

20100316 TZHC Dar es Salaam

DECIDED
16 March 2010

IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CRIMINAL APPEAL
NO. 57 OF 2009 . i (Originating from District Court of Mafia Criminal Case No.63 of 2008) JONAS
PAULO APPELLANT VERSUS THE REPUBLIC RESPONDENT Date of
last order . - 10/3/2010 Date of Ruling - 16/3/2010

MGAYA, J.: The appellant Jonas Paulo was convicted of rape contrary to section 130 of the Penal Code as amended by Section 5 of the Sexual Offence Special Provision Act No.4 of 1998, and was sentenced to 30 years imprisonment. The appellant being aggrieved by the conviction and sentence imposed appealed to this court on ten grounds contained in the petition of appeal filed by the appellant challenging the findings of the trial magistrate in that he was convicted of an offence he did not commit and that the charge against him was not proved beyond reasonable doubt. 1 At the hearing of the appeal, the appellant appeared in person unrepresented, and Mr. Maugo the learned were riddled with serious irregularities which rendered the entire proceedings a nullity. He contended further that the trial courts record reveals that the Charge was not read over to the appellant and he was not called up on to plead to the charge; and the proceedings continue State Attorney represented the respondent. At the hearing of this appeal, Mr. Maugo the learned State Attorney submitted that there is no reason to go into the merits of the appeal as the proceedings were a nullity. He said he was not supporting the conviction and sentence imposed on the appellant as it was found on null and void proceedings, and have occasioned injustice on the part of the appellant. He submitted that the trial courts proceedings indicate that proceedings were conducted without the (accused) the appellant being called up on to plead to the charge. The learned State Attorney referred this court to the case of Naoche Mbile VR 1993 TLR 253 where the Court of Appeal decided on the same issue and nullified the proceedings. Mr. Maugo further submitted that, the trial court's record reveal that after the prosecution had closed its case and the appellant was found to have a case to answer, the trial Magistrate did not address the appellant in terms of Section 231 of the Criminal Procedure Act. The trial magistrate decided for the appellant how he would defend 2 himself and according to the learned State Attorney the omission was a serious irregularity and occasioned injustice. On the part of the appellant as it denied the appellant his basic rights. Mr. Maugo, submitted that the cited irregularities were fatal to the proceedings and called up on this Court to nullify the proceedings in the best interest of justice. The appellant in reply submitted that, the

irregularities cited in the entire proceedings as submitted by the learned State Attorney Mr. Maugo are fatal to the proceedings and no justice was done to him at the trial. The appellant further contended that he was convicted on a defective charge that did not disclose any offence. He pleaded with the Court to do justice to him. I carefully listened to the learned State Attorney in his submission that the appellant was convicted on proceedings that were a nullity; in that the appellant was not called up on to plead to the charge when he was first brought to court. The trial Courts record is clear in this point. For ease reference, the trial Courts proceedings indicate as follows:- 3 "Court: Charge read over to the accused person who is asked not to plead to the charge" "Pros: Investigation is incomplete; I pray for a mention date, I also object to the accused person as there is a possibility ORDER: Mention date to 6/1/2008. Accused to be remanded . II It is obvious and as correctly submitted by Mr. Maugo the charge was not read over to the appellant as required by Section 228 (1) of the CPA and the entire proceedings were found on proceedings that were a nullity. As the proceedings were a nullity, the conviction and sentence were equally a nullity. In Naoche Ole Mbile VR - 1992 TLR 253 the Court of appeal when faced with a similar situation, held "One of the fundamental principles _of our Criminal Justice is that at the beginning of a criminal trial the accused must be arraigned, i.e the Court has to put the charge or charges to him and require him to plead" (ii} Non compliance with the requirement of arraignment of the accused person renders the trial a nullity". 4 ,, In our instant appeal, the proceedings of the trial Court indicate that the requirement of arraignment as provided for under section 228 (1) of CPA was not complied with in that the accused appellant was convicted without having been arraigned, and the trial magistrates failure to read the charge to the appellant is a fatal. Irregularity to the proceedings, and it renders the entire trial in criminal case No. 63 of 2008 a nullity. As correctly submitted by Mr. Maugo the learned. State Attorney, after the closure of the prosecution case, the trial magistrate having found that a prima facie case had been made against the appellant, did not address the appellant in terms of Section 231 of the Criminal Procedure Act, and non compliance with S - 231 of the CPA also renders the proceeding a nullity and occasioned gross injustice on the part of the appellant who was denied the opportunity to exercise his basic rights stipulated thereof. Lastly, the appellant has complained that he was convicted on a defective charge that did not disclose an offence. I entirely agree with the appellant on this issue, as it is supported by the court record. The charge sheet reads as follows: 5 Offence Section and law: "Rape c/s 130 of the Penal Code as amended by S.5 of the Sexual Offence Special Provision Act No.4/ 1998." PARTICULARS OF OFFENCE: "That Jonas s/o Paulo charged on 22 nd day of December 2008 at about 08.00 hours at Mkimbile Micheni within Mafia District Court Region did Carnal Knowledge one Sihaja d/o Hussein Ponda a Sixty year old" With due respect to the trial magistrate the charge as it is does not disclose. The offence of rape, as provided for by the law. It is not an offence to have carnal knowledge of a woman aged Sixty years, and What creates an offence is to have carnal knowledge of a woman without her consent where consent is an issue. Lack of consent is what constituted the offence see - Selemani Makimba VR CAT - Criminal Appeal No. 94/1999 - unreported - "evidence to prove rape is that of the victim herself, an adult where consent is . d " require In addition, the word_ did carnal knowledge one Sihaja d/o Hussein is a word not known to the Penal Code. In view of the above, the serious irregularities cited in the trial courts proceedings I entirely agree with the learned

State Attorney 6 that what transpired in the entire proceedings is the traversity of justice, and the conviction and sentence found on these proceedings are equally a nullity. By reason of the foregoing consideration I hold that the proceedings before the trial court are a nullity. In the event I hereby quash the proceedings before the trial court, and because the convictions and sentence were founded on void proceedings they are equally unsustainable, and consequently quashed. I order the appellant to be released from prison immediately unless otherwise lawfully held. JUDGE 16/3/2010 16/3/2010 Coram: Mgya, J. For Appellant: Present For Respondent: Miss Mlaki, S/ A C.C.: Doris Miss Mlaki S/A for the - Respondent: Madame Judge: 7 The matter is coming for ruling honourable Madame Judge. The Republic is ready. Court: The ruling of the Court delivered, on 16/3/2010. F. JUDGE 16/3/2010 8

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