IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 284 OF 2019

JACKSON DAVID@ LINUS .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kilekamajenga, J.)

Dated 30th Day of April, 2019
in
Criminal Appeal No. 21 of 2018

JUDGMENT OF THE COURT

8th & 17th December, 2020

MUGASHA, J.A.:

The appellant herein was charged before the District Court of Biharamulo at Biharamulo with the offence of rape contrary to section 130 (1) and (2) (e) of the Penal Code Cap 16 RE. 2002. It was alleged that, on 20/8/2017, at night time the appellant, did unlawfully have sexual intercourse with a school girl who we shall refer as C.B or the victim so as to conceal her identity.

What led to the arraignment and conviction of the appellant is hereby summarized as follows: On the fateful day, the appellant went at the residence of C.B and found her washing her clothes. It is alleged that he convinced her and she obliged to go to his house to be given vitenge cloth. While there, the appellant seduced her to make love with him but she declined. Suddenly, the victim's mother surfaced and on seeing her the victim ran into the bush. After her mother had left, the victim returned to the appellant's house and she claimed to have been forcefully raped by the appellant. She felt pains and blood was oozing out from the private parts. Then she went home and narrated the episode to her mother who called a neighbour and proceeded to report the matter to a Ward Executive Office (WEO) one Momeli Baryahari who testified as PW2. The WEO arrested the appellant and took him to the Nyanza Police Station together with the victim. The victim was issued with a PF3 and upon medical examination by Doctor Christopher Samba (PW4), he established that the victim was actually raped. According to PW2, upon being interrogated, the appellant confessed to have committed the offence. However, the statement was not exhibited in evidence.

In his defence the appellant denied the accusations by the prosecution. Upon being satisfied that the prosecution account is true, the trial court concluded that the victim was actually raped in terms of the victim's account as corroborated by the evidence of PW2, PW3 and PW4. As such, the victim was convicted and sentenced to imprisonment to 30 years.

Aggrieved, the appellant unsuccessfully appealed to the High Court whereby the learned High Court Judge, apart from concluding that the prosecution had failed to prove the charge because the age of the victim was not established, he ordered a retrial on account of what is reflected at page 54 to 55 of the record as follows:

> *"However, despite the fact that the prosecution failed to establish its case beyond reasonable doubt, I still believe that justice needs to be done. What the victim needs is to see is justice being done and not otherwise. The victim does not know the legal technicalities and she believes that the court will deliver the expected justice. Further the appellant raised a serious allegation that the case was cooked and that he was arrested only four days after his marriage. Though this might be an afterthought, it*

will be an injustice if he is not given opportunity to substantiate this allegation.

...Taking into consideration and the seriousness of the offence, and the fact that the offenses are increasingly becoming rampant in our society, I find it fit to quash the proceedings and judgment of the trial court and order retrial of the case before another magistrate so that justice may be done...."

Undaunted, the appellant has preferred the present appeal to this Court raising two grounds of complaint as follows:

1. That, the Hon Judge erred in law and fact to order retrial after the court was satisfied that the prosecution had failed to prove the charge beyond reasonable doubt during trial.
2. That, the High Court erred in law in ordering a retrial having concluded that the casefile changed hands and as such failed to interpret section 214(1) of the Criminal Procedure Act.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. Grey Uhagile, learned State Attorney.

The appellant urged the Court to consider the grounds of complaint and allow order his immediate release. On the other hand, the learned State Attorney supported the appeal. He submitted that the charge was not proved beyond reasonable doubt as the prosecution did not prove the age of the victim which is an essential element of the charged offence of rape. He argued this to have raised doubt which ought to have been resolved in favour of the appellant instead of ordering a retrial which was irregular. To back up the proposition, he cited to us the case of **ZABRON TALIAN VS REPUBLIC,** Criminal Appeal No. 143 of 2011 (unreported). He thus urged the Court to allow the appeal and set the appellant at liberty. The appellant reiterated his earlier prayer to be set free.

After a careful consideration of the grounds of appeal and the record before us, we shall dispose this appeal starting with the second ground of appeal and conclude with the first ground of appeal.

It is the appellant's complaint that the learned High court judge misinterpreted the provisions of section 214(1) of the Criminal Procedure Act Cap 20 RE. 2002 (CPA) which stipulates as follows:

" 214 (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings".

The said provision regulates taking over of a partly heard case by another magistrate for continuation of the trial. We have gathered that what precipitated the appellant's ground of complaint is a remark by the learned High Court Judge at page 54 of the record as follows:

"Furthermore, in passing, I have carefully examined the proceedings of the trial court and realized that the case file was changing hands from one

magistrate to another without ascribing reasons. For instance, the matter began before N.W Mwakatobe, later it was transferred to V.T Bigambo without assigning reasons. It is an established jurisprudence that reasons must be stated whenever the case filed is transferred to another magistrate. This is also contrary to section 214 of the Criminal Procedure Act, Cap 20 RE. 2002..."

Apparently, with respect, this is not what transpired because according to the record, Mwakatobe, RM admitted the appellant to bail and subsequently ordered that preliminary hearing be conducted on 4/12/207. The preliminary hearing was conducted by Bigambo, RM on 4/12/2017 and on the following day, he presided over the trial having recorded the evidence of four prosecution witnesses and that of the appellant who was the sole witness for the defence. He also prepared and delivered the respective judgment. In this regard, in the light of the cited provision and what actually transpired before the trial court, Bigambo, RM was not obliged to assign reasons to commence with the trial. Thus, the second ground of appeal is merited.

Next for consideration is the first ground of appeal whereby the appellant is faulting the first appellate court in ordering a retrial and not allowing the first appeal because the age of the prosecution victim was not proved. It is not disputed that the appellant was charged with the offence of raping a 16 years old school girl contrary to among others, section 130 (1) (2) (e) of the Penal Code which stipulates as follows:

> *"130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

As it can be discerned from the cited provision, the age of the victim is one of the crucial elements in establishing rape under the said category of the offence. In the case at hand, the prosecution did not adduce evidence on the victim's age and this could not have been remedied by her parent who was not among the prosecution witnesses though the record shows that she is the one who set in motion the arraignment of the

appellant having reported the incident to the WEO. In the event the age of the victim was not proved, the category of the offence of rape charged was not proved beyond reasonable doubt by the prosecution as against the appellant. Thus, in view of the weak prosecution evidence as acknowledged by the learned Judge of the High Court, instead of ordering a retrial he should have allowed the appeal and set the appellant at liberty. We are fortified in that account in the light of what we said in the case of **SIMON KITALIKA AND TWO OTHERS VS REPUBLIC**, Criminal Appeal No. 468 of 2016 (unreported) having held:

> *"We are of the view that to require the appellants to stand trial again would be unfair under the circumstance, since it will accord the respondent an opportunity to lead evidence which did not feature at the original trial.* ***A trial may also provide an opportunity for the prosecution to fill the gaps in evidence and even amend the charges."***

[Emphasis supplied]

Moreover, in the case of **FATEHALI MANJI VS REPUBLIC** [1966] 1 EA 343 the defunct East African Court of Appeal among other things, held as follows:

> *" In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should be made where the interests of justice require it."*

In the light of the settled law a retrial cannot be ordered to enable the prosecution to fill the gaps in a repeated trial. In the matter at hand, a retrial as ordered by the High Court would have accorded the prosecution to lead evidence which did not feature in the initial trial which is unfair on the part of the appellant.

In view of what we have endeavoured to discuss, we find the appeal merited and it is hereby allowed. The conviction is quashed, sentences set aside and the appellant should be set at liberty unless otherwise lawfully held.

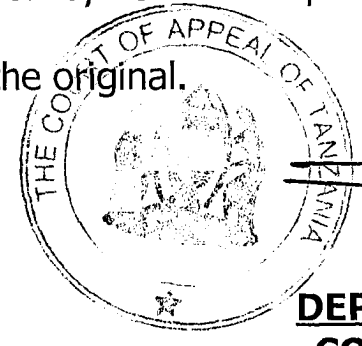
DATED at **BUKOBA** this 16th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 17th day of December, 2020 in the presence of the appellant in person and Mr. Juma Mahona, the 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