IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 321 OF 2007

MASOME ROBERT..... ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mziray, J.)

Dated the 5th day of July, 2006
in
Criminal Appeal No. 132 of 2003

JUDGMENT OF THE COURT

7 & 14 JUNE, 2010

RUTAKANGWA, J.A.:

The appellant was convicted as charged of the offence of Rape contrary to sections 130 and 131 of the Penal Code, Cap. 16, by the District Court of Nzega District. He was sentenced to life imprisonment and twelve strokes of the cane. His appeal to the High

Court against conviction and sentence was dismissed in its entirety. Convinced of his innocence, he has lodged this second appeal.

In this appeal the appellant is claiming that his conviction ought to be quashed for the following reasons. One, the prosecution evidence was riddled with contradictions and implausibilities. As such, the three prosecution witnesses ought not to have been believed. Two, the PF3 was irregularly admitted in evidence, as the provisions of section 240(3) of the Criminal Procedure Act, Cap 20 (the CPA henceforth) were not complied with. Three, the case against him was not proved beyond reasonable doubt.

During the course of hearing the appeal, it occurred to us that the appellant was not accorded opportunity to cross-examine all the prosecution witnesses. This glaring omission forced Mr. Jackson Bulashi, learned Senior State Attorney, for the respondent Republic, to urge us to nullify the trial of the appellant and the proceedings in the High Court and its judgment. Given the poor quality of the prosecution evidence and the fact that the appellant has been in

prison for nearly 8 years, he was of the opinion that a re-trial would not be in the interests of justice.

All in all, three prosecution witnesses testified. These were PW1 Simon Paulo, PW2 Magreth Paulo and PW3 Magreth Shija. Whereas PW1 Simon is the father of PW2 Magreth, PW3 Magreth Shija is the latter's step mother.

At the trial of the appellant, PW2, who was aged 10 years, testified that sometime in October, 2002 the appellant, with whom they stayed in the same house, called her into his room. He requested her to sit down, which she did. He then put off his clothes and proceeded to undress her as well. Thereafter the appellant "*pushed his penis into*" her "*vagina*". In the process she sustained bruises in her "*private parts*". While the alleged sexual intercourse was going on, PW2 was called by one Neema, who did not testify but the appellant ordered her not to respond. Later the appellant released her, with a warning not to tell anybody what they had done.

According to PW2, the following day her father (PW1) noticed her walking uneasily. When questioned, she first hesitated to tell her father. Subsequently she told him that the appellant had raped her. PW3 examined her and found bruises in her "*private parts*". The incident was reported to the police and she was sent to hospital.

In his defence the appellant denied raping PW2. He said he spent the whole of 9th and 10th October, 2002 at their home and on 11th October, 2002 he left for Kipilimuka where he had gone to repair a motor vehicle. It was at Kipilimuka where he was arrested on 12th October, 2002.

The trial District Court found PW2 to have been a truthful witness and rejected the appellant's defence. Relying on the finding of the trial court, the High Court dismissed the appellant's appeal on the basis of section 127(7) of the Evidence Act, Cap.6.

Before us, the appellant appeared in person and impressed upon us that the case against him was fabricated. For this reason,

he said, the trial Senior District Magistrate hastily tried and convicted him without even according him opportunity to cross-examine the prosecution witnesses.

There is no gainsaying that the trial of the appellant took only one day. To us, this would have been a commendable job, had the learned trial magistrate not compromised the statutory rights of the appellant, thereby exposing himself to the accusation of having been partial.

The record of the trial District Court clearly bears out the appellant on one of his basic complaints that he was not given a fair trial. Although the record shows that the appellant never cross-examined both PW1 and PW3 after they had testified in chief, the prosecution was favoured with a right, it did not have, of re-examining these witnesses. We have anxiously asked ourselves this pertinent question: If the appellant did not cross-examine these witnesses or was denied that right as he is alleging, what was the prosecutor re-examining them on? What provision of the law

sanctioned such a bizarre procedure? Our understanding is that the procedure of examing witnesses is governed by the Evidence Act. Section 147 of this Act provides thus:-

> *"147-(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.*
> *(2) ... not relevant ....*
> *(3) The re-examination* ***shall be directed to the explanation of matters referred to in cross-examinations,*** *and if new matter is by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter."*
> [Emphasis is ours].

If the appellant was not given opportunity to cross-examine these witnesses, as he is now claiming, then the prosecution had no right of re-examination. We have noted that new matters were introduced in the process. But if the appellant cross-examined the witnesses, then the evidence given by them under cross-examination, is not on record. That omitted evidence might have discredited the

witnesses. In both instances, we are of the settled view, that the appellant was prejudiced. Equally, either omission exposed the partiality of the trial District Magistrate. But that was not all.

It is clear from the record of proceedings in the trial District Court that the appellant never cross-examined PW2 Magreth, the victim of the alleged offence. Either he was not informed of this right or he was denied this right. This was in breach of the provisions of section 229 of the C.P.A. This section preserves the right of confrontation in judicial proceedings, which is a basic attribute of a fair/full hearing.

Section 229 reads thus:-

> *" (1) If the accused person does not admit the truth of the charge the prosecutor shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge.*
> *(2) The accused person or his advocate* ***may put*** *questions to each witness produced against him.*

(3) ***If the accused does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person if he wishes to put any questions to that witness or make any statement.***

(4) ***If the accused person asks any question, the magistrate shall record the answer and,*** *if he makes a statement the magistrate* ***shall,*** *if he thinks it desirable in the interest of the accused person, put the substance of such statement to the witness in the form of a question and record his answer."* [Emphasis is ours].

The appellant, at his trial as was the case in the High Court, was unrepresented. As we have already sufficiently demonstrated, the learned trial Senior District Magistrate totally failed to comply with the mandatory provisions of this section which was provided to conform with the mandatory requirements of Article 13(6)(a) of our 1977 Constitution. It goes without saying, therefore, that the appellant was not given a full or fair trial/hearing. His trial was accordingly a nullity.

In view of the above, we hereby nullify, quash and set aside the entire trial of the appellant. Since the proceedings in the High Court and its judgment were based on null proceedings in the District Court, they are also quashed and set aside.

Under normal circumstances, we would have ordered a re-trial. However, having gone through the evidence of the prosecution and considered the fact that the appellant has already served eight years of his illegal life sentence in prison, we shall not do so as rightly pressed by Mr. Bulashi. This is because we have found the evidence of the three prosecution witnesses lacking in cogency.

Going by the charge sheet the offence was allegedly committed on 9th October, 2002. However, according to the evidence of PW1 and PW3 it was on this day when they were allegedly informed by PW2 that the appellant had raped her on the previous day, i.e. on 8th October, 2002. PW2 testified to that effect too. All the same, going by the PF3 (exhibit P1) the alleged rape was reported at Nzega police

station on 12th October, 2002. There was, therefore, a lapse of four clear days. Why was this alleged rape belatedly reported when it was committed within the Nzega township?

The appellant allegedly raped PW2 on 8th October, 2002 at about 2.00 p.m. The evidence of all the three witnesses is silent as to when, where and how the appellant was arrested. It was the appellant who revealed that he was arrested by PW1 who was accompanied by some militiamen on 12th October, 2002. He was not challenged on this. He further testified, and it was not disputed, that he was at his home with all the three prosecution witnesses from 9th to 11th October, 2002 when he left for Kipilimuka. If he had actually committed this offence and PW2 had named him on 9th October, 2002, why was he not arrested forthwith?

Having considered these nagging and pertinent questions for which we have obtained no answer, even an unconvincing one, from the evidence on record, we have found ourselves inclined to believe that the case against the appellant might have been cooked up for reasons, which are not obvious to us.

In the circumstances, we are constrained to agree with Mr. Bulashi that a re-trial would not be in the interests of justice.

All said and done, we allow this appeal. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

DATE at TABORA this 10th day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL