IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LILA, J.A., KITUSI, J.A. And KAIRO J.A.)

CRIMINAL APPEAL NO. 428 OF 2017

ROBERT MAJENGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania at Mwanza]

(Ebrahim, J)

dated the 23rd day of June, 2017

in

Criminal Appeal No. 113 of 2016

JUDGMENT OF THE COURT

22nd November & 2nd December, 2021

LILA, JA:

In the Resident Magistrate Court of Mara, the appellant, Robert Majengo, was arraigned for attempted rape contrary to section 132 (1) and (2) (a) of the Penal Code [Cap 16 R: E 2002]. It is noteworthy that the alleged victim was a nine (9) year old child who, in order to disguise her identity, we shall henceforth refer to as the victim or PW1.

The appellant was accused of committing the offence on 19/1/2014 at Etaro Village within Butiama District in Mara Region. He

denied the charge, whereupon the prosecution featured five (5) witnesses and tendered a PF3 as an exhibit so as to prove its case.

The prosecution case goes like this. On the fateful day at 18:00hrs, PW1, who gave unsworn evidence because she did not understand the nature of an oath, was on her way back home from buying salt from the shop. She met the appellant who wished to know from her where she was coming from to whom she responded that she was from buying salt. Then the appellant seized the opportunity to pull her into the bush, forcefully pulled down her short, shirt and underwear. He then undressed himself and pulled PW1 down. She cried for help. Among those who responded was one Masatu Masatu (PW3). She tendered white short and black and red stripped underwear which were collectively admitted as exhibit PE1. On his part, PW3 told the trial court that he found the appellant having kneeled down with an erected penis trying to penetrate it into PW1's vagina. He took both the appellant and PW1 to the latter's family and neighbour but there was nobody. He decided to report the matter to PW1's relative as the Village Executive Officer's Office was already closed. Wakirya Rubate (PW2), the victim's mother, who was in hospital attending another child went home and was informed of the incident whereupon checking the victim she found

bruises on her chick, thigh and neck which prompted him to take her to Kigera Police Post where he was issued with a PF3 and proceeded to Musoma Government Hospital for medical examination. At the hospital, Wile Fanuel Dishion (PW5) examined PW1 and he reduced his findings into writing on the PF3 which he tendered as exhibit in which he indicated that he observed bruises on her vagina but was still virgin. A Woman Police, one WP 6548 PC Aisha, who investigated the case, simply collected exhibit PE1 and took the statements of witnesses.

In his sworn defence, the appellant flatly distanced himself from committing the alleged offence. He claimed to have been arrested at the village office where he had gone in response to the summons issued to him whereat he found the victim and her parents who accused him of attempted rape. He admitted being a resident of Etaro Village and knowing PW3 as well as PW1 because her parents were his neighbours.

The trial court convicted the appellant upon being satisfied that the charge was proved beyond reasonable doubt. In its relatively short judgment, it held that the offence was committed during day time and the appellant not being a stranger to PW1, was properly identified. As to who committed the offence, it was satisfied that the unsworn evidence by PW1 was satisfactorily corroborated by PW3 who found the

appellant and PW1 naked and the latter forcing to penetrate the victim's vagina. Consequently, the appellant was convicted as charged and was sentenced to serve thirty (30) years jail term.

The decision of the trial court dissatisfied the appellant. His appeal to the High Court was unsuccessful. Still aggrieved, he has appealed to this Court fronting six grounds of complaints. However for a reason soon to be apparent, we see no reason to recite them.

The appellant appeared in person in this appeal, whereas the respondent Republic was represented by a team of learned brains comprised of Ms. Monica Hokororo, learned Senior State Attorney and Mr. Frank Nchanila and Ms. Agma Haule, both learned State Attorneys.

When we engaged the appellant to amplify his grounds of appeal, he simply complained that if at all he committed the offence, more witnesses would have featured to testify since they were not living alone in the village. He then asked us to determine the appeal basing on his grounds of appeal.

For the respondent, Mr. Nchanila rose to argue the appeal and at the outset he intimate to the Court that he was not resisting the appeal but for a reason other than those advanced by the appellant. While

making reference to various pages of the record of appeal, Mr. Nchanila submitted that the trial magistrate did not comply with the requirements of section 210(1)(a) of the Criminal Procedure Act Cap. 20 R. E. 2002 (now 2019) (the CPA) which imperatively obliged the presiding magistrate to append his/her signature after completing recording evidence of each witness. Failure to do so, he argued, rendered the recorded evidence unauthentic. He pointed out to us page 10 where PW1's evidence ended, page 12 where PW2's evidence was completed, page 13 where recording of PW3's evidence ended, page 16 where evidence of PW4 ended and page 20 where recording of PW5's evidence who was the last prosecution witness ended. He went further to submit that even when the appellant's defence evidence was recorded, the learned trial magistrate did not append his signature at the conclusion of his evidence at page 22 of the record of appeal. With the total omission to append signature, Mr Nchanila invited the Court to invoke its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and nullify the proceedings and judgments of both courts below, quash the conviction and set aside the sentence meted out to the appellant.

Mr. Nchanila, initially, pressed for an order for retrial being made but when he was engaged by the Court whether the victim's evidence

and that of PW3 were consistent and therefore established the charged offence, he retreated. He appreciated the fact that there was a material inconsistence in the evidence by the victim and PW3 as to what exactly transpired which went to the root of the case hence corroded the prosecution case. In the circumstances he urged the Court to set the appellant free.

The issue pointed out by Mr. Nchanila being legal, the appellant had nothing to contribute for a very obvious reason that he is a layperson not knowledgeable with legal matters.

We have carefully perused the proceedings in the record of appeal and we are of the settled mind that the pointed out infraction is apparent on the record of appeal. We wish to associate with Mr. Nchanila as to the position of the law on the manner the witness's evidence should be recorded. A trial magistrate is imperatively required by law to append his signature after he has completed recording the evidence of every witness. This is provided under section 210(1)(a) of the CPA which reads:-

> *"210.-(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witness 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;..."

The record of appeal is loud and clear that the trial magistrate did not sign after recording each witness's evidence hence violating the above provisions of the law which lays down the procedure to be followed in recording evidence of witnesses. By virtue of the law, any omission to append a signature has far reaching consequences that the authenticity of the proceedings is rendered questionable. It creates an uncertainty as to who recorded the evidence such that it cannot be taken to be part of the record of trial [See **Yohana Mussa Makubi and Another vs Republic**, Criminal Appeal No. 556 of 2015 cited in **Chacha Ghati @ Magige vs Republic**, Criminal Appeal No. 406 of 2017 (both unreported)]. That said, in the instant case, there was no evidence on which the appellant's conviction could be grounded.

In the circumstances, we accept the invitation by the learned State Attorney to invoke the revisional powers this Court is clothed with in

terms of section 4(2) of AJA and nullify the proceedings and judgment of the trial court and those of the first appellate court as they emanated from a nullity, quash the conviction and set aside the sentence imposed by the trial court and sustained by the High Court.

Reverting to the question whether or not an order for retrial should be made, one of the essential factors that have to be taken into consideration is the intrinsic gravity of the evidence on record implicating the appellant with the commission of the offence. Where evidence is weak, inconsistent or unreliable or taken in violation of the law such that it is inadmissible no retrial should be ordered for, to do otherwise will accord the prosecution opportunity to correct the anomalies and or fill the yawning gaps in the prosecution case. (See **Fatehali Manji vs Republic** [1966] E. A. 341).

In this case, it is clear that the testimonies by PW1 and PW3 formed the basis of the appellant's conviction. It has often been held by the Court that the evidence by any particular witness or among witnesses implicating the appellant which is tainted with serious and material discrepancies going to the root of the case and which may not be resolved by the court impacts negatively on the prosecution case by rendering it doubtful. [See **Dickson Elia Nsamba Shapwata & Another**

vs Republic, Criminal Appeal No. 92 of 2007 (unreported)]. In the instant case, the learned State Attorney, initially, pressed for an order for retrial being made on account of the testimonies by the two witnesses which, to him, established the offence of attempted rape. He, however, later changed goal posts when we engaged him on whether there existed any inconsistence in the evidence by the two witnesses and also whether there were gaps that may be filled by the prosecution in the event an order for retrial is made. The evidence under scrutiny is that, while the victim's testimony simply stated that the appellant undressed her and himself after which she cried for help and PW3 turned up, PW3 stated that he found both the appellant and the victim kneeled down, the appellant's penis erected and was trying to penetrate it into the victim's genital parts. With respect, given the nature and substance of the above evidence, we are not inclined to agree with the learned State Attorney that there are inconsistences and gaps to be filled. That said, a retrial order will not benefit the prosecution as there are no substantial gaps to be filled or anomalies to correct. No injustice will therefore be occasioned to the appellant.

In fine, we agree with the learned State Attorney that the foregoing reason sufficiently disposes of the appeal. We accordingly

allow the appeal. We find this to be a fit case for making an order for retrial. We, therefore direct the record of the trial court be remitted back so as to commence a trial afresh which should be conducted by another magistrate. Given the time that has passed, we direct both the trial court and the prosecution to expedite the trial. Meanwhile, the appellant has to remain in remand custody awaiting for the trial.

It is so ordered.

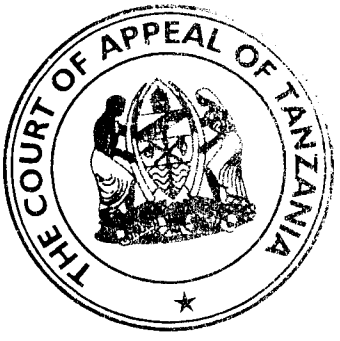
DATED at **MWANZA** this day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the presence of Appellant in person and Ms. Georgina Kinabo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL