

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 43 OF 2022

(Arising in Criminal Case no 159 of 2020, District Court of Musoma at Musoma)

PASCHAL S/O KIMWAGA @ MAHIMBO APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

19th September & 31st October 2022

F. H. Mahimbali, J.

The appellant was convicted and sentenced to 30 years jail imprisonment after being convicted with the offence of gang rape contrary to section 130(1) (2) (e) and 131 A (1) (2) of the Penal Code, Cap 16 R.E 2019.

It was alleged by the prosecution that on the 8th day of October 2020 at Nyakato Bondeni are a within District and Municipality of Musoma in Mara Region the appellant and Prisca d/o Eliud had carnal knowledge of one PW1.

The appellant pleaded not guilty to the charge. The prosecution then summoned a total of three witnesses and tendered one exhibit (Pf3

The appellant has not been amused by both conviction and sentence, thus this appeal propped on three grounds of appeal, namely:

- 1) That since the succeeding Magistrate who concluded the matter composed and delivered the judgment) never stated in the record as to why he was taking over the case, he erred on point of law to proceed so, thus he lacked jurisdiction to do what he did.*
- 2) That the trial Magistrate erred on point of law to deny the appellant the right to a hearing, thus occasioned a failure justice to the appellant.*
- 3) That given the inconsistencies and the contradictions of the prosecution witnesses, the trial misdirected itself on points of law and facts for failure to address and resolve them.*

During the hearing of the appeal, Mr. Makowe learned advocate appeared for the appellant whereas Mr. Malekela learned advocate appeared for the respondent

Arguing the first ground of appeal, Mr Makowe submitted that his grief is on the successor magistrate taking it over without assigning reasons for succeeding the case as provided under section 214 (1) of CPA Cap 2022. He faulted the subsequent proceedings by Hon. E. Marley – SRM as irregular proceedings and lack legal value as per law. He emphasized that should Hon. Marley legally succeeded Hon. Swai, he ought to have given reasons for the said succession. Failure to do so, was improper and is legally unacceptable. On this, he invited this Court

law. In the circumstances of this case, the appellant was denied the right to defense.

As to aggravating factor by the prosecuting attorney, he had submitted that the appellant had been convicted by other offences and thus was a criminal. He challenged this as there was no such proof tendered in court.

On the 3rd grievance, his concern is on the analysis of evidence by the trial magistrate. That as per available evidence in the proceedings, the trial magistrate failed to analyse the evidence of the case presented in trial and how he arrived at the findings of guilty and consequently entered conviction. As the said offence was committed at night time, the issue of identification comes into play squarely. Since the trial magistrate failed to analyse the whole evidence as per law, the finding of guilty is unjustified and that the appellant should be acquitted.

On his part, Mr. Malekela learned state attorney for the respondent resisted the appeal.

With the first ground of appeal on the grievance of non-compliance to section 214 of the CPA, he admitted that as per page 23 of the typed proceedings, the successor magistrate did not provide reasons for the succession. However, reading section 214 (1) of the CPA, does not

I have carefully scrutinised the submissions of the learned counsel in respect to the grounds of appeal filed in respect of this appeal. I have equally scanned the trial court's proceedings, to satisfy myself as what transpired at the trial court.

It is undisputed that Hon. Marley -SRM took over the partly heard matter without assigning any reason. What is the law providing on that? Section 214 (1) of the CPA, provides:

*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, re-summon the witnesses and recommence the trial or the committal proceedings [Emphasis added].*

Consistent with the provisions of s. 214 (1) of the CPA, the Court of Appeal in the unreported case of **PRISCUS KIMARO V. R;** Criminal Appeal No. 301 of 2013, had an occasion to underscore the need for putting on record the reasons for re-assignment of a partly heard matter to a successor trial magistrate. In this case, they said:-

*"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, **the***

expeditiously retried, beginning from the date Hon. Marley, S.R.M purportedly took over the trial court's proceedings. In the event Hon. T.Swai, S.R.M., before whom the trial commenced can cease to have jurisdiction, I further hereby direct that the case be expeditiously tried afresh before another magistrate of competent jurisdiction. Otherwise, as I am aware that Hon. T. Swai S.R.M is in the office, let the matter be placed before him for the expeditious trial.

That said, as this ground of appeal is sufficient of disposing of this appeal, I find no need of expounding other grounds of appeal as this is not an academic platform for providing lecturing material. Appeal is thus allowed to the extent explained.

The appellant shall meantime wait his trial as this the trial court file is being remitted before the subordinate court for the continuation of trial from where it ended before Hon. T. Swai S.R.M.

It is so ordered.

DATED at MUSOMA this 31st day of October, 2022.



F. H. Mahimbali
Judge