IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 331 OF 2016

ANOSISYE TUBUKE MWAMKINGA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Lyamuya, SRM – Extended Jurisdiction.)

Dated 29th day of March, 2016
in
Criminal Appeal No. 19 of 2015

RULING OF THE COURT

28th & 29th August, 2019

MUGASHA, J.A.

In the District Court of Rungwe, at Tukuyu, the appellant was charged with rape contrary to sections 130 (1) (e) and 131 (3) of the Penal Code [CAP 16 RE.2002]. It was alleged in the charge sheet that, on 9th April, 2014 at about 10.00 hours at Ipelo Mwakaleli village within Rungwe District in the Region of Mbeya, the appellant did unlawfully have carnal knowledge of one **I.K.** a girl aged twelve (12) years.

To prove its case the prosecution lined up six witnesses and relied on two documentary exhibits namely: the cautioned statement of the

appellant which was admitted as Exhibit P1 and the Medical examination report tendered as Exhibit P2.

What precipitated the arraignment and the conviction of the appellant is briefly as follows: The victim who was the fifth born child resided together with her mother **N.K** (PW2) and other family members. On the fateful day, the victim's mother and sister all went to Ikubo village whereas the mother had gone to the farm and her sister at the grandmother's residence. Other children also went to school. PW1 remained home because she was ill. While there, a person called Jomba with another fellow came complaining to be hungry, they asked and were given food. After they had departed, a moment later Jomba returned pretending to have forgotten his bag. Instead, he took the victim into her mother's room, pushed her to the bed, undressed her and ravished her. PW1 raised alarm which was heeded to by Aisha who rushed at the scene and found Jomba ravishing PW1. Aisha shouted at him and he ran away while she advised the victim to wash her private parts. PW1 went to her uncle where she stayed up to 16.00 hours and later in the evening she went home and narrated to her mother what had befallen her.

Apart from PW2 testifying on what was narrated to her by the victim, she recounted that and the appellant was commonly known as Jomba by the children around the vicinity. She as well recalled to have taken to the Health Centre and upon examination by PW5 it was confirmed that the victim was actually raped. Asheli Mwakyoma (PW3) who learnt about the fateful incident from the village authorities, interrogated PW1 who mentioned the appellant to be the assailant. PW3 then traced the appellant who on seeing him attempted to escape but he was apprehended. According to PW3, he was requested by the appellant to plead on his behalf to the parents of the victim so that the matter could be resolved amicably. However, the matter was reported to the Police and the assailant was arrested and taken to the Police Station where upon being interrogated by W.P 3291 D/CPL Bupe, (PW4) his cautioned statement was recorded and he admitted to have raped PW1. As for W.P 2439 SGT. Rozy (PW6), he came to know about the incident from the victim who narrated to have been ravished by the appellant.

On the other hand, the appellant denied the accusation by the prosecution account. He denied to know the victim and claimed that she

was couched by her mother to make the rape allegations and that the charged was a frame up.

Having accepted the prosecution's version to be true, the trial court convicted the appellant and sentenced him to imprisonment for thirty (30) years with an order that the appellant pay the victim compensation at a tune of TZS 200,000.

The verdict of the trial court hinged on: **One,** the credible account of the victim that she was raped by the appellant. **Two,** the cautioned statement of the appellant in which he confessed to have raped PW1. **Three,** the Doctor's report which established that PW1 was actually raped and **four,** the conduct of the appellant before and after having committed the rape. Before the first appellate court, the first appeal was unsuccessful as it was dismissed and the conviction and the sentence were sustained.

Still undaunted, the appellant has preferred this second appeal. In the memorandum of appeal he has raised nine grounds of complaint.

However, for reasons to be apparent in due course, we shall not reproduce those grounds.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. Ofmedy Mtenga and Ms. Prosista Paul, both learned State Attorneys.

Mr. Mtenga rose to inform the Court that, the trial was vitiated by a procedural irregularity. He pointed out that, after rejecting the prosecution prayer to add one witness, the trial magistrate proceeded to close the prosecution case. He argued this to be irregular because the prosecution was prejudiced after being denied a full hearing of the case they had commenced. As such, and in order to cure the anomaly, the learned State Attorney urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE.2002] (**the AJA**) to nullify the proceedings from the date when the prosecution was denied to add a witness and order the continuation of the trial.

The appellant being a layman had nothing useful to add as what was raised by the Learned State Attorney was purely a point of law.

What actually transpired at the trial is that: it commenced on 25/4/2014 whereby three prosecution witnesses gave their evidence. Then, the matter was adjourned to 12/5/2014 and only one witness adduced evidence and the case was adjourned to 23/6/2014 but the trial could not proceed and on 11/6/2014, the prosecutor informed the trial magistrate that the appellant had jumped bail and that the sureties made efforts to have him arrested. From 20/6/2014, the hearing could not proceed as the case remained adjourned on various dates for more than two months up to 8/9/2014. On that day, only one witness testified and the matter was adjourned for three months up to 4/12/2014 whereby only one witness did adduce evidence. Moreover, after the prosecution prayed to add one more witness, the trial magistrate refused the prayer and closed the prosecution case as reflected at page 32 of the record of appeal.

After a careful consideration of the submission of the learned State Attorney and the record before us, the issue for over determination is the propriety or otherwise of the trial on account of the procedural irregularity and if the trial was vitiated.

The procedure which governs the opening and the close of the prosecution case is governed by the provisions of sections 229 (1) and 230 of the CPA which stipulate as follows:

Section 229 (1)

> *" If the accused person does not admit the truth of the charge,* ***the prosecutor shall open the case against the accused person and shall call witnesses and adduce evidence in support of the charge."***

[Emphasis supplied]

Section 230

> *"****If at the close of the evidence in support of the charge, it appears*** *to the court that a case is not made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person."*

[Emphasis supplied]

It is clear that, in the light of the bolded expressions contained in both provisions, having opened the prosecution case, the prosecution is at liberty to close its case when satisfied that the evidence adduced by their respective witnesses is sufficient. Thus, it is not upon the trial court to close the prosecution case as it was emphasized in the case of **DIRECTOR OF PUBLIC PROSECTIONS VS IDDI RAMADHANI FERUZI,** Criminal Appeal No. 154 of 2011 whereby having concluded that, it is the prosecution which has control over all aspects of Criminal prosecution, the Court held:

> " *It is not therefore either the court or the defence to determine when the prosecution should close its case,* ***or in respect of the court to make an order for such closure."***

[Emphasis supplied].

Furthermore, as to who is mandated to close the prosecution case and the defence case, in the case of **ABDALLAH KONDO VS REPUBLIC,** Criminal Appeal No. 322 of 2015 (unreported) we said:

"... a magistrate or judge has no power, under our laws, to close the prosecution case...the same applies in the case of defence that a magistrate or a judge is not mandated to close the defence case. Both the prosecution and defence are at liberty to close their respective cases as and when satisfied that the evidence their respective witnesses have adduced is sufficient."

The liberty on the closure of either the prosecution or defence case when satisfied that the evidence their respective witnesses have adduced is sufficient is in accordance with the principles of fair trial as envisaged by article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which gives the following directions:

"Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba–

wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, ***basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu,*** *na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria*

kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika;"

[Emphasis supplied]

The literal translation is that: To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account that, when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair and full hearing and to the right of appeal or other legal remedy against the decision of the court or of other agency.

Sections 229 (1) and 230 of the CPA, constitute among the envisaged appropriate procedures which are expected to ensure that, a fair hearing entails one to be fully heard before her/his rights are determined. In this regard, the closure of either the prosecution case or defence case by the prosecution or the defence by the trial magistrate or a judge, is not only a breach of natural justice but also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6) (a) of the Constitution. See - **MBEYA RUKWA AUTO PARTS AND TRANSPORT LIMITED VS JESTINA GEORGE MWAKYOMA**, Civil Appeal No. 45 of 2000 (Unreported). In this regard, a decision which is

arrived at in violation of such basic right it will be nullified even if the same decision would have been reached had the party been heard. See- **ABBAS SHERALLY & ANOTHER VS ABDUL S. H. M. FAZALBOY,** Civil Application No. 33 of 2002 (unreported).

In the light of the stated position of the law, the infractions by the trial magistrate's wrongly rejecting the prayer by the prosecution to add a witness and subsequently closing the prosecution case were so grave and as such, the subsequent proceedings are a nullity and so was the first appeal.

To cure the anomaly, we invoke our revisional jurisdiction under section 4 (2) of the AJA to quash and set aside the trial magistrate's orders dated 4/12/2014, the subsequent proceedings and the entire judgment. Also, the appellant's conviction is quashed and the sentence is set aside. Since the appeal before the first appellate court stemmed on a nullity it is equally nullified. We direct the case file to be remitted to the District Court and placed before the trial magistrate (O.H. Kingwele, RM) for the expedited continuation of the trial from the stage it had reached before the orders refusing the prosecution to add a witness and the closure of the prosecution case. If for any cogent reason O.H. Kingwele,

RM is unable to proceed with the trial, the successor magistrate before proceeding with the trial, must comply with to the dictates of section 214 (1) of the CPA. Meanwhile the appellant shall remain in custody.

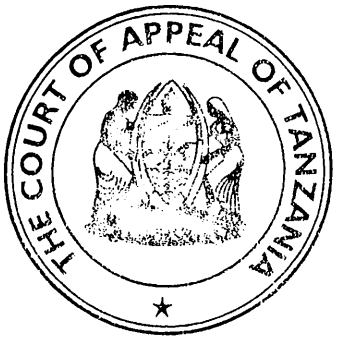
DATED at **MBEYA** this 29th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 29th day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL