

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CRIMINAL APPEAL No 116 OF 2017

**(Original Criminal Case No 461 of 2015, of Kinondoni District Court
at Kinondoni)**

SAMWEL DICKSON ENOCK @ JEREMIA MICHAEL BWILE.....1st APPELLANT

SAID MASOUD ATHUMAN.....2nd APPELLANT

ZUBERI MOHAMED HASSAN.....3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 16/5/2018

Date of Judgment: 30/5/2018

Munisi, J.

The appellants, Samwel Dickson Enock @ Jeremia Michael, Said Masoud Athuman and Zuberi Mohamed Hassan stood before the District Court of Kinondoni at Kinondoni, charged with the offence of offences comprised of 4 counts; namely; 1st count: conspiracy to commit an offence contrary to section 384, 2nd count: obtaining money by false pretenses contrary to section 302, 3rd count: forgery contrary to section 333, 335 & 337, 4th count: uttering a false document contrary to section 342 all of the Penal Code, Cap 16 RE 2002. It was alleged that on diverse dates in the month of January,

2015 the three appellants conspired to commit an offence by falsely misrepresenting that they had a plot to sell at Kulagwa Goba area and obtained cash Shs. 18,000,000/- from one Mariam Muhina @ Mbelwa. To prove the allegation, prosecution summoned five witnesses while appellants defended themselves in person without calling any witness. At the conclusion of the trial, the appellants were found guilty and convicted as charged. They were sentenced to three and seven years for the 1st and 2nd counts respectively. Aggrieved by the decision they have filed a joint appeal comprised of 6 grounds each for the 1st & 3rd appellant and 8 grounds for the 2nd appellant. In addition, on 2/8/2017, appellant sought leave to file six more grounds which was accordingly granted. Among the added grounds, the appellants raised a new issue that the proceedings were irregular as the provisions of section 214 of the Criminal Procedure Act (CPA) were not complied with.

On 16/5/2018 when the appeal was called on for hearing, the appellants appeared in person unrepresented and prayed to rely on the grounds raised in their petition of appeal together with the additional grounds. Miss Selina Kapange, learned State Attorney appeared for the respondent/Republic.

Before venturing in the merits of appeal, Miss Kapange invited the court to address the issue of the regularity of the proceeding with regard to the non-compliance with the provisions of section 214 of the CPA. The learned State Attorney contended that from the record it is apparent that the trial was conducted by two different magistrates, Hon. Mushi who recorded the evidence from three prosecution witnesses and Hon. Ding'ohi who recorded evidence from the two remaining witnesses together with the defence evidence. She elaborated that the successor magistrate did not record the reasons for the change that occurred. In that regard she argued that the part of the trial that was conducted contrary to the provisions of section 214 of the CPA should be nullified. She added that since the appellants had just served a small part of their sentence and the evidence against them is overwhelming, the

court should direct the rehearing of the nullified part in strict compliance to section 214 of the CPA.

I have gone through the record and considered closely the complaint in regard to the non-compliance of section 214 of the CPA. I have no doubt the complaint has merit. The provisions of section 214(1) and (2) of the CPA as amended by Act No 9 of 2002 provides:

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 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 proceedings 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 subject (2).

(2) Whenever the provision of subsection (1) applies: -

(a) in any trial the accused may, when the (sic) 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.**

(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.

From the express wording of the above provision, it is clear that in any criminal trial, it is a requirement for the successor magistrate to expressly inform the accused person/s of the right to **re-summon or re-hear any witness** before he/she commences his proceedings. It also requires **reasons to be assigned for change of trial magistrates**. The Court of Appeal in the case of **Elisamia Onesmo V Republic, Criminal Appeal No. 160 of 2005** (unreported) emphasized the need to observe the said requirement strictly. In another case of **Aly Juma Faizi @ Mpemba and Another V Republic, Criminal Appeal No. 401 of 2013** (unreported), the Court cited with approval its holding in its earlier case of **Adam Kitundu V R, Criminal Appeal No. 360 of 2014**(unreported)). In the said case it was observed, that the section requires the reasons showing why the predecessor magistrate could not complete the trial to be laid bare.

The above being the obtaining position of the law, the question is whether it was complied with by the trial court. On the day when the predecessor magistrate, Hon. Ding'ohi took over the conduct of the case, i.e. 1/9/2016, the record shows the following:

"Corum - Hon S.R. Ding'ohi – RM

P.P - Insp Masini

C.C - Pudensiana

Accd - Present

Pros.

The 2nd accused person still at large....

Court:

- (i) The prayer to proceed/s 226 of the CPA against the 2nd accused person granted.*
- (ii) The 1st, 3rd and 4th accused addressed u/s 241 f the CPA and they say*

1st Accused:

I pray to proceed from where the case ended

3rd Accused:

I 'm of the same stance your honour

4th Accused:

Let the case proceed from where the magistrate ended"

From the above extract of the proceedings, while it is glaring that the successor magistrate complied with the provisions of section 214(1) of the CPA, there is nothing to indicate that subsection (2) of the section was complied with.

The above being what transpired before the trial court, I am satisfied that the successor magistrate did not strictly comply with the requirement of section 214(2) of assigning reasons for the takeover of the proceedings. In the case of **Elisamia Onesmo**, the Court of Appeal cited with approval its earlier position reached in **Richard Kamugisha @ Charles Simon and 5 Others V R, Criminal Appeal No 59 of 2004** (unreported) in which it reiterated the principle that "***courts have been cautious in situations where a single trial is presided over by more than one magistrate.***" In the said case, the Court quoted with approval an observation made in the old case of **Remebisele s/o Elisaro V R (1967) HCD 72** to the effect:

"The discretion given to a magistrate by the Criminal Procedure Code section 196 (now section 214 of the Criminal Procedure Act) 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 a recent case of **Priscus Kimaro V Republic, Criminal Appeal No. 301 of 2013** (unreported) the Court of Appeal emphasized thus:

"....where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete 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."

Emphasizing the importance of putting on record the reasons where there is a change of judicial officers in trials in both civil and criminal, the Court of Appeal in its recent case of **M/S Georges Centre Limited V The Honourable Attorney General and Another, Civil Appeal No. 29 of 2016** (unreported) observed as follows:

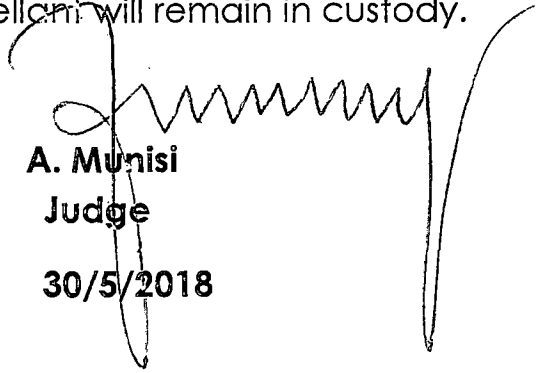
"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that."

Undoubtedly from the authoritative decisions cited herein above, the omissions by the successor magistrate to comply with section 214 of the CPA constituted a serious irregularity which renders the proceedings of the successor magistrate beginning from 1/9/2016 to the end of the trial and the judgment thereof a nullity. Accordingly, I nullify that part of the trial and the judgment thereof which in addition to the name of Hon. Ding'ohi RM, it also shows the name of Hon. Kuppa RM although he did not take part in the trial throughout the proceedings.

Consequently, from the foregoing discussion, the proceedings from 1/9/2016 to the end and the judgment thereof are declared a nullity. Going by the evidence on record and considering the little portion of sentence that the appellants have so far served, the remedy available is to order a retrial for that part of proceedings conducted by the successor magistrate in strict compliance with section 214 of the CPA.

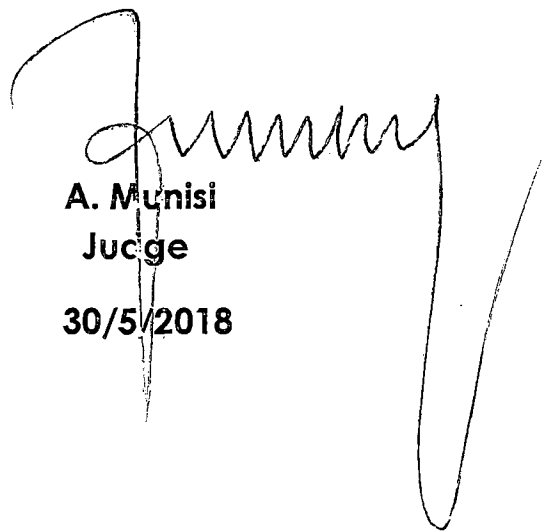
Accordingly, the appeal is allowed to the extent explained above and the trial court record is to be remitted back to Kinondoni District

Court soonest with direction to conduct a fresh trial on the part of the proceedings beginning from 1/9/2016 to the end and compose a fresh judgment. If the appellants will still be desirous, they could prefer their appeals then. In the meantime, and until their submission to the District court, the appellants will remain in custody.



A. Munisi
Judge
30/5/2018

Judgment delivered in Chambers in the presence of the appellants in person and in the presence of Miss Honorina Munishi, learned Senior State Attorney for the respondent/Republic, this 30/5/2018.



A. Munisi
Judge
30/5/2018