

TANZANIA / JUDGMENT

bariki mathayo msuya vs republic

2023 tzca 17643 22 september 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI f CO RAM: MUGASHA, 3.A..
MWANDAMBO. J.A., And MAIGE, J.A.1 CRIMINAL APPEAL NO. 103 OF 2020 BARIKI MATHAYO
MSUYA APPELLANT VERSUS THE
REPUBLIC RESPONDENT (Appeal from the decision of the High
Court of Tanzania at Moshi) fMkapa. 3.1 dated the 18th day of December, 2019 in DC Criminal
Appeal No. 2 of 2019 JUDGMENT OF THE COURT 18th & 22nd September, 2023 MAIGE, J.A.: The
victim who shall hereinafter be referred as "PW2", was, on 9th September, 2016 (the material
date), a girl of 14 years old. She was living at Mdawi area in Old Moshi with her mother, Restitute
Bariki Mathayo (PW4) and father, Bariki Mathayo Msuya, the appellant The appellant was
accused in this case of having carnal knowledge of PW2 contrary to section 158(1) (a) of the Penal
Code. The incident was alleged to have happened at home on the material date when PW2 had
just arrived from school. She followed the i appellant in the bed room upon being requested by
him so to do. While in the bed room, the appellant forcibly undressed her and inserted his penis
into her vagina. According to her, the appellant committed a similar wrong in 2015 and she
informed her mother but only to end up by receiving heavy punishment from the appellant. This
time around, PW2 testified, she reported the incident to the village executive officer one Mary
Adam Mkondye (PW1) who together with PW4 reported to the police. The appellant denied the
charge and testified that, the same had been fabricated due to antagonistic relation between him
and PW1. The trial magistrate believed the evidence of the victim to be credible. To the contrary,
he found the appellant's defence incapable of raising any reasonable doubt. Therefore, he
convicted the appellant and sentenced him to thirty (30) years imprisonment. Both the conviction
and sentence were upheld by the High Court of Tanzania at Moshi on appeal. Once again
aggrieved, the appellant has preferred the current appeal. In the initial memorandum of appeal
and a supplementary memorandum of appeal, the appellant is 2 questioning the correctness of
the concurrent decision of the two courts below in many respects. For the reasons which shall be
apparent henceforward, we find it worthless to reproduce all the grounds of appeal. As the record
of appeal speaks, the trial commenced on 21st December, 2016 with S.S. Massati being the trial
magistrate. He received the evidence of PW1, PW2 and PW3. On 22nd February, 2017, J.G. Mawole
took over the proceedings. The latter conducted the trial to the completion and composed the
judgment. It is common ground that the succession of the two trial magistrates was done without

assigning any reason therefor. In the second ground in the supplementary memorandum of appeal, the two courts below are criticized in conducting the trial in violation of the provisions of section 214 of the Criminal Procedure Act [CAR 20 R.E. 2022 (the CPA). The appellant who fended for himself fully relied on the written submissions which he had filed before the date of hearing. On the strength of the written submissions, he urged us to allow the appeal and set him free. In relation to the ground under discussion, it was the appellant's submission that, in not assigning the reasons for succession of magistrates, the judgment and the proceedings of the trial court was seriously irregular for violating the requirement under section 214 of the CPA. The irregularity, he submitted, occasioned failure of justice in that, a large part of the prosecution evidence including that of the victim which was the basis of the conviction was received by the predecessor magistrate, Citing the Court's decision in *Abdi Masoud @ Xboma and Others v. R*, Criminal Appeal No. 116 of 2015 (unreported), the appellant urged us to allow the appeal. In response, Ms, Eliaineny Njiro, learned Senior State Attorney who assisted Ms. Revina Tibilengwa, learned Principal State Attorney in defending the appeal, started her submission with a note that, in accordance with the principle in *Stephano s/o Victor @ Mlelwa v. R*, Criminal Appeal No. 257 of 2021 (unreported), for the conviction to be vitiated on account of non-compliance with the provision just referred, the appellant should have been materially prejudiced. She submitted, therefore, that as the evidence of the victim which was the basis of the conviction was not received by the successor magistrate, the omission was materially prejudicial the appellant in that; the successor magistrate was not in a position to closely observe the demeanor of the said witness. In her contention, therefore, the appeal has merit and should be allowed on that ground. As to what should be the appropriate way forward, the counsel proposed for continuation of trial from where the predecessor magistrate ended. There was no comment from the appellant to the contrary. We have closely followed the parties' concurrent submissions on this issue. We are in agreement with them that under section 214

- (1) of the CPA, it is obligatory for a successor magistrate to give reason for succession. We are also in agreement with the learned Senior State Attorney that, it is not always the case that wherever there is improper succession of the trial magistrate, the trial proceedings would be vitiated. As we held in *Charles Yona v. Republic*, Criminal Appeal No. 79 of 2019 (unreported), for a conviction to be nullified for the reason of non-compliance of the respective provisions, the appellant must have been materially prejudiced as a result of the same. See also *Stephano s/o Victor @ Mlelwa v. R*, Criminal Appeal No. 257 of 2021 (unreported). 5 In the present case, the conviction was essentially based on the evidence of the victim which, together with that of two other prosecution witnesses, was recorded by the predecessor magistrate. The successor magistrate just received the evidence of the two remaining prosecution witnesses and of the appellant. In such a situation, it cannot reasonably be said that the appellant was not materially prejudiced by the omission. We say so because while under section 127 (6) of the Evidence Act, the trial judge or magistrate is obliged, before placing reliance on the evidence of the child of the tender, to assess the credibility of the same, the successor magistrate in so far as he did not observe the victim while testifying, missed the advantage of closely and directly assessing her demeanor

something which is instrumental in determining the witness's credibility. In the circumstances, we find merit on this ground of appeal and we allow it. Since the ground is by itself capable of determining the appeal, we shall not consider the remaining grounds of appeal. At the end, we quash the conviction of the trial court and set aside the sentence meted to the appellant. We also quash the proceedings of the trial court subsequent to 22nd February, 2017 when the irregular succession of the trial magistrates happened. We direct that the record be remitted to the trial court for continuation of trial from where the predecessor magistrate ended. The continuation of the trial should in the circumstances, be expediated and should the appellant be convicted, the time spent in prison be considered in determining proper sentence. In the meantime, the appellant should remain in custody unless ordered otherwise by the trial court. DATED at MOSHI this 21st day of September, 2023. S. E. A. MUGASHA JUSTICE OF APPEAL L.J.S. MWANDAMBO JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL The Judgment delivered this 22nd day of September, 2023 in the presence of Appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/ Republic is hereby certified as a true copy of the original. D.R. LYIMO DEPUTY REGISTRAR COURT OF APPEAL 7

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