IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAA

CRIMINAL APPEAL NO. 161 OF 2015

(Originating from the District Court of Morogoro in Crim. Case No. 98 of 2013)

WILSON S/O SIMON @ BABU.....APPELLANT

VERSUS:

THE REPUBLIC.....RESPONDENT

JUDGMENT

18 Oct. 2017 & 9 Apr. 2018

DYANSOBERA, J:

The appellant Wilson s/o Simon @ Babu stood trial before Morogoro District Court charged with unnatural offence c/s 154 (1) of the Penal Code, Cap. 16 R.E. 2002. He was found guilty, convicted and sentenced to thirty (30) years term of imprisonment. Aggrieved, he has appealed to this Court challenging both conviction and sentence. He is armed with six grounds of appeal. In this judgment, I shall deal first with the anomaly discerned and pointed out by learned State Attorney on the procedural irregularity and if need be, I shall then revert to the grounds of appeal.

It was alleged in the particulars of the offence on 11th day of June, 2013 at Langali village within Mvomero District and Region of Morogoro did have carnal knowledge of one Gloria Adrian, a female child of 3 years against the order of nature. The accused denied the charge.

Briefly, the prosecution case was as follows. Angela Bosco (PW 1) is related to the appellant whom she calls her uncle. She has

a daughter known as Gloria Adrian. She testified that on 11th June, 2013 she was at a burial ceremony in Mburo village. When back home she found her daughter, the victim crying. The victim told her that she had been beaten by her grandfather, the appellant and that her anus was painful. PW 1 examined the victim and found *"uchafu mweupe mkunduni"*. With the PW 3 one Nestora Kiliozo took the victim to the Mgeta Health Centre via the Police Station where they obtained a PF 3 from F. 4000 D/Cpl Joseph (PW 4). At the Health Centre, the victim was attended by Rehema Shaban (PW 5), a clinical officer. In her evidence, she told the trial court that the victim's anus had bruises and inside her anus she was found with something like pus. She admitted to have not conducted a laboratory test arguing that the microscope was out of order. The PF 3 was tendered in court and admitted as Exhibit P. 1. PW 4 arrested the appellant at the hospital and had him charged.

In his defence, the appellant denied having committed the offence. He told the trial court that he had love affair with PW 1, the victim's mother on the agreement that he would pay her ten thousand shillings for the sexual favour but then the appellant then paid her five thousand shillings, the fact which angered PW 1 leading her to complain that *"unafanya mwili wangu wa mchezo, unanilala halafu unanipa hela hii."*

The learned trial magistrate was satisfied that the case against the appellant had been proved beyond reasonable doubt. The appellant thought that the decision robbed him of justice.

At the hearing of the appeal, the appellant stood on his own, unrepresented while the respondent was represented by Ms Lilian Rwetabura, learned State Attorney.

Supporting his appeal, the appellant told this court that PW 1 and PW 3 gave inconsistent evidence and that the listed witness did not testify. He argued further that there was no voire dire examination to ascertain if the witness knew the meaning of an oath and that the medical officer who examined the victim was not reliable. He asserted that the trial magistrate was biased as he believed the State Attorney who was misleading the court.

Submitting in support of the conviction and sentence, learned State Attorney at the outset, informed the court that he had discovered there was non-compliance with the legal procedure on part of the trial court. She pointed out that learned trial magistrate Mr Futakamba did not comply with the mandatory provision of section 214 (1) of the Criminal Procedure Act. Relying on the case of **Elisamia Onesmo v. R**, Criminal Appeal No. 160 of 2005 at p. 9 which quoted the case of **Medisere s/o Elisario v. R** (1967) HCD No. 72, learned counsel said that the witness was not re-called for cross-examination. It was the prayer on part of the Republic (respondent) that this record be returned back to the trial court for a re-trial.

In his rejoinder, the appellant insisted that the evidence at the trial was insufficient to prove the offence and that remitting the case back to the trial court will give opportunity to the prosecution to fill in the gap left. He referred this court to the case of **Shaban Seif and Saidi Abdallah @ Chekacheka v. R**, Criminal Appeal no. 215 of 2015.

As to the conviction where proceedings heard partly by one magistrate and partly by another, section 214 of the Criminal Procedure Act [Cap.20 R.E.2002] comes into play and is provided as hereunder.

214.

(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and

may, in the case of a trial and if he considers it necessary, resummons the witnesses and recommence the trial or the committal proceedings.

(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.

The trial court record shows that the trial commenced with Hon. Ringo, learned Resident Magistrate who heard PW1, PW 2, PW 3 and PW 4. Then Hon. Futakamba, learned Resident Magistrate took over and proceeded with PW 5, the defence and then composed the judgment.

The issue is whether it was proper for Hon. Futakamba, Resident Magistrate, the successor trial magistrate to have proceeded with the trial without recording any reason for the transfer of the case. Learned State Attorney wants the court to answer the issue in the negative. I agree. There were no reasons given why the first magistrate did not proceed with the trial until

conclusion. That went contrary to the mandatory provisions of the above cited provision.

Although the word used is **may** which indicates discretion, the Court of Appeal of Tanzania in the case of **Hamis Amani v. R**; Criminal Appeal No. 262 of 2015 was of the view that the fact that the right to a fair trial is fundamental, the court has an obligation to conduct a fair trial in all respects.

The rationale for the giving reasons for re-assignment of a partly heard matter was underscored by the Court of Appeal of Tanzania in the case of **Priscus Kimaro vs R.**; Criminal Appeal No. 301 of 2013 (unreported) in which it observed:

> " "*We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter 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. This must not be allowed.*"

The proceedings in the trial court were vitiated and rendered a nullity.

The next issue is whether a re-trial should be ordered. Learned State Attorney asked the court to order a re-trial. The appellant was of a different view fearing that this will give an opportunity to the respondent to fill in the gaps.

I think the appellant is right. Ordering a re-trial may amount to affording the respondent Republic and opportunity of filling the gaps apparent in the evidence tendered in the trial court. The appellant's fears are obvious. In the first place, the appellant was not seen committing the alleged crime; the prosecution case, particularly the evidence of PW 1, PW 3 and PW 4 was hinged on a hearsay evidence. None saw the appellant carnally knowing the victim against the order of nature. Second, there was no evidence recorded from the victim although the Public Prosecutor insisted that during the interrogation the victim was ok and mentioned the appellant as her rapist. Third, the appellant's contention that he was not in a good relationship with the victim's mother, that is PW 1 which contention was maintained throughout the trial created a reasonable doubt in the prosecution case. I am fortified in this by the position taken by the Court of Appeal in the case of **Shaban Seif**

and Saidi Abdallah @ Chekacheka v. R (supra) referred to me by the appellant.

As this aspect suffices to dispose of the whole appeal, I find no reason of discussing the grounds of appeal raised by the appellant which incidentally were not addressed to by learned State Attorney.

For those reasons, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. I decline ordering a re-trial and order the appellant to be set free from custody forthwith unless lawfully held for other causes.

THE HIGH COURT OF TANZANIA

W.P. Dyansobera
JUDGE
9.4.2018