IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 201 OF 2022

(*Appeal from the decision of the District Court of Ilala at Kinyerezi in Criminal Case No. 420 of 2020 before Hon. A. Nyenyema, SRM dated 4th Day of April 2022)*

RAJABU SELEMANI ATHUMANI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

7th June & 5th July, 2023

MWANGA, J.

In the District Court of Ilala at Kinyerezi, **Rajabu Selemani Athumani** was charged and convicted of rape contrary to Sections 130(1), 2(e), and 131 (1) of the Penal Code, Cap. 16 [R.E 2002]. Upon conclusion of the trial, the appellant was convicted and sentenced to serve 30 years imprisonment in jail. According to the particulars of the offence, on the 29th day of February 2020 in Kivule area within Ilala District in Dar es Salaam, the appellant did have carnal knowledge with a child of five years, whose

name is withheld for dignity purposes. The child shall be referred to as "the victim" for further purposes of this appeal.

Being aggrieved by both conviction and sentence, the appellant appealed to this court on the following grounds as follows: -

1. The learned trial magistrate erred in law and fact by convicting the appellant based on facts contradictory to the evidence adduced by PW1, PW2, and PW3.
2. That learned trial magistrate erred in law and fact to believe that an offence of Rape has been committed as the appellant charged without sufficient elements to sustain the offence.
3. That learned trial magistrate erred in law and misdirected himself by not adverting to the gist of criminal procedure in arriving at the judgment.
4. That the learned trial magistrate erred in law and misdirected himself by holding a conviction on the appellant without considering that the inconsistency of judgment and proceedings could not be justified with the offense as charged.
5. That the learned trial magistrate erred in law and misdirected himself when convicted. The appellant relied on the evidence on

record while the proceeding shows that the Magistrate who presided over the entire oral did not give out the judgment; instead of that, it was done by another magistrate while nowhere was noted on the record that there were changes of the magistrate which the criminal procedure Act contravenes.

6. That the learned trial magistrate erred in law and misdirected himself when he failed to follow the procedure on the appellant's plea during the charge's substance and at the prosecution evidence's close.
7. That the learned trial magistrate erred in law and fact to ignore the appellant's defense of alibi without sufficient reasons and subsequently convicted the appellant based on the weakness of the security, which is not his duty because the defense evidence adduced in court by DW2 and DW3 was sufficient to be acquitted the accused/appellant.

In addition to the above grounds of appeal, the appellant also filed a supplementary appeal stating that; the trial Magistrate erred in law for his failure to take the appellant's evidence, and hence the appellant was condemned unheard.

The appeal was argued by way of written submission. In addressing issues, the prosecution was represented by Ms. Nura Manja, the learned State Attorney, while Mr. Michael Mkenda, the learned advocate, represented the appellant. Having gone through Mr. Mkenda's submission, he had abandoned the 3rd and 4th grounds of appeal.

Starting with the supplementary ground of appeal, the appellant's advocate addressed that the appellant, as evidenced in the judgment, is not seen in the court proceedings giving evidence as the accused because the only defense witness who appeared in the proceedings was Rajabu Selemani Ismail and not, Rajabu Selemani Athumani, the appellant herein. The counsel referred to pages 28,30, and 35 of the typed proceedings to substantiate his claims. In that regard, the counsel called such an act as condemning the appellant unheard, contrary to the fundamental principles of natural justice. The counsel argument was supported by the decision of this court in **Asha Mohamed Versus Antony Ulirk Massawe,** Civil Appeal No. 66 of 2022, (Unreported) where Hon. Kakolaki, J. referred the conclusion of the Court of Appeal in the case of **Abbas Sherally and Another Versus Abdul Sultan Haji Mohamed Fazaboy,** Civil Application No 133 of 2002(Unreported). On the other hand, the learned State Attorney refuted such arguments stating

that the ground is irrelevant and immaterial, thus, cannot exonerate the appellant from the offense of rape due to the reason that on page 7 of the trial court proceedings, the appellant, on the memorandum of facts admitted name, address and so forth. Therefore, the appellant was heard before the trial court.

Apart from that, the counsel submitted on the 1st ground of appeal that the evidence of PW2 and PW3 is contradictory, as shown on pages 13 and 17 of the trial court proceedings. It was his submission that PW2 said that on 29th February 2020, the victim was crying and was not expected. Hence, they examined her in accompany of PW3 while PW3 testified that, on 29th February 2020, the victim returned home crying because a tsetse fly bit her. The learned counsel contended that the trial court should have resolved the contradictions before convicting the appellant. The counsel enabled his argument by referring to the case of **Mohamed Said Matula Versus The Republic** [1995] TRL 3**, where** the Court of Appeal insisted that: -

> "***Where the testimony by the witness contained inconsistencies and contradictions, the court must address the inconsistencies and try to resolve them where possible else, the court has to***

decide whether the inconsistencies and the contradictions are only minor or go to the root of the matter."

On his part, the learned State Attorney contended that the contradictions stated on page 17 are minor and do not go to the root of the matter; hence will not vitiate the prosecution case. Ms. Nura Manja supported her argument in the quoted case of **Mohamed Said Matula Versus Republic** (Supra) and also the cited case of **Jacob Jonas @ Maganga Versus The Republic,** Criminal Appeal No.24 of 2021 TZHC (unreported), which was quoted in the case of **Said Ally Saif Versus R,** Criminal Appeal No.249 of 2008 CAT (unreported) on page 9 and 10 stated that:

> ***"... It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory that the prosecution case will be dismantled..."***

Following the above argument, the prosecution also prays for this ground to be dismissed.

Considering the 2nd ground of appeal, the learned counsel argued that the prosecution failed to prove the alleged offense as charged as there was

no evidence of sperms or blood obtained from the victim, connecting the crime with the appellant and the medical report. Therefore, such gaps create much doubt, considering that the victim was taken to the hospital four days later while PW2 testified that he noticed the offense was committed on the first day.

On this ground, the learned State Attorney replied that PW4 gave her medical examination report stating that the victim had been penetrated over her vagina wall, bruises, wound, and labia minora /hymen was not found. Therefore, Ms. Manja argued that the appellant's guilt was proved to the required standard. The learned State Attorney supported her argument in the cited case of **Hamis Shabani@ Hamis (Ustadhi) Versus Republic,** Criminal Appeal No. 259 of 2010 CAT (unreported) on page 11 ND 12**.** According to her, the victim's evidence was corroborated by PW1, PW3, and PW4, sufficiently proving that the appellant committed the offense.

On the 5th ground of appeal, it was contended that the proceedings show that the evidence of the witnesses was partly recorded by Honourable Nassary and later on by Honourable Nyenyema SRM, who proceeded to receive the evidence of DW3 without assigning reasons for such takeover. The council cited the case of **Josephine Mangala Msema (Legal**

representative of the estate of Rev. Sadock Yakobo Mlongecha) Versus The Registered Trustees of PEFA-Kigoma, Civil Appeal No.490 of 2021(Unreported), where the Court of Appeal quoted the case of **Leticia Mwombeki Versus Faraja Safarali & 2 Others**, Civil Appeal No.133 of 2019 (Unreported) at page 11; where it was stated that,

> ***"We observed that the silence of the record as to how the court file found its way from the predecessor judge to successor judge puts to test the integrity and transparency of the proceedings in question. It was also observed that where the successor judicial officer takes over the proceedings without assigning reasons, whatever he does in the case, he does it without jurisdiction. The omission goes to the root of the matter."***

According to the counsel, given such shortcomings, the proceedings shall be nullified, including the entire judgment, conviction, and sentence entered against the appellant.

On the other hand, the learned State Attorney supported this ground of appeal, submitting that the appellant ought to be informed otherwise of the procedures under Section 214 of the Criminal Procedure Act. It was further

submitted that, in the case of **Samwel Dickson Enock @ Jeremia Michael Bwile and Two others V. Republic,** criminal Appeal 116 of 2017) on pages 5 and 6, the court had this to say: -

> ***"... where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons, could pick up any file and deal with it to the detriment of justice. This must be not allowed."***

Therefore, the learned State Attorney undoubtedly submitted that from the authoritative decision cited herein above, the omissions by the successor magistrate to comply with section 214 (1) of the Criminal Procedure Act constituted an irregularity which renders the proceedings of the successor magistrate from 30/01/2022 to be void. Accordingly, having conceded this ground of appeal, the learned State Attorney prayed to this honorable court to expunge the trial court proceedings from 30/01/2022 and order the file to be returned to the trial court for compliance with Section 214 of the Criminal Procedure Act.

As to the 6th ground of appeal, it was submitted that the trial court contravened the provision of sections 228(2) and 282 of the Criminal Procedure Act [R. E 2019] regarding plea taking. According to the counsel, the trial court was wrong to proceed with taking the evidence of DW1 having pleaded guilty. The counsel quoted the case of **Kamundi Versus Republic** [1973] EA 540 in support of his submission.

In reply to the above, the State Attorney argued that the appellant was reminded of his charge when the defense case opened and pleaded, "It is true." Then the court entered a guilty plea as shown on page 28 of the typed court proceedings as required by section 228 of the Criminal Procedure Act. The learned State Attorney considered the view that in the case at hand, the court did not proceed to convict and pass sentence against the appellant but moved by hearing the appellant's defense. According to her, the plea taken was equivocal. As part of her submission, she supported the trial magistrate's action to proceed to take the appellant's evidence, saying that, after all, the appellant denied the charge against him even though he seemingly admitted to having committed the said offense of rape as indicated at pages 28 & 29 of the proceedings. Further, the learned State Attorney said that when the appellant was for the first time arraigned in court on 16/09/2020, he pleaded

not guilty to the charge. And on 24/02/2020, when he was called to admit facts during the Preliminary hearing stage, the appellant pleaded not guilty. Consequently, it was wise for the trial magistrate to proceed with the previous plea at the defense stage.

Regarding the 7th ground of appeal, Mr. Mkenda argued that the appellant sufficiently raised a defense of alibi supported by DW2 and DW3. The prosecution case never stated the time of the commission of the alleged offense. According to him, DW2 and DW3 testified that on a fateful day, they were together with the appellant at Kivule Matembele at the burial arrangement and after that burial ceremony at Tuangoma Kigamboni. The appellant's counsel referred to the case of **Masoud Amina Versus Republic** [1989] TLR 23, where the court denied the defense of alibi on account that the accused did not issue notice and that he did call a witness who was with him, unlike in the present case where the appellant corroborated his evidence. The counsel asserted further that the defense of alibi casted doubt on the prosecution case, which doubt to have been resolved in the appellant's favor.

Per contra, the learned State Attorney also opposed this ground of appeal. Ms. Nura Manja contended that the appellant should issue a notice

to rely on the alibi defense, which still needs to be done. The State Attorney cited the case of **Yusuph Juma @ Kyagwa Versus Republic,** Criminal Appeal No.48 of 2021 TZHC (Unreported), where it was stated that it is essential to note that the defense of alibi has mandatory requirements for it to be considered. Section 194 (4) of the Criminal Procedure Act also affirmed that the accused person who intends to rely on an alibi in his defense must give prior notice to that effect. That also included his particulars as enumerated under subsection (5) of Section 194 of the CPA. Ms. Nura argued that the appellant did not issue any notice that he would rely on the defense of alibi. Last, the learned state attorney concluded that this case was proved beyond a reasonable doubt.

In rejoinder, Mr.Mkenda reiterated his earlier submission in chief. Also, adding that the allegations that the appellant used another name during the defense is of no substance because the prosecutor who was present in court ought to have observed if it occurred. Therefore, he insisted that the appellant should have been allowed to defend his case.

Having gone through the submission by both parties and upon perusal of the trial court records, I have noticed some critical procedural issues for determination by this court before the detailed merits of this appeal. **First,**

the case regarding plea taking and, **second,** the change of magistrates without assigning reasons.

To start with the process of plea-taking. It is governed by the provision of Section 228 (1) and (2) of the Criminal Procedure Act. Cap.20 [R.E 2019]. As it can be seen on page 28 of the typed proceedings, when the trial magistrate reminded the appellant about the charge against him, the same was recorded as hereunder:

> ***"Court:*** *Charge read over to the accused who is required to plead to it:*
>
> ***Accused:*** *It is true*
>
> ***Court:*** *Accused entered a plea of guilty".*

Immediately after such an event, the trial magistrate took the evidence of the DW1, the appellant herein. Undoubtedly, that differed from the process to follow according to the law. The provision of Section 228 (1) and (2) of the CPA reads: -

"S. 228. -(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the order.

(2) Where the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses, and the magistrate shall convict him and pass sentence upon or make an order against him unless there appears to be sufficient cause to the contrary".

In light of the above provision, the trial court ought to state; **One** substance of the charge to the accused person. **Two,** ask whether the accused admits or denies the truth of the charge. **Three,** record the accused's words in accepting the charge as soon as possible**. Four,** if it is a guilty plea, the magistrate shall convict him, pass a sentence, or make an order against him.

The fourth ingredient still needs to be met according to the law for the preceding. After the appellant has pleaded guilty, the facts of the case were to be read out to the accused person, and his admission or otherwise be recorded. But instead, the trial court proceeded with the taking of evidence

of the appellant as if no guilty plea entered against him. That is unwarranted and irregulates the proceedings of the trial court.

The other irregularity was the change of magistrates without assigning reasons. On perusal of the records on page 33 of the typed proceedings, there was a charge of a magistrate when the defense hearing was ongoing. However, there were no reasons assigned for such a change. According to the cited case of **Samwel Dickson Enock @ Jeremia Michael Bwile and two Others Versus Republic,** Criminal appeal No. 116 of 2017 [2018] TZHC 2740, which quoted the case of **Priscus Kimaro Versus Republic**, Criminal Appeal No.301 of 2013 CAT (Unreported) at page 5 and 6 it was stated that: -

> ***"... where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons, could pick up any file and deal with if to the detriment of justice. This must be not allowed".***

Given the decision above, assigning a reason(s) is mandatory. See also the case of **M/S Georges Center Limited vs The Honourable Attorney General and Another**, Civil Appeal No.29 of 2016, where the Court of Appeal held that: -

> ***"The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why they have to take up the case that is partly heard by another. There are several reasons why the same judicial officer must complete a trial started by one judicial officer unless it is not practicable. For one thing, ...the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be accessed is very crucial in determination of any case before a court of law. Furthermore, integrity of judicial proceeding hinges on transparency. Where there is no transparency justice may be compromised"***.

Noncompliance with the above position of law can be seen clearly in the proceedings at page 33, where Hon. Magistrate Nyeyema SRM took over the proceedings without assigning any reasons.

For the preceding, I now quash and set aside the proceedings recorded for the defense case from 21st October 2021 onwards. Having considered all that, I order a retrial of the case to start at the defense hearing, whereby the appellant shall be allowed to defend, and eventually, the presiding trial magistrate shall compose a fresh judgment. For those reasons, there will be no need to consider other grounds of appeal filed by the appellant.

Order accordingly.

H. R. MWANGA

JUDGE

05/07/2023

COURT: Judgement delivered in Chambers this 5th day of July 2023 in the presence of Advocate Michael Mkenda for the Appellant and Ms. Nura Manja, learned State Attorney for the Respondent.

H. R. MWANGA

JUDGE

05/07/2023