IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 65 OF 2019
(Originating from the District Court of Arusha Criminal case No.242 of 2017 N.A Baro RM)

TEREVAELI ZABLON MBISE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 24/03/2020
Date of Judgment: 29/05/2020

Masara, J.

In the District Court of Arusha, the Appellant, Terevael Zablon Mbise, stood charged with two counts of Incest by Male, contrary to section 158(1)(a) of the Penal Code Cap 16 [R.E 2002] and Impregnating a School Girl, contrary to section 60(1)(3) of the Education Act, Cap. 353 [R.E 2002]. The Appellant was found guilty and convicted of the first count and was sentenced to serve a term of thirty (30) years imprisonment in jail.

The Prosecution alleged that on unknown date in February, 2017, at Doli Area within the District of Arumeru, Arusha Region the Appellant had sexual intercourse with his biological daughter, one Loveness Terevaeli Mbise, who was by then 16 years of age and a form two student. On the fateful day, it was alleged that the Appellant, the victim (PW1) and her

siblings, Mussa and Ebenezer, went to cut grass for feeding their cattle in the wilderness around Doli area. After a while, the Appellant told the victim's young brothers that to take home the already cut grass and they obliged. The Appellant remained there with the victim. He then attacked and undressed her and then raped her. The Appellant threatened to kill her if she revealed the secret to any other person. PW1 obliged and did not reveal the secret to anyone. After two months, she realized that she had missed her menstrual periods. She then wrote a letter to her mother on the 5th June, 2017 revealing to her that she was pregnant and that it was the Appellant who had impregnated her. She informed her mother in that letter that she could not proceed with school. She reported to the Police Station where the Appellant was summoned and thereafter charged with the two offences aforementioned. The victim was taken to the hospital on 28/6/2017 for medical examination and she was discovered to be three months pregnant. She gave birth to a baby boy named Francis. On 20th November, 2017 the court ordered DNA test to be conducted. On 18th April, 2018 samples were taken from PW1, the Appellant and Francis. The samples were taken to Dar es Salaam for DNA test and upon examination, on 24th July, 2018, the report came out that the Appellant is the father of the new born to PW1 (Francis) by 99.99%. PW1 and PW2 also said that the Appellant had also raped PW1 in the year 2013 when PW1 was a standard VII pupil but that the case was traditionally resolved.

The Appellant denied to have committed the offences he was charged with. On the contrary he mentioned the person who allegedly raped his daughter

as one Wilson Kiungai whose case was ongoing at Arumeru District Court before Hon. Jasmine, RM. He further stated that the case was framed up as he has land dispute with his brothers in law whom he mentioned as Fanûel, Anthony and Elibahati the sons of Akyoo who want him to vacate the plot where he lives and leave it to his wife.

The trial Court convicted the Appellant as already stated. The Appellant was aggrieved by both conviction and sentence of the trial court. He is appealing to this Court on the following grounds:

a) *That, the Honorable trial Magistrate erred in law and fact for conducting criminal case unprocedurally; and*
b) *That, the Honorable trial court Magistrate erred in law and fact by failing to note that the prosecution side failed to prove its case beyond reasonable doubt.*

At the hearing of this appeal, the Appellant appeared in person unrepresented while the respondent Republic was represented by Ms. Blandina Msawa, learned State Attorney.

Submitting on the grounds of appeal, the Appellant submitted that the trial magistrate did not follow the procedure as the exhibits were not read in court. He made reference to pages 24, 29 and 31 of the proceedings. He fortified that the trial court did not follow procedure in admitting exhibits P1-P3. On the second ground of appeal, the Appellant contended that the trial magistrate erred in not deciding that the case was not proved beyond reasonable doubts. He submitted that Exhibit P1 which was a letter allegedly written by PW1 to PW2 and which PW2 tendered as Exhibit was

not identified by PW1 and should at best have been tendered by the investigator who had custody of the same. He further argued that PW1 and PW2 stated that they reported the matter on 6/6/2017 but exhibit P1 and PF3 were filled on 28/6/2017. Worse still, the trial court did not allow the doctor to come for cross examination as per the law. Prosecution did not state why they failed to summon such a doctor as an important witness.

The Appellant added that, while examining exhibit P3, the trial court should have considered that he is the father of PW1 therefore it would not have been impossible for the DNA to be alike. He insisted that the case was fabricated against him contending that if the letter to PW2 was written on 5/6/2017 and the report to Police was made on 6/6/2017, there is no explanation why there is no evidence from police to prove the same. And if he had run away why is there no police report to that effect. On the strength of those arguments, the Appellant prayed that his appeal be allowed.

Ms. Msawa did not support the decision of the trial Court. She submitted that she supported the appeal, but asked this Court to order a retrial contending that the five Prosecution witnesses had proved the case against the Appellant. That they proved that the Appellant had incestuous relationship with his daughter. Ms. Msawa stated that the victim (PW1) proved that it was his father (the Appellant) who raped her and impregnated her. That evidence, according to her, is corroborated by that of PW2 (her Mother) and also the evidence of PW4 the Government

Chemist who examined the DNA profiling and they matched at 99.99%. This evidence in her view, leaves no doubt that the Appellant committed the offences he stood charged of. The learned State Attorney conceded that there were apparent procedural mistakes committed by the trial court. She admitted that exhibits P1, P2 and P3 were admitted but they were not read over and explained in court as per the law. She cited the case of ***Robinson Mwanjisi Versus Republic*** [2003] TLR 219 which insisted on the importance of reading the exhibits to the court so as to inform the accused of what is contained therein for proper defence. Failure to adhere to that procedure is fatal to the case.

The learned State Attorney stated that despite the procedure shortcomings the evidence against the Appellant was overwhelming. She implored the Court to order a retrial citing the Court of Appeal decision in ***Godfrey Ambrose Ngowi Versus Republic,*** Criminal Appeal No.420 of 2016 (CAT-Arusha) (Unreported) where it quoted in affirmation the holding in ***Fatehali Manji Versus Republic*** [1966] EA 344 to the effect that the purpose of retrial is not to fill holes in the prosecution case, it ought only be ordered where evidence at trial was overwhelming. She argued that in this case they are not going to fill the holes for the case was proved beyond reasonable doubts. She also cited section 388 of the Criminal Procedure Act, Cap 20 [R.E 2002] to further emphasise on thinned for a retrial.

On whether the mother (PW2) should not have tendered the letter as exhibit, Ms. Msawa contended that the mother was the addressee of the letter therefore she was competent to tender it. She concluded by stating that 99.99% percentage of DNA only applies to a father and a child.

I have carefully gone through the grounds of appeal and the submissions made by both the Appellant and the Respondent. I should hasten to say that I agree with the Appellant and Ms. Msawa that the trial court was rather casual in the way it conducted the trial considering the gravity of the offences before it. There is no doubt that the tendered exhibits; that is, exhibit P1 (the letter from PW1 to PW2), exhibit P2 (the report from the Chief Government Chemist on the DNA test) and exhibit P3 (sample receipt notification form) were not read in court. The same applies to Exhibit D1 (the written statement of PW1 before the police). This is a serious omission because reading the contents of an exhibit before the court enables the accused to appreciate its content and may be in a position to cross examine on the tendered document and also prepare his defence accordingly. That will also assist the accused in preparing his defence. The court of Appeal in a number of decisions has stressed on the importance of reading the contents of a document in court. In addition to the decision cited by Ms. Msawa, in the case of ***Nkolozi Sawa and Another Versus Republic***, Criminal Appeal No. 574 of 2016 (Unreported), the Court of Appeal stated inter alia:

> *"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it*

denied the appellants the opportunity of knowing and understanding the contents of the said exhibits."

See also ***Jonas Ngolida Versus Republic,*** Criminal Appeal No. 351 of 2017 (Unreported) and ***Ramadhani Hamisi Mwenda Versus Republic,*** Criminal Appeal No. 116 of 2008 (Unreported)

The fact that the exhibits were not read out is not the only anomaly inherent in the proceedings of the trial court. The way the said exhibits were admitted is also quite strange. Whenever a document was tendered as evidence it was admitted without naming it as exhibit or showing whether the same is admitted for identification purpose only. Pages 24, 29 and 31 of the typed proceedings show that when the exhibits were admitted they were simply marked P1, P2 and P3 respectively. That was not proper. Whenever a document is admitted in evidence it has to be labelled as an exhibit. The Court of Appeal in ***Robinson Mwanjisi and 3 Others Versus Republic*** (Supra) it stated that:

"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out, otherwise it is difficulty for the court to be seen not to have been influenced by the same."

It is the conclusion of this Court that the procedural irregularities committed by the trial court are fatal as they occasioned injustice. The effect of not reading the contents of the documentary evidence is to expunge those documents from the court record. As stated above, exhibit P1 (the letter from PW1 to PW2), exhibit P2 (the report from the Chief Government Chemist on the DNA test) and exhibit P3 (sample receipt

notification form) were not read in court, I accordingly expunge them from court record.

Having expunged the said exhibits from the court record, it follows whether the remaining evidence suffice to warrant conviction of the Appellant. In my view the remaining evidence has holes that cannot sustain a conviction. The fact that the Prosecution failed to lead any evidence to prove that PW1 was a student at any school creates a credibility issue. The Prosecution must have preferred the second count on information given to them either by the PW1 or PW2. Why such evidence got lost during testimony, makes one wonder as to the integrity and credibility of the evidence that was led. One would have expected such evidence to come from PW1, PW2 and PW5. To the contrary, PW1 identified herself as a peasant and no other witness testified that PW1 was a student.

Regarding the issue of rape, it is common knowledge that in rape cases the best evidence is that of the victim. In this case, PW1 testified on how she went to Doli with her younger brothers to cut grass and how the Appellant sent the brothers home and raped her thereby ending pregnant. She kept that ordeal a secret until she realised that she was pregnant. She revealed this through a letter to her mother; a letter that she placed in her mother's bed. That ordeal is said to be a repeat of what had happened four years back, which ordeal was kept away from law enforcers. The question is whether that evidence was credible. Under section 127 (7) of the Evidence Act, Cap. 6, if a witness is found to be a credible witness, the victim's

evidence can alone ground a conviction. In the case of ***Seleman Makumba Versus Republic*** [2006] TLR 384 the Court of Appeal stated the following regarding the evidence in rape cases:

> *"True evidence of rape has to come from the victim, if an adult, that there were penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration."*

See also ***Anyelwisye Mwakapake and Another Versus Republic,*** Criminal Appeal No. 227 of 2011 (Unreported), ***Hussein Hassan Versus Republic,*** Criminal Appeal No. 405 of 2016 (Unreported) and ***Mathias Robert Versus Republic,*** Criminal Appeal No. 328 of 2016 (Unreported).

In ***Mathias Robert's case,*** the Court of Appeal confronted with a similar case, it made the following observation:

> *"...the issue of DNA report was properly resolved by the first appellate court and it was not that evidence which proved the conviction of the appellant as he was convicted basing on the evidence of PW1 (the victim) which was corroborated by the evidence of PW4."*

It follows therefore that even without the DNA report, if the Court was to believe the evidence of PW1 as credible, it could proceed to convict the Appellant based on the oral evidence of the victim. However, in the circumstances of this case, the absence of the DNA report will leave the Prosecution case very weak. I say this based on the following grounds. One, if it is true that the Appellant raped the victim in February 2017, the time PW1 was tested, on 28/6/2017, it was impossible that the pregnancy was only three months old. It must have been at least four months old,

even assuming that the incestuous act took place on the last day of February. Incidentally, the Prosecution did not call the doctor who examined PW1 nor did they tender the PF3. This lacuna adds to the doubts in the Prosecution case. Two, it was also alleged that in 2013 while PW1 was in class seven, she was also raped by the Appellant. One would expect that if she was in class seven in 2013, then in 2017 when she was allegedly raped, she would be a Form Four student. But the Prosecution placed her in Form Two. Three, the defence evidence also creates doubts on the credibility of the Prosecution evidence. The Appellant stated in evidence that the letter allegedly written by PW1 was in fact written by PW2. This objection was raised during the Prosecution case, the Prosecution did not attempt to avert that doubt. The Appellant also testified that the issue of PW1 pregnancy was subject of another criminal case where another person, Wilson Kiungai, was charged. He even mentioned the name of the magistrate who had the conduct of that case. That evidence was not even considered by the trial Magistrate. These are doubts that cannot be ignored. It would therefore be against all tenets of justice to sustain conviction of the Appellant in the absence of the expunged evidence.

The last question I have to address is whether a retrial should be ordered in the circumstances of this case. As ably submitted by the learned State Attorney, a retrial should only be ordered where it is in the opinion of the court that the same will not be to the prejudice of the accused person. It is ordered where the Prosecution evidence is overwhelming. It should not be ordered if by so doing it will afford the prosecution to fill up holes in their

evidence. The Court of Appeal decision in ***Abdulswamadu Azizi Vs. R***, Criminal Appeal No. 180 of 2011 (unreported) is instructive in this front. The grounds for a court to order retrial were enunciated by the erstwhile East Africa Court of Appeal in the case of **Fatehali Manji Versus Republic** (Supra) where it was stated thus:

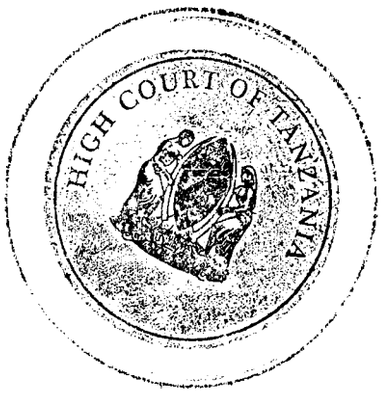
> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial.* ***Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require.*** "(emphasis added)

See also **Ezekiel Hotay Versus Republic**, Criminal Appeal No. 300 of 2016 (Unreported). In this case the interest of justice will not be met by an order of a retrial. It will only afford the Prosecution to fill up gaps in their case. For instance, the expunged exhibit P3 which was used by the Prosecution to prove that the Appellant is the father of PW's son was not accompanied by paper trails confirming a chain of custody of the samples taken. The same can be said of the other pieces of evidence that appear shaky. In the circumstances I desist from ordering a retrial as requested by the learned State Attorney.

Consequently, it is this Court's finding that the conviction of the Appellant was based on a trial that was not procedurally conducted. Furthermore, there are doubts in the Prosecution case, thus a retrial will not be

appropriate. In the circumstances, the Appeal is allowed in its entirety. The conviction against the Appellant is hereby quashed and the sentence thereof set aside. The Appellant should be released from prison forthwith, unless he is lawfully held for another lawful offence.

Order accordingly.



Y. B. Masara
JUDGE
May 29, 2020