

TANZANIA / JUDGMENT

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9 May 2018

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. IN THE COURT OF APPEAL OF TANZANIA AT IRINGA (CORAM: LUANDA, J.A., MZIRAY, J.A., And NDIKA, J.A.) CRIMINAL APPEAL NO. 16 OF 2016 MESHAKI GUGAMI APPELLANT VERSUS THE REPUBLICRESPONDENT (Appeal from the decision of the High Court of Tanzania at Iringa) (Shangali, J.) dated the 4 th day of December, 2015 in . Criminal Appeal No. 25 of 2014 RULING OF THE COURT 8th & 10th May, 2018 MZIRAY, J.A.: The appellant was charged in the District Court of Iringa with two counts. The first count was rape c/s 130(1) (2) (e) and section 131 and the second count, which was charged in the alternative to the first count was Incest by male c/s 158(1) both of the Penal Code Cap. 16 R.E 2002. It was alleged that on 28 th day of August, 2012 at Limuli Village within Mufindi District and in the Region of Iringa, the appellant had sexual intercourse with one "AG", a 17-years old girl who was alleged to be his sister. The trial court after hearing the Prosecution evidence and defence case, found the appellant guilty of the offences as charged. 1 He was convicted and sentenced to serve 30 years imprisonment on each count. The sentences were ordered to run concurrently. Aggrieved, the appellant appealed to the High Court of Tanzania at Iringa. The High Court (Shangali, J.), dismissed the appellant's appeal in the second count on the ground that the same was charged in the alternative to the first count. The conviction on the first count of rape was upheld. Aggrieved with that decision, the appellant has appealed to this Court raising eight grounds in the memorandum of appeal. At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic had the services of Mr. Adolf Maganda, learned Senior State Attorney assisted by Mr. Alex Mwita, learned State Attorney. Before the commencement of hearing, the Court on its own motion sought to satisfy itself as to whether it was proper as it appears on page 26 of the record of appeal for the successor trial magistrate to have proceeded with the trial without recording any reason for the transfer of the case. Mr. Maganda, learned Senior State Attorney was the first to respond. He submitted that, it was not proper for the second magistrate 2 to take over and continue with the trial without assigning any reason for the change of hands. He said that this was contrary to section 214

- (1) of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the CPA) and that the irregularity was incurable. He urged us to invoke our revisional powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the Act) to quash all the proceedings, from where the successor magistrate took over the conduct of the case and those of the first

appellate court. On his part, the appellant agreed with the views expressed by the learned Senior State Attorney, and had nothing useful to add. On our part, we are in agreement with Mr. Maganda's submission that it was not proper for the successor magistrate to take over and continue with the trial without assigning any reason for the transfer of the case. We so hold, minded with the provision of section 214 (1) of the CPA. The provision reads:- "214(1) Where any magistrate, after having heard and recorded the whole or part of or any part of the 3 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 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 proceeding recorded by his predecessor and may, in the case of a trial, and if he considers it necessary resummon the witnesses and recommence the trial or the committal proceedings. [Emph 9sis supplied]. According to the preceding cited provision, it is absolutely necessary that the magistrate taking over the case should state the reasons for doing so. In the instant case, the magistrate who took over the conduct of the case (F.S.K Lwila, PDM) did not state any reasons why the predecessor magistrate (M.I. Senapee, RM) was unable to complete the trial. It is now a settled principle that the reasons for the take over have 4 to be put on the record. In *Priscus Kimaro v. Republic*, Criminal Appeal no. 301 of 2013 (unreported) this Court observed: •~ .. 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 to the detriment of justice. This must not be allowed,✓ In another case of *Abdi Masoud @ Iboma and Others v. The Republic*, Criminal Appeal No. 116 of 2015 (unreported), the Court went further and held that in the absence on record of any reason for (/ the taking over, by a different magistrate of the trial of a case that is partly heard, the successor magistrate lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard matter become a nullity. In our case at hand, we have no hesitation that F.S.K Lwila, PDM, who did not assign any reason, lacked jurisdiction to take over the matter that was partly heard matter before his predecessor. Several decisions of this Court support our view. 5 See for example, *Salim Hussein v. Republic*, Criminal Appeal No. 3 of 2011, *Mary Richard Nzingula v. Republic*, Criminal Appeal No. 153 "B" of 2011 and *Adam Kitundu v. Republic*, Criminal Appeal No. 360 of 2014 CAT, *Isaack Stephano Kilima v Republic*, Criminal Appeal No. 273 of 2011 CAT and *Msami Ally v Republic*, Criminal Appeal No. 280 of 2015 (All unreported). On that basis therefore, we exercise our revisional powers under section 4(2) of the AJA, to revise and quash all the proceedings beginning with those conducted by Lwiza, PDM and those of the first appellate court. We also set aside the sentence and order a re-trial with effect from 18/4/2013, the date the proceedings by the predecessor magistrate (M.I Senapee, RM) ended. The appellant should however remain in custody pending the finalization of the case in the District Court. We further direct that the matter be handled expeditiously taking into account that the

charge against the appellant was of 2009. In case of a conviction, the time the appellant spent in prison should be taken into consideration. 6 Order accordingly. DATED at IRINGA this 9th day of May, 2018. B.M. LUANDA JUSTICE OF APPEAL R.E.S MZIRAY JUSTICE OF APPEAL . G. A. M NDIKA JUSTICE OF APPEAL I certify that this is a true copy of the original.

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Prepared on 13 October 2026 · Esheria