IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 98 OF 2020

(Originating from Criminal case No. 57 of 2019 of Muleba District Court)

BEGAYA PAULO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

08/09/2021 & 23/09/2021

NGIGWANA, J.

In the District Court of Muleba sitting at Muleba hence forth (the District Court), the Appellant was charged with two offences; Rape contrary to sections 130(1) (2) (e) and 131 (1) of Penal Code Cap. 16 R: E 2002, (now R: E 2019), and impregnating a school girl contrary to section 60A (3) of the Education Act Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No.2 of 2016

At the trial court, it was alleged that on unknown day of August 2018 at Bihanga Village within Muleba District in Kagera Region the appellant did unlawfully have carnal knowledge of one A.R (Identity of the child hidden) a primary school girl aged 15 years old.

As regards the 2nd count, it was alleged that on unknown day of August 2018 at Bihanga Village within Muleba District in Kagera Village the appellant did impregnate the victim (PW1) a primary school girl aged 15 years old. When the charge read over and explained to the appellant, he pleaded not guilty to the charge.

After full trial which involved four (4) prosecution and two (2) defense witnesses, the trial court was satisfied that the prosecution proved the offence of Rape beyond reasonable doubt and proceeded to convict the appellant and sentenced him to thirty (30) years imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to this court. In the memorandum of appeal, he has lodged three (3) grounds of complaint appeal upon which he asked this court to quash the conviction, set aside judgment and set him free. For easy reference, the grounds of appeal are hereby reproduced as follows;

One, that the trial court grossly erred in law and facts by convicting the appellant basing on contradictory evidence by the prosecution witnesses; hence failed to prove the case beyond reasonable doubt. **Two**, that the Trial Court erred in law and fact for convicting the appellant without sufficient evidence as the age of the victim was not proved in accordance with the law. **Three**, that the Trial Court erred in law and fact by not considering the evidence of the appellant; and failed to take into consideration that the Appellant was not mentioned in the earliest possible stage before his arrest.

At the hearing of this appeal the appellant appeared in person and represented by Mr.Remidius Mbekomize learned advocate whereas the respondent Republic was represented by Mr. Grey Uhagile, learned State Attorney.

Expounding on the first ground of appeal Mr. Mbikomize submitted that, the standard of proof in criminal cases is that of beyond reasonable doubt. He further submitted that in the trial court the victim (PW1) testified that she gave birth to a baby girl on 23/05/2019. Mr. Mbekomize attacked the evidence of the PW1 that it was not free from doubt since she could not mention the appellant at the earliest stage, as a result the appellant was arraigned before Muleba District Court on 19/06/2019.He made reference to the case of **Yusta Lala versus The Republic,** Criminal Appeal No.337 of 2015 CAT at Arusha (Unreported) in which it was held that the lapse of time of almost five months between the alleged rape and the time when the appellant was mentioned raises doubt in the credibility of the victim.

Mbekomize further argued that, there was no evidence linking the appellant with the born child as there was no DNA test conducted. To back up his submission, he referred the court to the case of **Faida George versus the Republic,** Criminal Appeal No.58 of 2019 where the court held that, considering the fact that the victim was submitted to the health facility, DNA test was necessary to establish the father of the child which results would give an answer of who raped the victim. The learned counsel faulted the trial court for not considering the defense of the appellant.

On his part, Mr. Uhagile, learned State Attorney for the Republic supported the appeal. His reason for supporting the appeal is that the case against the appellant was not proved beyond reasonable doubt due to the fact the offence of rape was committed in August 2019 but the appellant who was living in the same village with the victim was arrested 8 months later, and no DNA test was conducted to link the appellant with the born child.

Under normal circumstances, the relevant question which ought to be answered at this juncture is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant beyond reasonable doubt. However, when the court posed to compose the judgment, it discovered a fatal irregularity committed by the trial court which had not been addressed by the parties.

It has to be noted that this issue was not raised as one of the grounds of appeal. Since it is trite in our adversary system of administration of justice where the Judge or Magistrate is as at all time expected to play the role of unbiased umpire, he/she cannot raise any issue **suo motu** and proceed to decide the matter on the said issue without hearing the parties.

As to what procedure should be adopted where the issue has been discovered at the time of composing the judgment, I sought guidance from the cases of **Zaid Sozy Mziba versus the Director of Broad casting, Radio Tanzania Dms and Another**, CAT, Civil Appeal No.4 of 2001 and **Pan Construction Company and Another versus Chawe Transport Import and Export Co.Ltd** Civil Reference No.20 of 2006 CAT (Both unreported), where the court emphasized that where in the

course of composing its decision a court discovers an important issue that was not addresses by the parties at the time of hearing , it is duty bound to re-open the proceedings and invite the parties to address it on the discovered issue.

A careful scrutiny of the court records of the trial court reveals that at on 19/06/2019 by leave of the court the charge was amended whereas the 2nd count was introduced into the charge as a result, the substituted charge comprising two counts to wit; Rape contrary to sections 130(1) (2) (e) and 131 (1) of Penal Code Cap. 16 R: E 2002, (now R: E 2019), and impregnating a school girl contrary to section 60A (3) of the Education Act Cap 353 as amended by section 22 of the Written Laws (Miscellaneous Amendments) Act No.2 of 2016 was read over and explained to the appellant whereupon he pleaded not guilty. There is nowhere in the trial court record showing that the 2nd count was ever withdrawn against the appellant before judgment.

Contrary to the substituted charge, the prosecution evidence in which after the closure of the prosecution case, the trial court found that a primafacie case was established against the appellant, and contrary the defense evidence where the appellant defended himself in respect of the two counts the judgment of the trial court does not reflect that the appellant was charged with two counts. The appellant was found guilty on the 1st count, hence was convicted and sentenced to thirty (30) years imprisonment. The fate of the appellant in respect of the second count was not at all determined. The issue here is whether in such a situation, it can be said that the trial court judgment is a valid.

After re-opening the proceedings, Mr. Derick Zepherine, learned advocate holding brief for Mr. Mbikomize appeared with instruction to proceed while the Republic was represented by Mr. Amani Kilua, learned State Attorney.

In a nutshell, Mr. Amani Kilua, learned State Attorney submitted that, since the fate of the 2nd count in respect of the appellant was left undetermined, the judgment is a nullity. He added that the remedy is to remit the case file to the trial court for it to compose a proper judgment.

Mr.Derick Zepherin, learned advocate for the appellant on his side concurred with Mr. Kilua that, the judgment was tainted with an irregularity but differed with him on the remedy as he urged the court to step into the shoes of the trial court to re-evaluate the evidence adduced in support of the first count, then analyze and evaluate the evidence in support of the 2nd count instead of remitting the case file to the trial court because that will delay justice

I really appreciate for brief, rich and useful submissions by Mr. Kilua and Mr. Derick. It is plain and clear that the trial Magistrate did not address the 2nd count leaving the fate of the 2nd count against the appellant undetermined. With no doubt, this disquieting aspect of the proceedings was occasioned by the laxity of the trial Magistrate. The charge being a foundation in a criminal trial, the trial court had the duty to determine whether there was evidence led by the prosecution to prove both counts.

I paused to ask myself as to whether this court can step into the shoes of the trial court to analyze and evaluate the evidence adduced before the trial court in support of the 2nd count to see whether it can ground the

conviction or that the appellant is entitled to an acquittal. The answer to this issue is no.

It is the duty of the trial court to analyze and evaluate the evidence adduced before it, and where there is an appeal, it is the duty of the first appellate court to re-evaluate the same. In our case, neither analysis nor evaluation was done, the appellant was neither convicted nor acquitted in respect of the 2nd count. The conclusion of the trial court in respect of the 2nd count is missing

In the case of **Faki Said Mtanda versus Republic,** Criminal Application No.249 of 2014 (Unreported) the Court of Appeal of Tanzania quoted with approval the decision of then East African Court of Appeal in the case of **R.D.Pandya versus Republic** [1957]EA 336 that;

"It is a salutary principle of law that a first appeal is in the form re- hearing where the court is duty bound to re-evaluate the entire evidence on record by reading together and subjecting the same to a critical scrutiny and if warranted arrive to its own conclusion"

Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may,

depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus Republic,** Criminal Appeal No.341 of 2017 and **Yohana Dioniz and Another versus Republic,** Criminal Appeal No.114 of 2015 CAT (both unreported*)*

It must be noted that, it is cardinal principle of law that a decision of court must contain the point or points for determination, the decision thereon and the reasons for such decision. See section 312 (1) of the Criminal Procedure Act, Cap 20 R: E 2019. Since the fate of the 2nd count against the appellant was left undetermined and reasons for such omission were not assigned in the judgment, it cannot be said the composed judgment was valid.

It is trite that justice will not be done if it is not apparent to the parties why one has lost and the other has won. See **Director of Public Prosecutions versus Elias Daudi@ Sumbuka**, Criminal Appeal No.06 of 2019 HC Tabora Registry (Unreported)

In the premise, I am of the considered view that the trial court did not enter a proper judgment which can be cured under section 388(1) of the Criminal Procedure Act, Cap 20 R: E 2019, thus the judgment is a nullity hence quashed and the sentence of thirty (30) years imprisonment meted against the appellant in respect of the 1st count is set aside. For that

reason, the case file is remitted to the trial court with directions to compose a new judgment within thirty (30) days from the date of this order.

For purpose of clarity, the new judgment has to be composed by the trial Magistrate, and if prevented for one reason or the other, by his/her successor. Upon compliance of this order, the right of appeal to the High Court will certainly be there for either party from the date of the judgment. The appellant shall remain in custody waiting for compliance of the order of this court by the trial court.

It is so ordered.

E.L. NGIGWANA

JUDGE

23/09/2021

Judgment delivered this 23rd day of September, 2021 in the presence of the appellant in person, Mr. Derick Zephurine, learned counsel holding brief for Mr. Mbekomize, learned advocate for the appellant, Mr. Amani Kilua, learned State Attorney for the respondent Republic and E. M. Kamaleki, Judges' Law Assistant.

E. L. NGIGWANA

JUDGE

23/09/2021