IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 202 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

YASSIN HASSAN @ MROPE ..... RESPONDENT

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

(Moshi, J.)

dated the 9th day of April, 2019
in
DC Criminal Appeal No. 9 of 2019

.....

JUDGMENT OF THE COURT

17th & 19th August, 2020.

NDIKA, J.A.:

This is an appeal by the Director of Public Prosecutions against the judgment of the High Court of Tanzania sitting at Songea (Moshi, J.) dated 9th April, 2019 on a first appeal from the decision of the District Court of Tunduru at Tunduru in Criminal Case No. 81 of 2018 dated 31st December, 2018. In essence, the appeal questions the propriety and legality of the first appellate Judge deciding the appeal before her in favour of the appellant Yassin Hassan @ Mrope, the respondent herein, on a point she raised on her

own in the course of composing the judgment without hearing the parties on the point.

The background to the appeal is briefly as follows: the respondent was convicted by the trial court for the offence of rape, the charging provisions cited being "section 130 (1) and (2) (e) and 131 (1)" of the Penal Code, Cap. 16 RE 2002 ("the Penal Code"). The prosecution's accusation was that on an unknown date between June 2016 and November, 2018 at Umoja Street, within Tunduru District in Ruvuma Region the respondent had sexual intercourse with 'JM', a girl aged eight years. The said conviction earned him life imprisonment.

Resenting the outcome of his trial, the appellant appealed to the High Court on seven grounds of grievance assailing the trial court's judgment on mostly evidential issues.

Before the High Court, the respondent herein, who was the appellant at the time, appeared in person and prosecuted his appeal. The appellant herein, then the respondent, had the services of Mr. Medalakini Emmanuel, learned State Attorney, who valiantly opposed the appeal.

Having heard the parties on the grounds of appeal on record, the High Court retired to compose its judgment. In composing her judgment, the

learned appellate Judge took the view that the charge sheet against the respondent was defective and dealt with that point without hearing the parties on it. She proceeded to quash and set aside the conviction and life sentence against the respondent whose liberty she restored at the end.

As stated earlier, the Director of Public Prosecutions is aggrieved by the High Court's decision, which he now challenges on two grounds:

1. *That, the Honourable Judge erred in law for holding that the charge laid against the respondent was fatally defective for wrong citation of the subsection providing punishment, which in fact did not occasion any failure of justice.*
2. *That, the First Appellate Court erred in law to raise and decide the issue of legality of the charge without inviting the parties to address on that question.*

When the appeal was placed before us for hearing, Ms. Hellen Chuma, learned State Attorney, appeared for the appellant Director of Public Prosecutions but there was no appearance on the part of the respondent.

Upon Ms. Chuma's prayer in terms of Rule 80 (6) of the Tanzania Court of Appeal Rules, 2009, we ordered the hearing to proceed in the absence of the respondent. We did so acting on an affidavit on record made by ACP

Amini M. Mahamba, the Regional Crimes Officer, Ruvuma Region dated 11th August, 2020 that efforts had been made in vain to serve the respondent personally with the notice of the hearing. In addition, we were satisfied that the respondent was served with the notice by publication in the *Daily News* and *Habarileo* newspapers of 3rd August, 2020.

In her submissions, Ms. Chuma was very brief and focused on the second ground of appeal. In essence, she faulted the learned appellate Judge for determining the appeal before her on the issue of alleged invalidity of the charge sheet that she raised *suo motu* in the course of composing her judgment without inviting the parties to address that question. She argued that the course taken by the learned Judge was improper because it abrogated the parties' right to be heard before a judicial decision is taken. On that basis, she urged us to nullify the High Court's judgment and proceed to restore the respondent's conviction and life sentence. Furthermore, she prayed that the matter be remitted to the High Court to hear the parties on the point it raised *suo motu* and or determine the appeal on its merits.

Quite understandably, the learned State Attorney abandoned the first ground of appeal.

We have reviewed the record of appeal in the light of the appellant's submissions. Indeed, it is evident from pages 2 and 3 of the typed judgment that the learned appellate Judge did not address any of the grounds of appeal but raised the alleged invalidity of the charge sheet *suo motu* in the course of composing her judgment and dealt with it without hearing the parties on it. We wish to let the relevant part of the judgment speak for itself:

> *"This appeal was duly heard whereby the appellant appeared himself and the respondent was represented by Mr. Medalakini Emmanuel who opposed the appeal. However, upon perusal of the records of the entire cases file, I wish to state from the outset, unfortunately that this appeal will not be decided on merit."*

The learned appellate Judge went on to state:

> *"I say so because in the course of composing this judgment and upon perusal of the entire records in the file, I have found that the charge sheet [to] which the appellant pleaded was fatally defective for wrong citation."*

In the rest of the judgment, the learned Judge reproduced the entire provisions of sections 130 and 131 of the Penal Code to indicate that the charge sheet against the respondent omitted the citation of the punishment

provisions of subsection (3) of section 131 of the Penal Code. Having galvanized support from a number of decisions of this Court on the point, she took the view that the respondent's trial was unfair particularly on the ground that the respondent was oblivious of the severity of the prescribed punishment. She thus concluded, at page 9 of the typed judgment:

> *"In light of these observations above it is without a flicker of doubt that since the charge institutes a criminal case the same was fatally defective for wrong citation it rendered the whole proceedings a nullity and the appellant never received a fair trial. There was therefore grave injustice to the appellant."*

In the end, the learned Judge quashed and set aside the respondent's conviction and life sentence. The respondent's liberty was, accordingly, restored.

The approach by the learned appellate Judge was most unfortunate, injudicious and unfair as it denied the parties the opportunity to be heard on the point she raised on her own motion. There is no doubt that the abrogation of this right in the instant case rendered the resulting judgment a nullity.

We need to stress that the cardinal principles of natural justice, being the cornerstone of every judicial system, must guide the discharge of judicial

functions at all stages. One of these principles is undoubtedly the right to be heard, requiring the parties concerned to be afforded opportunity to be heard before a final decision is taken. In **Mbeya-Rukwa Auto Parts and Transport v. Jestina Mwakyoma** [2003] T.L.R. 251, we stressed, at pages 264 and 265, that:

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In* ***Ridge v. Baldwin*** *[1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly.* ***We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away.*** *As similarly stated by Lord Morris in* ***Furnell v. Whangarei High School Board*** *[1973] AC 660, 'Natural justice is but fairness writ large and juridically."*
>
> [Emphasis added].

As explained in the above case, the right to be heard in our country is not just a peremptory common law principle but also a fundamental constitutional right guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as one of the attributes of equality before the law.

Where a judicial decision is reached in violation of that right as happened in the instant case, the decision concerned is a nullity and cannot stand. Indeed, the Court has taken that position quite consistently in numerous decisions including **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) where it was held that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it wiii be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

[Emphasis added].

See also **National Housing Corporation v. Tanzania Shoe Company Limited and Others** [1995] TLR 251; and **Margwe Erro and Two Others v. Moshi Bahalulu,** Civil Appeal No. 111 of 2014 (unreported).

In the final analysis, we find merit in this appeal and allow it. In consequence, we reverse the decision of the High Court and restore the respondent's conviction and life sentence. Furthermore, we remit the matter to the learned appellate Judge (Moshi, J.) for her to re-hear and determine,

on the merits, the appeal she dismissed erroneously. In the event that the aforesaid learned Judge cannot re-hear the appeal as directed due to any ground to be recorded in writing, the matter be placed before another Judge for a fresh hearing and determination according to the law.

Order accordingly.

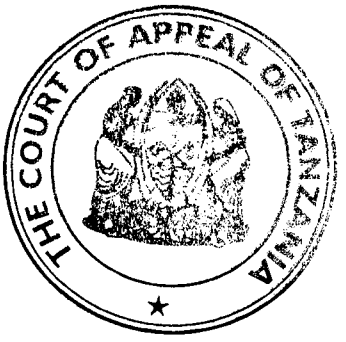
DATED at **IRINGA** this 18th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2020 in the presence of Ms. Edna Mwangulumba assisted by Ms. Jackline Nungu, learned State Attorneys for the Appellant and in the absence of the Respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL