**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**(DAR ES SALAAM REGISTRY)**

**CRIMINAL APPEAL NO 218 OF 2017**

**(ORIGINATING FROM THE DISTRICT COURT OF MKURANGA IN CRIMINAL CASE NO 136 OF 2016 BY HON Y.C. MUYOMBO, RM)**

**IDDY S/O ATHUMAN @ ALLY ..... APPELLANT.**

**VERSUS**

**THE REPUBLIC .....RESPONDENT.**

**Date of last order: 13/06/2018**

**Date of the judgment: 27/06/2018**

**JUDGMENT.**

**MAGOIGA, J.**

The appellant was charged on one count of rape contrary to sections 130 (1) (2) (b) and 131of the Penal Code, [Cap 16, R.E 2002] in the District Court of Mkuranga at Mkurunga and was convicted and sentenced in absentia to imprisonment of 30 years'. Aggrieved with both conviction and sentence of the District Court have appealed to this court armed with nine grounds of appeal as listed in his memorandum of appeal contesting for his innocence.

The brief facts of this appeal are that on 25th day of May, 2016 did rape one Zakia d/o Mohamed @ Msilo a girl aged 13 years' old at Mkiu village within Mkuranga District in Coast Region. The matter was reported to village authority, then to police and sailed to court where the appellant was ultimately convicted and sentenced, hence this appeal, challenging both conviction and sentence.

When this appeal was called for hearing the appellant appeared in person, unrepresented and was ready for hearing. The respondent, Republic was represented by Ms. Selina Kapange, learned State Attorney and was ready for hearing. The learned State Attorney submitted that she supports conviction and sentence because there is a very cogent evidence on record, however, she was quick to point out that in the fourth ground of appeal the appellant is challenging the trial court for failure to accord him right to be heard after being apprehended and this is contrary to section 226(2) of the Criminal Procedure Act, [Cap 20 R.E 2002]. The learned Attorney submitted that failure to afford a right to be heard amounts to condemning the appellant unheard contrary to rule of natural justice. She cited the case of **ROMAND MKINI V. REPUBLIC, [1980] TLR 148** in which it was held that right to be heard is natural and even God heard Adam before conviction.

According to her the trial magistrate was duty bound to address itself to the provisions of the section 226 (2) of the CPA before passing the sentence. In the circumstances, she prayed this matter be returned to the trial court ordering the court to comply with the provisions of section 226(2) of the CPA by ordering a retrial or direct otherwise, she concluded.

The appellant had it that he leaves it to the court to decide on raised ground and do justice to him.

Going by the trial record it is clear as day light that the conviction and sentence was entered in the absence of the appellant after he disappeared on 03/08/2016. On 19/09/2016 the appellant was apprehended and was brought before trial magistrate BUT the trial magistrate did not address the accused person in terms of section 226(2) of the CPA, as rightly submitted by the learned State Attorney. The learned State Attorney cited the case of ROMAN MAKINI V Republic (supra) to underscore the need to comply with the requirement in that section. I had had an opportunity to through another case of **STANLEY PIUS AND ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO 181 OF 2017, (unreported) Dar es salaam, (HC)** in which justice Muruke, J, faced with similar situation in that appeal cited other Court of appeal of Tanzania decisions that has given interpretation, the importance and effect of not complying with the right to be heard enshrine in that provision vitiate the proceedings.

The learned State Attorney has humbly requested this court to order a retrial or give direction otherwise. The appellant cries for justice to set him free. I have taken into account the seriousness of the offence charged and I have gone through the whole evidence for the Republic am constrained not to order retrial as this will amount to give the Republic to fill in the gaps in their case for the following reasons: -

One, testimony of PW1 is flawed by the trial court turning into public prosecution by cross examining the witness in a manner not acceptable at all. The court being the umpire between parties cannot have a dual capacity in any trial. In the instant appeal the record is clear that on 04/08/2016 when PW1 testifying the trial court assumed the role of the public prosecutor and examined the PW1 in chief PW1. This was irregular and fatal to a fair trial.

Two, The testimony of PW5 contradicts what PW1 testified that she was serious injured by the alleged 'dudu' which was pressed in- out while playing with her breasts. PW5 examined PW1 just a day after the alleged rape but his findings and the PF3 which was admitted as exhibit P1 leave a lot to be desired. PW5 testified that she examined PW1 and said **"there was no bruises in her vagina and her anus but she had no virginity."** This piece of evidence does not corroborate the case of rape for Republic. The absence of virginity alone does not prove rape. Again the medical remarks are very interesting that "**all investigation normal".**

All these in their totality have made this court not to order a retrial for want of cogent evidence. In the upshot I hereby order immediate release of the appellant from prison unless held for another lawful cause.It is so ordered.

Dated at Dar es salaam this 27th day of June, 2018.

**S.M. MAGOIGA**

**JUDGE.**

**27/06/0218**