IN THE COURT OF APPEAL OF TANZANIA
AT TANGA
(CORAM: LUANDA, J.A., JUMA, J.A. And MUGASHA, J.A)

CIVIL APPEAL NO. 299 OF 2015

AMIRI OMARY ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Rugazia J.)

dated 6th day of March 2015

in

Criminal Appeal No. 6 of 2014

.....

JUDGMENT OF THE COURT

18th & 19th August, 2015

JUMA, J.A.:

Before us is a second appeal by the appellant Amiri s/o Omary. He is appealing against the conviction and sentence imposed by the District Court of Handeni on a charge of rape contrary to section 130 (1), (2) and 131 (3) of the Penal Code, Cap 16, his first appeal having been dismissed by the High Court of Tanzania at Tanga.

In his judgment, P. G. M. Maligana-RM, the learned trial magistrate considered the application of section 127 (7) of the Evidence Act, Cap 6

which allows trial courts, after assessing the credibility of the evidence of the victim of the sexual offence; to convict on merit of the evidence of the victim. The trial magistrate convicted the appellant after finding that the evidence of the victim of sexual offence is sufficiently water tight and she was a truthful witness. The appellant was sentenced to serve thirty (30) years in prison and to suffer twelve (12) strokes of the cane. In his first appeal to the High Court at Tanga, the appellant fronted six grounds of appeal. His appeal was also dismissed.

Aggrieved appellant has in this second appeal preferred four grounds of appeal. He still complains that the first appellate Judge should not have relied on the evidence of the victim of sexual offence to convict him. He faulted the finding that there was penetration without any evidence of expert opinion to prove penetration.

At the hearing of instant appeal, the appellant appeared in person, fending for himself. The learned State Attorney Ms. Shose Naiman appeared for the respondent/Republic. Ms. Naiman raised a preliminary issue under the provisions of section 361 (1) (a) the Criminal Procedure Act, Cap. 20 (CPA). She submitted this appeal is not competently before this Court because the appellant did not give any notice of his intention to

appeal to the High Court within ten days from the date of the decision of the district court. Further, the learned State Attorney submitted that there is no second appeal before us because all the proceedings before the High Court on first appeal and the resulting Judgment were a nullity. She urged us to invoke the revisional jurisdiction of the Court under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 (AJA) to quash the proceedings before the High Court and the Judgment and order a retrial.

On our own motion, we called upon Ms. Naiman to address us on the learned trial magistrate's failure to take the appellant's plea in compliance with section 228 (1) of the CPA. We also wanted her reaction to the first appellate Judge's observation that failure to call upon the appellant to plead to the charge did not occasion miscarriage of justice to him since his plea was taken to be that of NOT GUILTY.

When given a chance to respond to his apparent failure to express an intention to appeal to the High Court and the failure by the trial court to take his plea, the appellant had understandably little to say except to cite his lack of legal knowledge and his general illiteracy.

In view of the jurisdictional issue raised by Ms. Naiman, it is appropriate we should first determine the question whether the High Court

which sat to hear the first appeal was seized with requisite jurisdiction. We have perused through the original record of appeal we found neither written or any oral intention to appeal to the High Court. As this Court stated in **Mtani Alfred vs. R,** Criminal Appeal No.262 of 2009 (unreported), an oral notice of intention to appeal given to the trial court or the prison officer on admission into prison would normally suffice to satisfy the requirements of section 361 (1) (a) of the CPA.

The relevant section 361 (1) (a) of the CPA requiring expression of intention for appeals to the High Court provide:

> *361.-(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant–*
>
> > *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence;*

The learned State Attorney is with due respect right about the mandatory duty on intending appellants to file the notice expressing their intention to appeal under section 361 (1) (a) of the CPA. This duty has been underscored in several decisions of the Court. In **Sostenes s/o Nyazagiro vs. R.**, Criminal Appeal No. 12 of 2013 (unreported) this Court emphasized that:

> *"...no appeal shall be entertained unless the appellant has, under Section 361 (1) (a) of the Act, given notice of his intention to appeal within ten days from the date of finding, sentence or order. The ten days limitation applies for all prospective appellants, whether in Prison or not. After giving notice, an intended appellant is required, under Section 361(1) (b) of the Act, to file his appeal within forty five days from the date of the finding, sentence or order,..."* [Emphasis added].

With regard to the taking of plea, section 228 of the CPA, gives a mandatory requirement of reading the charge to the accused person and requiring the accused person concerned to say whether he admits or denies the truth of the charge:

228.-(1) The ***substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge****.*

(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary.

(3) ***If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided****.* [Emphasis added]

The trial magistrate had no legal mandate to proceed to hear the case without so much as reading out the charge and asking the appellant to plead. We do not agree with the suggestion by the first appellate Judge that failure to call upon the accused person to plead can be remedied by entering a plea of NOT GUILTY. In 1. **Rojeli s/o Kalegezi, 2. Habonimana s/o Stanisalus , 3. Hamed s/o Phillipo vs. R**., Criminal

Appeal No. 141, CF 142 CF 143 of 2009 (unreported) the Court insisted that failure to take a plea of the accused person means that the accused person concerned has not undergone any trial as his plea was not taken. The Court ordered the file to be remitted back to the trial court for a fresh trial. We shall in the instant appeal follow similar path, the appellant herein was not in law tried.

The matter before us is further compounded by the provisions in the statement of the offence which the prosecution preferred against the appellant. Although the complainant Asha Ally (PW1) was 36 years old (an adult) when the offence was committed, the prosecution cited section 131 (3) of the Penal Code which creates the punishment of life imprisonment for an accused person who commits an offence of rape of a girl under the age of ten years. Secondly, the particulars of offence of rape did not include the important ingredient of "lack of consent" to disclose an offence of rape of an adult woman. Lack of consent is conspicuously missing out in the particulars of the offence in the Charge Sheet appearing on page 1 of the record of appeal:

> *"**STATEMENT OF THE OFFENCE:** RAPE C/S 130 (1) (2)(b) and **131 (3)** of the Penal Code Cap. 16 Vol. 1 of the laws as*

amended by Act No. 4/1998 of Sexual Offence Special Provision [RE:2002]

PARTICULARS OF THE OFFENCE: *That AMIRI S/O charged on 26th day of May 2011 at about 13:00 hours at Komkonga village within Handeni District in Tanga Region did have carnal knowledge of one ASHA D/O ALLY a woman of 35 years old.*

SGD: PUBLIC PROSECUTOR"

With the foregoing defects, we have arrived at the conclusion that this is a fit case for us to exercise our power of revision under section 4 (3) of the AJA to nullify, quash and set aside all the proceedings before the trial District Court of Handeni in Criminal Case No. 169 of 2011 together with the resulting Judgment which was delivered on 11/05/2012.

In addition the tainted proceedings in the High Court in Criminal Appeal No. 6 of 2014 which resulted in the Judgment of the first appellate court, are nullified, quashed and set aside.

In light of the decision of the Court of Appeal for Eastern Africa in **Fatehali Manji vs R.** [1966] 1 EA 343, the best interests of justice will be

served if we order a fresh trial. The appellant, who has served almost three out of the thirty years imprisonment, will not be prejudiced by a fresh trial that will enable him to plead to a charge as mandated by section 228 (1) of the CPA.

We finally direct that Criminal Case No. 169 of 2011 should begin afresh as soon as practicable before another trial magistrate.

DATED at **TANGA** this 19th day of August, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL