IN THE HIGH COURT OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

DC CRIMINAL APPEAL NO. 67 OF 2023

(Appeal from the District Court of Nzega at Nzega, Criminal Case No. 31 of 2023)

MATHIAS S/O JUMA KULABA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Judgment: 10/05/2024

Date of last order: 19/04/2024

A. Mambi, J

The appellant, Mathias s/o Juma Kulaba was charged for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2019]. In the District Court of Nzega the Appellant was alleged to have carnal knowledge of one M (pseudo name - PWI) a girl aged 12 years. It was alleged that the incident occurred on 5th day of June, 2023 at Kinolo village within Nzega District in Tabora region. The appellant did have carnal knowledge of M (pseudo name) a girl of 12 years old. Having heard the case for both parties on merits, the trial Resident Magistrate found the accused guilty as charged and sentenced him to serve a custodial sentence of 30 years imprisonment. Aggrieved by the conviction and sentence, the appellant preferred this appeal to this Court faulting the trial Resident Magistrate on the following grounds; -

1. That, the trial magistrate erred in law in sentencing the appellant of the offence which was not proved beyond reasonable doubt before the Honourable court and no proof of the act was done by the appellant thus leaving doubts on the charge and the appellant had to benefit from the doubts.
2. That, the trial magistrate erred in law by not adhering to the provisions of section 231 of the Criminal Procedure Act (Cap 20 RE 2022)

During hearing, the appellant who appeared unrepresented prayed to rely on his grounds of appeal. The learned State Attorney Mr **Nurdin & Miss Oresta** who represented the Republic briefly submitted that they do not support all grounds of appeal.

The Learned State Attorney submitted that the grounds of appeal have no merit as the prosecution proved the charge beyond reasonable doubt through six witnesses including the victim (PW1). The Learned State Attorney argued that the evidence of the victim as per S.127 (6) Evidence Act is the best evidence and does not need corroboration. He referred the decision of the court in **Seleman Malimba Vs R C A T 1999.**

The Learned State Attorney further submitted that the evidence of PW1 at pages 4 & 5 of the proceedings is clear that at the trial court the victim mentioned the accused. He averred that apart from that the evidence of PW1 was corroborated by the doctor (PW5) who tendered PF3 also corroborated by her sister (PW2) and PW3 (the victim's mother). The respondent State Attorney submitted that PW6 (investigator) also supported the evidence of PW1, PW2, PW3. He submitted that ppenetration was proved by the doctor (PW5). He was of the view that

though the appellant claimed that Section 231 CPA was not complied as page 19 of proceedings but the appellant was given right to be heard and he called witnesses. The respondent prayed the appeal be dismissed for lack of merit.

The appellant in his rejoinder submitted that the evidence of PW1 was hearsay as at the trial court she said she did not identify him. He conceded that, PW1 said the appellant tore her underwear at the middle but she did not say if he inserted his penis on her vagina while PW2 said the accused tore the victim's underwear on the side and inserted his penis. He argued that PW3 (doctor) said he was phoned at night while the victim said she was to the hospital at 6:00 pm. The appellant further submitted that the prosecution did not tender the victim's underwear at the court. He stated that: "*maelezo ya mama na mtoto yanapishana*". The appellant also stated that he was beaten by PW6. The appellant contended that the prosecution said that the incident occurred on 15th but PF3 was filed on 16th.

I have considered the grounds of appeal and submission of both parties. In my considered view the main issue to be addressed is whether the prosecution at the trial court proved beyond reasonable doubt the charges against the accused.

The appellant as shown above has raised two grounds of appeal where on his second ground the appellant has faulted the trial court for irregularities. The appellant contest that the Trial Court offended Section 231 of the Criminal Procedure Act, Cap 20 [R.E 2022]. Indeed, the very section 231 of the CPA reads as follows;

"(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 charged 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 answers 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.

(2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross-examination by the prosecution.

(3) If the accused after he has been informed in terms o f subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

(4) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence oi such witnesses is not due to any fault or neglect o f the accused person and that there is likelihood that they could, if present,

give material evidence on behalf of the accused person; the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses.

The appellant referred the decision of the curt in **BAHATI MAKEJA v. R, Criminal Appeal No. 113 of 2006 (unreported).**

It appears the appellant is contesting that when the trial court made the ruling on the prima facie case, the appellant was not informed his right to defend himself. I am aware of the position of the law that, at the closure of the prosecution case if the court is satisfied that a case has sufficiently been made against the accused, the court shall explain to the accused person the content of the charge against him/her and his right to defend. Now, the question is; did the trial magistrate explain the accused his right to defend? Basing on my perusal of trial court the records does not show that if the trial magistrate informed the appellant his right to fend himself. The records show that when the court made ruling, the magistrate just adjourned the matter for defence hearing without informing the appellant his right to either defend himself or use the lawyer to defend him. Indeed, the omission was also admitted by the learned State Attorney but he argued that omission did not occasion into justice. In my view failure to inform the accused rights do defend or call witnesses violates Section 231 (1) (b) of the Criminal Procedure Act, Cap 20 [R.E2019]. More specifically section 231 of CPA requires that where 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 charged or in relation to any other offence of which, the court is required to inform the accused if he wishes to call witness in his defence. The court is further obliged to ask the accused person or his advocate if intends to exercise

any of the above rights. Thereafter the court has to record the answers and the court shall then call on the accused person to enter on his defence. However, all these mandatory legal requirements were not followed by the trial court. This in my view denied the accused right to prepare himself or through his advocate for defence and call his witnesses if any. In my view this is a serious omission which vitiates justice and right to be heard. See ***BAHATI MAKEJA V. R, CRIMINAL APPEAL NO. 113 OF 2006*** (unreported).

This is incurable irregularity which vitiates the proceedings of the trial court as the accused/appellant was not availed with the right to be informed his rights under Section 231 (1) (b) of the Criminal Procedure Act, Cap 20 [R.E2019].

In the circumstances of this case, I find it justiciable to invoke revisionary powers bestowed upon this Court by the laws and order this matter for trial de-novo.

Now having observed those serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. In my considered view the best way to deal with this matter is by way of revision. In this regard I wish to invoke section 272 and 273 of the Criminal Procedure Act, Cap 20 [R.E.2019] which empowers this court to exercise its revisionary powers to examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. This in accordance with section 372 of the Act. Section 373 further empowers the court that in the

case of any proceedings in a subordinate court, the record of which comes to its knowledge, the High Court may in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence. The Court is also empowered in the case of any other order other than an order of acquittal to alter or reverse such order.

I wish to refer section ***372*** of the Criminal Procedure Act, Cap 20 [R.E.2019] as follows:

> ***"372.*** *The High Court may call for and* ***examine*** *the record of any criminal proceedings before any subordinate court for* ***the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,*** *and as to the regularity of any proceedings of any subordinate court.*
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> Furthermore, section 373 of the same Act provides that:
>
> *"(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise* ***comes to its knowledge****, the High Court may–*
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may* enhance the sentence*; or*
>
> *(b) in the case of any other order other than an order of acquittal,* ***alter or reverse such order****, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this subsection.*

(3) ...

(4) Nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to do in the interest of justice

(5)...."

Reading between the lines on the above provisions of the law empower this Court wide supervisory and revisionary powers over any matter from the lower courts where it appears that there are illegalities or impropriety of proceedings that are likely to lead to miscarriage of justice. Reference can also be made to other laws. In the regard I will refer section 44 (1) (a) and (b) of Magistrates Courts Act Cap 11 [R.E. 2019] which clearly provides that:

"44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) ***shall exercise general powers of supervision over all district courts and courts of a resident magistrate*** *and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers* ***may be necessary in the interests of justice,*** *and all such courts shall comply with such directions without undue delay;*

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit:"

From the above findings and reasoning, I hold that from the above provision of the law including various decision by the court, this court is right in exercising its supervisory and revisionary power on the matter at hand as noted by the learned State Attorney. The law is clear it is proper

for this court to invoke revisional powers instead of appeal save in exception cases.

Having observed those irregularities that are incurable will it be just to remit the file back for proper conviction. I wish to refer the case of ***Fatehali Manji V.R, [1966] EA 343,*** cited by the case of ***Kanguza s/o Machemba v. R Criminal Appeal NO. 157B OF 2013,*** where the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; 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 observed those irregularities that are incurable will it be just to remit the file back for proper procedure? In this regard I will refer Section 388 (1) of *the Criminal Procedure Act*, Cap 20 [R.E.2019] and see what would be the proper order this court can make in the interest of justice. It is a settled law that failure to comply with the mandatory requirement of the law, is a fatal and incurable irregularity, which renders the purported judgment incapable of being upheld by the High Court in the exercise of its appellate jurisdiction. In my view an order for retrial would be more just and the interests of justice me to do so. I am of the considered view that, an order for retrial will not cause any likely of injustice to the appellant. In this regard i order the trial magistrate to start

the procedure after the rule on case to answer. The trial court should inform the accused of his rights as per section 231 of CPA CAP 20 [R.E 2022]. The trial court should thereafter avail the appellant an opportunity to defend his case in line with the provision of the law before making decision.

The trial court should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant or any party resulting from any delay.

It should be noted that all appeals that are remitted back for retrial or trial de novo need to be dealt expeditiously within a reasonable time. Having observed that the proceedings at the trial court was tainted by irregularities, I find no need of addressing other grounds of appeal.

This matter is remitted to the trial court to rectify the irregularity observed by this court. This means that the proceedings shall start after the court made ruling on prima fascie case to answer. The court should address the accused in terms of section 231 of CPA CAP 20 [R.E 2022]. Where it appears that the trial magistrate has ceased jurisdiction for one reason or another, in terms of section 214 (1) of the CPA another magistrate should be assigned the case to proceed with the matter. The Trial Court should consider this matter as priority and deal with it immediately within a reasonable time to avoid any injustice to the appellant resulting from any delay.

A. J. MAMBI

JUDGE

10/05/2024

Judgment delivered in Chambers this 10th day of May, 2024 in presence of both parties.

A. J. MAMBI

JUDGE

10/05/2024

Right of appeal explained.

A. J. MAMBI

JUDGE

10/05/2024