

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO.53 OF 2022**

*(Originating from the District Court of Masasi at Masasi in Criminal Case  
No.79 of 2021)*

**FADHILI HUSSEN MOHAMED.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*12/10/2022 & 19/12/2022*

**LALTAIKA, J.:**

The appellant herein **FADHILI HUSSEN MOHAMED** was charged at Masasi District Court with the offence of rape contrary to Section 130(1)(2)(e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2019]. He was convicted on the offence of rape and sentenced to serve thirty (30) years imprisonment term. Dissatisfied and aggrieved with both conviction and sentence hence this appeal premised on the following grounds: -

- 1. That, the Honourable trial Magistrate grossly erred in law and facts by sentencing the appellant while the charge was not proved beyond reasonable doubt.*
- 2. That, the Honourable trial Magistrate grossly erred in law and facts by sentencing the appellant without considering the defence case in the judgment.*
- 3. That, the Honourable trial Magistrate grossly erred in law and facts by sentencing the appellant without properly addressing the*

*appellant his full rights and manner on how to defend by failing to explain the substances of the charge after the appellant was found with a case to answer as required under section 231 of the Criminal Procedure Act Cap 20 [RE 2019].*

- 4. That, the Honourable trial Magistrate grossly erred in law and facts by sentencing the appellant to serve thirty (30) years in prison without the appellant being properly convicted.*
- 5. That there was a change of magistrate from one R.Y. Idd RM to R. Yunus RM without assigning the reasons for the change.*

When the appeal was called on for hearing on 5/12/2022 the appellant appeared and was being represented by Mr. Rainery Songea, learned counsel. The respondent republic on the other hand was represented by Ms. Florence Mmbamba, learned State Attorney. The learned counsel submitted extensively in support of the appeal. Likewise, the learned State Attorney submitted against the appeal. At this juncture, as the court of record it is important to address the fifth ground of appeal and where possible give the appropriate directives to the parties and the lower court. On the fifth ground the appellant asserts that there was a change of magistrate from one **R.Y. Idd RM** to **R. Yunus RM** without assigning the reasons for the change. On top of that Mr. Songea contended that these are two different individuals. The learned counsel stressed that had been a change of the magistrate, the proceedings and judgment should have indicated and provide reasons for the change. Mr. Songea submitted further failure to disclose reasons for the change, proceedings cannot stand. To substantiate his argument, the learned counsel cited the case of **Paskalina Mage Gitonge vs Elias Zakaria Mtemi**, Land Appeal No.38 of 2020 HCT, Arusha (Robert, J) and **The International Director, World Vision Tanzania vs Basinda Construction Co. Ltd.**, Civil Appeal

No.2 of 2017 HCT, Bukoba Bongole J, at page 7-8 provides that the reasons for the change of a magistrate must be provided.

The learned counsel contended that no reasons were given and the judgment was delivered by a different magistrate cannot be considered to a proper judgment. Mr. Songea insisted that the court records are important documents and are used for all appeal which must be clear and unambiguous. The learned advocate submitted that from the beginning to the end the magistrate was **R.Y. Idd** but the judgment was delivered by **R. Yunus, RM**. Thus, he argued that in the eyes of the law these are different people unless there was an affidavit to verify names of that **R.Y. Idd** and **R. Yunus** are the same person.

In reply, Ms. Mmbamba contended that the original file from the lower court be consulted to find out if indeed, in the proceedings, there was such a change of magistrate. The learned State Attorney submitted that should there be no change, the ground be dismissed. The learned State Attorney stressed that it is a practice or tradition of the use of initials in writing. Ms. Mmbamba further argued that it is her conviction that all these names belong to the magistrate who entertained the matter. She also contended that in case that is not the same, she argued that appeal be allowed.

In a short rejoinder Mr. Songea submitted that on the names of the magistrate, the learned State Attorney argued that it is a tradition is not true. The learned counsel contended that the courts records are different. The learned counsel went further and argued that the names must be seen the same names as they appear in the proceedings. Mr. Songea believed

that the original file must contain the same thing and must avoid going by assumption. The learned counsel stressed there was no reason given.

Having dispassionately considered rival submissions over the fifth ground of appeal, I am now inclined to determine the merits of this ground and thereafter give an order. It is very true that the proceedings of the trial court show that the trial magistrate was **R.Y. Idd, RM**. However, at the first page of the judgment, it bears the names of **R. Yunus, RM**. More so, from page 10-11 of the impugned judgment bears the names of **R.Y. Idd, RM**. According to this finding it is apparent clear that the proceedings of the trial court do not feature the names of **R. Yunus, RM**. It is the settled position of this court that the proceedings of the trial court have proved that the matter was heard by **R.Y. Idd, RM**. In that regard, I find that the proceedings do feature the problem of change of magistrate and that is why there are no reasons assigned to that effect. In addition, I have gone through the cited cases of **Paskalina Mage Gitonge vs Elias Zakaria Mtemi**, (supra) and **The International Director, World Vision Tanzania vs Basinda Construction Co. Ltd.** (supra) but they are distinguishable as to the present case. In the cited cases there were changes of trial magistrates and chairman during hearing stage but there were no reasons assigned. Therefore, lack of the assigned reasons for the change of the magistrate or chairman, this court nullified the proceedings and went further to quash and set aside the judgments and orders/decrees. And finally this court on both cases ordered the matters to be remitted back to the lower court or tribunal and be retried by a different magistrate/chairman.

However, in the matter at hand the problem which this court has seen, is on the impugn judgment. The impugn judgment bears the names of two distinct individuals. At the first page of the impugn judgment it bears the names of **R. Yunus, RM** while at page 10 and 11 it features the names of **R.Y. Idd, RM**. In fact, these are two distinct persons as submitted by Mr. Songea. Unfortunately, there is no sworn affidavit which could prove that **R. Yunus, RM** and **R.Y. Idd, RM** are names of one person. To this end, I am of the settled position that the impugn judgment is incompetent for being prepared and delivered by two distinct persons in law. Therefore, I quash the conviction and set aside the sentence of thirty years imprisonment term.

In addition, I remit Criminal Case No. 79 of 2021 to the trial court for **R.Y. Idd, RM** to prepare and deliver the proper judgment in the presence of the appellant. In the meanwhile, the appellant shall remain in custody waiting for implementation of the order of this court.

It is so ordered.



**E.I. LALTAIKA**

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**JUDGE**

**19/12/2022**

**COURT:**

This judgment is delivered under my hand and the seal of this court this 19<sup>th</sup> day of December 2022 in the presence of by Ms. Florence Mbamba, learned State Attorney for the respondent and Mr. Rainery Songea, learned advocate for the appellant and the appellant being present in person.



**E.I. LALTAIKA**

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over a horizontal line.

**JUDGE**

**19/12/2022**

**COURT:**

The right to appeal to the Court of Appeal of Tanzania is duly explained.



**E.I. LALTAIKA**

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over a horizontal line.

**JUDGE**

**19/12/2022**