IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOROGORO SUB-REGISTRY

[AT MOROGORO]

CRIMINAL APPEAL NO. 38399 OF 2023

(*Originating from the judgment of Kilombero District Court in Criminal Case No. 366 of 2020 before Hon. T.A. Kaniki, RM delivered on 6th July 2021*)

MZEE PASKALI GREMANUS ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

25/03/2024 & 28/03/2024

KINYAKA, J.:

In the present appeal, the appellant seeks to challenge the decision of the District Court of Kilombero in which he was convicted for the offence of rape contrary to sections 130 (1) and 131 (e) of the Penal Code, Cap 16 R.E. 2019, and sentenced to serve 30 years imprisonment in jail.

Dissatisfied with the said conviction and sentence, the appellant filed his petition of appeal in which he raised a total of six grounds of appeal coached in layman's language as reproduced hereunder: -

1. That your honourable judge the charge against the appellant was characterized with jealousy following theft of clothes done by PW1 one Nasma Musa, the property stolen belonged to DW1 as clearly narrated

by PW1. The trial magistrate was not keen enough to evaluate the degree of fabrication that lead to unfair conviction;

2. That no caution statements were taken to be reproduced before the trial magistrate during the trial to prove the charge against the appellant. Your honourable judge, failure to take caution statement from the appellant is fatal and caused miscarriage of justice on the part of the appellant;
3. That there is contradictions on part of the Prosecution evidence as to where exactly PW2 was sent for medical examination. PW3 informed the court that PW2 was medically examined at Nyandeo Health centre while at page 3 of the judgment the trial magistrate states that PW2 was attended at Mang'ula health centre. Your honourable judge all these contradictions leaves doubt as to the conviction of the appellant;
4. That, there existed fabricated evidence by PW2 (the victim) who informed the court that she had sexual intercourse with the appellant during night without clearly identify the appellant. No identification parade was conducted. Your honourable judge, People do resemble in terms of shape and sound. There is no clear identification on part of appellant to be the one who participated in the incident. Again prosecution failed in proving the case and such failures creates doubts too;

5. That the appellant has been condemned unheard the omission which contravenes the cardinal principles of natural justice "right to be heard" this case was tried *ex parte* while appellant was in custody at Idete prison where I was remanded. I did not utilized my right to defend myself and the trial magistrate has, not only offended the procedural laws, but also constitutional rights of the appellant;
6. That, presumption of innocence as the principle in criminal liability was not honoured in this case the fact which made the trial magistrate to act as if she is the prosecutor forgetting that the court is an independent body in administering justice and that the Magistrate should act reasonably as the neutral umpire.

At the hearing of the appeal, the appellant appeared in person fending for himself whereas the respondent was represented by Mr. Josberth Kitale, Learned State Attorney.

Before the appellant could submit in support of the grounds of Appeal, Mr. Kitale took the floor to support the appeal. His concession was predicated on the denial of the appellant's right to be heard occasioned by the trial court's decision of proceeding with the hearing and determination of the criminal case against the appellant *ex parte* under

section 226(1) of the Criminal Procedure Act, Cap. 20 R.E. 2022, hereinafter, "the CPA").

The learned state attorney faulted the procedure followed in invoking section 226(1) of the CPA opining that the prosecution should have prayed for the arrest warrant and summons to show cause to the sureties, and thereafter, inform the trial court of their failure to get hold of the sureties and the accused person. According to him, it was after adhering to the above laid down procedures that the prosecution could have prayed to proceed with the hearing under section 226(1) of the CPA.

Expounding more on the proper course that the trial court was supposed to take under the circumstance, Mr. Kitale contended that upon the court's finding that the accused person was guilty, the trial court, before convicting the accused person, should have inquired from the accused person as to why the court should not proceed to convict him without giving him the right to be heard under section 226(2) of the CPA. To substantiate his position, he referred the Court to the case of **Elia Kulanga v. R, Criminal Appeal No. 76 of 2023, HCT** on page 7, in which the High Court quoted the case of **Magoiga Magutu Wansima v. R., Criminal Appeal No. 65 of 2015**.

Guided by the above authority, the learned state counsel contended that the trial court should have allowed the accused person to address the court on the reasons for his failure to enter appearance in the case, and thereafter set aside the *ex parte* order and proceed to hear the accused person's defence, in case the trial court was satisfied with the accused's reasons for absence.

On the basis of such a procedural irregularity, the learned counsel beckoned upon the Court to set aside the decision of the District Court of Kilombero based on the failure by the trial magistrate to exercise its powers under the provisions of section 226 of the CPA judiciously.

As to the way forward, Mr. Kitale prayed for an order for re-trial of the case as according to him, at the trial court, the prosecution managed to prove the offence against the appellant beyond reasonable doubt through the evidence of PW2, the victim, and PW3, the medical doctor.

On his part, the appellant being a lay person had nothing meaningful to add on the learned state attorney's submissions apart from insisting that he was denied his right to be heard before the trial court. As for an order for retrial, he did not object to the prayer only on the condition that the case be heard at the trial court before another magistrate.

I have considered and examined both the learned state attorney's submissions on his concession to the appeal and the trial court proceedings. On my part, I will resolve the issues as to whether the accused person was denied his right to be heard, and whether in the circumstance, an order for retrial is appropriate.

My point of entry will be a brief narration of what transpired at the trial court prompting the present complaint channeled to this court through the fifth ground of appeal. At the trial court, after the hearing of the prosecution witnesses (PW1 and PW2) on 14/12/2020, the case was adjourned to 27/01/2021 for hearing but the same was not conducted for the reason that the trial magistrate was on leave hence the same was adjourned until 17/03/2021. On that date, the public prosecutor in charge of the case, informed the trial court that the accused person didn't enter appearance and thereafter prayed for the court to issue both an arrest warrant and summons to show cause. He also prayed that the hearing proceed under section 226 of the CPA.

As the records speaks, the trial court granted all the prosecutor's prayer and adjourned the matter for hearing. However on 03/06/2021, when the matter came for hearing after several adjournments, the public prosecutor informed the court that the accused person had already been arrested

and prayed for an adjournment as the republic had no witnesses on that date. Despite such an information, when the matter was called on for hearing on 08/06/2021, the accused who was by then in custody was not brought before the court to show cause as to why he was absent on the previous hearing dates as per the trial court's order dated 17/3/2021. Instead, the court proceeded with the hearing of the remaining prosecution witness and scheduled the date for an *ex parte* judgment.

From the onset, in line with the above narration, I agree with the learned state attorney that the accused person's right to be heard was infringed under the circumstance. I say so because, if the accused person was in custody, the trial magistrate should not have denied him the right of a hearing. As the accused was in custody after being re-arrested for absconding bail, the trial court should have given him a platform to address the court on the reasons for his previous non-appearance. Admittedly, it could have been different if the accused person's presence was not procured on the date of the hearing of the case after such abscondment. In my view, it was only under such circumstances, the trial court would have rightfully proceeded with hearing of the matter *ex parte* and convict the accused person.

It is imperative to state that section 226 of the CPA invoked by the trial court to hear the trial *ex parte*, not only provides for the consequences of non-appearance of parties at the trial, but also the procedures thereto. The section provides:-

> *"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.."*

In my reading of the above section, I am of the profound view that it was wrong for the trial court to proceed with hearing of the case even after being informed of the re-arrest of the accused person. I say so for the reason that the fact that the accused person had jumped bail couldn't in any way mean that his right to be present in the case and defend himself was automatically waived.

