IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. and KEREFU, J.A.)

CRIMINAL APPEAL NO. 362 OF 2016

DENNIS DEOGRATIUS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Makani, J.)

dated the 15th day of July, 2016
in
(DC) Criminal Appeal No. 96 of 2015

JUDGMENT OF THE COURT

06th & 12th May, 2020

KWARIKO, J.A.:

Dennis Deogratius, the appellant, was convicted by the District Court of Shinyanga of unnatural offence contrary 154 (1) (a) and (2) of the Penal Code [CAP. 16 R.E. 2002] (now R.E. 2019) and was sentenced to imprisonment of thirty years. Upon being aggrieved by that decision, he appealed to the High Court. His appeal was dismissed and the sentence was enhanced to life imprisonment since the victim was aged below ten years. Following that decision, the appellant is before this Court on appeal.

Due to the circumstances obtaining in this case, we will not reproduce the whole evidence adduced at the trial but as we progress with the judgment, some parts of that evidence will be revisited.

Earlier, on 28/2/2017 the appellant filed a memorandum of appeal containing eight grounds of appeal, which for reason which will be apparent soon we find no need to reproduce them.

At the hearing of the appeal, the appellant appeared via video conference facility from prison being represented by Mr. Kamaliza Kamoga Kayaga, learned advocate. On the other hand, the respondent Republic was represented by Ms. Mercy Ngowi, learned State Attorney.

Before the hearing commenced in earnest, Mr. Kayaga was granted leave to file a supplementary memorandum of appeal in terms of Rule 73(1) of the Tanzania Court of Appeal Rules, 2009 as amended. In the supplementary memorandum of appeal the following two grounds of appeal have been raised: -

> "1. *That the Honourable Judge erred in law to uphold the appellant's conviction by the trial court basing on the illegal evidence of PW1 PILI SHIJA, PW2 GRACE JOSEPH and PW3 SHIJA CHARLES that was wrongly recorded by way of*

a reported speech of the interpreter one PETER MAGENGE.

2. *That in the absence of any evidence properly on record, the sentence of life imprisonment against the appellant is illegal."*

When he took the stage to argue the appeal, Mr. Kayaga first abandoned the memorandum of appeal which was filed by the appellant and preferred to argue the grounds of appeal in the supplementary memorandum of appeal.

Arguing the first ground, Mr. Kayaga submitted that the High Court erred to uphold the conviction of the appellant in the absence of any evidence to that effect. This, he said, is due to the reason that all three prosecution witnesses had their evidence taken contrary to the law. Explaining, he argued that the trial court did not record the words of the witnesses but that of the interpreter Peter Magenge. He thus contended that, that evidence which is found at pages 9 to 14 of the record of appeal, is in the reported speech mode instead of the first-person speech which is no evidence at all. To fortify his argument, Mr. Kayaga referred us to the decisions in the cases of **Juma Bakari v. R**, Criminal Appeal No. 362 'B' of 2009 and **Mabula Damalu & Another**

v. R, Criminal Appeal No. 160 of 2015 (both unreported). He submitted that, in the cited cases, such evidence was expunged. The learned counsel was of the contention therefore, that if the prosecution evidence in the instant case is expunged there remains no evidence at all and the High Court ought to have seen and deal with that anomaly, which was not the case.

Mr. Kayaga argued in respect of the second ground of appeal that, the High Court had no evidence to act upon to uphold the conviction hence it had no right to enhance the sentence. In any case, he argued, there was no evidence to prove the age of the victim. He urged us to allow the appeal. However, the learned counsel argued that there is no reason to order retrial of the appellant because there is no evidence to that effect. He submitted that; the retrial will only give the prosecution opportunity to fill in gaps in the case, for instance, the issue of the age of the victim.

In her reply to the foregoing, Ms. Ngowi supported the appellant's appeal for the reason that the evidence was taken contrary to section 210(1) (b) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA), hence there was no evidence at all. He urged the Court to nullify the proceedings of the courts below, quash the sentence and set aside the

sentence. However, she prayed for an order of a retrial of the appellant as it was the case in the cited decisions.

Upon being prompted by the Court, Ms. Ngowi submitted that an order of retrial was necessary because the witnesses did not give evidence at all instead it was the interpreter who was heard and recorded. She also urged us to consider the right of the victim and in any case this matter is not long standing one. Mr. Kayaga did not have anything to add in rejoinder.

We have considered the grounds of appeal and the submissions of the learned counsel for the parties. The issue to decide is whether the appeal has merit.

In relation to the first ground, we fully agree with both parties that the trial court did not comply with the manner in which the evidence ought to be recorded in the subordinate court. Section 210 of the CPA which is relevant in this case provides that: -

> *"(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner–*

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record; and

(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.

In this case, the trial magistrate did not comply with sub-section (1) (b) quoted above as he did not take the evidence of the prosecution witnesses in a narrative form. Instead, it was the evidence of the interpreter, Peter Magenge who was recorded in a reported speech form. For instance, we will let a portion of the evidence of PW1 speak as follows: -

"On 16/6/2014 at about noon time she was playing to the house of Mama Lehel with Lahel, when she was playing Denis (accused person) called; to enter to his room and he told to put off his clothes then to sleep to his bed. She denied, but accused person took of his clothes. Then he slept together to the bed, and then she said...

Similarly, the evidence of PW2 was recorded in part as thus;

"She said at material day on 19/06/2014 at morning she went to be given the maize given by government free, and she returned home at noon time, and cooked a food of family thereafter she returned to the area where they given the food by a government, she returned back home at about 05.00 pm while she never saw PW1 at home."

Likewise, PW3 was recorded as follows;

"..... His wife told that, when she was not at home PW1 was taken by Dennis (accused person) intended to go to the shop to buy sweet for PW1. That why her wife followed to accused person, and saw accused were together with her daughter PW1; to his house, ..."

It is clear from the excerpts reproduced above; the trial magistrate recorded the prosecution evidence in a reported speech instead of a

narrative form in total disregard of the law. Unfortunately, the omission in which the evidence was recorded did not get the attention of the first appellate court. This is not the first time the Court encounters this kind of scenario. It happened for instance, in the cases of **Juma Bakari v. R** and **Mabula Damalu v. R** (supra) cited by Mr. Kayaga and **Malando Charles @ Madwilu v. R,** Criminal Appeal No. 510 of 2016 (unreported). In the case of **Juma Bakari** where the trial magistrate recorded the evidence in a reported form contrary to the law, the Court stated thus;

> *"It is clear from the wording of the provision of sub-section (a) and (b) of section 210 (1) of Cap 20 that in recording the evidence of a witness, the trial magistrate must record it in the first person. In other words he/she must record and not report what the witness says....."*

To show that the trial magistrate had judicial obligation to comply with the mandatory provision of the law in recording the evidence, the Court went on to state that;

> *"Recording of evidence is a function which the trial magistrate must perform. The word used in sub-section (b) of section 210 (1) is "the evidence shall*

not ordinarily...." This means that it was mandatory for the trial magistrate to comply with the said law in recording of the evidence of the witnesses. As there was no compliance, the proceedings were vitiated."

Likewise, in **Malando's** case where the trial magistrate recorded the evidence in a reported speech the Court stated thus;

"Moreover, it is noteworthy to stress that the presiding trial court magistrate is required to take down evidence of each witness in writing in the language of the court. Most importantly, that evidence should be in a form of a narrative and not in reported speech."

We have thus seen that the trial magistrate recorded the prosecution evidence in a reported speech of the interpreter. This means the evidence was not of the witnesses but the statements of the interpreter. This means that there was no evidence from the prosecution upon which conviction could have been grounded. This was fatal irregularity. The first ground of appeal has merit.

We have found in the preceding ground that there was no evidence upon which conviction could have been grounded. We therefore agree with both learned counsel in the second ground that

there was no basis upon which the High Court could have upheld the decision of the trial court and enhance the sentence. This ground too has merit.

Consequently, following the position taken in the cited cases, we find the omission fatal which vitiated the proceedings of the trial court and the resultant appeal proceedings in the first appellate court. We thus nullify the proceedings of the two courts, quash the conviction and set aside the sentence meted out against the appellant. We find the appeal with merit and allow it.

The question which follows now is what is the way forward? Mr. Kayaga argued that an order of retrial would not be proper in this case because there is no evidence at all. Further, according to him, a retrial will only help the prosecution fill in gaps in their evidence. On the other hand, Ms. Ngowi urged us to follow the route which was taken in **Mabula Damalu** and **Malando's cases** and order a retrial. Her reasons were two-fold; first, that, there is no evidence upon which the prosecution would fill in gaps and secondly, it will be in the interest of the victim and the case because it is not a long-standing one.

We have considered the counsel's submission and the case as a whole and we are inclined to leave to the wisdom of the Director of Public Prosecutions to decide whether he would wish to charge the appellant afresh. In the event, on the basis of the above stated reasons, we order the immediate release of the appellant from prison unless his continued incarceration is related to any other lawful cause.

DATED at **TABORA** this 11th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of May, 2020 in the presence of the appellant via video conference and Mr. Kamaliza Kayaga, learned Counsel for the Appellant and Ms. Gladness Senya, 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