IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J,A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 309 OF 2014

BARNABAS LEON ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania

at Moshi)

(Nyerere, J.)

Dated 28th day of April, 2014
In
Criminal Appeal No. 86 of 2009

JUDGMENT OF THE COURT

1st & 8thOctober, 2015

MWARIJA, J.A.

On 20th August, 2003 at about 20.00 hrs while at home in Lesoroma, Useri Village within Rombo district, one Legista Kandidi (PW2) heard someone desperately calling her from outside. At first she hesitated to open the door but did so after the caller had identified herself. She was Getrude Patrice, the child who was staying with her aunt, Teodora Patrice (PW4) at a neighbouring house. The child who was at the material time aged 12 years was crying. Upon being asked what had happened to her, she told PW2 that she (PW1) had been raped by one Barnabas Leon (the

appellant). She explained further that in the course of committing the offence against her, the appellant strangled her. On inspecting her, PW2 noticed that the child (PW1) had a swollen neck with visible finger marks on it.

PW2 took the child to her aunt (PW4) who, upon inspecting the victim's private parts and noticed that it had blood, decided to take her to her mother. The child was immediately taken to hospital but could not be examined by a doctor because she did not have a police form No. 3 (P.F.3.). She was examined on the next day after she had obtained the form from Useri Police Station.

It was PW1's evidence that on 20/8/2003 at about 18:30 hrs while she was in her family's farm working, the appellant who was their neighbour and thus known to her, found her there. He got hold of her hand and pulled her telling her *"twende tukatafute mtoto",* meaning *"let us go and find a child"*. Noticing that the appellant was leading her to his farm, she refused to go with him. The appellant then strangled her thus making her unable to scream for help. Having arrived in his farm, the appellant undressed her underpants and while still strangling her, inserted

his penis into her vagina. The act caused her to suffer pains. When the appellant left her, she ran to PW2's house to get assistance.

The fact that PW1 was raped was supported by the evidence of PW5, Dr. Joachim Mzee Swai who conducted a medical examination on PW1 at Huruma Hospital on 21/8/2003. According to his evidence, the victim had bruises on the left side of her labia majora. Although no spermatozoa were seen, the reason being a lapse of time because she was examined on the next day after the incident, it was his evidence that the child was raped and caused to suffer grievous harm.

After the efforts made by the area's ten cell leader, with the sanction of the village chairman, the appellant was arrested on 21/8/2003. He was arrested by a militiaman, Gabriel Mchomba (PW3) and other militiamen in the neighbouring village at the home of one James Lashu. After his arrest the appellant was charged in the District Court of Rombo Mkuu on 22/8/2003. According to the record, he was convicted in the same year and sentenced to 30 years imprisonment. He appealed to the High Court and in 2009 a retrial was ordered hence the proceedings which gave rise to this appeal. The charge sheet with which the appellant was retried shows that he was charged as follows:

"Rape c/s 130 and 131 of the Penal Code Vol. 1 of the Laws as amended by section 5 and 6 of the sexual offences special provisions Act No. 4 of 1998".

After a full trial, the appellant was convicted and sentenced to an imprisonment term of 25 years. In sentencing him, the trial court took into consideration the period spent by the appellant in prison following his first conviction. Aggrieved, the appellant unsuccessfully appealed to the High Court hence this second appeal.

In his memorandum of appeal, he has raised three grounds:

"1. *That the first [appellate] Court erred in law and fact when it upheld the conviction and sentence imposed against the appellant by trial court, yet the charge was not proved against the appellant to the standard required by the law.*

2. *That the first [appellate] Court erred in law and fact by sustaining the conviction of the trial Court against the appellant basing on conflicting contradictory and uncredible evidence of prosecution witnesses.*

3. *That the first [appellate] Court grossly erred in law and fact for failing to realize that the charge sheet stated an offence of rape under section 130 together with section 136 of the Penal Code (SUPRA). The charge sheet did not state under which subsection of 130 the appellant was charged. Appellant was charged with an offence unknown in law."*

At the hearing of the appeal the appellant appeared in person and unrepresented. On its part, the respondent Republic was represented by Ms. Stella Majaliwa, learned Senior State Attorney assisted by Mr. Khalifa Nuda, learned Senior State Attorney.

Before we embarked on hearing the appeal on merit, Ms. Majaliwa addressed us on some pertinent irregularities which she considered to be of grave consequence on the trial court's proceeding. She argued that the proceedings were flawed because firstly, the same were conducted by two different Magistrates without due compliance with the provisions of s. 214(1) of the Criminal Procedure Act, [Cap 20 R.E. 2002] (the CPA). Elaborating, the learned Senior State Attorney stated that the trial commenced before Lusewa, RM who recorded the evidence of five prosecution witnesses but before he concluded the trial, the case was re-

assigned to another magistrate, A.E. Temu, R.M. who, without complying with s. 214(1) of the CPA by stating the reason for the change of Magistrate, proceeded to record the evidence of the last prosecution witness (PW6), the appellant's defence and finally wrote and delivered the judgment of the case.

Secondly, Ms. Majaliwa argued that the appellant was charged under a non-existent provision of law. She submitted that on this point, she supports the third ground of the appellant's memorandum of appeal, that the appellant was arraigned under a defective charge sheet. The basis of the argument by the learned Senior State Attorney is the failure by the prosecution to state in the charge sheet, the proper provision of the law which creates the offence of rape.

She argued that since the offence of rape is provided for under s. 130 (1) of the Penal Code, by being charged under s. 130 of the Penal Code, the appellant was charged under a non-existent section of the law. Citing this Court's decision in the case of **David Halinga v. R.**, Criminal Appeal No. 12 of 2013, she argued that the defect in the charge sheet vitiated the trial. She urged us therefore to find that the two irregularities,

non-compliance with s. 214 (1) of the CPA and defect of the charge sheet rendered the proceedings a nullity.

For reasons which will be apparent herein, we do not intend to consider the second point raised by the learned Senior State Attorney. As to her first point, the same is based on the provisions of s. 214 (1) of the CPA which provides as follows:-

> *"214 (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 any part any committal proceedings* ***is for any reason*** *unable to complete the trial or committal proceedings within 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, re-summons the witnesses and recommence the trial or the committal proceedings.* [Emphasis added]."

In this case, as submitted by the learned Senior State Attorney, the hearing which commenced on 6/12/2007 proceeded before Lusewa, R.M.

who recorded the evidence of five prosecution witnesses. On 25/3/2009, A. E. Temu, R.M. (the successor magistrate) re-assigned the case to himself and proceed to hear the evidence of PW6 and the appellant's defence. He then wrote and delivered the judgment. In transferring the case to himself, the successor magistrate did not assign any reason for doing so. According to the record, he merely stated as follows:-

"The matter is re-assigned to Hon. Temu (RM)."

The provisions of s. 214 (1) of the CPA reproduced above make it a condition that a case which has been partly heard by one magistrate may be transferred to a successor magistrate only if there is a reason for failure by the predecessor magistrate to complete it. Such reason must be recorded in the record by the successor magistrate. Compliance with this requirement has, many a time, been emphasized by this Court. In the case of **Salim Hussein v. The Republic**, Criminal Appeal No. 3 of 2011, the Court stated as follows:-

> *"We only wish to emphasize here that under this section, the second or subsequent magistrate can assume the jurisdiction to 'take over and continue the trial ...and ...act on the evidence recorded by his predecessor' only if the first magistrate* ***'is for any***

> ***reason unable to complete the trial'*** *at all or* ***'within a reasonable time'****. Such reason or reasons must be explicitly shown in trial court's record of proceedings****. [Underlining*** supplied*]."*

Similar position was also stated in the case of **Issack Stephano Kilima v. The Republic,** Criminal Appeal No. 273 of 2011 where the Court had this to say:-

> *"We are of the considered view that it is very important that the magistrate taking over should state the reasons for doing so. One magistrate cannot simply continue with a trial by another magistrate without stating the reasons for the charge. This is a requirement under the law and therefore has to be complied with. It is also important for the sake of transparency so as not to prejudice the accused in any way."*

In the latter case, the successor magistrate took over the hearing after his predecessor had heard all the prosecution witnesses and proceeded with the case without assigning reasons for such change of magistrate. The Court held that non-compliance with the requirement to give reasons under

s. 214(1) of the CPA rendered the proceedings by the successor magistrate a nullity.

In the present case, since as we have found above, the successor magistrate did not comply with the provisions of s. 214 (1) of the CPA, we agree with Ms. Majaliwa that the trial was vitiated. In the exercise of the powers conferred on this Court by s. 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] we therefore hereby nullify the proceedings of the successor magistrate, quash the judgment arising therein and set aside the sentence imposed on the appellant. The effect thereof is to render the judgment of the High Court without any basis. The same is thus also hereby quashed.

Having so decided, the next pertinent matter for our consideration is whether or not we should order a retrial as from the stage where the predecessor magistrate ended the proceedings. Ms. Majaliwa did not move us to order a retrial. She urged us to consider that an order of retrial will cause the appellant to be subjected to a second retrial. She argued also that the victim who was sexually molested while she was aged 12 years should by now be aged 24 years. This factor, argued Ms. Majaliwa, will make a retrial difficult on the part of the prosecution.

We agree with the learned Senior State Attorney that a retrial order will not be appropriate under the particular circumstances of this case. The general principle on whether or not a retrial should be ordered is succinctly stated in the often cited case of **Fatehali Manji v. R.,** [1966] 1 EA 343 in that case, the erstwhile Court of Appeal for Eastern Africa held as follows on that aspect:-

> *"in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where its conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."*

Having considered that principle, we agree that on the basis of the factors stated by Ms. Majaliwa, an order of retrial will not, in this case, serve the interests of justice. According to the record, the appellant was

re-tried after his first conviction was set aside. Furthermore the victim who, at the time when the office was committed against her was a child aged 12 years, should now be an adult of about 24 years old. Ordering a retrial will amount to letting her testify for the third time. We think that this will remind her, for the second time, the sad and horror moment she encountered at the time when the offence was cruelly committed against her. The Court considered a similar issue in the case of **Rock Maduhu @ Osca v. The Republic,** Criminal Appeal No.333 of 2010. The trial magistrate had received the evidence of two children of tender years including the victim, PW1 Rose Owera without ascertaining whether or not they understood the nature of oath. This court discounted their evidence and nullified the proceedings. In considering whether or not to order a retrial, the Court stated as follows:-

> *"Given the six (6) years that have lapsed, it will not be in the interest of justice and PW1 Rose to relive the horror of that nasty incident (see* ***Alkard Mahai v. R,*** *Criminal Appeal No. 113 of 2013* (unreported)"

The Court declined to order a retrial. For these reasons therefore as we intimated earlier, we respectfully agree with Ms Majaliwa that an order

dispose of the appeal, we see no need to consider the second ground argued by the learned Senior State Attorney. In the event, we order that the appellant shall be released from prison unless he is otherwise lawfully held.

DATED at **ARUSHA** this 06th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL