IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MJASIRI, J.A., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 126 OF 2016

MAGID MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Makani, J.)

dated the 13th day of April, 2016
in
DC. Criminal Appeal No. 106 of 2015

JUDGMENT OF THE COURT

14th & 19th February, 2018

MUGASHA, J.A.:

In the District Court of Shinyanga, the appellant was arraigned as hereunder:

> *"**STATEMENT OF OFFENCE:** Unnatural Offence c/s 154(1) (a) of the Penal Code Cap. 16 volume 1 of the laws R.E. 2002.*
>
> ***PARTICULARS OF OFFENCE:** That, Majid s/o Mohamed charged on 12th day of August, 2008 about*

20.00 hrs at Jomu village within the Shinyanga Rural district in Shinyanga Region did have carnal knowledge to one Husna d/o Ramadhani a girl of 4 years against the order of nature".

The appellant denied the charge. The prosecution side alleged that, on 12/8/2005 at 20.00 hrs at Jomu village the appellant took the victim from her home in the presence of her sister **HUSNA RAMADHANI** (PW2) for the purpose of buying her candy. When the appellant returned the victim home, she was crying and the appellant ran away. Upon inquiry by PW2 and **ZAINABU ISSA** (PW4) the victim stated to have been sodomised by the appellant. They examined her and found her anus bleeding. Her mother **SHAKILA MUSSA** (PW1) was informed and the incident was reported to the Police. **D/CPL ALFRED** (PW5) the investigator, testified that he was assigned the case file on 13th August, 2007 and by then the appellant was already in police custody for the offence charged.

PW5 gave the victim's mother a PF3 and the victim was sent to the doctor who noted that she was severely injured. While PW5 was planning to interrogate the appellant, he escaped from police

custody. He was arrested, charged and admitted to have escaped from lawful custody.

The appellant denied the accusations. He claimed to have had a quarrel with PW1 as they had a love affair and she vowed to deal with him and that is why charges were commenced against him.

The appellant was convicted and sentenced to life imprisonment. He unsuccessfully appealed to the High Court where his appeal was dismissed. Still dissatisfied, he has preferred an appeal to the Court in two memoranda of appeal containing among others, three grievances to the effect that, he was not accorded a fair trial since the trial was presided by two magistrates and no reason was assigned for the change.

At the hearing at the appeal, the appellant appeared in person whereas the respondent Republic was represented by Mr. Solomon Lwenge, learned Senior State Attorney. He readily conceded to the ground of appeal. He pointed out that, the trial was conducted by two magistrates without the successor magistrate assigning reasons for the taking over from his predecessor. As such, he argued that the appellant was not fairly tried. He urged us to invoke section 4(2)

of the Appellate Jurisdiction Act [CAP 141 RE.2002], nullify the proceedings and judgment of High Court, all the trial court's judgment and the proceedings of the successor Magistrate. However, he prayed for the remission of the case file to the trial court for continuation of the trial because on record there is strong prosecution evidence.

On the other hand, the appellant apart from supporting the respondent's submission on irregular change of Magistrates at the trial, urged us not to order a retrial because he has been incarcerated for almost 10 years.

It is evident that, the trial under scrutiny suffers irregularity as the trial was conducted by two Magistrates contrary to section 214(1) of the CPA. In the District Court, the first magistrate who presided over the trial was F. Haule, RM (predecessor Magistrate). He recorded the entire evidence of five prosecution witnesses and made a Ruling of a case to answer. He as well, addressed the appellant on his right and the modality of defending himself. However, he did not accomplish the task of continuing with the trial. Instead, it is one Senapee, RM (successor Magistrate) who recorded the defence evidence and composed the judgment.

After a careful consideration of the trial record we are satisfied that, the successor magistrate did not assign reasons for the taking over. This was contrary to the requirements of section 214(1) of the CPA which provides:

> *"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."*

In the light of the cited provision, the successor Magistrate can only assume jurisdiction and take over if the predecessor is for any reason not able to complete the trial, or as the case may be within a reasonable time. Moreover, if the trial is conducted by more than one Magistrate, the successor Magistrate must assign reasons for the taking over.

In the case of **RICHARD KAMUGISHA @ CHARLES SAMSON AND FIVE OTHERS VS. REPUBLIC,** Criminal Appeal No. 59 of 2002 (unreported) this Court was confronted with a similar scenario. The Court emphasized that the discretion stated under Section 214(1) of the CPA must be judicially exercised 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 respects.

The rationale behind exercising the discretion under section 214 (1) of the CPA with utmost care is due to the primary purpose of hearing to enable the demeanour and evaluate the credibility of all witnesses. A Magistrate who sees and hears the witness is placed in a better position to assess the credibility than the successor (see **ELISAMIA ONESMO VS. REPUBLIC,** Criminal Appeal No. 160 of 2003, **SHABANI S/O SAID VS. REPUBLIC** and **SALIMU HUSSEIN VS. REPUBLIC,** Criminal Appeal No. 3 of 2011 (unreported).

In all these cases, the Court emphasized that under section 214 (1), If the first Magistrate is for any reason unable to complete the trial, such reason must be shown in the trial court's proceeding

that is only when the successor Magistrate can take over, continue with the trial and act on evidence.

In view of the aforesaid since the successor Magistrate did not record the reasons for the taking over he did not assume jurisdiction and had no authority to conduct the trial under scrutiny. (See **ABDI MASOUD @ IBOMA AND 3 OTHERS VS. REPUBLIC**, Criminal Appeal No. 116 of 2015 (unreported).

Given the circumstances, ordinarily we would have nullified the proceedings and judgments of both the trial and first appeliate courts and the proceedings of the subordinate Court presided by the successor Magistrate and proceed to remit the case file to the trial court for continuation of the trial.

However, we decline to do so because of the discrepancies on the evidence of the prosecution as we shall endeavour to explain. At the beginning, we reproduced the charge under which the appellant was arraigned. It shows that, the offence is alleged to have been committed on 12/8/2008. However, this is contrary to the evidence of the investigator PW5 who at page 23 of the record told the trial court as follows:

"As an investigator of this case on 13 August, 2007 I was assigned the case of the offender Majid Mohamed who was already at the police for the offence of unnatural offence of a girl aged 4 years."

On the same day that is the 13/8/2007, PW5 is on record to have given a PF3 to the victim's mother and they proceeded to the Hospital whereby the doctor recommended that the victim was severely injured.

It really taxed our minds as to how the investigator could have been assigned the case file before the occurrence of the alleged offence. We have discovered that the 13/8/2007 is not a typographical error as substantiated by the original case file.

Therefore, notwithstanding that the Court should rarely interfere with concurrent findings of fact by the lower courts, the Court will interfere if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice and arrive at its own conclusions. This position was well stated in **WANKURU MWITA VS REPUBLIC,** Criminal Appeal No. 219 of 2012. As such, we have found it sound to reconsider the evidence of PW5 on the date of occurrence of the

offence which is different from that appearing in the charge sheet and the evidence of PW1, PW2, PW3 and PW4.

The trial Court was satisfied that according to the evidence of PW2 to PW5 there was a quarrel between PW1 and the appellant but all the same the prosecution did prove the charge. The trial court did not address itself on the variance of the dates as stated by PW5 *vis a vis* the charge sheet and the evidence of PW1 – PW4. At the first appellate court the appellant raised the following ground among others.

> *"The trial Court failed to note the contradictions in the testimonial of PW1, PW2, PW4 and PW5 which rendered the evidence to lack credibility."*

However, the High Court judge did not consider the variance of dates stated by PW5 which is at variance with the charge and date stated by PW1-PW4 as a serious matter because in a criminal case any doubt on the prosecution case is beneficial to the accused. She instead drew a negative inference against the appellant that he escaped from lawful custody. This is contrary to what PW5 testified which is to the effect that in 2007 the appellant was in custody for committing unnatural offence.

Given the circumstances, if the offence was committed on 13/8/2007 and reported to the police as per the investigator's account, then the offence alleged to have been committed on 12/8/2008 was not proved beyond reasonable doubt. On this accord, we find it unsafe to remit the record at the trial court as proposed by the learned State Attorney.

We thus, invoke our revisional powers under section 4 (2) of AJA, nullify judgments and proceedings of the trial and first appellate courts and set aside the sentence. We allow the appeal and order the immediate release of the appellant.

DATED at TABORA this 15th day of February, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL