IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 547 OF 2016

SALIMU ALPHAN ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Tanga)

(Khamis, J.)

dated the 19th day of June, 2015

In
Criminal Appeal No. 13 of 2015

RULING OF THE COURT

16th & 19th April, 2018

MWANGESI, J.A.:

At the District Court of Korogwe at Korogwe, the appellant herein stood arraigned for the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002 (**the Penal Code**). It was the case for the prosecution that, on the 11th day of March, 2014 at about 10:00 hours at Mtonga area within Korogwe District in the Region of Tanga, the

accused did have carnal knowledge of one Mwajuma Abdu a girl of 15 years old.

When the charge was read over to the appellant, he protested his innocence whereupon, the prosecution paraded four witnesses and one exhibit to establish the guilt of the appellant to the charged offence. On his part, the appellant relied on his own affirmed testimony in defense, and never summoned any witness. At the end of the day after the trial resident magistrate had evaluated the evidence placed before him, was of the considered view that the guilt of the appellant had been established to the hilt. He therefore convicted the appellant to the charged offence and sentenced him to the mandatory jail term of thirty years.

The appellant's appeal to the High Court was not successful and hence this second appeal wherein, he has raised five grounds of grievance namely:

1. That, the trial court erred in law and in fact by incriminating the appellant without analyzing as

required the evidence adduced in court of which it is from the contrivance issue of rape on the appellant.

2. *That, the prosecution failed to prove the charge of rape against the appellant beyond reasonable doubt.*
3. *That, the evidence which PW1, PW4 and PW5 testified before the trial court differed. While PW1 said that, she was raped on the 11th March, 2013, PW4 detective constable Christina who investigated the case, stated that PW1 was raped on the 2nd March, 2014 and PW5, the clinical officer testified that, PW1 was raped on the 11th March, 2014.*
4. *That, the district magistrate erred in law and in fact to convict the appellant by not considering the defense case of the appellant, which stated the reason which caused PW1 to fabricate the rape case against the appellant.*
5. *That, the appellate Judge deviated in truth when he believed the decision of the trial court without peering*

(sic) the rightness over the allegation of rape raised against the appellant.

The brief facts of the case as could be discerned from the evidence received in court is that, PW1 who happened to be the victim of the rape incident, her mother died some time ago, while her father was staying in Muheza after being married to another woman. At the material time, PW1 was staying with her aunt who was cohabitating with the appellant and therefore, she used to call the appellant her father. At the particular period of time, her aunt had travelled to Mbeya on business and therefore, PW1 had been left back at home to attend to her guardian father with cooking activities.

On the date of the incident, after PW1 had served the appellant with breakfast, he did turn against her by forcing her to have sex with him. And after he had gratified his passion, PW1 did leave from home while crying, with a view of going to inform her brother (PW2), who was at the market place, on what had befallen her. On the way she met one Mariam Juma (PW3), to whom she narrated her ordeal. In no time, the duo were met by the appellant, who ordered PW1 to return

back home, an order which was complied with. On her part, Mariam Juma proceeded to the market place, where she relayed the information regarding to what had befallen PW1 to her brother Hashim Abdi (PW3). Through Hashim Abdi, the issue was reported to the Police Station and thereby leading to the arrest of the appellant and subsequently being charged accordingly.

The story by the appellant on the other hand was to the effect that, he was indeed staying with Mwajuma Abdi because her aunt was cohabitating with him. And further that, the mother of PW1 was dead and her father who was his friend, was staying in Muheza after being married to another woman. He however strongly resisted the contention that on the material date he did rape PW1. What happened on the said date according to the appellant was that, he did just cane PW1 when he returned from the shamba work, after finding that she had not cleaned the house which was so dirty. It was his defense that, the whole incident about rape had been framed up by PW1 and her brother Hashim Abdi, with whom they were not in good terms.

As earlier pointed out, the story by the appellant was never bought by the trial magistrate, who was sufficiently convinced that, the appellant had committed the offence of rape a position that was upheld by the first appellate Court.

When the appeal was called on for hearing before us on the 16th April, 2018, the appellant entered appearance in person unrepresented, and hence fended for himself whereas, the respondent/Republic had the services of Ms Jenipher Kaaya, learned State Attorney. The appellant opted to let the learned State Attorney respond to his grounds of appeal first while reserving his right of rejoinder if need could arise.

Nonetheless, before the learned State Attorney could respond to the grounds of appeal raised by the appellant, she raised a procedural legal requirement which had not been complied with by the appellant in the course of processing his appeal from the district court to the High Court. It was argued by Ms. Kaaya that, before lodging his appeal to the High Court, the appellant did not comply with the mandatory requirement under the provisions of section 361 (1) (a) of

the Criminal Procedure Act, Cap 20 R.E 2002 (**the CPA**), which required him to lodge a notice of appeal first. According to the learned State Attorney, the failure by the appellant to lodge in the High Court, the notice of appeal was fatal and rendered the appeal before the High Court a nullity. In that regard, she implored our indulgence to invoke our revisional powers under the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap 141, (**the AJA)**, to nullify the proceedings of the High Court and quash its judgment.

When the appellant was required to respond to the submission of the learned State Attorney, on the obvious reasons that he is a lay person, he had nothing useful to chip in because the point raised by the learned State Attorney involved a legal issue, of which he was not conversant with. He just told the Court that, he was leaving everything in the hands of the Court. That being the position, the question which stands for our deliberation and determination is whether or not, the appeal before the High Court was tenable.

The provisions of section 361 (1) (a) of **the CPA,** which stipulates the procedure for instituting an appeal to the High Court to challenge a decision of a subordinate court reads that:

> *"361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359* ***shall be entertained unless the appellant-***
>
> *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*
>
> *(b) not applicable)*
>
> [Emphasis supplied].

Where the word "shall" has been used in an enactment, in terms of the provisions of section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2002, it connotes that compliance is imperative. In that regard, it is apparent in the light of the wording of the provision

quoted above that, it was imperative for the appellant to lodge his notice of appeal first before lodging his appeal. His failure to do so vitiated his entire appeal. When this Court was faced with a similar scenario in the case of **Ntiranyabagira F. Kuteleza @ Robert Mwami Vs Republic,** Criminal Appeal No. 161 of 2006 (unreported), held that:

> *"Failure to give written intention of notice to appeal within ten days, deprives the High Court power to entertain the appeal."*

See also: **Mustafa Rajabu and Another Vs Republic,** Criminal Appeal No. 104 of 2015 (unreported).

In the same breath, since in the instant appeal the appellant did not lodge a notice of appeal before lodging his appeal to the High Court, we are constrained to agree with the contention of the learned State Attorney that, the first appellate Court in entertaining the appeal, embarked on a nullity, and as such, the said proceedings cannot be left to stand. We therefore, invoke the powers vested on us under the provisions of section 4 (2) of **the AJA**, to nullify the

proceedings of the first appellate Court and quash its judgment. If the appellant still so wishes to pursue his appeal to challenge the decision of the trial court, he may commence the process in accordance with the law.

Order accordingly.

DATED at **TANGA** this 18th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL