IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 59 OF 2020

(Originating from the District Court of Tabora in

Criminal Case No. 11 of 2020)

DISMAS THOMAS @WAMBURA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENTS

JUDGMENT

Date 14/6/2021-30/7/2021

BAHATI, J.:

This appeal arises from the decision of the District Court of Tabora. The appellant herein **Dismas Thomas Wambura** was charged and convicted of the offence of rape contrary to Section 13(1), (2)(e) and 131(1) of the Penal Code Cap. 16 [R.E 2019] and sentenced to serve a custodial sentence of thirty (30) years.

Aggrieved, the appellant is now preferring this appeal against the conviction and sentence on grounds namely:-

1. *That, the substance of the charge was not put to the appellant and his plea recorded immediately before the first witness for the prosecution started testifying, an incurable irregularity which renders*

the trial a nullity. In ***Umaiya Makilagi Musoma and 2 Others versus Republic, Consolidated Dc Criminal Appeal No. 139 of 139 and CF 140 OF 2019,*** *High court of Tanzania at Tabora, A. S. Khamis, J dated 10/7/2020 at page 20 of the typed judgment.*

2. *That the learned magistrate erred for failure to address his mind to the issue of the case being concocted upon the appellant as alluded to in his defence. Failure to consider the defence or a specific point in the defence of the appellant vitiates the conviction. See* ***Elias Steven Versus Republic [1982] TLR 313 and Hussein and another versus Republic [1986] TLR 166.***
3. *That, the appellant's rights and options available to him on how to give his defence were not explained to him by the trial magistrate to come to terms with section 231 (1) (a) and (b) of the Criminal Procedure Act,Cap. 20 [R.E 2019].*
4. *That, both PW3 and PW4 did not identify exhibit P1 and P2 respectively before asking the court to receive the same as exhibits.*
5. *That, exhibit P2 (the PF3) was not read aloud in court in the hearing of the appellant to reveal its contents, the failure of which renders the same liable to be expunged. See* ***Robinson Mwanjisi and 3 others Versus Republic [2003] TLR 218.***

The appellant pleaded not guilty to the charge whereupon the prosecution paraded four witnesses and exhibits.

Briefly, the facts of this case are narrated as; that on 13 November, 2019 the guardian of the victim Pudensiana Vitus detected some health changes in the victim. She sent the victim (name withheld for dignity purpose) to the hospital where she was revealed to be pregnant. The victim mentioned Dismas Thomas Wambura to be responsible for the pregnancy. The victim was a recent standard seven leaver. PW1, Pudensiana Vitus testified to this court that on 13 November, 2019 at night hours the victim left home, after a while, Dismas Wambura called her at 00.00hrs saying that her daughter was at his home and put off the phone. On the next day, PW1 met him on the way and he fled. Dismas was a "bodaboda" man whom they used to send to various places. In the evening the victim returned home saying that Dismas had returned at his home. PW1, did not do anything since her uncle was not present.

A few weeks later the victim felt sick and was sent to the hospital and was diagnosed to be pregnant. The victim then fled to the accused, Dismas place. They arrested him with her. They sent them to the police station at Kanyenye and were given PF3 and re-tested again and the result showed pregnancy positive. They then went to the police.

PW2, the victim in her evidence testified that she stays with her uncle Boniface and was born in 2004 and completed her standard seven in

2018 at Ighwenyi primary school. She further testified that she was learning sewing and she came to Tabora for further studies when Wambura, the accused approached her for a sexual affair in 2019. The victim had sexual relations with the accused so many times and she just slept at his home for a single day. In December she started feeling uncomfortable and she was sent to St. Anna for a pregnancy test. She mentioned Dismas to be responsible for the pregnancy.

PW3, E 608 DT Dotto recorded the caution statement of the appellant which stated that it is true that the victim was her lover but at that time she was not schooling but she was learning sewing. At that time she was not a student.

PW4, a medical officer explained to this court that he examined the victim and upon investigation, he found her pregnant and tendered his exhibit PF3 which was admitted in court as "exhibit P1".

The appellant distanced himself from the alleged offence. At the end of the day, through the impugned judgment the trial court found him guilty, convicted and sentenced him to thirty (30) years imprisonment. The appellant urged this court to allow his appeal and quash the sentence and conviction.

In this appeal during the hearing of the case, the appellant was unrepresented while the Republic was represented by Kajiru Miraji, Senior State Attorney.

The appellant being a layperson adopted the petition of appeal as submitted to this court and he had nothing to add.

In reply, the learned Senior State Attorney opposed the appeal and argued that the appellant was properly convicted and sentenced. He submitted that the case against the appellant was proved beyond reasonable doubt. He added that this is a rape case where always the court has stated that the true evidence comes from the victim.

He further submitted that PW2 (victim) while testifying stated clear that, she used to have sexual intercourse with the appellant. To bolster his arguments he cited the case of **Seleman Makumba versus Republic [2006] TLR 376** where the court observed that true evidence comes from the victim.

The counsel for the respondent further contended that the victim mentioned the accused person at the earliest stage to PW1.To substantiate his argument he cited the case of **Marwa Peter Wangiti and Another TLR [2002]** on page 39 where the court observed that;

"The ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."

The victim was mentioned by PW2 at the earliest possible. The evidence of PW1 also corroborates by PW2 which explains that the accused phoned her and informed her that they were together. Similarly, the evidence of PW4, Tobias who tendered PF3 as an exhibit in court corroborated the evidence of PW2, the victim.

In the same vein PW3, E 4608 Detective Co. Dotto took a caution statement of the accused person. Hence he submitted that the prosecution proved the case beyond reasonable doubt.

The learned State Attorney also conceded with the appellant's submission that the PF3 as exhibit P1 was not read aloud in court to reveal its contents, the failure which renders the same to be expunged from the record. He thus requested this court to expunge from its record. But, he hastily submitted that even though PF3 is expunged from the record the evidence is still cogent because the oral evidence moderates. He prayed to this court to dismiss the appeal.

In his rejoinder, the appellant submitted that this case is a fabrication. The evidence before this court is contradictory that he was arrested at the pharmacy but PW2 stated that they were arrested in the hotel. Also, he submitted that PW2 testified to this court that she was called by the appellant but there is no evidence proved in court to state if PW1 was called.

Having heard from both parties the issue for determination is whether the appeal has merit.

It is not in dispute that the appellant was charged with statutory rape whereby consent is immaterial rather the age of the victim is of the essence and has to be categorically stated in the testimonies.

The law provides that for the accused to be convicted of statutory rape, the victim must be below 18 years of age.

Upon perusal of the court records, I have noted that the age of the victim was 16 years as mentioned by the victim as well as her aunt.

To begin with the first ground of appeal that, the substance of the charge was not put to the appellant and his plea recorded immediately before the first witness for the prosecution started testifying, an incurable irregularity that renders the trial a nullity.

The law under section 228 of the Criminal Procedure Act, Cap. 20, *provides that,*

> (1) *The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he admits or denies the truth of the charge.*
>
> *2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he*

uses, and the magistrate shall convict him and pass sentence upon or make an order against him unless there appears to be sufficient cause to the contrary.

3) If the accused person does not admit the truth of the charge, the Court shall proceed to hear the case as hereinafter provided.

4) If the accused refuses to plead, the Court shall order a plea of "not guilty" to be entered for him.

5) (a) If the accused pleads:

i) that he has been previously acquitted of the same offences, or

ii) he has obtained a pardon at law for his offence, the Court shall try whether or not such plea is true.

b) If the Court holds that the evidence adduced in support of such plea does not sustain the plea, or if it finds that such plea is false in fact, the accused person shall be required to plead to the charge.

6) After the accused has pleaded to the charge read to him in Court under this section,

Section 229 (1) of the Criminal Procedure Act elaborates the procedure to be followed after a plea of "not guilty" is recorded.

In ***Naoche Ole Mbile V Republic [1993] TLR 253, the Court of Appeal*** revisited the above provisions of the law on plea taking, and held that:

> *"1) one of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, i.e., the Court has to put the charge or charges to him and require him to plead. 2) Non-compliance with the requirement of the arraignment of an accused person renders the trial nullity.*

Upon court scrutiny of the proceedings, the court noted that on 29/1/2020 and 14/4/2020 the charge was read over and explained to the accused person who was asked to plead thereto. I am of the view that the contention that the court failed to read over the charge to the appellants at the commencement of trial is not correct, since the proceedings correctly express this was done according to section 229 of the Criminal Procedure Act, Cap.20 [R.E 2019].

As to the second ground of appeal, that the learned magistrate erred for failure to address his mind to the issue of the case being concocted upon the appellant as alluded to in his defence. Failure to consider the defence or a specific point in the defence of the appellant vitiates the conviction. See ***Elias Steven versus Republic [1982] TLR 313 and Hussein and Another versus Republic [1986] TLR 166.***

It is a practice of the law that failure to consider the defence case is fatal, the remedy is for this court to remit the file back to the trial Magistrate to analyze the defence case. The same was also stated in the case of ***Yusuph Amani v Republic, Criminal Appeal No. 255 of 2015*** *where the Court of Appeal held that:-*

> *"It is the position of the law generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction."*

In the case at hand, the trial court Judgment summarized the evidence of the prosecution and in evaluating the same he did not touch on the appellants' defence. For ease of reference, I reproduce hereunder:-

> *"The accused just generally denied the allegation, while DW2 just said he knew another person, a woman who was in love with the accused person and not the victim because he never saw them in a relationship. These defence statements do not suffice to raise doubts against the prosecution's evidence. "*

Reading in context the above extracts, it is clear that no evaluation of evidence has been met. The law requires the trial court to summarize the evidence of both sides and then disregard it after scrutiny and then

consider the evidence. Even though having examined through the prosecution evidence I found that the evidence of the prosecution on record is heavy. However, to reach a fair decision the defence case be evaluated and analysed. The Court of Appeal of Tanzania quoted with approval the decision in the case of ***Leonard Mwanashoka v The Republic, Criminal Appeal No. 226 of 2014 (Unreported)*** *where it stated that:-*

> *" It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation to separate the chaff from the grain. Furthermore, it is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis."*

Having reviewed the trial court records and having revisited the District Court Judgment, I am in accord with the appellant that the trial court did not consider the defence case. It did not evaluate and analyze the defence evidence. Thus, the appellant was deprived of having his defence properly considered by the trial Magistrate

It is clear from the judgment that the trial Magistrate did not consider the appellant's defence. Indeed, he did not even consider the

other defence witnesses who testified to it. He merely stated defence of accused has not in any way shaken the evidence."

The inevitable consequence of all this is to apply the principle accentuated in the landmark decision of **Lockhart - Smith v United Republic [1965] EA 217** the remedy is retrial since the interest of justice is required in this case.

On the third ground that, the appellant's rights and options available to him on how to give his defence were not explained to him by the trial magistrate to come to term with section 231 (1) w(a) and (b) of the Criminal Procedure Act [Cap 20 R.E 2019].

Section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap 20 [R.E 2019] provides that;

> *"At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which under the provisions of sections 300 to 309 of this Act he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right- (a) to give evidence whether or not on oath' or affirmation, on his behalf; and*

b) to call a witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any 'of the above rights and shall record the answer,

As rightly submitted by the appellant the trial court did not explain to the accused person according to section 231(1) b of the Criminal Procedure Act, Cap.20.

It is a peremptory requirement that if at the close of the prosecution case the court is satisfied that a case has sufficiently been made against the accused, it shall explain to him/her their right of defence as shown therein. In the instant case, the record shows that after the court had ruled that a case had been made against the appellant, the court did not explain to him the right of defence as required. The court directly asked the appellant to give his defence.

It is my considered view that the omission is a fundamental procedural irregularity which denied the appellant his right to a fair hearing because the appellant was not given of his rights such as giving his defence with or without oath or affirmation or the right to remain silent and the right to call witnesses on his behalf. This omission was fatal because it occasioned injustice to the appellant who had no legal representation.

Since in the instant case the omission occasioned injustice to the appellant, it is the view of this court that it vitiated the trial court's proceedings after the court ruled that a case had been made out against him. This ground has merit which cannot sustain the conviction and be remitted to the trial court for it to comply with the law.

As stated earlier these grounds alone suffice to dispose of the appeal.

For aforesaid findings and having found the trial was defective, I hereby allow the appeal. In the end, I nullify the whole proceedings and quash the conviction, and set aside the sentence. I order that the case be remitted to the trial court to consider the defence case. The appellant shall in the meantime, remain in custody to await his trial.

Order accordingly.

A. A. BAHATI

JUDGE

30/7/2021

Judgment delivered under my hand and seal of the court in the chamber, this 30th day July, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

30/07/2021

Right of appeal fully explained.

A. A. BAHATI

JUDGE

30/07/2021