

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 72 OF 2022

[Original Criminal Case No. 6 of 2021 of Resident Magistrate Court of Simiyu at Bariadi]

ZEFANIA MAYENGA LIMBU.....1ST APPELLANT
MAYENGA NGUSA.....2ND APPELLANT
NDAKI NGUSA.....3RD APPELLANT
NGUSA MAYENGA.....4TH APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

October 25th & 27th, 2023

Morris, J

This appeal is by the four appellants above against both conviction and sentence in Criminal Case No. 6 of 2021 of Resident Magistrates Court of Simiyu (*the trial court*). The tetrad were charged before the trial court with two counts of grievous harm contrary to section 255 of ***the Penal Code***, Cap 16 R.E. 2022 (*the Penal Code*). Allegedly, the appellants had beaten Buya Mayala (their step mother) and Nhandi Njile (Buya's grandson).

The offence was claimed as having been committed on 20/8/2021 at Igegu Village, Bariadi District in Simiyu Region. The appellants were consequently convicted and sentenced to pay fine of Tshs. 200,000/- or to serve 7 years' imprisonment in default. Further, they were ordered to compensate the victims with Tshs. 2,000,000/=. They became aggrieved thereof. They appealed to this Court marshalled with five grounds that: the trial magistrate did not append signature at the foot of testimonies; the successor magistrate did not assign reasons for taking over the case; the charge was defective; the trial court relied on the defence weakness; and the prosecution evidence was tainted with doubts.

Nonetheless, when the matter came for hearing, the 1st appellant was represented by Advocate Julias Mushobozi. The 2nd, 3rd and 4th appellants defaulted appearance. I, thus, dismissed their appeal for want of prosecution. However, the respondent was represented by Ms. Carolyn Mushi, Mr. Goodluck Saguya and Ms. Mboneke Ndimubenya; learned State Attorneys. In the course of submissions, Mr. Mushobozi abandoned all grounds of appeal, save for the second ground. He pursued the second ground only. That is, the successor magistrate erred not to assign reasons for taking over the case from his predecessor.

Mr. Mushobozi submitted that the successor magistrate wrongly assumed powers of his predecessor without giving reasons thereof. To him, section 214 (1) of ***the Criminal Procedure Act***, Cap 20 RE 2022 (*CPA*) was violated. Accounting for the trajectory of events, he argued that the former magistrate, honorable J. J. Kamala SRM; presided over the matter between 21.9.2021 and 09.11.2021. And that, PW1 and PW2 testified before him. Later, on 10.5.2022, honorable M. J. Mahumbuga RM took over the proceedings until delivery of judgement. However, when he took over the latter did not record reason for the subject succession.

To the appellant's counsel, section 214(1) of ***the CPA*** mandates the magistrate who presides over a matter should finalize the trial save for disclosed ground/circumstances. He made reference to the case of ***DPP v Henry Kileo & 4 Others***, Crim. App 239/2012(unreported) and buttressed his argument that failure to assign the reasons on taking over the proceedings raises a jurisdictional question. In other words, the successor magistrate herein lacked the requisite mandate. Consequently, the proceedings taken/conducted by him from 10/5/2022 to the end are to be vitiated; and the matter to be retried if the prosecution still wishes to pursue their course.



In reply, Ms. Carolynne, while admitting the omission complained of; she sturdily submitted that the non-compliance is not fatal but curable under the principle of **overriding objective**. According to her, it is not mandatory that when the section above is not complied with, proceedings conducted by the successor magistrate are a nullity. Instead, the court would first establish if the appellant was prejudiced. That is, it is not enough for one to state that there was non-compliance to the provision. He must exhibit the prejudice suffered by him because of such non-compliance. Further, the appellate court should consider if the successor magistrate arrived at conviction on the strength of evidence of both prosecution and defence.

Reference was made to ***Tumaini Jona v R***, Crim. Appeal No 337/2020 and ***Charles Yona v R***, Crim. Appeal No. 79/2019 (both unreported). The learned State Attorney's conclusion hereof was that, if non-compliance did not prejudice the appellant – accused, the error is curable under section 388 of ***the CPA***. Thus, she was insistent that in the present matter the appellant does not indicate how the observed non-compliance prejudiced him. Hence, the irregularity is accordingly curable.



In rejoinder, Mr. Mushobozi submitted that the appellant was prejudiced. He also argued that the cited authorities by the respondent were from the Court of Appeal which also decided the case of **DPP v Henry Kileo** (supra) cited by the appellant. He finally implored the Court to consider the non-compliance in favour of the appellant.

I have dispassionately considered the submissions of both parties. To the appellant, the failure by Hon. Mahumbuga RM to assign reasons for taking over the proceedings from Hon. Kamala SRM on 10/5/2022; was fatal under section 214(1) of **the CPA**. The respondent, however, asserted that the subject omission is curable under section 388 of the same law.

I have taken time to read section 214(1) of **the CPA** in its literal and contextual scope. It is clear from the same that the proceedings may be conducted partly by one magistrate and taken over by another. In the addition, the taking over must be for any reason. It is also a principle that such reason must be disclosed. Also, the successor magistrate may act on the evidence or proceedings recorded by his predecessor. However, should the former consider it necessary, he may re-summon the witnesses



and recommence the trial. In this regard, therefore, the provision is permissive of a couple of options in the interest of justice.

There is a plethora of cases holding that non-compliance with the subject section is a fatal irregularity which vitiates conviction and sentence. See, for example, *James Maro Mhende v R*, Crim. Appeal No. 83 of 2016; *Patrick Boniface v R*, Crim. Appeal No. 2 of 2017; *Salimu Hussein v R*, Crim. Appeal No. 3 of 2011; *Abdi Masoud @ Iboma and 3 others v R*, Crim. Appeal No. 116 of 2015; and *Adam Kitunda v R*, Crim. Appeal No. 360 of 2014 (all unreported).

The rationale for such compliance is five-fold. **Firstly**, to safeguard the integrity of judicial proceedings whereby cases are assigned and re-assigned for valid reasons. **Secondly**, to afford parties with fair trial. It is an undeniable principle that justice needs not only to be done but also must be seen as having been so done. **Thirdly**, transparency is an integral part of trial. It is critical that the accused should know why there is a new presiding magistrate in a matter that was conducted by a different judicial officer.

Fourthly, the presiding magistrate should finalize the matter unless he recuses himself in accordance with the law and/or if he is precluded

for valid reason(s). **Fifthly**, the magistrate who sees and hears the witness testifying before him, is generally at an advantage of assessing the demeanor and credibility of such witnesses.

In the light of the above analysis, subsection (2) to section 214 empowers this Court to set aside any conviction passed on evidence not wholly recorded by the magistrate passing it. However, such step must be on the basis that the accused must have been **materially prejudiced**. This position was emphasized in ***Charles Yona v Republic*** (*supra*) and ***Tumaini Jonas v R*** (*supra*). Further, under section 388 of ***the CPA***, the conviction or sentence may only be altered where the omission or irregularity occasioned failure of justice. Therefore, as correctly argued by Ms. Mushi, it does not suffice for the appellant to merely fault the trial by mentioning the omission. It takes another line of obligation for him to state or display that the subject omission prejudiced him and/or it occasioned miscarriage of justice.

In his main submissions, the counsel for the 1st appellant did not demonstrate how the omission herein prejudiced the said appellant. In rejoinder, however, he insisted that his client was prejudiced. With adequate respect, the counsel was duty bound to state the details of the

alleged prejudice right in his submissions in chief. By so doing, the respondent would have been accorded an opportunity to address or contest the raised points. That is to say, settled is the general principle that in rejoinder, a party should not raise a new issue. I fully subscribe to such prohibition. In my view, condoning introduction and reintroduction of new matters during rejoinder proceedings, is as unscientific as driving a turned-off car without igniting it first.

Therefore, pursuant to section 214 (2) of ***the CPA***, I am stripped off the legal justification; under the circumstances of this appeal, to quash the trial court's proceedings and conviction; and/or set aside the sentence therefrom against the 1st appellant in clear absence of the established material pointers of injustice or prejudices to the said party.

In the upshot, this appeal is barren of merit. It stands dismissed. I so order. The right of appeal is duly explained to parties hereof.



C.K.K. Morris

Judge

October 27th, 2023

A handwritten signature in blue ink, consisting of a large, stylized 'S' shape with a dot at the end.

Judgment is delivered this 27th day of October 2023 in the presence of Mr. Zephania Mayenga Limbu, the 1st appellant and Mr. Goodluck Saguya, learned State Attorney for the respondent.



C.K.K. Morris

Judge

October 27th, 2023

