

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 89 OF 2021

LUCAS GISLAND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of
Dar es Salaam at Kisutu)**

(Maruma, PRM (Ext.J.))

dated the 31st day of December, 2020

in

Extended Criminal Appeal No. 13 of 2020

JUDGMENT OF THE COURT

15th February & 1st August, 2023

KOROSSO, J.A.:

This appeal emanates from the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Extended Criminal Appeal No. 13 of 2020 (Maruma, PRM Ext. J.) upon a conviction of the appellant by the District Court of Kigamboni at Kigamboni on a charge of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 (the Penal Code). The particulars of the offence were that, on diverse dates between 02/2/2019 and 06/3/2019 at Vumilia Okoni Kisarawe within Kigamboni District, the appellant did have carnal knowledge of the victim or PW1

(name disguised); a girl of ten years of age. The appellant denied the charge.

The factual setting of the case giving rise to the instant appeal is revealed through the five prosecution witnesses who adduced evidence in the trial court; the victim (PW1), Elizabeth Sudi Oiso (PW2), Peter Joshua (PW3), Francis Mwita Stephano (PW4) and WP 4827 (PW5). The appellant was a coconut seller conducting his business close to the house PW1 and her family resided. According to PW1, on the fateful day, while on her way back home from school, in an area with bushes, she met the appellant who told her to follow him into the bushes, he told her to lie down and they lied down on the ground, the appellant removed his shorts, undressed her underpants, closed her mouth with his hands, parted her legs, and then put his male organ into her female private organ and had intercourse with her. PW1 stated that though the ordeal was painful she could not scream because the appellant had his hands on her mouth. PW1 further testified that before the atrocious act, the appellant had told her that he will give her 200/= if she agreed to have sex with him, but that after the intercourse he did not fulfill the promise. She left the crime scene and proceeded home. According to PW1, the appellant repeated having sex with her several times whenever she went to fetch water and on her

way to school. It was until when she was taken to hospital by her mother who believed she had malaria when it was discovered that she was sexually abused. The doctor (PW4) who examined her concluded that PW1 was mentally challenged and had no hymen. Based on PW1's narration upon interrogation by PW4 of the person who was responsible for the act, the appellant was apprehended by PW3 and the incident reported to the Police Station at Kibada and subsequently the appellant was arrested and arraigned before the trial court.

The appellant's defence, which was presented by himself as DW1, was one of denial of the charge against him and narrating the circumstances of his arrest on 3/3/2019 at around 20.00 hours. Upon his arraignment in the District Court of Kigamboni, a full trial was conducted which ended in the conviction of the appellant for the offence charged. He was, in consequence sentenced to serve thirty years imprisonment with an order for him to compensate the victim Tshs. 500,000/=. The appellant was dissatisfied with the trial court's decision and thus appealed to the High Court, an appeal which was transferred to the Resident Magistrate's Court of Kisumu exercising extended jurisdiction where the appeal was dismissed. Still unsatisfied, the appellant preferred an appeal

to this Court armed with five grounds of appeal as found in the memorandum of appeal.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented, whereas Ms. Christine Joas, learned Senior State Attorney represented the respondent Republic assisted by Ms. Edith Mauya, learned State Attorney.

When the appellant was given an opportunity to amplify on his grounds of appeal, he sought and was granted leave to add one supplementary ground of appeal. The additional ground is as follows:

"That the appellant was denied the right to be defended by a counsel of his choice and subjected to an unfair trial."

We thus called upon the parties to first address us on the supplementary ground of appeal, a point of law, and then later move on to the other grounds of appeal. The appellant prayed that his grounds of appeal and written submissions be considered as part of his oral submissions and preferred for the learned State Attorneys to respond to his grounds of appeal first and he be given the opportunity to rejoin thereafter if need to so would arise.

With reference to the supplementary ground of appeal, the appellant, had nothing to clarify in his oral submission. In his written statement of arguments, The appellant submitted that when the case was called for hearing by the trial court, the appellant prayed to be allowed to engage an advocate to represent him but his prayer was refused. It was thus his argument that, the trial court's act of denying him an opportunity to engage an advocate offended the right to be heard, particularly where his conviction was based on the evidence of PW1, PW2 and PW3 whose evidence was recorded when he was not represented by a counsel of his choice.

The appellant further contended that it is well settled that a party's right to be defended by an advocate is so basic a right and any violation of the right is a breach of the principles of natural justice. He thus prayed that under such circumstances, the Court finds that the appellant was subjected to unfair hearing, allow the ground, then quash the conviction and set aside the sentence imposed against him.

Ms. Joas commenced by stating that she was resisting the appeal. On the additional ground presented by the appellant, she conceded that the trial court's refusal to allow him time to procure an advocate to represent him was improper since he was denied the right to be represented. She

however, proceeded to argue that the appellant was not prejudiced because he was present during the testimonies of all the witnesses who testified while he was unrepresented that he was accorded an opportunity to cross-examine them. Later on, upon further reflection, she changed gears and argued that such denial of legal representation, clearly meant that the appellant was not given a fair trial. The learned Senior State Attorney concluded that under the circumstances, the available remedy is to quash the proceedings and conviction and order retrial.

The appellant's rejoinder was to reiterate his earlier submission and prayed that he be set free and implored the Court not to order a retrial.

Having heard and carefully considered the submissions and gone through the record of appeal, the issue before us for determination is whether the right to legal representation was denied to the appellant during the conduct of his trial and if so, what effect did it have to the appellant's conviction.

We are alive of the fact that section 310 of the Criminal Procedure Act, Cap 20 (the CPA) which stipulates:

"Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject

to the provisions of any other written law relating to the provisions of professional services by advocate."

Certainly, the provision gives an accused person before a criminal court, the right to be defended by an advocate. Indeed, the right to legal representation which applies to both civil and criminal proceedings is fundamental as stated in various cases of this Court. In the case of **Samwel Kitau v. Republic**, Criminal Appeal No. 390 of 2015 (unrepresented), we observed:

"The right to legal representation is a human rights issue. It is of prime importance for an accused person to have a fair trial. Access to counsel is therefore very important."

(See also, **Thomas Mjengi v. Republic** [1992] T.L.R. 157, **Laurent Joseph and Another v. Republic** [1981] T.L.R. 351, **Hassani Mohamed Mkonde & Another v. Republic** [1991] T.L.R.148 and **Pascal Kitigwa v. Republic** [1994] T.L.R. 65).

As to the circumstances for the application of such right, the Court had an occasion to provide direction in the case of **Samwel Kitau** (supra) where it categorically it stated: -

"... However for other cases, legal assistance can be obtained upon request and only when the

*certifying authority considers that there is a need. It is therefore not automatic. There has been a number of situations where an accused person has been granted legal aid after putting in a special request. However, this position only apply to free legal aid, **otherwise an accused person is at liberty to engage an advocate**" [Emphasis added]*

Indeed, what we can discern from the above excerpt is that where an accused person is not within the ambit of being provided with legal aid, that accused person is at liberty to engage an advocate if he or she is so inclined, the court has to allow him to engage one.

For ease of reference, we find it pertinent to revisit the record of appeal and show what transpired on the respective dates that has given rise to the complaint as found at pages 7-8 of the record of appeal.

"22/5/2019

Coram: Hon. A. I. Mchome- SRM

S/A Joyce

Accused: Present

CC. Massare

S/A: I have 2 witnesses. I pray to proceed.

Accused: I intend to engage an advocate. I pray for adjournments.

Court: Until where the advocate appears in court the court shall consider the accused is unrepresented.

Sgd. A. I. Mchome- SRM

22/5/2019

PROSECUTION CASE OPENS.

PW1:"

Thereafter, up to page 11 of the record of appeal, PW1, PW2 testified on the same date. On 13/6/2019, the appellant was unrepresented, and the trial proceeded with the testimony of PW3 (pages 11-12 of the record of appeal). It was until on the 3/12/2019 (pages 16 of the record of appeal) when Mr. Kalage Rashid, learned advocate entered appearance for the appellant (then the accused) and proceeded to represent him during the testimony of PW4, PW5 and DW1.

Therefore, as conceded by the learned Senior State Attorney there was no legal representation for the appellant during the testimonies of PW1, PW2, and PW3, despite his quest to be given time to engage one. We have already alluded to above the importance of a party being legally represented especially in this case where he had shown intention to engage an advocate to represent him. The issue which arises is whether

not being accorded an opportunity to engage an advocate, did prejudice the rights of the appellant in the circumstances of this case.

Upon scrutiny of the record, leaves us without doubt that, denial of opportunity for legal representation was prejudicial to the appellant's rights. The fact that legal representation is an essential component of a fair trial has been over-emphasized in various decisions of this Court as already discussed above. For the foregoing, plainly the appellant was denied a fair trial.

What is left to ponder is the remedy available under the circumstances. We have been invited by the learned Senior State Attorney to order a retrial arguing that the evidence presented by the prosecution side was very strong and that is why it led to the appellant's conviction. She contended that the interests of justice weigh more on such a way forward. The appellant implored us to set him free considering his time in custody.

The decision of the defunct East African Court of Appeal of **Fatehali Manji v. Republic** [1966] E. A. 341 should guide us on the way forward. In that case it was held that as a general rule a retrial should be ordered only when the original trial was illegal or defective and should only be made when the interest of justice require but each case must depend on

its own facts and circumstances. (See also, the case of **Selina Yambi and Others v. Republic**, Criminal Appeal No. 94 of 2013 (unreported)).

Having heard the parties and carefully pondered what is before us, we are of the considered view that in the present case, the interests of justice require that a retrial be ordered. Therefore, we hereby nullify all the proceedings of the trial and first appellate courts, quash the conviction, and set aside the sentence imposed against the appellant. We order an expedited retrial before another magistrate to start from just before the testimony of PW1, when the appellant request to engage legal representation was denied.

DATED at DAR ES SALAAM this 25th day of July, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 1st day of August, 2023 in the presence of appellant in person and Mr. Clement Masuwa, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL