

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

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

**CRIMINAL APPEAL NO. 125 of 2018**

**JUMA OMARI NASUMA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Conviction of the High Court of Tanzania at Mtwara)**

**(Mandia, J)**

**dated the 4<sup>th</sup> day of March 2002**

**in**

**Criminal Appeal No. 41 of 2001**

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**JUDGMENT OF THE COURT**

6<sup>th</sup> & 8<sup>th</sup> November, 2019

**MMILLA, J.A.:**

In 2000, Juma Omari Nasuma (the appellant), was charged along with one other person, Omari Juma Abedi (he absconded during trial), at the District Court of Masasi in Masasi District in the Region of Mtwara, with the offence of rape contrary to section 130 (1), (2) (a) and 131 of the Penal Code Cap. 16 Vo. 1 of the Laws of Tanzania as amended by the Sexual Offences Special Provisions Act No. 4 of 1998 (SOSPA). It was alleged that those two persons had carnal knowledge of the complainant one Anastancia d/o Peter without her consent. They were convicted and sentenced to a life imprisonment term. The appellant unsuccessfully

appealed to the High Court of Tanzania at Mtwara, hence this second appeal to the Court.

The facts of the case were not complicated. The complainant was a resident of Makumbalu village within Masasi District. On 12.6.2000, she left her village for Rukumbi village to visit her daughter. On the way, she came across the appellant and his colleague, working in a cashew nut farm. They approached her, grabbed her by force and lured her into the bush at which they raped her in turn. It was alleged that Omari Juma Abedi raped her first, and was followed by the appellant. In the process, the complainant was injured on the head. She shouted for help, but there was no response. After accomplishing that evil act they ran away, leaving her at the scene of crime.

After the rapists had gone, the complainant composed herself and went to the home of Magreth Ngaidi (PW2) who, together with her husband one Petro Nambuta (PW3), took her to the office of the Ward Executive Officer (WEO) of Rukumbi Ward. She was subsequently taken to an unnamed police station at which she was given a PF3 and instructed to go to hospital for medical examination and treatment. Meanwhile, the appellant and his accomplice were arrested by militia people and taken to police. They were eventually charged with the said offence.

Upon their arraignment before the trial court, the appellant and his colleague denied commission of the alleged offence. As earlier on pointed out, the trial court convicted and sentenced each one of them to a life imprisonment term. The appellant unsuccessfully appealed to the High Court of Tanzania at Mtwara, hence this second appeal to the Court.

The appellant's memorandum of appeal raised two grounds as follows; **one** that the evidence of PW1 (the complainant) was wrongly relied upon in terms of section 127 (7) of the Evidence Act, Cap. 6 of Vol. 1 of the Laws, as amended by the SOSPA because it was not credible; and **two** that, the evidence constituted in the PF3 (Exhibit P1) was improperly relied upon because it did not prove the offence of rape, also that it was tendered by an incompetent witness.

This appeal was first heard on 4.11.2019. The appellant appeared in person and was not defended; whereas the respondent/Republic enjoyed the services of Mr. Paul Kimweri, learned Senior State Attorney. However, the parties were re-summoned to appear in Court on 6.11. 2019 after it was found that there was need for them to re-clarify a certain legal point. Attendance was as it was on 4.11.2019.

During the hearing on 4.11.2019, the appellant chose for the Republic to reply to his grounds of appeal before he could make his submission if need would arise. On that basis, we invited Mr. Kimweri to respond.

At the start, the learned Senior State Attorney successfully requested the Court to address it on an irregularity he found in the proceedings before the lower court, which he said was capable of disposing of the entire appeal. His observation focused on the failure by the second trial District Magistrate to comply with the provisions of section 214 (2) (a) of the Criminal Procedure Act Vol. 1 of the Laws, Act No. 85 of 1985 of the CPA.

In elaboration of his point, Mr. Kimweri submitted that the trial at Masasi District Court commenced on 19.1.2001 before J. B. C. Massito, Esq. Senior District Magistrate. He recorded the evidence of Anastancia d/o Petro (the complainant), after which the hearing was adjourned to another date. The hearing however, did not resume until on 3.4.2001 when the trial was taken over by M. O. Lilibe, Esq. District Magistrate who conducted the trial to its conclusion. He found the appellant and his accomplice guilty and convicted them. At the end, he sentenced both of them to a life imprisonment term. Unfortunately, Mr. Kimweri remarked,

the second trial District Magistrate did not accord the appellant the rights which were expressed under section 214 (2) (a) of the CPA. He clarified that in terms of section 214 (2) (a) of the CPA as it was then, the second trial magistrate was duty bound to inform the appellant that he had the right to elect on whether or not he wished for the witness who had already testified before the previous trial magistrate to be recalled to testify. Mr. Kimweri was confident that failure to comply with that section constituted a nullity of the entire proceedings before the second magistrate, so also the proceedings and the judgment before the first appellate court were null and void for having been based on a nullity. He urged us to invoke the revisional power we have under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), on the basis of which we may quash the proceedings from where the second magistrate began on wards, and order the case to be completed by the first magistrate, or where it may be impractical, to be taken over by another magistrate of competent jurisdiction who may proceed after complying with the demands of that section as it was then.

It is unfortunate that the discussion focused on a legal point, as a result the appellant, who is a lay person, had no vital contribution apart from expressing his support to the submission made by the learned Senior

State Attorney. As such, we are constrained to solely depend on the submission of Mr. Kimweri *vis a vis* the contents of the Record of Appeal.

To begin with, we wish to acknowledge Mr. Kimweri's submission that before the 2002 amendment to the Criminal Procedure Act, section 214 (1) of that Act allowed another magistrate to take over and continue with proceedings commenced by his predecessor who for any reason was unable to complete the proceedings, conditional upon compliance with the instructions under section 214 (2) (a) of that same Act.

As already pointed out, the present case was tried by two District Magistrates. As shown at page 10 of the Record of Appeal, trial of the case commenced on 19.1.2001 before J.B.C. Massito, Esq. Senior District Magistrate. On 3.4.2001, trial was taken over by M.O. Lilibe, Esq. District Magistrate who continued with the trial to its conclusion. Remarkable however, is the fact that during the takeover on 3.4.2001, the learned District Magistrate did not explain to the appellant his rights which then obtained under section 214 (2) (a) of the CPA. Prior to the 2002 amendments of the CPA by Act No.9 of 2002, section 214 (1) and (2) (a) provided that:-

***"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 or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and two 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 re-summon the witnesses and recommence the trial or the committal proceedings or otherwise **subject to subsection (2).***

*(2) Whenever the provision of subsection (1) applies –*

*(a) in any trial the accused may, when such other magistrate 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 magistrate when he commences his proceedings.***"[The emphasis is ours].

As correctly submitted by Dr. Kimweri, section 214 (2) (a) of the CPA was couched in mandatory terms. That meant compliance was strictly demanded. This was emphasized in a number of cases, including those of

**Liamba Sinanga v. Republic** [1994] T.L.R. 97 and **Richard Kamugisha @ Charles Simon and 5 others v. Republic**, Criminal Appeal No. 59 of 2004, in which the case of **Remebisele s/o Elisa v. Republic** (1967) HCD no. 72 was cited with approval. It was stated in **Remebisele's** case that:-

*"The discretion given to a magistrate by the Criminal Procedure Code under section 196 (now section 214 of the Criminal Procedure Act, [1985] should be exercised with great care, for the primary purpose of the hearing is to permit the court to observe the demeanour and evaluate the credibility of all the witnesses. In the present case the charges were grave and the accused persons vigorously contested the allegations of the prosecution witnesses..."*

We think that the court's concern in that case was that the appellant had the right to be informed of his right to re-summon the witnesses so that he could be in a better position to prepare his defence given the grave nature of the charges which he was facing. Since that was not done, that court was forced to quash the conviction, set aside the sentence and ordered a retrial.



The position was amplified in the latter case of **Richard Kamugisha** (supra) in which it was stated that:-

*"We have cited the above cases to illustrate that where a trial is conducted by more than one magistrate, the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses. The word used in section 214 (1) of the Criminal Procedure Act, 1985 is 'may' which indicates discretion but **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.** We are hesitant to say that where, as is the case here, the third magistrate only heard 3 defence witnesses and did not take the evidence of the five prosecution witnesses such magistrate adjudicated upon and determined the case fairly". (Emphasis is ours)."*

In that case too, the Court found that the omission to inform the appellant his right to re-summon the witnesses was a fundamental irregularity. Like in **Remebisele's** case (supra), the proceedings of the trial court, the judgment and the appeal to the first appellate court were nullified.

As the record shows, the appellant in the present case was charged with rape contrary to sections 130 (1), (2) (a) and 131 of the Penal Code. Upon conviction, he was sentenced to a life imprisonment term. No doubt, basing on the sentence which was meted out against him, the charge he faced was very grave. As such, at the time the second trial magistrate took over from the previous magistrate, he ought to have complied with the demands of section 214 (2) (a) of the CPA. We emphasize that to have not been done so was highly prejudicial to the appellant, and it constituted unfair trial. We accordingly declare it to be an incurable defect which vitiated the proceedings and judgments in both courts below, that cannot be left to stand.

That said and done, in terms of section 4 (2) of the AJA we quash the proceedings of the trial court from 3.4.2001 when M. O. Lilibe, Esq. District Magistrate took over the trial of the case from his predecessor and the judgment resulting therefrom, and set aside the sentence of life imprisonment which was meted out against the appellant. We further quash the proceedings and judgment of the High Court on account that it was based on a nullity, and direct the trial of this case to be proceeded with by the first trial magistrate from where he ended on 19.1.2001 until its conclusion. In case that is not possible for any reasons that may be,

then trial may be taken over by another magistrate with competent jurisdiction who will first be required to comply with the demands of section 214 (2) (a) of the CPA as it then stood. We underscore however, that because the appellant has been behind bars since 4.7.2001, the trial of his case should be speeded up for purposes of getting early results.

Order accordingly.

**DATED at MTWARA** this 7<sup>th</sup> 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 8<sup>th</sup> day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Meshack Lyabonga learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



A handwritten signature in blue ink, appearing to read "S. J. Kainda", with a stylized flourish at the end.

S. J. Kainda  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**