IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK,J.A.,LUANDA,J.A., And MZIRAY, J.A.,)

CRIMINAL APPEAL NO. 109 OF 2016

LAURENT MSABILA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court at Tabora)

(HURUMA SHAIDI, PRM – Extended Jurisdiction)

dated 16th day of March, 2016
in
Criminal Appeal No. 28 of 2014

JUDGMENT OF THE COURT

24th & 26th October, 2016

LUANDA, J.A.:

The appellant, LAURENT S/O MSABILA was charged, convicted and sentenced to 30 years imprisonment by the District Court of Urambo at Urambo of rape. Aggrieved, he appealed to the High Court of Tanzania (Tabora Registry). However, the appeal was transferred to Tabora Resident Magistrate for hearing by Huruma Shaidi – PRM Extended Jurisdiction. The appellant was not successful, hence this appeal.

In this appeal, the appellant who was not represented and so fended for himself, raised four grounds of appeal. The respondent/Republic was represented by Mr. Juma Masanja, Senior State Attorney. The appellant preferred the respondent to start and he would respond if there was a need to do so.

Mr. Masanja supported the appeal on account of ground number three of appeal in particular the words ".. indeed didn't consider my defence."

The entire ground three reads:-

> *"That, the trial court's conviction was wrongly upheld by the Hon. PRM Extended Jurisdiction, before the Resident Magistrate Court Relying on the evidence of the witnesses PW. 1 PW.2, PW.3, PW.4 and PW.5 which lacked corroboration from the village Leaders and indeed didn't consider my defence".*

Probably it is the right opportunity at this juncture, to explain briefly why Mr. Masanja said so. As earlier said the appellant was charged with rape. The particulars of offence in brief are that on 12/1/2012 around 20.00 hrs at Motomoto Village in Urambo District the appellant did canal knowledge Aziza d/o Salum, a girl of 9 years old.

The prosecution called six witnesses to prove its case. It then closed its case. The learned trial resident Magistrate made a ruling that the appellant had a case to answer. He then addressed the appellant in terms of S. 231 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) whether he wish to give his defence on oath and call witnesses. The appellant made the following reply, we reproduce:-

> "***Accused:***
> *I will make my defence on oath I have no witness nor exhibit. However your honour I admit the offence here that I raped the victim. Ninakubali kabisa nilimbaka Aziza d/o Salum ambaye ni mwanangu, ni shetani alinipitia.*

I pray that this court enter judgment now but I pray for lenience of sentence.

Signed;

Accused;.....

Prosecutor;.....

Court:

O.J.Burugu, RM.

07/02/2013

PP;

Your honour we pray for judgment date.

Order:

1. Judgment on 06/03/2013.

2. ABE.

Sgd: O.J.Burugu, RM

07/02/2013."

It is the above extract which is the subject of attack by Mr. Masanja. He said because the appellant elected to give his evidence on oath then he should have been sworn as provided under s. 198 of the CPA and give evidence. The trial magistrate should have not allowed the appellant to say what he had said after he recorded the manner in which the appellant would give his evidence. That portion should be

expunged. Once expunged it is the submission of Mr. Masanja that the appellant was condemned unheard. That was a serious omission. The defect is not curable under S. 388 of the CPA. He suggested that the proceedings after delivery of the ruling to be quashed and remit the trial court record to start from there. He urged us to invoke S.4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E .2002 (the AJA). He made reference to **Meckizediki Mkuta V R,** Criminal Appeal No. 17 of 2006 (unreported) where this Court nullified the proceedings that followed the closure of the prosecution case of the trial High Court of Tanzania (Bukoba Registry) for failure on the part of the learned trial judge to inform the accused person his right as provided under S. 293(2) of the CPA, though the advocate for the accused was around.

The appellant, being a lay person not learned in law, had nothing to contribute to the point of law raised.

We have given a deep thought to what Mr. Masanja has told us. Basically we agree with him that the proceedings on page 22 are neither an admission nor evidence. As regards

evidence, when the appellant informed the trial court that he would give his evidence on oath, he was a potential witness.

In criminal cause like this one before a witness gives evidence he must take an oath or affirm as mandatorily required by S. 198 of the CPA. Any evidence, save of those children of tender years, given without an oath or affirm has no evidential value (See **Mwita Sigore @ Ogora V R,** Criminal Appeal No. 54 of 2008 (unreported). So, the appellant cannot be taken to have admitted the offence. Further, the appellant appeared to have intended to admit the offence. The learned trial resident magistrate was uncertain or not conversant with the procedure to be followed. The procedure is to read over again the charge and particulars to the accused. The procedure was fully explained by the Court of Appeal for Eastern Africa in **Adan V R,** [1973] E.A. 445.

The Court said:-

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The*

magistrate should then explain to the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

Since there is nothing in the defence case worth to be considered, we agree with Mr. Masanja that the appellant was condemned unheard.

In the exercise of our revisional powers as conferred under S. 4(2) of the AJA, we declare the proceedings of the trial court after the finding that the appellant had a case to answer onwards and the entire first appellate court proceeding as a nullity. The conviction is quashed and sentence set aside. The appellant to appear before the trial court for taking his defence.

Order accordingly.

DATED at **TABORA** this 25th day of October, 2016

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL