

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 05 OF 2020

(Arising from Judgment of the District Court of Ilemela at Ilemela at Mwanza in
Criminal Case No. No.01 of 2019)

JEREMIAH S/O BERENA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last Order: 25.02.2020

Judgment Date: 27.02.2020

A.Z.MGEYEKWA, J

The appellant Jeremiah S/O Berena was arraigned by the District Court of Ilemela and charged with an offence of rape contrary to Section 130 (1) (2)(e) and 131 (1) of the Penal Code Cap.16 [R.E 2002].

The evidence in brief upon which the conviction of the appellant was grounded was as follows; it was alleged that from

2015 on different dates up to 21st November, 2018 the accused had sexual intercourse with Ana D/O John (*not her real name*), a girl of 12 years old. In his defence at the trial court, the appellant denied involvement in the commission of the offence. On the other hand the trial Magistrate was satisfied that on the evidence adduced, the case for the prosecution was proved beyond reasonable doubt. Upon conviction, the appellant was sentence to 30 years imprisonment. Dissatisfied and aggrieved by both conviction and sentence he appealed to this court.

The memorandum of appeal filed by the appellant raises seven grounds of complaint, namely:-

- 1. THAT, upon the formulation of the facts no in dispute, the trial court did not read and explain It to the appellant as is required by section 192 (3) of the Criminal Procedure Act.*
- 2. THAT, in the absence of full compliance with the provisions of section 127 (7) of the evidence Act there was no basis for connecting the appellant.*
- 3. THAT, the trial court erred in law for failure to look properly for and determine whether or not there was sufficient corroborative evidence in support of PW2'S Angelina Benedictor felling.*

4. *THAT, the trial Magistrate erred in law in connecting the appellant with the offence of rape while penetration which is an essential element of the offence was not elaborated by the PW2.*
5. *THAT, the evidence of PW1, PW2, PW3 and PW4 was weak, incredible and doubtful to warrant a conviction to appellant.*
6. *THAT, the trial court erred in law to convict the appellant basing on the fabricated evidence of the prosecution witnesses.*
7. *THAT, the prosecution evidence did not prove the case against the appellant beyond reasonable doubt as law required.*

When the appeal came up for hearing, Ms. Fyeregete, learned State Attorney appeared for the Republic. While the appellant appeared in person and advocated for himself.

In his submission the appellant argued that the trial Magistrate considered the prosecution evidence, he argued that PW2 evidence is untrue because what she testified before the court was quite different to what he stated at the Police Station. He continued to narrate that before the Police Station, PW2 testified that he is his step father and they were living together peaceful. He added that PW2 complained that the appellant pulled and raped her and she saw sperm While before the court PW2 hesitated to say the appellant

raped her until when she was asked three times then she told the trial Magistrate that '*aliingiza dudu*'. He further lamented that the case was fabricated because PW1 wanted to end their love affair and return to her former lover. It was the appellant further complain that PW3 evidence was someone untrue as the Doctor failed to mention the responsible person who caused PW2 to loss her virginity.

In conclusion he argued that the prosecution evidence was weak because each witness gave his/her own story thus he was dissatisfied by the trial court decision and opted to file an appeal.

On her part, the learned State Attorney opted to combine the 2nd and 3rd grounds and argue them together, she also opted to combine the 5th, 6th and 7th grounds and argue them together. In supporting the first ground of appeal, Ms. Fyeregete concurred with the appellant's first ground of appeal, she stated that the facts were not read over therefore section 192 (3) of the Criminal Procedure Act, Cap.20 was not complied. However, the learned State Attorney stated that the appellant was not prejudiced because the case was

determined to its finality. She added that the defects are curable under section 388 of the Criminal Procedure Act, Cap.20.

In relation to the 2nd and 3rd grounds of appeal, Ms. Fyeregete argued that in rape cases the best evidence is that from the victim herself. She added that it does not matter if there was no corroboration, the court can reach its decision basing on the victim's evidence. Ms. Fyeregete fortified her argument by referring this court to the case of **Selemani Mapumba v R** TLR 2006 379. She continued to argue that the court believed that PW2 was telling the truth and she was a credible witness.

It was Ms. Fyeregete further submission that PW2 evidence was corroborated by PW1 and PW3 evidence she invigorated her arguments by referring this court to page 13 -222 of the court proceedings that PW1 testified that PW2 told her that she was previously raped by the appellant, the same proves that the appellant raped the victim. Thus she prays this court to disregard this ground.

Concerning the 4th ground of appeal, the learned State Attorney concurred with the appellant's ground of appeal that penetration was important in proving the offence of rape. However, she stated that PW2 evidence tells all as to how she was raped in previous days. She went on further stating that PW2 said that *akaniwekea dudu kwenye dudu langu* the wording meant that he inserted his penis into her vagina, the same suffice to mean that she was raped. To fortify her submission she cited the case of **Khanga Daudi v R** Criminal Appeal No.316 of 2013, Mwanza (unreported). She said this ground is demerit.

Submitting for the 5th, 6th and 7th grounds of appeal, Ms. Fyeregete forcefully argued that the prosecution evidence was reliable and they proved the case. She further argued that PW2 proved that she was raped and PW2 evidence was corroborated by PW1 and PW3 evidence. She continued to submit that PW3 evidence was true and confirmed that PW2 was raped thus the prosecution side proved the case beyond reasonable doubt.

In rebuttal, Ms. Fyeregete said that the trial Magistrate considered both the prosecution and defence case and she found that the prosecution evidence was heavy to ground conviction.

In conclusion, she prayed for this court to dismiss the appeal.

The appellant had no new issue to rejoin, he maintained his submission in chief and insisted that the evidence was cooked.

Having considered the grounds of appeal and the submissions made by the learned State Attorney and the appellant, I remain with one central issue for determination, and that is none other than ***whether or not the present appeal is meritorious.***

Starting with the first ground that the Preliminary Hearing was not properly conducted whereas the trial Magistrate did not read and explain the facts to the appellant as required by section 192 (3) of the Criminal Procedure Act, Cap. 20. The learned State Attorney in her submission conceded that the trial Magistrate did not comply with section 192 (3) of the Criminal Procedure Act, Cap.20. However, she said that the appellant was not prejudiced.

Having heard the learned State Attorney views I had to peruse the court records and found that during preliminary hearing the trial court on page 6 of the proceedings mentioned facts not in dispute but the facts were not recorded instead the trial court proceeded to record as hereunder:

Court: the accused is inquired whether he admits the facts which have been ready to him.

Accused: I do admit facts regarding my name, personal particulars as well as to be a step father of Angelina D/O Benedictor. Further I admit to have been arrested and taken to Police.

Guided by what transpired during the preliminary hearing, I think it instructive to set out the provision of section 192 (3) of the Criminal Procedure Act, Cap20 which provide that:-

*" 192 (3) At the conclusion of preliminary hearing held under this section, the court shall prepare a memorandum of **the matters agreed and the memorandum shall be read over and explained to the accused in a language that he***

understands, signed by the accused and his advocate (if any) and the public prosecutor and filed. [Emphasis supplied.]

The bolded part of the provision tells it all: The court to read over and explain to the accused person and his advocate (if any), the contents of the memorandum of undisputed facts. But that was not done in the instant case, the same is fatal thus non-compliance vitiated the entire Preliminary Hearing proceedings. In the case of **MT. 7479 sgt. Benjamin Holela v R** [1992] TLR 121 the court observed that:-

" Section 192 (3) of the Criminal Procedure Act, 1985 imposes a mandatory duty that the contents of the memorandum must be read over and explained to the accused."

Similarly, in the in the case of **R v Francis Lijenga** Criminal Revision No.3 of 2019 Dar es Salaam (unreported) which was delivered on 9th September, 2019, the Court of Appeal of Tanzania remitted back the file to the lower court to be tried afresh after noting that the trial Magistrate did not comply with section 192 (3) of the Criminal Procedure Act Cap.20.

In light of the cited provision of law, the preliminary hearing was conducted in compliance with the law. I have gone through the evidence in record and I find no reason to dwell much on the grounds of appeal as from the foregoing, it is enough to dispose of the appeal at hand.

Having found that there was an irregularity in conducting the preliminary hearing as mentioned above I say the trial is flawed. I have to nullify the said proceedings and judgment of the District Court of Ilemela in respect to Criminal Case No.01 of 2019. I however and in the interest of justice order, the case scheduling for trial be given priority, hearing to end within one year from today, and in the interest of justice, the period that the appellants' have so far served in prison should be taken into account.

Order accordingly.

DATED at Mwanza this 27th day of February, 2020.


A.Z MGEYEKWA

JUDGE

27.02.2020

Judgment Delivered on 27th day of February, 2020 in the presence of Ms. Fyeregete, learned State Attorney for the Republic and the appellant.




A.Z. MGEYEKWA

JUDGE

27.02.2020