

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 150 OF 2020**

(Appeal from the Judgment of the Resident Magistrates Court of Dar es salaam at Kisutu, Criminal Case No. 284 of 2016 before Hon. H.S.Ally, SRM dated 02nd day of January,2020)

JOHN S/O BONIFACE TULLA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

2nd May, 2022 & 27th May, 2022

E.E. KAKOLAKI J.

The appellant John Boniface Tulla together with three others Jackson John Lutale, Ambrois Kessy and Collins Johnstone who are not subject of this appeal were arraigned before the Resident Magistrate Court of Dar es salaam Region at Kisutu in Criminal Case No. 284 of 2014. They were charged with a charge containing seven counts in which in the first three counts were charged jointly and together. These are the 1st count of Conspiracy to Commit an Offence Contrary to section 384 of the Penal code, [Cap 16 R.E 2002] (the Act) and the 2nd and 3rd counts on the offence of Obtaining Registration by False Pretence Contrary to Section 309 of the Act. The 4th and 5th counts were the against the accused Collins Johnstone on offence of Unauthorized Transfer of Ownership Contrary to

Section 108(1)(a)(ii) of the Tax Act, [Cap 332 R.E 2006] and the 6th Count against the appellant on Possession of Uncustomed Goods Contrary to Section 200(d)(iii) of the East African Customs Management Act, 2004 while the 7th count was charged in alternative to the 6th count as Failure to Follow Procedures of Importation of Goods Contrary to Section 15(1) (4) of the East African Community Management Customs Act No.1 of 2005. All the accused persons pleaded not guilty to all offences.

Brief facts of the case leading to this appeal as gleaned from the records can be stated as follows. The appellant and the first accused person during the trial court is the owner of the company christened as JOFLO Co. Ltd which had purportedly purchased two motor vehicles from Musa Balumi Kapitula from Congo/Uganda DRC, make Land Rover Defender with registration number DRC 4898 AC/19 and Nissan Patrol Station Wagon DRC 7347 AC/19 which allegedly were later on fraudulently changed into Registration numbers T.739 AFS and T.876 BJF, respectively. It was alleged that, in effecting change of registration numbers the appellant instructed the 2nd accused who was his driver to secure the plate numbers registered in Tanzania. That the 2nd accused successfully approached the 3rd accused who sold him the original motor vehicles registration cards which he used to effect transfer of ownership

from the original owner to JOFLO Company Limited through the 4th accused person an officer from the Tanzania Revenue Authority from the motor vehicle transfer section.

Existence of the two cars in Tanzania remained a secret until on 27/11/2014 when one Mussa Balumi Kapitula was arrested on immigration issues. Upon being searched he was found with a flash disc which when reviewed was found to contain several pictures including pictures of two motor vehicles sold to the appellant with DRC and Tanzania registration numbers. Following that discovery, the matter was reported to the Police Force whereby Asp. John Joseph Lugakingira (PW1) mounted its investigation. During his interview with said Musa Balumi Kapitula revealed to him that, he brought in Tanzania the said motor two vehicles from Congo DRC in the year 2012 and 2013, respectively and sold them to his friend John Boniface Tulla (appellant) who was residing at Mbezi Luis area within Dar es salaam City. A search was conducted at the appellant's home and the two cars retrieved and seized before the charge was preferred against all accused persons after completion of investigation. As all accused persons denied the charges against them the case proceeded to a full trial, whereby the prosecution case was premised

on evidence of nine (9) witnesses and fourteen (14) exhibits while the defence side had six (6) witnesses without exhibits.

At the conclusion of the trial, all accused were found guilty and convicted as charged on the 1st, 2nd, 3rd, 4th, 5th and 6th counts. They were thus sentenced to pay fine of Tshs.500,000/= or imprisonment for a term of two years in default for the 1st, 2nd and 3rd counts. The 4th accused was sentenced to pay fine of Tshs.500,000/= or imprisonment for one year in default for the 4th and 5th counts while in the 6th count the 1st accused was sentenced to pay fine of Tshs.23,817,492.43 or imprisonment for two years in default. The trial court further ordered the seized motor vehicles to be confiscated and forfeited to the government of the United Republic of Tanzania. Aggrieved with both conviction and sentence, only the appellant preferred this appeal premised on sixteen (16) grounds which can be paraphrased as hereunder:

1. That, the learned trial SRM erred in law and fact by convicting the appellant relying on Exh.P4 (caution statement) which was unprocedurally recorded by the arresting officer and investigator of the case (PW1).
2. That, the learned trial SRM erred in law and fact by convicting the appellant relying on Exh.P4 which was unprocedural tendered by

PW1 without objection from the defence counsels while the trial court erroneously failed to ask the appellant to object the tendering contrary to the procedure of law.

3. That, the appellant's guilty is doubtful as Musa Balumi Kapitula who was found with the flash disk and CD having pictures of various cars including the alleged motor vehicles in dispute which is the genesis of the case was not charged.
4. That, the trial court wrongly convicted the appellant relying on Exh.P1 collectively (search order and seizure certificate) which was unprocedurally obtained and tendered by incompetent witness PW1.
5. That, the appellant was wrongly convicted as the trial court relied on Exh.P2 and P3 respectively (two Motor vehicles) which were unprocedurally admitted as the appellant was denied a right to object their admission.
6. That, the ingredients of the offence of conspiracy in the first count were not proved beyond reasonable doubt against the appellant.
7. That, the appellant was wrongly convicted relying on Exh.P7 and P8 (two registration card) as it is doubtful as to when the appellant registered them.

8. That, in convicting the appellant the trial court relied on discredited and unprocedurally recorded evidence of PW1 who testified without being sworn and contrary to the law.
9. That, the appellant was convicted relying on Exh.P7 and Exh.P8 which were tendered unprocedural by PW1 who testified without taking oath and without objection from the defence counsels.
10. That the learned trial SRM erred in law and fact when convicted the appellant relying on proceedings unprocedurally conducted following changes of five magistrate without any justified reasons.
11. That, the appellant was wrongly convicted by trial court that relied on Exhibits P4 and P13 admitted without objection from the defence counsels.
12. That, the trial court erred in law and fact for relying on Exh.P10 (search order and seizure certificate, to convict the appellant while the same was unprocedurally tendered by PW3 without objection from defence counsels.
13. That, the trial court erred in law and fact to convict the appellant basing on the discredited evidence of PW8 and Exh.P14 which was admitted without objection from the defence counsels.

14. That, the trial court erred to convict the appellant relying on the discredited evidence of PW9 Shabani Seifu which was contradicted by the testimony of PW1.
15. That, the learned trial SRM erred in law and fact to convict the appellant without considering that was not address properly in terms of law in the ruling of prima facie case and after amended of the charge before entering his defence.
16. That, the learned trial SRM erred in law and fact by convicting the appellant without evaluating and analysing properly the evidence tendered by the appellant which raised doubt to the case.

On the strength of those grounds of appeal, the appellant is praying this Court to allow his appeal by quashing the conviction and set aside the sentence and the order thereto while leaving him at liberty.

On 02/05/2022 when the matter came for hearing, both parties appeared represented. The appellant hired services of Mr. Hashim Mziray, learned advocate, while the Respondent was represented by Ms.Estazia Wilson, learned State Attorney. By consensus both parties were heard viva voce.

In addressing the Court on the grounds of appeal, Mr. Mziray from the outset prayed to adopt the petition of appeal as part of his submission while dropping ground No.15 of the appeal. He also sought leave of the

court to argue jointly and together ground number 1,2,3,4,5,7,8 and 9 as they were referring to the discrepancies of evidence of prosecution witnesses particularly that of PW1. However, in this judgment I am intending to start addressing first the 10th ground of appeal where it is contended that, there was change of magistrates without assigning reason to the appellant and in contravention of the law. He said up to the time of composing the judgment six magistrates were changed one of them being magistrate who composed the judgment but never asked parties as to whether they had any objection or not contrary to section 214 (1) of the CPA. According to him the appellant was prejudiced with the non-disclosure of the reasons for such change of magistrates. Basing on that submission Mr. Mziray prayed the Court to allow the appeal.

Opposing the appeal, Ms. Wilson on the 10th ground of appeal, while admitting that there were change of magistrates she countered that, at all times section 214(1) of the CPA was complied with all magistrates. She had it that, recording of witnesses evidence was conducted before three magistrates only while the fourth one composed judgment who explained as to why the file was brought to him for judgment writing. According to her there was no reason for latter to ask the appellant whether he had an

objection or not. she therefore prayed for dismissal of the ground and entire appeal for want of merit.

In his rejoinder submission with regard to the change of magistrates the magistrate who composed the judgment at page 154 of the proceedings did not state the law under which he was proceeding to compose the judgment. This is against the decision of the court of appeal in the case of **Said Sui Vs. R**, Criminal Appeal No.266 of 2015 (CAT) and the case of **Shabani Seif** (supra). Mr.Mziray insisted this court to allow the appeal.

I have examined and critically considered the fighting arguments advanced by the parties in supporting and contesting this appeal as quantified in their submissions as well as revisiting the trial Court records. It is a common knowledge that due to the nature of their work re-assignment of magistrates or judges in a case or suit is inevitable. It normally happens when a judge or magistrate who has partly heard the case or suit due to sickness, transfer or retirement fails to try the matter to its finality. Under the circumstances reassignment is a must and must be so done in compliance with the requirement of the law. In the subordinate Court the applicable provision is section 214(1) of the CPA. For easy reference I find it imperative to reproduce the said provision as I hereunder do:

"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."

From the above cited provision of the law change of magistrate in the circumstances where the predecessor magistrate is unable to complete the trial is permissible with reasons stated. Though the law seems to be coached not in mandatory terms by using the word "may", the Court has given it a mandatory interpretation that, the reason(s) for such changes must be recorded and communicated to the parties more so to the accused person. Further to that, the law gives the successor magistrate discretion to either continue with the recorded evidence or resummons the witnesses for retaking evidence afresh. The purpose for such requirement of assigning reasons for the change of magistrate is not far-fetched as the reasons for the change if assigned guarantees the

accused's right to fair trial as any stage of criminal proceedings is likely to affect his fate.

Further to that, assignment of reason(s) creates more transparency to both parties and reduces the possibility of any magistrate taking over the case without being reassigned hence preservation of the entire criminal justice system. Failure to comply with the law no doubt renders the proceedings a nullity as the omission is not curable under section 388 of the CPA. There are plethora of authorities by the Court of Appeal and this Court relating to that mandatory requirement or procedure for assigning reasons where there is a change of magistrate. To mention a few is the case of **Salimu Hussein Vs. R**, Criminal Appeal No.3 of 2011 (CAT-unreported) the Court while making reference to section 214 (1) of the CPA emphasized thus:

*"...under this section the second subsequent 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.**" [Emphasis supplied].*

Also in the case of **Priscus Kimaro Vs. R**, Criminal Appeal No. 301 of 2013 (CAT- unreported) the Court of Appeal stated thus:

*"...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...**" (Emphasis added)*

Similarly in the case of **James Maro Mahende Vs. R**, Criminal Appeal No. 83 of 2016 (unreported), where the successor magistrate had composed a judgment without explaining the reasons for taking over and in infraction of the provisions of section 214 (1) of the CPA, the Court observed that:

*" 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.**" (Emphasis added)*

In a more recent decision of the Court of Appeal in the case of **Gharib Ibrahim @ Mgalu & 4 others Vs. R**, Criminal Revision No.05 of 2019 (unreported), while making reference to the cases of **Richard Kamugisha @ Charles Samson and Five Others Vs. R**, Criminal Appeal No. 59 of 2002 as referred in **Salimu Hussein Vs. R**, Criminal Appeal No. 3 of 2011, (both unreported) briefly held thus:-

*"... where a trial is conducted by more than one magistrate, the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses. The word used in section 214 (1) of the Criminal Procedure Act, 1985 is 'may' which indicates discretion but **in view of the fact that the right to a fair trial is fundamental the court has an obligation to conduct a fair trial in all respects.** (Emphasis added).*

From the above position of the law, I now direct the legal torch to what transpired in the case at hand. It is evident from the record that there were three magistrates who recorded the evidence before the last one who composed the judgment. To start with the complaint of failure of the last successor magistrate who composed judgment to ask parties whether he should proceed to compose the judgment or not, I find the same to be devoid of merit. I so hold as one, that is not one of the conditions provided under section 214(1) of the CPA. Secondly, the reasons for re-assignment

of the case to him for judgment writing was stated to be due recusal of the predecessor magistrate. Second for consideration is the assertion by Mr. Mziray that, the magistrates who presided over before judgment writing failed to assign reasons for reassignment. On that this Court is guided by the record of 30/11/2017 at pages 43-45 of the typed proceedings where it is indicated that, the 1st predecessor magistrate Hon. V. Nongwa, SRM failed to try the matter to its finality and Hon. Kiswaga, RM took over. The record shows further that, on 06/12/2017 before he had started to record the evidence and without assigning reasons for taking over the case, Hon. Kiswaga, RM indicated to have complied with section 214(1) of the CPA before opting to continue from where his predecessor had ended. However, the record talks further at page 78-80 of the typed proceedings that, after Hon. Kiswaga had partly heard the matter, on the 12/03/2018 case was again reassigned to Hon. Shaidi to proceed with hearing, who proceeded without revealing the reasons for his reassignment up to the closure of defence case. To bring into picture what transpired, I quote the excerpt from page 78 – 79 of the typed proceedings:

12/03/2018

Coram: Hon. R. Mashauri – PRM

Parties: Absent

Court: Case file re-assigned to Shaidi-PRM.

Sgd: W.R. Mashauri.

Principal Resident Magistrate

12/03/2018

From the above cited excerpt of the trial court proceedings it is noted conspicuously that, neither reasons for re-assignment of the case were given to the parties nor were they asked whether they would wish to have the case start afresh by recalling some witness or continue from where the predecessor magistrate ended. It was stated in the case of **Gharib Ibrahim @ Mgalu & 4 others** (supra) that:

"...it is therefore well settled principle of the law that, where a trial is conducted by more than one magistrate; the accused should be informed of his right to have the trial continue or start afresh and also the right to recall witnesses."

In deed the above mentioned omission to assign reasons for their reassignment of the case and to inform the appellant of his right to continue with the trial or start afresh done by Hon. Kiswaga, Rm and Hon. Shaidi, PRM, is fatal and the appellant was justified to complain on the

denial of his right to know why his case kept on being presided over with different magistrates. Since the right to fair trial is guaranteed by our Constitution as provided under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 R.E 2002), I find the omission to assign reason for the change of two magistrates to the appellant was in contravention of the provisions of section 214 (1) of the CPA as submitted by Mr. Mziray and therefore prejudicial to him for interfering with his constitutional right of fair hearing. I say so believing that if he was so informed of the reasons for change of magistrates, he would have commented on the course to be taken something which promotes not only trust of parties to the Court but also transparency in the whole process of criminal justice system.

Now what is the effect of such omission in this case? As stated above the omission if any is serious and fatal irregularity which goes to the root of the case for affecting the proceedings presided over by the successor magistrate(s). The Court of Appeal when sitting in the case of **Director of Public Prosecutions Vs. Laurent Neophitus Chacha & 3 Others**, Criminal Appeal No.252 of 2018 (CAT-unreported) and confronted with the similar situation to the present one had this to say:

*"... What emerges from the said authorities is that change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new trial magistrate to take over from a previous one, he must record the reasons for doing so and invite the accused person to express his position if he will require that the witnesses whose evidence had been taken by the previous Magistrate be recalled to testify before a new trial Magistrate. It is also settled law from the cases cited that **non-compliance with section 214(1) of the CPA renders the proceedings before the new magistrate a nullity for lack of jurisdiction.**"*
(Emphasis supplied)

In another case of **Abdi Masudi Iboma and 3 Others Vs. R** Criminal Appeal No. 116 of 2015 (CAT-unreported) the Court of Appeal stated that:

"In our view under s. 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrate. It is a requirement of the law and has to be complied with. It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case".

Seeking a refuge from the above position of the law and applying the principles therein in the appeal at hand, I hold without any scintilla of

doubt that, the omission by the two magistrates to assign reasons for their re-assignment in the case rendered the proceedings from 30/11/2017 onward a nullity as Hon. Kiswaga, RM and Hon. Shaidi, PRM including Hon. Ally, SRM who composed the judgment proceeded to handle the case without jurisdiction and were thus swimming in a pool of nullity for want of authority or jurisdiction to try the matter.

In the light of the foregoing, I allow the appeal and proceed to quash the whole proceedings from 30/11/2017 the date when Hon. Kiswaga, RM took over onward as well as setting aside the impugned judgment composed by Hon. Ally, SRM and orders thereto. For the interest of justice, I remit the file to the trial court with an order to proceed with hearing before the first successor Magistrate Hon. V. Nongwa, SRM as soon as possible unless for any compelling reasons the said Magistrate is unable to complete the trial in which case the trial shall continue before another magistrate with competent jurisdiction in strict compliance with section 214(1) of the CPA.

Having taken that position, I do not intend to consider the other grounds of appeal as the change of magistrates in contravention of section 214 (1) of the CPA suffices to dispose of the appeal.

It is ordered accordingly.

DATED at Dar es salaam this 27th day of May, 2022.



E. E. KAKOLAKI

JUDGE

27/05/2022.

The Judgment has been delivered at Dar es Salaam today on 27th day of May, 2022 in the presence Ms. Nura Manja, learned State Attorney for the Respondent and Ms. Monica Msuya, Court clerk and in the absence of the appellant.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

27/05/2022

