IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 252 of 2018

DIRECTOR OF PUBLIC PROSECUTIONS ....APPELLANT

VERSUS

1. LAURENT NEOPHITUS CHACHA
2. MICHAEL S/O PLASDUS NDUNGURU
3. MBURUSHI S/O SEIF NGOMELO } **.....RESPONDENTS**
4. ARAFAT S/O HASHIM MKAMBE

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

(Twaib, J.)

dated the 25th day of July, 2018
in
Criminal Appeal No. 53 of 2016

JUDGMENT OF THE COURT

23rd October & 4th November 2019

MWANDAMBO, J.A.:

This is an appeal by the Director of Public Prosecutions, the appellant. It is against the decision of the High Court sitting at Mtwara in its appellate jurisdiction from a decision of the Resident Magistrate's Court at Mtwara dismissing the appellant's appeal.

The background from which this appeal emanates is fairly straight forward. The respondents stood charged before the Resident Magistrate's Court at Mtwara on four counts namely: - conspiracy to commit an offence c/s 384, breaking into a building and committing an offence c/s 296(a) and (b), stealing by public servant c/s 270 and neglect to prevent the commission of an offence c/ss 383 and 35 all of the Penal Code, [Cap. 16 R.E 2002].

After the completion of the preliminary matters, the trial commenced before E.J. Nyembele, Senior Resident Magistrate who heard seven prosecution witnesses before another Resident Magistrate, E.S Misana took over the trial from where her predecessor had ended. The new trial magistrate took evidence of three more prosecution witnesses and four defence witnesses. At the end of it all, the learned Resident Magistrate found the prosecution evidence too insufficient to sustain the charges against the respondents and acquitted all of them.

Not unsurprisingly, the appellant appealed against the trial court judgment before the High Court. The first appellate court (Twaib, J.) heard the appeal by way of written submissions. However, in the course

of composing judgment on the merits of the appeal before him, the learned first appellate judge discovered some irregularity in the proceedings of the trial court in relation to the change of trial magistrates without indicating the reason for such change and addressing the accused persons to state their positions whether they would have wished to have witnesses recalled as dictated by section 214 (1) of the Criminal Procedure Act, Cap. 20 [R.E. 2002] (hereinafter to be referred to as the CPA). To that end, the first appellate judge invited counsel to address him on the effect of the noted irregularity.

The learned State Attorney for the appellant and the Advocate for the respondents agreed that there was such an irregularity whose remedy was to make an order for a retrial. Having heard counsels' brief and submissions, the learned first appellate judge reserved judgment which he delivered on 25th July, 2018. That court found no difficult in holding that the transfer of the case to Missana, RM was not accounted for in the proceedings and so the proceedings before her were a nullity. Having so held, the learned Judge found himself constrained to determine whether the case was fit for a retrial. He did so relying on

Fatehali Manji vs. The Republic [1966] E.A. 343 (CAN) in which the defunct Court of Appeal for East Africa held that retrial should only be ordered where the interest of justice so require and not where it is likely to cause injustice to the accused. On the strength of the above authority, the first appellate court declined to order a retrial as urged by the learned counsel. It did so upon being satisfied that ordering a retrial will only be advantageous to the appellant by taking the chance to fill in the gaps in the evidence which was otherwise too insufficient to sustain the charges against the respondents.

By and large, the first appellate court's conclusion was based on PW2's evidence which it found to be too wanting. At end of it all, the said court found no merit in the appeal and dismissed it. Still dissatisfied, the appellant has preferred the instant appeal predicated on two interrelated grounds namely:-

1. *His Lordship High Court Judge grossly erred in law for failure to order retrial after observing that the trial court abused action 214 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002].*
2. *His lordship High Court Judge grossly erred in law and fact when he proceeded to acquit the Respondents having held*

that the proceedings of trial court were nullity on account of violation of section 214 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002].

At the hearing of the appeal, Mr. Kauli George Makasi, learned Senior State Attorney, appeared for the appellant/Republic; whereas Mr. Rainery Songea, learned Advocate, appeared for the respondents as he did before the High Court. The first and third respondents were in attendance whilst the second and the fourth respondents did not enter appearance. Despite the absence of the second and fourth respondents, we proceeded with hearing of the appeal in view of the fact that they were duly represented by their Advocate they had retained before the lower court.

In his oral address before us, Mr. Makasi argued both grounds of appeal together and urged us to allow the appeal. The learned Senior State Attorney kick started his submissions by highlighting the essence of the law under section 214 (1) of the CPA, that is to say; any change of trial magistrate must be supported by reasons for such change which was not the case in the proceedings before the trial court. The learned Senior State Attorney submitted that since there was non-compliance

with section 214 (1) of the CPA, the proceedings before the second Magistrate was a nullity for lack of jurisdiction. In support of that proposition, Mr. Makasi cited to us one of our previous decisions in the case of **Saidi Sui vs. The Republic**, Criminal Appeal No. 266 of 2015 (unreported) in which we cited the cases of Abdi **Masudi Iboma and 3 Others vs. Republic**, Criminal Appeal No. 116 of 2015 and **Priscus Kimaro vs. The Republic,** Criminal Appeal No. 301 of 2013 (both unreported).

Relying on decided cases, the learned Senior State Attorney submitted that once it was established that there was non-compliance with section 214 (1) of the CPA, the only cause open for the first appellate court was to nullify the proceedings before the second trial Magistrate and order a fresh trial from the stage where the first trial magistrate had ended upon full compliance with the dictates of the law rather than delving into the merits of the appeal as the first appellate did, resulting into the dismissal of the appeal.

To buttress his stand point, Mr. Makasi argued that the first appellate court's decision declining to order a retrial was erroneous in

any event because it was a result of examination of evidence of only one witness (PW2), excluding other prosecution witnesses. On the other hand, the learned Senior State Attorney argued that the contention that the prosecution would seize the opportunity to fill in gaps in its evidence if retrial was ordered is not correct because PW2 whose evidence was said to be too wanting had already testified before the first trial magistrate. On the basis of the foregoing, Mr. Makasi implored us to find merit in the appeal and allow it with an order quashing the decision and order of the High Court dismissing the appeal and substitute it with an order directing fresh hearing of the case from the stage the first magistrate had ended.

For his part, Mr. Songea urged us to find that the appeal is without basis. Whilst conceding that the proceedings before the second trial magistrate were a nullity on account of non-compliance with section 214 (1) of the CPA, the learned Advocate contended that the first appellate Judge correctly declined to order a retrial after being satisfied that the case was not fit for a retrial. It was the learned Advocate's submission that from the authorities some of which he placed before us, ordering a retrial is not the only remedy available in cases of non-compliance with

section 214 (1) of the CPA , for each case has to be decided on the basis of its own peculiar circumstances. In this case, the learned Advocate argued, the circumstances did not attract ordering a retrial but one for a dismissal order as the first appellant court did.

To fortify his position, Mr. Songea sought refuge from **Hamisi Miraji vs. Republic,** Criminal Appeal No. 500 of 2016 in which the Court declined to order a retrial notwithstanding the unaccounted for change of trial magistrates contrary to the dictates of section 214(1) of the CPA. The learned Advocate also referred to the case of **Anthony Mateo @ Minazi and Two others vs. Republic** Criminal Appeal No. 13 of 2017 citing with approval **Selina Yambi vs. Republic**, Criminal Appeal No. 94 of 2014 (also unreported). Reference was also made to **Sultan Mohamed vs. Republic,** Criminal Appeal No. 176 of 2003 (Unreported) to buttress the view that not in every case where there is an irregularity in the proceeding will attract an order for retrial. The learned Advocate wound up his submissions by inviting the Court to uphold the decision of the High Court and dismissing the appeal for lack of merit.

Mr. Makasi who had a final word in rejoinder was quick to concede to the correctness of the authorities cited by Mr. Songea but argued that the same were decided on circumstances which are different from those obtaining in this appeal. We understood him to be saying that the authorities are thus distinguishable and inapplicable to the instant appeal. Submitting further, the learned Senior State Attorney argued that the assessment of the prosecution witnesses by the first appellate court confined itself to PW2 ignoring other witnesses, which did not justify the conclusion the first appellate court arrived at refusing to order a retrial and instead it dismissed the appeal.

Having heard the rival submissions by the learned counsel, there is no dispute as to the interpretation of section 214 (1) of the CPA backed by the cases placed before us. What emerges from the said authorities is that change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new trial magistrate to take over from a previous one, he must record the reasons for doing so and invite the accused person to express his position if he will require that the witnesses whose evidence had been

taken by the previous Magistrate be recalled to testify before a new trial Magistrate.

It is also settled law from the cases cited that non-compliance with section 214(1) of the CPA renders the proceedings before the new magistrate a nullity for lack of jurisdiction. There is a thick wall of authorities on the issue represented by such cases as; **Ali Juma Ali Faizi@ Mpemba & Another vs. Republic, Criminal** Appeal No. 401 of 2013, **Richard Kamugisha@ Charles Samson and 5 Others vs. Republic,** Criminal Appeal No. 59 of 2001, **Emmanuel Jackson Kamwela vs. The Republic,** Criminal Appeal No. 482 of 2015 and **John S/o Lukozi vs. The Republic, CAT** Criminal Appeal No. 340 of 2014 (all unreported). In **Priscus Kimario vs. The Republic** (supra) the Court stated:

> *".... we are of the settled mind that where it is necessary to re-assign a partly heard matter, to another Magistrate the reason for the failure of the first Magistrate to complete the matter 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..."

In **Abdi Masoud @ Iboma and Three Others v. Republic** (supra) we said thus:

> *"In our view, under s. 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 a prerequisite 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."*** [Emphasis added]

Apparently, the first appellate Judge was alive to that settled legal position, and this explains why he did not hesitate to nullify the proceedings before E.S. Missana, RM as well as her judgment as evident at page 124 of the record. Despite the above, the first appellate judge found compelling to dismiss the appeal on account of deficiencies in the prosecution's evidence rather than ordering a retrial consistent with the counsels' consent prayer. As seen above, Mr. Songea was emphatic that ordering a retrial was not the only option available to the irregular

proceedings as found by the first appellate court. We have no demur with that line of argument considering the position expressed by the defunct Court of Appeal for East Africa held in **Fatehali Manji vs. Republic** (Supra). Indeed, in **Hamis Miraji vs. Republic** (supra) the Court declined to order a retrial despite the unexplained transfer of the case from one trial Magistrate to the other after it was satisfied that taking that route would have unduly advantaged the prosecution by filling in gaps in its wanting evidence. However, it is plain that the Court took that position on the basis of the submission by the learned State Attorney representing the Republic.

In **Antony Mateo @ Minazi 2 Others vs. Republic** (supra), the Court held the trial a nullity by reason of improper summing up to the assessors after a full trial of the case. Instead of ordering a retrial, the Court, relying on several of its previous decisions including **Selina Yambi vs. Republic** (supra) it found itself constrained to acquit the appellants by reason of insufficient evidence which could not be made better if a retrial was ordered. Again, the circumstances in that case are not similar to those obtaining in the instant appeal in that the learned first appellate Judge's reason for not ordering a retrial was based on a

selective evaluation of evidenced of one witness of the prosecution rather than the entire prosecution witnesses in the manner it was done in **Hamis Miraji's** case (supra). Finally, in **Sultan Mohamed vs. Republic** (supra), the irregularity involved was non-compliance with section 240(3) of the CPA in that the appellant was not addressed to exercise his right to require the personal attendance of the author of a PF3 tendered as exhibit for cross-examination. Referring to **Fatehali Manji vs. Republic** (supra), the Court found itself constrained to order a retrial in the interest of justice. In our respectful view, apart from stating the law relevant to the instant appeal, that decision is not helpful to the respondents. The circumstances in that case were too obvious to order a retrial. On the contrary, considering the undisputed fact that the order for the refusal to order a retrial by the first appellate court was based on selective evaluation of the evidence of only one prosecution witness omitting the other witnesses. With respect, that is not the position in the instant appeal attracting a similar consequence as rightly submitted by Mr. Makasi. It is for this reason we are, with respect, inclined to endorse Mr. Makasi's submission that the order was erroneous and the same cannot be allowed to stand. We would have

stopped here but we find it compelled to examine other cases cited by the learned Advocate for the respondents.

Much as we agreed in principle that ordering a fresh trial in cases of non-compliance with s. 214(1) of the CPA is not the only remedy, the circumstances in the instant appeal dictates the making of that order. In our view, to arrive at the conclusion the first appellate Judge reached as a reason for taking the route he took, required scrutiny of the entire prosecution evidence rather than picking PW2's testimony in isolation. We say so considering the submission by the learned Senior State Attorney that the opportunity for the prosecution taking advantage to fill in gaps in its evidence did not arise because the retrial did not affect the evidence of witnesses including that of PW2 which had already testified immediately before the successor magistrate.

In the light of the foregoing, we allow the appeal and quash the decision of the first appellate court dismissing the appeal and substitute it with an order directing the trial court forthwith to proceed with hearing before the first Magistrate as soon as possible unless for any compelling reasons the said Magistrate is unable to complete the trial in which case

the trial shall continue before another magistrate with competent jurisdiction in strict compliance with section 214(1) of the CPA.

It is ordered accordingly.

DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 4th day of November, 2019 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the appellant/Republic and Mr. Alex Msalenge, for the respondents is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL