

IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 167 OF 2022

BASHIRAKANDI EMMANUEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma

(Mlacha, J.)

dated the 9th day of February, 2022

in

Criminal Appeal No. 40 of 2021

JUDGMENT OF THE COURT

2nd & 5th June, 2023

MUGASHA, J.A.:

The appellant was arraigned before the District Court of Kibondo at Kibondo for the charge of rape contrary to sections 130 (1), (2) (e) and 131 of the Penal Code [CAP 16 R.E. 2022]. In the charge laid against him, it was alleged that on 22/3/2021 during afternoon hours at Nduta Refugee camp within Kibondo District in Kigoma Region, he did have carnal knowledge with A.A. a girl aged 13 years. For the purposes of concealing the identity, the girl shall be referred to as the victim or PW2.

When the charge was read to the appellant, he denied the charge and in order to prove its case, the prosecution paraded nine witnesses and tendered six documentary exhibits namely, the PF3 of the victim (P1), the chain of custody document(P2), the exhibits Register (P3), the search order (P4), the sketch map of the scene of crime (P5) and the cautioned statement of the appellant (P6). The appellant was the sole witness for the defence. After a full trial he was convicted as charged and sentenced to serve a jail term of (30) thirty years. Undaunted, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed and conviction and sentence sustained.

Aggrieved, the appellant has knocked the doors of the Court seeking to demonstrate his innocence. In the Memorandum of Appeal, the appellant has raised among other things a complaint faulting the first appellate court to have dismissed his appeal without taking cognizance of the fact that, being not conversant with the language of the court, he was not accorded the requisite facility of an interpreter and thus, unfairly tried. Owing to the nature of the complaint raised, and on account of what will become apparent in due course we have opted not to reproduce a factual account leading to the conviction of the appellant.

At the hearing, the appellant appeared in person unrepresented whereas the Respondent Republic was represented by Ms. Edna Makala, learned State Attorney.

The appellant who did not understand the language of the court had the services of an interpreter one Patrick Ntahondi who was sworn to interpret Rundi language into Kiswahili and vice versa. As the complaint relates to a point of law, the appellant opted to initially hear the submission of the learned State Attorney reserving a right to rejoin if need arises.

On taking the floor, Ms. Makala submitted that, the appellant was not fairly tried because being a Hutu conversant with Rundi language, he did not understand the language of the court that is, Kiswahili. In this regard, it was pointed out that, despite the presence of an interpreter at the trial, the nature of interpretation rendered remain unknown as the record is silent on the language which was interpreted to the appellant. It was thus argued that, besides what transpired at the trial not being in conformity with the dictates of the provisions of section 211 (1) of the Criminal Procedure Act [CAP 20 R.E. 2022], it occasioned a failure of justice as the appellant was not fairly tried as he could not follow and understand the nature of the charge and subsequent proceedings. On

account of the said omission, the learned State Attorney urged us to annul the entire proceedings and judgments of the courts below and order a fresh trial. To support her stance, she cited to us the cases of **MISANGO SHANTIEL VS REPUBLIC**, Criminal Appeal No. 250 of 2007 and **LEKENI LOKONDOROTU AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 338 of 2015 (both unreported).

On the other hand, this being a point of law, the appellant had nothing useful to add and opted to leave the matter in the hands of the Court for determination.

Having considered the submissions in relation to the ground of complaint and the record before us, we have gathered that, it is glaring that at the trial, the record shows that the appellant is of Hutu tribe who was conversant with Rundi language. On this account, plea taking and hearing were adjourned on several occasions in order to procure the services of an interpreter. However, after the interpreter was procured what transpired is as reflected at page 6 of the record of appeal in the following terms:

"Date: *13.04.2021*

Coram: *M. M. Majula*

PP: *A/Insp. Charles*

Accused: Present

Court Clerk: Ajara

Interpreter – Raymond, sworn in section 4 (b) of the Oath and Statutory Declaration Act [CAP 34 R: E 2019] has been complied with

Signed

M. M. Majula -RM

13/04/2021

P.P The case is coming for mention, investigation is complete, I pray to proceed with the preliminary hearing.

Accused- No objection.

Court: Prayer granted, accused be reminded of his charge, charge ready over and explained to the accused who is asked to plead thereto.

Date: 27.4.2021

Coram: M. M. Majula -RM

PP: A/Insp. Charles

Accused: Present

Court Clerk: Ajara

Interpreter – Raymond, sworn in section 4 (b) of the
Oaths and Statutory

*Declaration Act [CAP 34 R: E 2019] has been complied
with*

Signed

M. M. Majula -RM

27/4/2021

P.P: *The case is for hearing, I have one witness, I pray to
proceed with the hearing.*

Accused- *No objection.*

Court- *Prayer granted the prosecution hearing hereby
commence”.*

This was the trend throughout the trial as the record merely shows that the interpreter was sworn in accordance with the law but the nature of the interpretation is not stated. This was against the mandatory requirements of section 211 (1) of the CPA which stipulates as follows:

*"211 (1) Whenever any evidence is given in a
language not understood by the accused and he is
present in person, it shall be interpreted to him in
open court in a language understood by him”.*

The consequences of noncompliance with the above cited provision is a fundamental breach of the appellant's right to understand and follow up proceedings of a case against him and it is a fatal omission. See: **LEKENI LOKONDOROTU AND ANOTHER VS. REPUBLIC**, (supra), **MPEMBA MPONEJA VS. REPUBLIC**, Criminal Appeal No. 256 of 2009 (unreported) and **MISANGO SHANTIEL VS. REPUBLIC** (supra) and **MUSSA MWAIKUNDA VS. REPUBLIC** 2006] TLR 387. In the latter case, the Court had the occasion to discuss the essence of the principle that an accused person must know the nature of the case facing him as a condition in ensuring that the accused is fairly tried. The Court relied on the case of **REGINA VS. HENLEY** [2005] NSWCCA 126 and **R VS. PROSSER** [1958] 45 at 48 which stated the minimum standards to be complied with by the court so as to gauge if the accused is afforded a fair trial which include: **One**, to understand the nature of the charge; **two**, to plead to the charge and to exercise the right of challenge; **three**, to understand the nature of proceedings namely, that it is an inquiry as to whether the accused committed the offence charged; **four**, to follow the course of proceedings; **five**, to understand the substantial effect of any evidence adduced in support of the prosecution; and **five** to make a defence to the charge or to answer the charge.

Since the record is silent if at all the interpretation from Kirundi to Kiswahili and vice versa was conducted by the interpreter, it cannot be safely vouched that the appellant was accorded the services of the interpreter. In this regard, the minimum standards of the trial were not complied with because the appellant who was present throughout the trial, did not understand the nature of the charge so as to make an informed plea; neither did he understand nor could follow the nature of proceedings and the effect of prosecution evidence against him so as to make an informed defence at the trial. This omission occasioned a failure of justice as the appellant was not accorded a fair trial.

Given that, the trial court was aware of the appellant's predicament on the language of the court, it was incumbent on that court to make sure that the matter is addressed in accordance with the law. The mere presence of the interpreter was not sufficient as the record ought to have indicated the nature of interpretation rendered. We say so because the law governing the conduct of procedure in a criminal trial requires what takes place at the trial to be on the record of proceedings so as to enable the appellate court to ascertain and determine any factual or legal question challenging the conduct of the trial.

Since the appellant was denied a fair trial, we entirely agree with the learned State Attorney that the proceedings and judgments of both courts were vitiated and cannot be spared and as such, the appellant's complaint raised in the Memorandum of Appeal is indeed merited. On the way forward, we nullify the respective proceedings and judgments, quash and set aside the conviction and sentence meted on the appellant and direct an expedited fresh trial of the accused and that he be accorded the services of an interpreter commencing at the plea taking stage.

DATED at KIGOMA this 3rd day of June, 2023.


S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2023 in the presence of the appellant in person, Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Edina Makala, learned State Attorney for the respondent/Republic and Patrick Ntahondi Ruhayaga, interpreter is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL