IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 75 OF 2020
(Originating from Criminal Case No. 290 of 2017 from Muleba District Court)

EDWIN VEDASTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

04th February & 25th February 2022

Kilekamajenga, J.

The appellant, Edwin Vedasto, was arraigned before the District Court of Muleba for the offence of rape Contrary to **Section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 RE 2019**. It was alleged that, on 20th October 2017, at Bushamba village within Muleba District, the appellant had sexual intercourse with a child of seven years. During the trial, the appellant entered a plea of not guilty prompting the prosecution to parade six witnesses to prove the case to the required standard. Finally, the trial court was fully convinced that the appellant committed the offence charged. The appellant was convicted and sentenced to life imprisonment. Being aggrieved with the decision of the trial court, the appellant appeared before this court armed with seven grounds of appeal couched thus:

1. *That the trial court erred in law to entertain the case whose charge sheet did not contain the title of the court but the Tanzania Police Force;*

2. *That the convicting magistrate erred to entertain the case which was commenced by Hon. Waane, without assigning the reason thereto;*
3. *That the court erred in law to consider the tendered exhibits which were not read in court;*
4. *That the trial magistrate further erred in law to admit the caution statement which was recorded of the prescribed time;*
5. *That the trial court made a misnomer to use the title of District Resident Magistrate (DRM) which is not recognized in the law;*
6. *That the learned lower court magistrates erred in law and procedure when they failed to relate the found sperms on the body of the victim and the applicant through the use of Deoxyribonucleic Act (DNA) mechanism;*
7. *That the court did not adequately consider the defence of the appellant.*

The case was finally scheduled for hearing before this court. The appellant appeared to defend his innocence under the legal representation of the learned advocate, Mr. Fahad Rwamayanga whereas the learned State Attorney, Mr. Josephat Mwakasege appeared for the respondent, the Republic. The counsel for the appellant unveiled the illegalities apparent in the proceedings of the trial court. **First**, he argued that, during the trial, the successor Magistrate did not assign reasons for taking over the case from the predecessor magistrate that presided over this case. He averred that, the case was heard by Hon. Mwetindwa who, however, did not assigned reasons for taking-over the case from the predecessor magistrate. He fortified the argument with the case of **Mary Richard Nzingula v. The Republic, Criminal Appeal No. 153 "B" of 2021.**

Second, the counsel for the appellant averred that, the charge sheet against the appellant was titled Tanzania Police Force instead of bearing the name of the court where the appellant stood charged. The counsel invited the court to consider the case of **Sultan Omary and 6 others v. The Republic, Criminal Appeal No. 154 of 2017, High Court at Dar es salaam** (unreported) where the court took the stance of nullifying the proceedings and quashed the conviction and sentence of the trial court. **Third**, the appellant's counsel argued that the prosecution tendered exhibits to prove the case but the same exhibits were not read in court. Based on this error, he invited the court to expunge the appellant's cautioned statement which was admitted but not read in court hence violated the principle of fair hearing.

Fourth, when addressing on the sixth ground of appeal, the counsel argued that, the case against the appellant was not proved beyond reasonable doubt because the sperms found in the victim's private part were not examined to ascertain whether they actually belonged to the appellant. Furthermore, the victim's evidence shows that she was told by her father to name the appellant as the rapist. Therefore, the victim was coached to frame the case against the appellant. In addition, the recording of the victim's evidence did not comply with the requirement of **Section 127 (2) of the Evidence Act, Cap. 6 RE 2019** as there was no promise to tell the truth and not lies. The counsel cemented the

argument with the case of **Yusuph Molo v. the Republic, Criminal Appeal No. 343 of 2017**. The counsel finally urged the court to allow the appeal.

On the other hand the learned state attorney had no reason to object the submission advance by the counsel for the appellant rather than supporting the appeal.

In this case, the counsel for the appellant raised several issues that prompted me to consider them according to their order of presentation. **First**, the counsel argued that, the successor judge did not assign reasons for taking over the case from her predecessor. In fact, this is the legit requirement stated under **section 214 (1) of the Criminal Procedure Act, Cap. 20 RE 2019** which the trial magistrate must comply. The section provides:

> *'214 (1) Where any magistrate after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part of the committal proceedings is for any reason unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummons the witnesses and recommence the trial or the committal proceedings.'*

Moved by the above provision of the law, I perused the proceedings of the trial court and found the following information. The trial of the case commenced in the hands of Honourable Waane until the closure of the defence case. Later, the case was remitted back to the District Resident Magistrate in Charge for further action. There is no better reason why the trial magistrate referred the file to the District Resident Magistrate in Charge. Thereafter, another magistrate took over the case and composed the judgment. In line with the above provision of the law which has been amplified in a number of case law, the successor magistrate who took over the case without giving clear reasons violated the law and also lacked jurisdiction to try that case. I wish to emphasise the amplification of the above law done by the Court of Appeal of Tanzania in the case of **Mary Richard Nzingula** (*supra*) that:

> *'In a number of cases decided by the Court, the Court has always emphasized that a trial started by one magistrate should be completed by the same magistrate. When for one reason or another a magistrate who started the trial fails to conduct the trial to its completion, the reasons for his failure to do so must be given. Where a successor magistrate takes over the trial of the case without reasons being given, the successor magistrate lacks jurisdiction.'*

Therefore, despite the fact that the successor magistrate violated the law hence lacked jurisdiction. Also, in a case where all the evidence is recorded by the predecessor magistrate, the successor magistrate was not well placed to make a

judicious decision because he/she did not have an opportunity to assess and observe the demeanour of the witnesses. In other words, the successor magistrate may just be deciding based on assumptions. The trail judge or magistrate enjoys an exclusive privilege of getting direct evidence from the witnesses. He/she may observe and assess the demeanour demonstrated by the witnesses. Any other person or the appellate court which did not perceive the evidence directly from the witness may lack coherence and judicious investigation of the evidence adduced. In the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and others [1994] TLR 132**, the Court of Appeal of Tanzania had the following observation:

> *'Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record.'*

In the same vein, the successor magistrate lacked jurisdiction and also had no opportunity to assess the credibility of the witnesses. This ground has merit.

Second, the counsel for the appellant argued that the charge against the appellant was defective for being titled Tanzania Police Force instead of the name of the trial court. Without wasting the precious time of this court, a quick glimpse reveals the blatant error on the title of the charge. Where the charge is titled Tanzania Police Force instead of the name of court where the appellant

was charged, it denied jurisdiction on the trial court. In the case of **Sultan Omary Kipenzi** (*supra*), this court stated that:

> *'One of the rationale of titling the charge is to consider where it has to be lodged to signify the jurisdiction of the said institution.'*

The charge available in the court file shows as if the appellant was arraigned for trial in the Tanzania Police Force instead at the District Court of Muleba at Muleba. In other words, the appellant was tried under a defective charge rendering the whole proceedings a nullity. This ground is also meritorious and sufficient to allow the appeal.

Third, the counsel for the appellant argued that the accused's cautioned statement was admitted but not read in court something which violated the established principle of the law. The perusal of the trial court proceedings shows that, when PW3 testified, he prayed to tender the accused's cautioned statement. The statement was admitted and marked exhibit P1 but it was not read in court. It has become an established principle of the law that when a documentary evidence is admitted, it must be read loudly in court to give right to the other party to challenge it. In the case of **Robert P. Mayunga and David Charles Ndaki V. R; Criminal Appeal No. 514 of 2016**, CAT at Tabora the Court of Appeal of Tanzania emphasized that:-

"...documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings."

The court went further stating that:-

"In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his right to cross-examine the witness effectively.

Therefore, failure to read the admitted documentary evidence tendered in court such document suffers the consequences of being expunged from the records. Based on this principle of the law, I hereby expunge the appellant's cautioned statement from the record of the trial court.

Fourth, the counsel argued that the victim's evidence, who was only seven years old, was recorded contrary to **section 127(2) of the Evidence Act**. The victim, when testifying before the trial court, did not promise to tell the truth as required by the law. Before discussing further, I wish to consider the above provision of the law. **Section 127(2) of the Evidence Act** provides that:

'(2) A child of tender age may give evidence without taking oath or making an affirmation ***but shall, before giving evidence, promise to tell the truth to the court and not to tell lies.'*** (Emphasis added).

The above provision of the law came into application after the amendment made in 2016. The amendment relieved the trial court on the requirement of conducting *voire dire* test in order to assess whether the child of tender age understands the nature of oath and the duty of telling the truth. Currently, what is the most important aspect to be observed before the child of tender age testifies is to promise to tell the truth and not lies. However, ordinarily, no one may directly record the evidence of a child of tender age without ascertaining whether the child is able to understand the rationale of speaking the truth. Therefore, the trial judge or magistrate may be required to take the child through a number of simple questions to establish whether the child is willing to promise to tell the truth.

In the case at hand, on 25th January 2018, when the case came for hearing, the trial magistrate wrote some words in capital letters that 'VOIRE DIRE TEST". Thereafter, the magistrate had some conversation with the child in form of questions and answers. Finally, the trial recorded that the *voire dire* test was successful but the magistrate proceeded to record the victim's evidence without recording whether the child promised to tell the truth and not lies as the law requires. Certainly, the recording of the victim's evidence went contrary to the law. Such evidence cannot be considered.

Therefore, in absence of the victim's evidence and the accused's cautioned statement, the case lacks legs stand. Based on the errors pointed above, I find merit in the appeal and allow it. The appellant should be discharged from prison unless held for other lawful reasons.

DATED at **BUKOBA** this 25th day of February, 2022.

Ntemi N. Kilekamajenga
JUDGE
25/02/2022

Court: Judgement delivered this 25/02/2022 in the presence of the appellant and his counsel, Mr. Fahad Rwamayanga and the learned state attorney, Mr. Joseph Mwakasege. Right to appeal explained.

Ntemi N. Kilekamajenga
JUDGE
25/02/2022