IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 87 OF 2019

(Arising from Judgment of the District Court of Nyamagana at Mwanza in Criminal Case No.233 of 2016)

JABA S/O JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 26.02.2020
Judgment Date: 28.02.2020

A.Z.MGEYEKWA, J

The appellant JABA S/O JOHN was arraigned by the District Court of Nyamagana 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 brief background to this appeal is that the prosecution alleged that on the 18th day of October 2016 at Nyakato Mahina area within Nyamagana District, Mwanza Region the accused did have sexual intercourse with one Jesca D/O Jacob, a girl aged 7 years old.

The appellant was brought before the District Court of Nyamgana, where he pleaded not guilty to the charges. Consequently, the appellant was convicted and sentenced as he stands now. Dissatisfied and aggrieved by both conviction and sentence he appealed to this court.

In support of the appeal the appellant filed six grounds of Appeal which can be crystallized as follows:

1. *THAT, voir dire test was not properly conducted as it never met the standards required in law.*
2. *THAT, the trial court never warn itself to the danger of recording PW5's evidence who neither knew the meaning of oath nor did she promise to say nothing but the truth.*

3. *THAT, the appellant was represented by lawyer to the capital offence as such, thus the trial was not fair too prejudicial to the indigent and layman appellant.*
4. *THAT, the appellant was detained at Police Station over period required by law i.e. from 18 October to November 24 of 2016 when arraigned in Court the Act amount to torture and oppressive.*
5. *THAT, the section of law charged to was unfounded further was no locus stand in law.*
6. *THAT, the charged offence was not proved to appellant beyond reasonable doubt thus must benefit on such.*

At the hearing of this appeal, the appellant appeared in person and advocated for himself while Ms. Fyeregete , learned State Attorney appeared for the Republic.

The appellant had not much to say; he stated that he was dissatisfied by the decision of the lower court hence he decided to file the instant appeal, he prays this court to adopt his grounds of appeal and form part of his submission.

Ms. Fyeregete supported the conviction and sentence. In relation to the first and second grounds of appeal, she stated that the appellant lamented that *vior dire* test was not properly conducted and PW5 failed to promise that she could tell the truth. Ms. Fyeregete stated that the test was properly conducted to test the intelligence of the child and the trial court found that the child did not understand an oath. Ms. Fyeregete further stated that she is aware in 2017 the law was amended by Misc. Amendment No.4 of 2016 which require a child to promise to state the truth although the trial Magistrate conducted *voir dire* test the appellant was not prejudiced.

Ms. Fyeregete continued to submit that if the court will find that it was a defect then it should consider other evidence which are heavy enough to prove the case. The learned State Attorney fortified his arguments by referring this court to the case of Court of Appeal **Issa Ramadhani v R** Criminal Appeal No.409 of 2015 Dodoma (unreported) where the victim did not testify but the Court relied on other prosecution witnesses and the accused was found guilty.

It was Ms. Fyeregete further submission that PW1 evidence is heavy that while heading to the place he arrived at the shoe shiner place and went to witness what was happening then he saw the victim sitting on the legs of the appellant undressed and he saw the appellant's sperms. PW2 saw the appellant seated on a bench and his trouser was taken off and the child was undressed (naked) seated with the appellant while the appellant was full of sperms. The victim said the appellant used to rape her and he paid her Tshs. 500. PW2 was able to examine the victim in her vagina and saw sperms.

She further submitted that PW2 knew the appellant because they were neighbours and the appellant was a shoe shiner. PW2 testified that on 18th day of October 2016 the day when the victim was raped the Doctor examined her and confirmed that she was raped and found with sperms. She insisted that the prosecution evidence was heavy to ground conviction and PW3 also confirmed that PW5 was raped.

Ms. Fyeregete forcefully argued that even when PW5 testified the appellant did not cross-examine her, failure to cross-examine means the accused admitted the facts. To support his argument she cited the case of Emmanuel Saguda @ Salukuka v R Criminal Appeal No. 422B of 2013 the Court of Appeal decided that failure to cross-examine the victim on material facts renders to admission of it.

Arguing for ground 3 of the appeal, she that it is not mandatory for the government to offer legal assistant in rape cases but the appellant was at liberty to hire an Advocate, she prays for this court to disregard this ground of appeal.

Submitting on ground 4 of the appeal, Ms. Fyeregete rebutted that the appellant was detained at the Police Station. She stated that the appellant was brought before the court on 18th day of October 2014 and was arraigned before the court o 24th day of November 2014 but does not mean that he was at the Police Station all the said time since he was able to obtain bail as per section 29 (2)(3) of the CPA. She added that the same cannot overrule the prosecution evidence which was heavy enough to ground a conviction.

As to the 5th ground of appeal, she stated that the charge sheet was not defective therefore this ground be disregarded.

Concerning the 6th ground of appeal, she insisted that the prosecution case was heavy as PW1, PW2, PW3, and PW5 evidence were strong enough and pointed towards the appellant to have raped the victim taking to account that the victim's age was confirmed by PW6 by tendering a Birth Certificate.

In conclusion, Ms. Fyeregete prays this court to dismiss the appeal.

In his brief rejoinder, the appellant submitted that the victim failed to testify therefore she had to testify as PW5 instead of PW1 he complained further that the *Balozi* was not called to testify. He prayed this court to ignore the prosecution submission.

In the cause of composing the Judgment, this court *suo motu* invited the learned State Attorney and the appellant to submit on

whether the preliminary hearing was properly conducted. The appellant being a layman had nothing very substantive to state but on the part of the learned State Attorney, she submitted that she has noted a defect in the lower court proceeding, in the Preliminary Hearing the trial Magistrate listed Facts Agreed and Facts Disputed. But the Material Facts were not shown if it was read and explained to the appellant in accordance with section 192 (3) of the Criminal Procedure Act.

She continued to submit that on page 6 of the court proceedings both parties appended their signatures to confirm that they agreed on the facts agreed and fact disputed. She said that the appellant was not prejudiced because the matter proceeded to trial and he admitted throughout the hearing. She concluded by stating that the defects are curable under section 388 of the Criminal Procedure Act Cap.20.

Having carefully considered the submissions made by the learned State Attorney and the appellant, I will determine the issue of ***whether or not the present appeal is meritorious***.

As rightly pointed out by the State Attorney that there is a defect in recording the preliminary hearing, it is in the record that the Preliminary Hearing was not conducted in compliance with the law. The records do not show that before the conviction being entered the appellant was given the opportunity to plead to the offence since there is nowhere in the trial court records which shows that the appellant pleaded guilty or not guilty and the appellant was not asked if he admits the facts of the case. The issue above invites me to fault the manner in which the plea, in this case, was taken by the trial Magistrate, and the State Attorney supports that position.

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 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 not conducted in compliance with the law. I have gone through

the evidence in record and found that the evidence adduced are strong and reliable therefore and I find no reason to decide otherwise 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 thus, I proceed to nullify the said proceedings and judgment 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 28th day of February 2020.

A.Z MGEYEKWA

JUDGE

28.02.2020

Judgment Delivered on 28th day of February 2020 in the presence of Ms. Fyeregete, learned State Attorney for the Republic and the appellant.

A.Z MGEYEKWA

JUDGE

28.02.2020