IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 247 OF 2020

(Originating from the Decision of the District Court of Temeke at Temeke in Criminal Case No. 227 of 2018 before Hon. Mfanga -RM)

MOSHI RAMADHANI @ NYAU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 12th September, 2022

Date of Judgment: 21st October, 2022

E.E. KAKOLAKI, J.

the appellant herein, Moshi Ramadhani @ Nyau, was charged with offence of Rape; Contrary to sections 130 (1), (2) (e) and 131(1) of the Penal Code, [Cap. 16 R.E 2002]. It was prosecution case during the trial that, the appellant on the 2nd day of March, 2018 at Keko Mwanga area within Temeke District in Dar es salaam Region, did have carnal knowledge of one MM (name withheld) a girl of 6 years Old. When the charge read over and explained to him, he pleaded not guilty, hence the prosecution called in four (4) witnesses and relied on one exhibit PF3. Seeking to prove his innocence the appellant defended himself and called one witness without any exhibit to rely on. After a full trial, the Court was convinced that, prosecution case

was proved to the hilt, hence convicted the appellant as charged and sentenced him to life imprisonment term in jail.

Dissatisfied with the trial court's decision, the appellant lodged his appeal before this court whose petition of appeal comprised of nine grounds of appeal, in which the 2, 5 and 6 grounds of appeal seem to be interconnected hence joined as ground number two (2) in this judgment. The said grounds as paraphrased read thus, **One,** the sentence meted on the appellant is a nullity for being premised on a defective charge with improper sentencing provision of section 131(1) of the Penal Code, instead of section 131(3). **Two**, appellant's conviction is unlawful for relying on weak, unreliable, incredible and uncorroborated evidence of PW1, who also failed to call her friend one Nuiya who she alleged to have been playing. **Three**, penetration was not proved as per the requirement of section 130(4) of the Penal Code; **Four**, the trial Court wrongly relied on evidence of PW1 recorded in contravention of section 127 (2) of the Evidence Act; **Five,** appellant's conviction is illegal as the record is silent as to whether he was found with the case to answer or not before entering his defence; **Six**, the prosecution case was poorly investigated as PW4 interrogated one Norbert as child who was playing with PW1 instead of Nuiya; **Seven**; that the evidence of PW2

who examined the victim of rape (PW1) was unreliable for stating that bruises can be caused by blunt object.

It is the appellant's prayer that, this Court be pleased to allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

At the hearing of the appeal, the appellant appeared in person unrepresented, while respondent was represented by Ms. Estazia Wilson, learned State Attorney. The appeal was disposed by way of written submission upon the appellant's request, the request which was not contested by the respondent.

In this judgment, I am proposing to start with ground number four (4) where the appellant is faulting the trial Court for allowing him to defend himself without any findings that he had a case to answer or not, hence his defence and conviction rendered a nullity. It was the appellant's contention that the trial court's record is silent on whether there was a ruling or not delivered by the trial court on the case to answer before he entered his defence. He lamented though he entered his defence but was not informed of his right to defend himself as provided under section 231(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (new R.E 2022], hence unfair trial on his part. It

was his submission that, failure to comply with the provisions of section 231(1) of the CPA which safeguards accused persons right to fair trial is a fatal omission as held in the case of **Maneno Mussa Vs. R**, Criminal Appeal No. 543 of 2016 and **Alex John Vs. R**, Criminal Appeal No. 129 of 2006 (CAT-unreported). He thus implored the Court to find merit in this ground and proceed to quash his conviction and set aside the sentence hence order for his release as ordering retrial will be prejudicial to him. He relied on the case of **Mabula Julius and Another Vs. R**, Criminal Appeal No. 562 of 2016 (CAT-unreported).

In rebuttal on this ground Ms. Wilson resisted the appellant's submission arguing that, looking at page 22 of the typed proceedings, it is indicated that after closure of prosecution case, the ruling on case to answer was made by the trial court, though not reflected in the record. She argued it appears in page 23 of the typed proceedings there is typing errors for not indicating that the said ruling was made, hence prayed for dismissal of the ground. In rejoinder the appellant had nothing material to add apart from reiterating what he had stated earlier.

I have dispassionately considered the fighting arguments by both parties and taken time to peruse the record in search of the truth of appellant's

assertion in this ground. It is the law under section 231(1) of the CPA that, the accused person shall be called to enter his defence after it is established by the trial court that a case has been made against him sufficiently to require him to make such defence either in relation to the offence with which he is charged with or in relation to any other offence. Trial court's duty to make findings on whether the accused has a case to answer or not is provided under section 230 of the CPA which provides thus:

> *"230. Where at the close of the evidence in support of the charge,* ***it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or 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 dismiss the charge and acquit the accused person." (Emphasis added)*

Essentially what the above provision provides is that, at the closure of the prosecution case, the court is duty bound to make a ruling whether the adduced evidence against the accused person is sufficient to call him enter his defence on the offence he is charged with or any other offence found to be established by such evidence. This is what is called ruling of no case to

answer. It is upon delivery of that ruling as stated above the accused person if found with the case to answer can be called to enter his defence as per the requirements of section 231(1) of the CPA. The said section 231(1) of the CPA reads:

> *231.-(1) At the close of the 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 charge or 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 of his right-*
> *(a) to give evidence whether or not on oath or affirmation, on his own 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.*

Having deliberated on the legal requirement of what is to be done before the accused person is called to enter his defence, I revert back to the matter at hand to establish whether there was violation of the law as submitted by

the appellant. Upon thorough perusal of both hand writing proceedings which I consider to be authentic as well as the typed proceedings which essential bear same contents, it is revealed that, the ruling on case to answer was not only read in open court but also the same was never written. I therefore distance myself from Ms. Wilson's contention that, the said ruling though not reflected in the proceedings was made, meaning was delivered in court. I so do as the record is barren on that fact, since the trial magistrate apart from omitting to write the same, on the 08/03/2019 at page 23 of the typed proceedings, he never recorded to have read it in court something which would suggest that, he typed the same in his computer and forget to file it in the case filed after it was read. To bring into picture what transpired in court on the said 08/03/2019, I find it apposite to reproduce part of the proceedings on that day:

8/3/2019

Coram: Hon. Mfanga – RM.

PP: Salome

CC: Hidaya

Accused: Present represented by Okari advocate,

Pros: For Ruling ready to proceed.

RULING.

Advocate for the Accused.

Accused will defend himself he has four witness.

Order: 1. Defence hearing on 18/3/2019

2. ABE

Sgd: By Hon. Mfanga – RM

8/03/2019

What is seen in the above excerpt of the proceedings is the exactly contents of the written hand writing court proceedings where it appears the trial magistrate after writing the title **'RULING'** he never composed the same before proceeding to order for defence hearing date. This is a clear contravention of the provision of section 230 of the CPC, which in my firm view vitiates the proceedings as the appellant's defence was entered without the findings as to whether he had a case to answer or not. I so view as under that section the Court was duty bound to make a finding as to whether the case was made out against the appellant on the offence he was charged with or any other offence before he was called to enter his defence, the duty which it abrogated. That aside the record further shows that the appellant was not informed of his right to defend himself and call witness as provided

under section 231(1)(a) and (b) of the CPA as per his complaint, though he entered his defence on oath and called one witness. I was prepared to hold that failure of the trial court to inform the appellant of his right to enter defence and call witness as provided did not prejudice him, but with the court's omission to comply with the provision of section 230 of the CPA, I refrain from so doing, and proceed to hold that such omission prejudiced him and therefore affected the proceedings thereafter. The raised issue is therefore answered in affirmative and this ground I hold has the effect of disposing of the appeal.

In the premises I invoke the revisionary powers bestowed to this Court under section 373(1)(a) of the CPA, and proceed to quash the trial court's proceedings and appellant's conviction, and set aside sentence of life imprisonment meted on him. This ground therefore has the effect of disposing of the appeal and I see no reason to consider the rest do the ground as that remains to be an academic exercise.

Having so done, the next question is what remedy the appellant should be offered? He has invited this Court not to order for trial of the case as it is likely to prejudice him. However, having considered the circumstances of this case where the trial court never made its findings on whether the appellant

had a case to answer or not after conclusion of the prosecution case to let him free as prayed in my firm view will be prejudicial to the prosecution side too as their right to fair hearing will be prejudiced as well. To strike the balance on fair hearing between both parties I think retrial order will meet the end of justice.

In the premises having quashed the appellant's conviction and set aside his sentence, I remit the case file to the trial court with an order that this matter be tried de novo before another competent magistrate. The appeal is allowed to that extent. For avoidance of doubt the appellant shall remain in custody while awaiting for his retrial.

It is so ordered.

Dated at Dar es salaam this 21st day of October, 2022.

E. E. KAKOLAKI

JUDGE

21/10/2022.

The Judgment has been delivered at Dar es Salaam today 21st day of October, 2022 in the presence of the appellant in person, Ms. Gladness Senya, State Attorney for the respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
21/10/2022.