IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 196 OF 2018

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

ULILO HASSAN..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam

(Mlyambina, J.)

dated the 20th day of June, 2018

in

Criminal Appeal No. 337 of 2017

JUDGMENT OF THE COURT

15th & 30th September, 2020

MWANGESI J. A.:

In the District court of Temeke District at Temeke, ULILO S/O HASSAN, the appellant herein, stood charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E 2002 (now 2019) (**the Code).** It was the case for the prosecution that on the 30th day of December, 2015 at Yombo Vituka area within the District of Temeke in the Region of Dar es Salaam, the appellant did have carnal knowledge of a girl aged 15 years, who for the purpose of concealing her

identity will be referred to as AR. The appellant strongly protested his innocence when the charge was read over to him, a thing that compelled the prosecution to line up four witnesses and tender two exhibits, to establish his guilt. The prosecution witnesses were, AR, who happened to be the victim of the incident (PW1), Hamida Said (PW2), Flora Ng'itu (PW3) and WP 1654 Detective Station Sergeant Lucy (PW4), while the exhibits were a birth certificate of AR (exhibit P1) and a PF3 (exhibit P2).

On his part in defence, the appellant relied on his own affirmed testimony (DW1), which was supplemented by the testimonies of two defence witnesses namely, Asia Mohamed (DW2) and Amina Baina (DW3).

At the end of the day, after the learned Senior Resident Magistrate who presided over the matter, had analyzed the evidence placed before her, was convinced beyond reasonable doubt that the appellant was guilty of the charged offence. She convicted and sentenced him to go to jail for a term of thirty-five (35) years. She further ordered him to pay compensation to the victim at the tune of TZS Five Million (5,000,000/=).

Save for the alteration of the sentence of which, the first appellate High Court reduced it to the statutory term of thirty (30) years, the

appellant's first appeal to the High Court, was unsuccessful. Still undaunted, the appellant has come to the Court for the second and final appeal, premising his grievance on five grounds that were lodged on the 10th April, 2019 which read *verbatim* that: -

1. *That, the learned trial court and the first appellate Court Judge, grossly erred in law and fact in convicting the appellant by relying on the evidence of PW1 (which was a child under 16) which was taken contrary to section 127 (2) of the TEA Cap 6 R.E. 2002.*

2. *That, the learned trial magistrate and the first appellate Judge, grossly erred in law and fact for failure to observe that the prosecution witnesses (PW1 and PW2) were contradictory, unreliable and incredible and had material inconsistencies which rendered their evidence highly improbable against the appellant.*

3. *That, the first appellate Judge, erred in law and in fact for failure to observe the irregularity conducted by the trial magistrate for failure to explain to the appellant the option available to him in giving his defence contrary to section 231 (1) (a) and (b) of the CPA Cap 20 R.E 2002.*

4. *That, the learned trial court and the first appellate Judge, erred in law and fact by ignoring the defence of the appellant.*

5. *That, the lower courts erred in law and fact for failure to observe that the prosecution failed to prove their case beyond reasonable doubt.*

On the 5th June, 2020 the appellant lodged yet another supplementary memorandum of appeal, comprising of three grounds which are worded: -

1. *That, the learned first appellate Judge, erred in law and fact when upholding the appellant's conviction while PW3 (a pant of PW1 with blood stains) (sic), was not proved beyond reasonable doubt whether or not the alleged blood was of PW1 for failure to conduct a DNA test contrary to the procedure of law.*

2. *That, the learned first appellate Judge, erred in law and fact when upholding the appellant's conviction relying on contradictory and deficient evidence of PW1 and PW3 in regard to the place where the victim was examined and*

treated whether it was Malawi Hospital or Yombo dispensary contrary to the procedure of law.

3. *That, the learned first appellate Judge, erred in law and fact when upholding the appellant's conviction while the prosecution failed to prove their case against the appellant beyond any speck of doubt contrary to the procedure of law.*

Before we embark on considering the merits/demerits of the appeal, we think it is apposite to give a brief account of the facts leading to the decision which is the subject of the instant appeal as discerned from the testimonies of the witnesses from either side. It went thus, both the appellant and the victim were at the material time residents of Yombo Vituka area within Temeke District. While the appellant (DW1) was a licenced traditional healer, the victim (AR) was a day scholar student studying in form three at Barabara ya Mwinyi secondary school. According to the testimony of PW2 who was AR's mother, for some time AR had been suffering from epilepsy. In the course of searching for her cure, PW2 happened to get in touch with the appellant to whom she was introduced by her friend, that he was a traditional healer who could treat her daughter.

Upon PW2 discussing with the appellant on the problem which was troubling her daughter, an agreement was made whereby the appellant started to treat AR. The treatment was initially made at the home of PW2 and later at the premises of the appellant which was within the same locality. It was the testimony of AR, that when she was taken by PW2 to the appellant for treatment on the 30th December, the appellant told her while they were only two, that she had to return to his premises while alone at around 14:00 hours so that he could give her some additional medicine.

At around 14:00 hours on the same date, AR complied with the instruction which she had been given by the appellant, whereby she went to the appellant's premises without the knowledge of her mother (PW2). And while they were only two in his room, on the pretext that it was part of the treatment, the appellant raped her with a warning that she was not to disclose it to anyone.

Nonetheless, when AR returned to her home after the sad incident at the appellant's premises, she narrated to her mother (PW2) everything which had been done to her by the appellant and exhibited to her private parts wherein, she was still bleeding as well as her soiled under pants.

Following the revelation made by AR, the issue was reported to the police where AR was issued with a PF3 to take to the Hospital for examination. Eventually, the appellant was arrested and charged with the offence of rape which is the subject of the appeal at hand.

On his part in defence, the appellant conceded to the fact that he is a traditional healer, and that, he once treated AR after being taken to him by her mother (PW2) who was introduced to him by one *Mama Yuu*. He stated further that it was agreed between them that, the costs for the treatment would be TZS. 350,000/=, out of which she managed to clear TZS 50,000/= only. He thereafter, kept on reminding PW2 about payment of the balance which however, was not forthcoming. He was surprised when on the 29th December, 2015 policemen arrived at his home and arrested him without informing him as to what offence he had committed. And when he inquired from them as to what was amiss, they told him that he would be told his offence at the Police Station, where upon arrival, he was charged with the offence of rape which he had no any clue about it.

As earlier hinted above, the version of the appellant was not bought by the trial court, which convicted him to the charged offence and

sentenced him accordingly, a finding which was upheld by the first appellate Court.

During the hearing of the appeal before us, the appellant who was linked to the Court from Ukonga Central Prison where he is serving his sentence via video conference, entered appearance in person, without legal representation, whereas the respondent/Republic, had the joint services of Ms. Aziza Mhina and Ms. Joyce Nyumayo, learned State Attorneys. Upon being invited by the Court to expound his grounds of appeal, the appellant asked us to adopt his grounds of appeal in the way they have been presented in his memorandum and supplementary grounds of appeal as well as the written statement of arguments and the list of authorities, which he had earlier lodged, and let the respondent reply thereto while reserving his right of rejoinder, if need be.

On her part, Ms. Mhina, in responding to the grounds of appeal on behalf of the respondent, prayed to confine her address on the third ground of appeal only which in her view, sufficed to dispose of the entire appeal for the reason that it was based on a legal issue. The learned State Attorney, argued that according to the proceedings as reflected on page 29 of the record of appeal, after the trial court had ruled out that the

appellant had a case to answer following closure of the prosecution case, he was not informed of his right of defence in compliance with the stipulation under the provisions of section 231 of the Criminal Procedure Act, Cap 20 R.E. 2002 **(the CPA).** It was her submission that the omission occasioned by the trial court was fatal as it amounted to unfair trial to the appellant. In so arguing, she placed reliance on the decision in **Frenk Benson Msongole Vs Republic,** Criminal Appeal No. 72'A' of 2016 (unreported).

In view of the irregularity occasioned above, Ms. Mhina implored us to nullify the proceedings of the trial court subsequent to the ruling that the appellant had a case to answer and the judgment thereto, plus the entire proceedings of the first appellate Court as well as its judgment, on account that they emanated from null proceedings against the appellant. On the way forward after the nullification, Ms. Mhina proposed that the case file be remitted to the trial court, to do the needful by complying with the requirement of law as it has been provided under the provisions of section 231 of th**e CPA.**

The brief rejoinder by the appellant was to the effect that in view of the irregularity which had been conceded by the respondent, he be set at

liberty because he was not the cause for the same. After all, he went on to submit, there was no cogent evidence to implicate him to the charged offence which had just been framed up against him because of asking for payment of his money from the treatment which he offered to AR.

What stands for the Court to deliberate and determine in the light of what has been submitted from either side above, is the issue as to whether the irregularities occasioned in the proceedings by the trial court were fatal. And if the answer to the issue is in the affirmative, as to what should be the way forward.

The provisions of section 231 (1) of **the CPA** which Ms. Mhina argues that were flouted by the trial court, bears the following wording, that is: -

> *"(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 witness 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."*

[Emphasis supplied]

What transpired at the trial court after the prosecution had closed its case on the 01st day of August, 2016 in the instant appeal as reflected on page 29 of the record of appeal, goes thus: -

*"**Pros:** We pray to close our case.*

***Court:** Upon going through the adduced evidence this court is of the opinion that the accused has a case to answer.*

Signed

Accused: *I pray for a defence hearing date. I will call three more witnesses apart from me.*

Order: *Defence hearing on the 10th and 11th August, 2016.*

Even though in the light of the words which were stated by the appellant (accused) above before starting to give his defence, appear to suggest that he was aware of what he was supposed to do in defending himself, what is apparent from the proceedings, is the fact that the learned trial Senior Resident Magistrate, failed to discharge his legal duty in compliance with the requirement provided under the provisions of section 231 (1) of **the CPA** quoted above. We note that, the court neither explained to the appellant the substance of the charge which he was facing, nor did it explain to him of his right on the type of defence he wished to apply. Undoubtedly, the omission prejudiced the appellant in preparing his defence, no wonder he has made it one of his grounds of appeal. Since in terms of the provision of section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E. 2019 compliance was imperative from the use of the word "shall", then the infraction occasioned by the trial court, as correctly opined by Ms. Mhina, was fatal.

The Court had an occasion to emphasize on the duty of the trial magistrate to explain to an accused, his basic right on the option to use in entering his defence in terms of section 231 (1) of the Criminal Procedure Act, in the case of **Alex John Vs Republic,** Criminal Appeal No. 129 of 2006 (unreported), with these words; -

> *"This is because, in our view, this provision enshrining the fundamental right to hearing, must be given a liberal and purposive construction if it is to be in conformity with the provision of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977... In including this section in the Act, the legislature intended to impose a duty on a trial court to create or provide an environment for fair hearing or a fair trial."*

When the Court was encountered with a situation akin to the one under discussion in **Maneno Mussa Vs Republic,** Criminal Appeal No. 543 of 2016 (unreported), it stated that: -

> *"Failure by the trial court to comply with the provisions of section 231 (1) of the CPA which safeguards accused person's right to a fair trial, is a fatal omission which vitiated the proceedings."*

The foregoing stance was reiterated by the Court in **Cleopa Mchiwa Sospeter Vs the Republic**, Criminal Appeal No. 51 of 2019 (unreported), where it used the following words, that is: -

> "--- *this Court has oftentimes held that failure to comply with the mandatory provisions of section 231 (1) of the CPA, vitiates subsequent proceedings* ..."

See also: **Frenk Benson Msongole Vs the Republic** (supra), **Ally Juma Faizi @ Mpemba Vs the Republic,** Criminal Appeal No. 401 of 2013, **Richard Malima Vs the Republic,** Criminal Appeal No. 183 of 2010 and **Salumu Nassoro Vs the Republic,** Criminal Appeal No. 234 of 2009 (all unreported), just to mention a few.

In view of the settled position of the law as exemplified in the authorities cited above, there is no gainsaying that the statement by the learned State Attorney, that the proceedings of the trial court from when the prosecution closed its case; was seriously flouted and that it cannot be left to stand; cannot be controverted. That said, we nullify the defence of the appellant and the resultant judgment, quash the conviction and set aside the sentence which was meted against the appellant. In the same vein, we nullify the proceedings of the High Court and its judgment

because they were founded on null defence and and judgment of the trial court.

The subsequent issue which crops up following the nullifications made above, is as to what should be the way forward. There appears to be no hard and fast rule on what should follow where part of the proceedings of the trial court have been nullified by the appellate court for impropriety. From the decided cases, the circumstances of each particular case, seem to be the guiding factor. While for instance, in **Maneno Mussa's** case (supra) as well as in **Cleopa Mchiwa's** case (supra), the Court ordered for retrial of the case from the defence stage, in **Mabula Julius and Another Vs the Republic,** Criminal Appeal No. 562 of 2016 and **Maduhu Sayi @ Nigho,** Criminal Appeal No. 560 of 2016 (both unreported), the Court declined to order for retrial.

In declining to order for retrial in **Mabula Julius's** case (supra), the Court observed that: -

> *"With profound respect to Ms. Mapunda, we decline the invitation to give a retrial order. We have considered the fact that the failure to comply with section 231 (1) (b) of* ***the CPA*** *is tantamount to denying an accused person a fair trial. We have also*

considered that the appellants have served approximately eleven years now since they were convicted and sentenced to serve prison term of thirty (30) years on the 14th August, 2009. With such considerations in mind, we do not think a retrial order will meet the justice of the case. All considered, we order that the appellants be released from prison custody forthwith unless held there for some other lawful cause."

Back to the appeal before us, after dispassionately considering the circumstances surrounding it, we are of the considered view that justice demands that an order of retrial of the defence case be given. We therefore order that the record of this appeal be remitted to the trial District Court for the trial magistrate to address the appellant in terms of section 231 (1) of **the CPA** and proceed to receive the defence evidence from the appellant, before composing a fresh judgment. In case another trial magistrate other than Tarimo SRM takes over and continues with the trial, the provisions of section 214 of **the CPA**, be complied with. Regard being had to the fact that this is an old matter, we direct that its trial be expedited. In the meantime, the appellant should remain in custody to await compliance with this order.

Order accordingly.

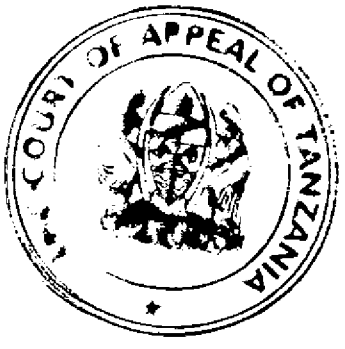
DATED at **DAR ES SALAAM** this 23rd day of September, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Ruling delivered this 30th day of September, 2020 in the presence of the appellant in person and Mr. Adolf Kisima, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL