IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA SUB- REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 74 OF 2023

(Originating from Criminal case No. 50 of 2023 of Bukoba District Court (W.E.Yona SRM)

NELSON WILSON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

09/04/2024 & 25/04/2024
E. L. NGIGWANA, J.

This is the first appeal from the District Court of Bukoba at Bukoba hence forth (the District Court) where the Appellant was charged with the offence of Rape contrary to sections 130 (1) (2) (e) and 131 (3) of Penal Code, [Cap. 16 (R: E 2022].

At the trial court, it was alleged that the appellant on 3rd day of May, 2023 at Rubale Village within Bukoba District in Kagera Region, did have carnal knowledge of a girl aged 8 years old who for the purpose of protecting her identity, shall be referred to as V.D or PW3.

The appellant denied the charge. After a full trial at which the prosecution relied on the evidence of Seven (7) witnesses and five (5) exhibits to wit; Clinic card (Exhibit P1), students' attendance register (Exhibit P2), PF3

issued to the V.D (Exhibit P3), PF3 issued to the accused (Exhibit P4) and sketch map of the crime scene (Exhibit P5) while the appellant fended himself as the only defence witness, the trial court was satisfied that the case had been proved beyond reasonable doubt. Consequently; the appellant was convicted and sentenced to life imprisonment. He was also ordered to compensate V.D to the tune of **TZS 5,000,000/=**.

Aggrieved by the conviction, sentence and compensation order, the appellant appealed to this court. In the petition of appeal, he raised eight (8) grounds of appeal on the basis of which he asked this court to quash the conviction, set aside the sentence of life imprisonment and the compensation.

Upon reading the trial court proceedings, I invited the parties to address me on whether or not sections 230 and 231 of the Criminal Procedure were complied with by the trial court. Since, this appeal will not be determined on eight (8) grounds of appeal raised by the appellant; I see no reason to reproduce them here.

At the hearing of this appeal, the appellant appeared in person, unrepresented, whereas Ms. Gloria Rugeye learned State Attorney, appeared for the Republic/Respondent.

Taking the floor, Ms. Rugeye submitted that reading the trial court's proceedings, it is not clear whether the prosecution side prayed to close its case. She added that it is also not clear whether the prosecution case was closed to allow the trial court to prepare a ruling on whether a primafacie case had been established against the appellant or not. According to her, there was non-compliance with section 230 of the CPA. She added that, even if it is considered that section 230 of the CPA was complied with, still there was non- compliance with section 231 of the CPA. According to her, the non-compliance with the said sections, vitiates the trial court's proceedings. She went on submitting that there is nothing in the record indicating that the appellant understood his rights and defended himself. She ended up her submission urging the court to nullify the trial court proceedings from 30/8/2023, quash the conviction, set aside the sentence and compensation order and remit the case file to the trial court for it continue with the trial according to the law.

The appellant who is a lay person had nothing to say in relation to compliance or the non-compliance of sections 230 and 231 of the CPA, [Cap. 20 R.E 2022].

Having heard submissions from the learned State Attorney and the appellant, the issue for determination is whether there was non-compliance with sections 230 and 231(1) of the CPA, and if yes, whether the omission to comply with the said provisions is fatal.

It is trite that section 231(1) of the CPA is a mandatory provision. The omission to comply with it, is fatal. This is the position held by the Court of Appeal in **Maneno Mussa versus Rupublic,** (Criminal Appeal No.543 of 2016)[2018]TZCA 242(19th April 2018) TanzLII, where it stated that-

> *"Indeed, as submitted by the learned State Attorney, the trial court's failure to comply with the provisions of S. 231(1) of the CPA is a fatal omission.* ***In the case of Richard Malima & 4 Others versus The Republic,*** *Criminal Appeal No. 183 of 2010 (unreported), the Court emphasized the duty bestowed on trial magistrates of strictly complying with the provisions of S. 231(1) of the CPA, particularly where an accused person is not represented by a counsel. It cited the case of* ***Juma Limbu @ Tembo versus The Republic,*** *Criminal Appeal No. 120 of 2005 (unreported) in which the Court stated as follows:* ***"...to avoid miscarriage of Justice in conducting trials/it is important for the trial court to be***

diligent and to ensure without fail that an accused person is made aware of all his rights at every stage of the proceedings..." *(Emphasis supplied)*

Again, it is a rule of practice that after the closure of the prosecution case, the trial court is required, under section 230 of the CPA, to prepare a ruling or finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it. If the court finds that the prima facie case has been established, then the accused person will be called upon to defend himself/herself, and he/she will be informed of his/her rights in terms of section 231 (1). If the same is not established, then the court will proceed to make the finding that the same has not been established and proceed to acquit the accused person accordingly.

I am saying it is a rule practice following that is the position underscored by the Court of Appeal in **Abdallah Kondo versus Republic,** (Criminal Appeal No. 322 of 2015) [2016] TZCA 836 (28 *September 2016) Tanzlii where the Court held that;*

"*We wish to make reference to the provisions of section 230 of the CPA which is relevant to the complaint we have fully quoted above. Closely read and comprehended, it does not provide that the trial*

magistrate should prepare a ruling so as to determine whether a case is made out against the accused to require him enter defence. That apart, it is now a long- established practice that after the close of the prosecution case, the trial magistrate prepares a short ruling in which he very briefly analyses the prosecution evidence so as to establish if the evidence adduced sufficiently incriminates the accused so as to require him account for in an effort to exonerate himself from liability"

In the case of **Maneno Musa** (Supra) the trial magistrate did not comply with section 231(1) of the CPA but in the case at hand, the trial magistrate indicated that he required the appellant to make his defence in terms section 231 of the CPA. Pages 39-40 of the typed proceedings read;

"Ruling: At the close of the prosecution case, the court has found that a primafacie case is established against the accused person who is required to make his defence in terms of section 231 of the Criminal Procedure Act Chapter 20 of revised laws"

Accused: No objection, I will make a sworn defence and have no witnesses to call

S/A: No objection"

The Court of Appeal in the case of **Abdallah Kondo versus Republic,(Supra)** emphasized that in compliance with section 231(1) of the CPA, a trial magistrate must state categorically what rights he has

informed an accused. However, if the trial magistrate omits to record what he informed the accused person but the answer given by the accused person suggests that he was addressed in terms of that section 231(1) of the CPA, the omission is not fatal. **However, as the best way of serving the best interest of justice, the Court gave directions on how sections 230 and 231 should be complied with.** The Court had this to say;

> *"We would have stopped there but we find it prudent that we use this opportunity to direct that the interest of justice is best served if trial magistrates and judges are to observe the now well established practice of composing a ruling on case to answer in which the material evidence implicating the accused with the offence charged is made known to the accused. This will enable the accused to give a focused defence. Statements such as "the accused have a case to answer" and "section 230 or 231 of CPA is complied with or done" leave the appellant in the dark not knowing what line of defence to adopt and what are the crucial areas to concentrate in his defence. Further to the above, as a way of complying with the provisions of section 231 of the CPA we wish to state that it is logical to categorically inform the rights the accused have when found to have*

a case to answer. It is quite unsatisfactory, in our view, to simply state "done" or "complied with"

Similarly, in the case of **DPP versus Seleman Juma Nyigo @ Mwanyigo,** Criminal Appeal No. 363 of 2022, CAT at Iringa, the Court held that; section 231 of the CPA requires the court to record the answers, making it unnecessary to be reflected in the record, **although it would be desirable to do so.**

In the matter at hand, as indicated herein above, the answer given by the accused now appellant suggests that he was addressed in terms of that section 231(1) of the CPA. There is no doubt that the appellant stood charged with a serious offence of statutory rape which attracts life imprisonment and that he was not represented. It is a well- known principle that each case has to be decided on its own facts and circumstances. In the case at hand, the appellant's defence was very short as follows;

"Your honey, I pray the prosecution to summon all witnesses remained. I was arrested by civilians/peasants, not public servants. Your honour, the residents of my village have a sour relationship with me. Your honour, the chairperson of my village notified me that I was arrested by common civilian, not public servants. That is all"

Reading the appellant's defence, it is my considered view that at any rate, it cannot be said that the appellant defended himself as per the law. I am saying so because the appellant's **defence evidence is not in line with the accusations and the evidence led against him by the prosecution.** Therefore, there is no evidence on record upon which the court looked at, in order to determine whether the appellant casted doubt on the prosecution case. His defence also reveals that he was not even aware that the prosecution case was closed. Unfortunately, there was no order marking the prosecution case closed and no ruling as per directions given in the case of **Abdallah Kondo versus Republic** (Supra). Again, there is no clear prayer made by the prosecution to close their case, and as per the law, the court has no mandate to close the prosecution case without being moved by the prosecution to do so.

Considering the nature and seriousness of the offence facing the appellant, but also considering the best interest of justice, and the anomalies existed in the trial court as I have already pointed out, I nullify the proceedings of the trial court from page 39 of the typed proceedings onwards and the judgment thereon, quash conviction, set aside the life sentence imposed on the appellant and set aside the compensation order. Further, I remit the case file to the trial court and direct the trial Magistrate or his successor to

continue with the hearing of the prosecution case until the same is closed as per the law, and comply with section 230 and/or 231(1) of the Criminal procedure Act, [Cap. 20 R.E 2022], as per directions given in the case of **Abdallah Kondo versus Republic** (Supra).

In the meantime, the appellant should remain in custody pending his trial. It is so ordered.

Dated at Bukoba this 25th day of April, 2024.

E.L. NGIGWANA

JUDGE

25/04/2024

Judgment delivered this 25th day of April, 2024 in the presence of the appellant, Ms. Gloria Rugeye learned State Attorney for the Respondent/Republic, and Ms. Queen Koba, BC.

E.L. NGIGWANA

JUDGE

25/04/2024