IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 317 OF 2016

DAMIANO QADWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Revisional Order of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 2nd day of April, 2015
in
Criminal Revision No. 2 of 2015

.....

JUDGMENT OF THE COURT

10th & 12th April, 2019

NDIKA, J.A.:

In the District Court of Mbulu District at Mbulu, Damiano Qadwe, the appellant herein, was charged with and convicted of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 RE 2002. The prosecution alleged that he, on 28th April, 2014 at or about 09:00 hours at Dirim Village within Mbulu District in Manyara Region, did have carnal knowledge of one Herena d/o Itaga without her consent. Having convicted the appellant, the

trial court (V.J. Kimario, Resident Magistrate) sentenced him to a two years' term of imprisonment.

The above sentence attracted the attention of the High Court at Arusha, its legality being manifestly questionable. At the instance of the Honourable Judge in Charge of that court, revisional proceedings were opened after the court had called for the record of the trial court pursuant to the provisions of section 372 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) so as to "satisfy itself as to the correctness, legality or propriety" of the aforesaid sentence.

The matter, then, came up before Massengi, J. on 24th March, 2015 in the absence of the parties. The learned Judge set it down for hearing on 1st April, 2015 and ordered that the parties be served with the notice of hearing. There is no proof on record that an attempt was ever made to notify the parties as was ordered. Unsurprisingly, on the appointed date none of them appeared at the hearing. Yet, the learned Judge proceeded to compose her two-page revisional order, which she delivered on the following day (2nd April, 2015), again in the absence of the parties.

In her order, the learned Judge observed, rightly so in our view, that:

"This court after going through the records found that the sentence of two years' imprisonment for the offence of rape as passed by the trial Magistrate was illegal and improper basing on the provisions of section 5 (d) of the Minimum Sentences Act, [Cap. 90 R.E. 2002]."

Section 5 (d) of Cap. 90 (*supra*) referred to above stipulates that:

"where any person is convicted of any sexual offence specified under Chapter XV of the Penal Code, as amended by the Sexual Offences Special Provisions Act, the court shall sentence such person to imprisonment for a term prescribed under that Chapter."

Since the offence of rape which the appellant was convicted of is one of the specified offences under Chapter XV of Cap. 16 (*supra*) attracting the minimum sentence of thirty years' imprisonment, the learned Judge ordered as follows:

"Basing on the above, this court finds that the sentence of two years' imprisonment passed by the trial Magistrate for the offence of rape was illegal and improper and therefore subject to the powers vested [in] this court under ***section 373 (1) (a) of***

the Criminal Procedure Act, Cap. 20 RE 2002,
I hereby enhance the sentence passed by the trial Magistrate against DAMIANO QADWE to thirty (30) years imprisonment."

Being unhappy with the above turn of events, the appellant lodged the present appeal against the aforesaid revisional order of the High Court. However, in his Memorandum of Appeal he challenges "the conviction and sentence" on points of law and fact as hereunder:

"1. That, the latter presiding trial Magistrate erred in law and in fact by not complying with the requirements of section 214 of the CPA (Cap. 20 R.E. 2002).

2. That the latter presiding trial Magistrate erred in law and in fact by acting upon a defective charge sheet.

3. That, the latter presiding trial Magistrate erred in law and in fact when he held that PW1, PW2, PW3 and PW5 proved the prosecution case beyond reasonable doubt."

Before us, the appellant appeared in person to prosecute "the appeal" whereas Ms. Agnes Hyera and Ms. Rose Swile, learned State Attorneys, joined forces to represent the respondent Republic.

The appellant had nothing useful to say on the propriety or substance of his "appeal" and so, he chose to leave the matter to the wisdom of the Court.

On the part of the respondent, Ms. Hyera argued that the purported appeal against conviction and sentence was premature, the High Court having not taken up the matter and pronounced itself on the conviction on an appeal to it from the trial court. However, she acknowledged that the learned Judge's revisional order by which the sentence on the appellant was enhanced was illegal on account of the High Court having proceeded to do so without hearing the appellant. She thus urged us to do two things: first, to revise the High Court's revisional proceedings and the resultant revisional order, which should then be quashed and set aside; and secondly, to step into the shoes of the High Court to quash the two years' imprisonment sentence and substitute for it the proper sentence of thirty years' imprisonment.

Having dispassionately considered the submissions made by Ms. Hyera and examined the record, we are in full agreement with the position she has taken. We think that in order to resolve this matter, we have to deal with two crucial points: the first point concerns the propriety of this

appeal while the second point relates to the legality or propriety of the revisional order of the High Court.

Beginning with the first point, we wish to observe that although the appellant's notice of appeal dated 27th April, 2015 by which this appeal was instituted indicates that the appeal arose from the revisional proceedings before the High Court, it does not challenge the resultant revisional order of the High Court dated 2nd April, 2015 by which the original sentence imposed on the appellant was enhanced. It is evident that the three grounds of appeal assail the decision of the trial court for founding conviction on the basis of a defective charge, an irregular trial and insufficient proof. For all intents and purposes, therefore, this matter is a purported appeal to the Court against the decision of the trial court, as these complaints raised were not taken to the High Court on appeal.

We find it apt to recall what the Court held in **Mohamed Saidi v. Republic**, Criminal Appeal No. 9 of 2014 (unreported) when dealing with an analogous situation:

> *"We wish to stress the obvious that the appellate jurisdiction of this Court is to hear appeals which result from the decisions of the High Court and/or*

from the subordinate courts with extended jurisdiction. This is in terms of the provisions of Article 117 (3) of the Constitution of the United Republic of Tanzania of 1977, Cap. 2 of the Revised Edition, 2002 ... and section 4 (1) of the [Appellate Jurisdiction Act, Cap. 141]."

In that case, the Court followed its earlier decision in **Asael Mwanga v. Republic,** Criminal Appeal No. 218 of 2007 (unreported) and concluded that it could not hear and adjudicate on appeals, like the present one, stemming from the courts other than the High Court and the subordinate courts with extended jurisdiction. To stress the point, we, too, wish to excerpt from **Asael Mwanga** (*supra*) what the Court held therein:

"Now, all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. in the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. ***What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court*** *....*

> *We must, therefore,* ***decline to turn this Court into a first appellate court from decisions of the District Court. In the result, we express no opinion on the grounds of appeal which the appellant brought to this Court.***" [Emphasis added]

We wholly subscribe to the stance taken in the above mentioned cases. The appellant ought to have appealed against his conviction to the High Court and that resort to this Court by way of a second appeal could only have been had once the High Court had dealt with the matter against conviction on a first appeal. In the premises, we find this purported appeal premature and, hence, incompetent.

Ordinarily, we would have proceeded to strike out the purported appeal as the Court did in **Mohamed Saidi** (*supra*) and **Asael Mwanga** (*supra*), but we are enjoined to deal with the second point on the legality or propriety of the High Court's revisional proceedings and the resultant revisional order.

Certainly, the High Court is empowered under section 372 (1) of the CPA to call for and examine the record of any criminal proceedings before any subordinate court for "the purpose of satisfying itself as to the

correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court." Similar supervisory powers of the High Court are provided for under section 44 (1) (a) of the Magistrates' Courts Act, Cap. 11 R.E. 2002.

The High Court's exercise of revisional power over criminal proceedings before a subordinate court, so far as is relevant to the instant matter, is regulated by section 373 (1) and (2) of the CPA thus:

> *"373 (1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and* ***may enhance the sentence****; or*
>
> *(b) [Omitted].*
>
> *(2)* ***No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own***

***defence**; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection."* [Emphasis added]

It is evident from the above provisions that while the High Court is vested with the power to enhance a sentence imposed by a subordinate court under sub-section (1) (a) as the learned Judge did, subsection (2) prohibits the making of a revisional order under section 373 to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence. It should be noted that although pursuant to section 374 of the CPA the High Court may, in its absolute discretion, conduct revisional proceedings, in certain cases, in the absence of the parties, the said section expressly stresses the peremptory requirement to hear the affected party in terms of section 373 (2).

In the instant case, it is beyond doubt that the learned Judge conducted revisional proceedings in the absence of the appellant, who was accorded with no opportunity to be heard in his own defence. The resultant order enhancing the sentence obviously prejudiced him and violated his

right to be heard as provided under section 373 (2). As rightly submitted by Ms. Hyera, that omission, without doubt, amounted to a fatal error, rendering the revisional order a nullity – see **Hamisi Rajabu Dibagula v. Republic** [2004] TLR 181. See also generally **National Housing Corporation v. Tanzania Shoe Company and Others** [1995] TLR 251; **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported); and **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma**, [2003] TLR 251.

Based on the foregoing analysis, we hold that the learned Judge wrongly revised the original sentence and enhanced it without hearing the appellant contrary to section 373 (2) of the CPA. In the circumstances, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 by which we nullify the revisional proceedings of the High Court in Criminal Revision No. 2 of 2015 and proceed to quash and set aside the revisional order imposing on the appellant the enhanced sentence.

The above notwithstanding, we agree with the learned State Attorney that, in view of the manifest error in the sentence imposed by the trial court, we must intervene and correct the error by stepping into the shoes

of the High Court. Accordingly, pursuant to our revisional powers, we enhance the two years' sentence to the minimum thirty years' imprisonment. For avoidance of doubt, the enhanced sentence is to be deemed as one imposed by the trial court. Should the appellant desire to appeal to the High Court against the conviction and sentence, he is at liberty to do so subject to compliance with the applicable provisions of the law.

Order accordingly.

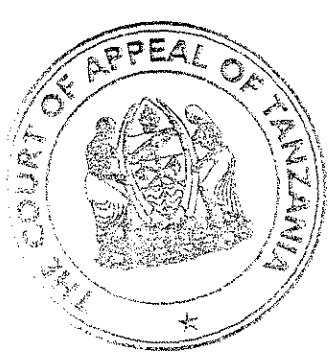
DATED at **ARUSHA** this 11th day of April, 2019

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL