

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

(CORAM: LUANDA, J.A. MMILLA, J.A. And NDIKA, J.A.)

CRIMINAL APPEAL NO. 608 OF 2015

**HASSAN MUSTAPHA APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

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

(Ngwala, J.)

dated the 23rd day of September, 2015

in

Criminal Sessions Case No. 33 of 2009

JUDGMENT OF THE COURT

7th & 14th February, 2018

MMILLA, J.A.:

The appellant, Hassan Mustapha, was arraigned before the High Court of Tanzania at Mbeya on a charge of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. After full trial, he was found guilty, convicted, and sentenced to suffer death by hanging. Aggrieved by the judgment and sentence of that court, he has appeal to the Court.

The facts of the case were not complicated. On the night of 29.5.2008, Issack s/o Obedi (the deceased) and Furaha s/o Jaramson were among the persons who had socially gathered at Mapelele local brew pombe shop in Mbalizi ward within Mbeya District and Region of Mbeya, at which they were drinking local brew and enjoying music. On the way home after the closure of the said local brew pombe shop round 23:00 hours, the deceased, who was in the company of the said Furaha s/o Jaramson, was allegedly fatally stabbed with a knife in the chest by the appellant. Simultaneous to reporting the incident at Mbalizi Police Station, the injured person was rushed to Mbeya Referral Hospital at which he died the next day. On 30.5.2008, autopsy was conducted and the deceased's body was released to his relatives for burial.

Meanwhile, the police commenced investigation which fruited into the appellant's arrest on 30.5.2008, and was subsequently charged with the offence of murder. He protested his innocence, but as aforesaid, the trial High Court found him guilty, convicted and sentenced him to suffer death by hanging, hence the present appeal to the Court.

At the hearing of the appeal the appellant, who was also present in Court, was represented by Mr. Simon Mwakolo, learned advocate. He had, on behalf of the appellant, filed a three point memorandum of appeal; **one** that, the prosecution did

not prove the case against the appellant beyond reasonable doubt; **two** that, there was no proper conviction; and **three** that, the appellant's conviction was wrongly anchored on exhibit P2 which left a lot to be desired.

On the other hand, the respondent Republic enjoyed the services of Ms Catherine Gwaltu, learned Senior State Attorney.

At the commencement of hearing of the appeal, the Court *suo motu* raised a point of law touching on the jurisdiction of the trial court, to wit that, while the trial of the present case was initially conducted by Hon. Mwangesi, J (as he then was), it was subsequently taken over by two other judges, one after another. It was first taken over by Hon Chocha, J (Rtd) ~~who did not complete it as well but was once~~ again taken over by Hon. Ngwala, J who tried it to its completion. However, both subsequent judges did not assign reasons for the takeover as envisaged by section 299 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). For that reason, we invited counsel for the parties to address us on the point.

First to submit was Mr. Mwakolo who readily appreciated that the takeover of the trial from Hon. Mwangesi, J by the above mentioned judges without assigning reasons flouted the provisions of section 299 (1) of the CPA, thus making the proceedings from the stage of takeover to its conclusion, including the judgment and the resultant sentence, a nullity. He invited the Court to invoke the provisions

of section 4 (2) of the Appellate Jurisdiction Act, Cap.141 of the Revised Edition, 202 (the AJA), quash the proceedings conducted by the subsequent judges, the judgment thereof, and set aside the sentence which was meted out on the appellant, and order a retrial from the point of takeover to its completion.

On her part, Ms Gwaltu supported Mr. Mwakolo's submission. She reasoned that the omission by the subsequent judges to assign reasons for the takeover of the trial from Hon. Mwangesi, J amounted to trying the case without jurisdiction. She affirmed the way forward proposed by Mr. Mwakolo.

We wish to begin by recounting that the trial in this case commenced on 14.11.2011 before Mwangesi, J. As at 30.11.2011 when he last presided, he had recorded the evidence of two prosecution witnesses, that of PW1 Sadu Kajisi Mwansisya, and PW2 No. D. 6988 D/Cpl. Ebenezer. For undisclosed reasons, on 6.9.2013 the trial was taken over by Chocha, J. He made two judicial orders concerning directions in the case, and adjourned the hearing of that case to a future date. Unfortunately, when the case was cause-listed for continuation of hearing on 3.10.2013, it was taken over by Ngwala, J who tried it to its finality and composed the judgment which is the subject of this appeal. Again, she assigned no reasons for the takeover. Given this situation, we fully agree with the views expressed by

counsel for the parties in this regard that the subsequent judges did not comply with the demands of section 299 (1) of the CPA. That section provides that:-

*"(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 a trial re-summon the witnesses and recommence the trial; save that in any trial the accused may, when the second judge commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard and shall be informed of such right by the second judge when he commences proceedings."* [Emphasis added].

From the wording of this section, it is crucial and indispensable upon the judge taking over the trial of a case from another judge who commenced it, to record the reasons for the takeover in order to cloth himself/herself with the necessary jurisdiction in the matter. Likewise, the judge taking over is duty bound

to inform the accused of his legal right to elect whether or not the witnesses or any of them may be re-summoned and re-heard : See the case of **Sabasaba Enosi v. Republic**, Criminal Appeal No. 135 of 2015.

At this juncture, we wish to re-emphasize that where it may be found that no reasons were assigned for the takeover of the trial from the previous judge who commenced it, the omission to do so is a fatal irregularity because the subsequent judges will have tried the case without jurisdiction, and it constitutes a fundamental illegality. Where such is the case, that part of the respective proceedings in that case, from the stage of the takeover by the subsequent judge/judges to its completion, as well as the judgment, will be declared a nullity, quashed, and the sentence set aside.

The rationale for this is not hard to find. We resort to what we expressed in this regard in the case of **M/s Georges Centre Ltd v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported). In that case we expounded that:-

"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. The provision

cited above (referring to Order 18 rule 10 of the CPC) imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another. There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."

We wish to illustrate that though the just quoted passage refers to civil matters, the requirement to give reason for takeover in civil matters is similar to that obtaining in criminal matters.

For reasons we have assigned, we exercise our power under section 4 (2) of the AJA, in terms of which we quash the proceedings of the two subsequent judges from the stage where Hon. Mwangesi, J ended to its conclusion, the judgment inclusive, and set aside the sentenced which was meted out against the appellant.

In its stead, we remit the record to the High Court to enable the case to start afresh from the stage where Mwangesi, J ended by a judge other than those whose proceedings we have quashed, who is required to expeditiously proceed with trial after complying with the provisions of section 299 (1) of the CPA. We further direct for the appellant to remain in custody pending retrial.

We accordingly order.


DATED at MBEYA this 13th day of February, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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


P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL