IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., WAMBALI, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 510 OF 2016

MALANDO S/O CHARLES @ MADWILU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

Dated the 28th day of September, 2016
in
DC. Criminal Appeal No. 137 of 2016

JUDGMENT OF THE COURT

4th & 12th December, 2019

WAMBALI, J.A.:

The Court of Resident Magistrate of Tabora convicted the appellant of the offence of rape contrary to section 130(1)(2)(a) of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code). Following the said conviction, in terms of section 131(1) of the Penal Code the appellant was sentenced to thirty years imprisonment.

The particulars of the offence indicate that on 3rd February, 2014 during the night hours at Mabama area, the appellant had sexual intercourse with Retisia Buzingo @ Maumo a woman of 90 years old without her consent. To support its case, the prosecution summoned six witnesses and tendered two exhibits, namely, the Police Form No. 3 (PF3) which contained the medical examination report of the victim and the cautioned statement of the appellant which were admitted as exhibits P1 and P2 respectively.

On the other hand, the appellant defended himself against the allegation leveled by the prosecution. His appeal to the High Court against both conviction and sentence was dismissed in its entirety, hence this second appeal before the Court.

For the reason which will be clear shortly, we shall not revisit the whole evidence adduced at the trial court in our judgment. We will however, reproduce some relevant parts of the evidence for purpose of our deliberation.

It is noteworthy that initially, the appellant lodged a memorandum of appeal comprising six grounds of appeal. However, at the hearing of

the appeal, the appellant submitted a supplementary memorandum of appeal comprising two grounds of appeal. The said Supplementary Memorandum of Appeal was lodged on 28th November, 2019 in terms of Rule 73(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Nevertheless, upon scrutiny of all the grounds of appeal and after having a brief discussion with the appellant and the learned Senior State Attorney for the respondent Republic, it was agreed that in the instant appeal, the major complaint of the appellant is based on the first ground in the Supplementary Memorandum of Appeal which is to the following effect:

> "1. *That, the first appellate judge erred for not noting that the procedure for recording of evidence in the magistrates courts was not observed, since the trial magistrate had reported what the witnesses said instead of recording what the witnesses says to come to terms with section 210(1)(b) of Cap. 20".*

At the hearing of the appeal the appellant appeared in person, unrepresented, while Mr. Miraji Kajiru, learned Senior State Attorney entered appearance for the respondent Republic.

When the appellant was given opportunity to address the Court on that ground of appeal, he opted to have the learned Senior State Attorney respond first, but reserved the right to rejoin.

In his response, at the very outset, Mr. Kajiru conceded that the complaint of the appellant on the way the learned trial magistrate recorded the evidence of witnesses is justified as it was contrary to the requirement of the law.

The learned Senior State Attorney explained that according to the record of the proceedings in the record of appeal, the learned trial magistrate recorded the evidence of witnesses in reported speech instead of the narrative form. In his view, the form in which the learned trial magistrate recorded the evidence of witnesses leaves anybody in an uncertainty as to whether it was the witnesses who stated the said words or whether it was the formulation of the trial court magistrate.

In the circumstances, Mr. Kajiru argued that the proceedings and judgment of the trial court cannot stand in view of that defect. He added that the proceedings and judgment of the first appellate court cannot also stand as the same originated from nullity proceedings and

judgment of the trial court. He therefore supported the appeal on this ground.

The learned State Attorney concluded his submission by urging us to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) to revise and nullify the trial court's proceedings and judgment, quash the conviction and set aside the sentence. He also prayed for the Court to nullify, quash and set aside the proceedings and judgment of the High Court which sat on first appeal.

However, Mr. Kajiru submitted that for the interest of justice, in the circumstances of the case at hand, the Court should be pleased to order a retrial of the case before another magistrate.

In his brief rejoinder, the appellant agreed with the submission of the learned Senior State Attorney with regard to the failure of the trial court magistrate to record the evidence in accordance with the requirement of the law. However, he prayed that he should be acquitted instead of the Court ordering his retrial as argued by the learned Senior

State Attorney for the respondent Republic, on the argument that, he did not commit the alleged offence.

On our part, having carefully perused the record of appeal and upon hearing the submissions of the appellant and the learned Senior State Attorney for the respondent Republic, we have no hesitation to state that, the learned trial magistrate did not comply with the provisions of section 210(1)(b) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA). The said section provides for the manner of recording the evidence of the witnesses in trials before a magistrate. For purpose of clarity, we deem it appropriate to reproduce the respective section in full hereunder:

> *"210(1). In trials, other than trials under section 213, or by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner –*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence*

and shall be signed by him and shall form part of the record; and

(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

[Emphasis Added]

It is noted that the most relevant part from the above quoted provisions is subsection (b) of section 210(1). In terms of that provision, it is mandatory for the evidence of witnesses to be recorded in a narrative form and not in a reported speech as it was done in Criminal Case No. 08 of 2014 by the learned trial magistrate.

In our case, it is evident from the record of appeal that, in recording the evidence of witnesses, for instance, the evidence of the victim (PW1), in most of his sentences the learned trial magistrate starts with the following words: **"PW1 states that..."** Yet, with regard to the evidence of PW2, the learned trial magistrate recorded some parts of his evidence as follows:

> ***"PW2 waked up, and welcomed him..."***
>
> ***Nevertheless PW2 told...***
>
> ***PW2 further told this Court that when accused..."***

Indeed, the manner in which the learned trial magistrate recorded the evidence of PW3 tells it all;

> ***He remembered on 3rd February 2014, the victim was raped. He perceived that story from the PW2, he told us that.***
>
> ***"...The Reticia victim was raped with one Malambo s/o. Charles..."***

From the reproduced paragraphs above, it is apparent that the learned trial magistrate recorded the evidence of PW1, PW2 and PW3 in

reported speech instead of a narrative form by the learned trial magistrate. This applied also to the evidence of other prosecution witnesses and the defence of the appellant.

In general, we wish to state that in most cases, in recording the evidence of witnesses, the learned trial magistrate quoted what he thought that witness stated as we have reproduced above in respect of the evidence of PW3.

Furthermore, the manner in which the learned trial magistrate recorded the evidence is also reflected in his judgment which makes it difficult to know exactly what was stated by the witness and what is the analysis of evidence by the trial court.

All in all, a thorough scrutiny of the entire proceedings of the trial court leads us to the conclusion that both parties, that is, the prosecution and defence were prejudiced by the form in which the evidence of witnesses was recorded by the learned magistrate.

Regrettably, the irregularity on form of recording witnesses' evidence at the trial court was not dealt with by the first appellate court. This is despite the fact that during the hearing of the appeal, the learned

State Attorney who appeared for the respondent Republic complained of his inability to understand the substance of the recorded evidence.

Be that as it may, at this juncture, it is instructive to refer to the observations of the Court in **Juma Bakari v. Republic**, Criminal Appeal No. 362 "B" of 2009 (unreported) when it was confronted with a similar situation. It was stated as follows: -

> *"(1) Section 210(1)(a) and (b) of the CPA is a general provision which regulates the procedure for recording of evidence in the Magistrates Courts (Primary Courts not included).*
>
> (2) *It is clear from the wording of the provisions of subsections (a) and (b) of section 210(1) of the CPA that in recording the evidence of a witness, the trial magistrate must record it in the first person. In other words, he/she must record and not report what the witness says.*
>
> *(3) The manner in which the trial magistrate recorded the evidence of the witnesses was*

obviously wrong and it contravened section 210(1)(b) of the CPA..."

(4) *Recording of evidence is a function which the trial magistrate must perform. The word used in subsection (b) of section 210(1) is "the evidence shall not ordinarily..." This means that it was mandatory for the trial magistrate to comply with the said law in the recording of evidence of the witnesses. As there was no compliance the proceedings were vitiated. This means that there is no appeal before the Court."*

In that appeal the proceedings of both the trial and first appellate court were declared a nullity. Indeed, in the present case, considering what we have stated above with regard to the proceedings of the trial court on the failure of the learned trial court magistrate to comply with the mandatory provisions of the law in recording of evidence, we are settled that the proceedings of the trial court and that of the first appellate court, a subject of the appeal before us were vitiated.

We wish to emphasize that trial courts must ensure that the evidence of witnesses is recorded in full. Trial court's magistrate

therefore, must be careful to record the disposition of each witness and see to it that, the procedure provided by law is followed strictly to remove the possibility of prejudice to the prosecution and defence case. Indeed, the omission to record evidence as per the laid down procedure cannot be justified at all except under the circumstances provided under subsection (2) of section 210 of the CPA where the trial magistrate, in his discretion may take down or cause to be take down any particular question and answer. To this end, trial courts' magistrates should endeavor to elucidate the facts and record the evidence in clear and intelligible manner.

Moreover, it is noteworthy to stress that the presiding trial court magistrate is required to take down evidence of each witness in writing in the language of the court. Most importantly, that evidence should be in the form of a narrative and not in reported speech.

We wish to make it clear that, taking down of evidence of a witness in full, entails that the record of the disposition of each witness in the trial court must be a faithful account of what a witness states in a case before the court. Therefore, importing words not stated by the witness constitutes a serious violation or infringement of the provisions

of section 210 (1) (b) of the CPA. Thus, where a trial court does so, it commits a departure from the usual and proper course.

As a result, where a trial magistrate does not comply with the mandatory provisions of section 210 (1) (b) of the CPA, the proceedings are liable to be set aside.

In the event, based on the foregoing deliberation, this ground of appeal alone suffices to dispose of the appeal. We accordingly allow the appeal.

In the result, we invoke the provisions of section 4(2) of the AJA to revise and nullify the proceedings and judgment of the trial court and quash conviction and set aside the sentence imposed on the appellant thereof. Similarly, we quash and set aside the proceedings and judgment of the High Court on appeal as they emanated from nullity proceedings and judgment.

In the end, considering the circumstances of the case that faced the appellant and in the interest of justice, regrettably we are inclined to grant the prayer of the learned Senior State Attorney for an order of a retrial. We remit the file in respect of Criminal Case No. 08 of 2014 to

the trial court with an order that the case be retried by another magistrate as soon as practicable. Meanwhile, the appellant should remain in custody pending a retrial.

DATED at **TABORA** this 12th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

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

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL