IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: RUTAKANGWA,J.A., KIMARO, J.A., And MANDIA ,J.A.)

CRIMINAL APPEAL NO. 310 OF 2010

MOSHI RAPHAEL .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mussa, J.)

Dated the 30th day of July, 2010
in
Criminal Appeal No. 69 of 2009

JUDGMENT OF THE COURT

27th June, & 4th July, 2012

RUTAKANGWA, J.A:

The appellant first appeared before the District Court of Tanga District on 30th May, 2006. He was to answer a charge of incest by male c/s 158(1) of the Penal Code, Cap 16 (the Code). It was alleged that on 27th May, 2006 at about 11.00 hrs, he had carnal knowledge of one Lina Michael, who was his daughter. He pleaded not guilty and the case went to a full trial.

The trial District Court (the trial court) found him guilty as charged, convicted him and sentenced him to thirty (30) years imprisonment. He was also ordered to pay his daughter TAS 1,000,000/= as compensation. His appeal to the High Court was dismissed. Still protesting his innocence, he has lodged this appeal.

The appellant lodged a memorandum of appeal containing eight (8) grounds of complaint. Having in mind the nature of the order we intend to make, we have found no pressing reason to reproduce them here. It will suffice if we say that he is complaining that the prosecution had failed to prove its case beyond a reasonable doubt.

At the hearing of the appeal, the appellant appeared before us in person and unrepresented. He adopted his grounds of appeal and had nothing to say in elaboration thereof.

The respondent Republic was represented by Mr. Joseph S. Pande, learned Senior State Attorney and Mr. Omar Kibwanah, learned State Attorney. Mr. Kibwanah supported this appeal and pressed us to quash the conviction of the appellant. All the same, he did not support the appeal from the same perspective as the appellant. He had a forminable legal reason. The appellant was illegally prosecuted, he argued.

To vindicate his stance, Mr. Kibwanah started by alerting us to the fact that the appellant's prosecution for the offence of incest by male commenced on 30th May, 2006. By that date, he said, courts subordinate

to the High Court had been mandated by the Written Laws (Miscellaneous Amendments) Act, 2004 (No.4) to try the offence of incest by males, which before that Act had only been triable by the High Court. All the same, Mr. Kibwanah elaborated that section 162 of the Penal Code, was still operative. This section read as follows:-

> *"S.162. – No prosecution for an offence under section 158 or 160 of this Code shall be commenced without the sanction of the Director of Public Prosecutions."*

This section was subsequently repealed by the Written Laws (Miscellaneous Amendments) Act, 2009 (Act No. 3), long after the appellant had been prosecuted, convicted and sentenced.

It was the submission of Mr. Kibwanah that having carefully perused the record of proceedings in the trial court, he was unable to glean therefrom any information going to indicate that when the appellant was initially prosecuted and tried, the Director of Public Prosecutions (the D.P.P) had given his consent in terms of the above cited section 162. But he was honest enough to refer us to a written consent, dated 6th February, 2007, signed by one L. K.N. Kaduri, Acting D.P.P, which is not part of the record (but found in the trial court's file) and does not indicate when it was received by the trial court.

The above fact notwithstanding, Mr. Kibwanah emphasized that this subsequent consent did not validate the illegal prosecution of the appellant. The law as it stood then, he stressed, was that no prosecution was to be commenced without the consent of the D.P.P. He accordingly urged us to hold that the prosecution of the appellant without the requisite consent was illegal and pressed us to nullify his trial and order a retrial. In support of his position, he referred us to the decision of this Court in the case of **Rhobi Marwa Mgare and Two Others v. R,** Criminal Appeal No. 192 of 2005 (unreported).

This being a legal issue, the appellant had nothing useful to tell us. He urged us to be guided by the governing laws in our decision.

After considering the submission of Mr. Kibwanah on this legal issue, the provisions of the said section 162 and the case referred to us, we have found ourselves in full accord with Mr. Kibwanah. There is no gainsaying here that as of 30th May, 2006, the law strictly prohibited **the commencement of any prosecution** for an offence under section 158 of the Code without the prior given consent of the D.P.P.

An identical situation obtains under the Economic and Organized Crimes Act. Section 26 (1) of this Act reads thus:-

> *"Subject to the provisions of this section, no trial in respect of an economic offence may be commenced*

under this Act save with the consent of the Director of Public Prosecutions."

This Court, in a number of cases, has nullified, quashed and set aside trials of accused persons arraigned under that Act which were commenced without the consent of the D.P.P. These cases included:-

(a) ***Paulo Mathew v. Republic*** *(1995) T.L.R. 144,*

(b) ***Rhobi Marwa Mgare v. Republic*** *(supra), and*

(c) ***Dotto Salum @ Butwa v.Republic*** *Criminal Appeal No. 5 of 2007 (unreported).*

In the case of **Paulo Mathew,** the appellant faced two charges, one of which was unlawful possession of firearms. The trial began without the D.P.P.'s consent. The consent was given in the middle of the trial, as it appears to have been the case here, and the trial continued. The appellant was convicted and sentenced to 15 years jail. His appeal to the High Court against conviction was dismissed. On a second appeal to this Court, it was held that the posthumous consent of the D.P.P. was invalid and it could not regularize the trial. The Court tellingly held that:-

"The consent of the D.P.P. must be given before any trial involving an economic offence can commence."

This is still the law in this country.

By parity of reasoning, we too hold that under the then section 162 of the Code, the consent of the D.P.P. had to be given first before the commencement of a prosecution and/or trial under section 158 of the Penal Code. As we have already sufficiently demonstrated, this was not the case here. The prosecution and/or trial of the appellant, was therefore, not valid in law. That being the case his conviction, and sentences were null, as were the entire proceedings in the High court. It is for this reason that we found ourselves constrained to agree with Mr. Kibwanah.

All said and done, we allow this appeal in its entirety. We hereby quash and set aside all the proceedings and judgments of the two courts below, as well the sentences imposed on the appellant. The appellant should be tried afresh. Meanwhile, we order that he be forthwith released from prison unless he is otherwise lawfully held.

DATED at **TANGA** this 3rd day of July, 2012

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL