IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 290 OF 2018

SAID OMARY MTANGI .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Mwandambo, J.)

dated the 2nd day of August, 2018
in
DC. Criminal Appeal No. 62 of 2018

....

JUDGMENT OF THE COURT

22nd September & 6th October, 2020

MWAMBEGELE, J.A.:

The District Court of Kinondoni District of Dar es Salaam Region convicted the appellant of offence of rape contrary to sections 130 (1) and (2) (e) and 131 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now 2019). He was alleged to have had carnal knowledge of a girl aged thirteen years old at Magomeni area. He was sentenced to serve a prison term of thirty years. His first appeal to the High Court against the

conviction and sentence was barren of fruit, for Mwandambo, J. (as he then was) dismissed it in its entirety on 02.08.2018.

In order to appreciate this appeal and the decision we are going to make on it, we find it apt to narrate the background material facts, albeit briefly, as they can be gleaned from the testimony of the prosecution witnesses. They go thus: the victim was a Form II student at Iringa Girls' Secondary School and, on the fateful day, she was on leave. To conceal her identity, we shall refer to her under the pseudonym of DAM or simply PW5; the title under which she testified in court. While on leave, DAM used to go to Turiani Secondary School for tuition classes between 11:00 hours and 03:00 hours, an arrangement which was made by her mother; Lucy Petro Swai (PW1). As Turiani Secondary School was in the neighbourhood, just a kilometre away, she used to go on foot to and fro. On 26.11.2015; DAM had gone there for the usual tuition classes. On her way back home, at about 15:00 hours, at Magomeni Fundikira area, she met the appellant who masqueraded as a police detective who was on an investigating mission of a certain criminal. The appellant asked the victim to accompany him in the mission. After some gimmicks of the appellant

moving here and there pretending to be in the mission, he managed to lure the victim into a guest house in which he asked her to take bath and sleep. Deep in the night, the appellant raped victim. In the morning, he also had carnal knowledge of her against the order of nature.

In the morning, the appellant proceeded with his gimmicks; moving from one place to another and lastly, at Ali Hassan Mwinyi School, he told her to wait so that he could take money somewhere to give her. But hardly had the appellant moved a step, the victim heard someone calling her name. When she turned to see who was calling her, she saw Zuhura Said (PW2) and a certain Mary (PW3). Realising that PW5 might have met her relatives, the appellant took to his heels and jumped over a certain fence and, in that process, he dropped behind his diary and two identity cards bearing his name.

The victim was taken to Mwananyamala Hospital where Shallyomari Sebo (PW4); a clinical officer, medically examined her and found that there had been a forced penetration in her vagina and there were sperms as well. PW4 posted the results of his examination to a PF3 which was admitted in evidence as Exh. P1.

In his defence at the trial, the appellant dissociated himself with the charges levelled against him. He came with a different episode altogether stating that he worked for PW3 who owed him. That she owed him Tshs. 450,000/= but paid him only Tshs. 150,000/=. Without testifying if his arrest had any connection with the money PW3 owed him, the appellant testified that he was arrested on 05.12.2015 by two persons who beat him and took him to the police station where he was told that he had raped and the present charge preferred against him.

As already alluded to above, the appellant was arraigned, found guilty, convicted and sentenced in the manner stated. His unsuccessful appeal to the High Court was premised on eleven grounds. This second appeal is predicated on a total of fourteen grounds of complaint comprised in two memoranda of appeal. The memorandum of appeal comprised ten grounds of grievance while the supplementary memorandum of appeal contained four grounds. However, for reasons that will come to light shortly, we think this appeal may be disposed of on only the ninth ground of the memorandum of appeal as well as the third ground of the supplementary memorandum of appeal. Both grounds bring to the fore a

complaint assailing the first appellate court for upholding a conviction in which the appellant was not afforded his rights under the provisions of section 231 of the Criminal Procedure Act, Cap. 20 the Revised Edition, 2002 (the CPA).

At the hearing of the appeal on 22.09.2020 which was conducted by video conference through the virtual court facility of the Judiciary of Tanzania, the appellant appeared remotely at Ukonga Prison at which he is serving his prison term. Ms. Clara Charwe and Grace Lwila, learned State Attorneys, joined forces to represent the respondent Republic. When we asked the appellant to address the Court on the third and ninth grounds of appeal referred to above, he, first, sought and was granted leave to add two more grounds touching on failure to read exhibits after admission into evidence and that his defence was not considered in the judgment of the trial court. Having so done, he implored us to adopt the grounds of appeal in the memorandum of appeal and the supplementary memorandum of appeal as well as the two additional grounds added at the oral hearing. Without more, he asked the Republic to respond to them and reserved his right of rejoinder, need arising.

Responding on the third and ninth grounds, Ms. Charwe submitted that the complaint by the appellant on these grounds was justified. The learned State Attorney took us to p. 32 of the record of appeal where the trial court ruled that the appellant had a case to answer and asked him to bring witnesses in defence on a date to be fixed. The case was fixed for defence hearing on 17.05.2016 and come that date, the appellant testified in defence. It is indicated nowhere that the appellant was addressed in terms of section 231 of the CPA. That, she submitted, was a fatal ailment which made all the proceedings thereafter and the resultant judgment a nullity. That, Ms. Charwe charged, made the proceedings of the first appellate court a nullity as well. The learned State Attorney thus beseeched us to nullify the proceeding of the trial court after the finding of the appellant having a case to answer and those of the first appellate court as we did in **Maduhu Sayi @ Nigho v. Republic**, Criminal Appeal No. 560 of 2016 (unreported) - [2020] TZCA 1723 at www.tanzlii.org..

