IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 86 OF 2019

(Originating from the District Court of Monduli, Criminal Case No. 2 of 2017)

BULKA PAYANA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

5th July & 20th August, 2021

Masara, J.

Before the District Court of Monduli (the trial court), **Bulka Payana**, the Appellant, stood charged with the offence of Rape, contrary to Sections 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R.E 2002]. At the end of the trial, he was convicted and sentenced to serve thirty years imprisonment. The Appellant was aggrieved by both the conviction and sentence imposed on him. He has preferred this appeal on the following grounds:

a) *That, the trial Magistrate erred both in law and fact by convicting the appellant based on the defective charge sheet;*
b) *That, the trial Magistrate erred both in law and fact by not complying with the Mandatory provisions of section 226(2) of the CPA, Cap 20 [R.E 2002];*
c) *That, the trial Magistrate erred both in law and fact by not complying with the provisions of section 127(2) of the Evidence Act, Cap 16 (sic) [R.E 2002]; and*
d) *That, the trial Magistrate erred in law and in fact in not affording the appellant the right to be heard.*

The fact as stated by the Prosecution at the trial, in the absence of the Appellant, went briefly as follows: The victim who was identified at the trial as Luciana d/o Isaya (herein after "the victim"), lived with her grandmother (Malita Salipu) at Monduli Juu area within Monduli District. On 20/12/2016, the Appellant went to their house and asked the victim for drinking water. She gave her drinking water which she refused and asked for soda ash magadi) instead. The victim replied that they did not have the magadi. By that time the victim

was alone at home. The Appellant asked the victim to go with him to bed, but the victim refused. The Appellant then forcefully took her and laid her on the bed. he undressed her clothes and eventually raped her. She felt severe pain and had blood oozing from her private parts. She wanted to shout for help but the Appellant covered her mouth. The Appellant also warned the victim that in the event she revealed the incident to any person, she will have her neck cut off. After he was satisfied, the Appellant left. When her grandmother came back, she found her still bleeding. She then explained to the grandmother all that the Appellant had done. She was taken to police station and later to the hospital.

The grandmother (PW2) confirmed what the victim had testified. She added that she came back home at about 1900hrs and found the victim in bad shape as she could not walk properly. When she inquired, the victim informed her what had happened to her while she was away. The victim named the Appellant as the defiler. PW2 inspected the victim in her vagina where she found blood and sperms. As it was already late, she informed the victim's uncle and had to wait till the next day when they took her to the police and later to the hospital.

A police Officer No. F 8718 DC Kassim (PW3) was the investigator of the case. He informed the Court that he recorded the cautioned statement of the Appellant from 14:00hrs to 15:30hrs on 24/12/2016. That the Appellant made his statement in the presence of his friend, Charles John Chacha. The cautioned statement of the Appellant was admitted as exhibit P1. The last prosecution witness was PW4 who is the doctor who examined the victim on 21/12/2016. In her examination, she concluded that the victim was penetrated by a blunt object. She tendered a PF3 which was admitted as exhibit P2.

In his defence, the Appellant denied involvement in the charge levelled against him. He stated that on the alleged date of the crime he was arrested from hospital. He stayed at the police station for 28 days without being interrogated. He also denied to have admitted raping the victim stating that he has dispute with the victim's grandmother. The Appellant also denied to have run away from the case and that the case against him was fictitious.

The trial Magistrate, as earlier stated, concluded that the prosecution had proved the case against the Appellant beyond reasonable doubts. After conviction, the Appellant filed his appeal to this Court vide Criminal Appeal No. 125 of 2019. On 1/10/2019, the appeal was dismissed for being initiated by a defective notice of appeal. He was given 14 days within which to file a proper Notice and Petition of Appeal. He complied, thus this appeal.

At the hearing, the Appellant appeared in person, unrepresented, while the Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was argued *viva voce*.

Submitting in support of the grounds of appeal, the Appellant contended that he does not know how to read and write. He fortified that he had a land dispute with the mother of the victim and his brother. It was his further contention that he did not abscond and therefore the trail proceeded in his absence irregularly. The Appellant averred that the person who is said to be his friend, is a policeman, whom the Appellant did not know. He insisted that the author of the statement wrote his own phrases, praying that his grounds be scrutinized and a fair decision be made by this Court.

On her part, the learned State Attorney conceded to the grounds of appeal but prayed that this Court be mindful to order a trial de novo considering that the

trial had proceeded up to closure of the prosecution case in the Appellant's absence. That as the Appellant did not cross examine any of the prosecution witnesses, their evidence cannot be worth of belief. Further, Ms. Tusaje admitted that according to the record, the age of the victim was not proved but that there is sufficient evidence of the victim and her grandmother to prove that she was a child.

Having examined the grounds of appeal, the submissions of the Appellant and that of the learned State Attorney, the issue for determination is whether the Appellant was accorded a fair trial and whether the conviction of the Appellant should be sustained. The other issue is whether a retrial is appropriate in the circumstances of this case.

Regarding the first issue, the record shows that the Appellant was bailed out on 31/3/2017. On 25/4/2017 and 16/5/2017 the Appellant did not enter appearance in Court. On 13/6/2017, he was present but the case was scheduled for hearing on 11/7/2017. On the subsequent three dates, that is 11/7/2017, 27/7/2017 and 11/8/2017, the Appellant is recorded as absent. On 27/7/2017 the prosecution prayed to proceed with hearing of the case in the absence of the Appellant under section 226 of the CPA. The trial court granted the prayer and the case was fixed for hearing on 11/8/2017. On that date, the court heard the evidence of PW1, PW2 and PW3.

The case proceeded on 21/8/2017, when PW4 testified. On that date, the Appellant was marked present in the quorum. However, after examination in chief, when it was time for the Appellant to cross examine PW4, the trial magistrate recorded nil because the accused was at large. The case was adjourned to proceed on 5/9/2017, but the Appellant was marked absent. On that date, the prosecution prayed to close their case. The prosecution case was

marked closed, and a ruling that a prima facie case had been established was delivered on 8/9/2017. The Appellant's defence was heard on 15/9/2017.

As noted from the record, all the four prosecution witnesses testified without being cross examined by the Appellant. From the records, the first three prosecution witnesses testified in the absence of the Appellant. It is not disclosed as to why the Appellant was not afforded the right to cross examine PW4 who testified in his presence as reflected in the record.

Failure to afford a party the right to cross examine a witness has been held to be fatal. Such omission leads to denial of the right of a fair trial. Importance of giving a party the right to cross examined a party was underscored by the Court of Appeal in the case of ***Ex-D. 8656 CPL Senga s/o Idd Nyembo and 7 Others Vs. Republic,*** Criminal Appeal No. 16 of 2018 (unreported) where it was stated:

> *"We must emphasize that a party to court proceedings has the right to cross-examine any witness of the opposite party regardless of whether the witness has given his testimony under oath or affirmation (as the case may be) or not. This right is a fundamental one to any Judicial proceedings and thus the denial of it will usually result in the decision in the case being overturned. Unless, a party has waived his right to cross-examine the witness,* ***the testimony of a witness cannot be taken as legal evidence unless it is subject to cross examination.*** *Consequently, the testimony affecting a party cannot be the basis of decision of the court unless the party has been afforded the opportunity of testing the truthfulness by way of crossing examination.)"* [Emphasis added]

From the above, it follows that the Appellant was not tried fairly. Further, the record shows that on 22/9/2017, the Appellant was under custody and while adjourning the case, it was ordered that he further remanded in custody. There is no record as to when he was placed under custody. In his petition of appeal and submissions in Court, the Appellant complains that he was not fairly tried. The conditions of a fair trial were enunciated by the Court of Appeal in ***Musa***

Mwaikunda Vs. Republic [2006] T.L.R. 387 in which the Court sought aid from the cases of ***Regina Vs. Henley*** (2005) NSWCCA 126 (a case from New South Wales Court of Appeal) and ***R. Vs. Prosser*** (1958) VR 45 at 48. In the said decisions the minimum standards which the trial court has to comply with to show that the accused was afforded a fair trial were set out as follows:

"1. to understand the nature of the charge;
2. to plead to the charge and to exercise the right of challenge;
3. to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged;
4. to follow the course of the proceedings;
5. to understand the substantial effect of any evidence that may be given in support of the prosecution; and
6. to make a defence to the charge."

In the present case, in order to ascertain whether the Appellant was accorded fair trial, his right to cross examine the prosecution witnesses ought to have been exercised. As pointed out above, the Appellant was not afforded the right to cross examine prosecution witnesses, especially PW4 who testified in his presence. That affected his right since he did not have chance to test the truth of the evidence of the witness. It is definite that the omission was fatal and it vitiated the proceedings of the trial court.

Regarding the other three witnesses, I note that there were changes of trial Magistrates from the time the trial commenced. While the preliminary hearing was conducted before B.K. Nganga, RM, on 17/2/2017, the matter was scheduled for hearing before A.R. Ndossy, RM on 16/5/2017 and 13/6/2017. On those dates, the Appellant appeared but there is no record to show whether hearing had been transferred from Nganga, RM. On 11/07/ 2017, the matter appeared before A.A. Mkama, RM. It is on that day that the Appellant did not appear and an arrest warrant was requested. Mkama, RM did not indicate the reasons why the case was before him. The assumption is that the case had been reassigned to him. On that day, the Prosecutor asked for a summons to

show cause to sureties as well. The learned Magistrate granted both prayers and adjourned hearing to 27/07/2017. On 27/7/2017, the record is silent on whether the Appellant was arrested or whether sureties were summoned to show cause. The State Attorney merely asked the trial to proceed in the absence of the Appellant, then accused. The trial was then fixed for hearing on 11/8/2017. It proceeded as scheduled but the record is silent on the whereabouts of the Appellant and his sureties. In my view, that was not proper. The trial magistrate ought to have inquired whether at that time the Appellant was still at large and why the sureties had not appeared. Furthermore, he should have recorded the reasons why the matter was assigned to him, considering that the trial had been previously assigned to another magistrate. The change of magistrate may have been a reason for the absence of the Appellant.

The above notwithstanding, on 21/8/2017 and 08/09/2017 the Appellant was recorded as present. But he was not asked to explain why he did not enter appearances or whether he wanted the three previous prosecution witnesses to be recalled. The silence also continues on 15/09/2017 when he was summoned to defend himself. The series of events culminates to one conclusion; that the proceedings were marred by serious irregularities. The first issue is therefore resolved in the negative.

On what is the way forward, the learned State Attorney asked the Court to order a retrial. An order for a retrial can only be given where the circumstances are such that the retrial shall not be to the prejudice of the Appellant. In ***Fatehali Manji Vs Republic*** [1966] EA 344, it was held that:

> *"In general a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill gaps in its evidence at the first trial ... each case must*

depend on its own facts and an order for retrial should only be made where the interest of justice require it."

Although there are elements of illegalities apparent in the way the trial proceeded; namely, failure to accord the Appellant the right to cross examine PW4, failure to record reasons for change of trial magistrates, failure to show why trial proceeded ex parte and failure to ascertain reasons why the Appellant did not appear, the conviction of the Appellant would not have been sustained even if such illegalities did not take place. As conceded by the learned State Attorney, the charge preferred against the Appellant could not be sustained without proof of the age of the victim. Unfortunately, the age of the victim was not proved in this case. The Appellant was charged with the offence of rape, contrary to sections 130(1)(2)(e) of the Penal Code, which is a statutory rape. A statutory rape offence requires establishment or proof of the age of the victim. The Court of Appeal in ***Andrea Francis Vs. Republic***, Criminal Appeal No. 173 of 2014 (unreported) held the following:

"In this case, the particulars of offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 14/2/2006 the Principal District Magistrate, before putting her on oath, also indicated that she was 16 years. ***With respect, it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation of age by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age****. It follows that the evidence in a trial must disclose the person's age.."*(Emphasis added)

Likewise in the case of ***Projestus Zacharia Vs. Republic***, Criminal Appeal No. 162 of 2019 (unreported), the Court of Appeal held:

"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal ..... This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim****."* (Emphasis added)

On the same breath, in the appeal at hand, there was no evidence in the trial court that led to prove the victim's age, which is an important ingredient in the offence the Appellant stood charged. Such omission by the trial Court renders the conviction of the Appellant unsustainable. I therefore decline to order a retrial. Doing it may be prejudicial to the Appellant as it may give the Prosecution the opportunity to rectify the deficiencies in their case.

Consequently, the appeal has merits. I allow it accordingly. The conviction against the Appellant is hereby quashed and the sentence set aside. The Appellant should be released from prison forthwith, unless he is held for another lawful cause.

Order accordingly.

Y. B. Masara
JUDGE
20th August, 2021.