

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM  
CRIMINAL APPEAL NO. 22 OF 2019**

*(Origin; Kinondoni District Court, Criminal Case No. 467 of 2015)*

**MOHAMED RASHID SHEMBAZI.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of Last Order: 12/9/2019*

*Date of Judgment: 20/3/2020*

**S.M. KULITA J.**

This appeal emanates from the judgment of Kinondoni District Court in the Criminal Case No. 467 of 2015 delivered on 26/7/2016. The Appellant, MOHAMED RASHID SHEMBAZI was convicted and sentenced to serve 30 (thirty) years imprisonment for Rape Contrary to Section 130(1) and (2) and Section 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. Aggrieved with both

conviction and sentence the Appellant filed a Petition of Appeal relying on the following four grounds;

- (1) That the lower court erred in law and facts in convicting the appellant for the offence of rape whereas there was no sufficient evidence to establish the alleged offence.
- (2) That the lower court erred in law and facts for holding and making finding to convict the Appellant basing on the weak, contradictory, incredible, inconsistent and unreliable evidence of the prosecution witnesses (PW 1, PW 2, PW 3).
- (3) That the learned trial Magistrate erred in law for failure to comply with the mandatory provision of Section 210(3) of the Criminal Procedure Act [Cap 20 RE 2002] which renders the proceedings to be irregular or nullity.

(4) That the offence against the Appellant was not proved beyond all reasonable doubt.

Briefly facts of the case transpire that on the 21<sup>st</sup> day of October, 2015 at Goba area within Kinondoni District, in Dar es Salaam Region the Appellant did have carnal knowledge to one Lilian Edward, a girl of 16 years of age.

The appeal was disposed of by way of oral submissions whereby the Appellant appeared in person while the Respondent/Republic was represented by Ms. Monica Ndakidemu, State Attorney.

When the appeal was called on for hearing the appellant started to argue the 3<sup>rd</sup> ground of appeal stating that the trial court erred in law for failure to comply with mandatory provision of section 210(3) of the Criminal Procedure Act [Cap 20 RE 2002]. He said that the proceedings in the original case are irregular and nullity as the testimonies recorded by the trial Magistrate were

not read over before the court as per the requirement of the said provision. He submitted that the conviction and sentence entered against him was therefore illegal. The appellant cited the case of **MUSSA ABDALLAH MWIBA & 2 OTHERS V. R, Criminal Appeal No. 200 of 2016, CAT at DSM (unreported)** to support his argument.

As for the other grounds of appeal the appellant prayed for them to be considered as the submissions for the remaining three grounds of appeal. He concluded by praying this court to allow the appeal by quashing the conviction, setting aside the sentence and set him free from prison.

Ms. Monica Ndakidemu, Learned State Attorney in response to the appellant's submissions supports the conviction and sentence imposed against the appellant by the trial court. She stated that the case at the lower court was proved beyond all reasonable doubts that the victim (PW3) was actually assaulted

and raped by the Appellant as stated by the victim herself and the watchmen (PW 1 and PW 2) who witnessed the victim (PW3) injured at her private parts by the Appellant before they went to the scene and arrested the accused/appellant. The Counsel submitted that the appellant was found half naked whereby his trouser was pulled down to the knees and the victim was found bleeding at her private parts.

As for the 2<sup>nd</sup> ground of appeal that the testimonies of PW1, PW2 and PW3 are contradictory Ms. Ndakidemu submitted that they are not contradictory as alleged. She said that the records show that the victim testified that she was assaulted and raped by the appellant before PW1 and PW2 had arrived at the scene. She said that it is a cry for help raised by the victim (PW3) that led the witnesses PW1 and PW2 to go to the scene, however they found her already raped.

Replying the issue of non-compliance of section 210(3) of the Criminal Procedure Act Ms. Ndakidemu admitted that the trial Magistrate never complied with the requirement of the said provision but she commented that the said omission does not lead into the miscarriage of justice. Ms. Ndakidemu stated that according to the Overriding Objective rules enacted under section 3A of the Appellate Jurisdiction Act [Cap 141 RE 2002] as amended by Section 4 of the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2018 the court should base not base on technicalities but substantive issues in making decision meaning thereby such minor errors should not be given much consideration as they do not go to the root of the case. She pointed out the case of **CHARLES BODE V. R, Criminal Appeal No. 46 of 2016, CAT at DSM (Unreported) at page 12** to support her argument. It is her submission that this ground of appeal be dismissed as non-compliance of section 210(3) of the Criminal Procedure Act does not lead into miscarriage of justice.

Alternatively the Learned State Attorney submitted that if the court finds the objection in respect of non-compliance of section 210(3) of the Criminal Procedure Act sustainable the remedy should not be dismissal of the case but an order for retrial. The Counsel stated that even in the case of **MUSSA ABDALLAH MWIBA & 3 OTHERS V. R (Supra)** cited by the appellant the view of Judges of the Court of Appeal was that in such scenario the remedy is retrial and not dismissal.

As for the allegation that the case was not proved beyond all reasonable doubts Ms. Ndakidemu submitted that the testimonies of the victim (PW3), arresting officers (PWI and PW2), Medical Doctor (PW5) who examined the victim and filled the PF 3 (Exhibit PE 2), as well as that of a Police Officer (PW4) who had noted down the Appellant's/Accused's cautioned statements (Exhibit PE 1) proved the case beyond all reasonable doubts. The counsel added that the records show that there were elements of penetration in the victim's sexual organ as per the PW5's

testimony. She also stated that the appellant confessed before PW4 that he committed the offence and that led to the recording of the caution statements by the said PW4. As for the testimonies of PW1 and PW2 the victim was found bleeding at her lower parts which is also an indication that she was carnally known.

Furthermore, the counsel submitted that the sentence of 30 years imposed against the appellant is proper as it scheduled under Section 131(1) of the Penal Code [Cap 16 RE 2002].

That was the end of submissions by both parties as the appellant had nothing to rejoin apart from praying the court to allow the appeal.

I have carefully considered the arguments both in support and against the appeal. As the grounds of appeal replicate, the appellant started to challenge the 3<sup>rd</sup> ground of appeal that is failure of the trial Magistrate to comply with the mandatory provision of section 210(3) of the Criminal Procedure Act [Cap 20



RE 2002]. The appellant challenged in his submissions that the testimonies recorded by the trial Magistrate were not read over before the court after completion of testimonies by each witness as per the requirement of the cited provision. I have gone through the lower court records and that is a position. The Respondent's Counsel also admits the existence of such fault in the lower court records but she came up with two different views for this court to adopt in deciding on that issue;

first, that the court should apply the Overriding Objective Rules (Oxygen Principle) to overrule the objection under section 3A of the Appellate Jurisdiction Act [Cap 141 RE 2002] as amended by Section 4 of the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2018 which prohibits the matter to be decided on technicalities but on merits unless the defect reaches into the root of the case.

Secondly, if the appeal is allowed the remedy should be retrial instead of acquittal to the appellant.

As for the first option this court is of the view that the Overriding Objective rule which is also famous as Oxygen Principle established under section 3A and B of the Appellate Jurisdiction Act [Cap 141 RE 2002] as amended by section 4 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, of 2018 enjoins the courts to do away with technicalities, instead it should determine the case justly. However the said provision cannot be applied blindly against the mandatory provisions of the procedural law which go to the foundation/root of the case. See the case of **MONDOROSI VILLAGE COUNCIL & 2 OTHERS V. TBL & 4 OTHERS, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported)**. According to the Criminal Procedure Act compliance of section 210(3) – **Manner of recording evidence before magistrate** is a mandatory requirement. The section states;

*"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, **the magistrate shall record any comments which the witness may make concerning his evidence.**" (emphasis is mine)*

It means non-compliance of the above provision by the trial Magistrate is fatal. Therefore the first attempt by the State Attorney that the 3<sup>rd</sup> ground of appeal be disregarded through the Overriding Objective principle cannot stand. I find this ground of appeal meritorious.

Alternatively, the State Attorney prayed for the court to order *trial de novo* of the original case instead of dismissal. I can agree on that submission. Even the findings of the Court of Appeal in the case of **MUSSA ABDALLAH MWIBA & 3 OTHERS V. R (Supra)** cited by the appellant it was held that in case the trial Magistrate at the lower court failed to comply with the mandatory

requirement of section 210(3) of the Criminal Procedure Act the remedy is to quash and nullify the defective proceedings. On furtherance the court may order *trial de novo* where the lower court records transpire the likelihood of the appellant to be convicted, as well the court may order acquittal of the accused/appellant if the records transpire no authentic evidence to convict the appellant even if the matter is ordered for re-trial.

See also **YOHANA MUSSA MAKUBI & ANOTHER V. R, Criminal Appeal No. 556 of 2015, CAT at Mwanza (unreported).**

As for the matter at hand I can agree with the State Attorney that the evidence in records looks to be authentic to convict the accused/appellant. However the irregularity of non-compliance with mandatory provision of section 210(3) of the Criminal Procedure Act [Cap 20 RE 2002] by the trial Magistrate affects the root of the case, hence there is no way for the same to be cured by this appellate court through Overriding Objective. As this

ground of appeal is sufficient to dispose of the matter I find it unnecessary to deal with the remaining three grounds.

In upshot it is the findings of this court that the trial court failed to comply with the mandatory requirement of section 210(3) of the Criminal Procedure Act [Cap 20 RE 2002]. However, the records transpire watertight evidence against the appellant. I therefore order the original case, Criminal Case No. 467 of 2015 of Kinondoni District Court to be tried *de novo*. It should be done by another Magistrate with competent jurisdiction from the stage of hearing the first prosecution case where the faults had started.



**S.M. KULITA**

**JUDGE**

**20/3/2020**