IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 465 OF 2019

SIMON LUCAS KIYEYEU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate of Dar es Salaam at Kisutu with Extended Jurisdiction)

(Rumisha, SRM.EXT.JUR.)

Dated the 13th day of September, 2019
in
Criminal Appeal No. 53 of 2019

JUDGMENT OF THE COURT

15th September, & 15th October, 2021.

WAMBALI, J.A.:

Simon Lucas Kiyeyeu, the appellant was arraigned before the District Court of Kigamboni (the trial court) for two counts, to wit; first, rape contrary to the provisions of sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002 (now R.E. 2019), and second, impregnating a school girl contrary to section 60 A (3) of the Education Act, Cap 353 R.E. 2002 as amended by Act No. 4 of 2016.

It was plainly laid in the particulars of the charge with respect to the first count that on divers dates between January and February 2018 at Vijibweni area within Kigamboni District in Dar es Salaam Region, the appellant had carnal knowledge of a girl aged 16 years, who in this judgment, for the purpose of disguising her identity, we will refer her as "HR" or the "victim".

It was further alleged with respect to the second count that on the said divers dates and place the appellant impregnated the victim, a form one student at Vijibweni Secondary School. The appellant strongly denied the allegation leveled against him by the prosecution.

To support its case, the prosecution summoned six witnesses and tendered one exhibit, namely, Police Form No. 3 (the PF3). The appellant was the sole witness in defending the case.

At the height of the trial, the learned Senior Resident Magistrate who presided over the trial, was convinced by the substance of the prosecution evidence and found that the appellant's defence had not raised doubt in the prosecution case. In the end, the appellant was convicted on the first and second counts and sentenced to life imprisonment and thirty (30) years imprisonment respectively.

Aggrieved, the appellant lodged an appeal to the High Court (Criminal Appeal No. 165 of 2019) which was however transferred to the Court of Resident Magistrate of Dar es Salaam at Kisutu exercising extended jurisdiction and was registered as Criminal Appeal No. 53 of 2019.

The first appellate court heard the parties and in the end, the appellant's appeal was dismissed for lacking merit, hence the instant appeal. We wish to state at the onset that for the interest of justice and the reason which will be unveiled shortly, in this judgment we do not intend to make reference to the detailed account of the evidence of the parties adduced at the trial court.

In support of the appeal, the appellant lodged four grounds of appeal. However, it is acknowledged that at the hearing of the appeal which was called in the presence of the appellant in person, unrepresented and Mr. Adolf Festo Kissima and Ms. Imelda Mushi, learned State Attorneys for the respondent Republic, it was unreservedly agreed that the determination of the appeal can be disposed of based on the second ground which we paraphrase as follows: -

> *"That the first appellant court erred in law by upholding the appellant's conviction without considering that there was pre-determination of guilt of the appellant by the learned trial Magistrate during the ruling of no case to answer hence unfair trial was occasioned".*

At the outset, when we invited the appellant to submit in support of the appeal, he adopted his grounds of appeal, urged us to allow the appeal and opted to let the respondent Republic's counsel respond to his complaints and retained the right to rejoin if need to do so would arise.

In response, Mr. Kissima outrightly supported the appellant's appeal based on the complaint in the second ground. He explained that according to the record of the proceedings of the trial court in respect of the ruling on no case to answer, there is no doubt that the learned trial Senior Resident Magistrate pre-formed an opinion that the appellant was guilty contrary to the requirement of the law. He submitted further that since the appellant had not defended himself after the closure of the prosecution case, it was improper for the trial court to intimate in that ruling that he was guilty on the strength of the prosecution evidence. In his submission, the determination of guilty was wrongly made before the appellant's

defence was made and considered along that of the prosecution evidence in the record. In his further submission, he stated that the irregularity committed by the trial court at that stage of the trial was fatal to the proceedings that followed as it impeded fair hearing and thus miscarriage of justice was occasioned.

In the circumstances, Mr. Kissima urged the Court to allow the appeal on the strength of the complaint in the second ground, revise and nullify the proceedings of the trial court from the stage of the ruling of no case to answer to the end and those of the Court of Resident Magistrate of Dar es Salaam at Kisutu exercising Extended Jurisdiction, quash the convictions and set aside the sentences imposed on the appellant on both counts.

Ultimately, the learned State Attorney submitted that in the circumstances of this case, for the interest of justice and in order to facilitate fair trial, a retrial be ordered from the stage of composing a ruling of no case to answer before another Magistrate of competent jurisdiction.

After the counsel for the respondent Republic's response, the appellant had nothing to rejoin as he left it to the Court to determine the appeal on the basis of the complaint in the second ground of appeal.

Going by the record of appeal before us, we entirely join hands with the complaint of the appellant on the second ground of appeal and the concession of the counsel for the respondent Republic on the issue of unfair trial. The record of the proceedings bears testimony to the fact that in her ruling on a no case to answer, the trial Senior Resident Magistrate had a pre-determined opinion that the appellant was guilty of the offences charged even before he entered his defence. For avoidance of doubt, we deem it appropriate to reproduce hereunder the relevant part of the said ruling:-

> "***The above piece of evidence points that the accused is guilty,*** *with that I hereby find that a prima facie case has been established ..."*
> *[Emphasis Added]*

From the reproduced part of the ruling, we entertain no doubt that the trial court formed the opinion that on the strength of the prosecution evidence the appellant was guilty without having the knowledge of the nature of the appellant's defence. Admittedly, the determination of guilt of the appellant at that stage of the trial was improper as it was against fair trial and it occasioned miscarriage of justice on his part.

It is instructive to note that faced with an akin situation in **Mussa Daudi v. The Republic,** Criminal Appeal No. 135 of 2019 (unreported) the Court critically considered the irregularity and stated as follows: -

> *"We have shown herein that the learned trial Magistrate, formed a pre-determined opinion that the prosecution proved its case beyond reasonable doubt without subjecting the entire evidence into evaluation and before even hearing the defence case. We are therefore settled that the learned trial Magistrate openly showed bias by inclining to the prosecution case. On account of bias on part of the learned trial Magistrate, the entire proceedings of the trial court cannot be left to stand since, as there is nothing that the appellant could have said would have changed the pre-determined mind of the learned trial Magistrate (see* ***Kabula d/o Luhende v. The Republic*** *(supra)). In that respect, we agree with the learned Senior State Attorney that the appellant was denied his right to a fair hearing. We accordingly invoke section 4 (2) of AJA and declare the proceedings and judgments of two lower courts null and void."*

Similarly, in **Bundala Mayala v. The Republic**, Criminal Appeal No. 148 of 2015 (unreported), the Court made the following pertinent remarks:-

> *"There can be no dispute that before the appellant was called upon to give his defence, the trial court made findings of fact, as captured in the passage quoted above.....with respect, such findings were expected to be found in a judgment, rather than in a ruling of a case to answer. This is because disputed findings of fact can only be legitimately established after a proper evaluation of both the prosecution and the defence case, (see* ***HUSSEIN IDD AND ANOTHER v. R*** *(1998) TLR 166). Since at that stage the trial court had only heard the prosecution case, it could not have established or made any findings of fact. This is, a ruie of the thumb, which every presiding judge of magistrate ought to know. It has its roots in the rules of natural justice, which is the backbone of any fair trial."*

Applying the above observations in the circumstances of this case, we are satisfied that the irregularity committed by the trial court renders the trial and first appellate courts' proceedings a nullity to the extent of

being nullified for occasioning miscarriage of justice on the appellant. In the event, we allow the second ground of appeal which sufficiently disposes of this appeal without considering the remaining grounds as intimated above.

As to the way forward, ordinarily we would have nullified the entire proceedings of the two courts below and order a fresh trial. However, having considered the circumstances of the case at hand, and for the interest of justice, we entirely agree with Mr. Kissima that we should only nullify the proceedings of the trial court from the stage of a ruling of no case to answer and the entire proceedings of the first appellate court, quash the convictions and sentences and order a retrial of the case from that stage.

Consequently, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 to revise and nullify the proceedings of the trial court from the ruling of no case to answer and the entire proceedings of the first appellate court. Accordingly, we quash convictions and set aside the sentences imposed on the appellant. In the result, we remit the trial court file in respect of Criminal Case No. 16 of 2018 and direct that the appellant be retried before another magistrate

from the stage of a ruling of no case to answer. We further order that, pending his retrial, the appellant shall remain in custody.

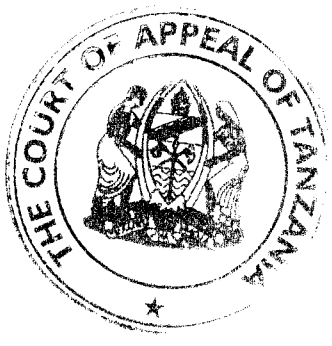
DATED at **DAR ES SALAAM** this 11th day of October, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered on 15th day of October, 2021 in the presence of the appellant in person, and Ms. Estazia Wilson, 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