

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 2 OF 2017

PATRICK BONIFACE..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mbeya)

(Mambi, J.)

Dated 26th day of January, 2017

in

HC Criminal Appeal No. 102 of 2015

JUDGMENT OF THE COURT

13th & 19th August, 2019

MUGASHA, J.A.

In the District Court of Rungwe, at Tukuyu, the appellant was charged with rape contrary to sections 131 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 RE.2002]. It was alleged by the prosecution that, on 7th May, 2014 at about 18.00 hours at Kiwira Ilongo Mboto village within Rungwe District in Mbeya Region, the appellant did have carnal knowledge of one B.M a girl aged nine (9) years old. The appellant denied the charge whereupon, to establish its case the prosecution paraded five witnesses and tendered one documentary exhibit (PF3). The prosecution account was

to the effect that, on the fateful day, the victim was sent by his father to return empties of soda bottles at a certain shop. Having returned the empties while going at home she was grabbed by the appellant, taken to a banana farm and ravished. She sustained injuries and could not walk properly which was noticed by her father when the victim reached at their residence. On being prompted by her husband, the victim's mother examined PW1 and established that their daughter was actually raped which was confirmed by the victim who narrated what had befallen her and mentioned the appellant to be the assailant. Subsequently, the matter was reported to the ten cell leader and the Police Station whereby the victim was given a PF3 and taken to the Hospital for medical examination. Ultimately, the appellant was arraigned in court.

After a full trial the appellant was convicted as charged and sentenced to life imprisonment with five strokes of a cane. The appellant unsuccessfully appealed to the High Court where his appeal was dismissed hence the present appeal. The appellant impugns the decision of the High Court in the Memorandum of Appeal which contains five (5) grounds of complaint on account of having being convicted on the basis of insufficient prosecution evidence which did not prove the charge of rape beyond

reasonable doubt and the propriety of succession of magistrates who conducted the trial without complying with the provisions of section 214 (1) of the Criminal Procedure Act [CAP 20 RE. 2002] (the CPA) which constituted the 4th ground of appeal.

To prosecute the appeal the appellant appeared in person unrepresented whereas the respondent Republic had the services of Mr. Ofmedy Mtenga, learned State Attorney.

Since the appellant's complaint on the propriety of the succession of magistrate relates to a point of law, we opted to deal with it first due to reasons that will be apparent in due course.

What transpired before the trial court is to the effect that: In the District Court of Rungwe, the first Magistrate who presided over the trial was O.H Kingwele, RM. He took the plea of the accused person, recorded the entire evidence of both the prosecution and the defence and authored the judgment as reflected at page 36 of the record of appeal. However, he did not sign and date the judgment. Instead, on 17/06/2015 it is one A.V Tarimo, RM who signed, dated and delivered the judgment, recorded the status of previous convictions and the mitigating factors of the appellant

and proceeded to sentence him as indicated at pages 46 and 47 of the record of appeal.

Having invited Mr. Mtenga to address us on what transpired before the trial court, he conceded that though the trial was conducted by two magistrates, the magistrate who composed the judgment did not disclose the reason for taking over the case file which is contrary to the provisions of sections 214 (1) and 312 (1) of the CPA. When it was brought to his attention that, the judgment was authored by O.H Kingwele, RM but did not sign and date the judgment, the learned State Attorney pointed out that section 312 (1) of the CPA was contravened. In this regard, the learned State Attorney argued that, the trial court's judgment is a nullity and it cannot be salvaged by the signature and date inserted by A.V Tarimo, RM who being a successor magistrate, did not comply with the dictates of the law before taking over the matter and as such, this was a procedural irregularity which vitiated the trial. To support his propositions he cited the case of **JAMES MARO MAHENDE VS REPUBLIC**, Criminal Appeal No. 83 of 2016 (unreported).

On the way forward, he urged us to nullify the judgment, quash the conviction, set aside the sentence and order the case file to be returned to the subordinate court with a direction that a judgment be composed by the magistrate who conducted the trial or else the successor magistrate take over the matter after having complied with the provisions of section 214 (1) of the CPA.

On the other hand, this being a point of law the appellant being a layman had nothing useful to add apart from asking the Court to set him free.

Having carefully considered Mr. Mtenga's submission, we are totally alive to the provisions of section 214 (1) of the CPA read together with section 312(1) of the CPA. Section 214(1) of the CPA among other things, provides as follows:

*"214.-(1) 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... within a reasonable time, another magistrate who has and who***

*exercises jurisdiction may take over and continue the trial ... 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, re-summon the witnesses and recommence the trial or the committal proceedings.***"

[Emphasis supplied].

On the other hand, section 312 (1) of the CPA provides:

*"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, **and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court**".*

[Emphasis supplied]

In the case of **SALIMU HUSSEIN VS REPUBLIC**, Criminal Appeal No. 3 of 2011(unreported) the Court made reference to section 214 (1) of the CPA having emphasized 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]

Similarly in the case of **JAMES MARO MAHENDE VS REPUBLIC** (supra) confronted with a situation whereby the successor magistrate composed a judgment without explaining the reasons for the taking over the Court emphasized on the essence of complying with section 214 (1) of the CPA having said:

" The requirement of giving reason by the successor magistrate is necessary in order to provide semblance of order and to ensure that the accused

person gets a fair trial. Apart from the fact that it is a requirement under the law, it is also good practice for the sake of transparency. The accused person has a right to know why there is a new presiding magistrate. In order for the accused person to have a fair trial, he has a right to know any changes relating to the conduct of his case.”

In the case at hand, it is evident that the successor magistrate signed and dated the judgment which was tantamount to composing the judgment without recording any explanation as to why she took over the matter from the predecessor magistrate. In this regard, she lacked authority to do so. See - the cases of **ABDI MASOUD @ IBOMA AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No. 116 of 2015 and **ADAM KITUNDA VS REPUBLIC**, Criminal Appeal No. 360 of 2014 (both unreported). In the premises, we agree with the appellant that, the succession of the magistrate was contrary to the provisions of section 214 (1) of the CPA.

In our considered view, the said anomaly 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.

In view of the aforesaid, we agree with the learned State Attorney that the failure by O.H Kingwele, RM to sign and date the judgment he authored offended the mandatory requirements of the law under section 312 (1) of the CPA which renders the purported judgment a nullity which cannot be remedied by the mere signing and dating by the successor magistrate who as earlier pointed out had no authority to assume jurisdiction.

We wish to emphasise that, this being the highest Court of the Land it has the duty to see to it that the laws of the land are not only properly interpreted but also correctly applied and complied with. As earlier pointed out, this appeal originates from the District Court of Rungwe. Normally, if a party to any criminal proceedings is aggrieved, he/she has a right to appeal in terms of section 359 (1) and (2) of the CPA against the judgment of the subordinate court. In the matter at hand, since the judgment of the trial court was not signed and dated by the magistrate who conducted the trial, there was no judgment to be appealed against before the High Court. Thus, we proceed to hold that, since no appeal could stem on a null judgment, the appeal before the High Court was misconceived in law and its judgment was also a nullity.

As to the way forward, we find the appellant's complaint in the 4th ground of appeal merited. As such, we nullify the judgment composed by A.V. Tarimo, RM including the sentence. Consequently, the entire proceedings and the judgment of the High Court are nullified. In the result, we quash the High Court proceedings and Judgment, the conviction and the sentence meted out on the appellant are set aside. It is hereby ordered

that, the case file to be returned to the District Court of Rungwe and the trial magistrate O.H. Kingwele, RM is directed to compose and deliver the judgment as soon as possible. If for any cogent reason O.H. Kingwele, RM cannot compose and deliver the judgment, the successor magistrate must pay due regard to the dictates of section 214 (1) of the CPA. Meanwhile the appellant shall remain in custody.

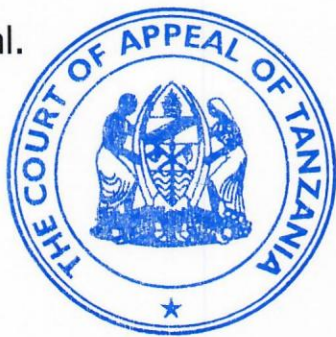
DATED at **MBEYA** this 17th day of August, 2019.


S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2019 in the presence of Ms. Prosista Paul, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL