IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 25 OF 2023

(Originating from the Resident Magistrates' Court of Arusha at Arusha before Hon. (H.G. MHENGA -RM) dated on the 25th day of January 2021 in Criminal Case No. 396 of 2018)

SIYOI ELIATA.....APPELLANT

VERSUS

THE D.P.P ..... RESPONDENT

JUDGMENT

18/10/2023 & 23/11/2023

GWAE, J

The Resident Magistrate of Arusha at Arusha ("trial court"), tried and convicted the appellant, Siyoi Eliata, for the offence of rape contrary to section 130 (1), (2)(e) and 131 (3) of the Penal Code [Cap. 16, Revised Edition, 2002]. Following conviction, the appellant earned a custodial sentence of life imprisonment.

Aggrieved by the trial court's conviction and the sentence thereof, the appellant is now before this court challenging the same. He has thus advanced six grounds of appeal, to wit;

1. That, the trial magistrate erred in law and fact to convict and sentence

2. That, the trial magistrate erred in law and fact to convict and sentence the appellant as the case/charge against the appellant was not proved
3. That, the trial magistrate erred in law and fact to convict the appellant by basing on the evidence of PW2 (the victim) despite the fact that her evidence was recorded in contravention of section 127 (2) of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019, there was preliminary tests to determine if PW1 understands the nature of an oath. Moreover, she did not promise to tell not to tell any lies
4. That, the trial magistrate erred in law and fact to convict the appellant of the offence of rape at the age of the victim was not proved beyond reasonable doubt
5. That, the trial magistrate erred in law and fact to convict for failure to see that the contradictions and inconsistencies in the prosecution evidence raise doubt in the case and the same should benefit the appellant
6. That, the trial magistrate erred in law and fact to convict grossly misdirected herself when he did not make any reference to the appellant's defence in making the decision

On 18th July 2023 when the appeal was called on for hearing before me, the appellant appeared in person whereas Ms. Alice Mtenga, the learned state attorney represented the Republic. Nevertheless, it was consensually agreed that, the appeal be disposed by way of written

submission after the appellant had stated his inability to orally proceed with the scheduled hearing.

However, when I was about to compose the judgment basing on the appellant's grounds of appeal, I have found that, the matter before the trial court was presided over by different magistrates before its conclusion. These were; Kisinda-RM (4th December 2018-17th June 2019, Hon. Ngoka-RM from 1st October 2019 to 10th January 2020, Comfort-RM (21st January 2020 to 17th July 2020 and Hon. Mhenga-from 14th December 2020 to its finality on 25th January 2021.

Unfortunately, when the matter was called on for hearing before Hon. Kisinda on 16th day of April 2019, it was ordered that the hearing should proceed in the absence of the appellant who was reported absent since 18th March 2019. Subsequent to the order of ex-parte hearing under provisions of section 226 of the Criminal Procedure Act, Chapter 20 Revised Edition, 2002 (CPA). During hearing of the case in the appellant's absentia, two witnesses gave their evidence including that of the victim until on 6th April 2020 when the appellant entered appearance before Hon. Comfort, Esq who is vividly found to have recorded evidence of three witnesses (PW3-PW5).

Unluckily, the 2nd trial predecessor, proceeded without setting aside the ex-parte hearing order or availing the appellant an opportunity to show cause as to why he defaulted appearance on the previous trial court's sessions. That, being the case, I entertained the parties to address the court on that clear legal anomaly. Undeniably, the appellant argued that it is true that he was absent when the evidence adduced by PW1 and PW2. He further stated that, he was not availed to say anything about his previous absence. On the other hand, the learned state attorney admitted that, the trial court misdirected itself when it proceeded with hearing without giving the appellant a chance to give reason (s) as to why he was absent when PW1 and PW2 testified.

Looking at the provisions of section 226 of CPA, it is clear that, if an accused person defaults appearance on the date scheduled for hearing or further hearing without notice, the trial court may order matter to be heard ex-parte as if he or she was present. Equally, when a complainant does not appear on date the matter is set for hearing, a complaint may be dismissed and an accused person be discharged of the offence. Perhaps it is apposite to have provisions of Section 226 of CPA reproduced it herein under;

"226 (1) Where at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court thinks fit

(2) Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit"

Though the above section of the Act does not provide what to do when an accused person does not appear on the date (s) fixed for hearing but he appears on the subsequent hearing date save when he is convicted in his absentia. However, in my view, the principles of administration of criminal justice require fair hearing, which include giving parties an opportunity to address the court before taking any adverse action. (See Article 13 (6) (a) of the Constitution of the United Republic of Tanzania).

In our present case, the appellant might have either been prevented from appearing on the dates fixed for hearing by reasons out of his control or might have negligently defaulted appearance. Thus, the trial court ought to have availed him an opportunity to explain as to why he

defaulted appearance on the dates he did not appear so that it may ascertain whether it is justified to proceed ex-parte or to vacate its own order. Failure of which though does not invalidate the proceedings as per proviso of section 227 of the CPA yet it leaves a lot to be desired. For example;- **One,** how could the appellant be heard without setting aside ex-parte hearing order entered by the trial court on 17th June 2019. **Two,** assuming the appellant had valid reasons for his non-appearance and **Three,** what will be the weight of the evidence recorded in the absence of the appellant where the appellant was not given an opportunity to re-call those who had already given their evidence. Section 147 (4) of the Evidence Act, Cap 6, Revised Edition, 2002 reads;

> *"147 (4)The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further cross-examination and re-examination respectively."*

In view of the above-cited provision of law, upon an application by either party in a criminal trial, the court may allow a witness to be recalled for further examination in chief or cross-examination as well as re-examination of such recalled witness. Right to recall a witness is statutory and the same is exercisable by both parties in criminal proceedings. This position was instructively stated by the Court of Appeal of Tanzania in the

Right to recall a witness is the statutory one and the same is exercisable by both parties in criminal proceedings. This position was instructively stated by the Court of Appeal in **Remmy Gerald vs. Republic,** Criminal Appeal No. 67 of 2019 (unreported).

Right to be heard is so basic and fundamental one, in that regard, I am entitled to decline to dispose the appellant's remaining grounds of appeal. I have opted so simply because the trial court patently breached the principle of natural justice.

Therefore, the above holding is capable of disposing the appeal. In the circumstances and nature of the offence I proceed, making an order of re-trial of the matter from 6th April 2020 when the accused entered his appearance on the subsequent dates fixed for continuation of the hearing of the prosecution case. Should the appellant be found guilty of the offence leveled against him, the imposed sentence shall start running from the date he was illegally convicted that is 25th January 2020

It is so ordered.

DATED at **DAR ES SALAAM** this day of 23rd November 2023

SGD: M. R. GWAE

JUDGE