IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No.31 OF 2021

(Originating from the judgment of the District Court of Sengerema in Criminal Case No. 161 of 2020,)

ELIAS YOMBO..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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JUDGMENT

21st April & 27th April, 2021.

TIGANGA, J.

The appellant herein, Elias Yombo, stood charged before the District Court of Sengerema with two counts the first count being Incest Contrary to section 158(1)(a) and (2), and the second count being rape contrary section 130 (1) (2)(e) and 131(1) both offences being under the Penal Code [Cap 16 R.E 2019]

The particulars of the offence are that, on 11th day of September, 2020, at about 22.00hrs at Kizugwangoma Village within Sengerema District in Mwanza Region, the appellant did have carnal knowledge with

one **H d/o E** (Name in initials) a aged 13 years old a pupil of standard IV at Kizugwangoma Primary School, who is his daughter.

After full trial before the trial court, the appellant was found guilty and convicted of both counts as charged, and consequently sentenced to the mandatory sentence of 20 and 30 years jail imprisonment respectively.

Dissatisfied by the conviction and sentence the appellant filed four grounds of appeal as follows;

i) That the case against the appellant was not proved beyond reasonable doubt,

ii) That the trial Magistrate erred in law by relying on mere words adduced by the prosecution,

iii) That the conviction of the appellant was against the weight of the evidence,

iv) That the appellant's defence was not considered.

In consequence thereof, the appellant prays for this court to allow his appeal, quash the conviction, set aside the sentence and release the appellant from prison. In his petition of appeal, he expressed his wishes to be present at the hearing of his appeal.

When this appeal was called for hearing, the appellant appeared in person and unrepresented, but through audio teleconference, while the respondent was represented Miss. Rehema Mbuya, learned Senior State Attorney.

Called upon to argue his appeal, the appellant opted to adopt his grounds of appeal and asked the court to consider them as his submissions, he asked the State Attorney to respond thereby reserving his right to rejoinder should there be anything to rejoinder from the arguments by the State Attorney.

The learned Senior State Attorney for the respondent did not support the appeal, she instead supported the conviction and the sentence meted out against the appellant. In her submission, she informed the court that, looking at all four grounds of appeal, all are similar as they are raising complaint that the appellant was found guilty and convicted on insufficient evidence, therefore she would argue them together.

She submitted that the evidence by the prosecution was strong enough to found the conviction against the appellant. Looking at the four grounds filed, the evidence of the victim, are to the effect that, the

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accused is her biological father and that before the fateful day she had already been raped twice the first time being on the date she does not remember but in the month of May 2020 when the appellant came back drunk at night. According to her, on his return, the appellant chased away other children, including the PW5, pulled the victim to his room where he threatened her by machete before he forcefully had sex with her. The victim said she felt pain but there was no body to help her. She bleeds a lot, but in the next day there was no adult person to tell. Further to that, she submitted that PW5 saw the incident and saw the victim bleeding on her vaginal part.

According to the learned Senior State Attorney, the second time was on 11/06/2020 when once again the appellant came home and raped the victim. In that night as well, the appellant came home and threatened the other children and due to that threat the PW5 ran away to the bush before he was found by people one of them being Kanyampare. After being so found, he informed Kanyampare that the appellant was raping the victim. Following that information, Kanyampare directed PW4 to arrest the appellant, which he did, but before affecting an arrest he was informed by the victim PW1 that, she was being raped by the appellant. The learned

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State Attorney submitted that the evidence of PW5 corroborate the evidence of PW1 and PW4.

In further buttressing submission, she said even the evidence of PW2 a medical doctor who examined the victim proved that the victim was carnally known as she had no virginity and her vagina had bruises.

Having so said, she reminded the court of the principle that, the best evidence in sexual offence cases is that of the victim. She submitted that the evidence by the victim was very categorical; it narrated and proved what the appellant did to her. Further more she submitted that, the victim, PW5 and all children of the appellant, have no reasons to lie against their father.

She submitted asking the court to find that the case was proved beyond reasonable doubt, and asked the appeal to be dismissed for want of merits.

In the alternative and without prejudice to the afore submitted the reasons, the learned Senior State Attorney submitted that, when she was preparing for hearing, she noted that the record shows that after PW1 had testified, the court was asked for leave to amend the charge sheet to

include the second offence of incest by male, that prayer was granted and the charge was on 22/09/2020 substituted, new charge was admitted and read over to the accused. However, after substituting the charge, the court did not call section 234(2)(b) of the Criminal Procedure Act, [Cap 20 R.E 2019] into play, which requires the witness who already testified to be called for cross examination on the new substituted charge. In the case at hand, that was not done, thereby rendering the proceeding defective in substance. She supported the argument by the decision in the case of **Ezekiel Hotay vs The Repulic,** Criminal Appeal No. 300 of 2016 CAT-Arusha. She prayed for the court if it will find that the omission was fatal, then it proceed to order the case to be tried *de novo* as directed by the Court of Appeal in the case cited above, and if it will find the omission to be curable, then, it proceed to determine the merit of appeal.

Even after such informative submission by the learned State Attorney, yet the appellant said he had nothing to rejoinder, he asked the court to allow his appeal, and acquit him.

Now having summarised the record and the submission made in opposition of appeal, I find it instructive to find that as in the submission by the learned Senior State Attorney, she pointed out and argued that

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there was non compliance with the law which non compliance renders the proceedings and the decision to be irregular and thus liable to crumble.

It is a cardinal principle of law and best practice that, where the matter involves both point of law and facts, the court needs to first resolve the point of law before going to the points of facts. Basing on that principle, I will therefore in this discussion, start with the issue raised by the learned Senior State Attorney in her argument in opposition of the appeal she indicated above. The provision of section 234(2)(b) CPA provides as follows:

> *"(2) Subject to subsection (1), where a charge is altered under that subsection–*
>
> *(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination"*

As rightly submitted by the learned Senior State Attorney, this provision has been interpreted by the in the case of **Ezekiel Hotay vs The**

Repulic, (supra) in that case after considering the provision at length, the Court of Appeal of Tanzania held *inter alia* that;

> *"According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge, the five prosecution witnesses who had already testified ought to have been recalled for purposes of being cross examined. This was not done, in failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value."*

This case was filed before the trial court on, 22/09/2020 charging the appellant with one offence of rape. On that date, the preliminary hearing was conducted and hearing as well, where the evidence of the victim, PW1, was recorded. However, on 28/09/2020 the charge sheet was amended and the new charge was admitted, the new charge had two counts to wit, rape and incest by male. The substitution of the charge was followed by the plea to the new charge and preliminary hearing as well. It thereafter followed by the testimony of PW2 and all other prosecution witnesses who testified thereafter. The victim, PW1 was never recalled to testify or for cross examination on the newly introduced count of incest by male.

In my considered view, it was necessary to recall the victim PW1 to be questioned not only on the new substituted charge but also in respect to the newly introduced offence of incest by male. Following that shortcoming, the proceedings cannot be saved so is the judgment which resulted therefrom. The proceedings and judgment are therefore fatally and incurably irregular and defective. That said, I hereby just like did the Court of Appeal in the case of **Ezekiel Hotay vs The Repulic,** invoke my revision powers under section 30(1)(b)(i) of the Magistrates Courts Act, [Cap 11 R.E 2019], and on that basis, I quash the proceedings and findings of the District Court as well as the conviction thereof, and set aside the sentence which was meted out against the appellant.

Having so done, I recall to have been asked by the learned Senior State Attorney, that I go further and make an order that the case be taken back to the trial court for retrial. I have given deep thought on the request, before I decide on that, I think it is important to have a look at the jurisprudential foundation upon which retrial or trial *de novo* be ordered. I am alive that, the principle of overriding objective requires that cases must be heard and determined basing on substantive justice. In this case, the errors which lead to the revision of the decision and the proceedings

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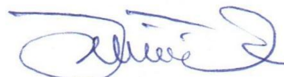
occasioned on the instances of the trial court for its failure to observe important mandatory procedure. Having so found, the next question is, is it in the interest of justice to just to end here?

The answer to these questions are in the decision of **Rashid Kazimoto and Masudi Hamisi Vs Republic**, Criminal Appeal No. 458 of 2016 CAT (unreported) in which the principle of retrial was formulated. This authority quoted with approval the authority in the case of **Sultan Mohamed Vs Republic Criminal Appeal No. 176 of 2003** (unreported) which also quoted with approval the decision in **Fatehali Manji vs Republic** (1966) E.A 343 which stated that:-

> *"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 in sufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, however, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of Justice require it"*

Also see **Paschal Clement Braganza versus Republic** (1957) EA 152



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But it should be made if the following conditions exist:

i) When the original trial was illegal or defective;

ii) Where the conviction was set aside not because of in sufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.

iii) Where the circumstances so demand

iv) Where the interest of Justice require it"

This means, if the court finds that the circumstances described in the above authorities do exists and where the interest of justice so requires, may order retrial.

As pointed out, in this case the error was committed by the trial court. I therefore find this to be a fit case for ordering retrial. That said, I order that the case be tried *de novo*, before the District Court by another magistrate with competent jurisdiction.

It is so ordered.

DATED at **MWANZA** this 27th day of April, 2021

J.C. Tiganga

Judge

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Judgment delivered in the presence of the appellant on line via audio confrence and Miss Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.

J.C. TIGANGA

JUDGE

27/04/2021

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