IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

Criminal appeal No. 62 of 2023

(Arising from DC Criminal case No. 100 of 2022 before Iramba District Court at Kiomboi).

ATHUMAN ABUBAKARI @RAMADHANI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Last Order: 14/2/2024
Date of judgment: 13/3/2024

MASABO, J.:-

This is a first appeal. It emanates from the District Court of Iramba at Kiomboi (the trial court) before which the appellant was convicted of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 RE 2019. The charges laid at his door were that, on 6th August 2022 he carnally knew a girl child aged 15 years old whom I shall refer as "x" or PW1. Agrieved by the conviction he has knocked on the doors of this court armed with (8) grounds of appeal which I shall conveniently summarise as follows: **One,** there was no proof of penetration which is an essential ingredient of rape. **Two,** the doctor who testified as PW3 did not prove that there was penetration. **Three,** the appellant was not addressed in terms of section 231(1)(a) and (b) of the Criminal Procedure Act and in consequence, he was denied the right to call his witnesses. **Four,** PW6 purported to be a teacher at Shelui Primary School but he rendered no identification card in proof

thereof. **Five,** provision of section 210(3) of the Criminal Procedure Act was offended. **Six,** the prosecution case was fabricated and **seven,** the defense was ignored.

When the appeal came for hearing on 14/2/2024 the appellant fended for himself as he was unrepresented. The respondent was represented by Ms. Mihambo Kezilahabi, learned State Attorney.

Invited to address the court in support of his grounds of appeal, the appellant forfeited his right claiming that he has nothing to submit and that he was confident that the court would do justice. For the respondent, Ms. Kezilahabi supported the appeal based on the 4th ground of appeal that the provision of section 231(1) (a) and (b) of the Criminal Procedure Act, Cap 20 RE 2022 was offended. She amplified that on page 32 of the proceedings, it is vivid that the mandatory requirement of section 231(1)and (b) of this Act was not complied with because, after the closure of the prosecution case the trial court made a finding that a *prima facie* case against the appellant has been established and thereafter it just stated that the appellant has the right to be heard. Contrary to the mandatory requirement that the answer of the appellant be recorded, nothing was recorded. The omission, she argued, vitiated the proceedings. In support, she cited the case of **Emmanuel Richard @ Humbe vs Republic** (Criminal Appeal 369 of 2018) [2021] TZCA 111 TanzLII in which the Court of Appeal delay with similar circumstances and having referred its previous decision in **Cleopa Mchiwa**

Sospeter vs R, Criminal Appeal No. 51 of 2019 [2020] TZCA 287 TanzLII, it nullified the proceedings and ordered a retrial. In conclusion, she submitted that the appeal be allowed and the record be remitted back to the trial court for retrial.

I have carefully considered this submission alongside the grounds of appeal and the lower court record. Since the respondent has conceded to the appeal based on section 231(1)(a) and (b) of the Criminal Procedure Act, the sole question for determination is whether there was compliance with this provision and if not, whether the proceedings have been consequently vitiated. For ease of reference, I reproduce the provision of section 231(1)(a) and (b) of the Criminal Procedure Act. It states that:

> " **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 section 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 his right**:-
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> (a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witnesses in his defence, **and shall ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer;** 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". [The emphasis added]

Interpreting this provision, the Court of Appeal in **Emmanuel Richard @ Humbe vs Republic** (supra), stated thus:

> The thrust of the above cited provision is that it imposes a duty on the trial court to explain again the substance of the charge to the accused if it is satisfied that a prima facie case has been established. Apart from that, the provision requires the trial court to explain to the accused his right as to the mode of giving his defence whether on oath or affirmation or not; and whether he has a witness to call. In this case, it is mandatorily required to record the answer thereof from the accused.

Cementing its decision, the Court echoed its previous decision **in Frenk Benson Msongole v. Republic,** Criminal Appeal No. 72A of 2016 [2019] TZCA TanzLII and in **Maduhu Sayi Nigho v. Republic,** Criminal Appeal No. 560 of 2016 [2020] TZCA 1723 TanzLII. In both cases, it consistently held that the obligation imposed on the trial court by the provision above is a mandatory requirement. In **Frenk Benson Msongole v. Republic** (supra) the Court stated that:

"It is crystal dear that before the accused person makes his defence, the trial court is mandatorily required to address him on the rights and the manner in which he shall make his defence."

And, in **Maduhu Sayi Nigho** (supra), it held that;

The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such right after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel.

In the present case, the trial court record shows that the prosecution closed its case on 30/11/2022 after which the trial magistrate made A following ruling:

The accused has a case to answer because the prosecution evidence has established a prima-facie case against him. **Therefore the accused has a right to be heard and to call his witness witnesses as defence according to section 231 of the Criminal Procedure Act, Cap 20 RE 2022.** [emphasis added].

The case was thereafter adjourned and scheduled for defence hearing on 6/12/2022 and on that date the appellant testified as the sole witness for his case. When this is considered in the light of the authorities above, it becomes crystal clear that the requirement of section 231 (a) and (b) was partially

complied with as the trial magistrate having explained to the accused his right did not record his answer. As the record is silent on his reply, I cannot help but assume that after being addressed of his right the appellant was not accorded the right to reply otherwise, his answer would have been recorded.

Tuning to the consequences for such omission, as correctly argued by Ms. Kezilahabi, the omission is a fatal irregularity and vitiates the proceedings as stated by the Court of Appeal in **Emmanuel Richard @ Humbe vs Republic** (supra). In this case, the Court while cementing its previous decision in the case of **Cleopa Mchiwa Sospeter v. Republic,** (supra) stated that, the failure to comply with the mandatory provisions of section 231 (1) and (2) of the Criminal procedure Act vitiated the subsequent proceedings. Ms. Kezilahabi has further argued and prayed that, in view of this anomaly, the proceedings should be quashed and set aside and the record be remitted back to the trial court for retrial. Having established the anomaly and affirmed that it vitiates the proceedings, the first part of the learned state Attorney's prayer is not difficult to grant as it is straightforward. The second part of her prayer requires further reflections and guidance from the principle governing retrials. Expounding such principle in the case of **Selina Yambi and Others vs Republic,** Criminal Appeal No. 94 of 2013 (unreported), the Court of Appeal stated thus:-

> "We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It

will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice requires. ".

The court had a similar position in **George Claud Kasanda vs DPP** (Criminal Appeal 376 of 2017) [2020] TZCA 76 TanzLII where it held thus:-

> It is now settled that as a matter of general principle a retrial will not be ordered where the prosecution evidence is patently weak and by ordering a retrial, the prosecution will seize that opportunity to fill up the gaps at the prejudice of the appellant. That was the stance taken by the defunct East African Court of Appeal in the case of **Fatehali Manji vs Republic** [1966] E. A. 341). In that case it was stated that:-
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> > "*In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that; a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require.*"

Having carefully examined the record under the guidance of this principle, I am of the firm view that it is in the interest of justice that the case be subjected to a retrial. Accordingly, I invoke the powers of revision vested in this court by section 373 (1) (a) of the Criminal Procedure Act, Cap 20 RE 2022 to quash the proceedings and judgment of the trial court and to subsequently set aside the sentence of thirty (30) years imprisonment meted out by the trial court. The order to pay a compensation of Tshs 5,000,000/= to the victim is also set aside and it is directed that, the trial court record be remitted back so that the trial can be recommenced before another magistrate from the date on which the anomaly occurred. For clarity, since there is already a ruling on a prima facie case, the retrial should commence by addressing the appellant in terms of section 231 (1) (a) and (b) of the Criminal Procedure Act. I further direct the trial court to expedite the trial. Meanwhile, the appellant shall remain in remand custody pending retrial.

DATED and **DELIVERED** at **DODOMA** this 15th day of March 2024.

J. L. MASABO

JUDGE