

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 363 OF 2022

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

SELEMAN JUMA NYIGO @ MWANYIGO RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Miyambina, J.)

dated the 8th day of June, 2022

in

Criminal Appeal No. 68 of 2021

.....

JUDGMENT OF THE COURT

13th & 22nd March, 2024

KITUSI, J.A.:

The Director of Public Prosecutions (the DPP) appeals against the decision of the High Court quashing the proceedings of the District Court of Iringa for violating two provisions of the Criminal Procedure Act (the CPA) and holding that the violations rendered the trial a nullity. The High Court ordered a retrial. The two provisions of the CPA which the High Court considered to have been violated are; section 231 which requires the trial court to inform the accused of his rights upon closure of the

prosecution case; and section 214 which guides trial courts on what to do when one magistrate succeeds another in the conduct of a case.

Briefly, the respondent was, in the first count, charged with robbery with violence contrary to sections 285 and 286 of the Penal Code, it being alleged that on 12th February, 2020 at Gangilonga area in Iringa Municipality he accosted one Hannah Beisel who was walking along the road and stole properties of value from her.

He was, in the second count, charged with rape contrary to section 130(1) & (2) (a) and 131(1) of the Penal Code, the prosecution alleging that on the same date at the same time and the same secluded area, the respondent had sexual intercourse with the said Hannah Biesel without her consent. Trial proceeded by recording evidence of six witnesses for the prosecution and four witnesses for the defence, at the end of which the court convicted the respondent with both counts. It sentenced him to 15 years imprisonment for the charge of robbery and 30 years for that of rape.

The respondent appealed to the High Court raising 13 grounds of appeal, to fault the convictions and sentences. The third and fourth grounds are relevant for our immediate purpose and they stated:

- "3. The trial court erred in law by failure to address the appellant in accordance with section 231 of the Criminal Procedure Act Cap 20 [R.E. 2019]*
- 4. The trial magistrate erred in law by failure to address the appellant according to section 214 of the Criminal Procedure Act, Cap 20 [R.E. 2019] as the case was conducted by different Honourable Magistrates."*

The learned High Court Judge considered the third ground of appeal at length citing many decisions of the Court linking section 231 of the CPA to the right to a fair hearing as per Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). One of such cases is; **Alex John v. Republic**, Criminal Appeal No. 129 of 2006 (unreported). The learned Judge was therefore satisfied that section 231 of the CPA had not been complied with which rendered the proceedings a nullity. Then, the learned Judge took note of existence of two positions by the Court on whether under such circumstances a retrial should be ordered or not. He chose to order a retrial because, he observed, there was also violation of section 214 of the CPA regarding succession of trial magistrates, and section 192 of the CPA providing for

a requirement to conduct a preliminary hearing. This decision aggrieved the appellant DPP who has raised two grounds of appeal to wit;

- "1. That the High Court erred in law for ordering re-trial asserting that the trial court violated section 231 of the Criminal Procedure Act [Cap 20 R.E. 2019]*
- 2. That the High Court erred in law for ordering a re-trial asserting that the trial Court violated section 214 of the Criminal Procedure Act [Cap 20 R.E. 2019]."*

Mr. Sauli Magori, learned State Attorney argued this appeal on behalf of the appellant DPP while the respondent appeared without the benefit of an advocate.

Submitting, Mr. Magori drew our attention to page 58 of the record of appeal where the accused (respondent) is recorded to have stated that he would testify on oath and would call witnesses. The learned State Attorney conceded to the fact that the magistrate did not put to the accused the question whether or not he would be calling witnesses, but proceeded to argue that the question was rendered irrelevant after the accused had already indicated that he was going to be calling witnesses to support his case. The learned State Attorney faulted the Judge's conclusion that section 231 of the CPA was violated because, he

submitted, that conclusion did not take into account the accused's (respondent's) response at page 58. He prayed for an order quashing the finding and the resultant order. The respondent, unrepresented as earlier intimated, appeared to be more than prepared to go along with the learned State Attorney. We also agree with the learned State Attorney, but only partly.

To begin with, the learned Judge cannot be faulted in the way he expounded the relevant law. We agree with him that failure to comply with section 231 of the CPA is fatal. That section provides:

"231

At the close of the evidence in support of the charge, if it appears to the Court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the Court shall again explain the substance of the charge to the accused and inform him of his right.

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the Court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

However, when that provision is applied to the facts on the record, it becomes clear to us, as rightly submitted by the learned State Attorney, that the Judge's attention inadvertently missed the substantial compliance with that section by the trial magistrate. This is because a glance at the proceedings of the trial court at page 58 clears the doubts as to compliance with section 231 of the CPA. We reproduce the relevant part:

"Having heard the prosecution case this court has observed that a prima facie case has been established against the accused person. He is hereby accorded a chance to defend himself."

Sgd: E. Nsungalufu: RM
27/07/2021.

Court: Will you testify on oath or not.

*Accused: Yes, I will testify on oath, I pray to
bring 3 witnesses.*

*Court: Section 231 of the CPA Cap 20 R.E.
2019 c/w.*

*Sgd: E. Nsungalufu: RM
27/07/2021”.*

In our view, the statutory duty imposed on the trial court to explain to the accused about his rights upon closure of the prosecution case, is not a mere formality but aims at achieving a purpose. In this case the court called upon the accused to state whether he would be testifying on oath or not; to which he responded. In his response the accused went further to disclose that he would be calling three witnesses, a response to a question that had not been put to him yet. Since the purpose had been achieved by the accused providing the answer, we do not think it was correct for the learned Judge to hold on to the formality which does not, in the end affect the justice of the case. In our view, although the learned Judge meticulously addressed the law by citing many of our decisions, the facts in those cases are distinguishable, rendering the cited cases not particularly relevant to the instant case. In the case of **Safari Anthony @ Mtelemko & Another**

v. Republic, Criminal Appeal No. 404 of 2021(unreported) the Court insisted on what it referred to as the justice driven test in resolving procedural violations and that it should always inquire if the accused has been prejudiced. We maintain that approach in this case. In our view, this approach rhymes with our view expressed above that formalities which do not affect the justice of the case should not enslave the court. In our finding, since the accused had expressed his intention to call witnesses, it was irrelevant that the trial magistrate had not put to him that question. In addition, going by the bolded part of section 231 of the CPA, it requires the court to record the answers, making it unnecessary for the questions to be reflected in the record, although it would be desirable to do so. For that reason, we find merit in the first ground of appeal.

The same is the case with the second ground of appeal. Mr. Makori submitted that the proceedings of the trial court at page 39 show that the trial court complied with section 214 of the CPA. The relevant excerpt reads:

"Court This Case file has been reassigned to me following the transfer of the presiding Magistrate. Accused person

*has been addressed in terms of section
214 ... and replies*

Accused Person: No objection let us proceed.

*Court: Section 214 of the CPA ... complied
with.*

*Sgd: E. Nsungalufu: RM
1/12/2020".*

The learned State Attorney submitted that the appellant was addressed in terms of section 214 of the CPA to bring to his attention the fact that there was succession of trial Magistrates. And that he responded by stating that he had no objection, and hearing should proceed. Mr. Makori cited three cases including **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (unreported) and **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527 to argue that a court record must not be easily impeached.

We begin by reproducing the letter of section 214 of the CPA. It states:

"214

**(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 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.

- (2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction based 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.*
- (3) Nothing in subsection (1) shall be construed as preventing a magistrate who*

has recorded the whole of the evidence in any trial and who, before passing the judgment is unable to complete the trial, from writing the judgment and forwarding the record of the proceedings together with the judgment to be read over and, in the case of conviction, for the sentence to be passed by that other magistrate.

Case law has made it a requirement for the trial court to give reasons for the takeover of the case. See the case of **Juma Kuyani & Musa Daudi v. Republic**, Criminal Appeal No. 525 of 2015 (unreported), among many others.

It may be useful to reiterate the fact that apart from being an administrative tool for control of movement of case files from one magistrate to the other, section 214 of the CPA gives the accused an assurance that his case will be determined by a magistrate who is familiar with the evidence in the case. See the case of **Kapama Hamisi Juma & Another v. Republic**, Criminal Appeal No. 591 of 2020 (unreported), where the decisions of the two courts below were quashed for having ignored the accused persons' request to have the witnesses recalled.

We note that the provision of section 214 of the CPA confers the trial magistrate with the discretion to decide whether to recall witnesses or not, but such discretion may not be arbitrarily exercised to the prejudice of the accused, as we stated in **Kapama Hamisi Juma** (supra). Although section 214 of the CPA does not give the accused the right to require witnesses to be recalled, it is in keeping with fair hearing that the magistrate should give reasons for deciding one way or the other. In the instant case however, the learned trial Magistrate substantially complied with section 214 of the CPA by informing the appellant why he had taken over the trial and required him to state if he wished the witnesses to be recalled. The accused had no objection to the trial proceeding from where it had reached. Therefore there is merit in the 4th ground of appeal and we allow it.

Considering what we have demonstrated above, it is clear that of the 13 grounds of appeal that were presented by the respondent, only two were determined by the High Court. We have also allowed the DPP's appeal because the High Court took a wrong view of the matter in relation to the alleged violations of sections 231 and 214 of the CPA. It means therefore, that the remaining 11 grounds of appeal which go to the merit of the matter, are yet to be determined.

Now, having faulted the learned Judge's decision on the alleged procedural violations, it remains that the merit of the appeal is yet to be determined. In that regard, we quash the judgment of the High Court and set aside the order of retrial. We remit the record to the High Court with an order that it should consider the remaining grounds of appeal and determine the appeal according to law.

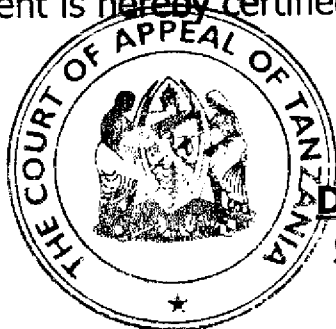
DATED at IRINGA this 21st day of March, 2024.

A. S. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgement delivered this 22nd day of March, 2024 in presence of Ms. Magreth Mahundi, learned Senior State Attorney assisted by Ms. Radhia Njovu and Ms. Sophia Manjoti, both learned State Attorneys for the Appellant/Republic and Mr. Seleman Juma Nyigo @ Mwanyigo, the Respondent is hereby certified as a true copy of the original.




J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL