IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC. CRIMINAL APPEAL NO. 15 OF 2021

(Originating from Criminal Appeal No. 173 of 2021 Mbinga District Court)

JANUARY DOMINICUS NDUNGURU @ TAMANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 15/9/2021

Date of Judgement: 13/10/2021

BEFORE: S.C. MOSHI,J

The appellant was arraigned before the District court of Mbinga for the offence of rape contrary to section 130(1)(2)(e) and 131 (1) of the Penal Code, Cap. 16 R.E 2019. It was alleged that January Dominicus Ndunguru @ Tamani from 2019 to November 2020 at different dates and time at Masumuni street within Mbinga District in Ruvuma Region did have sexual intercourse with one Flora Henjewele a girl aged 7 years. Prosecution case was heard, and the court ruled out that the appellant had a case to answer. The appellant was informed of his right to give

evidence and call witnesses. However, when the case came up for defence hearing the appellant opted to remain silent; hence the court proceeded under section 231(3) of the Criminal Procedure Act, Cap. 20 R.E 2019 (C.P.A). The appellant was found guilty as charged, consequently he was convicted and sentenced to life imprisonment. Aggrieved by the conviction and sentence he has appealed to this court on the following grounds: -

1. *That the trial court erred in law when recorded and conducted the proceedings contrary to the law and criminal procedure rules and principles which lead to miscarriage of justice.*
2. *That the trial court erred in law when it held that the appellant opted to remain silent and hence justifying it to draw adverse inference against him while it is not true that the appellant did not opt to remain silent.*
3. *That the trial court erred in law when it admitted the PF3 which was not tendered by the Doctor who made it despite the fact that it has earlier directed that the same be tendered in court by the maker.*
4. *That the trial court erred in law when it denied the appellant the right to cross examine the Doctor who made the PF3 despite the fact that the appellant*

requested for the said Doctor to be made available for cross examination.

5. *That, the trial court erred in law when it convicted the appellant while the prosecution did not prove their case beyond reasonable doubt.*
6. *That the trial magistrate erred in law when he hijacked and proceeded with the matter which was assigned to him.*
7. *That, the trial court erred when it sentenced the appellant contrary to the law.*

However, the seventh ground was dropped during the hearing of the appeal. At the hearing of the appeal the appellant was represented by Mr. Elseus Ndunguru whereas the Republic was represented by Ms. Hellen Chuma, State Attorney.

Among other things, Mr. Elseus Ndunguru submitted on first ground that, the whole proceedings at every stage when the case came for hearing or any other stage the accused was not asked if he was ready to proceed. For example, at the defence stage, on 5/7/2021 at page 29, the public prosecutor notified the court that defence advocate did not appear, the accused was not given a right to be heard, the public prosecution requested for another date of hearing and the court granted the prayer. Again on 8/7/2021, the public prosecution submitted the same, the accused said that he was not aware of the advocate's whereabouts. The

court proceeded to order defence hearing and ordered the accused to proceed without an advocate. The court ordered the case to proceed without asking him if he was ready, it proceeded under section 231 of the Criminal Procedure Act, Cap. 20 R.E 2019 after noting that the accused had decided to remain silent at page 30. The proceedings do not indicate that the accused decided to remain silent. He said that, it is a principle and rule of practice, that whatever a party says has to be seen in the proceeding.

He argued that, at page 1 of the proceedings on 23/12/2020 the case was before C. J. Haule, RM. On 6/1/2021, the proceeding was taken over by G. E. Kimaro. The case was not re – assigned to Kimaro since the proceedings doesn't show if Kimaro took over after a re – assignment. Preliminary hearing was conducted and hearing started. He said that, the accused was not asked if he has reservations. A fair trial includes comfortability of the party before the court. He said that, the way proceedings were conducted it is evident that the appellant was not comfortable as he was never asked if he was ready for hearing.

On the second ground he said that, the court pointed out that the appellant refused to take an oath or to say anything. He argued that, section 231(3) of Criminal Procedure Act allows the court to draw adverse inference if accused elects to remain silent. He said that, the

accused/appellant did not remain silent. The appellant was moved to witness box. The record is silent as to what the appellant stated when he was in the witness box. Whatever transpired in court should have been recorded. He added that, section 231(3) says accused, not witness. By then the accused was a witness. Where the party is an accused is treated differently from the treatment of a witness.

