IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 215 OF 2019

(Appeal from the Judgment of the Resident Magistrates' Court of Geita at Geita (Kurwijila, RM) dated 14th of May, 2019, in Criminal Case No. 222 of 2018)

FRANK S/O MATESO @ DEUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23rd, & 25th September, 2020

ISMAIL, J.

The appellant was arraigned in court facing two counts. In the first, the appellant stood charged with rape, contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019); while the second count related to impregnating a school girl, contrary to section 60A of the Education Act, Cap. 353 R.E. 2002 (now R.E. 2019), as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016. Both of these offences are alleged to have been

committed on unknown dates between April and 3rd July, 2018, at Katoro village, Geita District, within Geita village, and the victim of these allegations is DEF (in pseudonym), a girl aged 17 years of age, and a form one student at Katoro Secondary School. The appellant was said to have married the victim and were cohabiting up until 13th July, 2018, when he was apprehended in connection with the charges that he faced in court.

After a plea of not guilty was recorded, the matter proceeded to a full trial which involved four witnesses for the prosecution, against one for the defence. The appellant vehemently denied any involvement in the charged offence, claiming that he did not know the alleged victim. At the end of the trial rpoceedings, the Resident Magistrates' Court of Geita before which the appellant was arraigned, convicted him of both counts and sentenced him to imprisonment for 30 years on each of the counts. The sentences ran concurrently.

The appellant was quite unamused by the trial court's decision. He chose to take an appeal to this Court, through a petition of appeal which contains six grounds of appeal, paraphrased as hereunder:

1. *That, in the absence of a DNA report it was wrong to rely on a PF3 as the basis for linking the appellant to the alleged offence of impregnating a school girl;*

2. *That, consent and penetration, key ingredients in the charge of rape, were not sufficiently established before the appellant was convicted.*
3. *That, the victim's age of 17 years was not sufficiently proved as no proper documentation or evidence of the victim's parents was adduced.*
4. *That, no efforts were employed by the trial court to compel or ensure attendance of the appellant's witnesses in support of defence case and consistent with section 231 of the CPA, Cap. 20.*
5. *That, the evidence of how the appellant was arrested lacked support of the village leaders and that a month's delay in arraigning the appellant in court was without any sound explanation and therefore prejudicial to the appellant's interest.*
6. *That, the appellant's strong defence was wrongly rejected despite the fact that the prosecution had failed to prove its case beyond reasonable doubt.*

At the hearing, the appellant appeared in person, unrepresented, while the respondent enlisted the usual services of Ms. Ghati Mathayo, learned State Attorney. Appreciating that he is unrepresented and a lay person, the appellant offered that hearing of the appeal should begin with the respondent's counsel while his submission would follow after that.

Ms. Mathayo began by supporting two of the six grounds of appeal. These were ground six and ground four. With respect to ground four, the contention by Ms. Mathayo is that it is true that no DNA test was

conducted to ascertain fatherhood of the child. She held the view that, in the absence of such vital evidence, proof of the second count was impossible. The learned attorney argued that, in that respect, this ground is meritorious.

On ground four of the appeal, the learned attorney argued that there is no evidence that summonses were issued to compel attendance of the witnesses who were lined up by the appellant. The learned counsel contended that her argument is premised on what is gathered from page 14 of the proceedings at which the appellant's request was fielded by the trial court. Up until closure of the defence case, Ms. Mathayo contended, none of the prospective defence witnesses was summoned. She contended that this denied him of the right to a fair trial. Ms. Mathayo argued that such denial meant that the appellant was not accorded his rights under section 231 (1) (b) of the Criminal Procedure Act (CPA), Cap. 20 R.E. 2002 (now R.E. 2019).

Given the cited infraction, the respondent's counsel prayed that the matter should be remitted back for re-trial.

The appellant was expectedly brief. Riding on the wave of the respondent's submission, he urged the Court to set him free, arguing that

the cited error was committed by the trial court and that he had no hand in it.

Given the decisive importance that ground four carries, it behooves me to begin the disposal of this appeal by dealing with it. Outcry in this ground is that the trial court violated the appellant's rights enshrined in section 231 (1) (b) of the CPA. To appreciate the import of the parties' contention, I find it apt that the said provision be reproduced. It provides as hereunder:

> *"At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of section 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*
>
> *(b) to call witness in his defence,*
>
> *And shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those right."*

Having reproduced it, the question which follows is whether the trial court's conduct of the proceedings was a deviation from the requirements of the cited provision.

As correctly pointed out by Ms. Mathayo, the appellant, when the matter was called on for orders, the trial magistrate ruled that the prosecution had established a prima facie case that required the appellant to make a defence of the charges levelled against him. This was on 14th December, 2018, and proceedings in respect thereof are found at page 14 of the typed proceedings. Following the ruling on a case to answer, the appellant informed the trial court that he wished to have Ms. Regina Emmanuel and Mr. Emmanuel Kagoma, both of Katoro, summoned as his defence witnesses. The court then entered an order that such witnesses would be notified. The defence hearing was slated for 24th December, 2018. After several adjournments, the matter was called on for defence on 20th March, 2019, on which date the appellant testified as a sole defence witness, meaning that two of his witnesses whose attendance was undertaken by the court were not summoned. In so doing, the trial court defied the provisions of sub-section 4 of section 231 whose substance is reproduced as hereunder:

"If the accused person states that he has witnesses to call but they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial court and issue process or take other steps to compel attendance of such witnesses."

Noting that this is a discretionary need which can only be decided by the trial court, the need to adhere to it arose when the appellant informed the court, on 14th December, 2018, that he intended to have these witnesses present and testify in defence. If the trial magistrate felt that need did not arise for having such witnesses appear and testify is support of the appellant's case, then he ought to have expressly refused the appellant's prayer. Such refusal would still have to have been justified. In ***Jacob Tibifunga v. Republic*** [1982] T.L.R. 125 (HC), the Court held that the trial magistrate has a discretion to refuse, and of course give reasons for refusing to call a defence witness where such witness' evidence has no bearing upon the case.

In the absence of any reason, let alone a plausible one, failure to accord the appellant the right to defend himself was a serious violation of the appellant's right to present a formidable defence against the charges

that he faced. It cannot be said that the appellant was accorded a fair trial in these proceedings and, at this point, I can only join hands with Ms. Mathayo and hold that the trial proceedings were nothing but a serious travesty of justice.

In consequence of all this, this appeal succeeds. I invoke the provisions of section 388 of the CPA and quash the trial proceedings, set aside the conviction and sentence and order that the matter be remitted back to the trial court for trial *de novo*, before a competent magistrate. With this holding, I find other grounds of appeal superfluous, and discussing them is a needless waste of time.

I so order.

Right of appeal explained.

DATED at **MWANZA** this 25th day of September, 2020.

M.K. ISMAIL

JUDGE

Date: 25/09/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present in person

Respondent: Ms. Ghati Mathayo, State Attorney

B/C: P. Alphonce

Court:

Judgment delivered in chamber, in the presence of the appellant and Ms. Ghati Mathayo, State Attorney, this 25th September, 2020.

M. K. Ismail

JUDGE

At Mwanza

25.09.2020