

TANZANIA / JUDGMENT

JUDGMENT JOHN IBRAHIMU MALOSI

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MWANZA SUB- REGISTRY AT
MWANZA CRIMINAL APPEAL NO. 25522 OF 2024 (Arising from Criminal Case No.178 of 2023 of
2023 of Nyamagana District Court (C.A Mushi PRM) JOHN IBRAHIM @
MALOSI APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

11th & 13th March, 2025 E. L. NGIGWANA, J. In the District Court of Nyamagana at Mwanza henceforth (the trial Court), the Appellant was charged with Unnatural offence contrary to section 154 (1)(a) and (2) of Penal Code, [Cap. 16 (R: E 2022)]. At the trial court, it was alleged that the appellant on diverse dates between March 2023 at Patamahitaji- Mabatini area within Nyamagana District in Mwanza Region, did have carnal knowledge of a boy aged 8 years old against the order of nature. To protect the identity, the victim shall be referred to as QBI or PW1. The appellant denied the charge. After a full trial at which the prosecution relied on the evidence of five (5) witnesses and two (2) exhibits to wit; PF3 (Exhibit P1) and the appellant's cautioned statement 1 (Exhibit P2 while the appellant fended himself as the only defence witness, the trial court was satisfied that the case had been proven beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to life imprisonment. Aggrieved by conviction and sentence, the appellant appealed to this court, raising seven (7) grounds of appeal on the basis of which he asked this court to quash the conviction, set aside the sentence of life imprisonment and set him free. Upon reading the trial court proceedings, I invited the parties to address me on whether or not section 230 and/or 231 of the Criminal Procedure Act, [Cap. 20 R. E 2022] were complied with by the trial court. Because the instant appeal will not be determined based on the grounds raised by the appellant, I will not reproduce them here. At the hearing of this appeal, the appellant appeared in person, unrepresented, whereas Ms. Sarah Perias, learned State Attorney, appeared for the Republic/Respondent. Taking the floor, Ms. Perias submitted that the trial court record reveals that after the closure of the prosecution case on 29/04/2024, the 2 matter was adjourned to allow the trial court to compose the ruling on whether the prima facie case has been established against the accused/appellant or not. She added that the trial court composed the ruling as per section 230 of the CPA and delivered it on 08/05/2024, whereby the appellant was found to have a case to answer. She went on submitting that reading the said ruling, it cannot be said that it enabled the accused now appellant to make a focused defence. She elaborated that,

even if it is considered that the section 230 of the CPA was complied with, still there was non-compliance of section 231 of the CPA on the date when the ruling was delivered, the accused/appellant was not informed of his rights as per dictates of section 231 of the CPA, but he was informed of the rights after the defence case opened. She further submitted that the non-compliance of the said sections vitiates the trial court proceedings. She ended her submission by urging the court to nullify the trial court proceedings from page 48 of the typed proceedings; that is to say proceedings after the closure of the prosecution case, quash conviction, set aside the sentence and remit the case file to the trial court for it continue with the trial according to the law. 3 The appellant, who is a lay person and unrepresented, had nothing material to say concerning compliance or the non-compliance of sections 230 and 231 of the CPA, [Cap. 20 R.E 2022]. He just urged the court to do justice to him. Having heard submission from the learned State Attorney and the prayer by the appellant, the issue for determination is whether there was non-compliance of section 230 and/or section 231(1) both of the CPA, and if yes, whether the omission to comply with the said provisions is fatal. As per the case of Abdallah Kondo versus Republic, (Criminal Appeal No. 322 of 2015) [2016] TZCA 836 (28 September 2016) Tanzlii, it is a rule of practice that after the closure of the prosecution case, the trial court is required under section 230 of the CPA to prepare a ruling or finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it. If the court finds that the prima facie case has been established, then the accused person will be called upon to defend himself/herself, and he/she will be informed of his/her rights in terms of section 231 (1). If the same is not established, then the court will proceed to make the finding that the same has not been established and proceed to acquit the accused person accordingly. 4 In the case of Abdallah Kondo versus Republic, (Supra) the Court held that “We wish to make reference to the provisions of section 230 of the CPA which is relevant to the complaint we have fully quoted above. Closely read and comprehended, it does not provide that the trial magistrate should prepare a ruling so as to determine whether a case is made out against the accused to require him enter defence. That apart, it is now a long-established practice that after the close of the prosecution case, the trial magistrate prepares a short ruling in which he very briefly analyses the prosecution evidence so as to establish if the evidence adduced sufficiently incriminates the accused so as to require him account for in an effort to exonerate himself from liability” (Emphasis added) In the case at hand, the ruling composed by the trial Magistrate reads;

Ruling

“Accused John Ibrahim@ Malosi is standing the charge of unnatural offence contrary to section 154 (1) (a) and (2) of Penal Code, [Cap. 16 (R: E 2022)]. Particulars of the charge are to the effect that on diverse dates between March 2023 at Patamahitaji- Mabatini area within Nyamagana District in the City and Region of Mwanza, did have carnal knowledge of a QBI, a boy aged 8 years old, against the order of nature. When the charge was laid down against the accused, he entered a plea of not guilty as a result, the trial began on the prosecution side where a total of five witnesses 5 were paraded in support of the prosecution case. Therefore, the prosecution side closed their case, which raised this ruling for determination of prima facie case, Having gone through the evidence tendered by the prosecution side, I

am satisfied that a *prima facie* case has been established and therefore the accused will be required to make his defence against the charge he is facing as stipulated under section 231 (1) of the Criminal Procedure Act, [Cap. 20 R. E 2022]. Order Accordingly. Sgd: C.A Mushi -PRM 08/05/2024. To serve the best interest of justice, the Court of Appeal through the case of Abdallah Kondo versus Republic, (Supra), gave directions on how section 230 and 231 should be complied with. The Court had this to say; "We would have stopped there but we find it prudent that we use this opportunity to direct that the interest of justice is best served if trial magistrates and judges are to observe the now well-established practice of composing a ruling on case to answer in which the material evidence implicating the accused with the offence charged is made known to the accused. This will enable the accused to give a focused defence. Statements such as "the accused has a case to answer" and "section 230 or 231 of CPA is complied with or done" leave the appellant in the dark, not knowing what line of defence to adopt and what are the crucial areas to concentrate in his defence. Further to the above, as a way of complying with the provisions of section 231 of the CPA, we wish to state that it is logical to categorically inform the rights the accused have when found to have a case to answer. It is quite unsatisfactory, in our view, to simply state "done" or "complied with" Reading the ruling of the trial court as reproduced above, it goes without saying that it is not in line with the guidance given by the Court of Appeal in the case of Abdallah Kondo versus Republic, (Supra). It is clear that at the trial court, the prosecution case paraded five witnesses and tendered two exhibits. However, in its ruling, the brief material evidence implicating the accused/appellant with the offence was not known to him. In other words, the appellant, who is a lay person, unrepresented, was left in the darkness, not knowing what line of defence to adopt and what the crucial areas to concentrate in his defence. There is no doubt that the appellant stood charged with a serious offence that attracts life imprisonment, thus a fair trial is inevitable. I am aware that the defence evidence may be brief but focused. In the matter at hand, the brief and unfocused defence of the accused/appellant also shows that he was left in the darkness. It is worth noting that in order to enhance the principle of a fair trial and avoid miscarriage of Justice, it is important for the trial court to comply with the procedures, and to be diligent and to ensure without fail that an accused person is made aware of all his rights at every stage of the proceedings. A fair trial in the best mean of separating the guilty from the innocent and protecting the Innocent against injustice. I now turn to section 231(1) of the CPA. The same is a mandatory provision, therefore, failure to comply with it is fatal. This is the position articulated by the Court of Appeal in Maneno Mussa versus Republic, (Criminal Appeal No.543 of 2016) [2018] TZCA 242(19th April 2018) Tanzlii, where it observed that; "Indeed, as submitted by the learned State Attorney, the trial court's failure to comply with the provisions of S. 231(1) of the CPA is a fatal omission. In the case of Richard Malima & 4 Others versus The Republic, Criminal Appeal No. 183 of 2010 (unreported), the Court emphasized the duty bestowed on trial magistrates of strictly complying with the provisions of S. 231(1) of the CPA, particularly where an accused person is not represented by a counsel. It cited the case of Juma Limbu @ Tembo versus The Republic, Criminal Appeal No. 120 of 2005 (unreported) in which the Court stated as follows: "...to avoid miscarriage of Justice in conducting trials/it is important for the trial court to be diligent and to ensure without fail that an accused person is made aware of all his rights at every stage of the proceedings..." (Emphasis added) In the matter at hand, the trial court record speaks louder that the ruling informing the accused/ appellant that he had a case to answer was delivered by the trial court on 08/05/2024 in the presence of the appellant and the learned State Attorney namely Ms. Neema Kibodia. After the delivery of the ruling, the matter was adjourned to come for defence on 14/05/2024.

However, the defence hearing commenced on 21/05/2024, the day in which the appellant was informed of his rights under section 231 of the CPA, but he was informed of those rights before defending himself. Let the record speak for itself; “Court: Accused is hereby addressed in the terms of the rights stipulated under section 231(1) (a) (b) of the CPA Cap 20 E.2022] and responded thereto. Accused’s reply. I choose to defend under oath. I have no witnesses neither exhibit” From the above, there was compliance of section 231 (1) of the CPA by the trial court because the response by the accused now appellant shows that he was informed and understood his rights. Because the ruling composed by the trial court after the closure of the prosecution case was 9 inadequate as explained earlier, the fact that the appellant was informed of his rights stipulated under section 231(1) of the CPA cannot in itself cure the anomaly. Considering the nature and seriousness of the offence facing the appellant, but also considering the best interest of justice, and the anomaly discussed above, I nullify the proceedings of the trial court from page 48 of the typed proceedings onwards and the judgment thereon, quash conviction, and set aside the life sentence imposed on the appellant. The proceedings from the order closing the prosecution case shall remain intact. Further, I remit the case file to the trial court and direct the trial Magistrate or his successor to continue with the matter by complying with section 230 and/or 231(1) both of the Criminal Procedure Act, [Cap. 20 R.E 2022], as per directions given in the case of Abdallah Kondo versus Republic (Supra). In the meantime, the appellant should remain in custody pending his trial. It is so ordered. DATED at MWANZA this 13th day of March, 2025. E.L. NGIGWANA JUDGE 10 Judgment delivered this 13th day of March, 2025 in the presence of the appellant in person, Helen Mabula, learned State Attorney for the Respondent/ Republic, and Ms. Gladness Mnjari, B/C. E.L. NGIGWANA JUDGE 13.3.2025 11

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