IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A. AND RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 120 OF 2005

NDAMASHULE NDOSHI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Mlay, J.)

Dated the 16th day of May, 2003
in
High Court Criminal Appeal No. 121 of 2001

J U D G M E N T O F T H E C O U R T

12 March & 16 March 2007

MROSO, J.A.:

The appellant was prosecuted for and found guilty of the rape of a girl under the age of 10 years. He was awarded the mandatory sentence of life imprisonment under Section 131(3) of the Penal Code, Cap. 16 of the Laws as amended by the Sexual Offences Special

Provisions Act, 1998, even though he was of the age of 15 or 16 years. He was aggrieved by the conviction and sentence and appealed to the High Court. Mlay, J. dismissed his appeal. Not giving up, he appealed to this Court.

In his appeal to the Court he filed two sets of memoranda of appeal, one on 11th August, 2006 and the other on 7th March, 2007. He informed the Court that he intended to argue all the nine grounds on both memoranda of appeal. Ground 3 of the later memorandum of appeal reads as follows:-

> "3. That, The Learned appellate judge had erred himself in law to hold the appellant guilty as charged yet the trial Court neither found a prima facie case against him nor had sufficiently expressed his right to statutory inalienable right to defence in conformity with the demands of s.231(1) CPA Cap.20, RE 2002."

The grounds of appeal were clearly drafted by a lay hand but the message is clear.

At the hearing of the appeal, like in the lower Courts, the appellant was unrepresented. The respondent Republic was represented by Mr. Mgengeli, learned State Attorney. Mr. Mgengeli started to address the Court because the appellant said he wished to speak in response to whatever the State Attorney would say in relation to his appeal.

The learned State Attorney, very properly in our view, addressed the Court on the ground (3) of the appeal which we quoted above because it is crucial and overriding. But before we discuss the submissions by the learned State Attorney and the appellants' response to those submissions we think it is necessary to give a brief background to that ground of appeal which will make it unnecessary to go into the remaining grounds of appeal.

The trial court record shows that after the last witness for the prosecution, one Juma Bughali (PW.5), had given his evidence, the trial Principal District Magistrate Mr. N. T. Bwire, recorded that Section 210(3) of the Criminal Procedure Act, 1985 had been complied with. Section 210 referred to here details the manner of recording evidence. The subsection (3) which was specifically cited reads:-

> "(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him. If a witness asks that his evidence be read over to him then the magistrate shall record any comments which the witness may make concerning his evidence".

Immediately after recording that section 210(3) of the CPA, 1985 had been complied with the Principal District Magistrate signed and dated the record and, perhaps inadvertently, made the following order:-

"Order: Judgment on 23/7/99. AFRC."

Then he signed the order. The judgment was not delivered on the set date but on the 5th August, 1999 instead.

Mr. Mgengeli conceded to ground 3 of the memorandum of appeal to which we referred above. He said that, indeed, Section 231(1) of the Criminal Procedure Act, 1985 henceforth the Act, had not been complied with by the trial magistrate. The consequences of failure to comply with that provision rendered the judgment a nullity because the appellant was denied a hearing before he was condemned.

Section 231(1) of the Act makes the following stipulation:-

"(1) 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 section 312-321 inclusive 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;

(b) to call witnesses 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. The Court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise either of the above rights".

The trial court record as demonstrated above shows that Section 231(1) of the Act was not complied with. Curiously, in his judgment the Principal District Magistrate made the following observation:

"And not surprisingly his option (the appellant's) not to testify is not without significance".

The impression being created by the statement quoted above is that the appellant opted not to testify in his own defence or to call defence witnesses. But as we have endeavoured to show, the record does not bear out the trial magistrate. We even looked at the original, handwritten record of the trial court and it is exactly like the typed record which was before us.

Section 231 of the Act contains a fundamental right of an accused person: the right to be heard before they are judged. It directs that a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict. Not only is an accused entitled to give evidence in their defence but also to call witnesses to testify in their behalf. So, the

section is an elaboration of the all important maxim – **audi alteram partem** and that no one should be condemned unheard.

A careful look at the High Court proceedings and judgment shows that the issue of the trial court failing to comply with Section 231(1) of the Act did not feature anywhere, either in the submissions of the appellant or in those of the respondent Republic. It is apparent that glaring as that failure may appear from the trial court record, it never the less escaped the notice and attention of the parties and of the presiding judge. But since there was the reference in the judgment of the trial magistrate that the appellant "not surprisingly" opted not to testify and that such option was "not without significance", that should have struck the learned state attorney who appeared in the High Court to show curiosity which would have led to the discovery that, in fact, there was no such option exercised by the appellant.

Mr. Mgengeli submitted, again, with respect, correctly, that since the trial court judgment was given before the appellant was explained of his right to defend himself, in breach of the fundamental right to be

heard, such judgment should be nullified and the district court ordered to comply with Section 231 of the Act and, thereafter, proceed with the trial according to law.

The appellant resisted that submission. He said that that approach would have the effect of keeping him longer in custody after the eight years he has already spent in prison. He prayed that if the Court had found that there has been such a fundamental violation of his right, it should allow his appeal and order that he be set at liberty.

We have given full consideration to the appellant's argument and plea but we regret that we cannot order that he be set at liberty. Justice for the appellant and for the prosecution requires that the case be decided on its merits, on the full evidence and the law.

Following from what we discussed above, we nullify the order for judgment by the District Court; the judgment and sentence imposed on the appellant by the trial court as well as the appeal to the High Court, the proceedings in the High Court and the judgment and order of the

High Court which were based on the nullified judgment of the District Court. In other words, all that followed after the trial magistrate recorded that section 210(3) of the Act had been complied with up to and including the judgment of the High Court dated 16th May, 2003 has been nullified. We further direct that the District Court record be restored to the District Court of Kwimba at Ngudu to comply with Section 231 of the Act and then proceed with the hearing of the case according to law.

We also order that the District Court should resume the hearing of the case not later than thirty days from the date of this judgment.

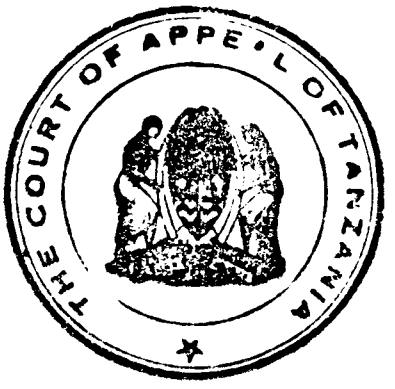
DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR