

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 28 OF 2023

*(Appeal from the Judgment of the District Court of Moshi at Moshi dated in 26th February 2021
in Criminal Case No. 413 of 2019)*

EZEKIEL BONIFACE MWENDO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

3rd October. & 7th November 2023

A.P.KILIMI, J.:

The appellant Ezekiel Boniface Mwendo was arraigned at the district court of Moshi with the offence of attempted rape under section 132(1) (2) (a) of the Penal Code [Cap. 16 R.E. 2002]. The particulars of the offence charged alleges that the appellant on the 3rd day of November, 2019 at Chekereni Bonite area within the District of Moshi in Kilimanjaro Region, did attempt to have carnal knowledge of one Mwanahusseini D/O Miraji a woman of 19 years. The appellant at the trial court denied the charge.

In proving the case at the trial court, briefly the prosecution evidence was to the effect that the victim is a girl aged 19 years old, is physically disabled due to cerebral palsy. She lived with her aunt (PW1). On the material day she was found by PW2 inside a toilet with her pants down together with the appellant. Having noticed that someone was inside the toilet which is not used as it was still under construction, PW2 was curious as to what that person was doing in there, so she asked while standing outside. The person inside who happened to be the appellant responded that he was there by mistake. PW2 decided to check inside the said unfinished toilet, she saw the appellant zipping his trouser but when she went closer, she also saw the victim who was on the floor and her pants was down on her feet.

PW2 also said, abruptly the appellant pushed her and she fell down but she remained holding the appellant's leg while raised an alarm. Following the alarm people gathered and the appellant was captured with the help of the village chairman and taken to the police station where he was consequently charged with attempted rape.

In his defence the appellant denied the charge saying that he was not at the crime scene but he was arrested by the police officers on the road

and was detained at the police station for ten days and later was charged with the offence of attempted rape.

In its decision the trial court found the appellant guilty of the offence charged. The trial magistrate reasoned that the act of the appellant being found with the victim alone in the toilet while the victim was undressed was sufficient to constitute the offence of attempted rape. It reasoned further that although the victim did not testify due to her physical disability that did not defeat justice since there was an eye witness (PW2) whose testimony was corroborated by other evidence. The trial court was of the view that the appellant wanted to take advantage of the victim's disability to satisfy his sexual desire but was caught before he could fulfil his desire. The trial court decided that the prosecution's evidence was watertight and convincing that the appellant attempted to rape the victim. Hence the appellant was found guilty and convicted for the charged offence. Following his conviction, he was sentenced to serve a sentence of 30 years imprisonment.

Aggrieved by the decision, the appellant has preferred the present appeal before this court on the following grounds:

1. That, the learned successor trial Magistrate grossly erred both in law and fact in convicting and sentencing the appellant basing on an irregular proceeding. Since

there were no reasons assigned on the court proceeding as to why the predecessor Magistrate failed to complete the trial of the case. Bare assertion and mere recording that section 214 of the CPA CAP 20 was not enough.

2. That, the learned Successor trial Magistrate grossly erred both in law and fact in convicting the Appellant basing on the fatally and incurably defective charge sheet, since the particulars of the of the offence in the charge sheet did not furnish the Appellant with all the elements of the offence, Hence, the omission made the Appellant not to well prepare and adduce an informed defense evidence.
3. That, learned Successor trial Magistrate grossly erred both in law and fact in using weak, tenuous, incredible, contradictory, uncorroborated and wholly unreliable prosecution evidence as a basis of convicting and sentencing the appellant.
4. That, the learned successor trial Magistrate grossly erred both in law and fact in convicting the Appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by the law.

At the hearing of the appeal the appellant appeared and argued the appeal himself, while Ms. Wanda Msafiri learned State Attorney on the other hand appeared on behalf of the respondent. It was the appellant's prayer that the hearing be argued by way of written submissions and the respondent did not object. Following the prayer this court granted the same and ordered for the submission to be filed as scheduled.

In his submission the appellant only made submission on the first two grounds of appeal. Arguing his first ground of appeal the appellant submitted

that he was convicted on irregular proceedings which flouted the Mandatory Provision of Section 214 of the CPA, Cap. 20 R.E. 2019. He contended that when the successor trial magistrate took over the case from her predecessor, she never at all recorded the reasons as to why, the predecessor magistrate failed to complete the trial of the case. It was the appellant's submission that recording of the reasons is a pre-requisite condition before the taking over by another magistrate. To fortify his argument, he cited the case of **Abdi Masoud @ Iboma And 3 Others vs. Republic**, Criminal Appeal No. 116 of 2015. (unreported).

Submitting further the appellant said that, what the successor magistrate had done when she took over the case to continue with the trial, just merely recorded that, section 214 of the CPA, Cap. 20 R.E. 2019 complied with. It was the appellant's submission that the requirement under section 214 (1) of the CPA is to record in the proceedings of the case, the reasons for failure by the predecessor magistrate to complete the trial. To support his submission, he again cited the case of **Salimu Hussein Vs. Republic**, Criminal Appeal No. 3 of 2011. Thus, it was the appellant prayer for this court to amplify the findings in the cited cases in resolving the aforementioned shortfall in the present case.

Submitting on the second ground of appeal which was in relation to defective charge sheet the appellant submitted that the trial magistrate had failed to note that the charge sheet which was laid against the appellant was incurably defective. Elaborating this point the appellant quoted the provision which he was charged with and submitted that in the charge sheet it was nowhere in the particulars of the offence shown that, the appellant had threatened the victim of the alleged offence in order to procure the prohibited sexual intercourse. He argued that failure to indicate/include this very important ingredient/element of the charged offence made him not to well prepare and give an informed defence. It was the appellant's submission therefore that the omission seriously occasioned an injustice against him. To support his submission the appellant cited the case of **Antidius Augustine vs. Republic** Criminal Appeal No. 89 of 2017 (unreported).

Concluding his submission, the appellant prayed for this Honourable Court to find merit in his appeal, allow the same, quash the conviction, set aside the sentence and set him at liberty.

The reply to the above Ms. Edith Msenga learned state attorney on behalf of the respondent. Responding on the first ground of appeal she submitted that it is true that Hon. Maziku, PRM took over the proceedings of

the case as the presiding Magistrate and that the Appellant was addressed by virtue of section 214 (1) of the Criminal Procedure Act. She further submitted that it was in that moment that the Appellant had an opportunity to challenge the change of presiding Magistrate and explain to the Court how the said change could prejudice his case as per section 214 (2) of the Criminal Procedure Act. Instead, she said that the Appellant responded to be fine with the change and that he wished to proceed where the case had previously ended. It was Ms. Msengas' submission that by so stating the appellant meant that he did not want to start afresh hearing. The learned State Attorney then said the appellant had waived his right to claim any prejudice by the takeover.

Submitting further in other way around, surprisingly the learned state attorney acknowledged that, it was also unfortunate that the trial court did not fully comply with the requirements of section 214 (1) of the Criminal Procedure Act. She submitted that the successor magistrate was not only supposed to address the appellant on such take over but also clearly explain and record reasons as to why there was such a takeover. She also submitted that there are number of decisions of the court of appeal with regard to the

effects of non-recording of reasons for takeover of which the consequences are rendering the second magistrate to have no jurisdiction to try the case.

The learned state attorney further urged this court to visit the decision in the case of **Stephano Victor Mlelwa vs. Republic** Criminal Appeal No. 2577 of 2021 CAT Mwanza (unreported). She then submitted that although it is the requirement under the law for the successor magistrate to state reasons, there is also a need to consider the circumstance of each case. She was of the view that the appellant has to demonstrate in what sense the omission vitiated the conviction. In the present circumstance Ms. Msenga submitted that the Appellant did neither complain during the takeover nor did he explain how the takeover prejudiced his case and conviction. In that regard she prayed for this court to find the ground baseless and dismiss it accordingly.

With regards to the remaining grounds of appeal the learned state attorney had nothing to submit but called upon the wisdom of this court in determination of the appeal by considering substantive and procedural laws together with the proceedings and judgment of the trial court. In the end Ms. Msenga prayed for the appeal to be dismissed and the decision of the trial court be upheld.

Having gone through the record of the trial court, grounds of appeal and the submission advanced for and against by both parties, the issue for determination is whether the appeal has merit. In determining this issue, I will start with first ground above.

In our jurisprudence, it is a trite law 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, 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. (see **Gharib Ibrahim @ Mgalu & 4 others Vs. R**, Criminal Revision No.05 of 2019 (unreported)).

In enhancing the above, 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. In 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]

In the present case having carefully examined the trial court's record and in particular the typed proceedings it is plainly revealed that Hon. J. Kijuwile RM was the one handling the matter from the beginning until 14/07/2020 the next date the matter was adjourned by Hon. N. Mwirinde who recorded that the trial magistrate was indisposed. From that date the matter was adjourned by different magistrates until on 13/11/2020 where Hon. Maziku PRM took over the trial and the record reveal as follows;

"Court: The parties addressed in terms of S. 214 of CPA Cap 20 R.E.2020 and replied.

S/A: Wish to proceed on where the case ended.

Accused: Wish to proceed to where the case ended.

Court: S.214 of CPA Cap 20 R.E. 2002 Compiled with."

From above, the mere saying that the provision has been complied does not dictates that the trial Magistrate assigned reasons for the first magistrate failure to continue with the case impugned. As rightly argued by the appellant and partly supported by the respondent's counsel, the requirement to record reasons in the proceedings is mandatory and this has been emphasized in a number of cases including the cases of **Emmanuel Malobo vs Republic** [2016] TZCA 267 (TANZLII) and **Priscus Kimario vs Republic** [2015] TZCA 13 (TANZLII). In the **Priscus Kimario** (supra) the court of appeal while deliberating on the similar matter had this to say;

"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 supplied]

Looking at the proceedings above it is clearly shown that parties were informed of their rights as required by the law however as said above no reasons were recorded to justify the change of the presiding magistrate. Hence it is my considered view based on the cited authorities above, this vitiated the trial court proceedings as the requirement to record reasons is very fundamental, thus that omission renders the proceedings a nullity as the omission is not curable under section 388 of the CPA.

In light of what has been discussed above, it is my considered opinion that the trial court proceedings in the present case was vitiated due to the failure by the second trial magistrate to inform parties the reasons as to why her predecessor magistrate could not complete the trial. Since the irregularity is fatal the proceedings that followed are null and void. Having observed as above, I see no need to determine the remaining grounds of this appeal. In the circumstance I hereby quash the conviction and set aside the sentence.

Further, I order this file be remitted at the trial court for retrial of the appellant only from the stage where the proceedings were marred by the irregularity as explained above. However, if it happens the appellant is convicted at retrial, the time he spent in prison from the date he was convicted till this day of judgment should be excluded since shall be deemed to have already been served. In the meantime, I order the appellant to be detained as a remand prisoner pending his trial.

It is so ordered.

DATED at **MOSHI** this day of 7th November 2023.



X

JUDGE
Signed by: A. P. KILIMI