With regard to the way forward, the learned State Attorney invited us to remit the record to the trial court so as to comply with section 231 of the CPA, hear the defence and compose a fresh judgment. When prodded

by the Court if the learned State Attorney had any authority which reinforced the course of action suggested, she had none at her fingertips. She was, however, firm that there were several. She was also firm that the evidence led by the prosecution proved the case against the appellant to the hilt, hence the prayer.

Given that the response by the appellant was essentially legalistic, the appellant had very little in rejoinder. He simply implored the Court to consider all his grounds of appeal and release him.

We have considered the complaint by the appellant on the non-compliance with the provisions of section 231 of the CPA, the subject of grounds three and nine in the supplementary memorandum of appeal and memorandum of appeal, respectively. For easy reference, we take the liberty to reproduce subsection (1) of section 231 hereunder, it reads:

> *"(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].

As good luck would have it, the Court has had an opportunity to traverse on this point in a string of its decisions. Such decisions include **Frenk Benson Msongole v. Republic**, Criminal appeal No, 72A of 2016 – [2019] TZCA 317 at www.tanzlii.org, **Maneno Mussa v. Republic**, Criminal Appeal No. 543 of 2016 – [2018] TZCA 242 at www.tanzlii.org, **Cleopa Mchiwa Sospeter v. Republic**, Criminal Appeal No. 51 of 2019 - [2020] TZCA 287 at www.tanzlii.org, **Mabula Julius & Another v. Republic, Criminal Appeal No. 562 of 2016** (supra) - [2020] TZCA

1739 at www.tanzlii.org, **Ulilo Hassan v. Republic**, Criminal Appeal No. 196 of 2018 (unreported) - [2020] TZCA 1792 at www.tanzlii.org and **Maduhu Sayi @ Nigho** (supra) which was cited to us by the learned State Attorney. In all these decisions, we have been firm that failure by a trial court to comply with the mandatory provisions of section 231 (1) of the CPA is a fatal irregularity and vitiates subsequent proceedings. In **Cleopa Mchiwa Sospeter** (supra) we relied on **Maneno Mussa** (supra) to articulate that the provisions of section 231 (1) safeguard the right of the accused to a fair trial. We held:

> *"... failure by the trial court to comply with the provisions of section 231 (1) of the CPA which safeguards accused persons' right to fair trial; is a fatal omission."*

Adverting to the case at hand, that the provisions of section 231 (1) of the CPA were flouted is apparent in the record of appeal. At p. 31, when the prosecution case was closed, the trial court deferred the matter to 10.05.2016. On that date; that is, 10.05.2016, the trial court delivered a two-sentence ruling in which the appellant was found with a case to answer. He was asked to bring witnesses on a date to be slated. Defence

hearing was slated for 17.05.2016. On 17.05.2016, the trial court went straight into the defence hearing. The appellant was never addressed in terms of section 231 (1) of the CPA at the close of the evidence in support of the charge 10.05.2016. Neither was he so addressed on 17.05.2016 before he started to testify in defence. That, on the authorities cited above, was a fatal ailment and prejudiced the appellant. In **Maduhu Sayi @ Nigho** (supra) we articulated the dire need of strict compliance with the section and the trial court recording the accused person's answer on how he intended to exercise those rights. We stated at p. 11 of the typed judgment:

> *"... the record does not show the manner in which the appellant elected to give evidence and whether or not he intended to call witnesses.* ***The trial magistrate was enjoined to record the appellant's answer on how they intended to exercise such rights*** *after having been informed of the same and after the substance of the charge has been explained to him."*
> [Emphasis supplied].

In the case at hand, failure by the appellant to comply with the letter of section 231 (1) of the CPA vitiated all the proceedings thereafter. The infraction also vitiated the proceedings in the first appellate court. In the premises, we agree with Ms. Charwe that the appellant's complaint in this regard is meritorious. In the circumstances, we nullify the proceedings of the trial court after the closure of the prosecution's case including the ultimate judgment. In the same token, we nullify the proceeding in the first appellate court and the decision thereon, for they stem from a partly null proceedings and null judgment of the trial court.

Next for consideration is the way forward. Ms. Charwe implored us to remit the record to the trial court so that section 231 of the CPA is complied with. In **Ulilo Hassan** (supra), we observed that there is no hard and fast rule on what should follow after the court has held that section 231 has been flouted and subsequent proceedings nullified. We observed:

> *"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 v. Republic**, Criminal Appeal No. 562 of 2016 and **Maduhu Sayi @ Nigho v. Republic**, Criminal Appeal No. 560 of 2016 (both unreported), the Court declined to order for a retrial."*

Having considered the facts of the present case, we think its circumstances fall with the ones in **Maneno Mussa** (supra) and **Cleopa Mchiwa** (supra). However, for fear of preempting the retrial, which order we intend to make shortly, we refrain from going into the reasons why.

As the two grounds dispose of the appeal, we refrain from considering the other grounds of the memorandum of appeal and supplementary memorandum of appeal. We reserve their consideration until some other opportune moment.

The above said and done; that is, having nullified the proceedings and the decisions thereon of the two courts below, we remit the matter to

the trial court for compliance with section 231 (1) of the CPA. In the meanwhile, the appellant should remain in custody to await giving his defence after being addressed in terms of section 231 (1) of the CPA. We order that the order be complied with expeditiously. This appeal is allowed to the extent stated.

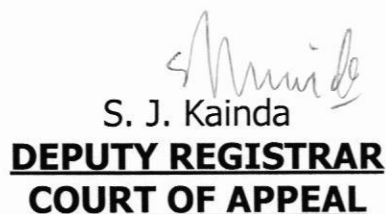
DATED at **DAR ES SALAAM** this 30th day of September, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered this 6th day of October, 2020 in the presence of Appellant in person through video conference and Mr. Adolf Kissima, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL