

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA**

CRIMINAL APPEAL NO. 75 OF 2021

*(Originating from Criminal Case No. 25 of 2021 in the District Court of
Nanyumbu at Nanyumbu)*

RASHIDI MARTIN SAMBU.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

Date of Hearing: 28/02/2022

Date of Judgment: 02/03/2022

JUDGMENT

Muruke, J.

Rashid Martin Sambu, the appellant was charged and convicted with offence of Rape contrary to section 130 (1) (3) (e) and 131 (1) of the Penal Code Cap 16 R.E 2019, by the district court of Nanyumbu at Mangaka. He was thus sentenced to serve 30 years imprisonment. Being dissatisfied he filed present appeal raising four (4) grounds of appeal as articulated in the memorandum of appeal.

On the date set for hearing, appellant was in person, while Principal State Attorney Ajuaye Bilishanga represented respondent. By way of preliminary remarks, notified this court that, appellant was not fairly tried as reflected at



page 25 of the trial court typed proceeding, when, it was recorded that, the matter is coming for judgment, while Appellant had not finished his defence. That by itself vitiated proceedings. Appellant had more witness remained i.e Bibiye Selemani as seen at page 20 of the trial court typed proceeding. He did not close his defence case. This is an a normally that goes to the root of right to be heard. Learned State Attorney, rightly asked this court to quash conviction, set aside the sentence, and order continuation of defence case where it reached before Judgment. Appellant on his part he had no much to say, apart from insisting that, he did not close his defence case.

As rightly submitted by learned State Attorney, there is serious anomaly created by trial magistrate. At page 21 of the trial court proceedings, appellant then accused is recorded to have said:

“Yes, I told the court that I have two witnesses to call Asha Saidi and Bibiye Selemani.”

Out of the mentioned witnesses only one witness testified Asha Saidi as reflected at page 21 of the trial court proceedings. Surprisingly, at page 25 of the trial court proceedings trial magistrate is recorded to have said;

“Apparently, the prosecution has overlooked the order of this court. The accused person has already offered his defence since 17/08/2021. What left is judgment date.”



Definitely, appellant, then accused witness not given opportunity to call his witness to testify. Failure by the trial court to allow appellant to call his witness curtailed appellant's right to be heard. Right to be heard is one of the fundamental principles of natural justice that cannot be easily ignored. Right to be heard was insisted by the court of Appeal in the case of **Ezekiel T. Oluoch Vs. The Permanent Secretary, President's Office, Public Service Management and 4 others, Civil Appeal No. 140 of 2018**, Dar es Salaam Registry (unreported)

"The right to be heard has been emphasized by the court in various decisions. Some of which are National Housing Corporation vs Tanzania Shoes and Others [1995] TLR 251, Mbeya Rukwa auto parts & Transport Limited(supra), Margwe Error and Two others vs. Moshi Bahalulu, Civil Appeal No. 11 of 2014(unreported) to mention but a few. In Margwe Erro and Two others(supra), the Court quoted the decision in Abbas Sherally and Another vs. Abdul S.H.M. Fazal boy, Civil Application No. 33 of 2002(unreported) where it was held that;

"The right of party to be heard before the adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That the right is so basic that a decision which is arrived at violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."



This court in the case of **Christantus Victory Issaya @ Siza Vs. The Republic (Criminal Appeal No. 85 of 2020) [2021] TZHC Mtwara Registry**, that;

"The right for a party to be heard and defend her or his case is a constitutional right and the same cannot be lightly denied."

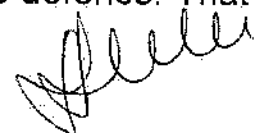
Similarly, in the case of **Faraji Said Nyambi Vs. Abdul Mkaleka Njanike, (Land Appeal No.09 of 2020) [2021] TZHC 6748 Mtwara Registry**, this court held that;

"The right to be heard is also safeguarded in the constitution. Article 13(6)(a) of the constitution provides in the official version thus;

"(6) kwa madhumuni ya kuhakikisha usawa mbele ya sheria, mamlaka ya nchi itaweka taratibu zinazofaa au zinazo zingatia misingi kwamba-"

"(a) wakati wa haki na wajibu wa mtu yeyote vinahitajika kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyinginene ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika."

As rightly submitted by State Attorney, appellant was not fairly tried when the trial court typed proceeding recorded that, the matter is coming for judgment, while appellant had not finished his defence. That



by itself vitiate proceedings. Thus, conviction and sentence is unfounded having emanated from improper proceedings. I quash the conviction and set aside sentence, and order hearing of defence case to proceed with hearing of other witnesses, where it reached before judgment. Trial court file to be remitted back within 30 days from today. Equally so, appellant to be returned to Masasi Prison from Lilungu for him to attend his defence case at Nanyumbu District Court.

Ordered accordingly.




Z.G. Muruke

Judge

02/03/2022

Ruling delivered in the presence of Ajuaye Bilishanga, Principal State Attorney for the respondent and applicant in person.




Z.G. Muruke

Judge

02/03/2022