

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO 301 OF 2013

PRISCUS KIMARIO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Moshi)**

(Nyerere, J.)

dated the 28th day of June, 2013

in

DC Criminal Appeal No. 32 of 2011

.....

JUDGMENT OF THE COURT

20th & 27th February, 2015

KILEO, J. A.:

In the District Court of Rombo at Mkuu, the appellant was charged with, and convicted of rape contrary to sections 130 (1) (2) (a) and 131 of the Penal Code. He was accused to have had sexual intercourse with one Lucia w/o Lokia, a woman aged 87 years. Upon his conviction he was sentenced to thirty years imprisonment. His appeal to the High Court was unsuccessful hence this second appeal.

At the hearing before us the appellant fended for himself while the respondent Republic was represented by Mr. Augustine Kombe who was assisted by Ms Elizabeth Swai, both learned State Attorneys.

At the trial the case for the prosecution centred on the testimonies of PW1 and PW2 who claimed to have found the appellant lying on top of the victim with his pants down. The victim, Lucia w/o Lokia was said to have died before the trial of the case. Her statement was tendered in court as exhibit P1 by PW3 WP 6044 D/c Jane. Following the commission of the crime the victim was taken to hospital and a PF3 was filled in and tendered in court as exhibit P2 by PW4.

The appellant filed nine grounds of appeal. In addition he filed a written submission which he asked us to adopt. His main complaints centred on:

- Non-compliance with the provisions of the law in admitting the statement of the victim,
- Non-compliance with section 240 (3) of the Criminal Procedure Act,
- Change of trial magistrate without compliance with the law,

- That generally the case against him was not proved to the standard required under the law.

At first, Ms. Swai who made presentations before us on behalf of the respondent Republic resisted the appeal but upon reflection she conceded that the appellant's grounds of appeal had merit.

We must state outright that the case against the appellant was full of anomalies and irregularities. The learned first appellate judge ought to have noted the chaotic nature of the proceedings in the trial court and acted accordingly. She should not have sustained the conviction.

We will begin with the ground on non-compliance with provisions of the law with regard to admission of statements of persons who cannot be called as witnesses. As it has come to light, the victim of the offence did not testify in court. It was said that she had died prior to the trial of the case. The appellant complained that her statement was admitted without there being proof of her death and without complying with the provisions of section 34B of the Evidence Act. The appellant was justified in this complaint. The relevant provision states:

34B. Proof by written statements in criminal proceedings

"(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written statement may only be admissible under this Section-

- (a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;**
- (b) if the statement is, or purports to be, signed by the person who made it;**
- (c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it**

anything which he knew to be false or did not believe to be true;

- (d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;***
- (e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;***
- (f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."***

We consider that it is instructive at this point to, reproduce the proceedings leading to the admission of exhibit P1. The relevant part of the proceedings starts from page 23 of the Court Record which goes like this:

"PROSECUTOR: Your honor we pray our witness to remain under oath so as to produce the victim statement who is already passed away. We pray the said statement be produced u/s 34B of the Tanzania Evidence Act Cap 6 (RE) 2002.

COURT: Prayer granted as prayed Pw3 D/C Jane still under oath.

SIGNED: A.E. TEMU – RM

25/2/2009

ORDER: Hearing on 11/3/2009 34 B TEA, WP D/C Jane warned.

DATED: 11/3/2009

CORAM: O.H. KINGWELE – RM

ACCUSED: PRESENT

C/C: MRS TEMBA

PROS: The trial magistrate has special duty at Moshi

ORDER: Hearing on 25/3/2009

AFRIC

SIGNED: O.H. KINGWELE – RM

11/3/2009

DATE: 25/3/2009

CORAM: A.E. TEMU – RM

PROS: D/CPL STANSLAUS

ACCD: PRESENT

C/C TEMBA.

PROS: The matter is set today for hearing for the statement of the victim Lucia w/o Lokia is produced in court u/s 34B of Tanzania Evidence Act.

PROSECUTION'S CASE CONTINUES:

WP 6044 DC Jane reminded her oath and XD by Pros:-

On 5/1/2007 at about 10.30 hrs I was C.R.O in Mashati. Police outpost and came a certain old mother called Lucia Lokia and told me she was raped I interrogated her and took her the statement and thereafter gave her PF3. I can recognize the statement I took he statement u/s 34B (2) c of T.E.A.

I pray to produce the statement of the victim Lucia Lokia as her evidence.

Accused: No objection.

Court: The statement of the victim Lucia Lokia admitted in court and forming the part of these proceedings as the evidence of the said victim Lucia Lokia and marked Exh P1.

SIGNED A.E. TEMU – RM

25/3/2009”

There is nothing on record to show that the appellant had been, prior to the production of the statement served with the statement of the victim. This violated the provisions of Section 34B (2) (d) as argued in the appellant's written submission.

Another irregularity is the production of the PF3 by PW4 Joachim Mzee Sway who was not the person who filled in the document. There was no explanation why the maker of the PF3 did not come to court for

production of the document. Section 240 (3) of the Criminal Procedure Act was violated. The provision states:

"(3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

The provision is very clear. The person to be made available for cross-examination is the person who made the statement; unless of course he cannot be called to testify in which case the provisions of section 34B (2) would come into play.

The above considerations would suffice to dispose of the appeal. However, there is yet another irregularity, which we feel constrained to address for the benefit of all of us who are involved in the administration of justice. The case was at first heard by M. B. Lusewa, Resident Magistrate. However it was A. E. Temu who brought it to completion. By the time it

was taken over by A. E. Temu, Resident Magistrate Lusewa had heard two witnesses. The following is what transpired when Temu took over:

"DATE: 11/2/2009

CORAM: A. E. TEMU- RM

PROS: CPL STANSLAUS

ACCUSED: PRESENT

C. C. MR. TEMBA

PROS:

COURT: The matter is re-assigned to Hon. Temu, (Rm). However the accused person is addressed in terms of s. 214 of CPA

SIGNED: A. E. TEMU- RM

11/2/2009."

There is nothing on record to show why the partly heard matter had to be re-assigned to another magistrate. Section 214 (1) of the Criminal Procedure Act covers situations where for some reason a magistrate is unable to complete a matter that he has already started to hear. It states:

"214. Conviction or committal where proceedings heard partly by one magistrate and partly by another

(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.”

We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed.

Having deliberated on the matter as above we find substance in the appeal filed by Priscus Kimario. We in the event allow it. Conviction entered against him is quashed and sentence is set aside. He is to be released from custody forthwith unless he is therein held for some lawful cause.

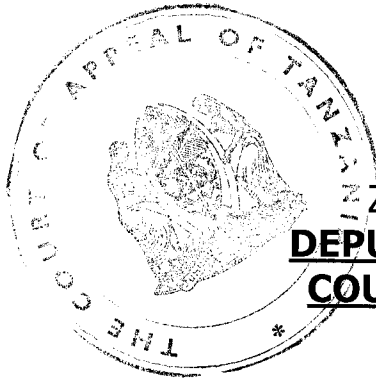
DATED at **ARUSHA** this 25th day of February, 2015

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL