IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MMILLA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 493 OF 2015

CHARLES MAYUNGA @ CHIZI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mrango, J.)

Dated the 28th day of October, 2015
in
DC. Criminal Appeal No. 159 of 2014

JUDGMENT OF THE COURT

16th &24th August, 2017

MMILLA, JA.:

The appellant, Charles Mayunga @ Chizi was charged in the District Court of Shinyanga at Shinyanga with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 of the Revised Edition, 2002. On conviction, he was sentenced to 30 years imprisonment term, plus twelve strokes of corporal punishment. In addition to that, he was ordered to pay T.shs 300,000/= as compensation to the victim of rape, Maua Ibrahim. His first appeal to the

High Court of Tanzania at Tabora was unsuccessful, hence this second appeal to the Court.

Before us, the appellant appeared in person and was not defended, whereas the respondent Republic enjoyed the services of Ms Jane Mandago, learned Senior State Attorney. She hastened to declare that they were opposing the appeal.

The memorandum of appeal filed by the appellant raised three substantive grounds: **one** that, the prosecutrix, a 17 years old girl was not subjected to the *voire dire* test as envisaged by section 127 (2) of the Evidence Act Cap.6 of the Revised Edition, 2002; **two** that, the evidence of PW1 Maua Ibrahim was wrongly believed that she correctly recognized the appellant at the scene of crime; and **three** that, both lower courts erroneously held that PW1, PW2 and PW3 were credible witnesses.

During the rival submissions on these grounds of appeal, the parties discussed certain events which occurred in the course of trial before the trial court. On that basis, an issue cropped up on whether or not the appellant was accorded a fair trial in the case. We wish to begin

with this aspect because we are firm that should this be upheld, it is sufficient to dispose of this appeal.

In the course of giving her testimony, PW2 Teddy Charles, the mother of the victim girl, complained to the trial magistrate that the appellant was intimidating her. That is reflected at page 20 of the Appeal Record at which she was recorded to have said that **"Hakimu angalia huyu mshtakiwa anataka kunikaba. Huyu ni mtu hatari sana Mhe. Sisi tunamfahamu.**" Literally translated, that means **"See your honour, the accused is intimidating to throttle me. He is a very dangerous person your honour. We know him.**" Upon that, the trial magistrate strongly warned the appellant against those actions. He directed him to respect the court and the witness as well.

After PW2 had completed her testimony on 11.7.2013, the case was adjourned to 25.7.2013 when the third prosecution witness was expected to appear in court and testify. On that subsequent date, the prosecution side had one witness who was ready to testify. However, the appellant was not prepared. He informed the trial magistrate that he had no confidence in him as he did not trust him, and had written a letter to the court asking him recuse himself.

Following the appellant's allegations, the learned State Attorney who had the conduct of that case advised the trial magistrate to give the appellant opportunity to formally make his submission so that he could also make a reply, after which the trial magistrate could decide on whether or not to opt out. The trial magistrate accepted the advice and called upon the appellant to make a formal submission in that regard.

Upon being called to make a formal submission, the appellant repeated his allegations that he had no confidence in the trial magistrate, and was not prepared to let him continue trying his case because he was reputed as a convicting magistrate. However, the appellant added one more ground that he suspected that PW2 had corrupted the trial magistrate so that he could convict him because he heard her say so.

On the basis of the allegation on corruption, the learned State Attorney informed the trial magistrate that it was proper for the appellant to give his statement on oath (whatever he meant).

Once again, the trial magistrate accepted that advice. This time though, he opened an inquiry which was titled "**An Inquiry in Respect**

of Corruption Allegations Upon Me - The Trial Magistrate." He called upon the appellant to testify. After being sworn, the appellant gave his evidence which contained the same allegations. The appellant declined to call the witnesses and closed his case. The case was once again adjourned to 25.10.2013.

On 25.10.2013, the prosecution had two witnesses in the inquiry proceedings. However, the trial court was informed that the appellant, who was in the lock up in the premises of the court, had refused to appear in court before the trial magistrate. After some deliberations on what to do, the trial court received evidence from one policeman and PW2, after which the magistrate composed a ruling to the effect that the allegations of bias and corruption against him were baseless and he dismissed them. He also directed that he was proceeding to try the case whether the appellant liked it or not.

Trial of the main case resumed in appellant's absence. The trial magistrate heard the evidence of one more prosecution witness (PW3 Jumanne Ashel @ Wanoma), after which the prosecution closed its case.

In the end, the trial magistrate prepared a judgment in which he found the appellant guilty; consequently he was convicted and sentenced as stated at the beginning of this judgment.

It is on the basis of those events that we asked ourselves the earlier on posed issue; whether or not the appellant was accorded fair trial in this case.

On the question of fair trial, Ms Mandago was affirmative that the trial Magistrate adopted a wrong procedure regarding the allegations of no confidence and corruption which were leveled against the trial magistrate. She submitted that on receiving the appellant's formal submission on those allegations, the trial magistrate ought to have called upon the Republic to give their side of the matter and make the ruling on whether or not to recuse himself. She emphasized that it was a wrong procedure for him to conduct an inquiry, whereby he called witnesses and made a decision in complaints of corruption directed at him. Given those circumstances, Ms Mandago went on to submit, the appellant was not accorded fair trial in the case.

On his part the appellant stated that he was not accorded fair trial because he believed the trial magistrate was not impartial. He added that this was based on what he heard from PW2 that he had corrupted him in order to convict him. Thus, it was not fair for him to refuse to opt out of his case.

There is no gainsaying that the crucial role of any government is to maintain law and order on behalf of the whole society; to hold people to account for crimes they have committed, and to ensure that justice is done and seen to be done. However, this carries with it a grave responsibility, since convicting someone of a criminal offence and potentially taking away a person's liberty is one of the most serious steps any government can take against an individual. This step can only be justified after the person has been given a Fair Trial. But then, what is a Fair trial?

Fair Trial includes matters such as a trial before an impartial trier (judge or magistrate), a fair prosecutor, and an atmosphere of judicial calm; and a trial in which bias or prejudice for or against the accused, the witness, or the cause which is being tried, is eliminated– See **Zahira Habibullah Sheikh & Another v. State of Gujarat** (2004) 4 Scc 158

In the case of **Gift Mariki & others v. Republic**, Criminal Appeal No. 289 of 2015, CAT (unreported) the Court emphasized that:-

> *"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 kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."*

See also the cases of the cases of **Alex John v. Republic**, Criminal Appeal No. 129 of 2006, CAT (unreported) in which the Court stated that:-

> *"It is settled law which binds us, that fair trial guarantees must be observed and respected from the moment the investigation against the accused commences until the final determination of the proceedings, the appeal process inclusive."*

In the present case, the appellant raised a complaint that he had no confidence in the trial magistrate. We agree with Ms Mandago that upon receiving that complaint, and after hearing the appellant's submission in that regard, the trial magistrate ought to have given the chance to the Republic to submit on that point, at the end of which he could have made a ruling on whether or not the appellant's worries had any basis. Depending on his finding, he could have weighed whether or not to recuse himself.

There is no dispute that following the allegations of corruption leveled against him, the trial magistrate formed an inquiry in which he was the enquirer, and that he called witnesses, and ultimately made a decision that he was clean. Given such facts, we are firm that the learned trial magistrate adopted a wrong procedure. Worse more that the trial magistrate was all in one**; by initiating inquiry, he was the complainant, the inquirer, and the decision maker.** That was improper because no one is permitted in law to be a judge in his own case, as goes one of the principles of natural justice - *Nemo judex in causa sua*. His decision that there was no evidence to support allegations of corruption against him cannot be said was unnatural. No one could

have expected him to find and hold that he was corrupted by PW2. As such, his decision that there was no cause to recuse himself from trying the appellant's case cannot be said it created an environment of impartiality. Consequently, we agree with Ms Mandago that there was no fair trial in this case.

Besides adopting a wrong procedure in weighing whether or not to recuse himself, there were certain matters reflected in the proceedings which raise serious doubts on the question of bias and partiality. We will cite some of the examples whereby the trial magistrate kept on emphasizing in Kiswahili language which we doubt that under normal circumstances, a witness of the age of the complainant could have been fearless to boldly pronounce them the way they appear on the record. This is more so when it is recorded that the words were uttered by PW1 to her mother, and subsequently to the doctor in the presence of her mother.

At page 13, last paragraph of the Appeal Record, PW1 was recorded to have told the trial magistrate that "**Mhe., Huyu ndugu yangu Charles Chizi alianza kunitomba kwa kutumia nguvu.**" Also, at page 15 of the Appeal Record, 5th paragraph from the top, PW1

was recorded to have said that "**Charles Mayunga @ Chizi . . . ordered me to drink . . .'Pombe aina ya Gongo'** and then **'alinitomba kwa nguvu'.**" Similarly, at that same page, last paragraph, the victim was recorded to have said that "Thereby, we managed to meet the Doctor and **I told the Doctor that' Dactari mimi nimetombwa na ndugu yangu kwa nguvu'.**"Likewise, at page 17 of the Appeal Record, during cross examination by the appellant, PW1 was recorded to have said that "On the material date I tried to raise alarm but "**ulinikamata na kunitomba mida ya saa mbili usiku".** She was recorded to have also said that "**Mhe, Hakimu, hii kesi haihusiani na ugomvi wa kifamilia, bali mshtakiwa ambaye ni ndugu yangu alidhamiria kunitomba, kunibaka na kufanya hivyo bila aibu.**"

Emphasis of the same words appeared also in the evidence of PW2 Teddy Charles. This witness was recorded at page 19, fourth paragraph of the Record of Appeal to have testified that "Your honour, according to PW1 . . . **aliniambia kwamba mtoto wa kaka yangu aitwae Charles s/o Mayunga @ Chizi alimkamata na kisha alimtomba kwa nguvu.**" Same trend of words were reflected in the evidence of

PW3 Jumanne Ashel @ Wanoma who was recorded at page 52, last paragraph over to page 53, first paragraph of the Record of Appeal at which this witness allegedly testified that "**Hapo kwenye makaburi ya Ndembezi, mshtakiwa alimbaka/alimtomba Maua na baadaye kumuacha hapo.**"

We repeat that it is doubtful that those words came from the mouths of the witnesses pointed out above, particularly the complainant, who was a minor. This is the foundation of the suspicion that could be the trial magistrate made such formulations for some sinister intentions against the appellant. Surely, the emphasis he employed/put implies the element of bias, which again does not conform to the requirements of a fair trial - See the case of **Newswatch Comm. Ltd. v. ATTA** (2006) All FWLR (Pt. 318) cited in the case of **Alex John** (supra). It was stated in that case that:

> " *. . .fair hearing according to the law envisages that both parties to a case* ***without let or hindrance from the beginning to the end*** *. . . . Fair hearing also envisages that the court or tribunal hearing the parties' case should be fair and impartial* ***without it***

showing any degree of bias against any of the parties."

[Emphasis provided].

Thus, a fair trial, first and foremost, encompasses strict adherence to the rules of natural justice, whose breach would lead to nullification of the proceedings.

For reasons we have shown above, with due respect, we think that there were elements suggesting that there was unfair trial in this case. If it is anything less than that, then we are entitled to give a benefit of doubt to the appellant. That destines us to the conclusion that the trial was a nullity. We thus invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002; consequent to which we quash the decisions of both courts below and set aside the sentence, and the resultant order for compensation.

The next issue is whether or not to order a retrial in the circumstances of this case. It is settled law that a retrial "should not be ordered where it is likely to cause an injustice to an accused person". See **Ahmed A.D. Sumar v. Republic** [1964] E.A. According to the case of **Sultan s/o Mohamed v. Republic**, Criminal Appeal No. 176 of 2003

(unreported), among others, a retrial may only be ordered when the interests of justice requires it – See also the case of **Fatehali Manji v. Republic** [1966] E.A 343. In that case the Court stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the 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 particular facts and circumstances and* ***an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*** [Emphasis provided].

The appellant in the present case was charged with rape which is a serious offence. We think that it will be in the interests of the public to order retrial. In the circumstances, we remit the matter to the District

Court of Shinyanga for a re-trial before another magistrate of competent jurisdiction.

Meanwhile, we direct for the appellant to be held in remand prison pending retrial. Aware that this is a very old case in the registry, we further direct the Resident Magistrate in-charge of the station to accord it priority so that it may be tried expeditely. Similarly, in case of a conviction after retrial, the 4 years he has served so far should be taken into account in the course of imposing a sentence.

DATED at **TABORA** this 23rd day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL