IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CRIMINAL APPEAL NO. 428 OF 2018

GEORGE DAUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Mlacha, J.)

dated the 18th day of October, 2018
in
Criminal Appeal No. 45 of 2016

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JUDGMENT OF THE COURT

10th & 12th December, 2019

MMILLA, J.A.:

In this appeal, George Daudi (the appellant), is challenging the judgment of the High Court of Tanzania, Bukoba Registry, which reversed the decision of the District Court of Ngara at Ngara which had acquitted him of the offence of rape contrary to section 130 (1) (2) (e) (3) (a) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code).

The background facts of the case were briefly that, the victim girl (A. A) (PW1), then aged 16 years, was by 2015 a standard six pupil at Mugasha Primary School within Ngara District in Kagera Region. On 7.10.2015 she was at school. Around 13:00 hours, she was called by the appellant who was one of her teachers requiring her to go to his home. She obliged and went there. On arrival there, she was taken into the house in which that man allegedly raped her, after which she went back to the school compounds. Although she did not report that incident to the school administration or any other teacher, she nevertheless told her friends, including Hamida Bakari (PW4) and Flora Gervas (PW5) that the appellant raped her. On returning home, she did not likewise report that incident to her parents. Her mother one Hadija Athumani (PW2) came to know of that incident after several days had passed, whereupon she asked her and she admitted having been raped by the appellant. It was then that among other steps, PW2 reported the incident to the police who sprang into action and arrested the appellant.

At the time the incident was reported at police, she was given a PF3 and her mother was instructed to take her to hospital for medical examination. The victim's mother (PW2) took her to Nyamiaga District

Hospital for medical examination. The A.A. was attended by Kalist Korongo (PW3), a clinical officer. Apart from his finding that she had bruises at her female organ, he also said that she had purse cells in her urine specimen which was taken for laboratory test. It entailed that she was infected with an unnamed venereal disease. PW3 tendered the PF3 and was received as exhibit P1.

In his defence the appellant admitted that he was one of the teachers at Mugasha Primary School, also that he very well knew the victim girl who was one of the pupils at that school, but he categorically said he did not rape A.A. as was claimed. He also said he did not remember to have called her at his home on 7.10.2015. He similarly said that he came to hear about those allegations from the victim's mother who followed him at the school, but he informed her that the rumor was false.

After a full trial, the trial Resident Magistrate at Ngara found that because PW1 did not promptly report that incident, that fact created doubts as to the genuineness of her complaint. According to him, another doubt was that the prosecution did not call important witnesses namely; Edina Seth, Edina Bernard, Aida Gwasa and Said Athumani for what he

said to re-enforce their case. For those reasons, he concluded that the prosecution did not prove their case beyond reasonable doubt; he found the appellant not guilty and acquitted him. That decision aggrieved the Republic, they successfully appealed to the High Court. In turn, the decision of the High Court aggrieved the appellant; he filed the present appeal to the Court.

Before this Court, the appellant appeared in person and fended for himself; whereas the respondent/Republic enjoyed the services of Ms Suzan Richard Masule, learned State Attorney.

The appellant filed a seven point memorandum of appeal. While the first and second grounds allege that the Director of Public Prosecutions (the DPP) did not lodge before the High Court the Notice of intention to Appeal; the third ground alleges that the prosecution did not prove the case against him beyond reasonable doubt. On the other hand, while the fourth, fifth and sixth grounds commonly query that the evidence of the prosecution witnesses was wanting and doubtful, hence that the High Court ought to have resolved those doubts in his favour; the seventh ground complains that the evidence of the prosecution witnesses was

deficient and uncorroborated, hence ought not to have been believed and relied upon in founding his conviction.

At the commencement of hearing, the appellant adopted his grounds of appeal and elected for the Republic to respond first. We invited Ms. Masule to proceed.

At the outset, the learned State Attorney signified that she was supporting the appeal on the basis of the complaint in the first and second grounds which she said are sufficient to dispose of the appeal.

In her short but powerful submission, Ms Masule contended that the DPP's appeal before the High Court was faulty because it did not comply with the provisions of section 379 (1) (a) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA) under which lodging of a Notice of intention to Appeal within a period of 30 days from the date of the decision intended to be impugned is an essential requirement before institution of any appeal. She stated that since there was no such Notice of Appeal in the High Court, the appeal before that court was incompetent. She referred us to the case of **John Tesha v. Republic,** Criminal Appeal No. 57 of 2008 (unreported). In

the circumstances, she advised the Court to allow the first and second grounds of appeal, quash the proceedings, judgment and conviction, set aside the sentence and release the appellant from prison.

On his part, the appellant said he was fully in agreement with the learned State Attorney. He requested the Court to allow the appeal and set him free.

We have dispassionately considered the submission of Ms Masule. We share her view that the first and second grounds of appeal which contend in common that the DPP's appeal before the High Court was faulty because it was entertained without having filed the Notice of Appeal are capable of entirely disposing of this appeal.

We scanned the Record of Appeal and satisfied ourselves that indeed, there was no Notice of Appeal filed in the High Court at the time the DPP endeavoured to challenge the decision of the District Court of Ngara which acquitted the appellant of the offence of rape he was faced with. That omission went against the dictates of section 379 (1) (a) of the CPA which provides that:-

"(1) Subject to subsection (2), ***no appeal under section 378 shall be entertained unless*** *the Director of Public Prosecutions–*

(a) ***has given notice of his intention to appeal*** *to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes to appeal."* [The emphasis is ours].

The situation facing us in this case is similar to that which occurred in the case of **John Tesha** (supra) referred to us by the learned State Attorney. In that case, the High Court heard the DPP's appeal in the absence of a Notice of Appeal. On appeal to the Court, it was held that in the absence of a Notice of Appeal, there was no competent appeal before the High Court, and that the orders which were made by that court were a nullity. It quashed the proceedings of the High Court and set aside the sentence which was imposed.

In the present case, we are firm that the absence of the Notice of Appeal in the High Court vitiated the appeal before that court, and we declare that it was incompetent. Therefore, the proceedings, judgment, conviction and sentence before that court were a nullity. Accordingly, the first and second grounds of appeal have merit and we allow them. In

consequence, we quash the proceedings before the High Court, the judgment and conviction thereof, and set aside the sentence of thirty (30) years' imprisonment. We order the appellant's immediate release from prison unless he may be continually held for some other lawful cause.

Order accordingly.

DATED at **BUKOBA** this 11th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2019 in the presence of appellant and Mr. Joseph Mwakasege, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL