IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 470 OF 2019

DUMA ILINDILO PANGARASI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Mbeya at Mbeya)

(Chaungu, SRM – Ext. Juris.)

dated the 19th day of August, 2019
in
DC. Ext. Juris. Criminal Appeal No. 17 of 2019

.....

JUDGMENT OF THE COURT

14th & 25th February, 2022

MKUYE, J.A.:

Before the District of Court of Momba at Chapwa, the appellant, Duma Ilindilo Pangarasi was charged with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, [Cap. 16 R.E. 2002; now R.E. 2019]. It was alleged in the particulars of offence that the appellant, on 7th November, 2016 during day time at Mbao village within Momba District in Songwe Region did have carnal knowledge of a boy aged 8 years against the order of nature. To conceal the victim's

identity, we shall refer to him as GMT or the victim or PW1. Upon a full trial the appellant was found guilty, convicted and sentenced to life imprisonment. Aggrieved by that decision, the appellant appealed to the High Court but his appeal was dismissed for want of merit. Still protesting his innocence, he has now brought this second appeal to this Court.

Before embarking on the merits of appeal, we find it apt to narrate albeit briefly, the facts leading to this appeal.

On the material date 7th November, 2016, GMT was on his way back home from school. He passed through a think forest. At a certain point he sat down to remove a thorn from his foot. No sooner had he completed to remove the said thorn, the appellant who was grazing cattle emerged from nowhere. Apprehensive about something wrong to happen, PW1 took to his heels but the appellant threw a stick which hit him and he fell down.

Upon falling down, the appellant approached him and ordered him to undress otherwise he would kill him. Fearing for his life, PW1 obliged to the order and undressed whereupon the appellant proceeded to have carnal knowledge of him against the order of nature. Having satisfied his

gratification the appellant allowed the victim to go. He ran straight home and informed his father Moris Thadeo (PW2) of what befell him.

Immediately, PW2 inspected the victim and observed that he had defecated on himself. PW2 together with his neighbours searched the assailant with the aid of PW1 and managed to spot him and arrested him while still grazing. Then, the victim and the appellant were taken to the police station where PW1 was issued with a PF3 for medical examination.

PW1 was taken at Kamsamba Dispensary where he was examined by Stanley Samson Simbeye (PW3) who observed that PW1 was carnally known against the order of nature as there were blood and bruises on the anus. He filled the PF3 which was admitted in court as Exh. P1.

In his defence, the appellant gave a general denial to the commission of the offence claiming that he would not have done so because he has two wives and two siblings.

The appellant has marshalled seven (7) grounds of appeal which can be paraphrased as follows: **One,** that the title of the case at the High Court is different from its title in this Court. **Two,** that the successor magistrate did not assign reasons after taking over the case from the predecessor magistrate. **Three,** that PW1, being a child

wrongly pointed at the appellant at the bush. **Four,** that PW2 failed to state the instrument used in examining the victim's anus which was found defecated/diarrhea. **Five,** that PW3 failed to explain the instrument used to examine the swollen anus, bruises and blood in PW1's anal area, which could have been caused by PW2 who had examined him earlier on. **Six,** that the neighbours who assisted PW2 to apprehend the appellant were not summoned to testify in court and that the evidence was from family members. **Seven,** that the prosecution failed to prove the case beyond reasonable doubt.

When the appeal was called on for hearing, the appellant appeared in person and was unrepresented; whereas the respondent Republic enjoyed the services of Mr. Njoloyota Mwashubila, learned Senior State Attorney.

Upon being invited to elaborate his appeal, the appellant sought to adopt his memorandum of appeal and let the learned Senior State Attorney respond first while reserving his right to rejoin later, if need would arise.

On his part, Mr. Mwashubila took off by declaring his stance that he was supporting both the conviction and sentence. After having said so, he assailed the appeal arguing that the 1st, 2nd, 3rd, 4th, 5th and 6th

grounds of appeal were new since they were not put up and decided by the High Court. It was, however, his contention that except for the 2nd ground which is on point of law, this Court lacks jurisdiction to entertain them. In support of his argument, he referred us to the cases of **Galusi s/o Kitaya v. Republic**, Criminal Appeal No. 196 of 2015; and **Barnaba Changalo v. Republic**, Criminal Appeal No. 165 of 2018 (both unreported). He, therefore, implored the Court not to entertain them.

We have considered the learned Senior State Attorney's submission on the issue of new grounds of appeal. After having done so we have compared the grounds of appeal which were filed in the High Court as they appear at pages 36 to 37 of the record of appeal and the ones filed in this Court and we agree with Mr. Mwashubila that, indeed, except for ground no. 2 which is on point of law, the remaining grounds nos. 3, 4, 5 and 6 are new as they were not raised and canvassed by the High Court. It is noteworthy that, under section 4 (1) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), the Court is only empowered to hear and determine appeals from the High Court or subordinate Court exercising extended jurisdiction. In which case, the Court would lack jurisdiction to hear and decide on any ground of appeal

which was not raised and determined by the said courts while acting under their capacities – See **Salum Rajabu Abdul @ Usowambuzi v. Republic**, Criminal Appeal No. 219 of 2017; **Galus Kitaya** (supra); **Barnaba Changalo** (supra); **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015; and **Jumanne Mondelo v. Republic**, Criminal Appeal No. 10 of 2018 (both unreported). For instance, in the case of **Galus Kitaya** (supra) the Court stated that:

> *"The Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts."*

On the basis of the above authorities we, therefore, refrain from entertaining them.

As regards the 2nd ground which is on point of law, we equally agree with Mr. Mwashubila that this Court would have the jurisdiction to deal with it. On this we are guided by the case of **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 (unreported) in which, when the Court was faced with akin situation it stated that:

> *"...those grounds are new. As often stated, where such is the case unless the new ground is based on a point of law the Court will not determine such ground for lack of jurisdiction."*

As a result, based on the above authorities, since ground no. 2 is on point of law, we shall entertain it.

We now move to the remaining ground of appeal in which the appellant's complaint is on the successor magistrate's failure to assign reasons for his taking over the case from the predecessor magistrate. It seems to us that the appellant had in mind that section 214 (1) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA) was not complied with since the appellant contends that the case was heard by two magistrates, the first one being Z. N. Mpangule RM and the second one being J. J. Mhanusi without transfer order, whatever that means.

Responding to the above complaint, Mr. Mwashubila submitted that according to the record of appeal, Z. A. Mpangule RM (the predecessor magistrate) took the evidence of all prosecution and defence side and made an order that the judgment would be delivered on 29th May, 2017. He contended that, the record also shows that the judgment was delivered by Mhanusi RM (the successor magistrate) on 12th July, 2017. He added that although the name of Mpangule RM is indicated at the beginning of the judgment it is not certain as to who between the predecessor and successor magistrate composed the said judgment for lack of signature at the end of the judgment. Due to this

uncertainity, the learned Senior State Attorney argued that failure to sign the judgment was a fatal omission. He, thus, implored the Court to invoke section 4 (2) of the AJA and nullify the judgment of the trial court and the proceedings and judgment of the first appellate court and order for a proper judgment to be composed and signed by the magistrate concerned.

In rejoinder, the appellant prayed to be released from prison since the omission that was detected was not his fault.

We have considered the uncontested submission by Mr. Mwashubila. Our take off would be to recapitulate the law relating to the change of magistrate to which appellant has pegged his complaint as well as judgments in criminal matters.

To begin with, section 214 (1) of the CPA provides:

> *"Where any magistrate after having heard and recorded* ***the whole or part of the evidence in any trial*** *... is for* ***any reason unable to complete the trial*** *... or he is unable to complete the trial ... within a reasonable time,* ***another magistrate who has and who exercises jurisdiction may take over and continue the trial ... and the magistrate so taking over may act on the evidence ... recorded by his predecessor and my***

> ***in the case of a trial*** *and if he considers it necessary, resummon the witnesses and recommence the trial..."*[Emphasis added].

Our reading of the above cited provision is that the successor magistrate can derive jurisdiction to take over and continue or deal with evidence wholly or partly taken by his/her predecessors where the predecessor magistrate is for any reason unable to complete the trial, or to do so within a reasonable time. And, in order for the above to be effected, the reason(s) for such failure are to be recorded in the record of proceedings.

This provision has been tested in numerous decisions of this Court. Among them is the case of **Abdi Masoud @Iboma and 3 Others v. Republic**, Criminal Appeal No. 116 of 2015 (unreported) where the Court had an occasion to interpret the provisions of section 214 of the CPA. In doing so it cited the case of **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported) where it was stated:

> *"...where it is necessary to reassign a partly heard matter* ***to another magistrate, the reason for the failure of the first magistrate to complete must be recorded.*** *If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal*

reasons could just pick up any file and deal with it to the detriment of justice." [Emphasis added].

In this case, we have carefully examined the record of appeal and have noted as correctly submitted by Mr. Mwashubila that from page 9 to 23 the predecessor magistrate recorded the evidence of all four prosecution witnesses and that of the appellant. So, the whole evidence was actually recorded by the predecessor magistrate, meaning that there was no partly heard case. This explains why at page 22 of the record of appeal after the appellant closed his defence case, the predecessor magistrate ordered that the judgment would be on 29th May, 2017. In this regard, there was no change of magistrate envisaged under section 214 of the CPA as the appellant seemed to understand or wanted us to believe so.

However, we also note that the purported judgment that was read out by the successor magistrate was not signed by the predecessor magistrate who presided over the trial. We say the purported judgment because of the uncertainty as to who wrote it.

Section 312 of the CPA gives guidance on how the judgment is to be written. It states as follows:

"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this

Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the points of or determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it was pronounced in open court."

Under the above cited provision, the judgment is mandatorily required to be written personally by the trial judge or magistrate or by another person under his personal direction or superintendence. The judgment has to be in a language of the court; contain points for determination, the decision and reasons for the decision and more importantly, the said judgement must be dated and signed. We think, the purpose of the requirement of showing the date and appending a signature in the judgment is not far-fetched. It is meant to signify its authenticity by the person who authored it.

In our neighbouring country of Kenya, the Court of Appeal was faced with akin scenario where the judgment was not signed – See **Likhanga Shikami and Another v. Illiana Ingasiali Regina**, Civil Appeal No. 28 of 2007; and **Ferdinand Indangasi Musee and Another v. Republic**, Criminal Appeal Nos. 370 & 372 of 2010 (both

unreported). In the former case of **Likhanga Shikami and Another** (supra) the judgment was written by Nambuye, J. and was pronounced by Gacheche, J. However, the said judgment was neither signed nor dated by the judge who wrote it which was contrary to Order XX rule 2 (2) of the Civil Procedure Rules which is in *parimateria* with Order XX rule 3 of the Civil Procedure Code, [Cap 33 R.E. 2019] (the CPC). Also, it was not signed by the judge who pronounced it as per Order XX rule 7 of the Civil Procedure Rules. It was argued before the Court of Appeal that failure to comply with those requirements rendered the judgment null and void. Incidentally, even the other party conceded to the anomaly though the other party implored the Court of Appeal to consider ignoring it as a technicality.

In deciding this issue, the Court of Appeal of Kenya stated that:

> *"In the instant case, the judgment was neither dated nor signed by Nambuye, J. who wrote nor was it dated and counter signed by Gacheche, J. who pronounced it. We, reject Mr. Nyarotso's invitation to consider this omission as a technicality which we should ignore under Article 159 of the Constitution.* ***A judgment which is not signed by the judge who wrote it is no judgement. It is a nullity.***"
> [Emphasis added].

The Court went further to consider the way forward and at the end it stated:

> *"... we find that the prudent approach would be to order a retrial so that the parties can obtain a final determination of their suit from the High Court."*

Yet, in the case of **Ferdinand Indangasi Musee and Another** (supra) an almost similar issue arose. In that case it was argued that as the judgment of the High Court was not signed by the two judges, it was a nullity. It was further argued that, since there was no competent judgment upon which an appeal could have been mounted, the omission was fatal to the extent that the Court of Appeal was precluded from considering the appeal before it on merit.

In its decision, the Court of Appeal found out that although the judgment was crafted by both judges, it was only Odero, J who signed it after delivering it. In the end, it stated that:

> *"By parity of reasoning, it is our considered opinion that in the absence of the signature of the second judge in the instant case renders the alleged judgment if at all a nullity. The omission is not curable at all either by reference to section 382 of the Criminal Procedure Code [section 388 of the Criminal*

Procedure Act] or Article 159 of the Constitution of Kenya."

The Court of Appeal then, allowed the appeal, quashed the conviction and set aside the sentence imposed and ordered for the appeal to be reheard in the superior bench of different two judges from those who presided over the initial appeal.

In this case, as we hinted earlier on, the predecessor magistrate heard and took the whole evidence from all four prosecution witnesses from 16th March, 2017 to 3rd May, 2017. On 15th May, 2017 he recorded the evidence of the appellant and at the end he fixed the date of judgment to be on 29th May, 2017 as shown at pages 21 to 23 of the record of appeal. This presupposes that the predecessor magistrate was set to compose the judgment. However, from there the record is silent as to what transpired until on 12th July, 2017 when the matter appears to have been placed before the successor magistrate and the Public Prosecution informed the court that the matter was coming up for judgment and that they were ready for the said judgment. It would appear that the said judgment was read over by Mhanusi RM despite the uncertainity of its composer. This is so because the record bears out that what followed was antecedents under the title "PREVIOUS

CONVICTION" where the Public Prosecution explained among others that there was no previous conviction which were recorded by the successor magistrate. At page 34 of the record of appeal the successor magistrate continued to record the accused's mitigation and sentenced him. That was on 12th July, 2017. What is clear, as was rightly submitted by the learned Senior State Attorney, is that the record does not show who wrote the judgment as it was neither signed or dated. This omission, in our considered view, amounts to contravention of section 312 (1) of the CPA which in mandatory terms requires among others the judgments to be dated and signed.

Applying the principle stated in the two Kenyan authorities of **Likhanga Shikam** (supra) and **Ferdinand Indangarasi Musee** (supra), which we take inspiration, we find that failure to sign and date the judgment was a fatal omission which is not curable under section 388 of the CPA. It renders the said judgment a nullity. It follows, therefore, as the trial courts judgment is a nullity, even the proceedings and judgment of the first appellate court which emanated from a nullity are also a nullity and, we accordingly nullify them. As such, the 2nd ground of appeal is allowed.

However, since the 2nd ground of appeal has the effect of disposing of the entire appeal, we did not venture to deal with the 7th ground of appeal as doing so would amount to an academic exercise.

Consequently, we allow the appeal, nullify the proceedings of the trial court dated 12th July, 2017 and those of the 1st appellate court together with the judgments thereof, quash the conviction and set aside the sentence. We further order that the matter be remitted to Mbeya Resident Magistrates' Court to enable Z. A. Mpangule compose another judgment in accordance with the law.

It is so ordered.

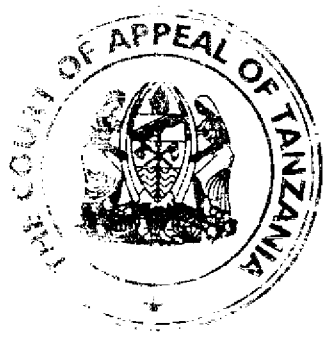
DATED at **MBEYA** this 25th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of the Appellant in person and Ms. Nancy Mushumbusi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL