

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MUGASHA, J.A., FIKIRINI, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 395 OF 2020

THADEO RUBUNGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Order of the Resident Magistrates' Court
at Bukoba)**

(Kiwonde, RM-EXT JUR.)

**dated the 04th day of May, 2020
in
Criminal Appeal No. 61 of 2020**

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JUDGMENT OF THE COURT

2nd & 2nd December, 2022

KENTE, J.A:

This appeal has its genesis in the decision of the Resident Magistrates' Court of Bukoba (Kiwonde RM- Ext. Jur.) in Criminal Appeal No.61 of 2020 dismissing the appeal by Thadeo Rubunga (the appellant), for want of prosecution. Initially the appellant appeared before the District Court of Biharamulo where he was charged with and convicted of two counts namely rape, C/s 130 (1), (2), (e) and 131 (1) of the Penal Code Chapter 16 of the Laws and impregnating a school girl c/s 60A (3) of the Education Act, Chapter 353 of the Laws. He was subsequently given two concurrent sentences of thirty years imprisonment. Dissatisfied

with the convictions and sentences, the appellant appealed to the High Court of Tanzania at Bukoba where the said appeal was transferred to the Resident Magistrates' Court of Bukoba in terms of section 173 and 256A (1) of the Criminal Procedure Act, Chapter 20 of the Laws (the CPA), to be heard by Mr. Kiwonde a Resident Magistrate with Extended Jurisdiction.

After the appeal was transferred from the High Court to the Court of the Resident Magistrate and assigned to Mr. Kiwonde, what transpired thereafter is the subject of the present appeal. Having informed the parties on 23rd April, 2020 that the matter had been transferred from the High Court and assigned to him, the learned Resident Magistrate went on to set it for hearing on 4th May 2020. That was after the appellant had successfully prayed for adjournment as he was not feeling well. However, when the appeal was called for hearing on 4th May, 2020, the appellant prayed the hearing to be further adjourned saying that, he had not prepared himself. That is when the learned Resident Magistrate of the first appellate court seems to have gone completely out of his way and lost patience which is an indispensable attribute of judicial temperament.

It is on the record that when the appellant requested for further adjournment a prayer which was not contested by Ms. Naila the learned

State Attorney then representing the respondent Republic, the learned Resident Magistrate rebuffed in no uncertain terms thus:

"Since the appellant is unable to proceed with the hearing of an appeal and no good reasons are assigned, this is to his detriment. The appeal was adjourned to be heard today right from 23.4.2020 yet the appellant is unprepared; therefore, I dismiss the appeal for want of prosecution".

Dissatisfied, the appellant has appealed against that decision citing four grounds of appeal which, in view of the conclusion that we have reached at in this matter, we will not reproduce. Suffice it to say that, the appellant's main complaints come down to the general complaint that he was prejudiced by the dismissal order as his appeal was dismissed without according him the opportunity to be heard.

At the hearing of the appeal Mr. Nestory Nchiman, learned Senior State Attorney appearing along with Ms. Suzan Masule, learned State Attorney to represent the respondent Republic, conceded that, indeed the appeal had merit as the appellant was denied the fundamental right to be heard. So, the learned Senior State Attorney concluded by submitting that, it was not proper for the learned Resident Magistrate of the first appellate court to condemn the appellant without according him a

hearing. He urged us to allow the appeal, quash the dismissal order and remit the matter to the High Court with a directive that the appeal be heard and determined on merit.

Having considered the appellant's grounds of complaint, together with what Mr. Nchimman has said, we are disposed to share their view that indeed the appellant was denied the right to be heard quite arbitrarily. While we are mindful of our earlier decision in the case of **Emmanuel Idd Faraja v. Republic Criminal Appeal No. 563 of 2016** (unreported) in which we held that, a court of law is vested with the power to control its proceeding and in some situations disregard prayers for unnecessary adjournments, we are charitably of the view that, such powers must be exercised carefully and judiciously, only in deserving cases. This brings us to the need for the cardinal virtue of patience which every judicial officer is enjoined to exhibit as an aspect of proper judicial temperament. In this connection, we pose to remark that, in the instant case, it was necessary for the learned Resident Magistrate of the first appellate court to address his mind to the beleaguered situation in which the appellant who is a very young man then aged 23 found himself. The learned Resident Magistrate was obliged to consider whether the prayer for further adjournment was calculated to delay or obstruct the course of

justice as he erroneously thought or it was intended to give some more time to the appellant to prepare himself to prosecute a meaningful appeal. Unfortunately, however, as it happened, the above said did not at all engage the mind of the learned Resident Magistrate hence his arbitrary order remarking ungraciously that, the appellant was praying for further adjournment at his own peril.

The facts of this case, in our firm view, operated to take it out of the scope of the case of **Emmanuel Faraja** (supra). For, we are quite sure that, if the learned Resident Magistrate of the first appellate court had exercised a little bit of patience, he would have given the appellant an opportunity to prepare himself to prosecute his appeal. He would therefore have further adjourned, the matter which was less than one year old and therefore not even in the category of backlog cases.

With respect, and for the reasons which we have already given herein above, we agree with the learned Senior State Attorney. The order by the learned Resident Magistrate on the first appellate court dismissing the appeal for want of prosecution is quashed and set aside.

In lieu thereof, we order that the casefile be remitted to the High Court at Bukoba for the appeal to be heard and determined according to law.

It is so ordered.

DATED at **BUKOB**A this 2nd day of December, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2022 in the presence of the Appellant in person unrepresented and Ms. Evaresta Kimaro, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.


A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL