IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 148 OF 2018

FREDY SICHEMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated the 12th day of March, 2017

in

Criminal Appeal No. 34 of 2017

RULING OF THE COURT

17th & 20th September, 2021.

FIKIRINI, J.A.:

The appellant, Fredy Sichembe, was charged and convicted by the District Court of Momba at Chapwa with the offence of rape contrary to sections 130 (1) and (2) (b) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002] (Now R.E. 2019). He was sentenced to 30 years imprisonment with 12 strokes of the cane and ordered to compensate the victim

Tzs.1,000,000/=. Aggrieved by the decision he preferred an appeal to the High Court. His appeal was dismissed entirely hence the present appeal contesting the conviction and sentence.

Before the High Court, the appellant raised 8 grounds and before this Court, he raised 14 grounds. For obvious reasons which we will disclose soon hereinafter, neither grounds of appeal nor all the evidence adduced at the trial court will be reproduced. However, to understand the gist of the decision we are about to make, we will from time to time revert to the records of proceedings at the trial court.

At the hearing of the appeal, the appellant appeared in person and fended for himself. On the respondent's side, Mr. Njoloyota Mwashubila learned Senior State Attorney entered appearance. Both parties were ready for the hearing of the appeal. The appellant being a lay person prayed that we adopt all his grounds of appeal and he was ready to hear the learned Senior State Attorney submit first.

Before the hearing commenced, we invited the learned Senior State Attorney to address us on the propriety of the trial court

proceedings found on pages 13 -15 of the record of appeal, on which, we have come across some procedural irregularities, *one,* it was not reflected on the record as to why there was a use of an interpreter nor was it indicated the interpretation was done from which language to which. *Two,* when recording PW5's evidence, the trial magistrate recorded what the interpreter was saying instead of the witness.

The learned Senior State Attorney in his brief submission admitted that the record of proceedings now part of the record of appeal, does not indicate why was the interpreter used. Accordingly, he acknowledged that the recording of PW5's evidence is such that the interpreter was the one testifying. He thus contended that aside from the procedural irregularity in essence there was no PW5's evidence on record at all.

From his response, we prompted him to submit to us on the way forward. On this, he contended that since there was good evidence, bearing in mind PW5 was the victim in the case, he urged us to order a retrial. He commended that for the interest of justice and considering

that the procedural irregularity was occasioned by the court, with a retrial justice for the parties would be met.

The appellant was asked if he understood the argument, he responded as to have, but he had nothing to add, at most leave it up to the Court.

Recording of the witness evidence has a specific prescribed manner. Though governed by different laws it has been illustrated to be in the form of a reported speech. Failure to do so is an irregularity that goes to the root of the case. Under section 210 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA), which applies to subordinate courts provides that:-

> *"1. In trials, other than retrials under section 123, by or before a magistrate, the evidence of the witness shall be recorded in the following manners:-*
>
> *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and*

under his personal direction and superintendence and shall be signed by him and shall form part of the record; and

(b) ***the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative****.*

(2) The magistrate may, in his discretion, take down or cause to be taken down any particular question and answer.

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."[Emphasis added]

The provision of section 210 of the CPA, specifically subsection (b) has mandatorily provided on the manner the recording of the witness evidence should be done. That has to be in a narrative form and not reported speech.

In the appeal before us, that has not been observed by the trial magistrate particularly when recording the evidence of PW5. Traced from the record of appeal from pages 12-15, the recording was a mixture of mainly reported speech and narratives here and there. Since the provision strictly requires the recording to be in a narrative form and not in the reported speech which essentially is the interpreter's account and not PW5 then the recording has contravened section 210 (1) (b) of the CPA. An example of what was recorded on page 12, is reproduced below for clarity:

> *"That I'm at Ndelema Chipaka and I'm peasant. That I know accused person as he is my young sister's son. That on 17/04/2016 I do remember, myself I went to fetch firewood as I got firewood and vegetables. Hence he bent wanted to tie those firewood hence she saw accused person following her on her behind. Hence she shocked as asked him what you wanted to do why you touch me using force? He said he wanted to rape me. Hence he made me fall down hence he grabbed my neck hence he started to rape her."*

The above excerpt visibly shows contravention of section 210 (1) (b) of the CPA, which illustrates how should the witness evidence be recorded. The omission has had consequences in the decision rendered ultimately.

In the course of composing the judgment, and as reflected on pages 27 of the record of appeal, the trial magistrate repeated what she recorded during the recording of PW5's evidence, which was in the reported speech form instead of narrative form. And at page 29 presumably when analyzing PW5's evidence she made reference to her evidence. For ease of understanding, let the record speak for itself as shown at page 29 of the record of appeal:

> "*That in relation to this case as per victim herself are PW5 one Fides Sinyangwe who testified that when she went to search for fire wood and vegetables on particular date hence accused person went to her and using force he hold her and he asked him what he wanted to do? He said he wanted to rape her hence while grabbing her neck he undress her and lied or top*

of her hence he also undressed all his clothes hence he have sexual intercourse as she was his wife hence he lost consciousness thereafter. That in relation to the offence of rape the best evidence must come from the victim as it was stated in....."

Besides being contrary to the dictates of section 210 (1) (b) of the CPA, it has been difficult to distinguish what was the narrative by PW5, reported speech by the interpreter, and the analysis of the evidence that grounded conviction.

Sharing the same sentiment with the learned Senior State Attorney, we agree that there is no credible judgment of the trial court. And this, in our observation, has prejudiced both parties by the manner the evidence of PW5, a key witness in the prosecution case, has been recorded. The omission has regrettably escaped the attention of the first appellate court. Nonetheless, this Court has on other occasions come across the same difficulty. It has thus made our task easy. In the case of **Dennis Deogratius v Republic**, Criminal Appeal No. 362 of 2016, the Court relying upon its previous decisions in the cases of **Juma Bakari v**

Republic, Criminal Appeal No. 362 'B' of 2009 and **Mabula Damalu & Another v Republic,** Criminal Appeal No. 160 of 2015 (both unreported), markedly in the case of **Juma Bakari**, in which the same glitch was experienced, the Court stated thus;

> *"It is clear from the wording of the provision of subsection (a) and (b) of section 210 (1) of Cap. 20 that* ***in recording the evidence of a witness, the trial magistrate must record it in the first person****. In other words he/she must record and not report what the witness says...." [Emphasis added]*

Likewise, in the case of **Naiman Richard and 4 Others v Republic,** Criminal Appeal No 246 of 2007 (unreported), the Court agreed that by not recording the witness evidence in the manner prescribed under section 210 (1) (b) is a fatal irregularity calling for retrial as the best option. No order for retrial was, however, made for the reason of insufficiency of evidence.

It has to be remembered that this requirement is not optional but mandatory, that recording of witness evidence must be in the first

person and not reported speech as it was the case in the present situation. Noncompliance is fatal for it would mean PW5 did not testify in a matter she was a victim.

As alluded by the learned Senior State Attorney, the position we also hold, that there was no credible evidence by the prosecution warranting conviction as it is currently the position. We are on the same page with the learned Senior State Attorney, that the irregularity was fatal and that retrial is in the interest of justice the appropriate way forward.

In the circumstances, we exercise our revisional jurisdiction by invoking the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, nullify all the proceedings, judgment and quash the conviction, and set aside the sentence. We equally quash and set aside the proceedings and judgment of the High Court on appeal as the proceedings originate from null proceedings and judgment.

We proceed to order a retrial of the appellant as soon as possible before another magistrate. Meanwhile, the appellant should remain in remand prison to await the new trial.

It is so ordered.

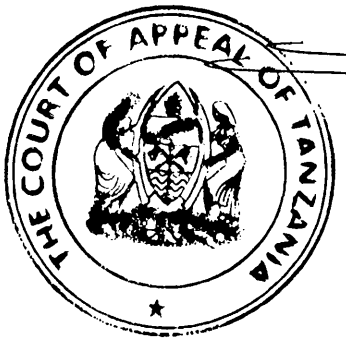
DATED at **MBEYA** this 20th day of September, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This Ruling delivered this 20th day of September, 2021 in the presence of the Appellant in person unrepresented and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL