**IN THE HIGH COURT OF TANZANIA**

**DODOMA SUB-REGISTRY**

**AT DODOMA**

**DC CRIMINAL APPEAL NO. 97 OF 2022**

*(Originating from Criminal Case No. 01 of 2022 in the District Court of Kongwa at Kongwa)*

**THOBIAS PETER MNGÓNGÓ.....APPELLANT**

**VERSUS**

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

# JUDGMENT

***03rd August & 21st September, 2023***

**HASSAN, J.:**

The appellant herein appeared before the District Court of Kongwa at Kongwa where he was charged with the offence of Rape contrary to sections 130(1) and (2) (e) and 131(1) and (3) of the Penal Code, Cap 16 [R. E 2019]. It is in the particulars of the offence that, on the 2nd day of January, 2022 at about 19:00 hours at Zoissa Village within Kongwa District, Dodoma Region the appellant did have sexual intercourse with one E. R a girl of 3 years old.

When the charge was read over to the appellant in the trial court, the appellant denied the charge. The prosecution, thereafter, called a total of four (4) witnesses, who testified against the appellant who entered his

defence without calling any witness on his case. At the conclusion of the trial, the appellant was convicted and sentenced to serve life imprisonment. Aggrieved, the appellant filed an appeal in the court. The Appellant's Petition of Appeal comprises eleven (11) grounds of appeal in which he essentially argues that the prosecution case against him was not proved beyond reasonable doubt.

On the 3rd day of March, 2023 when this appeal came for hearing, the appellant appeared in person whereas the Respondent Republic was represented by Mr. Leonard Chalo, the learned Senior State Attorney. Before the appellant was allowed to make his submission, the Respondent brought to the attention of the court an irregularity in the record of proceedings of the trial court. He submitted on the irregularity that, in the course of perusing the proceedings, at page 30 of the typed proceedings, they have observed that after the prosecution had closed its case, the trial magistrate ordered for defence case without first pronouncing for a Ruling of *prima facie* case as the requirement of the law by section 231(1) of the Criminal Procedure Act, Cap 20.

The learned counsel submitted further that, the record does not show that the accused person was given his right of defence as per section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap 20. That, with that omission, the proceeding is defective and since it was a mandatory

requirement of law the whole proceeding recorded after prosecution had closed their case become a nullity. He thus prayed for the file to be remitted back to the trial court to be heard afresh from where prosecution had closed their case. Thus, the proceeding taken after prosecution had closed their case to be expunged from the record.

On his part, the layman appellant had nothing to add from what was observed by the learned State Attorney. He left the matter to the court to do justice.

Indeed the record of the trial court shows that after the prosecution side had closed their case, the trial magistrate did not rule on whether or not the appellant (the then accused) had a case to answer regarding the offence he was charged with. What is seen in the original record of proceedings in the court file is two (2) white blank papers, one with a heading "RULING" only, with no any other word thereafter. This is contrary to section 231 of the Criminal Procedure Act, Cap 20, Which provides;

> *"231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable*

*to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*

*(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*

*(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

The above provision of law sets a mandatory requirement that, right after the prosecution side closes their case, the court will make a decision on whether or not the accused is found with a case to answer. And if the accused is found with a case to answer then the court shall then explain the substance of the charge against him and inform him of his rights before he gives his defence in court.

In the instant case, as it was well submitted by the learned Senior State Attorney, there is neither Ruling on *prima facie* case nor record for showing right for defence being addressed to the accused person and the court recording his answer as required by the law prior to the appellant's testimony. Thus, the defence case was opened without adhering to the mandatory requirement of the law. The court has given its direction on the importance of informing the accused of his right before defending

himself, in **Ally Juma Faizi @ Mpemba vs Republic, Criminal Appeal 401 of 2013** (unreported) where the court held:-

> *"We think the failure by the trial court to address the appellants in terms of section 231 was highly irregular"*

Also in **Namashule Ndoshi v. The Republic, Criminal Appeal no. 120 of 2005** (unreported) the court addressed section 231, thus:-

> *".....a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict. Not only is an accused entitled to give evidence- in their defence but also to call witnesses to testify in their behalf. So, the section is an elaboration of the all-important maxim- audi alteram partem and that no one should be condemned unheard."*

In the consideration above, it is with no doubt that the anomaly is very fatal since the accused was prejudiced for his right of defence. To that end, I hereby invoke the revisionary powers of the court to nullify, quash and set aside the proceedings from where prosecution evidence ended, judgment, conviction and the sentence thereto respectively.

Ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial. In **Fatehali Manji v. Republic, [1966] EA 343** the court held, thus;

> *".....each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*

Having considered the facts and circumstances of this case, I am of the firm position that for the sack of justice, thus, I direct that this case be remitted to the trial court to proceed with hearing of Criminal Case No. 1 of 2022 before another magistrate from where prosecution evidence ended.

Ordered accordingly.

**DATED** at **DODOMA** this 21st day of September, 2023.

**S. H. HASSAN**

**JUDGE**