Nasimire tried to suggest. The trial judge ought to have observed both requirements.

It is noteworthy that if the successor judge does not or omits to assign the reasons for taking over the trial, it amounts to an irregularity rendering the successor judge to lack jurisdiction to try the case. And whatever that successor judge does subsequently becomes a nullity liable to be nullified, quashed or set aside accordingly.

On the requirement of the successor stating reasons for taking over the trial, this Court in the case of **Masuke Malugu @ Matinyi and Another Vs. Republic**, Criminal Appeals Nos. 308 of 2015 and 518 of 2016 cited with approval the case of **Abdi Masoud @ Iboma and 3 Others vs Republic**, Criminal Appeal No. 116 of 2015 (unreported) which construed the provisions of section 214(1) of the CPA, which though relates to trials in subordinate courts, is to a large extent similar with section 299(1) of the CPA. In that case the Court stated as follows:-

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

*magistrates 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. 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. See also **Priscus Kimaro vs Republic**, Criminal Appeal No. 301 of 2013 (unreported)."*

For easy clarity we quote section 214(1) of the CPA. It reads 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 proceedings recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and commence the trial or the committal proceedings."

[Emphasis added].

As section 214(1) of CPA is almost in parimateria with section 299(1) of the same CPA, we think, the construction in that section can conveniently apply to section 299(1) of the CPA so as to require the trial judge who takes over the trial from his predecessor to assign reasons for such taking over. Thus, in this case, the failure by the successor trial judge to comply with section 299(1) of the

CPA was an irregularity which rendered the proceedings conducted by him and the judgment thereof a nullity.

Given the circumstances, we invoke section 4(2) of the AJA and quash the proceedings from 29/3/2016 when Mlacha, J. took over and the judgment thereof and set aside the sentence imposed against the appellant. We further direct that the matter be expeditiously placed before Makaramba, J. or another judge for continuation of the trial in accordance with section 299(1) of the CPA. Meanwhile, the appellant should remain in custody.

Order accordingly.

DATED at **MWANZA** this 19th day of July, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
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