IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A. And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 432 OF 2015

BARUTWAYO ZAHAKI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mrango, J.)

Dated 16th day of September, 2015
In
Criminal Appeal No. 83 of 2015

JUDGMENT OF THE COURT

20th & 29th August, 2018

LILA, J.A.

Before the District court of Kibondo within Kigoma Region, the appellant stood charged with two counts; **first**, rape contrary to section 130(2)(e) and 131(1) of the Penal Code Cap. 16 R.E 2002 and **second**; unlawfully entering into the United Republic of Tanzania contrary to sections 31(1) & (2) of Immigration Act No. 7 of 1995. Trial ensued during which the prosecution marshalled two witnesses so as to prove the charge against the appellant. As it were, at its conclusion, he was found guilty of the offences as charged, convicted and sentenced to serve a jail term of 30 years in the first count and 6 months' imprisonment in the second count. The sentences were ordered to run

concurrently. Aggrieved, the appellant unsuccessfully appealed to the High Court, hence this appeal.

The appellant filed a five point memorandum of appeal. However, substantially, they can be condensed into two grounds; **one** that the trial was improper as there was noncompliance with section 214 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA); and **two** that the first appellate judge wrongly relied on the uncorroborated testimony of PW1, the victim of the offence of rape, to dismiss his appeal.

Before us, the appellant appeared in person and fended for himself while Mr. Juma Masanja, learned Senior State Attorney, and Mr. Tumaini Pius, learned State Attorney, represented the respondent Republic.

After adopting the memorandum of appeal the appellant opted to clarify them after the State Attorney had responded to them if need arose.

Mr. Pius argued the appeal on behalf of the respondent Republic. He stated that there was succession of magistrates in that H. Magori, RM presided over the case from the time the preliminary hearing was conducted and recorded the testimonies of Zaituni Laban (PW1) and

Nemes Laban (PW2) while Erick R. Marley RM, took over during defence and recorded the defence evidence and composed the judgment without assigning reasons for such succession. In view of that, he argued, the provisions of section 214 (1) of the CPA were contravened. However, at first, Mr. Pius, relying on the Court's decision in the case of **Nichontize Rojeli Vs. Republic**, Criminal Appeal No. 180 of 2015 (unreported), was of the view that in the present case the appellant was not prejudiced by the change of magistrates without assigning reasons for the succession. The omission was not fatal, he stated. But, on reflection and proper interpretation of that decision in connection with the majority of the Court's decisions on the point, he retreated and conceded that failure to assign reasons for the succession of magistrates prejudiced the appellant and that the omission was fatal. He, in the circumstances, prayed the proceedings before Marley RM be nullified and the record be remitted to the trial court for it to proceed with the trial from where Magori RM ended in compliance with section 214 (1) of the CPA.

Before retiring, we wished to satisfy ourselves from the learned State Attorney whether the interpreter, one Lucas Gervas, was sworn before assuming the responsibility to interpret from Kiswahili into Kirundi and vice versa. He readily conceded that the interpreter was not sworn

hence rendering the whole trial a nullity. Following such procedural infraction he was inclined to withdraw his earlier prayer to have the record remitted to the trial court for continuation of trial from where Magori RM had ended. He, instead, urged the Court to make an order of retrial.

On further being prompted by the Court whether the evidence on record, particularly proving the age of the victim (PW1), was sufficient enough to warrant the grant of an order of retrial, Mr. Pius, straight away, argued that no evidence was led by the prosecution proving her age. He argued that it being very crucial in proving the offence of statutory rape with which the appellant was charged, then an order of retrial is inadvisable.

In turn, the appellant had nothing material to argue on the legal issue raised by the Court on account of being a layperson. He just pleaded with the Court that he be set at liberty.

Considering that the issue raised by the Court is very crucial we are inclined to consider it first.

We, indeed, fully associate ourselves with the stance taken by the learned State Attorney. We have dispassionately gone through the entire

record of the trial court and discerned therefrom that the appellant indicated that he was not conversant with Kiswahili. He did so at the earliest opportunity; at the Preliminary Hearing stage well before PW1 gave her testimony. The particulars in the charge sheet indicate that he is a Hutu from Burundi. More so, when registering his complaint in respect of language barrier he was facing on 09/07/2010, he is recorded to have told the trial magistrate, at page 5 of the record, that:

> ***"Accused:*** *I am ready for hearing, but I do know Swahili very little."*

Acting on that complaint, the trial magistrate indicated:

> ***"Court:*** *Then let the trial commence with the aid of the interpreter, Lucas Gervas, the court clerk who is conversant in Kirundi, hence to interpret from Kiswahili to Kirundi (sic) and vice versa"*

We gather from the above that after the appellant had indicated the language barrier he was facing the trial magistrate allowed the prayer and arranged for one Lucas Gervas to act as an interpreter. That is allowed under section 211(1) of the CPA which requires, in such situations, the court to arrange for an interpreter. That section states:

"211-(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, ***it shall be interpreted to him in open court in a language understood by him.****"(Emphasis added)*

The purpose of appointing an interpreter in judicial proceedings is to enable the proceedings or evidence of either the prosecution witnesses or defence or both be interpreted into the language understandable by the parties to the case and the court (see **Kigundu Francis and Another Vs. Republic**, Criminal Appeal No. 314 of 2010 (unreported).

Further, deployment of interpreters in court proceedings is based on one of the basic and uncompromisable tenets of due process of a fair trial which not only require trial be conducted in the physical presence of the accused but his actual participation in the proceedings (see **Moses Mayanja @ Msoke Vs. Republic**, Criminal Appeal No. 56 of 2009(unreported). Such arrangement ensures that the accused clearly follows and participates in the proceedings of the court. By so doing a fair trial is guaranteed.

However, to insure that the interpretation is done truthfully and faithfully, section 4(b) of the Oaths and Statutory Declarations Act, Cap.

34 R.E. 2002 (the Act) requires that such interpreters must take judicial oaths prescribed in that Act before assuming their responsibility.

The trial court record bears out that after the trial magistrates had assigned Lucas Gervas to act as an interpreter the evidence of PW1, PW2 and that of the appellant (DW1) was taken. Thereafter, a judgment was composed and delivered which resulted in the appellant's conviction and sentence as above. There is no indication whatsoever that Lucas Gervas was sworn before he assumed the duty of interpreting the judicial proceedings.

The inevitable consequences of the interpreter not being sworn is that the appellant did not receive a fair trial and the evidence of witnesses who gave evidence without being interpreted into the language of the appellant and the trial court is subject of being expunged from the record (see **Moses Mayanja @ Msoke Vs. Republic** (supra). In that case, one Mussa (PW3) gave evidence which was not interpreted into the language fully understood by the accused who was a Ugandan by nationality and who did not understand Kiswahili language used by PW3, a prosecution witness. That evidence was expunged.

In our case, it is evident that trial was conducted with the language not understandable by the appellant. That was, as demonstrated above, improper. That irregularity was fatal. Unfortunately, this procedural flaw went unnoticed by the High Court judge as a result of which he did not completely consider it on first appeal.

In the circumstances we are left with only one option of expunging from the record, as we hereby do, the proceedings of the trial court from 9/7/2010 including the evidence by PW1 and PW2, the only prosecution witnesses, as well as the defence evidence by the appellant, also the only defence witness.

Consequent upon expunge of the evidence by both sides, we are left with no evidence on which the culpability of the appellant can be gauged.

The above finding sufficiently disposes the appeal. We see no good reason to consider the issue of succession of magistrates which will definitely not affect the outcome of the appeal.

In the circumstances, we hereby invoke the Court's powers of revision bestowed under section 4(2) of the Appellate Jurisdiction Act,

Cap. 141 R. E. 2002 and hereby accordingly, quash the judgments of both courts below and set aside the sentences meted by the trial court. The appellant be released from prison forthwith unless held therein for any other lawful cause.

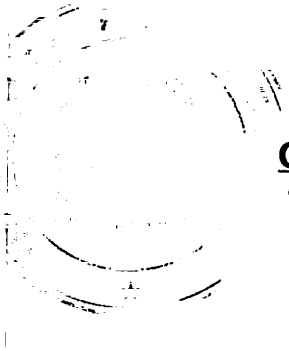
DATED at **TABORA** this 28th day of August, 2018.

K. M. Mussa
JUSTICE OF APPEAL

S. A. Lila
JUSTICE OF APPEAL

J. C. M. Mwambegele
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL (T)