IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., MUSSA,J.A. And JUMA.J.A.)

CRIMINAL APPEAL NO 289 OF 2015

1. GIFT MARIKI

2. FRANK JOHN MARIKI
3. PETER JOSEPH MARIKI.....APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from a judgment of the High Court of Tanzania at Arusha)
(Sumari, J.)

dated the 16th day of June, 2015
in
VIDE DC. CRIMINAL APPEAL NO. 24 OF 2014
JUDGMENT OF THE COURT

25th & 28th October, 2016
OTHMAN, C.J.

Before the District Court of Moshi, the appellants, Gift Mariki (1st accused) Frank John Mariki (2nd accused) and Peter Joseph Mariki (3rd accused) were charged with the offence of gang rape c/s. 131A of the Penal Code, Cap. 16, R.E. 2002. On 15/4/2014, the trial court convicted all the three appellants of the offence charged and sentenced each to a term of life imprisonment, twelve strokes of the cane and to pay the victim one Domester William, Tz.Shs. 500,000/= as compensation.

The appellants' unsuccessful appeal to the High Court (Sumari, J.) was dismissed on 6/6/2015. Undissuaded they have preferred this second appeal.

At the hearing of the appeal, the appellants who were unrepresented by learned Counsel appeared in person and fended for themselves. The respondent Republic, which resisted the appeal was represented by Ms. Janeth Sekule, Senior State Attorney and Ms. Lillian Mmassy, State Attorney.

In a nutshell, the charge sheet instituted by the prosecution on 10/07/2012 alleged that on 9/07/2012 the appellants at Mwika Msae, Moshi Rural District, had carnal knowledge of the victim (PW1) without her consent. Each of the appellants pleaded not guilty to the charge .

Having closely scrutinized the whole record and attentive to both the appellants' grounds of appeal contained in their memorandums of appeal and the parties submissions, we are of the respective view that ground two of the appellants' additional memorandum of appeal can most appropriately dispose of the appeal.

It reads:

> *"2 The learned trial magistrate and the first appellate judge erred in law and fact when they failed to consider that the appellants were denied their legal right to cross-examine each other on their defence, the point which made the conduct of the trial to be unfair on their part considering that they incriminated each other in their defence, so there was a need to cross-examine each other to find the true facts of what had really transpired'*

The appellant's main complain was that the trial court's failure to allow them to cross-examine each other after they had incriminated one another in the defence case resulted in an unfair trial. As a lay person, the best the 1st appellant could orally and unconvincingly submit before us was that he threw the blame on the 2nd appellant because the prosecution had promised to free him if he did so.

Resisting, Ms. Mmassy candidly conceded that the trial court had committed an irregularity. However, she contended that as the respondent Republic bore the burden of proving the appellants' guilt beyond reasonable doubt, and had fully discharged it, the complaint had no substance. That in any event, the trial court and the High Court had not

used any of the self-incriminating evidence of the eo-accused to convict any one of them.

A close examination of the record shows that on first appeal this ground of complaint was not raised by the appellants on first appeal at the High Court. Its judgment is silent. While ordinarily, we would have generally been less inclined to entertain a ground of appeal not pressed or canvased earlier and determined by the High Court, taking into account the seriousness of the offence of gang rape, the sentence of which is imprisonment for life; the nature of the irregularly which is apparent on the face of the record; the judicious responsibly of the trial court to take into account the totally of the evidence, properly tested including that of the defence before arriving at its own conclusion; the interests of justice, and considering that no unfairness would be occasioned, we are constrained to take up the fresh point of law and fact on this appeal.

In terms of section 231(a) of the Criminal Procedure Act, Cap.20 at the trial on 10/1/2014 each of the appellants elected to defend himself on oath, which they all did.

In his sworn defence, the 1st **appellant** (DW1) stated:

"*I also know the 2nd and 3rd accused, we are all family*
……

Finally.....2nd accused also raped PW1. It is true that PW1 was raped and that 2nd accused was involved in the incident.

The trial court did not call on the 2nd or 3rd appellants to cross examine the 1st appellant at all.

In his sworn defence, the **2nd appellant** testified:

I know 1st and 3rd accused are my neighbours and we live in same village.

When he was cross-examined by the learned State Attorney, the 2nd appellant responded.

"*I saw 1st accused and Boniface raping PW1"*

Again, the trial court did not call on the 1st and 3rd appellants to cross-examined the 2nd appellant.

When the **3rd appellant** gave his sworn evidence neither the 1st nor the 2nd appellants were called by the trial court to cross-examine his testimony.

In its judgment, the trial court reasoned and found out:

> *"In the same vein,* ***I find the accused persons general denials and pointing fingers on each other has not managed to raise a reasonable doubt in the present case.*** *In totality of the prosecution evidence especially of the victim (PW1) and* ***defence case.....****.(Emphasis added).*

The appellants were jointly charged and the trial proceeded as a joint one. The right to a fair trial is a cardinal principle of our legal system and a basic constitutional right. Article 13(6)(a) of the Constitution of the United Republic of Tanzania, Cap. 2, R.E. 2002 provides:

> *"6(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo chochote kinginecho kinachohusika, basi mtu hivyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..N*

Equally a fundamental right is the presumption of innocence of an accused enshrined in Article 13(6)(b). Furthermore, it is trite law that the burden of proof always rests on the prosecution to prove the guilt of an accused beyond reasonable doubt.

> In **Mattaka and Others v. R** [1971] E.A 495 pp.502-503 the defunct Court of Appeal for Eastern Africa stated:

"It is well established that where accused person gives evidence that is adverse to a co-accused, the co-accused has a right to cross- examination (See, Ndania Karuki v,R, (1945) 12 EA.CA 84 and Edward Msengi v,R, (1956) 23 EA.CA. 553)' ·

and it went on to further lay down:

"It is well established that where an accused person gives evidence, that evidence may be taken into consideration against a co-accused, just like any other evidence, Evidence which is inconsistent with that of the co-accused may be just as injurious to his case as evidence which expressly seeks to implicate him, should we think, give rise to a right of cross-examination"

……

" *that* ***where an accused wishes to cross- examine his co-accused, he should be permitted to do so as of right****, subject of course, to the overriding power of the court to exclude irrelevant or repetitive questions" (Emphasis added).*

Moreover, as held by the Supreme Court of Canada in **R.v. Crowford** [1955]1 SCR 858 co-accused persons clearly have the right to

cross-examine each other in making full answer and defence to the charge

(See, **R.v. Mclaughlin** (1974)2 O.R. (2d.) 514,C.A.).

That aside, section 155 of the Evidence Act, Cap. 6 R.E. 2002 governing cross-examination provides:

> *"155.* ***When a witness is cross-examined, he may, in additional to the questions herein before referred to, be asked my question which held-***
>
> *(a)* ***to test his veracity;***
>
> *(b)* *to discover who he is and what is his position in life; or*
>
> *(c)* ***to shake his credict,*** *by injuring his character;*
>
> *although the answer to such questions might tend to directly or indirectly to incriminate him, or might-expose or tend directly to expose him to a penalty or..... "(Emphasis added)"*

As clearly depicted by the record, **first,** the appellant were denied the right to cross-examine each other in order to test the veracity of the testimony or shake the credibility of the witness, adverse or otherwise. **Second,** the omission to allow the 1st, 2nd and 3rd appellant to cross examine each other meant that they were deprived of their right to put before the court their full answer and defence to the charge. **Third,** even with that serious non-direction, which also went undetected at the High

Court, the trial court proceeded to erroneously consider that the appellant had properly made their defence according to law and that each of the appellants' defence case was complete. So long as the appellants were denied their basic and essential right to cross-examination and to a fair trial, their defence to the charge could not have been fully accorded, heard or be complete. In these circumstances, it was unfair and premature for the trial court to find that the appellants' finger pointing at each other had not raised a reasonable doubt. The truth of their evidence had not properly tested by cross-examination against each other.

Four, by not granting the 1st and 2nd appellants their right to cross examine each other to test the veracity of their rival evidence, the trial court denied itself and the parties the opportunity of ascertaining the truth of the testimony, which is one of its primary functions. In our respective view, when the irregularity and its cumulative effects are all considered, it must have occasioned a miscarriage of justice (See, **Msenga's** case, *supra).*

Ms. Mmassy strenuously contended that as the evidence of a co accused could not be used to convict a co-accused, the irregularity in denying the appellants their right to cross-examine each other in their

respective defence cases, their complaint had no substance. With respect, there is no force in that proposition. None of the appellant's confessed to the offence or incriminated himself. The 1st appellant incriminated the 2nd appellant and *vice-versa* the 2nd appellant incriminated the 1st appellant. What rendered the irregularity grave was the denial of their right to cross examine each other in full answer and defence to their respective defence cases, this as a basic tenet of the right to a fair trial, which the trial court also breached to their serious prejudice.

That apart, Ms. Mmassy conceded that a retrial should be ordered by the Court, should it find that the irregularity had occasioned a failure of justice. In the circumstances and for the reasons stated earlier, we are of the settled view that there is no escape for that conclusion. The serious irregularity viciated the trial. Taking into account the principles and factors to be considered, in our respectful view, this case invites a retrial **(Merali** & **Others v R,** [1971] E.A. 221; **Fatehali Manji v. R** [1966] E.A. 343 and **Ahmed Ali Dharamsi Sumar v. R.** [1964] E.A. 481).

Accordingly, we find merit in the ground two of the appellants' additional memorandum of appeal, which we uphold.

In the result and for the foregoing reasons we hereby invoke our revisional powers under Section 4(2) of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002, and proceed to quash all the proceedings before the trial court and the High Court, the appellants' convictions, and set aside the sentences, corporal punishment and order for compensation. We order a retrial before the District Court with immediate dispatch by a different learned Resident Magistrate. The Director of public Prosecutions is at liberty to re-examined the charge according to the law. Ordered accordingly.

DATED at ARUSHA this 27th day of October, 2016.

M. C. OTHMAN
CHIEF JUSTICE

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL