

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CRIMINAL APPEAL NO. 167 OF 2016

SIMAITON PATSONI@ TOSHI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Dar es Salaam)**

(Mkasimongwa, J.)

Dated the 4th day of May, 2015

in

Criminal Appeal No. 158 of 2012

JUDGMENT OF THE COURT

19th & 28th February, 2019

KWARIKO, J.A.:

Originally, the appellant stood before the District Court of Bagamoyo being charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code [CAP 16 R.E. 2002]. It was alleged by the prosecution that on the 16th day of January, 2011 at about 19:00 hours at Kiharaka village within Bagamoyo District in Coast Region, the appellant had unlawful carnal knowledge of a boy aged five (5) years (whose name

is withheld) against the order of nature. In this judgment we shall refer to the boy as the victim.

Following the appellant's denial of the charge, the prosecution brought a total of four witnesses to prove it. The evidence by the prosecution can be recapitulated hereunder.

On 16/1/2011 at about 19:00 hours JOHN GEORGE (PW1) was at home when he learnt from his wife one Naomi Samuel that their son (the victim) was missing. Upon inquiry, another son Arnold informed them that the victim had been taken away by a certain man whom they identified to be the appellant.

PW1 mobilized other people including AMOS MALOGO (PW3). When they got at the appellant's house, they detected some movements from inside. They broke down the door, entered into the house and found the appellant in the sitting room heavily sweating with the zip of his trousers open. In the bedroom the victim was found lying on a mat, naked and facing down. Upon inspection PW1 found him with what looked like spermatozoa in the anus, thighs and cloth. Although the appellant tried to escape, he was apprehended at the scene by PW3.

Thereafter, the matter was taken to the village chairman who directed the same to be reported to the police station. A PF3 was issued to the victim for him to be examined at hospital. One NEEMA MALACHI MAJWALE (PW2), A Clinical Officer at Mapinga dispensary attended the victim. Upon examination she found spermatozoa in the victim's anus and the cloth he was wearing. PW2 filled the PF3 which was admitted in court unobjected by the appellant as exhibit P1.

No D 7325 D/Corporal JAMES (PW4) was the investigator of this case. He testified that the victim told him that, it was the appellant who sexually assaulted him on promise of being given money. Further, PW4 said upon interrogation the appellant denied these allegations.

At the close of the prosecution case the trial Court ruled that a case had been made out against the appellant sufficiently to require him to give his defence.

The appellant who was the sole witness for the defence denied the allegations. He recounted that on the material day at 8:00 a.m was at his place of work watering bricks. Whilst there, PW1 and PW2 appeared and inquired from a woman who was fetching water who the employer was. At

night three men followed him complaining that they were better placed to do the job he was doing. They beat him up until he fell down and people gathered where the present allegations were levelled against him.

At the end of the trial the appellant was found guilty, convicted and was sentenced to a statutory life imprisonment.

Upon being aggrieved by that decision the appellant challenged the conviction and the sentence before the High Court but was not successful. Therefore, the appellant has come before this Court on a second appeal. In his petition of appeal the appellant raised six grounds. Also, with leave of the Court he raised two additional grounds of appeal on points of law. The total eight grounds of appeal can be summarized as follows: -

1. That the evidence of visual identification by PW1 and PW3 against the appellant was not sufficient.
2. That, there were contradictions between the evidence of PW1 and PW3.
3. That, expert evidence by PW2 was not sufficient.

4. That, the prosecution evidence failed to connect the appellant with the offence charged.
5. That, the appellant was convicted on unjustified and uncorroborated prosecution evidence.
6. That, the prosecution case was not proved beyond reasonable doubt against the appellant.
7. That, the trial court did not comply with the provisions of section 231 of the Criminal Procedure Act [CAP 20 R.E. 2002]
8. That, the *voire dire* examination was not conducted according to law.

When the appeal came up for hearing, the appellant appeared in person unrepresented, whilst Mr. Ramadhan Kalinga, learned State Attorney appeared for the respondent Republic. The appeal was duly heard. However, because in his additional grounds of appeal, the appellant raised legal points, which in practice ought to be decided first, only the submissions to that effect will be reproduced herein.

The appellant submitted in respect of the seventh ground of appeal that, the trial court did not comply with the provisions of section 231 of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA), an irregularity which was not detected by the first appellate court. Regarding the eighth ground, he contended that, the trial court did not conduct a proper voir dire examination to the victim because the questions he was asked were not shown.

On his part, Mr. Kalinga concurred that, the trial court did not address the appellant in terms of section 231 of the CPA. He argued that, because the appellant was not represented, he was not accorded his right to defence, which omission vitiated the proceedings. He implored the Court to nullify the proceedings from the stage the omission was committed up to the decision of the High Court. The learned counsel prayed the case file to be remitted to the trial court for the omission to be cured.

Responding to the eighth ground of appeal the learned State Attorney argued that, the trial court correctly found the victim incapable of giving evidence.

In rejoinder the appellant complained that, the trial court knew the law hence he is not to blame for the omission. He prayed to be released from prison as he has been there for so long.

On our part, we will start with the legal procedure obtaining after the close of the prosecution case. Section 231 of the CPA which is relevant here provides that;

*"(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made 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 again explain the substance of the charge to the accused and inform him of his right—***

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

(2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution.

(3) If the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

(4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses".
(emphasis supplied).

Therefore, the law is clear that, if at the close of the prosecution case the court is satisfied that a case has sufficiently been made against the accused, it shall explain to him/her their right of defence as shown therein. In the instant case, the record shows that after the court had ruled that a case had been made against the appellant, it did not explain to him the right of defence as required in law. The court directly asked the appellant to give his defence. The trial court record is let to speak thus:

07/06/2011:

Before: S.A. Mkasiwa – RM

PROS: William – A/ Insp.

CC: Kulwa

Accd: Present

P. P: The matter is for ruling.

Court: - I have satisfied (sic) that the prosecution managed to provide sufficient evidence against the accused person. The accused has got the (sic) case to answer.

Sgd: S. A. Mkasiwa – RM

07/06/2011

Order:- Dhg on 21/06/2011

AFRIC

Sgd: S. A. Mkasiwa – RM

07/06/2011

21/06/2011:

Before: A.N. Kileo – RM

PROS: William – A/ Insp.

CC: Kulwa Mwasimba

Accd: Present

P. P: I pray for another defence hearing.

Order:- Dhg on 4/07/2011

AFRIC

Sgd: A.N. Kileo – RM

21/06/2011

4/07/2011

Before: S.A. Mkasiwa – RM
PROS: A/ Insp.
CC: Kulwa Mwasimba
Accd: Absent
P. P: I pray for Dhg date
Order:- Dhg on 18/07/2011
R/O to issue

Sgd: S. A. Mkasiwa – RM
04/07/2011

18/07/2011

Before: S.A. Mkasiwa – RM
PROS: A/ Insp.
CC: Tete Yohana
Accd: Present
P. P: The matter is for Dhg
Order:- Dhg on 1/08/2011
ARIC

Sgd: S. A. Mkasiwa – RM
18/07/2011"

Following the several adjournments, the appellant gave his defence on 01/8/2011.

It is our considered view that, the omission was a fundamental procedural irregularity which denied the appellant his right to a fair

hearing. This is because the appellant was not informed of his rights such as giving his defence with or without oath or affirmation or the right to remain silent and the right to call witnesses on his behalf, whose preferences ought to have been recorded. This omission is fatal because it occasioned injustice to the appellant who had no legal representation. In the case of **BAHATI MAKEJA v. R**, Criminal Appeal No. 118 of 2006 (unreported), a Full Bench of this Court interpreted section 293 (2) of the CPA which is applicable in the criminal trials before the High Court but similar to section 231 of the CPA. The Court first considered whether non-compliance with that provision occasions injustice to the accused and it said thus;

"It is our decided opinion that where an accused is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned".

The Court went on to decide as follows:

"In the current matter there was no injustice occasioned in any way at all. It is palpably clear to us that the learned Judge must have addressed the accused person in terms of s. 293 of the CPA and

that is why the learned advocate stood up and said that the accused person is going to defend himself on oath. But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply”.

Now, because in the instant case the omission occasioned injustice to the appellant, it is our decided opinion that it vitiated the trial court's proceedings after the court ruled that a case had been made out against him. As rightly prayed by the learned State Attorney those proceedings are nullified. As a consequence, we quash and set aside the conviction and sentence imposed on the appellant. The appeal proceedings before the High Court are also nullified as they lack legs upon which to stand as they originated from the nullified proceedings of the trial court.

Having nullified the proceedings of the lower courts this Court is in agreement with the learned State Attorney that, this is a fit case to be remitted to the trial court for it to comply with the law.

Therefore, the case file is hereby remitted to the trial court to comply with the provisions of section 231 of the CPA. This should be done by a

different magistrate of competent jurisdiction. Considering that this matter was initially instituted at the trial court way back in 2011, we direct the said court to expedite the finalization of the case. In the meantime, the appellant shall remain in custody.


DATED at DAR ES SALAAM this 26th day of February, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL