IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 357 OF 2017

(Appeal from the decision of the District Court of Ilala at Samora in Criminal Case No. 32 of 2009 dated 30th August, 2017 before Hon. A.A. Sachore, RM)

FRANK SUNGURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

28 May & 27 July, 2018

DYANSOBERA, J.:

This appeal arises from the decision of the District Court of Ilala at Samora in Criminal Case No. 32 of 2009 dated 30th August, 2017 where the appellant was charged with rape c/ss 130 (1), (2) (e) and 131(1) of the Penal Code [Cap 16 R.E 2002]. He was convicted and sentenced to life sentence (sic). He was not satisfied with the trial court's decision hence this appeal. He is armed with two grounds of appeal as follows:

1. That, the learned magistrate erred in convicting the appellant on the basis of a defective charge sheet.
2. That the learned magistrate grossly erred by deviating from the High Court order where he/she composed a judgment instead of re-trying the case.

Briefly stated, the facts of the case were the following. Felister Raphael (PW 1) is a resident of Gongo la Mboto, Majohe Street. She is a petty businesswoman selling buns and fried cassava. She is a mother of not less than six children two of whom being females-Naomi Raphael (PW 2) and Neema Raphael. In 2008 PW 2 was 6 years old. PW 1 told the trial court that on 27.9.2008 at 1700 hrs she was at home with five children including PW 2. She asked her daughters to undress so that they took bath. She discovered that the pants worn by PW 2 had blood stains. Upon inquiry on what was wrong, PW 2 told her that she had rashes (upele) on her buttocks. PW 1 could not discover those rashes.

On 29.9.2008 PW 1 again asked PW 2 but she said nothing. PW 1 then threatened to cane her unless she revealed who had raped her that his when she said that Frank had threatened to behead her if she told anyone. PW 1 then took her to the hospital but she was asked to first collect a PF 3 from the police station. She managed

to get the PF 3 from Stakishari Police Station and went to Kisarawe District Hospital where Dr. Chalo Michael (PW 3) attended the victim on 29.8.2008. PW 3 medically examined PW 2 and found her with no vaginal hymen but vaginal discharge with bad smell and a lot of milky fluid. He formed an opinion that these were indicators of Vaginal Discharge Syndrome (VDS); a collection of several venereal transmitted disease. He observed that PW 2 had sexual intercourse with a man with venereal disease. He then filled in the PF 2 (Exh. P.1).

In his investigation conducted on 23.12.2008, E.1826 D/Cpl Steven (PW 4) was told by PW 1 that on 27th day of September, 2008 she discovered that PW 2 had abnormal vaginal discharge in her private parts and her underpants was blood stained. PW 2 did not disclose to her on what had happened until on 29.9.2008. PW 4 arrested the appellant and on interrogation, the appellant denied to have committed the crime. PW 4 admitted that the arrest of the appellant took a long time.

The record shows that after a ruling of a case to answer on 14th day of October, 2010, the matter was set for defence hearing on 11th day of November, 2010 but on 2nd day of December, 2010 it was reported that the appellant had jumped bail. On 24th day of January, 2011 the appellant's surety one Jenifer Farijala told the trial court that she had reliable information that the

appellant was at Mpanda. It is on record that the surety's husband brought to court the appellant on 14th February, 2011. On 28th February, 20011 the matter was set for mention pending judgment and on 14th day of March, 2011 an ex parte judgment was delivered in the presence of the appellant.

The appellant made his first appeal to this court (Hon. Mwakipesile, J) vide Criminal Appeal No.3 of 2012 whereby the court discovered some procedural errors in Criminal case No. 32 of 2009 including the denial of the appellant to enter his defence before he was convicted and sentenced to life imprisonment. Although her Ladyship dismissed the appeal, she nullified the conviction and sentence and ordered a re-trial. In her order, she was clear that the matter appeared before the same magistrate so that the appellant adduced his evidence in defence and then judgment be entered by the same magistrate.

When the matter was remitted to the trial court, the order of this court was not, however, smoothly implemented some unprecedented events occurred. First, the trial magistrate (J.Kinyage, RM) who had heard the evidence and to whom the record was remitted for re-trial was transferred and the matter was re-assigned to another magistrate (F.Haule) who heard the defence on 23rd September, 2014 and on 23rd day of October, 2014 delivered a judgment in which he sentenced the appellant to life

imprisonment and ordered payment of compensation of Tshs.300, 000/= to the victim. Second, the appellant's other appeal to this court vide Criminal Appeal No.27 of 2015 which landed before His Lordship Mwandambo was allowed by quashing all the trial proceedings conducted by Hon. Haule, RM as well as the resulting judgment and orders. The court, however, ordered the record to be remitted to the trial court for it to proceed with the hearing before the first magistrate unless for any other compelling reasons the said magistrate was unable to complete the trial. Surely, the record was remitted to the trial court and on 17.1.2017 the trial court took note of it. On 21.2.2017 Hon. Haule, RM ruled that:

> "Having gone through the High Court's order, the court's proceedings by Hon. J. Kinyage who had been transferred, I will proceed with this case where it ended."

He observed that this was in compliance with Section 214 of the Criminal Procedure Act. It would seem, the appellant lost faith in this magistrate and sought his recusal. The request was granted and Hon. F. Haule, RM stepped down. That was on 6th day of April, 2017. The matter was then re-assigned to Hon. Hassan, SRM who declined the appellant's request for the case to start afresh but on 16th day of June, 2017 he disqualified himself from the case upon the appellant's request. The

matter was then re-assigned to Hon.A.A. Sachore, RM before whom the appellant told him that he was not ready to enter any defence because he had written a letter to the High Court seeking clarification on some things pertaining to this case.

The hearing of the defence did not take off on that date that is on 10.7.2017; instead, the matter was adjourned to 18th July, 2017 when the appellant declined to enter his defence arguing that he had written a letter to the High Court for clarification on some things pertaining to this case. On the appellant's stand, the Public Prosecutor left for the court to decide. Learned Resident Magistrate (Hon. Sachore, RM) ruled that *"since the accused had refused to exercise his legal right and enter his defence, the court draws adverse inference against him"*. He then marked defence as closed and proceeded to write judgment in regard to the prosecution evidence.

Accordingly, the appellant was convicted and sentenced to life imprisonment. This judgment was handed down on 30th day of August, 2017. The appellant was aggrieved and has again appealed to this court.

At the hearing of this appeal, the appellant was unrepresented while the respondent was represented by Ms Agnes Mtaki, learned State Attorney.

The appellant asked the court to adopt his two grounds of appeal and said that he had nothing useful to add. Ms Agnes Mtaki on the other hand, supported both conviction and sentence. On the first ground of appeal, she submitted that the sections used in the charge sheet were proper, the appellant having been charged under sections 130 (1), (2)(e) and 131 (1) of the Penal Codes and that the victim was a school girl according to her and PW 1, of the age of 6 years old.

As regards the second ground of appeal, learned State Attorney conceded to it saying that it had merit and contended that the order given by Hon. Mwandambo, J. was not complied with. She prayed the court to use its powers so that the order is complied with.

The appellant, in a brief rejoinder, reiterated his grounds of appeal.

The issue for consideration is whether this appeal has any legal substance.

As far as the first ground of appeal is concerned, I have no flicker of doubt that the complaint on the charge sheet being defective has no merit. The appellant was charged with rape under sections 130(1) (2) (e) and 131 (1) of the Penal Code [Cap.16 R.E.2002]. He is alleged to have carnal knowledge to Naomi Raphael, a child of 6

years. Section 130 (1) (e) of the Penal Code provides that:

> 130.-(1) It is an offence for a male person to rape a girl or a woman.
>
> (e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

It was alleged that the appellant on 27th day of September, 2008 during day time, at Majohe Mji Mpya within Ilala District in Dar es Salaam Region, the appellant did have carnal knowledge of Naomi Raphael, a child of 6 years old. The girl was under 18 years and was not the wife of the appellant. This first ground fails and is dismissed.

On the second ground of appeal, I join hands with both the appellant and learned State Attorney that the order of this court was not complied with.

This court (Hon. Mwandambo.) in Criminal Appeal No.27 of 2015 in determining the appeal the appeal made the following orders.

First, it allowed the appeal. Second, it quashed all the trial proceedings conducted by Hon. Haule, RM as well as the resulting judgment and orders. Third, the court ordered the record to be remitted to the trial court for

it to proceed with the hearing before the first magistrate but cautioned that unless for any other compelling reasons the said magistrate was unable to complete the trial.

There is no dispute on the record that the said trial magistrate was unable to complete the trial as he had already been transferred. Hon. Sachore, RM who took over the proceedings was not the trial magistrate. He had not heard any witness of the prosecution. When the matter was re-assigned to him he, on 28.6.2017, ruled that:

> **"The proceedings by Haule RM as well as the resulting judgment and orders were quashed by Hon. Mwandambo, J. in Criminal Appeal No. 27 of 2015. In this regard, the accused has to enter his defence as ordered by the High Court. Defence hearing on 10.7.2017."**

Knowing that he had not heard any prosecution evidence and failing to consider the appellant's concern that he could not enter his defence because he had written a letter to the High Court seeking clarification on some matters concerning the case, learned Resident Magistrate committed an error in rushing to conclude that the accused had refused to exercise his rights to enter his defence and then drew inference against him. His marking the defence as closed and his proceeding to write the judgment and then convicting the appellant and sentencing him to life imprisonment occasioned miscarriage of

justice. This is so because, the appellant was denied his right of being heard and was then condemned unheard. Besides, it was incumbent upon the trial court magistrate to investigate on the letter the appellant had written to the High court seeking clarification on matters pertaining to his case. this was so important because the appellant was not only charged with a statutory rape which attracted a life imprisonment but also he was not the trial magistrate who had heard the case from the beginning. For those reasons, the appellant was denied a fair trial which denial occasioned a miscarriage of justice. What then should be done, in the circumstances of the case? Should a re-trial be ordered? I have closely examined and considered the prosecution evidence and I am satisfied that this case is not fit for an order of re-trial. In the first place, there was no cogent evidence that the victim was raped, leave alone raped by the appellant. The victim did not report the incident nor did she name the rapist. According to the evidence, what suggested to the victim's mother that she had been raped was the blood stains on her pants but when PW 1 tried to inquire into PW 2 (victim) what the matter was, she at first lied that she had upele on her buttocks, but on the other day when PW 1 pressed her to tell her what had happened to her she remained silent. It is not until PW 2 was threatened to be caned and taken to the police that is when she said that she was raped. As rightly found by

the trial Resident Magistrate, the evidence of PW 2 that she was raped was not corroborated. Second, it would seem that the incident which was alleged to have occurred on 27th day of September, 2008 was formally reported to and dealt with the police on 23rd December, 2008 according to PW 4, E.1826 D/Cpl Steven of Ukonga Stakishari Police Station. Besides, the evidence is clear that it took a long time to get the appellant apprehended. This is very strange because, the appellant, it is in evidence that he was living at PW 1 and grazing her cattle. There was no explanation why the victim failed to report the incident, name the culprit and why it took such a long time the incident to be reported to the police and dealt with. The reasonable conclusion, in circumstances of this case, is that there was no rape committed by the appellant. It is trite that delay in reporting a crime or naming a suspect may dent the credibility of the witness. There was no evidence of penetration. What is available it the inconclusive evidence of PW 1 that the PW 2's pants had blood stains.

I am alive to the principles for ordering a retrial propounded in the case of **Ahamed Ali Dharamsi Sumar versus R** (1964) E.A. 481 where the Court of Appeal of East Africa held:

> **Whether an order for retrial should be made depends on the particular facts and**

circumstances of each case but should only be made when the interests of justice require it and where it is likely not to cause injustice to an accused.

I find no justification and basis of ordering the re-trial in this case.

For the reasons stated above, I find the appeal having legal merit and allow it. I quash the conviction and set aside the sentence. I order the appellant to be released from the custody forthwith unless his liberty is being assailed for other lawful causes.

W.P. Dyansobera

JUDGE

30.7.2018

Delivered this 30th day of July, 2018 in the presence of Mr. Justus Ndibalema, learned State Attorney for the respondent and in the presence of the appellant in person.

W.P. Dyansobera

JUDGE