IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KITUSI J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 405 OF 2019

KASSIM SALUM MNYUKWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kamuzora, SRM with Ext. Jurisdiction)

dated 29th day of August, 2019
in
Criminal Appeal No. 33 of 2019

JUDGMENT OF THE COURT

6th July, 2021 & 4th March, 2022

KAIRO, J.A.:

Kassim Salum Mnyukwa, the appellant, was charged in the District Court of Temeke with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, R. E. 2002 (2019) (the Penal Code). It was alleged in the particulars of offence that, on diverse dates in May, 2017 at Mbagala Kokoto area within Temeke District in Dar es Salaam City, the appellant did rape a girl of 17 years old who for the purpose of this judgment shall be referred to as the 'victim' or 'PW1' to conceal her

true identity. The appellant denied the charge and the case went to a full trial.

To prove its case, the prosecution paraded four witnesses who were the victim (PW1); WP. 5527 D/Const Elitruda (PW2), the investigator of the case; Sudi Said Mandwanga, the father of the victim (PW3) and Husna Ahmed Mansoor, a Clinical Officer who examined the victim (PW4). The prosecution also tendered three exhibits; a cautioned statement of the accused person, exhibit PI tendered by PW2; a Clinic Card No. 192/01, exhibit P2 tendered by PW3; and a PF 3, exhibit P3, tendered by PW4.

On the other hand, the defence side had two witnesses including the appellant who testified as DW1 and DW2 was Sudi Salum Mnyukwa, the appellant's brother. No exhibit was tendered.

The prosecution evidence was to the effect that, on diverse dates in May 2017, the appellant had sexual intercourse with PW1, a girl of 17 years old and a form three student. On the material date, the victim's father, PW3 was informed that, the victim spent a night outside their home. They decided to search the victim's belongings and discovered a mobile phone. PW3 involved the victim's sister to call the appellant pretending that there was a problem at home. He fell on the trap and

when he came at the victim's home, he was apprehended and taken to the police station. When interrogated by PW2, he admitted that he had love relationship with PW1. PW2 then took a cautioned statement of the appellant which was admitted in the trial court as exhibit P1. The victim was then issued with a PF3 and went to hospital for medical examination. She was examined by PW4 whose findings was to the effect that, the victim's hymen was not intact, which suggests that she had been penetrated though not currently as no bruises were found. PW4 then filed the PF3 which was admitted during the trial as exhibit P3.

In his defence, the appellant denied the offence charged against him. He however admitted to have love affairs with the victim for about two years but did not know that the victim was a student. On his part, DW2 said he was not sure if DW1 had raped the victim.

At the end of the trial, the appellant was found guilty of the offence charged, convicted and was sentenced to serve 30 years in jail. Discontented by both conviction and sentence, he appealed to the High Court of Tanzania where his appeal was also dismissed by an SRM with

Extended Jurisdiction. He was further aggrieved and preferred this second appeal.

His memorandum of appeal lodged on 12th November, 2019 had nine grounds of appeal. However, we will not reproduce them for the reasons to be apparent shortly.

The appellant further on 1st July 2021 lodged a supplementary memorandum of appeal comprising one ground only which can be conveniently paraphrased as follows:-

(1) *That, his lordships, the learned SRM (extended Jurisdiction) erred in law by upholding the appellant's conviction in a case where:-*

(i) the appellant was not given a chance to examine in chief DW2 contrary to procedure

(ii) the defence case was not closed contrary to the procedure.

At the hearing of the appeal, the appellant appeared in person, unrepresented; whereas the respondent Republic had the services of Ms. Sylvia Mitanto, learned State Attorney.

When called upon to amplify the grounds of appeal, the appellant adopted the memorandum of appeal and opted to allow the learned State Attorney to respond and reserved his right to make a rejoinder if the need to do so would arise.

Ms. Mitanto generally did not support the appeal. She however preferred to begin with the ground in the supplementary memorandum of appeal which she argued concerns a point of law to which we find ideal.

The appellant's grievance in his supplementary memorandum of appeal has two limbs, both centered on procedural irregularities during the defence hearing. In the first limb, the appellant complains that he was not given an opportunity to lead his witness (DW2) in chief and in the second limb the complaint is that the trial court did not close the defence case.

Responding to the first limb, Ms. Mitanto conceded to the pointed-out irregularity. She referred us to page 23 of the record of appeal which shows that the appellant did not conduct examination in chief to DW2 instead, it was the trial magistrate who did it. According to her, the irregularity amounted to denying the witness (DW2) the chance to testify on behalf of the appellant who called him.

Ms. Mitanto went on to submit that, the appellant who testified as DW1 was also not given a chance to defend himself, as it was the trial magistrate again who was asking him questions, thereby examining him in chief. She also argued that, by asking the appellant questions, the magistrate assisted to build up the evidence on the prosecution which eventually was used to convict the appellant. Thus, the court was neither objective nor impartial in its decision. She argued that the irregularity went to the root of the case since the trial was not fair and the appellant was prejudiced. She referred us to page 22 of the record of appeal to cement her submission. To wrap up, Ms. Mitanto implored the Court to invoke its revisionary powers under section 4 (1) (b) of the Appellate Jurisdiction Act Cap 141 RE 2019 (the AJA) to nullify the whole proceedings from the defence part, the judgment of the trial court, the whole proceedings and judgment of the first appellate court and order the return of the case file to the trial court (Temeke District Court) so that the appellant can be afforded a chance to defend himself. Ms. Mitanto did not address the second limb of the appellant's complaint.

The appellant in his brief rejoinder on this aspect lamented that justice was not done to him. He also pleaded with the Court to order the case file be reverted to the trial court to enable him defend himself.

The main issue for our determination with regard to this ground is whether there were procedural irregularities as pointed out by the parties, and if the answer is in the affirmative, what are the consequences.

We are aware that the issue was not raised at the High Court and as a general rule, the Court has no mandate to look at issues which were not determined by the courts below. However, being an issue that raises a matter of law, we are bound to determine it as we have so decided in many cases including **Godfrey Wilson vs Republic** Criminal Appeal No. 168 of 2018 quoted with approval in the case of **Nasibu Ramadhani vs Republic;** Criminal Appeal No. 310 of 2017 (both unreported).

To start with, we let the passage complained of speak for itself hereunder:-

> ***DW1 – KASSIM SALUM MNYUKWA, 25, MANZESE, LUGURU, MUISLIM,***
> ***Affirm and states:***

***XD by Court**: I didn't rape Waridi. We agreed to be lovers. I didn't know she was a student. After I noticed that she was a student the law took its channel. I admitted to have sexual intercourse with her twice. I am praying for this court to help me as I was not aware that she was a student.*

***XXD by Prosecution**: She used to come to my room. Her parents called me and I was arrested. We had a relationship for about two years. She hidden truth from me I trusted her. I didn't know she was a student.*

***XXD by Court**: Nil*

R.O.F.C

Sign. Hon. Mwaikambo – RM

5/10/2018

DW2 – SUDI SALUM MNYUKWA, 36, MANZESE BUSINESS, HEHE, MUISLIM,

Affirm and states:

***XD by Court**: The accused is my young brother. In year 2017, I was informed that he was arrested and accused for rape. I am here before the court to pray for his forgiveness.*

***XXD by Prosecution:** I am not sure if she raped the victim. The accused is living at Manzese and victim at Mbagala.*

***XXD by Court**: Nil*

R.O.F.C

Sign. Hon. Mwaikambo – RM

5/11/2018

Order:

1) Judgment on 16/10/2018

2) ABE

Sign. Hon. Mwaikambo – RM

5/11/2018.

The passage above speaks louder that it was the trial magistrate who was examining in chief DW2, the appellant's witness by asking him questions and not the appellant. It is imperative at this juncture to understand the meaning of an examination in chief or direct examination and its purpose.

According to Black's Law Dictionary, examination in chief or direct examination has been defined as *"the first questioning of a witness in a trial or other proceeding conducted by a party who called the witness to testify"* [**Black's Law Dictionary, 8th Edition Edited by Bryan A. Garner,** at page 492]

Deducing from the quoted definition, examination in chief is essentially the domain of a party that has called the witness in question; in this case, the appellant so as to give evidence on his side. It is during examination in chief when the party concerned is afforded with an opportunity to tell his /her side of the story and elicit his/her account of what transpired concerning the incidence. The given evidence will eventually assist the trial court to elucidate what happened so as to arrive at a fair and balanced decision.

We understand that the trial magistrate has the duty to put questions for clarification if need be, but such questions are asked after the witness has finished to testify, though he may as well interrupt and seek clarification when the witness is testifying. In the matter at hand however, the questions asked by the trial magistrate were not for clarification, instead were to examine the witnesses in chief, which was wrong procedurally. By doing so, the magistrate turned himself into a party to the case instead of being an umpire who would give decision at the end. We wish to instructively state that, since DW2 was called by the appellant, then, he was the one supposed to examine him in chief and not the court as it happened. Besides, we have also observed that the trial Magistrate

asked questions to the appellant when testifying in chief as rightly submitted by Ms. Mitanto, which also amounts to conducting examination in chief to him.

The questioning of the defence witnesses instead of letting them narrate tell their stories freely had an adverse effect of denying the appellant an opportunity to defend himself. This is because the appellant was denied the opportunity of telling his story concerning the incident. The pointed-out irregularity contravened the appellant's right to a fair hearing.

That apart, conducting of examination in chief to defence witnesses by the trial court has made the court to be partial, thereby breaching the principle of fair trial which is entrenched in the Constitution. In the circumstances, the appellant cannot be said to have been heard or defended himself. It is a cherished principle of law that justice should not only be done, but it must also be seen to be done.

The right to be heard or fair trial is among the fundamental rights enshrined under Article 13(6) (a) (ii) of the Constitution of the United Republic of Tanzania, Cap 2 R. E. 2002. It states:

> *(6) (a) (ii)* ***when the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing*** *and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned."* [Emphasis added]

The quoted principle has been interpreted in our other decisions including **Mbeya- Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] T.L.R. 251 and **Ausdrili Tanzania Ltd vs Mussa Joseph Kumili and Another**, Civil Appeal No. 78 of 2014 (unreported) to mention but a few. In **Mbeya- Rukwa Auto Parts and Transport Ltd** (Supra) the Court in insisting on the principle stated as follows:-

> *"In this country natural justice is not merely a principle of Common Law; it has become a fundamental Constitutional right. Article 13(6)(a) includes the right to be heard amongst the attributes of the equality before the law..."*

[See also **Dishon John Mtaita vs The Director of Public Prosecution**, Criminal Appeal No. 132 of 2004 (unreported). Moreover, in **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Fazalbay,** Civil Application No. 33 of 2002 (unreported) the Court held that:-

"The right of a party to be heard before an adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a beach of the principles of natural justice "

As we stated, the record of appeal in the case at hand speaks louder of the pointed out irregularity which with much respect, we consider to be a serious misdirection on the part of the trial magistrate, the result of which has occasioned injustice to the appellant. Indeed, there was no procedural fairness to the parties in the said circumstances.

Having found that there was procedural irregularity in the hearing of the defence case which adversely prejudiced the appellant, the next question we have asked ourselves is what should be the consequence?

The law is settled that a denial of a right to be heard is an incurable irregularity which vitiates the proceedings. There is a plethora of authorities to this effect, among them is the case of the **Director of**

Public Prosecution vs Sabinus Inyasi Tesha and Rephael J. Tesha [1993] TLR 273 wherein it was held that a denial of a right to be heard in any proceedings would vitiate the said proceedings.

In the circumstances of the case, we are of the settled mind that the proceedings, findings and the judgment of the trial court were invalid due to the pointed-out irregularity. Legally the same cannot be left to stand.

In the exercise of the revision power conferred upon the court under section 4(2) of the AJA, we nullify, quash all of the proceedings of the trial court starting from the defence case, the findings and the decision of the trial court. We further quash and nullify all of the proceedings and the decision of the first appellate court; the Resident Magistrate Court of Dar es Salaam at Kisutu under Extended Jurisdiction in Criminal Appeal No. 33 of 2019 and set aside the orders made there from having emanated from nullity proceedings. We further order the case file be remitted back to Temeke District Court to enable the appellant defend himself. Meanwhile the appellant shall remain in custody to await for the said hearing before the trial court.

Having in mind that the ground suffices to dispose of the appeal, we see no need to proceed discussing other grounds of appeal.

The appeal is allowed to the stated extent.

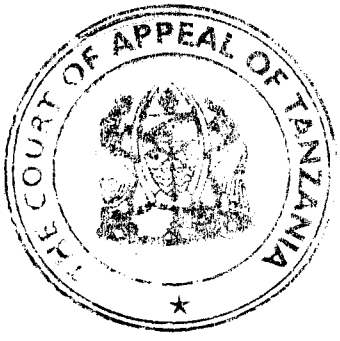
DATED at **DAR ES SALAAM** this 4th day of February, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of March, 2022 in the presence of appellant, represented in person and Ms. Jackline Werema, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL