

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT IRINGA (CORAM: MJASIRI. J.A.. MMILLA. 3.A. And LILA. J.A.) CRIMINAL APPEAL NO. 520 OF 2015 MARTIN

HAULEAPPELLANT VERSUS THE

REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Songea) (Manento. J.1 Dated the 13th day of June, 2002 in Criminal Appeal No. 33 of 2002 JUDGMENT OF THE COURT 6th & 11th October, 2017. MJASIRI. J.A.: In the District Court of Songea District, the appellant Martin Haule was charged with the offence of rape contrary to sections 130(l)(e) and 131(1) of the Penal Code, Cap 16 R.E 2002 (the Penal Code). He was convicted as charged and was sentenced to 30 years imprisonment. Being aggrieved by the decision of the District Court, he appealed to the High court. His appeal was unsuccessful, it was summarily dismissed by the High Court (Manento, J.), hence the second appeal to this Court. The appellant filed numerous grounds of appeal (nine in total) complaining against the summary dismissal of his appeal by the High Court. We considered ground No. 5 to be of particular importance and we reproduce it as under: "Hon. A.R. Manento, J erred in law and in fact when he dismissed my appeal without considering that the trial at the trial court was not fair due to the fact that the case was heard by more than two Hon. Magistrates without asking if I wish to proceed with the hearing or to recall witnesses. " At the hearing of the appeal the appellant appeared in person and had no legal representation while the respondent Republic had the services of Mr. Hamimu Nkoleye assisted by Ms Helen Chuma learned State Attorneys. The counsel for the respondent had initially filed a notice of preliminary objection which he subsequently sought leave to withdraw, leave of which was granted by the Court. The appellant asked the Court to let the State Attorney submit first. 2 In relation to ground No. 5, Mr. Nkoleye conceded that the trial was conducted by two Resident Magistrates. The case was initially heard by Hon. F. Stolla Resident Magistrate who conducted the proceedings up to the closure of the prosecution case. He heard four (4) prosecution witnesses. The prosecution case was closed on August 18, 2000. During the hearing of the defence case the matter was heard by M.J.B. Hamisi Resident Magistrate, who also prepared and delivered the judgment. No reason was assigned for the change of magistrates. Mr. Nkoleye submitted that the appellant did not receive a fair trial. He argued that the trial was a nullity and he asked the Court to quash the proceedings and judgment of the District Court and the judgment of the High Court. Mr. Nkoleye submitted that this is not a proper case for ordering a retrial given that the appellant has been in custody since 2000, was convicted in 2002 and has already served 15 years of his sentence. However he urged us to leave

the issue of whether or not a retrial should be conducted to the discretion of the Director of Public Prosecutions. The appellant being a lay man with no benefit of counsel did not have much to say. He stated that he agreed with the submissions made by the learned State Attorney. He also left the matter in the hands of the Court. He asked the Court to set him free having spent 15 years in prison. After a careful scrutiny of the record, we are constrained to agree with the learned State Attorney that the appellant did not have a fair trial. The appellant's right to a fair trial is guaranteed under Article 13(6)(a) of the Constitution of the United Republic of Tanzania. It is evident from the record that section 214(1) of the Criminal Procedure, Cap 20 R.E. 2002 (the CPA) Act was not complied with. Section 214(1) and (2) of the CPA provides that:- "(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 of any committal proceedings is for any reason unable to complete the trial or the 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 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.

- (2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial. [Emphasis provided]. In the instant case the magistrate who took over the conduct of the case (Hamisi, RM), did not state any reasons why the predecessor magistrate who had heard and recorded the whole prosecution evidence was unable to complete the trial. According to section 214(1) of the CPA it is absolutely necessary that the magistrate taking over the case should state the reasons for not doing so. In order for an accused person to get a fair trial, he has a right to know any changes relating to the conduct of his case. One magistrate cannot unceremoniously take over a file which has been handled by another magistrate. Apart from the fact that it is a requirement under the law, it is also good practice for the sake of transparency. The magistrate who took over the conduct of the case only heard the defence case before writing the judgment. Given the blatant non compliance with the requirements under the law, the proceedings before the second magistrate are a nullity. Having failed to give reasons for taking over the case, the successor magistrate lacked authority to proceed with the trial. See- Adam Kitundu v Republic, Criminal Appeal No. 360 of 2014 and Isack Stephano Kilima v Republic, Criminal Appeal No. 273 of 2011 (both unreported) 6 In Eustace v Republic (1970) EA 393 it was stated thus:- "In the absence of statutory provision one magistrate could not continue a trial begun by another". Section 214 of the Criminal Procedure Act requires reasons to be provided. This statutory requirement has to be met. The accused person has a right to know why there is a new presiding magistrate after the case has been handled by another magistrate up to the defence stage. In the result, we hereby exercise our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act), to revise and quash all the proceedings beginning with those conducted by Stolla, RM, the

judgment of Hamisi RM and the judgment of the first appellate court. We also set aside the sentence. Ideally, we would have ordered a retrial in accordance with section 214 (2) of the CPA. However given the circumstances of this case and taking into consideration that the appellant has already served fifteen (15) years in prison, he was convicted in 2002, we hereby discharge the appellant. We leave the matter to the discretion of the Director of Public

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