The provision stated above is so protective of the accused's right to be heard to the extent that it gives a room for reopening of the case after the court's satisfaction that the accused person who has been convicted in absentia has successfully shown cause for his absence. That was the position in the case of **Shija Juma v. Republic, Criminal Appeal 383 of 2015** (unreported). In that case, the trial court proceeded *ex parte* against the appellant who had jumped bail for almost two years until when he was arrested. In adjudicating as to whether the conviction of the appellant was proper under those circumstances, the Court of Appeal on page 9 observed as follows:-

> *"Section 226(2) therefore enables proceedings which were preceded with the conviction from the stage before the close of the prosecution case to be reopened if the court was satisfied that the accused's absence was justified. The appellant was arrested nearly two years after the judgment was pronounced. He was taken before the trial court in line with the requirements under section 226(2) of the CPA in order to explain his absence. He failed to come up with any viable explanation for his absence. He was therefore not denied his fundamental right to be heard as claimed."*

Based on the above decision, I am of the firm view that, if the convicted person can be afforded an opportunity to explain his absence even after two years after conviction was passed, it is more complicated in the

instant matter where the appellant who was yet to be convicted and who had been re-arrested before the continuation of the prosecution case from where it ended before his abscondment, was denied the right to show cause as to why he didn't enter appearance in the trial.

In my understanding of the law and practice, the trial court was supposed to order the accused person, who was by then in a lawful custody, to be brought before the court to show cause for his absence. Unfortunately in this case, after making an order for the issuance of the summons to show cause on 17/03/2021, the trial court never bothered to find out if the prosecution had complied with the procedure for ex parte hearing and conviction of the accused person in the circumstances. The cause taken by the trial court was tantamount to breach of the appellant's right to be heard with an effect of nullifying the entire proceedings. **In the case David Mushi v. Abdallah Msham Kitwanga, Civil Appeal 286 of 2016** (unreported) on page 18 through to 19 when the Court of Appeal was faced with much akin situation like in present matter, it instructively held as follows on the consequence of the violation of the right to be heard;

> *"It is a cardinal principle of law that where a judicial decision is reached in violation of the right to a fair hearing as is the*

case in this matter, such decision is rendered a nullity and cannot be left to stand.....In Abbas Sherally and Another (Supra) the Court observed as follows:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.****"*
> *[Emphasis added].*

From what I have illustrated herein above, I am satisfied that the accused person's right to be heard was seriously violated by the trial court. In view of the above authority, the appellant's fifth ground of appeal is hereby allowed. As a consequence, I nullify the proceedings of the trial court and set aside the resultant conviction and sentence rendered to the appellant. Following the disposal of the appeal premised on the determination of the fifth ground of appeal, I find no need of canvassing the remaining grounds of appeal.

On the way forward, the learned state attorney suggested an order for retrial which the appellant did not contest. The learned state attorney opined that the prosecution proved the case against the appellant beyond reasonable doubt. I agree with him in such aspect. My thorough scrutiny of the trial court judgment and proceedings have revealed that the accused person's conviction was based on the evidence of PW1 who witnessed the accused taking PW2, the victim, to the nearby sugarcane farm and thereby having sex with her. PW2 testified that the accused forcefully had sex with her on the material date. Their testimonies were corroborated by PW3 who testified that upon examining PW2, he found signs of penetration in her vagina. As such, I find no gaps that could be filled by the prosecution in case I order retrial. In doing so, I have warned myself of the danger of making an order for retrial as it was held in the case of **Fatehali Manji v. Republic (1966) E.A 343,** that a retrial should not be ordered where the conviction is set aside because of insufficient evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial.

From the foregoing, I direct retrial of the appellant herein as early as possible before a different magistrate. The appellant, Mzee Pasckali Gremanus shall remain in custody awaiting his trial.

It is so ordered.

DATED at **MOROGORO** this 28th day of March 2024.

H.A. KINYAKA

JUDGE

28/03/2024

Court:

Judgment delivered in this 28th day of March, 2024 in the presence of the Appellant who appeared in person and unrepresented and in the presence of Daniel Makalu for respondent.

F.Y. Mbelwa

DEPUTY REGISTRAR

28/03/2024

Court:

Right of the parties to appeal to the Court of Appeal of Tanzania fully explained.

F.Y. Mbelwa

DEPUTY REGISTRAR

28/03/2024