IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J. A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 206 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

JABA JOHN .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Mgeyekwa, J.)

dated 28th day of February, 2020

in

(DC) Criminal Appeal No. 87 of 2019

JUDGMENT OF THE COURT

4th & 11th July, 2022

KWARIKO, J.A.:

The respondent in this appeal was arraigned before the District Court of Nyamagana (the trial court) 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. 2022]. The prosecution alleged that on 18th October, 2016 at Nyakato Mahina Area within Nyamagana District in the Region of Mwanza, the respondent had carnal knowledge of one 'JJ' (name withheld to disguise

her identity), a girl aged seven years. He denied the charge. However, at the end of the trial, he was convicted and sentenced to life imprisonment.

Dissatisfied with that decision, the respondent appealed to the High Court of Tanzania at Mwanza (the High Court). However, the appeal was not decided on merit because the proceedings of the trial court were nullified on account that the preliminary hearing was conducted in contravention of the provisions of section 192 (3) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). Consequently, the case was ordered to be tried afresh before the trial court. The decision aggrieved the appellant, hence this appeal.

Before we proceed with the merit or demerit of the appeal, we find it apposite to revisit the background of the matter *albeit* briefly as follows: The respondent was a shoe cobbler. According to the victim who testified as PW5, on 18th October, 2016 at about 13:00 hours she was asked by the respondent to take her shoes to him for polishing. However, when she got into the respondent's hut, the respondent undressed her underpants and had sexual intercourse with her where she felt pain. In the course, a certain lady arrived at the respondent's hut for shoe shinning but encountered the respondent making love to the child and raised an alarm. Some people who were witnessing a motor vehicles' accident which had

just happened somewhere close to the scene responded to the alarm. One of them was the mother of the child 'RM' (PW1) (name withheld to preserve the dignity of the child). PW1 found the respondent's trousers down while PW5 was sitting on the appellant's lap and her underpants was on the ground while the skirt was pulled to the respondent's chest. On seeing her, the respondent was confused and failed to release the girl. Another person was Mary Elias (PW2), who upon arrival at the scene found the respondent dressing-up his trousers and saw sperms on the girls' legs and her private parts.

Other people came to the scene, the respondent was apprehended and sent to Nyakato Police Station where No. WP 5391 Detective Corporal Janeth (PW4) was assigned to investigate the case. She interrogated the respondent but he denied the allegations and thereafter, she issued a PF3 to PW5 to go to the hospital for examination. At Sekou Toure Hospital, Dr. Dani Matari (PW3) examined the girl and found some blood in her vagina with no hymen and could not seat or walk properly. He concluded that the girl had been sexually assaulted. PW3 posted his findings in the PF3 which was admitted in evidence as exhibit PI.

The age of the victim was proved by her father 'JC' who testified as PW6. He tendered the birth certificate which was admitted as exhibit P2

indicating that the victim was born on 16th September, 2008 hence she was eight years old when PW6 testified on 7th August, 2017.

The respondent who was the sole witness for defence, denied the charge. He claimed that the case was fabricated against him due to land dispute between him and his neighbour who happened to be PW6's sister. In relation to what happened on the material day, the respondent testified that at 13:00hours while he was at Mahina Nyangurugu shop which is near his shoe shine hut, a motor vehicle came with three people including a militiaman and PW6's sister. He was arrested and sent to Nyakato Police Station being accused of indecent assault and rape. Later, he was arraigned in court as indicated earlier.

Upon full trial, the trial court found the charge to have been sufficiently proved, entered conviction and sentenced the respondent as indicated above.

As intimated earlier, the appellant preferred his appeal to the High Court. The appeal was duly heard but, in the course of preparing the judgment, the High Court Judge found that the preliminary hearing was not conducted as per the dictates of the law. She thus called upon the parties to address her on that issue. Being a layperson, the respondent had

nothing useful to say, whilst the learned State Attorney for the appellant observed and concurred that during the preliminary hearing, the trial court did not comply with the provisions of section 192 (3) of the CPA but contended that the omission did not prejudice the parties.

On her part, the High Court Judge found that non-compliance with section 192 (3) of the CPA was fatal and thus she nullified the entire proceedings of the trial court and ordered for a retrial of the respondent.

The appellant was not amused with the decision of the High Court, hence preferred this appeal upon the following single ground:

> *"That the High Court Judge erred in law and fact to nullify proceedings and judgment of the trial court on the reason that section 192 (3) of the Criminal Procedure Act was not complied with".*

At the hearing of the appeal, Ms. Ghati Mathayo, learned State Attorney represented the appellant, whilst the respondent appeared in person without legal representation.

On taking the stage to argue the appeal, Ms. Mathayo did not dispute that during the preliminary hearing, the trial court did not read out to the respondent the memorandum of the undisputed facts of the case as required under section 192 (3) of the CPA. However, she argued that the

omission was not fatal to the extent of nullifying the proceedings of the trial court as it was done by the High Court. The learned counsel argued further that, what that court ought to have done is to nullify the proceedings concerning the preliminary hearing. Fortifying her contention, she referred us to the Court's previous decision in **The Republic v. Francis Lijenga,** Criminal Appeal No. 3 of 2019 (unreported).

Upon being probed by the Court on the importance of the preliminary hearing of the case, the learned State Attorney responded that, its aim is to expedite trial of the case by reducing the number of witnesses who would have been called to testify on undisputed facts of the case. She submitted further that, since the trial was conducted where witnesses were called from each side, the omission to read out the undisputed facts of the case did not prejudice the respondent.

Responding further to the Court's probing, the learned State Attorney argued that the High Court erred to conclude in its judgment that the prosecution evidence was strong enough against the respondent while the appeal was not determined on merit, but again surprisingly went ahead and nullified the proceedings of the trial court and ordered a retrial of the case. For this reason and for the interest of justice, the learned counsel

urged the Court to nullify the entire proceedings of the High Court and order the appeal to be heard afresh.

On his part, the respondent made his stance known that he was opposing the appeal because the High Court was right in its decision and he would have preferred for the trial to start afresh.

We have considered the submissions by the parties and have found the issue which calls for our determination is whether non-compliance with section 192 (3) of the CPA by the trial court vitiated its proceedings. We find it instructive to reproduce this provision thus:

> *"At the conclusion of a 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."* [Emphasis supplied].

According to this provision, in the course of the preliminary hearing, the court is enjoined to prepare a memorandum of undisputed facts of the case, read and explain the same to the accused in a language well understood by him and cause it to be signed by the accused and his

advocate, if any. This provision is couched in mandatory terms. It is not disputed that; the trial court neither read out the undisputed facts of the case to the respondent nor caused the same to be signed by him. The question which follows is whether the omission is fatal to the proceedings of the trial court.

It is the position of the law that, the aim of the preliminary hearing is to speed up criminal trials so that matters which are not disputed will be identified and thus witnesses to prove them will not be called to testify hence saving court's time and costs. See for instance the Court's decision in **Kalist Clemence @ Kanyaga v. R,** Criminal Appeal No. 1 of 2000 (unreported). The law also states that failure or erroneous preliminary hearing only vitiates its proceedings and does not vitiate the proceedings of the trial. In the case we have just cited, it was observed that non-compliance with section 192 of the CPA, only vitiates the preliminary hearing proceedings, and not the trial proceedings. The omission does not vitiate the trial proceedings because like in the instant case, the trial was fully conducted where the prosecution called witnesses to support their case and the respondent gave his defence. The Court has had encountered a similar scenario in its previous decisions including **Kalist Clemence @ Kanyaga** (supra), **Kapten Mwaipungu v. R,** Criminal Appeal No. 87 of

2007, **Mwita Nyamhanga Mangure v. R,** Criminal Appeal No. 130 of 2015 and **Hassan Said Twalib v. R,** Criminal Appeal No. 95 of 2019 (all unreported). For instance, in the latter case where the trial court neither read over the undisputed facts of the case nor signed by the appellant, the Court held thus:

> *"This was contrary to section 192 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002]. However, the infraction did not vitiate the proceedings considering that, the trial was fully conducted as the prosecution paraded witnesses who testified at the trial and the appellant had the opportunity to give his defence to counter the prosecution case. Thus, the infraction did not prejudice the appellant in any manner and no injustice was occasioned."*

Therefore, following the cited authorities, we find that the omission did not vitiate the trial court's proceedings. Further, in its judgment, the High Court made conclusion at pages 68 to 69 of the record of appeal that the prosecution evidence was strong enough and reliable and therefore there was no reason to decide otherwise. It is our considered view that this expression is prejudicial to the parties because the court did not determine the grounds of appeal instead its decision was based on the omission in the preliminary hearing which was raised *suo mottu.*

In the circumstances, we agree with the learned State Attorney that the High Court Judge misdirected herself to nullify the proceedings of the trial court on account that section 192 (3) of the CPA was not complied with during preliminary hearing. We therefore allow the appeal and proceed to nullify the appeal proceedings before the High Court from 17th June, 2019 and the resultant judgment dated 28th February, 2020.

As to the way forward, we remit the case to the High Court for the appeal to be heard afresh by another judge on the basis of the petition of appeal which was filed by the respondent on 29th May, 2019.

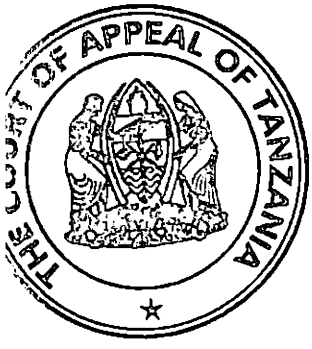
DATED at **MWANZA** this 7th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 11th day of July, 2022 in the presence of the appellant in person, and Ms. Ghati Mathayo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL