IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: SEHEL, J.A., KIHWELO, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 313 OF 2021

PUSINDAWA LOSILO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate at Arusha at Arusha)

(Mahumbuga, SRM-Ext. Jur.)

dated the 17th day of May, 2021
in
Extended Jurisdiction Criminal Appeal No. 29 of 2020

.....

JUDGMENT OF THE COURT

11th & 18th March, 2024

SEHEL, J.A.:

In the District Court of Monduli at Monduli, the appellant, Pusindawa Losilo, was charged with two counts. The first count concerned the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. It was particularized that, on 20th September, 2017, at Einguki within Monduli District in Arusha Region, the appellant had carnal knowledge of a girl of sixteen (16) years old.

The second count was on the offence of impregnating a primary school girl contrary to section 60 A of the Education Act as amended by section 22 of the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016. It was alleged that in the same date, month and year, the appellant impregnated a school girl aged 16 years of M.P.S school. For the purpose of this judgment, we shall refer the girl as "the victim" or "PW1" in order to disguise her identity.

The appellant denied the charge. Thus, a full trial ensued whereby the prosecution called a total of four witnesses. The prosecution case was also built upon three exhibits, namely; the PF3 (exhibit P1), the victim's baptism certificate (exhibit P2) and a school attendance register (exhibit P3).

The first prosecution witness was the victim (PW1). Her evidence was to the effect that, on 20th September, 2018, she went to E forest for herding the family cattle. At the forest, she met the appellant who used to be her lover. They hang out together till evening. While there, the appellant tried to seduce her but she denied. On their way back, the appellant started to caress her which led her to fall down. The appellant

quickly laid on top of her and forced himself into her. After he was done, he gave her TZS. 5,000.00 in exchange for sex and they parted ways. After a while, PW1 noticed that she missed her period for two months but remained quite until when she was examined at school and tested positive to pregnancy. Upon interrogation, PW1 mentioned the appellant to be responsible with the pregnancy. She said that she was taken to E Dispensary for treatment.

According to Elizabeth Lengidile (PW3) who is the mother of PW1, the matter was reported to the police station whereby they were issued with PF3 and went to the hospital for medical examination. She tendered the victim's baptism certificate which was admitted in evidence as exhibit P2.

Yona Athumani (PW2), assistant medical officer at Monduli District Hospital examined the victim by ultra sound and found that she was sixteen weeks pregnant. He filled the PF3 which was tendered and admitted in evidence as exhibit P1.

A teacher from I.P.S, Elifuraha Maleko (PW4), said that she knew the victim as a student at their school, and that, upon testing her, they

found that she was pregnant. PW4 tendered the pupil's attendance register which was admitted as exhibit P3.

The appellant did not give his evidence because he jumped bail. He absconded after the trial court ruled that the appellant had a case to answer. The record of appeal shows that the appellant opted to give his evidence on oath and said that he had no witness to call and no exhibit to tender. On 13th June, 2018 when the case was called on for defence hearing, he was absent thus hearing was adjourned to 19th June, 2018. On the adjourned date, the appellant was still at large. Hearing of the defence case continued to be adjourned till 3rd August, 2018 when the prosecution prayed for judgment to be delivered in the appellant's absence. Accordingly, the trial court issued a date for delivery of a judgment. The judgment was delivered on 30th August, 2018. Here, we wish to reproduce the proceedings of the trial court of 30th August, 2018 in order to show what transpired on that date, it reads as follows:

> *"**30/08/2018***
> ***CORAM:*** *A. A. Mkama-RM*
> ***For Prosecution:*** *Chacha*
> ***C/Interpreter:*** *Anna F. Alfonce*

Accused: *Absent*

Chacha: *the matter is for judgment.*

Order: *Judgment has been delivered in the presence of the accused person and Ms. Chacha, State Attorney.*

Sgn: A. A. Mkama - RM
30/08/2018"

The above shows that the judgment was read in the presence of the appellant but the quorum shows that he was absent. Nonetheless, the appellant was sentenced to thirty (30) years' imprisonment for each count. The sentences were to run concurrently. His appeal to the High Court which was later on, in terms of section 45 of the Magistrates' Courts Act, transferred to the Resident Magistrates' Court of Arusha at Arusha to be heard and determined by Mahumbuga, Senior Resident Magistrate with extended jurisdiction (the first appellate court) was dismissed for being devoid of merit. Hence, this second appeal.

The appellant presented five grounds of appeal which are reproduced hereunder:

> *"1. That, the lower courts erred in law and fact in convicting and upholding the sentence against the appellant while the charge sheet was*

incurably defective and no amendment was done in terms of section 234 (1) of the CPA.

2. *That, the lower courts erred in law and fact in believing that the appellant impregnated the victim while there is no proof that the appellant is the person responsible for the pregnancy because the victim asserted that it was not her first time to perform sexual intercourse before mating the appellant.*
3. *That, the lower courts erred in law and fact in not finding that the trial against the appellant was irregular and had infractions for the appellant was denied the right of equality before the law to defend himself during the trial which resulted to unfair trial contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania (the Constitution).*
4. *That, the lower courts erred in both law and fact in believing that PW1 (victim) whose evidence originated from a mis-application, mis-apprehension and non-direction of section 127 (7) of the Evidence Act.*
5. *That, the first appellate court erred in law and fact in upholding both conviction and sentence of the appellant while the case against the*

appellant was not proved beyond reasonable doubt."

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas, the respondent/Republic was represented by Ms. Upendo Shemkole, learned Senior State Attorney assisted by Mses. Naomi Mollel and Tusaje Samwel, learned State Attorneys.

The appellant being layperson did not have much to say. He opted for the respondent to respond to his grounds of appeal while reserving his right to rejoin, if need would arise.

In her brief submission, Ms. Samwel supported the appeal by conceding to the third ground of appeal that the appellant was convicted without being given an opportunity to be heard. Elaborating on her stand, the learned State Attorney pointed out that, after the charge was read over to the appellant, the prosecution called a total of four witnesses. On 24th May, 2018, the prosecution closed its case, and that, on 29th May, 2018, the trial court made a finding that the prosecution had sufficiently made out its case to require the appellant to mount his defence. She further submitted that, on that same day, the trial court

explained to the appellant on his right to mount his defence whereby the appellant opted to give his sworn evidence with no witness to call and no exhibit to tender. The case was then adjourned to 13th June, 2018 for hearing of the defence case. However, from 13th June, 2018 to 30th August, 2018, the learned State Attorney argued that the appellant was absent without notice.

She went on to argue that the record of appeal bears out that the judgment was read in the presence of the appellant but it is silent as to when he was arrested. It is also silent on whether the trial court investigated on the appellant's reason of absence in order to satisfy itself whether he had probable defence on merit.

Ms. Samwel contended that failure to afford the appellant a right to account of his absence denied him his fundamental right to be heard enshrined under Article 13 (6) of the Constitution thus vitiated the proceedings of the trial court. Accordingly, the learned State Attorney urged us to quash the proceedings of the two lower courts and set aside the judgments, convictions and sentences of thirty years' imprisonment imposed on the appellant.

On the way forward, the learned State Attorney argued that, generally, a retrial would have been ordered but given the circumstances of the present appeal where there is insufficient evidence to uphold the conviction and sentence in that the evidence of the victim was at variance with the charge on the place where the crime was committed; there was material contradiction between the evidence of PW1 with that of PW2, and that, there is no evidence on when and who arrested the appellant, it would not be in the interest of justice to order a retrial. She thus prayed for the appellant to be released from the prison.

The appellant had nothing to rejoin. He only urged the Court to set him free from prison.

Having heard Ms. Samwel's submissions and gone through the memorandum of appeal and the record of appeal, we are in agreement with her that the appellant was not accorded a right to be heard. Section 226 (2) of the Criminal Procedure Act provides that:

> *"226 (2) Where the court convicts the accused person in his absence,* ***it may set aside such conviction, upon being satisfied that his absence was from causes over which he***

had no control and that he had a probable defence on the merit. *" (Emphasis supplied).*

The above provision of the law vests a discretionary power to the trial magistrate either to set aside or not the conviction of the accused person who was convicted *in absentia*. The conviction can only be set aside and the proceedings be re-opened after the trial magistrate has satisfied himself on the reasons of the absence of the accused and that the accused had probable defence on the merit.

This Court has repeatedly emphasized on the need of the trial magistrate or judge to exercise discretionary powers enshrined under section 226 (2) of the CPA by affording a right to be heard to the re-arrested accused person who was convicted and sentenced *in absentia*. For instance, in the case of **Marwa Mahende v. The Republic** [1998] T.L.R. 249 where the appellant was convicted and sentenced *in absentia* by the District of Court of Tarime at Tarime after he had absconded bail during the trial and, on appeal before the High Court, the sentence was reduced, the Court noted that the record of appeal did not indicate as to what happened after the appellant's re-arrest. As such, it reaffirmed the

position stated in **Olonyo Lenuma and Lekitoni Lenuna v. The Republic** [1994] T.L.R. 54 as follows:

> *"In our view the sub-section (that is section 226 (2) of the CPA) is to be construed to mean that an accused person who is arrested following his conviction and sentenced in absentia should be brought before the trial court first, and not to be taken straight to prison.... The need to observe this procedure assumes even greater importance bearing in mind that by and large accused persons of our community are laymen not learned in the law, and are often not represented by Counsel. They are not aware of the right to be heard which they have under the sub-section. It is, therefore, imperative that the law enforcement agencies make it possible for the accused person to exercise this right by ensuring that the accused, upon his arrest, is brought before the Court which convicted and sentenced him, to be dealt with under the sub-section."*

It follows thereafter that, after the accused person had been convicted *in absentia* and upon his re-arrest, he was required to be taken to the trial court and be given a chance to explain as to why he

had absconded himself during trial. If there was justifiable cause then the conviction and sentence could have been set aside and continue to hear a defence. Failure by the trial court to comply with section 226 (2) of the CPA vitiates the proceedings of the trial court which was conducted in the absence of the appellant – see: the case of **Severine Kimatare v. The Republic**, Criminal Appeal No. 279 of 2006 (unreported), **Loning'o Sangau v. The Republic,** Criminal Appeal No. 396 of 2013, **Magoiga Magutu @ Wansima v. The Republic**, Criminal Appeal No. 65 of 2015 and **Mohamed Abubakar v. The Republic**, Criminal Appeal No. 273 of 2015(all unreported).

In the present appeal, with due respect to the holding of the first appellate court, we see nothing suggesting that the appellant was given such a chance to explain his absence, and that, he failed to give reasonable explanation of his absence. As we have shown, the proceedings of 30th August, 2018 indicates that the judgment was read in the presence of the appellant but he was not afforded a right to be heard on the reason of his absence. Furthermore, as rightly observed by the learned State Attorney, it was not on record when the appellant was re-arrested and how he was sent to prison. Since the appellant was not

accorded a right to be heard, the proceedings of the trial court which were conducted in the absence of the appellant were vitiated.

Ordinarily, we would have quashed the proceedings of the trial court which were conducted during his absence, the proceedings of the first appellate court and set aside the judgments of the two lower courts with a direction that the appellant be sent back to the trial court and be dealt with in accordance with the provisions of section 226 (2) of the CPA. Nonetheless, having closely considered the circumstances of the present appeal, we agree with the learned State Attorney that this is not a fit case for a retrial, for the following reasons; **one**: the charge is at variance with the evidence. The charge indicates that the offence took place at Enguiki but PW1 testified that she met the appellant at E Forest. **Two**, the evidence of PW1 materially contradict with the evidence of PW4 and exhibit P1. While PW1 said that she was taken to E dispensary, PW4 and exhibit P1 establish that PW1 was examined at Monduli District Hospital, and **three**, the record of appeal lacked the evidence on who and when the appellant was arrested.

In the end, we allow the appeal. Consequently, we quash the convictions and set aside the sentences imposed on the appellant and make an order that the appellant, **Pusindawa Losilo,** be released from prison unless he is otherwise being held for some other lawful purpose.

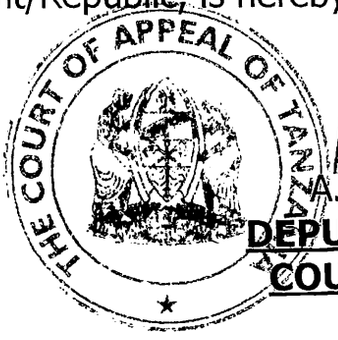
DATED at **ARUSHA** this 18th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 18th day of March, 2024 in the presence of the appellant appeared in person and Ms. Tobiesta Matekeleza Chang'a, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL