**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HC. CRIMINAL APPEAL No. 171 OF 2018**

(Original Criminal Case No. 330 of 2016 of the RM'S Court of Mwanza, at Mwanza)

**SEBASTIAN MUSSA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*20th July & 10th August, 2020*

**TIGANGA, J.**

Before the Resident Magistrates Court of Mwanza at Mwanza, the Appellant Sebastian Mussa stood charged with one offence of rape contrary to Section 130 (2) (b) (c) and 131 (1) of the Penal Code [Cap 16 RE. 2019].

The particulars of the offence as per charge sheet are that, on 03rd day of June, 2015 at Kitangiri Medical Research area within Ilemela District in Mwanza Region, the appellant had sexual intercourse with one E D/o G. [name in initials] a girl aged 15 years old.

When the appellant was arraigned before the trial court, he pleaded not guilty. The record shows that the appellant disputed all the facts

constituting the offence. Following that response to the charge and the facts constituting the offence as narrated during preliminary hearing, the prosecution called a total of six witnesses namely Esther D/o Gabriel, Sylivia D/o Gabriel, Elizabeth D/o Balteza, Leonard Robert, D. 7993 D/C Kaluletelo and Dr. Hilda Michael Kibani. All these witnesses had their evidence recorded as PW1, PW2, PW3, PW4, PW5 and PW6 respectively and the tendered exhibit which were the cautioned statement and the PF3, which were admitted and marked as exhibits P1 and P2 respectively. The accused person defended himself, without calling any other witness.

After full trial the accused was found guilty and convicted as charged, consequently, he was sentenced to a mandatory sentence of thirty years.

Aggrieved by the conviction and sentence, the appellant appealed to this court. He filed a total of ten grounds of appeal. The grounds of appeal were served to the respondent, who decided not to file reply but to argue the appeal viva voce. During the hearing, the appellant adopted the grounds of appeal and asked the court to make them a base of its judgment.

Miss Mwaseba, learned State Attorney who represented the respondent Republic submitted that after passing through the proceedings and judgment she found that the proceedings were recorded in a reported speech contrary to section 210 (3) of the Criminal Procedure Act [Cap 20 R.E.2019] which requires the magistrate to record the evidence in a narrative way. She submitted that the evidence was recorded as if it was the magistrate who was giving the statement.

She prayed the matter to be ordered to be tried de novo as required by law as decided in the case of **Denis Deogratias vs The Republic**, Criminal Appeal No 362 of 2016 CAT - Tabora, where it was insisted that, evidence must be recorded in a narrative way. In the case cited hereinbefore, the court nullified the proceedings and the decision of the trial court. She consequently asked this court to order that the case be tried *de novo*, for the trial court to comply with the requirement of section 210 (3) of the CPA [Cap 20 RE. 2019].

In rejoinder the appellant complained that this case has taken so long, he asked the court to decide on the merit of the appeal not to return it for hearing *de novo* before the District court.

That being the case, the issue for consideration and determination is whether the proceedings were properly recorded by the trial court as required by the provision of Section 210 (3) CPA [Cap 20 RE. 2019].

Although Miss Mwaseba has referred me to section 210 (3), after passing through the whole of section 210, I found that, the relevant provision is section 210 (1) (b) of the Criminal procedure Act [Supra] which provides *inter alia* that;

> *"In trials other than trials under section 213 by or before a magistrate the evidence of the witnesses shall be recorded in the following manner.*
>
> *(a) N/A*

*(b) The evidence **shall not ordinarily** be taken down in the form of question and answer, but subject to subsection (2) **in the form of a narrative"*** [Emphasize added]

Properly interpreted, this section requires and makes mandatory that the evidence must be recorded in a narrative manner. Section 53 of the Interpretation of the Laws Act [Cap 1 R.E. 2019] provides that where the word shall is used to confer any function, that function must be performed.

That being the case the use of shall under Section 210 (1) (b) means that the evidence must be recorded as provided in that section, failure to do so tenders the proceedings to be a nullity and deserves to be nullified.

In this case the proceedings were recorded contrary to the law as it was recorded in a reported speech as if it was the magistrate who was telling the story of what the witness told him. This is contrary to section 210 (1) (b) of the Criminal Procedure Act (supra). That being the case, the proceedings cannot stand.

I am aware that the case has taken so long, and that there is a need to be finalised on merits. However, where the mandatory provision of the law has not been complied with in recording the evidence, there is no way these said proceedings can stand.

For that reason I find as requested by Miss Mwaseba State Attorney that this is a fit case for retrial. That said, I order the case to be tried *de novo* by another magistrate of competent jurisdiction who shall properly

record the evidence in compliance with Section 210 (1) (b) of the Criminal Procedure Act [Cap 20 RE. 2019].

It is so ordered.

**J.C. Tiganga**

**Judge**

**10/08/2020**

**DATED** at **MWANZA** this 10th day of August, 2020.

**J.C. Tiganga**

**Judge**

**10/08/2020**

Judgment delivered in open chambers in the presence of the accused in person and Miss Magreth Mwaseba-SA

THE HIGH COURT OF TANZANIA
MWANZA

**J.C. Tiganga**

**Judge**

**10/08/2020**