He submitted further that; his client told him that he informed the court that he couldn't testify on that date; he would testify when his advocate is present. He told the court that he was detained in prison so he had no contact with his advocate. All what was stated by the appellant was not recorded. Therefore, he said that the magistrate drawing adverse inference against the appellant was void and it caused a serious miscarriage of justice.

On the third ground, it was Ndunguru's submission that the District Court erred in admitting a PF. 3 since it was not tendered by the doctor who prepared it. The court had ordered that the PF. 3 should be tendered by the doctor who filed it at page 18 and 19 of typed proceeding. However, at page 22, 23 and 24 of the proceeding the court continued to receive it although it was not tendered by the doctor as previously ordered.

On the fourth ground he said that, even if it was tendered by another witness, the doctor should have been summoned for cross – examination. He stated that, section 240(3) of the Criminal Procedure Act, Cap. 20 R.E 2019 gives a right to the accused to request to cross – examine the doctor. The accused through its advocate asked that the doctor should be called but the court remained silent, it did not make any order. He cited the case of **Sultan Mohamed V. Republic,** Cr. Appeal No. 176/2003, Court of Appeal sitting at Dar es Salaam (unreported) and the case of **Mohamed Rajab V.R,** Cr. Appeal No. 55/2005, High Court, Dar es Salaam (unreported) where it was held thus if the accused asked for the doctor to be summoned, if the court does not grant it, it is a fatal irregularity.

On the fifth ground, he submitted that, prosecution's case was not proved beyond a reasonable doubt. The charge sheet shows that the accused raped the victim between 2019 – 2020 on different occasions. However, the evidence did not indicate that the victim was raped on different incidents as shown in the charge sheet. The element of rape is penetration. Penetration is penetration of penis. He said that, the victim did not say what penetrated was penis but it was inferred from the evidence of PW1. The victim gave different contradictory versions. At page 11 PW1 said that the accused person *"alikuwa ananilala".* For a seven years child saying appellant was sleeping on her is doubtful. At page 12

during cross – examination she answered *"I have no pain....."*. At page 13 on cross – examination she said that a medical doctor examined her on Monday, and told her that the accused destroyed her on *'Mabodi'*. The prosecution did not describe or explain what are *'Mabodi'*. At page 25 the prosecution, vide PW3 was asked about *'Mabodi'* and answered *'Mabodi' ni 'matako'*.

He said therefore that, there is inconsistencies on the issue of penetration, as there is no explanation which part of the body was penetrated. She said that, at page 11 of the proceedings shows that the appellant used to assault three children at the same time. Other victims were Winfrida and Jacky. Neither Winfrida nor Jacky were summoned to testify. Winfrida's assault led to the arrest of the appellant. It was stated that, the appellant used to rape Winfrida, in the presence of the victim. Both cases i.e., Winfrida's and this one was heard at the same time. It was said that in this case eye witnesses were Winfrida and Jacky but they were not summoned to testify despite the fact that Winfrida was within reach as her case was also in court.

He argued further that, at page 11, the victim said that, *"my mother told me to tell the truth....."*. This means that she was told what to testify. It was indicated that the victim was 6 years old i.e., in 2019 when she was raped for first time. For a six years child, it is expected that her

mother was bathing her but her mother did not notice anything from 2019 – October, 2020. Again, at page 14 the victim said that she went to hospital because she was sick and she got an injection. On cross examination PW2, said that she was injected for blood test. PW1 said that when PF.3 was filled, she went to hospital to get an injection. He argued that, in the circumstances, the prosecution was supposed to explain what the injection was all about, whether did she had contracted sexually transmitted diseases or if she had any other sickness.

He said that, at page 26 when PW3 was asked when the appellant was arrested, he said that he did not remember the actual date when the accused was arrested for raping Winfrida who is another victim in another case. The teacher said that the accused person was like an insane person. It was stated that the accused was arrested raping another child and he was implicated in this case. He said that, despite the fact that the teacher who testified in Winfrida's case said that the person they arrested was not the appellant but they did not summon the teacher in this case. PW3, said that after interrogation, he observed that the appellant was not insane. He said that this means that the person who committed the offence is not the appellant.

He argued that, in the circumstances, basing on the analysis of evidence, the prosecution did not even attempt to prove the case beyond

a reasonable doubt, the proceeding and the judgment are a nullity the way forward is to quash them. He prayed that the court shouldn't order a re – trial as the prosecution will get a chance to fill in the gaps in evidence. He cited the case of **Francis Alex vs. Republic**, Court of Appeal, sitting at Dar es Salaam, Cr. Appeal No. 185/2017 (unreported), and the case **Fatehali Manji V.R** [1966] EA 343. He contended that if a retrial is ordered the weaknesses pointed out in evidence will be taken by the Republic to fill in the gaps. He prayed the appeal to be allowed, sentence be set aside and the appellant be set fee from prisons.

In reply Ms. Hellen submitted among other things that, there is no law which requires a magistrate to record everything said in court, for instance recording that the advocate was ready to proceed with hearing. She said that the appellant's advocate said that the appellant was not asked if he was ready to proceed with hearing. However, there is nowhere in the proceeding showing that the magistrate made orders *suo mottu* without involving the public prosecutor and the accused. She said that, the magistrate was lenient, when the appellant's advocates requested to cross – examine PW1 and PW2, the court allowed their prayer. The witnesses were re – called for cross – examination.

Regarding hijacking the case. She said that, the record does not show that case was assigned to Ms. Haule, it could be that it was assigned to

Kimaro but Haule just adjourned the case. She contended that, nevertheless there was no miscarriage of justice as the charge was read afresh to the accused before Kimaro.

She submitted further that at page 28 of proceeding the appellant's advocate was present, he was given a chance to represent the accused but he said that his witness was tired, and he prayed for another date. Therefore, the accused and his advocates were given a right to indicate that they were ready to proceed with the case; hence no injustice was occasioned.

Regarding appellant's claim that he was denied his right to give evidence, she said that the record shows that the witness denied to give evidence, he also refused to take an oath. Therefore, there was nothing to record as the proceedings show that the accused was in the witness box but remained silent. The case was set for defence on 21/6/2021 but the defence advocate did not appear, and he did not give a notice of absence. It was set for last adjournment on 5/7/2021, again, the defence advocate did not appear. That is why it proceeded on 8/7/2021 in absence of the defence advocate.

The appellant's advocate alleged that his client said that he could not proceed without his advocate but his statement is not on record. If this is taken, it means that the accused was not afforded a right of

representation. The court was supposed to afford time to the accused to look for another advocate. The court then should have given him a chance; the advocate had a duty to notify the court or his client that he would not represent him otherwise it was only a delaying technique.

She supported the third and fourth ground, she said that at page 19 the prosecutor intended to tender the PF.3. It was objected and ordered that it should be tendered by a doctor. However, at page 24 the PF.3 was tendered by PW3, Mr. Ndunguru did not oppose its admission, but he prayed that the maker should be called for cross – examination, however, the doctor was never cross – examined. She contended that, since the law was not complied, then the exhibit, PF.3 was incorrectly admitted. She proposed the same to be expunged from the records.

She however argued that, even after expunging PF3 still sufficient evidence to prove that the appellant raped the victim between 2019 – 2020. She made reference to the case of **Seleman Makumba V.R,** Cr. Appeal No. 94 of 1999, High Court Mbeya [2006] TLR, 384, where it was stated that the truthful testimony in rape cases comes from the victim. She said that, PW1(Victim), explained how the appellant raped her, that the appellant stripped her cloth, *'akatoa mdudu wake na kuniingiza kwenye uchi wangu'.* She said that, the victim was raped when she was going to school and when she was coming back from school, she

explained how the act was done, during cross – examination by Mapunda, advocate she said that that, the *mdudu* had no teeth but it was painful. This shows that the child was hurt following the rape. The child identified the accused properly. She said that, Regarding the issue of "*Mabodi*" it was PW3 who referred to 'Mabodi' and not the victim.

She argued that, the contention that the other victim in another case didn't testify in this case is untenable since the testimony of PW1 was sufficient to prove the case. She also said that, the fact that the parent could have noticed signs of rape when she was bathing the child is not viable as in village's environment such child could bath herself. The child was asked why she remained silent, the child said that she was being threatened that he would beat her. The record shows that the appellant was correctly arrested, the victim's mother and appellant knew each other and had no grudges. So, it is not expected that the victim would blame the accused for what he did not do. Upon his arrest the accused intended to evade justice and pretended that he was insane.

She ended by submitting that, the procedure was followed and there is sufficient evidence, the mixing up of the word 'Mabodi' does not go to the root of the case. She prayed that conviction and sentence be upheld. She proposed that if the court were to order a retrial, then it should start at defence stage so that the appellant can be represented by his advocate.

In rejoinder Mr. Ndunguru reiterated his submission in chief.

I had an ample time to keenly peruse the entire record of this appeal, having considered the rival submissions of both parties, the issue is whether this appeal has merit. I have decided to make deliberation on second ground only due to the reasons which will be discussed herein.

The second ground of appeal basically relates to non compliance of section 231 of the Criminal Procedure Act Cap. 20 R.E 2019, this section requires a trial court to inform an accused person of his rights before making his defence. The said provision provides as follows: -

(1) At the close of 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 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 his right;

(a) To give evidence whether or not on oath or affirmation, on his behalf; and

(b) To call 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 and the court shall then call on

the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

(2) Nothwistanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross examination by the prosecution.

(3) if the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

The relevancy of section 231 of the CPA has been put more clearly in the case of **Juma Limbu @Tembo vs. The Republic**, Criminal Appeal No. 188 of 2006 (unreported), where it was stated as follows: -

"To avoid a miscarriage of justice in conducting trials it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings."

In the case at hand, after closure of the prosecution case the records show that the trial Magistrate explained to the appellant his right to defend in terms of section 231 and the accused responded that;

"I do not have witnesses; I will give my evidence on oath."

However, when the case came for defence hearing on 08/07/2021 the accused remained silent. The reasons which led the appellant to remain silent are not on record. The record shows that after he stated his name, age, occupation, tribe and area of residence he decided to remain silent. By then he was already in witness box. The appellant's advocates submitted that the appellant told him that he informed the court that he would not testify on that particular date because his advocate was not present. However, these assertions are not on court record, and the record was not impeached. I would like to point out that, it is unprocedural to impeach court records from the bar and submitting on information which was provided to him by the appellant out of court.

It is also on record that, following accused's refusal to testify, the court decided to proceed under section 231(3) of the Criminal Procedure Act, Cap. 20 R.E 2019. However, the court and the prosecutor did not comment on the accused's failure to give evidence.

Thereafter, the trial Magistrate proceeded to fix a date of judgement. Bearing the above in mind, it is apparent that the trial court contravened section 231(3) of the Criminal Procedure Act for omitting to comment on the accused's failure to give evidence. I am of the view that

the omission is a fundamental procedural irregularity which has occasioned injustice. It was important for the court and the prosecution to comment on the failure of the appellant to give his evidence which would enlighten him of the consequences of his choice of not giving evidence. See the case of **Simaiton Patson@ Toshi vs. The Republic**, Criminal Appeal No. 167 of 2016 Court of Appeal sitting at Dar es salaam (Unreported).

In light of the above, the question for attention is, what is the consequence of the omission by the trial court to fully comply with section 231(3), evidently, noncompliance with this section is legally fatal.

Failure by the court to observe the requirement of the law led to a miscarriage of justice as it denied the appellant a right to bring defence evidence. In the circumstances, it follows from the above conclusion that, in my opinion, the accused deserves a chance to bring his defence evidence.

That said and done, I quash all proceedings and orders made on 08/07/2021 to 22/7/2021. I also quash the judgement and set aside the sentence. I order a fresh hearing of defence case to its completion i.e fresh defence hearing and a judgement before a different magistrate with competent jurisdiction.

Meanwhile the appellant should be held in prison while awaiting his trial.

The appeal is allowed to the extent shown herein.

It is so ordered.

Right of Appeal Explained.

S. C. MOSHI

JUDGE

13/10/2021