IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 250 OF 2017

G.9963 RAPHAEL PAUL @MAKONGOJO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

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

(Maghimbi, J.)

dated the 12th day of June 2017
in
Criminal Appeal No. 134 OF 2016

.....

JUDGMENT OF THE COURT

14th & 30th September, 2021

KIHWELO, J.A.:

In the High Court of Tanzania sitting at Arusha the appellant, G. 9963 Raphael Paul @Makongojo, unsuccessfully challenged the decision of the Resident Magistrate's Court of Arusha in Criminal Case No. 13 of 2016 which convicted him of the offence of Rape contrary to section 130 (1) (2) (a) of the Penal Code, Cap 20 R.E 2002 (now R.E 2019) and was subsequently sentenced to 30 years' imprisonment. Disgruntled with the decision of the High Court the appellant has lodged this appeal against

both conviction and sentence. In order to facilitate an easy appreciation of the case we think, it is desirable to briefly give a historical account of the appeal as gleaned from the totality of the evidence on record.

Mwanahamisi Mikidadi (PW1) a 20 years old secondary school student in Korogwe Girls High School on 16th January, 2016 arrived at Arusha en route to Korogwe, Tanga from Mwanza her home town. Apparently, PW1 decided to stop in Arusha hoping to spend a night at his cousin's residence one Ramadhani Shabani (PW5) as she was tired of the long journey not knowing the ordeal she was going to endure that night. It occurred that PW5 was not at home that evening and therefore PW1 was compelled to look for an alternative accommodation. She decided to go and stay with his friend Rehema Msami (PW10) who lived at Kwamrombo but prior to that she went to get her bus ticket for her final leg to Korogwe the following morning.

According to PW1 she then took a public ride to Kwamrombo where she arrived at around 20:00 hrs and tried to reach PW10 through her

mobile phone, at first PW10 was not reachable, and later PW1's mobile went out of airtime and therefore she was stranded not knowing what to do next. Her attempt to locate PW10's residence did not bear any fruits as she got lost despite the fact that she had once visited the place way back in 2014. She therefore decided to go back to the bus station to take refuge and along the way she met one Stephen Richard (PW2) who curiously wanted to know why PW1 looked stranded as he found her going back and forth. PW1 explained to PW2 what befell her and PW2 using his mobile phone tried to call PW10 who did not answer. As PW1 and PW2 were trying to find PW10's residence which according to PW1 was nearby a petrol station and football ground close to Field Force Unit (FFU), suddenly the appellant appeared and introduced himself that he was a police officer and inquired whether PW1 and PW2 knew each other and upon realizing that they did not know each other, the appellant slapped PW2 on the face and told them to go to the police station and upon PW2 asking the reason for their arrest, the appellant kept shoving them ostensibly claiming that he was taking them to the police station.

Apparently, people who were passing through that area seemed to know very well the appellant who appeared to be familiar to them as they addressed him as a police officer and some went ahead to call him Idd Amin. After a short while the appellant told PW2 to leave and the appellant remained with PW1 alone while he was holding her hand.

At first, PW1 begged the appellant to leave her alone but that invitation was not welcomed by the appellant who instead kept holding PW1's hand and convincingly told her that, he was a police officer and went ahead to show his identification. Having seen the appellant's identification as a police officer PW1 had no option but to believe that she was in safe hands.

It was further told by PW1 that the appellant directed her to follow him to the police station where PW10 was going to meet them. While still holding her hand, he took her to the football ground and when PW1 tried to ask why they were going through the deserted and dark part and avoiding another road on the other side, the appellant suddenly shouted at PW1, "Shut up your mouth you prostitute".

Scared and not knowing what to do next, PW1 started screaming and by then they were at the middle of the football ground as such no one could hear her screaming. It was there and then that the appellant pushed her down and threatened that if she dared to scream he was going to beat her. PW1 kept screaming but her hope for rescue met a dead-end as no one could hear her screams and therefore her attacker, kept waging his dark desires and managed to sit on top of PW1's chest while strangling her. PW1 tried to fight back with zeal and kept screaming which irritated the appellant who slapped PW1 on her face and started beating her furiously until PW1 lost control and was helplessly unconscious. The appellant then undressed PW1 and forcefully had carnal knowledge of her. Upon regaining conscious she found herself naked and realized that she was raped because she felt severe pain on her private parts. She knew that she was raped because until that day she was a virgin but could feel spermatozoa in her vagina.

At that time the appellant was searching her bag and after that he approached PW1 and ordered her to suck his penis. Scared of further beating PW1 unwillingly agreed to suck the appellant's penis and while

sucking him she bit his penis following which the appellant furiously and severely beat PW1 while complaining that PW1 wanted to make him impotent ("Unataka kunifanya hanisi"). The appellant told PW1 that in revenge he would also make her barren and started inserting his fingers on PW1's vagina in an attempt to remove her uterus an act which caused severe pain to PW1. The appellant went on beating PW1 and then took her mobile phone, her money Tshs. 177,000/= and a spray. He then urinated on PW1's vagina and other parts of the body as well as on her clothes and before leaving the scene he threatened PW1 that he was leaving her there and would let bandits come and kill her.

Following that, PW1 dressed up and ran straight to the nearby petrol station for rescue where she explained in detail her story to the petrol station attendant one Zuwena Kupara (PW3) from her arrival in Arusha, until when she was raped by the appellant. She also mentioned and described the appellant to the security guard and (PW3). Initially, PW1's story was not believed but later having seen her identification and the bus ticket her version of the story was believed. Subsequently, PW3 informed

the father of PW1, Mikidadi Hassan (PW4) and then gave her a place to rest as it was 03:00hrs in the morning.

Later that day the matter was reported to Arusha Central Police Station by PW1 who was accompanied by PW5. PW1 graphically described her ordeal and how she identified the appellant who stayed with her for 7 hours from 20:00hrs to 03:00 hrs. She described his physique, colour and his name. She further informed the police that she had bitten the appellant's penis and identified the appellant's name through the identification card which was shown to her by the appellant when they met. PW1 was issued PF3 (exhibit P1) at the police station and later was taken to Mount Meru Hospital for treatment where she was admitted for 10 days.

The account given by Assistant Inspector Mahita (PW6) is that on 17th January, 2016 he was instructed to organise an identification parade which was prepared in accordance with the requirement of the law and that PW1 identified the appellant and an Identification Parade Register (exhibit P3) was prepared. On his part D/Cpl John Ngowi (PW7) testified that on 17th January, 2016 he was assigned to investigate the case

reported by PW1 and went to the scene of crime where he drew the sketch map of the scene of the crime (exhibit P4). He also interrogated the appellant who admittedly complained that his penis was bitten by PW1 and that he prepared a PF3 (exhibit P5) for the appellant. At the hospital, Dr. Joachim Lekundayo Mallya (PW8) examined PW1 and observed that she had sustained bruises around her neck especially on the right side, had swollen eyelids and several bruises along the spine as well as her posterior wall of the vagina was teared. Furthermore, PW8 observed hematoma on the right lateral wall. On the other hand, Dr. Elibariki Kalua (PW9) examined the appellant and observed that his penis was punctured by teeth on the glans and to the shaft.

In a surprising twist of events the appellant elected to exercise his right to remain silent and in terms of section 231(3) of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E 2019) ("the CPA") the trial court drew an adverse inference against the appellant and therefore it invited the prosecution to comment on the failure by the appellant to give evidence. Consequently, the learned State Attorney made final submission and argued that on the strength of the evidence presented by the prosecution

and in particular the evidence of PW1 which was corroborated by other prosecution's witnesses and documentary exhibits the case against the appellant was proved to the hilt.

Thus, in the upshot, the trial court was satisfied that the prosecution accusations were proved beyond reasonable doubt, whereupon the appellant was convicted and sentenced to thirty years imprisonment.

Unhappy, the appellant preferred an appeal to the High Court where upon hearing the appeal, the first appellate Judge believed that the prosecution proved its case beyond reasonable doubt and that the appellant was afforded fair trial from the beginning of the case to the end of the trial and that, the appellant even prayed for adjournment in order to engage an advocate and the prayer was granted. The Judge went further to state that, the appellant was accorded the right to cross examine every prosecution witness who testified and was also given the right to defend but elected to exercise his right to remain silent. Consequently, the Judge upheld the conviction and sentence and dismissed the appeal.

Aggrieved further, the appellant presently seeks to overturn the decision of the High Court through a memorandum which is comprised of

four points of grievance which may be paraphrased as follows: **One**, the identification environment was not conducive for proper identification of the appellant. **Two**, the appellant was not correctly identified through the wound said to have been inflicted by PW1. **Three**, the appellant was not accorded a fair trial; and **four**, the prosecution did not prove the charge beyond reasonable doubt.

When, eventually, the matter was placed before us for hearing on 14th September, 2021 the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Adelaide Kassala and Ms. Akisa Mhando, learned Senior State Attorneys and Ms. Tusaje Samwel, learned State Attorney.

Before we address the appeal, we think, we should observe for the benefit of all magistrates and judges, that the conduct of preliminary hearing in this jurisdiction is clearly spelt out under section 192 of the CPA which was initially introduced by rule 6 of the Accelerated Trial and Disposal of Cases Rules 1998 GN 192 of 1988. Our starting point would be restating what the law provides in relation to conducting of preliminary hearing. Section 192 of the CPA which is pertinent to this issue reads:

"(1) Notwithstanding the provisions of sections 229 and 283, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.

(2) In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.

(3) At the conclusion of the preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."

Indeed, the record of the proceedings bears out that, the trial magistrate did not conduct properly the preliminary hearing. For the sake of clarity, we wish to let record of appeal at pages 6 and 9 speak for itself.

> *"**State Attorney**: I pray to read the facts as per section 129 (1) of the CPA.*
>
> ***Court:** Prayer granted*
>
> ***Signed: A.A. JASMIN- RM***
>
> ***15.2.2016***
>
> ***Facts:***
>
> N/A
>
> ***MEMORANDUM OF UNDISPUTED FACTS***
>
> ***Accused:** I do agree all what was read to me by the State Attorney and explained to by the court except fact No. 32 which concerned (sic) with the statement written in the police station.*
>
> ***Court:** Section 192 (1) of the CPA complied with.*
>
> ***Signed: A.A. JASMIN- RM***
>
> ***15.2.2016"***

Looking at the preliminary hearing which was conducted by the trial magistrate, with due respect, it is no doubt that the trial magistrate erred on how to properly conduct the preliminary hearing contravening section

192 of the CPA. Luckily, this Court has in numerous occasions, provided guidance on how to conduct a proper preliminary hearing under section 192 of the CPA. See, for example, **Efraim Lutambi v. Republic,** Criminal Appeal No. 30 of 1996, **Joseph Munene and Another v. Republic,** Criminal Appeal No. 109 of 2002, **Mkombozi Rashid Nassor v. Republic**, Criminal Appeal No. 59 of 2003 and **Christopher Ryoba v. Republic,** Criminal Appeal No. 26 of 2002 (all unreported). A preliminary hearing has several basic steps. **The first step** is for the court to explain to the accused person if he is not represented, the nature and purpose of preliminary hearing and after that the court may put questions to the parties. **The second step** is for the prosecution to read facts of the case constituting elements of the offence in question and tender any document(s) which the prosecution in its opinion thinks can be tendered at this stage. **The third step** is for the court to ask the accused or his advocate if any, on the basis of facts read by the prosecution which matters are not in dispute. **The fourth step** is that the court shall list down all matters which are not in dispute on the basis of which a Memorandum of matters agreed shall be prepared. **The Fifth step** is for the court to read over and explain to the accused in a language that he

understands after which the Memorandum shall be signed by the accused and his advocate (if any) and the prosecutor as well as the Magistrate or Judge.

In the case of **Christopher Ryoba** (supra) while discussing section 192 (3) the Court set out the following steps as mandatory:

> *(a) "Prepare a memorandum of the matters agreed in the presence of the accused and his advocate (if any) and the public prosecutor.*
>
> *(b) The memorandum must:*
>
> *i. be read over and*
>
> *ii. be explained to the accused and in a language understood by the accused*
>
> *(see also **MT 7479 Sgt. Benjamin Holela v. R** (1992) TLR 121.*
>
> *(c) The memorandum must be signed*
>
> *i. by the accused;*
>
> *ii. by his advocate (if any); and*
>
> *iii. by the public prosecutor*
>
> *(d) Then it must be filed as part of the record."*

Turning to the merit of the appeal, when invited to speak, the appellant began his submission on ground three, of unfair trial. In support

of his submission the appellant contended that, he was unfairly tried and convicted because he was denied bail for an offence which is bailable and that the affidavit which was the basis of his denial for bail was neither served upon him in order to afford him an opportunity to counter it nor was it on record. He argued further that, since he was denied bail based upon an affidavit which was not served upon him and that affidavit is not even in record, he was denied bail for no apparent reason. To buttress further his argument, he referred us to page 3 of the record of appeal and contended further that, he did not get bail until the trial came to an end despite the fact that the trial court ordered that bail should not be granted until key witnesses complete their testimonies.

When prompted by the Court on whether he pursued an appeal to the High Court upon denial of his bail, the appellant admittedly argued that he did not appeal against the order of the trial court that denied him bail.

In response, Ms. Kassala who opposed the appeal, at first was quick to respond that there is nowhere in the record of appeal where the appellant applied for bail despite the fact that the appellant is complaining

about irregularities in denying him bail at the trial court. However, she conceded that the appellant was charged for a bailable offence.

Upon being prompted by the Court on whether the alleged affidavit is on record and whether the appellant was given an opportunity to counter the affidavit, Ms. Kassala readily conceded that the said affidavit is not on record and the appellant was not afforded an opportunity to counter the affidavit in support of his denial for bail. She further argued that, it is true that the appellant was not given a fair trial but quickly took a rider that, the appellant had an opportunity to appeal and yet he did not do so.

Upon being further probed by the Court as to the way forward given the apparent irregularity on denial of bail to the appellant without according him right to respond, Ms. Mhando who took over from Ms. Kassala to assist submitted that, in the circumstances surrounding this case where the appellant was not supplied with the affidavit, the affidavit is not on record and furthermore the fact that the appellant was denied the right to be heard in respect of the bail application, this vitiates the entire proceedings of the trial court and therefore, she prayed that the proceedings and judgments of both the trial court and the first appellate

court be nullified, conviction be quashed and sentence be set aside and the matter be remitted back to the trial court for retrial since evidence on record is water tight. To facilitate the appreciation of the proposition put forward by the learned Senior State Attorney, she referred us to the case of **Aron Mathew Kikoti v. Republic,** Criminal Appeal No. 206 of 2013 (unreported).

In rejoinder reply the appellant did not have much to say in respect of this issue but prayed that he should be released because the respondent Republic had ample opportunity to rectify the anomalies.

We have passionately considered the submission by the parties in respect to this ground of appeal and we entirely agree that, the record of appeal before us does not indicate anywhere that the appellant was either served with the affidavit denying him bail in order to counter or was given an opportunity to be heard before his bail was denied and the alleged affidavit is not on the record. The record of appeal at pages 2 and 3 will paint a clear picture:

"Date: 19.1.2016

Coram: Jasmini A.A. RM

Pros: Silayo

Accused: Present

Inter: Kanno

Charge read over and explained to the accused person who is asked to plead thereto.

Accused: It is not true.

***Court**: Entered a plea of not guilty.*

Signed: A.A. JASMIN- RM

19.1.2016

***State Attorney:** Investigation is complete we pray for preliminary hearing date. We also pray to file an affidavit to denies (sic) the bail of the accused. In the (sic) regard we pray for statement (sic) adjourned so as to proceed with the order.*

***Court:** Having gone through the submission by the State Attorney and the affidavit sworn by one Faustine Mafwele a Police Officer regarding the bail of the accused person, this court is hereby grant (sic) the prayer made by the State Attorney basing on the reason adduced in the affidavit and that the*

accused bail is suspended until key witnesses complete their testimony.

Signed: A.A. JASMIN- RM
19.1.2016"

The excerpt above is conspicuously clear that the appellant on the day when the matter came for the first time before the trial court, he was denied bail on the basis of the affidavit which was said to have been lodged in court and sworn by Faustine Mafwele. However, the record is silent on whether the appellant was in any way given an opportunity to be heard leave alone to be served with that affidavit. This is contrary to the dictates of the law that in the eyes of the law every man is honest and innocent, unless it is proved legally to the contrary.

This Court has in numerous occasions, emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. See for example **D.P.P. v. Sabina Tesha & Others** [1992] TLR 237, **Transport Equipment v. Devram Valambhia** [1998] TLR 89, **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251 and **ECO-TECH (Zanzibar) Limited v. Government of**

Zanzibar, ZNZ Civil Application No. 1 of 2007 (unreported), just to mention a few.

The right to be heard is one of the fundamental constitutional rights as it was religiously stated in the case of **Mbeya-Rukwa** (supra) at page 265 thus:

> *"In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law and declares in part:*
>
> ***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."***

In the above case, the Court stressed that a party does not only have the right to be heard but to be fully heard. The right of a party to be heard was similarly discussed in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) in which the Court among other things observed as follows:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

See also- **VIP Engineering and Marketing Limited and Others v. CITI Bank Tanzania Limited**, Consolidated Civil References No. 5, 6, 7 and 8 of 2008, **Samson Ng'walida v. The Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 and **R.S.A Limited v. Hanspaul Automechs Limited and Another**, Civil Appeal No. 179 of 2016 (all unreported). In the latter case, the respondent faulted the learned trial judge for dismissing the points of objection without hearing the parties in violation of the fundamental constitutional right to be heard and contended that the parties were prejudiced. The Court declared the entire judgment a nullity.

As hinted earlier on, the learned trial magistrate granted the prayer to deny bail to the appellant based upon the affidavit which was not served

upon the appellant and the appellant was not given an opportunity to be heard before his right for bail was curtailed. This is contrary to the fundamental right to be heard. Unfortunately, the judge on a first appeal did not notice this anomaly.

Thus, in view of what we have endeavoured to discuss, we are satisfied that the appellant was denied the right to be heard on the crucial question of bail that touched upon his individual liberty and we are further satisfied that the denial was in violation of the fundamental constitutional right to be heard and the appellant was prejudiced. This renders the proceedings and judgment of the trial court a nullity. In the event the proceedings and judgment of the first appellate court emanating from a nullity is equally nullified.

As hinted at the beginning the appellant preferred four grounds of appeal, however, this issue alone is sufficient to dispose of this appeal, we shall not make a painstaking inquiry into the other grounds of appeal raised by the appellant.

As to the way forward in the circumstances of this appeal, this has exercised our minds considerably bearing in mind that, it is not a rule of

the thumb that retrial will always be ordered when the original trial is declared nullity. See, for example **Shaban Abdallah v. Republic,** Criminal Appeal No. 255 of 2013 (unreported). But we are decidedly guided by the celebrated case of **Fatehali Manji v. R** [1966] EA 334 in which the Erstwhile Court of Appeal of East Africa set guidance that an order of retrial should only be made where the interest of justice require and that the court must guard the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial.

In the appeal under our consideration we are firmly of the view that, considering the evidence on record, while refraining to analyse it, we think, with respect, that an order for retrial will be appropriate for the interest of justice.

Consequently, we nullify the proceedings and judgment of the trial court as well as the proceedings and the impugned judgment of the first appellate court. We further quash the conviction and set aside the sentence and direct that the case file be remitted to the trial court and be assigned another magistrate who will proceed from the proceedings of 19/1/2016 when the matter was set down for mention and bail

consideration. In the event, we make an order for an expedited retrial and for avoidance of doubt we order that the appellant should remain in custody to await for a retrial.

DATED at **ARUSHA** this 29th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered on 30th day of September, 2021 in the presence of the appellant in person, and Ms. Lusaje Samuel, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL