IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 265 OF 2017

STEPHANO NYANDWI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Utamwa, J.)

dated 18th day of November, 2016
in
(DC) Criminal Appeal No. 115 of 2016

JUDGMENT OF THE COURT

5th & 7th May, 2021

KWARIKO, J.A.:

The appellant, Stephano Nyandwi was arraigned in the District Court of Urambo at Urambo 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 R.E. 2019]. The prosecution alleged that on the 16th day of October, 2011 at about 11:30 hours at Mkindo Village within Urambo District in Tabora Region the appellant had carnal knowledge of a girl aged fifteen years whose name is withheld and we shall refer her as "EE" or simply the victim.

The appellant denied the charge but at the end of the trial, he was convicted and accordingly sentenced to thirty years imprisonment with an order of compensation to the victim of the offence at the tune of TZS. 500,000.00.

Aggrieved by that decision, the appellant preferred an appeal to the High Court of Tanzania at Tabora. His appeal was found to be devoid of merit and was accordingly dismissed. The appellant is before the Court on a second appeal.

The prosecution case which led to the appellant's conviction was comprised of five witnesses whose evidence can briefly be stated as follows. The victim of the offence (PW1) testified that she was in STD VII and was at home on 16th October, 2011 at about 11:30 hours while his parents had gone to church. Whilst there, the appellant who was a husband to one of her cousins, appeared and saw her entering her brother's house. Thereafter, the appellant followed and grabbed her while covering her mouth and pulled her into the bedroom. While in the bedroom, he undressed her by force and penetrated his male organ into her vagina. As a result, she said, she bled. She went on to state that during that act, PW1 raised

alarm whereupon two women responded. On seeing them the appellant ran away.

On her part, Zainab Daniel (PW2) testified that whilst on her way home, she heard cries and saw PW1 lying beside her father's house while the appellant was nearby wearing his trousers. When she inquired as to what the matter was, the appellant stopped her from further inquiry. Thereafter, PW1 told PW2 that the appellant had raped her. Another witness Sabina Yaredi (PW3) testified that when she responded to the alarm, the appellant had already left. Information of the incident was sent to the village office and then police station where PW1 was given a PF3 to go to hospital for treatment.

At the hospital, PW1 was attended by Dr. Samson Katimbo (PW5) who testified that upon examination, he found bruises and blood in PW1's vagina. He washed her and prescribed some drugs. His findings were recorded in the PF3 which was admitted in evidence as exhibit P1.

At the close of the prosecution case, the trial court found that a prima facie case had been established against the appellant. He was addressed in terms of section 231 of the Criminal Procedure Act

[CAP 20 R.E. 2002; now R.E. 2019] (the CPA). The defence case was scheduled for 5th July, 2012 but on that date the appellant did not appear following which a warrant of arrest was issued against him. The appellant was arrested and appeared in court on 19th October, 2012. On that date, the appellant was asked to explain away his absence and whether he had any defence to make. At the end, the court ruled out that he had not given reasonable excuse. After which his bail was cancelled and the case was adjourned for judgment which was delivered on 14th November, 2012. In its judgment the trial court found that the offence of rape was proved beyond reasonable doubt against the appellant. As regards his defence, the learned magistrate indicated that when the appellant was afforded opportunity to make his defence, he remained silent. He was subsequently convicted and accordingly sentenced as indicated earlier.

In his appeal before the first appellate court, the appellant complained among other things that he was denied opportunity to give his defence evidence. The High Court's decision was that upon his arrest the appellant failed to give reasonable explanation about his absence and that on his part, he had no any defence to make. According to the learned Judge, the appellant was correctly

convicted in terms of sections 226 and 227 of the CPA. The court found further that the charge was proved beyond reasonable doubt against the appellant and thus dismissed the appeal.

Before this Court, the appellant has raised a total of five grounds of appeal. In the circumstances of the case, we find it proper to start with the fifth ground of appeal which we have paraphrased as follows:

> *That, the first appellate court Judge erred in law to uphold the conviction while the appellant was not afforded a fair trial.*

At the hearing of the appeal, the appellant appeared in person, unrepresented; whilst Ms. Upendo Malulu, learned State Attorney appeared for the respondent Republic. When the appellant was invited to argue his appeal, he only adopted his grounds of appeal and preferred for the State Attorney to reply first reserving his right to rejoin should it be necessary to do so.

For her part, Ms. Malulu supported the appeal specifically in respect of the fifth ground of appeal. She argued in that respect that the appellant was denied opportunity to give his defence and thus was unfairly tried in clear contravention of section 231 of the CPA. The learned counsel argued further that the first appellate court

wrongly applied the provisions of sections 226 and 227 of the CPA because the same are applicable where the accused is convicted and sentenced in absentia. She contended that since the conviction and sentence were erroneous, the appellant deserved to be released from custody.

However, upon being probed by the Court, Ms. Malulu submitted that the prosecution case was intact. She thus urged us to remit the case file to the trial court for the appellant to be heard on defence.

Rejoining, the appellant argued that the omission was committed by the trial court and thus he was not the one to blame. For that reason, he urged us to order for his release from custody.

We have considered this ground of appeal together with the submissions by the parties. We are enjoined to decide whether the appellant was fairly tried. Upon perusal of the court record, we have found that the prosecution case was closed on 15th March, 2012 and the court ruled out that a prima facie case had been established against the appellant sufficiently to require him to make his defence. Thereafter, as stated above, he was addressed in terms of section 231 of the CPA. The appellant said that he would give his defence

on oath and call one witness Magi s/o Samwel of Ulyankulu area. The court scheduled the defence hearing on 11th April, 2012 but on that date the trial magistrate was absent and the case was adjourned to 7th June, 2012 where the appellant said he was sick, then it was adjourned for defence on 5th July, 2012. On that date, the appellant did not appear and a warrant of arrest was issued against him. The matter was fixed to come before the court on 6th August, 2012 but the appellant had not been arrested following which the prosecutor prayed for judgment to be entered in terms of section 227 of the CPA. The court granted the prayer and fixed the date of judgment to be 5th September, 2012 but on that date the trial magistrate said he was indisposed and deferred it to 19th October, 2012.

On that date the appellant appeared as he had already been arrested. The prosecutor prayed for the law to take its course. Thereafter, the court asked the appellant to explain why his bail should not be cancelled and whether he had any defence to make. The appellant explained how he was arrested and the whereabouts of his properties and that he had nothing to say in defence. Consequently, the court ruled out that the appellant had no

reasonable excuse, cancelled his bail and remanded him in prison to await his judgment which was delivered on 14th November, 2012.

According to the sequence of events, it is our considered view that, section 227 of the CPA which was invoked in this case was not applicable in respect of the appellant because, although he had absconded after the close of the prosecution case, he appeared before he was convicted and sentenced. Similarly, section 226 of the CPA could not be applied since the case was not heard in the absence of the appellant until conviction and sentence. For ease of reference, section 226 of the CPA is reproduced as hereunder:

> *"(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit.*
>
> *(2) If the court convicts the accused person in his absence, it may set aside the*

conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.

(3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension and the person effecting such apprehension, shall endorse the date thereof on the back of the warrant of commitment.

(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court."

Whereas section 227 provides that:

"Where in any case to which section 226 does not apply, an accused being tried by a subordinate court fails to appear on the date fixed for the continuation of the hearing after the close of the prosecution case or on the date fixed for the passing of sentence, the court may, if it is satisfied that the accused's attendance cannot be secured without undue delay or expense, proceed to dispose of the

case in accordance with the provisions of section 231 as if the accused, being present, had failed to make any statement or adduce any evidence or, as the case may be, make any further statement or adduce further evidence in relation to any sentence which the court may pass:

Provided that–

(a) where the accused so fails to appear but his advocate appears, the advocate, subject to the provisions of this Act, be entitled to call any defence witness and to address the court as if the accused had been or is convicted, and the advocate shall be entitled to call any witness and to address the court on matters relevant to any sentence which the court may pass; and

(b) where the accused appears on any subsequent date to which the proceedings may have been adjourned, the proceedings under this section on the day or days on which the accused was absent shall not be invalid by reason only of his absence."

Faced with a situation where the appellant had absconded and was convicted in his *absentia* in the case of **Magoiga Magutu @**

Wansima v. R, Criminal Appeal No. 65 of 2015 (unreported), the Court interpreted section 226 (2) of the CPA as follows:

> *"Finally, we turn to the issue regarding the duty the law imposes on trial magistrates under section 226 (2) of the CPA to ask the appellant who had absented from his trial, whether he had any explanation for his absence. It is clear to us that the above sub-section (2) provides a statutory opportunity to a person who fails to appear after an adjournment but he is all the same convicted in absentia; to explain why he did not turn up for his trial."*

-See also **Adam Angelus Mpondi v. R,** Criminal Appeal No. 180 of 2018 (unreported).

Contrary to what has been explained above, in the instant case, the appellant was yet to be convicted when he was arrested. What the trial court ought to have done was to inquire and make a finding in respect of the appellant's bail as it deemed fit. Thereafter, the court ought to have required the appellant to give his defence in terms of section 231 of the CPA which had been addressed to him earlier on 15th March, 2012 before he absconded. This provision says:

"(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."

From the foregoing, it is clear that, the High Court erred in holding that the provisions of sections 226 and 227 of the CPA were properly applied by the trial court thus finding that the appellant was not denied his right to be heard. Further, the omission by the trial court

to comply with the provisions of section 231 of the CPA denied the appellant his right of a fair trial and thus vitiated the proceedings of the trial court from the stage when the appellant was sent to court on 19th October, 2012 following his arrest. We therefore nullify the proceedings of the trial court to the stated extent, its resultant judgment and the proceedings and judgment of the High Court. We thus quash the conviction and set aside the sentence.

As the fifth ground is sufficient to dispose of the appeal, we find no need to discuss other grounds of appeal.

As to the way forward, the learned Senior State Attorney urged us to remit the case file to the trial court for the appellant to be heard on defence before judgment is given because the prosecution case is still intact. For his part, the appellant complained that he was not to blame for the omission but the trial court thus deserving to be released from custody. We are in agreement with the learned Senior State Attorney in that because the appellant was not heard on defence before he was adjudged, justice requires that the case should be heard to conclusion.

On the basis of the foregoing, we remit the case file to the trial court for it to proceed with the trial from 19th October, 2012 when

the appellant was arrested after abscondment. We further direct the trial to be expedited given the fact that the appellant has been in custody for very long now.

DATED at **TABORA** this 6th day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2021 in the presence of the Appellant in person and Ms. Upendo Malulu, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL