

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KOROSSO, J.A., MDEMU J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 66 OF 2023

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

AL -HALIL OMAR KOMBO RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Tunguu)

(Issa, J.)

dated the 3rd day of March, 2021

in

Criminal Appeal No. 09 of 2020

JUDGMENT OF THE COURT

24th April & 2nd May, 2024

MLACHA, J.A.:

This is a second appeal. The Director Public Prosecutions Zanzibar (the DPP) is challenging the acquittal of the respondent, Al-Halil Omari Kombo who was charged of statutory rape contrary to section 108 (1) (e) and 109 (1) of the Penal Act, Act No. 6 of 2018 of the Laws of Zanzibar. He was accused of raping a girl aged 11 years (hereinafter referred as PW2 or the victim), on 22/11/2018. The Regional Court of Zanzibar at Pemba found him not guilty and acquitted him. The first

appeal by the DPP at the High Court of Zanzibar was not successful hence the appeal now before the Court.

The summary of the evidence upon which the conviction was based can be presented as follows: PW1 Sabina Salum lived with the victim, a daughter of her sister in law, who was a standard IV pupil at Machomanne School, Chakechake Pemba. On a date which she could not mention, she found the victim with a CD player and some cash. The victim said that she got them from the respondent. On interrogation, the victim admitted to have had sex with the respondent. She added that she had missed her period for 3 months. PW1 sent her to Chakechake hospital where it was confirmed that she had been engaging in sex and was pregnant. PW6, Dr.Ali Mzee Mrisho received and examined the victim on 26/11/2018 and remarked the same thing in the PF3. The matter was reported to the police who mounted an investigation leading to the arrest of the respondent.

The narration of the victim and her school mates, PW3 Nasrat Ramadhani Juma and PW4 Nasra Omari was that they used to visit the respondent who lived adjacent the school. They visited her on 22/11/2018 at 10:30 am after finishing examinations. PW3 and PW4 remained at the sitting room while the respondent and the victim moved to the bedroom where they had sex. They left after having sex. The

victim could not tell PW1 on what was done to her on 22/11/2018 until 26/11/2018 when she was found with the CD player and the money.

The respondent agreed that the three kids had a habit of visiting his house. They were used to his house as he lives near the school. He also admitted that they visited the house on 22/11/2018 but denied to have had sex with the victim that day. He called DW2 Juma Abraham Juma and DW3, Asha Bakari Omari (who is his wife) to corroborate his defence. Both DW2 and DW3 said that the respondent did not have sex with the victim that day. DW3 said that she gave water to the children who drunk and left.

The trial magistrate found that the prosecution had failed to prove the age of the victim which is an important element in statutory rape. Based on this finding, the respondent was found not guilty and set free. The High Court differed with the trial court on the question of age of the victim. It found that there was good evidence from PW1 who was the guardian, the victim herself who pronounced her age and the class she was schooling (Standard IV) and PW6. It also held that age of the victim is not a serious issue where the victim is very young, as was in this case.

The High Court then went on to make the following finding:

"However, before the evidence on record is revisited or re-evaluated, it has to be pointed out at this very stage that it has been revealed that there was a procedural irregularity that was committed in respect of the way the trial changed hand between the two magistrates who tried the case. The trial was commenced by Mr. Khamis A. Simai (RM) who recorded evidence from PW1 and PW2 before Mr. Luciano M. Mayengo (RM) took over the trial without assigning any reason why his predecessor could not try the case to its conclusion.

The law on partly heard cases where there is a change of trial magistrates or judges is very settled. Where a magistrate takes over a partly heard case from his colleagues he must, when taking over the case, assign reasons why his colleagues could not proceed with the trial. This is what is provided under s. 204 (1) of the Criminal Procedure Act NO. 7 of 2018 (which is in parimateria to S. 214 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002]) ... Failure by the magistrate to do so renders the proceedings before the said successor magistrate a nullity."

Based on this finding, coupled with a finding that there was weak evidence, the respondent was set free. The DPP did not see justice in

the decision of the High Court hence the appeal before the Court which has one ground which reads:

- 1. That, the learned High Court Judge erred in law by raising an issue of transferring the case between magistrates without affording parties right to be heard.*

The respondent Republic was represented by Messrs. Seif Mohamed Hamis, and Huda Othmas Khamis, Senior State Attorneys, whereas the appellant had the service of Rajab Abdalla Rajabu, learned advocate.

On taking the floor, Mr. Khamis submitted that the Judge raised the issue of change of magistrate *suo moto* and resolved it without affording the parties a right to be heard contrary to the law. Making reference to pages 74 and 75 of the record of appeal, counsel contended that as change of venue was not one of the grounds of appeal there was need to draw the attention of the parties on it and require them to air their views before making the finding and decision on it. He submitted further that failure to give the parties the right to be heard was contravention of article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977 (as amended) which is also reflected in section 6 (a) of the Constitution of Zanzibar. He contended that failure to afford the parties the right to be heard on the issue vitiated

the proceedings and decision of the High Court. He referred the Court to its decisions made in **Issa Juma @ Magono and 2 Others v. The Republic**, Criminal Appeal No. 378 of 2020 [2023] TZCA 17650: (25 September 2023:TanzLII) and **NCBA Bank Tanzania Ltd (as successor of Commercial Bank Tanzania Ltd) v. VEST Tanzania Ltd and Another**, Civil Appeal No. 321 of 2020 [2023] TZCA 17923: (11 December, 2023: TanzLII) in support of his contention. He urged the Court to vacate the decision of the High Court and order the appeal to be heard afresh at the High Court.

The response of Mr. Rajabu was short and straight forward. He agreed with the submission of the learned Senior State Attorney and urged the Court to act under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to revise and vacate the proceedings and decision of the High Court and order a rehearing of the appeal.

We had time to examine the record and consider the submissions of the parties carefully. Having done so, we share the views of the learned counsel that whereas it is the position of the law that transfer of the case from one Judge or Magistrate to another must be accompanied by reasons for the failure of the predecessor Judge or Magistrate to complete the case, however, it was not correct, with respect to the learned Judge, to raise the issue *suo moto* as he did, and decide on it

without inviting the parties to make submissions on it. We agree with the learned counsel that this issue ought to have been raised as a ground of appeal or if raised by the court *suo moto* as it did, the parties ought to have been called to address the court before making its finding on it. We also agree that failure to call the parties to address the Court vitiated the proceedings and decision. This calls for the exercise of revision powers followed by the resultant orders of retrial. That was the import of our decisions in the cases cited by the Senior State Attorney. We reiterated the position in several other cases which include **Alpitour World Hotels & Resorts S.P.A. and 2 Others V. Kiwengwa Limited**, Civil Application No. 3 of 2012,[2012] TZCA 138: (11 December, 2012: TanzLII), **Margwe Error and 2 Others v Moshi Bahalulu**, Civil Appeal No. 111 of 2014,[2015] TZCA 282: (25 February 2015:TanzLII), **Christian Makondoro V. The Inspector General of Police and another**, Civil Appeal No. 40 of 2019 [2021] TZCA 30: (22 February, 2021:TanzLII) and **Director of Public Prosecutions V. Rajabu Mjema Ramadhan**, Criminal Appeal No. 223 of 2020 [2023] TZCA 45: (23 February, 2023:TanzLII).

In **Margwe Erro and 2 Others v. Moshi Bahalulu**, (supra) we stated thus:

"...the learned judge in the present appeal, in the course of composing her judgment posed a

question suo motu on whether the exclusion of period of obtaining the Decree can be dealt in the appeal. She did not invite the parties (as she ought to have done), to address her on this question which in the light of things she found to have been necessary in the determination of the appeal before her. Instead she went ahead and suo motu and ruled that. 'The court cannot in an appeal automatically exclude the time used to obtain copies of Judgment and Decree....

The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court.

We find the judgment of the High Court to have been a nullity for violation of the right to be heard." (Emphasis added)

See also **Director of Public Prosecutions V. Rajabu Mjema Ramadhan** (supra), where we had this to say:

"Time without number, the Court has consistently insisted on the need to guard against contravention of the right to be heard (audi alteram partem) in adjudicating the rights of parties. It is a rule against a person being

condemned unheard. Any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard".
(Emphasis added)

That said, the judgment of the High Court of Zanzibar in Criminal Appeal No. 9 of 2020 is quashed and set aside. We direct the appeal to be heard afresh by another Judge of competent jurisdiction.

It is ordered so.

DATED at ZANZIBAR this 30th day of April, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of May, 2024 in the presence of the Ms. Huda Othman Khamis, Senior State Attorney for the Republic and Mr. Emmanuel Asama, counsel for the Respondent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL