

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA.**

**DC. CRIMINAL APPEAL NO. 09 OF 2020**

*(Arising from Criminal Case No. 21 of 2018 of Songea District Court)*

**FELISTA CHARLES KIPANGULA .....APPELLANT**

**VERSUS**

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

*Date of last Order: 24/04/2020*

*Dated of Judgment: 26/05/2020*

**JUDGMENT**

**I. ARUFANI, J**

This Appeal originates from Criminal Case No. 21 of 2018 of Songea District Court (hereinafter referred as the trial court) whereby the appellant, Felista Charles Kipangula was charged with thirteen counts. She was charged in the first to twelfth counts with the offences of Forgery contrary to sections 333, 335(a) and 337 of the Penal Code, Cap 16 R. E. 2002 (hereinafter referred as the Penal Code) and charged in the thirteenth count with the offence of Personating Public Officer contrary to section 100 (b), and section 35 of the Penal Code.

Before hearing of the case the appellant was admitted to bail but she disappeared and for sixteen months she was nowhere to be found. That

caused the trial court to order hearing of the appellant's case to proceed in her absence under section 226 (1) of the Criminal Procedure Act, Cap 20, R.E 2002 (hereinafter referred as the CPA) and on 12<sup>th</sup> July, 2019 she was convicted in absentia. The appellant was arrested on 15<sup>th</sup> July, 2019 and taken to the trial court where she was sentenced to serve seven years imprisonment term in each of the twelve counts of Forgery and two year imprisonment term in the thirteenth count of Personating Public Officer. The appellant was aggrieved by the decision of the trial court and appealed to this court basing on five grounds quoted hereunder:-

- 1. That, the trial magistrate erred in law by proceeding to hear the evidence of PW8, PW9, PW10, PW11 and PW12 without complying with the provision of section 214 of the Criminal Procedure Act, Cap 20 R E 2002, for the reasons of taking over the matter from previous magistrate who heard the PW1, PW2, PW3, W4, PW5, PW6, and PW7.*
- 2. That, the trial magistrate erred in law when he continued with the matter without assigning the reasons for him taking over the previous magistrate who heard PW1 to PW7.*
- 3. That, the trial magistrate erred in law by receiving all the documentary evidence without reading before the trial court after admission of the same and used them to determine the case, therefore admitting of the documentary evidence and without reading before the court it is irregularity beyond repair.*

*4. That, the trial magistrate erred in law and facts to convict and sentence the appellant contrary to the law considering that the appellant was convicted in absentia.*

*5. That, the trial magistrate erred in law and in facts by convicting the appellant while the case of prosecution was not proved beyond reasonable doubt.*

When the appeal came for hearing the appellant was represented by Mr. Vicent Kassale, learned advocate who was assisted by Mr. Raphael Matola, learned advocate and the Republic/Respondent was represented by Mr. Hamimu Nkoleye, learned Senior State Attorney. Due to the ongoing spread of Covid-19 (Corona Virus Decease) the court decided to order the counsel for the parties to argue the appeal by way of written submissions instead of arguing it orally. I commend both sides for complying with the schedule of filing their submissions as given by the court.

In arguing the appeal the counsel for the appellant merged the first and second grounds of appeal and argued them jointly. I will start to deal with the stated two grounds of appeal and if they will be sustained there will be no need of continuing to deal with the rest of the grounds of appeal as the way they are crafted their substance depends on the outcome of the first two grounds of appeal.

The counsel for the appellant stated in relation to those two grounds of appeal that, the trial court's proceedings shows there was a change of magistrate in the trial of the case which the appellant was facing before the trial court. He stated that, hearing of the prosecution case commenced

before Hon. I. H. Magori, SRM who heard the evidence of PW1 to PW7. Thereafter the matter proceeded before Hon. C. F. Waane, RM who heard the evidence of PW8 to PW12 and composed the judgment which convicted the appellant in absentia. The counsel for the appellant argued that, the transfer of the case from Hon. I. H. Magori, SRM to Hon. C. F. Wanne, RM was done without abiding to the requirement of the law provided under section 214 (1) (2) of the CPA. He stated that, under the cited provision of the law the successor magistrate was required to state in the proceedings of the case the reason for taking over the matter from his predecessor magistrate to him but that was not done in the appellant's case.

He submitted that, the stated omission is a serious and fatal irregularity as it is a trite law that, for a successor magistrate to have authority to proceed with a trial which its hearing commenced before his predecessor he is required to assign reasons for taking over the matter from his predecessor. He argued that, failure of the successor magistrate to state in the record of the matter the reason for taking over a matter from his predecessor renders the proceedings conducted by him a nullity. He bolstered his argument with the case of **Isaack Stephano Kilima V. R**, Criminal Appeal No. 273 of 2011 CAT at Arusha (unreported), where the Court insisted that, a successor magistrate is required to assign reason for taking over a matter from his predecessor and consequence of failure to comply with what is provided under section 214 of the CPA is to render the proceedings conducted by the successor magistrate a nullity.

In reply to the above submission of the counsel for the appellant, the learned Senior State Attorney admitted that, failure for a successor magistrate to assign reason for taking over a trial from his predecessor is an incurable irregularity. He however, distinguished the case at hand from the case of **Issack Stephano Kilima**, (supra) by arguing that, the accused in the cited case was present in court when his case was being heard while in the case at hand the appellant was not present in court when her case was being heard. He argued that, as the accused in the above cited case was present in court he had a right to know why the successor magistrate took over the case from his predecessor as failure to do so would have prejudiced the accused in the cited case.

He argued in relation to the case at hand that, as the appellant was not present in court when her case was being heard and her case was heard in her absence under section 226 of the CPA she was not prejudiced by the omission done by the successor magistrate to state the reason for taking over the trial from his predecessor. He submitted that, under that circumstances the successor magistrate did not violate the requirement provided under section 214 (1) of the CPA as the appellant who was required to be informed the reason for change of magistrate was not present in court. At the end he prayed the court to refuse to accept the prayer of the counsel for the appellant that the proceedings of the appellant's case conducted in violation of the above cited provision of the law be nullified.

After considering the submissions made to the court by the counsel for the parties and going through the record of the trial court, the court

has found as rightly argued by the counsel for the parties the appellant's case was heard in her absence and was heard by two different learned Resident Magistrates. The proceedings of the trial court shows hearing of the matter commenced before Hon. I. H. Magori, SRM who heard the evidence of PW1 to PW7. Thereafter the hearing of the matter continued before Hon C. F. Waane, RM who heard the evidence of PW8 to PW12 and composed the judgment which convicted the appellant in absentia. After the appellant being arrested and taken to the trial court she was sentenced to serve imprisonment terms as stated at the outset of this judgment.

As rightly argued by the counsel for the parties the position of the law as provided under section 214 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 is very clear that, where a magistrate who has commenced hearing of a matter has failed to complete the trial commenced before him because of any reason another magistrate with competent jurisdiction may take over and continue with the trial. For clarity purposes the mentioned provision of the law states as quoted hereunder:-

***"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.”[Emphasis added].*

The interpretation which has been given to the above provision of the law in number of cases decided by this court and the Court of Appeal of Tanzania has emphasized that, a magistrate who is taking over a matter which its trial has commenced before another magistrate is required to give reasons as to why he has taken over hearing of a matter which its hearing had commenced before another magistrate. One of the cases where the stated requirement was stated is in the case of **Issack Stephano Kilima** cited to the court by the counsel for the appellant where it was stated inter alia that:-

*"One magistrate cannot simply continue with a trial commenced by another magistrate without stating the reasons for the change. This is a requirement under the law and therefore has to be complied with. It is important for the sake of transparency so as not to prejudice the accused in anyway."*

The similar view was taken by the Court of Appeal of Tanzania in more recent case of **Abdi Masoud @ Iboma & 3 Others V. R**, Criminal Appeal No. 116 of 2015 (unreported) where the Court stated inter alia that:-

*"In our view, under s. 214 (1) of the CPA it is necessary to record the reason for reassignment or change of trial*

*magistrate. It is a requirement of the law and has to be complied with.*

Since both sides are in agreement that the appellant's case was heard by two different magistrates it is obvious that the requirement of the law emphasized in the above cited cases that, reason for change of magistrate in a case is required to be stated in a proceedings of a case was supposed to be complied with by the successor magistrate in the case at hand. As the whole proceedings of the appellant's case is not showing anywhere stated why the successor magistrate took over the matter from his predecessor and he continue with the hearing of the matter to the end it is obvious that the requirement of the law provided under section 214 (1) of the CPA quoted hereinabove was not complied with.

The court has considered the arguments used by the learned Senior State Attorney to distinguish the case of **Issack Stephano Kilima** cited in the submission of the appellant from the case at hand and find that, it is true that there is a difference in the cited case when compared with the case at hand. The court has found while in the cited case the accused was present in court when his case was being heard, in the case at hand the appellant was not present in court when her case was being heard. The court is also in agreement with the learned Senior State Attorney that, one of the reason for requiring a successor magistrate to state the reason for change of the trial magistrate as observed in the above cited case of **Issack Stephano Kilima** is to give the accused person right to know why there is a new presiding magistrate in his case.



However, the court is not in agreement with the learned Senior State Attorney that the requirement to state the reason for change of a trial magistrate in a case is only to give an accused person right of knowing why there is a change of magistrate in his case. To the view of this court the stated legal requirement has more reasons than that of giving an accused person a right to know why there is a change of magistrate in his case. The other reason includes enabling the successor magistrate to assume jurisdiction of continuing with the trial of the case commenced by his predecessor. Failure to state the reason for taking over the trial from his predecessor renders him to lack authority or jurisdiction of continuing with a trial commenced by his predecessor. The above stated position of the law can be found in the case of **Abdi Masoud @ Ibomu** (supra) where the Court of Appeal stated inter alia that:-

*"It is prerequisite for the second magistrate's assumption of jurisdiction. If is not complied with, the successor magistrate would have no authority or jurisdiction to try the case."*

The above quoted excerpt shows if the successor magistrate does not state the reason for taking over the matter from his predecessor cannot have authority of jurisdiction to try the case. Another reason for requiring a successor magistrate to state the reason for taking over a matter from his predecessor was stated in the case of **Priscus Kimaro V. R.**; Criminal Appeal No. 301 of 2013 CAT (unreported) where the Court of Appeal of Tanzania 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."*

Further reason for requiring a successor magistrate who take over a file from his predecessor to state the reason for failure of his predecessor to complete the trial was stated in the case of **Hatwibu Salim V. R**, Criminal Appeal No. 372 of 2016, CAT at Bukoba (unreported) where the Court of Appeal stated at pages 11 to 12 of the typed judgment that:-

*"The requirement to state the reasons of change of magistrates from one magistrate to another is a very important issue to consider. 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 requirement of the law."*

From what is stated in the above cited cases it is to the view of this court crystal clear that, the requirement for a successor magistrate to state in the proceedings of a case the reason for taking over a trial from his predecessor is not only to show the accused person has been given right to know why there is a change of magistrate in his case and avoid to prejudice him or her but also to enable the successor magistrate to assume

jurisdiction of continuing with the trial, to avoid chaos in the administration of justice by controlling the persons who for personal interest could just pick up any file and deal with it for the detriment of justice.

In the strength of the above stated position of the law the court has come to a settled view that, despite the fact the appellant was not present in court when her case was being heard but the successor magistrate was required to state in the record of the matter the reason for taking over the matter from his predecessor. The effect of the successor magistrate to fail to state the reason for taking over a trial of a case from his predecessor as stated in the case of **Abdi Masoud @ Iboma** (supra) is to render the whole proceedings from where the successor magistrate started hearing the matter to the end a nullity.

Having found the successor magistrate omitted to record in the proceedings of the case the reason for taking over the trial which had commenced before his predecessor the court has found the proceedings of the appellants' case from where Hon. C. F. Waane, RM took over the trial is a nullity and the judgment composed by him is unlawful. Upon finding the proceedings conducted by Hon. C. F. Waane, RM is a nullity and the judgment composed by him is unlawful the court has found there is no need of continuing to deal with the rest of the grounds of appeal as all what is being challenged in those grounds is based on a proceedings which has been found to be a nullity and the judgment which has been found is unlawful.

From all what I have stated hereinabove the court has come to the settled view that, the appropriate step to take in the matter as rightly

prayed by the counsel for the appellant is to nullify the whole proceedings of the case from where Hon. C. F. Waane, RM took over the trial of the appellant's case and quash the judgment entered by him against the appellant and set aside the sentences imposed to the appellant. As the appellant has served only ten months in jail from when she was taken to prison the court has found proper for the interest of justice to order the case to be tried de novo before another magistrate with competent jurisdiction from where Hon. I. H. Magori, SRM ended.

The court is ordering the record of the trial court to be remitted to that court for rehearing of the matter. The court is ordering the successor magistrate to comply with the dictates of section 214 (1) of the CPA. In case of conviction the period the appellant has spent in prison should be taken into consideration. While awaiting compliance of the above directives the appellants should remain in custody. It is so ordered.

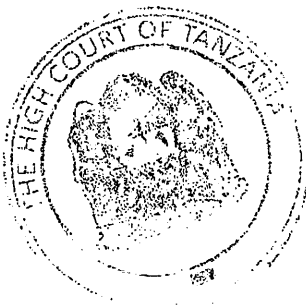
Dated at Songea this 26<sup>th</sup> day of May, 2020



*I. Arufani*  
**I. ARUFANI**  
**JUDGE**  
**26/05/2020**

**Court:**

Judgment delivered today 26<sup>th</sup> day of May, 2020 through video conference and delivered in the presence of the appellant in person and also represented by Mr. Raphael Matola, learned Advocate and Mr. Frank Chonja State Attorney for the Republic. Right of appeal to the Court of Appeal is fully explained.



*I. Arufani*  
**I. ARUFANI**  
**JUDGE**  
**26/05/2020**