IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., MUGASHA, J.A. And LEVIRA,J.A.)

CRIMINAL APPEAL NO 51 OF 2019

CLEOPA MCHIWA SOSPETER..APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Hon. L. Mansoor, J.)

dated the 14th day of November, 2018

in

Criminal Appeal No. 4 of 2018

RULING OF THE COURT

9th & 11th June, 2020

JUMA, C.J.:

The appellant CLEOPA MCHIWA SOSPETER was convicted by the District Court of Dodoma at Dodoma (E. Anangisye—RM), for the offence of rape contrary to section 130 (1)(2)(a) and 131(1) of the Penal Code, Cap. 16 R.E. 2002 and sentenced to serve thirty (30) years in prison. The particulars of the charge were that on the 28th day of January, 2017 at Msamalo village of Chamwino District in Dodoma Region, the appellant

had carnal knowledge of a 90-year-old woman, Sangaya Gulani, without her consent.

At night of 28th January, 2017 the complainant (PW2) who had a running fever, was at home sleeping. One of her grandsons she identified in Swahili as "*mjukuu,*" who happened to be the appellant, passed by to find how his grandmother was progressing. She was still not very well, was her reply when he enquired.

But, in a surprising turn of events, the complainant said that the appellant moved to her bed and began touching her. With one hand massaging and tickling her head, the other hand was stripping off her clothes. He proceeded to have sexual intercourse with her by force, without her consent. Because of her illness, she could neither raise an alarm nor offer any resistance. It was only when the complainant's daughter, Verian Mayanga (PW3) came into the room and flashed light, only to see the appellant having sexual intercourse with his grandmother.

PW3 also gave testimony recalling how earlier in the evening, while she was busy cooking, the appellant who is her own son, arrived at her compound. After turning down her son's request for a meal, he asked

where his grandmother was. The appellant walked to the room where his grandmother was sleeping. PW3 testified that it was torchlight which enabled her to witness the incident as she raised an alarm attracting the villagers. Incensed villagers were about to begin attacking her son who was naked, and she had intervened to let the appellant dress up first. The village executive officer arrived at the house and apprehended the appellant.

Will Kitasuka (PW4), a nurse at Mnase Dispensary, he recalled on 29th January 2017 he had received an old woman who did not know her exact age, complaining that she had been raped. Upon examination, the complainant's vagina had bruises and bloodstains. PW4 concluded that she had been raped. After examining the complainant, PW4 prepared a medical examination report which he tendered as Exhibit P1.

The appellant denied in his sworn defence that he ever committed the offence. He recalled that day he had indeed visited his aunt's residence where he found his grandmother was unwell. Because it was raining, her grandmother advised him to postpone his departure until the following morning. The appellant expressed his surprise, that while still in his grandmother's room, his aunt had closed the door from inside and

raised the alarm. When the villages arrived, she told them that there was an unknown man inside raping her mother. When the door was opened the villagers began to assault him, pushing him back inside as the door was being closed. The appellant stated that PW3 is his aunt, while the complainant is his grandmother.

In convicting the appellant, the trial court found that the prosecution evidence left no doubt that the appellant committed the offence of rape. The trial court sentenced the appellant to serve thirty (30) years in prison.

In his first appeal to the High Court at Dodoma, the appellant preferred eight grounds of complaints in his petition of appeal. The first, second and third grounds were complaints over the evidence of a nurse, Willy Kitusuka (PW4). The appellant complains that the medical examination report which this witness prepared, was not well scrutinized. It was a report made up of suspicions whether the complainant was raped, instead of reality. The complaint also faults the trial court for failing to consider the lapse of five days which had passed before the appellant was examined by PW4.

The appellant faulted the way the trial court conducted insufficient voire dire before acting on the evidence of a fourteen-year-old Alfred Edwin (PW5).

The High Court dismissed the appeal on 14th September, 2018 prompting this appeal. In his memorandum of appeal filed on 1st June 2020, the appellant raised five grounds of appeal on the basis of which he asked this Court to allow this appeal, quash his conviction and set aside the sentence of 30 years imprisonment. In his first ground, the appellant faults the trial and first appellate courts for failing to consider the evidence of the medical officer who had examined the victim. The second ground contends that the two courts below erred in law for receiving the evidence of a nurse (PW4) who worked at Mnase Dispensary. The third ground asserts that the case for the prosecution was not proved beyond reasonable doubt. In his fourth ground, the appellant complains that the prosecution witnesses gave contradicting evidence which cannot stand to convict the appellant. The fifth ground contends that the identification evidence is not watertight to sustain a conviction. In his sixth ground, the appellant complains that the defence evidence was not considered.

At the hearing of appeal, the appellant appeared remotely by video link to Isanga Central Prison where he was serving his sentence. Unrepresented, the appellant placed full reliance on his grounds of appeal, he also preferred to let the learned State Attorneys to first submit in reply to his grounds of appeal.

Learned Senior State Attorney Mr. Nassoro Katuga, assisted by Mr. Leonard Chalo learned Senior State Attorney and Ms. Grace Mpatili learned State Attorney, appeared for the respondent Republic. Before addressing the grounds of appeal, Mr. Katuga informed us he had a preliminary issue of law affecting the competence of this appeal, which he urged us to determine first.

He contended that at the close of the prosecution evidence in support of the charge of rape levelled against the appellant in the District Court of Dodoma in Criminal Case No. 16 of 2017, the learned trial magistrate did not comply with the mandatory provisions of section 231 (1) of the Criminal Procedure Act, Cap 20 (CPA) on two salient matters. Firstly, the prosecution did not close its case at the close of its evidence in support of the charge. Secondly, apart from not making a Ruling on a case to answer, the learned trial magistrate merely concluded that there

was sufficient evidence against the appellant, without explaining to the appellant the substance of the charge of rape facing him. Thirdly, the appellant was neither informed by the trial magistrate of his right to give evidence on his own behalf nor his right to call witness in his own defence. The relevant provision states:

> *"231 (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 charge 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."

Mr. Katuga referred us to pages 28 and 29 of the record where on 17 July 2017 the prosecution declared that it did not have more witnesses, the learned trial Magistrate (E. Anangisye—RM) failed to explain to the appellant the substance of the charge of rape facing him, and to inform him of his right to give evidence whether or not on oath or affirmation, on his own behalf; and his right to call witness in his defence.

Instead, the learned trial magistrate issued an order explaining that the prosecution had made out its case sufficiently to require the appellant to offer his defence. The procedure which the trial magistrate followed, Mr. Katuga noted, is not proper procedure under section 231 (1) of the CPA. He referred us to page 28 of the record where, instead of closing its case, the prosecutor stated:

"***Prosecutor:*** *We don't intend to call any more witnesses we pray for another date."*

Learned Senior State Attorney also submitted that the appellant was not informed of his right to call witnesses. He argued that while the appellant's right to give evidence was not infringed as is shown on pages 30-34 where he gave a sworn testimony, he was not informed about his right to call defence witnesses.

As a whole, Mr. Katuga submitted that the procedural irregularities he has outlined impacted the appellant's right to be heard. He invited us to invoke the Court's powers of revision under Section 4(2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA), and quash the proceedings from after the last prosecution witness, including judgments of both the trial court and the High Court. He urged us to set aside the conviction and the sentences which the two courts below had imposed on the appellant.

When we asked the appellant to react to Mr. Katuga's submission, he had nothing to say, other than to place his total trust that the Court will do justice to his appeal.

On our part, we agree with the learned Senior State Attorney that this Court has oftentimes held that failure to comply with the mandatory provisions of section 231 (1) of the CPA vitiates subsequent proceedings.

In **FRENK BENSON MSONGOLE VS REPUBLIC** (CRIMINAL APPEAL NO.72A OF 2016) [2019] TZCA 317; (19 AUGUST 2019) (TANZLII) wherein we stated that section 231 (1) of the CPA is crystal clear that, before the accused person makes his defence, the trial court is mandatorily required to address him on his rights and the manner in which he shall make his defence. As we stated in **MANENO MUSSA VS RUPUBLIC** (CRIMINAL APPEAL NO.543 OF 2016) [2018] TZCA 242; (19 APRIL 2018) TANZLII, failure by the trial court to comply with the provisions of section 231 (1) of the CPA which safeguards accused persons' right to a fair trial; is a fatal omission.

As a result, we agree with Mr. Katuga that the procedural irregularity he outlined calls for our intervention by way of our revisional jurisdiction under section 4(2) of the AJA. We as a result, quash and set aside all the proceedings after the last prosecution witness (PW7) in the trial of District Court of Dodoma in Criminal Case No. 16 of 2017 and all subsequent proceedings in the High Court at Dodoma in DC Criminal Appeal No. 4 of 2018.

We order that the record be remitted to the trial District Court for the prosecution to close its case and thereafter for the trial Magistrate to

address the appellant in terms of section 231(1) of the CPA. In case another trial magistrate other than E. Anangisye—RM takes over and continues the expediated trial, the provisions of section 214 of the CPA shall be complied with.

Order accordingly.

DATED at **DODOMA** this 11th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

S.E.A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered on 11th day of June, 2020 in the presence of the Appellant in person and Ms. Chivanenda Luwongo, Senior State Attorney and Mr. Salimu Msemo, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL