IN THE COURT OF APPEL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 420 OF 2016

GODFREY AMBROS NGOWI ---------- APPELLANT

VERSUS

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

(Appeal from the decision of the High Court of Tanzania

at Moshi)

(Sumari, J.)

dated the 18th day of September, 2016

in

DC Criminal Appeal No. 39 of 2016

JUDGMENT OF THE COURT

10th & 12th April, 2019

MWANGESI, J.A.:

This appeal originated from the District Court of Moshi at Moshi, where the appellant herein was charged with the offence of rape contrary to the provisions of sections 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap 16 R.E 2002. The particulars of the offence were to the effect that, on the 5th day of May, 2015 at Marangu area within Moshi Rural District in the Region of Kilimanjaro, the appellant/accused did have carnal knowledge of

one Augustina d/o Daudi Minja a woman aged 95 years without her consent.

The trial court found the appellant guilty of the charged offence and sentenced him to the mandatory term of thirty years' imprisonment. The attempt by the appellant to challenge the conviction and sentence of the trial court at the High Court of Tanzania at Moshi was not successful, and hence this second appeal.

The brief facts of the case as could be gathered from the witnesses were to the effect that, the appellant and the victim of the incident were living in a neighbourhood at Marangu area within the District of Moshi Rural. On the fateful date, while the victim, Augustina Daud Minja, was asleep in her house, the appellant sneaked therein and raped her. In the course of the fracas, the cry for help which was raised by the victim was heard by August Daud Minja (PW1), Fadhili Abel (PW2) and Constancia August Minja (PW4), who rushed to check as to what was amiss. At the scene they found the door locked and they had to break it to gain access.

Therein, they found the victim lying on the floor and told them of the person who raped her, and further that, the said person was still within the

house. A search was mounted whereby, the appellant was arrested hiding in one of the rooms within the house naked. The incident was reported to the relevant authorities within the locality and later to the Police Station at Himo. The appellant was eventually charged with the offence of rape. The appellant on his part strongly resisted the accusation.

To establish the commission of the offence by the appellant, seven witnesses were called by the prosecution while in his defence, the appellant relied on his own sworn testimony and summoned no witness. According to the proceedings of the trial court, it is indicated that after six witnesses of the prosecution had given their evidence, on the 15th day of May, 2016, the prosecution substituted the charge sheet against the appellant. Even though the fresh charge was read over to the appellant, he was never told of his rights pertaining to alteration of the charge sheet as provided for under the provisions of section 234 of the Criminal Procedure Act, Cap 20 R.E 2002 (**the CPA**). Subsequent to the substitution of the charge sheet the prosecution called one witness only and closed its case. As pointed out earlier, after the appellant had entered his defence, the trial court entered judgment in his disfavor of which its challenge on appeal at

the High Court of Moshi, also proved futile as it was dismissed, and hence this appeal.

The second appeal by the appellant to this Court which was lodged on the 27th day of July, 2018 is premised on nine grounds. Later, on the 4th day of April, 2019, the appellant added one supplementary ground of appeal and thereby making a total of ten grounds of appeal. Our close observation of all ten grounds of appeal, has revealed that they all boil to three grounds namely,

> ***First,*** *that the first appellate Court erred in law and in fact in upholding the decision of the trial court which was based on weak and contradictory evidence which did not establish the offence against the appellant to the required standard of law.*
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> ***Two,*** *that the cautioned statement and extra-judicial statement of the appellant as well as the statement of the complainant which was admitted under section 34B of the Law of Evidence Act, Cap R.E 2002 (**the TEA**), were all admitted without compliance to the required provisions of law.*
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> ***Three,*** *that subsequent to the substitution of the charge sheet which was made by the prosecution after six*

witnesses of the prosecution had testified, the provisions of section 234 of ***the CPA,*** *were not complied with.*

On the date when the appeal was called on for hearing before us, the appellant entered appearance in person legally unrepresented whereas, the respondent/Republic had the joint services of Mr. Ignas Mwinuka and Ms Akisa Mhando, both learned State Attorneys. In his submission before us to amplify the grounds of appeal, the appellant argued that, the prosecution amended the charged against him after six witnesses had given their testimonies. Thereafter, they called the seventh and last witness without informing him of his rights if he wished any of the witnesses who had already given their evidence to be recalled or not. It was also his argument that, he was prosecuted and convicted on on-compliance with the procedure following the substitution of the charge.

As regards the statement of the victim of the incident, which was admitted under the provisions of section 34B of the Tanzania Evidence Act, Cap 6 R.E 2002 (**the TEA)** after it had been reported that she was dead, the appellant submitted that besides being admitted without compliance with the law, after it had been admitted, it was not read over so as to let him know its contents. Furthermore, the appellant argued, it was not

indicated in the said statement, if it was read over to the victim after it had been recorded by the recorder.

Arguing on the cautioned statement and extra-judicial statement alleged to have been given by him, the appellant submitted that, he objected to their production as exhibits. Nonetheless, his objection was dismissed without the trial magistrate making any effort by way of an inquiry to satisfy himself if they had been given by him voluntarily. On the basis of those grounds, the appellant urged us to allow his appeal by quashing the findings of the two lower courts and setting him to liberty.

Responding to what was submitted by the appellant, Mr. Mwinuka, conceded to the first ground that, indeed, after the charge sheet against the appellant had been substituted, the provisions of sections 234 of **the CPA** were not complied with. The same was the position taken by the learned State Attorney in regard to the admission of the cautioned statement and extra-judicial statement of the appellant, where after objection to their production in evidence by the appellant, there was no inquiry conducted by the trial court to establish the voluntariness on the part of the appellant. On the basis of the foregoing anomalies, the learned

counsel urged the Court to expunge them from the record and order for a trial *de novo*. The prayer was anchored on the overwhelming evidence against the appellant in this matter.

In respect to the statement of the victim which was admitted under the provisions of section 34 B of **the TEA**, the view of the learned State Attorney was that the appellant was precluded from challenging it because during its admission in evidence, he never objected. Such fact notwithstanding, because it was not read out after being admitted, it was as well illegally before the Court. He again reiterated the prayer which he had made in respect of the cautioned statement and the extra-judicial statement that, there be an order of retrial.

At issue for our determination in the light of the submissions from either side above is whether the appeal by the appellant is sound. In deliberating the appeal, we propose to start with the third ground that concerns the irregularities following the substitution of the charge. It was argued by the appellant that, after the charge had been substituted which was after six witnesses had already testified, the provisions of section 234 of **the CPA**, were not complied with. Indeed, that is the position of law.

And the rationale was stated in the case of **Ramadhan Abdallah Vs Republic** [2002] TLR 45, where the Court stated that:

> *".. we wish to state that the rationale for section 234 is easy to discern. A new charge sheet is introduced after some witnesses have already testified. The new offence charged may ... consist new ingredients and or may attract different consequences"*

The above holding was followed in the case of **Nyiga Kinyalu Vs Republic,** Criminal appeal No. 64 of 2012 (unreported). The fact that in the instant appeal the provision of section 234 was flouted as conceded by Mr. Mwinuka, there was no way in which the proceeding against the appellant could stand.

In the second ground of appeal, the complaint by the appellant was based on the way the extra-judicial statement and the cautioned statement of the appellant were admitted. It was submitted by the appellant that, he objected to their production in court as exhibits but the trial magistrate summarily dismissed the objection and admitted them. Again as agreed upon by both sides, the procedure adopted by the trial magistrate was flawed. The procedure is that where the production of a cautioned

statement or an extra-judicial statement as exhibit in court has been objected to by the accused, the trial magistrate has to conduct an inquiry to establish the voluntariness of the accused in making the alleged document.

We refrain from discussing the third ground of appeal which is in respect of the evaluation of the evidence which was received by the trial court for the reason that, since it has been pointed out in the first two grounds above, that the trial was vitiated, then discussion on the evidence has been rendered redundant.

After having held on the first two grounds that the trial of the appellant was vitiated, then the proceedings before the High Court on appeal were also a nullity as they were founded on null proceedings. Invoking the powers conferred on us under the provisions of section 4 (2) of the Appellate Jurisdiction Cap 141 R.E 2002, we quash the proceedings of the High Court and its resultant judgment. We as well quash the proceedings of the trial and its judgment.

The subsequent question which arises, is as to what should be the way forward. Ordinarily, after the proceedings have been nullified, what

follows is an order for retrial though not always. In the famous case of **Fatehali Manji Vs Republic** [1966] EA 344, it was held that:

> *"In general, a retrial may 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 purposes of enabling the prosecution to fill gaps in its evidence at the first trial --- each case must depend on its own facts and an order for retrial should only be made where the interest of justice require it."*

So the guiding principle in determining as to whether an order for retrial should be made or not, depends on the circumstances of each case. In many instances the Court has refrained from ordering for trial *de novo* for fear that the same would give advantage to the prosecution to fill the gaps after the case had collapsed in the first instance. See: **Rock Maduhu @ Oscar Vs Republic**, Criminal Appeal No. 333 of 2010, **Waziri Said Vs Republic,** Criminal Appeal No. 39 of 2012 and **Lyego Wilson Vs Republic,** Criminal Appeal No. 194 of 2009 (all unreported).

Back to the appeal before us, after having carefully gone through the evidence which was tendered during the nullified trial at the District court and in particular the cautioned statement and extra-judicial statement, we

are convinced in our mind that for the interest of justice, an order for trial is necessary. An order of the like was also made in **Timoth Sanga and Another Vs Republic,** Criminal Appeal No. 80 of 2015 and **Masunga Erasto Vs Republic,** Criminal Appeal No. 170 of 2015 (both unreported).

That said, we order that the appellant be tried *de novo* before another magistrate of competent jurisdiction. Taking account of the fact that this matter is old, we direct that the retrial be conducted expeditiously.

Order accordingly.

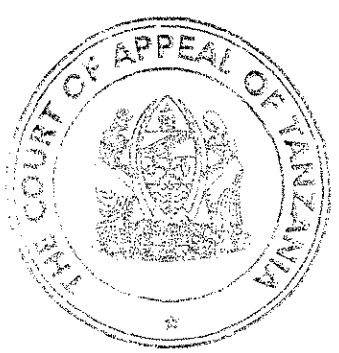
DATED at **ARUSHA** this 11th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL