IN THE HIGH COURT OF TANZANIA

(SHINYANGA DISTRICT REGISTRY)

AT SHINYANGA

CRIMINAL APPEAL NO. 62 OF 2021

(Arising from Meatu District Court, Criminal Case No. 121 of 2017)

SIDA MADIRISHA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 02/09/2021

Date of judgment: 16/09/2021

S.M. KULITA, J.

This is an appeal from Meatu District Court. The appellant **SIDA MADIRISHA** (hereinafter to be referred as appellant) was convicted to serve 30 years imprisonment for Rape, contrary to sections 130(1) and (2)(e) of the Penal Code [Cap. 16 RE 2002]. Aggrieved with both, conviction and sentence the appellant appealed to this court relying on the following 5 (five) grounds.

1. That the trial court Magistrate erred in law and fact to convict the appellant (DW1) without explanation from PW1 and PW4

as to how the light of a torch was, at that night which managed PW1 and PW4 to identify DW1. Due to that fact the credibility of PW1 together with PW4 was to be warned by the trial court Magistrate.

2. That the trial court Magistrate erred in law and fact as section 127(2) of the Tanzania Evidence Act [Cap 6 RE 2019] was not adhered.
3. That, when the Appellant (Accused) was brought to court after the conviction in absentia, the trial court Magistrate did not give him an opportunity to be heard as to why he was absent, and whether he had a probable defense on merit.
4. That the evidence of PW7 does not show that DW1 raped PW1 but surprisingly the trial court Magistrate convicted DW1 by just a belief that it is DW1 who had committed the offence, something which is fatal in the eyes of law.
5. That the trial Magistrate erred in law and fact by convicting the appellant while the case was not proved beyond all reasonable doubts.

During the submissions which were conducted orally, the Appellant appeared in person while the Respondent was represented by the Learned Counsel Nestory Mwenda, State Attorney.

In his submission the appellant prayed for his grounds of appeal to be adopted as the submission for his appeal before this court. He prayed for the court to find him not guilty and acquit him forthwith.

In the reply thereto the State Attorney, Mr. Nestory Mwenda conceded with the appeal. He said that according to the provisions of the Penal Code that the Appellant had been charged with, that is sections 130(1) and (2)(e), the victim must be a girl under the age of 18 years, but there is no witness for the Prosecution side at the lower court who had mentioned the age of the victim. The age is just transpired in the particulars of the victim (PW1) while testifying, which is not part of the evidence.

Submitting on the 3rd ground the State Attorney stated that after the closure of the prosecution case, the defense case was not conducted for non-appearance of the accused (appellant). The court therefore proceeded under section 227 of the Criminal Procedure Act whereby the defense case was skipped and the judgment was entered in the absence of the accused. The accused was then convicted and sentenced accordingly. The counsel stated that the records do not transpire if the accused, after being found, was given a chance to state as to why he didn't attend to court to defend his case.

It is the submission of the Respondent's counsel that the situation that exists in this case does not suffice to order retrial as the prosecution case in the trial court records is weak for having no evidence on the age of the victim while the matter is a statutory rape, in which age of the victim is something crucial. As well, the visual identification of the suspect by PW1 (victim) and PW4 (victim's sister) during the night when the crime was committed, have a shadow of doubts. Hence, re-trial order cannot be convenient.

The counsel concluded by praying the court to allow the appeal and acquit the Appellant.

The above submissions led me to go through the records of the trial court. Having so done I actually noted that the conviction entered and sentence imposed by the District Court against the Appellant were unlawful, the State Attorney who is a Defense Counsel in this matter was therefore right to concede the Appeal. I concur with him that there are material procedural errors in entertaining the matter at the lower court and the evidence is weak to find the accused person (appellant) guilty.

Starting with the issue of procedure to be followed when for the Accused who has been convicted and sentenced in absentia under

section 227 of the Criminal Procedure Act but later on found, according to section 226(2) the said person should be handled to the trial Magistrate in the court which had convicted and sentenced him so as to show cause as to why he should not start to serve his sentence. Actually, he has to give reasons of which, if the court finds reasonable it sets aside the *ex-parte* judgment and give him a chance to defend his case. This should be followed by the composition of a new judgment by that court which should have contained the evidence for defense case.

As for the matter at hand, the proceedings are silent as to whether the Appellant had been taken to the trial Magistrate to show cause after being found. In that light therefore, the trial court did not satisfy itself whether the appellant's attendance could not be secured without undue delay or expense as per the requirement of section 227 of the Criminal Procedure Act. In that sense, the proceedings of the trial court, from the date of closure of the prosecution case are regarded nullity. See **GHATI NYANGI @ CHACHA V. R, Criminal Appeal No. 200 of 2020, High Court at Musoma (unreported),** that, after the accused been found and handled to court, it was wrong for the trial court not to ask him to show cause as to why he should not start to serve his

imprisonment term of 30 years that had been imposed against him in *absentia.*

Basically, a way forward is for this appellate court to remit back the appellant to the trial court so that he can be asked show cause as per section 226(2) of the Criminal Procedure Act. In showing cause, if the trial court finds that the appellant has genuine reasons, all proceedings that followed after closure of the prosecution case are supposed to be quashed and the Appellant/Accused be asked to defend his case. In **MTWA MICHAEL KATUSA V. R, Criminal Appeal No. 577 of 2015, CAT at Mbeya (unreported)** it was held that failure to afford the appellant an opportunity to be heard before his incarceration, was contrary to the principle of natural justice enshrined under **Article 13(6)(a) of the Constitution of the United Republic of Tanzania [Cap 2 RE 2002]**.

As so narrated above that the Appellant has the right to show cause before the trial court, whereby if he is found to have genuine reasons, he gets an opportunity to defend his case. But this procedure does not apply in a situation where the appellate court has noticed from the records that, the prosecution evidence in record is weak to convict the accused person (Appellant). The same applied to the circumstances in which this court finds that the

proper remedy is *trial de novo* but the prosecution evidence in the record is weak. See **FATEHALI MANJI V. R [1966] EA 343** in which it was held that the order for re-trial (*trial de novo)* is granted only if the evidence on the lower court's record is sufficient enough to convict the Accused.

As for the matter at hand, the fact that the records transpire that the prosecution case is weak in the sense that the matter is Statutory Rape as per section 130(2)(e) of the Penal Code, that the victim is under the age of 18 years, but no witness has established age of the victim during trial, the offence does not stand. That fault on the prosecution case vitiates the whole case against the Accused/Appellant. As the issue of victim's age being under 18 years is among the ingredients constituting statutory rape, failure to mention it during trial is fatal. See **ISSAYA RENATUS V. R, Criminal Appeal No. 542 of 2015, Criminal Appeal No. 542 of 2015, CAT at Tabora (unreported).**

The issue of visual identification of the accused by the prosecution witnesses is also doubtful. The records transpire at page 5 of the trial court's proceedings that PW1 (victim) and her sister (PW4) identified the Appellant via a torch which was handled by PW4. However, PW4 whose testimony is available at page 9 of the typed

proceedings, never stated that she had a torch, though she said that she saw the Appellant running. Actually, neither of the two gave a description as to how she identified the accused, and how was the flashlight.

In this matter, therefore, quashing only the lower court's proceedings which followed after closure of the prosecution case, and give the appellant an opportunity to make a defense, is not enough. As it is evident that even the testimonies of the prosecution witnesses at the subordinate court are not weight enough to convict the Appellant/Accused, I find it convenient to quash the conviction, set aside the sentence and acquit the Appellant in totality, and I so order.

The appeal is therefore allowed. The appellant to be released from the prison house immediately, unless he is held for any other lawful cause.

THE HIGH COURT OF TANZANIA

S.M. KULITA

JUDGE

16/09/2021