IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 01 OF 2020

(Arising from Criminal Case No. 98 of 2019 of Kigoma District Court Before E.B. Mushi, RM

DASTAN S/O ELIA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

30th April, & 2nd June, 2021

A. MATUMA J.

This is a very peculiar appeal to me since my sitting as a Judge. I call it peculiar due to the undefined mental status of the appellant, and yet he was normally tried, convicted and sentenced of rape to suffer a life imprisonment.

The appellant stood charged in the District Court of Kigoma for rape contrary to section 130 (1) (2) (e) and 131 (3) of the penal code, Cap. 16 R.E. 2002. He was alleged to have had carnal knowledge of a one year and seven months old girl on the 5th day of July, 2019 during

morning hours at Kalenge Village within Uvinza District in Kigoma Region.

After a full trial, the hon. trial Magistrate was convinced that the prosecution case was proved beyond reasonable doubt against the appellant. She thus convicted the appellant of the offence and sentenced him to suffer life imprisonment.

Aggrieved with such conviction and sentence, the appellant is before this court on appeal with five grounds of appeal whose major complaints are;

i. *That taking into consideration the provisions of the law upon which he was charged, he was wrongly sentenced to life imprisonment.*

ii. *That the proceedings of the trial court were fatally defective for none compliance with the provisions of section 210 (3) of the CPA, Cap. 20 R.E. 2002.*

iii. *That the defence evidence was ignored and not considered by the trial magistrate.*

iv. *That the evidence of Clinical Officer was wrongly admitted on record.*

v. *That the trial magistrate erred to have not found that the prosecution case was full of doubts which ought to have been resolved in his favour.*

Before dwelling into the appeal on merit, let me explain a bit why earlier on as herein above I called this appeal as a peculiar one.

The appeal came for hearing before me in the first time on 25/02/2020 whereas the appellant was present in person under custody. The respondent was represented by Mr. Shabani Juma Masanja learned State Attorney. The learned State Attorney expressed his readiness in the hearing of the appeal. The appellant on his party as to whether he was ready for hearing his appeal stated;

> *'Watoto wa mtaani wanakuwa wananichonganisha, yule neighbor akaja na Watoto wengine Yoso'*

In the circumstances I noted that the appellant was not mentally normal, I thus asked the prison officer to state an account of the appellant's stay in prison and this is what the prison officer one B.8995 Warden Joseph stated;

> *'Since we received the appellant, he seems to have unusual life. He cannot express himself well. We take him as chizi'*

Mr. Shabani Juma Masanja learned State Attorney then doubted whether the appellant is really mentally disturbed and left to the court to

determine the way forward. I then made an order in the exercise of my general powers under section 264 of the Criminal Procedure Act supra that the appellant be mentally examined at Isanga Mental Institute in terms of section 220 (1) of the same Act supra as I considered that it could not be fair to determine this appeal without the mental status of the appellant having been established.

The appeal then stood adjourned on several sessions pending the mental report.

On 30th April, 2021 Mr. Riziki Matitu learned State Attorney and Regional Prosecutions Officer of Kigoma Region appeared before me and explained that despite the fact that the appellant was sent to the mental institute, he was not medically examined but rather they treated him without forwarding him to the mental section for checkup. He thus proposed that the appeal be heard on merit in the absence of such report because he was going to support the appeal and thus the appellant won't be prejudiced.

I agreed with the proposal of the Senior State Attorney who also had observed that the appellant was yet well recovered. This was due to the fact that the appeal has now been pending in court for a long time and I had also gone through the trial court's records and share the same view

with the learned Senior State Attorney that the conviction of the appellant was uncalled for.

Before I dwell into the merits or otherwise of the appeal, let me remind the learned trial magistrates once again as I have done in several other cases. Administration of justice is a noble duty. It should be kindly executed. An administrator of justice like magistrates or judges should always be curious to justice whenever executing their adjudication duties. They should not let matters which appears before them detrimental to justice to go unchecked and dully determined. In the case of ***Patrick s/o Ezron versus Republic***, *(DC) Criminal Appeal No. 51 of 2020,* High Court at Kigoma for instance, the appellant who was allegedly 20 years old in the charge sheet for rape and impregnating a 16 years school girl was convicted of rape for his own plea of guilty and sentenced to 30 years jail term. Immediate after such sentence the prosecutor withdrew the remaining charge of impregnating a school girl. The appellant in that case appealed to this court and on the date when the appeal came for hearing, I was shocked to see a minor entering into my Court room. I inquired whether he was the very appellant and it transpired that he was him. I asked him of his age. He told me that he was 18 years in the meaning that at the time he was charged at the trial

court he was aged only 16 years old. I asked the learned state attorney to comment whether the appellant's age on the charge sheet really correspond to his apparent age. The learned State Attorney Edna Makala doubted the age on the charge sheet as well and called for this court to order for a retrial on several grounds but with a specific order that the age of the appellant be properly dealt with. I then made the following recommendations;

> *'I call upon trial magistrates to be curious to justice. They should inquire into whatever fact that transpires to them as a detriment to justice. They should not stand as mere observers but as administrators of justice. They are not bound by mere citations of age of accused persons in the charge nor the accused is bound to prove his age. It is the duty of the prosecutions to prove that the accused is an adult and legally responsible for the alleged offence. In this case the facts just as it was to the victim, the appellant's age was also merely stated that he was 20 years old. The fact did not state the source of information relating to the age of the appellant. Age of the accused persons in sexual offences is vital as it has legal effect to sentences particularly when the offence is committed by a boy of the age of 18 years or below'*

Similarly, in the case of ***Angelina Reubeni Samsoni and Another versus Way Safi Investment Company,*** *(DC) Civil Appeal No. 4 of 2020,* High Court at Kigoma, I held;

> *'Judicial officers who stands as mere observers of trials without reminding the parties to adhere to certain requirements of the law for proper presentations of their respective cases would not be discharging their duties for the administration of justice and if that is to happen then good technical litigants would always be using the courts to win cases to the detriment of justice'*

In the instant appeal, I reiterate the herein above observations in the two cases and re-appeal to trial magistrates to be curious to justice. They should be aware that the legal principle in the administration of justice is that; ***magistrates and Judges are duty bound to ensure that even undefended accused persons gets a fair hearing.*** See: ***Mohamed Bakar and 7 others v. Republic,*** *[1989] TLR 134.* That rule cannot be executed well unless, the magistrate or judge is curious to justice.

Now back to the merits or otherwise of this appeal, I agree with Mr. Riziki Matitu learned Senior State Attorney that the trial magistrate did not comply to section 210 (3) of the CPA supra which in effect was

prejudicial to the appellant. Both in the typed and handwritten proceedings, all the evidence of witnesses were recorded without informing them of their rights under the herein above provision which mandates the trial magistrate to inform each witness that he is entitled to have his evidence read over to him, and if he so wishes, the evidence shall be read over to him for him to make any comment relating to his evidence, the comment of which shall be recorded.

In the case of ***Elia Wami versus The Republic***, *Criminal Appeal No. 30 of 2008,* the Court of Appeal of Tanzania held that none compliance of the trial magistrate to section 210 (3) of the CPA supra is procedurally wrong and being procedural irregularity, the effect thereof would depend to whether the accused was prejudiced by the omission. If the omission prejudiced the accused, then the proceedings would be vitiated and if there was no any prejudice then the omission would be cured under the provisions of section of section 388 of the CPA supra.

The Court of Appeal explained the purpose of the law to require magistrates to comply with section 210 (3) supra;

> *'Section 210 (3) is intended to give witnesses opportunities to put right what was wrongly recorded of their evidence.*

In order to do so, the court is enjoined to inform the witness of such right. The wording is mandatory'.

In the instant case not only, the prosecution witnesses but also the accused person were not informed of their rights under the provision. In the circumstances that one of the complaints in this appeal is that the prosecution case was fabricated, and that the defence evidence was not considered at all, it is clear that the appellant was prejudiced. The trial court could have not justifiably considered the evidence of the appellant without complying to section 210 (3) supra for the appellant to satisfy himself that his evidence was properly recorded and thus wealthy for consideration. Again, and as rightly argued by the learned Senior State Attorney along with the complaint of the appellant, the evidence of the PF3 was wrongly admitted as the contents of such document was read and revealed out before the same could have been cleared for admission and actually be admitted. That was procedurally wrong as it was held by the court of appeal in the case of ***Robinson Mwanjisi and 3 others versus Republic***, *[2003] TLR 218* that a documentary evidence must first be cleared for admission before its contents are read out. Once it has been cleared for admission and subsequently admitted in evidence, it is then read out to reveal its contents to keep the accused informed for his preparation of a thorough defence. The document

received contrary to this procedure is liable to be expunged and I accordingly expunge the PF3 in this case.

Not only that, but also the evidences of PW2 Dorothera Shedrack (5 years old) and that of PW3 Katarina Gibson (13 years old) who are all witnesses of tender ages were taken contrary to section 198 (1) of the CPA supra read together with section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019.

Under section 198 (1) supra, the law is very clear that every witness in a Criminal trial must testify on oath or affirmation in accordance to the provisions of **The Oaths and Statutory Declarations Act** unless under certain circumstances, the evidence of such witness is governed by any other written law to the contrary.

Children of tender age can therefore give their respective evidences under section 127 (2) of the Evidence Act supra without taking oath or affirmation as an exception to the general rule under section 198 (1) of the CPA supra. But in order to justify the reception of the evidence of a witness child of tender age under section 127 (2) of TEA supra, the trial court has to strictly comply to the principles and guidelines given by the Court of Appeal of Tanzania in the cases of ***Selemani Moses Sotel @ White versus Republic,*** *Criminal appeal No. 385 of 2018;* ***Issa***

Salum Nambaluka versus Republic, *Criminal Appeal No. 272 of 2018,* and ***Godfrey Wilson versus Republic****, Criminal Appeal No. 168 of 2018.* The principle is that the trial court must make a determination on record whether the witness of tender age should give the evidence under oath or not or should give the evidence under the exception rule under section 127 (2) of the Evidence Act supra. That is done through the trial court putting simplified questions to the witness to ascertain whether the witness understands the nature of oath sufficiently, to have his evidence on oath or affirmation.

In the instant matter, the evidence of the two witnesses were received under section 127 (2) of the Evidence Act supra, without adhering and or complying to the herein above principle whose effect is to expunge the evidence from the record, which is hereby expunged accordingly.

Since PW2 was the only witness who alleged to have witnessed the appellant committing the crime and PW3 was the only witness who alleged to have been the witness who was the first to respond to the crime scene and found the appellant already committed the crime but still on the crime scene and the victim raped, in the absence of their evidence and that of the PF3, the prosecution case remains unproved beyond reasonable doubt against the appellant. Given the cumulative

deficiencies of the prosecution case as herein above demonstrated, I find that the prosecution case was not proved to the required standard and thus the appellant wrongly convicted and sentenced.

I accordingly quash the appellant's conviction, and set aside the sentence of life imprisonment meted to him. I order his immediate release from prison unless held for some other lawful cause. Right of further appeal to whoever aggrieved is hereby explained.

A. Matuma

Judge

02/06/2021

Court: Judgment delivered in the presence of the appellant in person and Antia Julius State Attorney for the Respondent.

Sgd: A. Matuma

Judge

02/06/2021