

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 111 OF 2019

KASALA LUGOYE KASALA@ MSUKUMA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dodoma)

(Mansoor, J.)

Dated 3rd day of April, 2019

in

HC Criminal Appeal No. 79 of 2018

RULING OF THE COURT

15th & 17th June, 2020

MUGASHA, J.A.

In the District Court of Iramba, at Kiomboi, the appellant was charged with two counts of the offence of grievous harm contrary to section 225 of the Penal Code [CAP 16 RE.2002]. It was alleged by the prosecution that, on 9/12/2017, at about 23.00 hours at Ishenga village within Mkalama District in Singida Region, the appellant did unlawfully cause grievous harm to one Ramadhani s/o Zephania and Bertha d/o Zephania.

The appellant denied the charge whereupon, to establish its case the prosecution paraded seven witnesses and tendered one documentary exhibit (Exhibit P1), Police Form No. 3 (the PF3). The prosecution account was to the effect that, on the fateful day, while in their house the victims Bertha Zephania and Ramadhan Zephania, PW1 and PW2 respectively, were invaded by a certain person, attacked and sustained cut wound on different parts of their bodies. In the same encounter, their parents were also attacked and succumbed to death. They raised alarm which was heeded to by the villagers who gathered at their house. They narrated what had befallen them to the villagers and mentioned the attacker to be a person who was known to them having previously seen him when he visited their homestead to buy sunflower. The matter was reported to the police where one of the victims, PW1 was issued with the PF3 and taken to the hospital and upon examination, Dr. James Rubagara (PW7) established that PW1 had deep cut wound and the bone of her right arm was broken. Subsequently, the appellant was arraigned in court.

In his defence, the appellant denied each and every detail of the prosecution case.

After a full trial, the appellant was convicted as charged and sentenced to imprisonment to seven years. 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 four grounds of complaint on account of having being convicted on the basis of insufficient prosecution evidence which did not prove the charge beyond reasonable doubt. However, due to reasons which will become apparent in due course we shall not reproduce the grounds of appeal.

To prosecute the appeal, vide a virtual link with Isanga Central Prison where the appellant was serving jail term, the appellant appeared in person unrepresented whereas, the respondent Republic had the services of Mr. Amani Mghamba, learned Senior State Attorney and Ms. Grace Mpatili, learned State Attorney.

Before proceeding to hear the appeal, the learned Senior State Attorney with leave of the Court, rose to address the Court on a point of law relating to the succession of magistrates in the trial which is subject of the appeal. He pointed out that, initially, from 15/3/2018 to 3/7/2018 the trial was presided over by C.P. Singano, RM who took the evidence of all the prosecution witnesses. Subsequently, from 17/7/2018 C.C Makwaya, RM proceeded to take the defence evidence and wrote a judgment which was delivered on 16/8/2018. However, the successor magistrate did not record the reasons for the taking over which was a violation of the provisions of section 214 (1) of the Criminal Procedure Act [CAP 20 RE.2002] (the CPA). In this regard, the learned State Attorney argued that, the trial court's judgment is a nullity because the successor magistrate did not comply with the dictates of the law before taking over the matter and as such, had no jurisdiction and the trial was vitiated. To back up his argument he cited to us the case of **HATWIB SALIM VS REPUBLIC**, Criminal Appeal No. 372 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 the trial be continued before the predecessor magistrate who initially presided over the trial. 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. Mghamba's submission, we are aware of 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 ... **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...”

[Emphasis supplied].

Moreover, section 312 (1) of the CPA stipulates as follows:

“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]

Under this section, the successor 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. See - **SALIMU HUSSEIN VS REPUBLIC**, Criminal Appeal No. 3 of 2011 (unreported).

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

Similarly, in the case of **HATWIB SALIM VS REPUBLIC**, (supra) the Court reiterated the essence of complying with the provisions of section 214 (1) of the CPA made a following observation:

"the requirement to state reasons of change of magistrates from one magistrate to another is a very important issue to be considered. This is for the reason of controlling and avoiding the danger of some mischievous persons who might be able to access the file and do issues not in accordance with the procedure or requirements of the law."

In the present case, it is clear that while the predecessor magistrate took the evidence of seven prosecution witnesses, the successor magistrate without assigning reasons, presided over the defence case having taken the evidence of the appellant and composed the judgment. In the absence of any recorded explanation as to why the successor magistrate took over the matter from the predecessor magistrate, the former had no jurisdiction to subsequently preside over the trial at that stage. 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 learned Senior State Attorney that, the

succession of the magistrate was contrary to the provisions of section 214 (1) of the CPA.

In addition, the failure by C.C. Makwaya, RM to record the reasons for the taking over and authoring the Judgment offended the mandatory requirements of the law under section 312 (1) of the CPA which renders the purported judgment a nullity. In this regard, in the absence of the reasons for the taking over 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

In our considered view, the infraction 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. We remind the High Court that in future the said provision should be invoked so as to timely remedy the infractions to facilitate timely resolution of the criminal disputes.

As to the way forward, we invoke revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE. 2002] and nullify the trial proceedings before C.C. Makwaya, RM dated 17/7/2018 to 7/8/2018 and the judgment of the trial court including the sentence. Consequently, 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 Iramba before the trial magistrate C.C. Singano, RM to continue with the trial from where he ended by taking the defence evidence, composing and delivering the judgment as soon as possible. If for any cogent reason C.C. Singano, RM is unable to continue with the trial, compose and deliver the judgment, the successor magistrate must pay due regard to the dictates of section 214 (1) of the CPA. In

case of conviction, the period spent by the appellant in prison should be considered in imposing the sentence. Meanwhile the appellant shall remain in custody.

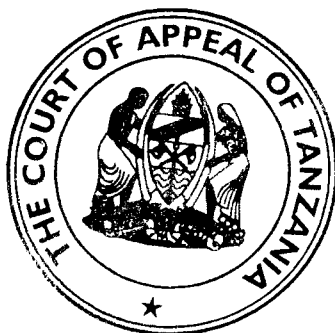
DATED at **DODOMA** this 17th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered on 17th day of June, 2020 in the presence of the Appellant in person and Mr. Harry Mbogoro, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL