

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA SUB - REGISTRY
AT IRINGA

DC CRIMINAL APPEAL NO. 8784 OF 2024

(Arising from the District Court of Iringa at Iringa in
Original Criminal Case No. 29 of 2023)

EDGAR MTELEWA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 20/06/2024

Date of Judgement: 28/06/2024

LALTAIKA, J.

The Appellant herein **EDGAR MTELEWA** was arraigned in the District Court of Iringa at Iringa for one count of Rape contrary to section 130(1)(2)(e) read together with section 131(1) of the Penal Code Cap 16 RE 2022. After a full trial He was convicted as charged and sentenced to life imprisonment. Dissatisfied, he appealed to this court on 11 grounds. Irrespective of the many grammatical, typographical and syntactical errors,

I take the liberty to reproduce them for ease of reference and record purposes as hereunder:

1. *That, the learned trial Magistrate erred both in law and fact to convict and sentence the appellant basing on the evidence of the PW1 (Inspector Lydia Ad vera Sos peter) whose evidence was hearsay, circumstantial and uncorroborated.*
2. *That, the learned trial Magistrate erred in law and fact to convict and sentencing the appellant without considering that the prosecution side failed to produce material witnesses that was one Senti d/o Miliso who accompanied the victim to the Police Station at gender desk.*
3. *That, the learned trial magistrate erred in law to convict and sentence the appellant by relying on weak and poor medical examination report tendered by PW3 who was the medical practitioner basing on the following herein below grounds;-*
 - a) *Doctor's recommendation on PF 3 contains a lot of shortfalls which lacks expertism in the sense that absence of hymen cannot connect the appellant at hand with the offence he stood charged unless stated that it is the appellant act which removed the victim's hymen since the fact that there was vivid evidence that the victim in different time had the love affairs with one Fred and a Bajaji driver.*
 - b) *There is no clear link line which connect the appellant with the alleged vaginal bruises since it was supposed to have been explained the time limit on whether the same was foreappointed times ago or of recently caused by the alleged rape with a regard that the victim was a hard core prostitute since the fact that evidence of sleeping outside the parents domicile and custody was plainly vivid.*
4. *That, the learned trial Magistrate erred both in law and fact for admitted caution statement of the appellant without considering that the same was recorded and taken inconsistency by violating section 50 of the Criminal Procedure Act Cap, 20, In the following manner:*
 - a) *The appellant was not informed on the offence he stood charged,*
 - b) *The Police officer who recorded the caution Statement was not introduced to me on his name, rank and his duties*
 - c) *The appellant was not granted with the opportunity to call my parents, lawyer or nearby relative at the time my statement was recorded,*
 - d) *The appellant was not granted with the opportunity to peruse What I was forced to sign.*
5. *That, the trial Magistrate erred both in law and fact for failure to draw adverse inference towards PW2 evidence as to why she did not report the matter to School or Street Authority before going to Police, PW2's did so in*

- order to avoid being blameworthy of her bad behaviour from inhabitants and the street Officials whom they know her prostitute behaviour,*
- 6. That, the learned trial Magistrate misdirected himself for the failure to consider the appellant's defence that the victim had a bad behaviour of having and falling in love affairs with various men and this was evidenced and corroborated by the victim herself when she admitted to have been found with a man by the appellant. (See page 23 of the typed proceedings)*
 - 7. That, the learned trial Magistrate erred both in law and fact for failure to address his mind properly that the Police detained the appellant contrary to the period stipulated by law that is the appellant was arrested on 04.03,2023 and taken before the Court on 28.03.2023, There was no; any reasonable and justifiable grounds were given as per section 33 of the Criminal Procedure Act,*
 - 8. That, the Learned trial Magistrate wrongly convicted the appellant for failure to consider the fact that the case was not properly investigated since it was emanating as a family case on which the presence of both family members as witnesses to testify in both sides was inevitably necessary to prove the allegation.*
 - 9. That, the learned trial Magistrate erred in law for failure to consider the appellant' Defence of alibi and the DW2's and DW3's testimonies that during the alleged fateful day of incidence the accused was not within the vicinity of the said house and was taking care (nursing) of his relative who used to live at Kihodombi area which is more than 15 kilometres from where the victim resided,*
 - 10. That, the sentence of life imprisonment is harsh, unfair, injustice and contrary to the law as the age of the victim was not proved but believed to be 17 years old.*
 - 11. That, the prosecution side failed totally to prove the case against the appellant beyond reasonable and meaningful doubts.*

When the appeal was called on for hearing on the **20th day of June 2024**, the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, **appeared through Mr. Majid Matitu**, learned State Attorney. The appellant requested the learned State Attorney

to be allowed to proceed while he reserved his right to a rejoinder should the need arise.

Taking up the podium, Mr. Matitu indicated that he had thoroughly reviewed the grounds and proceedings of the case and he identified a significant issue regarding the proceedings on August 2, 2023. On that date, Mr. Matitu reasoned, learned State Attorney Rehema Ndege requested to substitute the charge sheet, which the court granted. The new charge was read to the accused, who pleaded not guilty, as recorded on page 19 of the proceedings.

Mr. Matitu pointed out that the court failed to inform the accused that he had the right to recall PW1 to either testify afresh or be cross-examined regarding the substituted charge, a requirement under section 234(2)(b) of the **Criminal Procedure Act Cap 20 RE 2022**. He emphasized that this omission was a serious procedural error, amounting to an unfair trial for the appellant. To support his argument, he cited the case of **EZEKIEL HOTAY v. REPUBLIC** Crim App No 300/2016 CAT, Arusha (unreported) p. 7, which states:

"According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge, the five prosecution witnesses who had already testified, ought to have been recalled for purpose of being cross-examined. This was not done. In failure to do so, renders the evidence led by five prosecution witnesses to have no evidential value. Given the shortcomings in the procedure, which with respect the High Court failed to detect, we are not inclined to vouch that the appellant's conviction was safe. We therefore exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act Cap 141 RE 2002 and revise and quash the lower court proceedings and judgment and set aside the sentence."

Based on this precedent, Mr. Matitu argued that the matter should be ordered for retrial to protect the appellant's rights. However, he also noted that after the amendment of the charge, the victim and the medical doctor testified, and there were no apparent shortcomings in the evidence. He concluded his submission by reiterating his prayer for a retrial.

The Appellant prayed that his grounds be considered and, if possible, that he be set free. He stated that he had nothing to do with the allegations. He asserted that the root cause of the matter was a conflict between him and the complainant, PW2, who was living in his place. He had been trying to encourage her to become serious in her studies, as she was a secondary school student and was 16 years old.

I have dispassionately considered the learned State Attorney's submission in the light of the grounds of appeal. I have also thoroughly examined the trial court's records. It is evident that the procedural lapse in the present case resulted in an unfair trial, thereby undermining the Appellant's right to a fair hearing. Procedural fairness is a cornerstone of our justice system, ensuring that every accused person is given a fair opportunity to challenge the evidence against them. This principle is enshrined in the Constitution and the Criminal Procedure Act and must be upheld to maintain the integrity of our judicial process.

Given the procedural shortcomings observed, this Court finds that the Appellant's conviction cannot be sustained. The failure to recall and re-

examine PW1 after the substitution of the charge sheet was a material irregularity that vitiated the trial process.

Mr. Matitu has proposed a retrial for the purposes of remedying the unfairness and procedural lapse stated. I have thought through the proposal, and I am fortified that such an order is not to the interest of justice. The evidence available in the court file is insufficient to hold conviction. I am convinced that even the prayer by Ms. Ndege to substitute the charge was motivated by lack of sufficient evidence. I have also noted with concerns three different versions of the age of the victim that make the whole narrative very difficult to connect. There is nothing better a court can do than acquit an accused whose allegation has no sufficient supporting evidence. This is because in criminal law an accused is either guilty or innocent. There is nothing in between.

In the upshot, I allow the appeal. I hereby quash conviction and set aside the sentence. I order that the Appellant **EDGA MTELEWA** be released from prison forthwith unless he is being withheld for any other lawful purpose.

It is so ordered.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
28.06.2024**

Court

This judgement is delivered under my hand and the seal of this court this 28th day of June 2024 in the presence **Mr. Sauli Makori**, learned State Attorney for the Respondent and the appellant who has appeared in person, unrepresented.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
28.06.2024**

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.



E.I. Laltaika

**E.I. LALTAIKA
JUDGE
28.06.2024**