

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC CRIMINAL APPEAL NO. 06 OF 2021

*(Arising from decision of Criminal Case No. 30/2020 of the District Court of
Ilemela District at Mwanza before Hon. Kubaja RM)*

EDWARD MACHIBYA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

25/8/2021 & 21/09/2021

W. R. MASHAURI, J;

This is a appeal by Edward Machibya (the appellant) who was tried and convicted for the offence of rape c/s 130(1), (2) (e) and 131(1) of the Penal code was sentenced to suffer 30 years' imprisonment.

Dissatisfied with both conviction and sentence, he now appeals to this court against both.

He has fronted seven grounds of appeal namely: -

1. That, the trial court erred both in law and fact to convict the appellant for the offence of rape whose essential ingredients to wit penetration was not proved beyond reasonable doubt by the prosecution evidence.
2. That the trial court erred both in law and fact to admit into exhibit and consider the evidence of the purported confession by the appellant that was illegal i.e. obtained forcefully, involuntarily and brutality and wanting into the eyes of law.
3. That the trial magistrate grossly and totally ignored the evidence of the appellant and worst (still) he did not even consider that defence in his analysis.
4. That, the trial court seriously erred in law when it disregarded ignored the medical expert's evidence/observation that there was nothing to suggest rape on the victim and proceeded to convict the appellant on hearsay evidence.
5. That, the Trial Court's failure to cast doubt on PW1's story particularly about her husband's involvement as to why PW1 and her husband would handle a girl of that age to a man at the justice of peace was a blatant manifestation of miscarriage of justice that rendered the whole case a doubtful venture.

6. That, the trial court's omission to accord weight and include PW3 a medical practitioner's evidence in the judgment is fatal and prejudicial to the appellant.
7. That, the trial court never apportioned proper analysis and evaluation of whole evidence brought before it.

When the matter was called in court for hearing on 25/08/2021 the appellant appeared in person and Mr. Hemed Senior State Attorney appeared for the Republic/Respondent.

And at the commencement of hearing the appeal, Mr. Hemed Senior State Attorney was accorded by this court an opportunity to address the court first, and he told the court that, upon carefully passed through the typed proceedings of the trial court as shown at page 13 of the same he gathered that, upon taken the evidence of PW1, and PW2, the trial magistrate did not sign below to authenticate the proceedings, the omission of which was equally done to the defence side evidence upon the appellant's giving his evidence in defence. Which is contrary to the guidance given by the Court of Appeal in the case of **Yohana Mussa Makubi & Another v/s. R.** Criminal Appeal No. 556 of 2015 CAT Mwanza Registry (unreported) in which the Court of Appeal held at page 13 of its typed judgment enter alia that: -

"We are thus satisfied that, failure by the judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted."

Having cited the said decision of the Court of Appeal in the **Yohanas case** (supra) the learned State Attorney prayed this court to declare the proceedings of a trial court a nullity as the same is not properly before this court.

Being a layperson, the appellant did not challenge the submission by the learned Senior State Attorney on this aspect save that, he prayed the court to proceeding considering his grounds of appeal and allow his appeal. The issue is therefore what is the remedy to be taken by this court to cure the omission.

In its judgment in the **Yohana Mussa case** (supra), the Court of Appeal further stated that: -


"In view of the stated omission the trial proceedings of the trial court were indeed vitiated and are a nullity and neither did they constitute the record of the trial and the appeal before

us. We are thus satisfied that, before us there is no material proceedings upon which the appeal could be determined ... Thus, in the interest of justice, we order an expedited retrial before another judge with a different set of assessors."

Equally, there is no material proceedings in this case upon which the appeal could lie. In the interest of justice, I order an expediate retrial before another magistrate with competent jurisdiction.

It is so ordered.




W. R. MASHAURI
JUDGE
21/09/2021