

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
(APPELLATE JURISDICTION)

HC CRIMINAL APPEAL NO. 162 OF 2014

(Originating from the Kinondoni District Court Criminal Case No.323 of 2010)

KASSIM S/O SAID NGALAMBE @ KESSY..... 1st APPELLANT
MUHSIN S/O ISMAIL MANZI 2nd APPELLANT
Versus
THE REPUBLIC RESPONDENT

Date of hearing: 13th July, 2015
Date of Judgment: 7th September, 2015

JUDGMENT

Feleshi, J.:

This is an appeal against the conviction and sentence mounted against the above appellants in respect of the two counts of Armed Robbery allegedly committed on 12th March, 2010 at about 08:30hrs at Magomeni Mapipa Bagamoyo Community Centre area within Kinondoni District in Dar es Salaam Region, contrary to sections 287A of the Penal Code, [Cap. 16 R.E.2002] as amended by Act No.4 of 2004.

At the end of the trial the court did not enter conviction. Instead, on omnibus basis it sentenced each appellant to thirty (30) years imprisonment and without specifying in respect of which count(s). The prevalence of these deficiencies is now untold and requires immediate intervention.

It is noted that the trial proceedings from 29/3/2010 to 11/3/2013 was succeeded over by Hon.Mzava-RM on 2/5/2013 who continued with the cross-examination against PW.6 and finalized the trial. For clarity purposes, I am reproducing the relevant parts of proceedings covering the dates when those changes occurred, that is -2/5/2013 when Hon. Mzavas took over the conduct of the case and 15/5/2013 when the trial was continued.

"2/5/13

Coram HON. MZAVA RM
PP MASINI
CC SHEMDOE
ACCD Both Pt
PP No witness, the case is just assigned from Hon. Kiwonde.

Order Hg 15/5/13
AFRIC
.....
SGD
2/5/13"

And

"4/9/13

Coram HON. MZAVA RM
PP MASINI
CC SHEMDOE
ACCD Both Pt

PP For hg no witness. PW6 (is warned he is still under oath)

that's all.

.....
SGD
4/9/13"

XXD 1st accd:....."

It is evident from the foregoing portion of the trial court's proceedings that in taking over the trial proceedings that had commenced before Hon.Kiwonde – RM the learned successor trial magistrate Hon.Mzava-RM did not address the

appellants on those charges and did not submit their comments on the rights enshrined under section 214(1) of the Criminal Procedure Act, [Cap.20 R.E.2002] here in after referred to as CPA, for proceedings conducted by subordinate courts and section 299 for those conducted by the High Court.

In **Godwin Raphael Mushi v. Rep.**, HC-Cr.Appeal No. 33 of 2014, Dar Es Salaam Registry (unreported) this court observed that although the vitality of sections 214(1) of the CPA has been in our law books for decades, the flaws connected to their violations are still at drastic increase. It thus raised a question **“what is the consequence (if any) of the non-compliance with sections 214(1) of the Act obtaining in the court record at hand.”** This same question must be first tackled in this appeal since its answer will determine whether or not to consider the appeal on merit. Unfortunately, nothing of the like features in the several grounds of appeal filed by the appellants and was not also raised and argued by the parties at the hearing of the appeal on 13th July, 2015.

The decision of the Court of Appeal in the case of **Richard Kamugisha @ Charles Simon and 5 others v. Rep.**, Cr.Appeal No. 59 of 2004, Mwanza Registry (unreported) which was quoted with approval in **Elisamia Onesmo v Rep.**, Cr.Appeal No.160 of 2005, Arusha Registry-unreported provided that proceedings conducted in total violation of section 214(1) of the CPA constitutes a fatal irregularity.

In **Godwin Raphael Mushi v. Rep. (supra)** this court held that it is trite that magistrates and judges when trying criminal cases must pay regard to basic standards of fair trial which include, but not limited to; first, to understand the nature of the charge; second, to plead to the charge and to exercise the right to challenge it; three, to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; four, to

follow the course of the proceedings (i.e. to understand the substance effect of any evidence that may be given in support of the prosecution); and six, to make a defence or to answer the charge. It therefore held that in the light of those standards it is understandable why the Court of Appeal decision in the case of **Richard Kamugisha @ Charles Simon and 5 others** (supra) deliberately and purposively underscored that the word "may" in section 214(1) of the CPA be interpreted in the manner guaranteeing the accused's right to fair trial. That means, it departed from the literal interpretation assigned to that word by section 53(1) of the Interpretation of Laws Act, [Cap.1 R.E.2002]. Below is a quoted section 214(1) before and after amendments which, when read together with the cited decisions above fortifies the vitality of the right referred to:

"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 who 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 provisions of subsection (1) applies-

- a) in any trial the accused **may**, when the such other magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-hear and shall be informed of such right by the second magistrate when he commences his proceedings;
- b) 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."
[emphasis supplied]

Then the Written Laws (Miscellaneous Amendments) (No.2) Act, No. 9 of 2002 amended it by:

by deleting the words "subject to subsection (2)" appearing in subsection (1), and substituting for them the words "if he considers it necessary"

(ii) by deleting subsection (2) and substituting it the following:

"(2) whenever the provisions of subsection (1) applies 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."

And after the amendment the section now reads:

"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 who 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 and **if he considers it necessary**, resummon the witnesses and recommence the trial or the committal proceedings.

(2) 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."

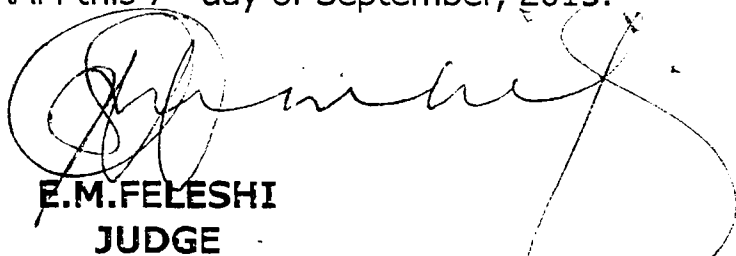
This Court underscored in **Godwin Raphael Mushi v. Rep. (supra)** that the subsequent amendments to the section were duly considered by the Court of Appeal in **Richard Kamugisha's** case (supra) before held that the accused primary right to be informed of his right to have a witnesses or witnesses re-summoned when the second magistrate commences his proceedings, which was otherwise taken away by the amendments to section 214 of the Act (supra) without paying regard to the outlined basic standards of fair trial, is fundamental. The court further observed that the remedy provided by subsection (2) of section 214 is not an immediate as in most cases the High

Court becomes aware of the violations done by the successor who magistrate very late.

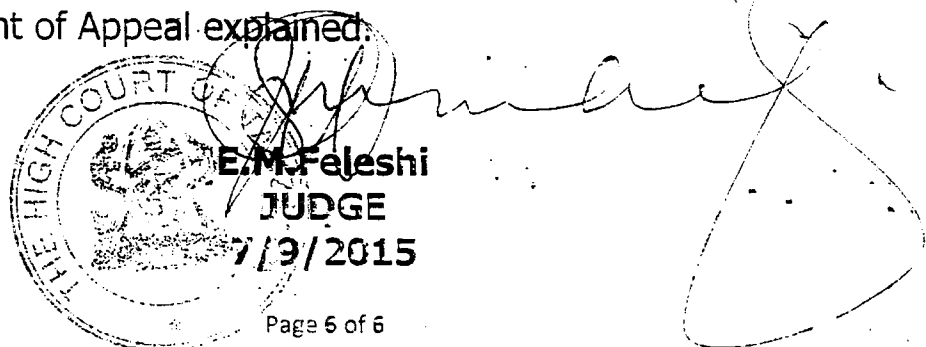

This case being squarely exhibiting similar a violation like the one dealt with by the Court of Appeal, leaves this court with no other option other than that of nullifying the proceedings and consequent judgment and orders couched by Hon. Mzava-RM. I quash that portion of proceedings, its consequent judgment and orders and further set aside the appellants' sentence.

The appellants should be re-tried by the same or different magistrate of the rank of Senior or Principal Resident Magistrate as soon as it is practicable possible. For avoidance of doubt, the proceedings shall commence and proceed from where Hon. Kiwonde, learned Resident Magistrate had ended. Order accordingly.

DATED at DAR ES SALAAM this 7th day of September, 2015.


E.M. FELESHI
JUDGE

Delivered in Court Chambers in the presence of the Appellants and Ms. Saada Mohamed, the learned State Attorney, for the Republic Respondent. A right of Appeal explained.



E.M. Feleshi
JUDGE
7/9/2015