

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

CRIMINAL APPEAL NO. 92 OF 2020

(Originating from Criminal Case No. 65 of 2019 In District Court of Karagwe at Kayanga)

PROSPER RWECHUNGURA----- APPELLANT

VERSUS

REPUBLIC----- RESPONDENT

JUDGEMENT

Date of Last Order: 03/03/2022

Date of Judgment: 18/03/2022

A. E. Mwipopo, J.

The appellant herein namely Prosper Rwechungura was charged in the District Court of Karagwe at Kayanga for the offence of Rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16 R.E. 2002. It was alleged that on 21st February, 2019 at Kibingo Village within Karagwe District in Kagera Region the appellant did unlawfully had sexual intercourse with JE (the name of the victim is concealed for purpose of protecting her) a girl aged 5 years. The prosecution called 5 witnesses to prove their case. The trial Court did find the appellant with a case to answer and in defence the appellant testified on oath. The Court convicted the appellant and sentenced him to serve 30 years imprisonment.

Aggrieved by the decision of the District Court, the appellant filed the present appeal containing 6 grounds of appeal as provided hereunder:-

- 1. That, the victim failed to name the appellant at earliest opportunity available.*
- 2. That, the presiding magistrate erred both in law and fact for conducting poorly the voire dire test in term of section 127 (2) of the Evidence Act, as amended by Act No. 4 of 2016 hence has no evidential value.*
- 3. That, the essential elements of the offence were not proved to the standard required by the law.*
- 4. That, the trial Magistrate did wrong to reach decision without any scientific prove by the chemists (DNA) as there was a contradictions by witnesses on testimonies that the blood was from the victims nose and vagina and found on victims underwear which were taken to hospital for tests.*
- 5. That, the trial Magistrate did wrong to proceed with case and reach the decision without any reasons in court record as to why the former Magistrate one Hon. Kishenyi did not proceed with the case until final decision as the requirement of the law.*
- 6. That, the trial Court did wrong to reach her decision while the prosecution failed to prove the case on standard required by law.*

The appellant, who appeared in person, prayed for his grounds of appeal in the Petition of Appeal to be considered by the Court and the Court to allow his appeal.

In response, Ms. Happiness Makungu, State Attorney appearing for the respondent in this case was against the appeal. She commenced her submission

with the 5th ground of appeal. It was submitted that the Hon. Kishenyi, RM heard all prosecution witnesses and find the appellant with case to answer. Hon. Kahanwa, RM took over the case as seen at page 24 of the typed proceedings and proceeded with defence case and drafted the judgment. It is requirement of the law that when the Magistrate fail to continue with hearing to provide the reason. The Court of Appeal in the case of **Said Sui v. Republic**, Criminal Appeal No. 266 of 2015, Court of Appeal of Tanzania at Dodoma, (unreported), held that:-

"..... where it is necessary to re assign a partly heard matter to another Magistrate, the reason for failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in administration of justice".

The court in the cited case quashed the conviction and set aside all proceedings in the trial court which followed after the first trial magistrate had recorded the evidence of the first defence witness.

The counsel said that if this court will find that there is no reason provided for reassignment of the partly heard case, she prayed for the Court to revert the case to the District Court and the first trial magistrate has to proceed with hearing of the case from where he ended or so the reason for re-assignment has to be provided before another magistrate proceeds.

The counsel proceeded to submit on the first ground of the appeal that the evidence by PW1 proved that he heard the child crying in the room of the appellant. PW1 knocked the door and the appellant opened the door. She saw the victim behind the appellant crying and she was covered with blood. PW1 called leaders of the local authority and the appellant was arrested. For that reason, there was no delay in reporting of the incident.

In the second ground, the Counsel submitted that the evidence shows that the victim was of the age of 4 years. The record of proceedings does not show at all if the victim promised to tell the truth as it is requirement of the law provided by section 127 (2) of the Evidence Act. For that reason, the testimony of the victim has to be expunged in the record. She said that even after expunging the evidence of the victim, the evidence was still sufficient to prove the evidence against the appellant.

Regarding the third ground of the appeal, the Counsel said that the charge sheet revealed in the statement of the offence that the punishment for the offence is under section 131 (1) of the Penal Code. But the punishment for the offence. Where the child is of less than 10 years the punishment is under section 131 (3) of the Penal Code. The said defects is curable under section 388 of the Criminal Procedure Act as it was held by the Court of Appeal in the case of **Halfan Ndubashe v. Republic**, Criminal Appeal No. 493 of 2017, Court of Appeal of Tanzania at Tabora, (unreported).

The evidence adduced by the victim's mother – PW2 proved that the victim age was under the age of 18 years. Also, the evidence by PW1, PW2 and PW5 medical practitioner proved that the victim was found to have bruises and was bleeding in her private parts. All of these proved the offence. The Court of Appeal in the case of **Yusuph Molo v. Republic**, Criminal Appeal No. 343 of 2017, CAT at Iringa, (unreported), after it has expunged the testimony of victim witness which was not taken according to the requirement of the law, it proceeded to consider other evidence available and upheld conviction of the subordinate courts. She prayed for the court to consider other evidence available and upheld the decision of the trial court.

On the fourth ground of the appeal, she said that there is no contradiction concerning the victim's blood to be covered with blood and his body. In the circumstances of this case there was no need to conduct D.N.A as the appellant was apprehended soon after committing the offence.

The State Attorney said that the submission on the last ground of appeal is similar to her submission in the second ground of appeal.

In his rejoinder, the applicant said that the cloth and underparts which the victim did wear during the incident was not tendered as exhibit. When the victim was testifying he was not in the court as they took him out and proceeded to record victim's evidence. The trial Magistrate never considered his defence and he relied on the prosecution case only.

The counsel for the respondent submitted on the 5th ground of appeal that Hon. Kishenyi, RM., heard partly the case before Hon. Kaanwa, RM., took over the case as seen at page 24 of the typed proceedings. The successor Magistrate proceeded with defence case and drafted the judgment. I agree with the learned Counsel that it is requirement of the law when the Magistrate fail to continue with hearing of the partly heard case he/she has to provide the reason. The Criminal Procedure Act, Cap. 16, R.E. 2002 as amended in 2016 in Section 214 (1) provides as follows:-

"214 (1) Where any magistrate, after having heard and recorded the whole or part of or any part of the evidence in any trial or conduct in whole or part any committal proceedings, is for any reason unable to complete the trial or the committal proceedings or he is 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."

The above cited provision requires that reason be laid down to show why the predecessor magistrate could not complete the trial. In the absence of any such reasons, the successor magistrate lacks authority and jurisdiction to proceed

with the trial and consequently all such proceedings before him becomes a nullity. The Court of Appeal was of the same position in the case of **Abdi Masoud Iboma and 3 others V. Republic**, Criminal Appeal No.116 of 2015, at Dodoma, (unreported).

In the present case, Hon. Kishenyi recorded the evidence of all 5 prosecution witnesses and find the appellant with a case to answer. On 30th October, 2019, without assigning any reason Hon. Kaanwa, R.M., took over the case and recorded the appellant's testimony and drafted the judgment which was delivered on 26th November, 2019. This prove that the successor magistrate proceeded with the hearing of the case without jurisdiction. Failure by successor Magistrate to record reason as to why the predecessor trial magistrate was unable to complete the trial, the proceedings of the successor magistrate were conducted without jurisdiction, hence a nullity. The irregularity is incurable as it was held in the case of **Said Sui v. Republic**, (Supra).

Therefore, proceedings in the trial court including the conviction of the appellant which followed after the first trial magistrate ruling of a case to answer are quashed and the sentence is set aside. I order for the case to be reverted back to Karagwe District Court to Hon. Kishenyi, RM, who has to complete the trial from where he left unless for some reason, to be recorded by successor Magistrate, if he is unable to do so. Where upon completion of hearing of the evidence the appellant is convicted of the offence, the time spent by the appellant in jail should

be deducted from the sentence that will be imposed. The trial District Court should give priority to this matter. It is so ordered.



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A.E. Mwipopo

Judge

18/03/2022

The Judgment was delivered today, this 18.03.2022 in chamber under the seal of this court in the presence of the Appellant only.

- Respondent to be supplied with fee copy of Judgment.



A handwritten signature in blue ink, appearing to be "A.E. Mwipopo", written over a horizontal line.

A. E. Mwipopo

Judge

18/03/2022