**IN THE COURT OF APPEAL OF TANZANIA**
**AT SHINYANGA**

**(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 563 OF 2016**

**EMMANUEL IDD FARAJA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Shinyanga)**

**(Kibella, J.)**

**dated the 11th day of November, 2016**
**in**
**DC. Criminal Appeal No. 24 of 2016**

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# RULING OF THE COURT

17th & 28th August, 2020

## MWARIJA, J.A.:

The appellant, Emmanuel Idd Faraja and another person who is not a party to this appeal, Hezron Fabian Bugalukanya (to be referred to by his first name of Hezron), were charged in the District Court of Kahama with the offence of gang rape contrary to section 131A (1) and (2) of the Penal Code [Cap.16 R.E 2002]. The prosecution alleged that on 5/1/2015 at about 21:00 at Nyihogo Village within Kahama District in Shinyanga Region, the appellant and Hezron had carnal knowledge of a girl child aged

16 years who, for the purpose of disguising her identity, shall be referred to as "S.J." or "the victim".

The duo denied the charge. However, after completion of the trial, both of them were convicted. The appellant was sentenced to life imprisonment while Hezron, who was a young person aged 16 years, was sentenced to corporal punishment of six strokes of the cane.

The appellant was aggrieved by the decision of the trial court and therefore, appealed to the High Court. His appeal was dismissed hence this second appeal which is predicated on six grounds. For reasons which will be apparent herein however, we need not recite them.

At the hearing of the appeal, the appellant appeared in person unrepresented, through video conferencing linked to Shinyanga District Prison. On its part, the respondent Republic was represented by Mr. Nassoro Katuga, learned Senior State Attorney assisted by Ms. Wampumbulya Shani, learned State Attorney.

Before the hearing of the appeal on merit could commence, Ms. Shani sought and obtained leave of the Court to argue a point of law. The point raised by the learned State Attorney concerned application of section

225 of the Criminal Procedure Act [Cap. 20 R.E 2002] (the CPA) to close the prosecution case. Making reference to the proceedings of the trial court at page 17 of the record of appeal, Ms. Shani submitted that the trial court's order purportedly closing the prosecution case under section 225 of the CPA, was erroneous. At that page of the proceedings the following transpired:

*"Date: 26/5/2015*

*Coram: I. D. Batenzi, RM*

*PP: D/Ssgt Felix*

*Accused: Present*

*B/C: Leticia*

***PP:*** *For hearing we expected for arrival of doctor but he did not come, we pray for another hearing date.*

***Court:*** *This prayer with all intents has to be dismissed the prosecutor was given last adjournment. And since they have failed to bring the witness this court is compelled to invoke the provisions of S.225 of Criminal Procedure Act Cap 20 R.E 2002 and order closure of prosecution case. And indeed I hereby pronounce that the prosecution case is closed.*

*I.D. Batenzi, RM*

***26/5/2015."***

Ms. Shani submitted that the order made by the learned trial Resident Magistrate prejudiced not only the respondent because it was denied the right of calling its witness but also the appellant who was deprived his right to cross-examine the witness. Relying on the cases of **Abdallah Kondo v. Republic,** Criminal Appeal No. 322 of 2015 and **Matimo Sagila & another v. Republic,** Criminal Appeal No. 7 of 2015 (both unreported), the learned State Attorney beseeched us to exercise the Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and quash that order. She urged us further, to order a retrial from the stage at which the trial court purportedly closed the prosecution case.

In reply, the appellant complained that since the impugned order was made by the court, a retrial order will prejudice him because the trial took about eight months and therefore, to recommence it will amount to being penalized for the mistake which was not of his own making.

In rejoinder, Ms. Shani submitted that from the serious nature of the offence and the fact that the respondent did not, as well, contribute to the

making of the order, her prayer for an order that the trial be recommenced from the stage at which the trial court purportedly closed the prosecution case, should be granted.

Having considered the parities' submissions, the crucial matter for our determination is the propriety or otherwise of the impugned order of the trial court. In the order, the trial magistrate did not specify the sub-section of section 225 which he applied to close the prosecution case. However, the relevant provision as regards adjournment of cases is sub-section (4) of that section which provides as follows:

> *"225 – (1) .... N/A*
>
> *(2) .... N/A*
>
> *(3) .... N/A*
>
> *(4). Except for cases involving offences under sections 39, 40, 41, 43, 45, 48(a) and 59, of the Penal Code or offences involving fraud, conspiracy to defraud or forgery, it shall not be lawful for a court to adjourn a case in respect of offences specified in the First Schedule to this Act under the provisions of subsection (1) of this section for an*

*aggregate exceeding sixty days except under the following circumstances-*

*(a) wherever a certificate by a Regional Crimes Officer is filed in court stating the need and grounds for adjourning the case, the court may adjourn the case for a further period not exceeding an aggregate of sixty days in respect of offences stated in the First Schedule to this Act;*

*(b) wherever a certificate is filed in court by the State Attorney stating the need and grounds for seeking a further adjournment beyond the adjournment made under paragraph (a), the court shall adjourn the case for a further period not exceeding, in the aggregate, sixty days;*

*(c) wherever a certificate is filed in court by the Director of Public Prosecutions or a person authorised by him in that behalf stating the need for and grounds for a further adjournment beyond the adjournment made under paragraph (b), the court shall not adjourn such case for a period exceeding an aggregate of twenty four months since the date of the first adjournment given under paragraph (a)."*

From the wording of that provision, we are of the considered view that the same was misapplied by the learned trial Resident Magistrate because it does not vest the court with the power of closing a case for the prosecution. It is trite position that a trial court does not have a right to close the prosecution's case. In the case of **Matimo Sagila and another** (supra) cited by the learned State Attorney, the Court emphasized that principle. It cited a passage in the case of **Frank Mgalla and 2 others v. Republic,** Criminal Case No. 364 of 2015 (unreported) where it was stated that:

> *"The trial court has no such authority to close the prosecution case for whatever reasons. The power to do so is exclusively vested in the person who prosecutes the case as provided under section 231(1) of the CPA ... Thus, the trial court was wrong to do so. In any case, there is a danger for the court being not seen to be impartial."*

Similarly, in the case of **Abdallah Kondo** (supra) also cited by Ms. Shani, the Court had this to say:

> *"Indeed, the order to close the prosecution case by court affects greatly the prosecution for it blocks the*

*prosecution from calling witnesses to prove their case."*

Admittedly, the court is vested with the power of controlling its proceedings and therefore is, in appropriate situations enjoined to check unnecessary adjournments. In doing so however, the move is not to close a party's case but to refuse adjournment, dismiss the charge and discharge the accused person. The Principle was echoed by the Court in **Matimo Sagila & another** (supra) in the following words:

> *"... if the trial magistrate felt that it was improper to adjourn the hearing of that case for whatever reasons, he ought to have dismissed the charge and discharged the accused – see the case of* ***Republic v. Deemay Chrispin and Others*** *[1980] T. L. R. 116, a case whose principle was approved by the court in* ***Abdallah Kondo's case."***

Given the above stated position, we agree with the learned State Attorney that the trial magistrate erred in closing the prosecution case. That act prejudiced the prosecution. For this reason, in the exercise of the powers of revision conferred in the Court by section 4 (2) of the AJA, we quash the trial court's order dated 26/5/2015. As a result, the subsequent

proceedings of the trial court and those of the High Court are hereby nullified. The judgments of the two courts below are also nullified and the appellant's conviction is set aside. We order that the trial be recommenced against the appellant from the stage at which the prosecution case was purportedly closed by the trial court.

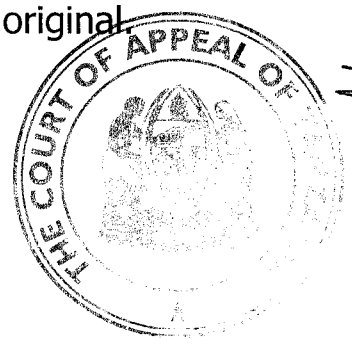
**DATED** at **SHINYANGA** this 28th day of August, 2020.

A.G. MWARIJA
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

The Ruling delivered this 28th day of August, 2020 in presence of the Appellant via Video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**