

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO

CRIMINAL APPEAL NO. 10 OF 2021

(Originates from Criminal Case No. 161 of 2020 before District Court of Kilosa)

HUSSEIN IDDI MSUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing on: 24/01/2022

Judgement on: 02/02/2022

NGWEMBE, J:

Hussein Iddi Msuya found himself jailed for the period of thirty (30) years after being convicted and sentenced for the offence of rape. However, immediately after being convicted and sentenced, he procured legal assistance from Mahembega Emmanuel Elias an advocate who issued notice of intention to appeal against both conviction and sentence. Subsequently advocate Abdul Bwanga from Jubilee Attorneys prepared and filed in this court three grounds of appeal. For the reasons which I will disclose them later on, I find there is no need to recap those grounds of appeal herein.

For convenient purposes and according to the charge sheet, the genesis of this appeal, traces back to 12th July, 2020 at about 01: 00 hours at



Ruaha Village within Kilosa District in Morogoro Region, the appellant had carnal knowledge with Sara Augustino @ Kayomba without her consent.

During trial, the prosecution was blessed with five witnesses while the appellant/accused defended himself. At the end the trial court was satisfied with the prosecution evidences, hence proceeded to convict the appellant and pronounced sentence of thirty (30) years imprisonment.

On the hearing date of this appeal, the appellant was represented by the learned advocate Abdul Bwanga, while the Republic/Respondent was represented by learned principal State Attorney Flora Masawe. Before addressing the court on the grounds of appeal, the learned advocate pointed out on the validity of the judgement itself. That the judgement pronounced by the trial court lacked important ingredient of a valid judgement for it had no sentence. Likewise, the proceedings of the trial court comprised sentence and right to appeal which is irregular.

Further argued that, the defect is not curable under section 388 of Criminal Procedure Act. Thus, prayed the whole trial be dismissed and the appellant be released forthwith.

In response, the learned Principal State Attorney conceded to the identified irregularity contrary to section 312 (2) of CPA. However, she strongly argued that the defect is curable under section 388 (1) of CPA. Thus, prayed this court to revert back the whole file to the trial magistrate with instructions to compose an acceptable judgement and sentence the accused/appellant properly.



Argued further that, the evidence on record was watertight leaving no doubt that the appellant committed the offence of rape against the victim.

In rejoinder, the learned advocate reiterated to his submission in chief and stated that failure of the trial court to sentence the accused according to law is equal to no judgement. Added that even the evidence adduced in court does not indicate that the appellant committed the alleged offence, rather was a good Samaritan who helped her on that midnight. Rested by a prayer that the appeal be granted and the appellant be released forthwith.

Considering deeply on the arguments advanced by both parties, obvious they are legal issues related to validity of a court judgement. Section 312 (1) & (2) of CPA provide general guidance on a properly composed court judgement. The section is quoted hereunder:-

Section 312 (1) "Every judgement under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be writtenin a language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court"

Section 312 (2) "In the case of conviction the judgement shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced"



The contents of a judgement was emphasized by the Court of Appeal in the case of **Hamis Rajabu Dibagula Vs. R, [2004] T.L.R. 196** held:-

*"A judgement must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. A good judgement is **clear, systematic and straight forward**. Every judgement should state the **fact of the case**, establishing each fact by reference to the particular evidence by which it is supported and it should give sufficiently and plainly the reason which justify the finding. It should state sufficiently particulars to enable a court of appeal to know what facts are found and how"*

In conclusion, Court Judgement must be clear in respect of material facts and particulars of the offence; systematic, that is, flow of logical thinking up to the conclusion; straight forward; and clear.

Judgement may be termed as a decision between life and death; laughing and crying; joy and pain; separation with family and union; poverty and prosperity. Therefore, I have observed several times, the court verdict is the most pernicious part to the loser or accused person. Therefore, failure to pronounce sentence is fatal. Thus, pronouncement of sentence is statutory, but is the most difficult part of the whole judgement.

In criminal trials the end result is either acquittal or conviction. In case the accused is convicted, the trial court has uncompromised duty to pronounce conviction and the subsequent sentence. Failure to convict the accused based on the charging section of law is fatal. Also, failure to pronounce sentence as required by law is equally fatal contrary to section 312 (2) of CPA. Therefore, a valid court judgement must specifically comprise, summary of material facts arising from the charge sheet; summary of evidences testified during trial; analysis of those evidences and arguments advanced by both parties in line with the applicable laws; conclusion of the case which may either be acquittal or conviction; aggravating factors if any, that is, the history of criminality of the accused, together with rights to mitigate gravity of sentence; and lastly, pronouncement of sentence and right to appeal to the superior court.

These are procedural rules governing judgement writing, which no judge or magistrate should forget it. In law failure to convict the accused or to pronounce sentence is a serious legal irregularity. The Court of Appeal in

Criminal Appeal No. 203 of 2011 between George Patrick Mawe & 4 others Vs. R, at page 4 held:-

"In the case of conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law/the accused person is convicted and the punishment to which he is sentenced"

In the same vein the Court in the case of **Kelvin Myovela Vs. R, Criminal Appeal No. 603 of 2015** whereby the Court of Appeal held:-

*"It is not sufficient to find an accused guilty as charged. Failure to enter a conviction renders a **judgement invalid**. In fact, there is **no valid judgement** without a conviction having been entered, as it is one of the prerequisites of a valid judgement".*

Similarly, the same Court arrived into the same decision in **Criminal Appeal No. 253 of 2013 Abdallah Ally Vs. R, (CAT) (unreported); Aman Fungabikasi Vs. R. Criminal Appeal No. 270 of 2008; Shabani Iddi Jololo and three others Vs. R, Criminal Appeal No. 200 of 2006; and Hassan Mwambanga Vs. R, Criminal Appeal No. 410 of 2013**; In all these cases, the Court of Appeal had similar pronouncement.

However, currently the Court of Appeal has relaxed by assuming that in any event the accused was convicted so long the sentence is proper. That the omission is curable under section 388 of the CPA. Such position was so arrived by the Court of Appeal in the case of **Musa Mohamed Vs. R, Criminal Appeal No. 216 of 2005; Ally Rajabu & 4 Others Vs. R, Criminal Appeal No. 43 of 2012**; and in **Bahati Makeja Vs. R, Criminal Appeal No. 118 of 2006**. The Court of Appeal departed from their earlier positions on conviction so long the sentence is proper.

In regard to this appeal, the trial judgement had conviction, but lacks sentence. The sentence was misplaced, instead of having part and parcel of the judgement, was placed to the proceedings. Thus, causing the judgement incomplete. More interestingly, reading the proceedings, at page 27, contain aggravating factors of the accused; mitigating factors; sentence and an order on right to appeal. All those contents

ought to form part and parcel of the court judgement as opposed to court proceedings.

Sentence is the final pronouncement on a criminal trial. After conviction what follows is court sentence. **Black's Law Dictionary** 8th Edition) defines sentence to mean a *judgement that a court formally pronounces after finding a criminal guilty; the punishment imposed on a criminal wrongdoer.*

In this appeal, the whole judgement of the trial court lacks sentence. This lapse of sentencing the appellant was neither contributed by the prosecution nor by the accused, all fingers point to the trial court. Mistakenly the trial magistrate overlooked such essential element of a competent criminal judgement.

The consequences of failure to have a competent judgement goes beyond the appeal itself. For instance, if the court judgement is incompetent, it means the appeal itself is likewise incompetent. Consequently, before this court there is no competent appeal.

In the circumstances, the best verdict is to return the whole judgement and proceedings to the trial magistrate with instructions to compose and pronounce an acceptable judgement. Thereafter, the appellant may prefer a proper appeal to this court.

However, before arriving to that conclusion, this court has a duty to find whether the evidences adduced during trial proved the offence of rape beyond reasonable doubt. It is, I think very easy to accuse a person on rape, but becomes very difficult to defend against that accusations. This has occurred several times in our courts. Family conflicts or land

disputes have been reported to the law enforcers as rape, simply because sexual related offences attract long imprisonment sentence. Thus, courts should always be keen enough to scrutinize every piece of evidence before conclusion.

In regard to this appeal, though parties did not address the court on them, yet the evidences therein raise doubt on two areas, one the alleged event occurred during midnight under influence of alcohol, thus, imbalanced decision in many aspects. Second, the whole allegation of rape is centered on lack of consent of the victim during that midnight and under influence of alcohol. In such circumstances, it is unsafe to rely only on the allegations of the victim without corroboration. The incidence was alleged to occur in a midnight and in a thick sugarcane farm.


To prove rape must have unshakable evidences that the victim lacked consent, but if the victim is below the age of majority, consent is unnecessary. Due to the nature of punishment, proof of rape must leave no doubt or its proof must be beyond all reasonable doubts, failure of which, this court will reasonably decide otherwise.

In totality and for the reasons so stated, I am certain that even if, I return the court file and order the trial magistrate to compose a properly and legally acceptable judgement, yet same was not proved to the standard required by law. Therefore, I proceed to allow this appeal, quash the whole proceedings and judgement of the trial court and order an immediate release of the appellant from prison, unless otherwise lawfully held.



I, accordingly order.

Dated at Morogoro in Open Court this 2nd day of February, 2022



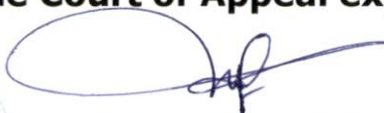
P.J. NGWEMBE

JUDGE

02/02/2022

Court: Judgement delivered at Morogoro in Open Court on this 2nd day of February, 2022 in the presence of Mr. Abdul Bwanga advocate for the appellant and Ms. Neema Haule Principal State Attorney for the Republic/Respondent.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

02/02/2022