

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO 2 OF 2021**

(Originated from the judgment of the District Court of Monduli in Criminal Case No.  
03 of 2019)

**PASCHAL SULE @ ELISEUSI ..... APPELLANT**

**VERSUS**

**THE D.P.P..... RESPONDENT**

**JUDGMENT**

05.05.2022 & 31.05.2022

**N.R. MWASEBA, J.**

The appellant in this case was charged and convicted by the District Court of Monduli at Arusha for two offences, the first one being rape contrary to Section 130 (1) (2) (a) and 131 (1) of the Penal Code [ Cap 16 R.E 2002]. The second one being, grievous harm contrary to Section 225 of the Penal Code, [ Cap 16 R.E 2002].

The matter was tried and as a result the appellant was convicted and sentenced. As for the first offence, the appellant was sentenced to serve 30 years imprisonment and to be inflicted with six (6) strokes into his

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buttocks and pay compensation of one million (1,000,000) to the victim. For the second offence, he was sentenced to seven years imprisonment.

The material facts of this case as gathered from the trial court's record are as follows: On the 18<sup>th</sup> day of January 2019, when **MS** who testified as PW1 (name withheld to hide identity) had gone to her farm at Migongoni, the appellant invaded and bit PW1 with a club, undressed and started raping her. She raised an alarm and PW2 (Ally Mnyaru) went to the scene to assist her but the appellant run away. Later on, the Village Chairman went to the scene and called the police to inform them about the incident. The victim went to report at the police station where she was supplied with a PF3 and thereafter went at Mto wa Mbu Hospital for treatment. At the hospital PW3 (Ema Augustino) who was a doctor examined the victim (PW1) and noted that there were sperms and that the victim was carnally known to her private parts.

Later on, the appellant was arrested and eventually he was arraigned to court. At the District Court of Monduli, the prosecution brought a total of three witnesses to prove its case. The appellant when he was defending himself alleged that he never raped the victim (PW1) nor robbed her handbag and added that no examination was done to prove the finger print and the sperm to be his.



The appellant was aggrieved by both, conviction and sentence hence the present appeal. The appellant lodged two grounds of appeal:

- 1. That, the successor Magistrate erred in Law and fact in not complying with the mandatory Provisions of Section 214 (1) of the CPA Cap 20 R.E, 2019.*
- 2. That, the successor magistrate failed miserably to look at the whole evidence so as to ascertain whether there was evidence against the accused person (now the appellant) adduced by the prosecution to warrant a Conviction of the Appellant.*

The hearing of this appeal was done orally, whereas the appellant was present in person while Ms. Eunice Makala, learned State Attorney appeared for the the respondent.

Submitting on the first ground of appeal, the appellant argued that the Hon. Magistrate who took over the case did not comply with Section 214 of the CPA. When the successor magistrate took over the case, he neither gave reason as to why the previous Magistrate was unable to proceed with the case nor ask the accused person if he want to proceed with the case from where the previous Magistrate ended or to start afresh (See page 8 and 9 of the trial court proceedings).

*Aceesa*

Coming to the second ground, the appellant complained that the trial magistrate failed to look at the evidence of the prosecution to see if the charge was proved beyond all reasonable doubt and convicted him based on wanting evidence due to the following reasons: **First**, during the Preliminary Hearing (Ph) the prosecution did not disclose the names of the witnesses and the exhibit to rely on during the hearing, the thing which deprived of his right to defend himself properly. **Second**, he told the court that he was 58 years of age while the charge sheet shows that he is 63 years of age. The difference in age proved that there were two different persons.

**Third**, the victim (PW1) says she identified the appellant at the scene of crime and after being raped she also identified PW2 who went to help her. He added that during her testimony PW3 (the doctor) told the court that she received the victim (PW1) while being unconscious, thus, the question is how did she identify the appellant while being unconscious. The only identification which was done, was a dock identification which was illegal. More so, a woman who was mentioned by the PW2 that she was also at the scene of crime her name was neither mentioned before the court nor brought to testify.

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**Fourth**, PW3 failed to prove penetration and bruises to the appellant. Thus, based on the raised doubts the prosecution failed to prove their charge beyond all reasonable doubt and prayed for the court to acquit him.

On her side, the learned state attorney for the respondent did support the appeal. She added that though the appellant has brought two grounds of appeal, she will deal with the first ground only. She told the court that in his first ground the appellant complained that the Successor Magistrate failed to comply with **Section 214 (1) of the CPA** which states that any change of trial magistrate must be supported by reasons for such change which was not the case in the proceedings before the trial court.

Looking at the trial court proceedings particularly page 8 to 9, the matter was previously before Hon. A. Mkama who heard two witnesses, thereafter Hon. Ngoka proceeded with other witnesses as from page 9 to 12 of the typed proceedings. The successor Magistrate did not give reasons as to why she took over the matter and she did not comply with the above provision. The alleged failure leads the whole proceedings to be declared null and void. So, they pray for the court to nullify the proceedings from 14.06.2019 up to the judgment due to noncompliance of **Section 214 (1) of the CPA**.

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She cited the case of **Onesmo Joseph @ Manyoro and 4 Others Vs Republic**, Criminal Appeal No. 201 of 2015,(Unreported) where the court nullified the proceedings from the successor magistrate and ordered for trial *de novo* from that date a successor took over. Based on the cited authority she prayed for the court to nullify the proceedings from 14.06.2019. However, during the conviction, the court will be required to take into consideration the time the appellant stayed in the custody. Thus, she prayed for the appeal to be allowed to such extent.

Having been considered the submission made by the applicant and the counsel for the respondent. I will commence by examining the instructive provisions of **Section 214 (1) of the CPA** which reads:

*"Where any magistrate/ after having heard and recorded the whole or part of the evidence in any trial or conduct 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 exercise 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*

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*proceedings recorded by his predecessor and may, in the case of a trial and if he considers it necessary resummons the witnesses and recommence the trial or the committal proceedings."*

Based on the extracted provision of law, when it is permissible for a successor magistrate to take over, and continue with the trial and act on the evidence recorded by his/her predecessor, he/she will have to provide the reasons as to why his/her predecessor was unable to complete the trial.

The same has been decided in many cases including the case of **Priscus Kimario Vs. The Republic**, Criminal Appeal No. 301 of 2013 (Unreported) where the Court stated that:

*".... 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."*

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Further in **Abdi Masoud @ Iboma and Three Others Vs. Republic** Criminal Appeal No. 116 of 2015 (Unreported) the court held 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. "*

Based on the cited authorities the only option for the court where there is a violation of **Section 214 (1) of the CPA** is to nullify the proceedings before the second trial Magistrate and order a fresh trial from the stage where the first trial magistrate had ended upon full compliance with the dictates of the law.

Thus, this court having gone through the trial court's proceedings did note that there was a violation of **Section 214 (1) of the CPA** due to the fact that after the predecessor Hon. Mkama RM heard the two prosecution witnesses, the successor Magistrate Hon. Ngoka proceeded with the 3<sup>rd</sup> witness till the end and delivered a Judgment without assigning the reasons for so doing.

*Ngoka*



Violation of **Section 214 (1) of the CPA** entails this court to order for retrial as specified under **Section 214 (2) of the CPA**. However, before reaching to such requirements, I revisited the record to find out whether remitting the matter to the trial court for retrial will lead to justice or will amount to increase of unnecessary backlog. This issue takes me to the second ground of appeal whereby the appellant is challenging the evidence that led to his conviction.

The appellant is facing two counts and was convicted on both counts. Starting with the second count which is causing grievous harm the victim told the court that the appellant invaded her and started beating her with a club on her body. Her evidence ended up there with regard to the proof of the offence of grievous harm. She did not state how she was injured. PW2 who saw her soon after the incident, told the court that he saw PW1 with a lot of blood at her face. The PF3 is silence with regard to the commission of the offence of grievous harm. Thus, this offence was not proved at all.

Coming to the first offence which is rape it is a settled principle that the evidence in sexual offences comes from the victim. See the case of **Godi Kasenegala Vs Republic**, Criminal Appeal No 10 of 2008 (Unreported) and **Mohamed Haji Ali Vs DPP**, Criminal Appeal No 225 of 2018.

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However, the evidence of prosecution witnesses is contradictory hence brings doubt as to the commission of the offence. The victim (PW1) told the court that she was invaded by the appellant, undressed her and himself then he raped her. She further said that, Ally (PW2) came to the scene of crime and found the appellant still raping her. That the PW2 asked the appellant what was he doing? Then PW2 called the village chairman. PW2 on his testimony he said he went to the scene of crime and found the victim naked. His evidence contradicted the evidence of PW1 who said PW2 found the appellant still raping the victim.

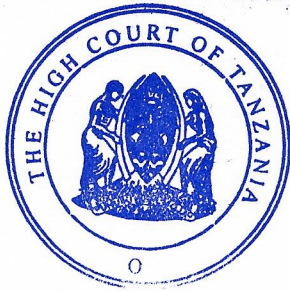
Moreover, while the victim was able to identify PW2 when he went to assist her, and narrated the whole story that she went to police for PF3 and then to hospital, PW3 who was a doctor testified that the victim was brought to her for examination while unconscious and full of *matope*. The contradiction on the prosecution evidence brings doubt as to commission of the offence. In the case of **Wilfred Lukago Vs R**, (1994) TLR No 189 it was held that contradictory evidences create doubt, which doubt should be decided in favour of the accused or the appellant. That being the legal position, the contradiction in the prosecution evidence in the case at advantage goes to the appellant.



For the foregone reasons, I allow the appeal and proceed to quash the conviction and set aside the sentence imposed to the appellant. The appellant should be released from custody unless he is otherwise lawfully held.

Ordered accordingly.

**DATED** at **ARUSHA** this 31<sup>st</sup> day of May 2022.



*N.R. Mwaseba*  
**N.R. MWASEBA**

**JUDGE**

**31.05.2022**