

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 115 OF 2020**

**(Arising from Criminal Case No. 39 of 2020 of the District Court of  
Mtwara at Mtwara)**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT**

**VERSUS**

**MOHAMED SALUM KOWEKA.....RESPONDENT**

**JUDGMENT**

**11<sup>th</sup> Oct. & 15<sup>th</sup> Dec. 2021**

**DYANSOBERA, J:**

The instant appeal has been filed assailing the decision of the District Court of Mtwara in Criminal Case No. 39 of 2020 whereby the respondent, one Mohamed Salum Koweka was acquitted of the offence of rape contrary to Sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E.2019]. Aggrieved by the acquittal, the appellant has preferred this appeal on the following ground:-

1. That the Honourable trial Magistrate erred in law and fact for failure to appreciate the prosecution evidence which proved the case beyond reasonable doubt.

Briefly, the facts of the case were the following. The victim (PW 2) is a student at Mwena Secondary School, Ndanda. She was born on 20<sup>th</sup> day of March, 2006 as evidenced by the certificate of birth (exhibit P. 2). In 2019 she was schooling at Milongaminne Primary School in Nanyamba Township and was living with her mother. In November, 2019 she was also selling some bananas but specifically, on 3<sup>rd</sup> day of November, 2019 while in her daily routine, she was called by the appellant at his house and when she drew closer to him, the respondent pulled her inside his house, covered her mouth with his hand palm, tore her under pants and inserted his penis into her vagina. She felt pain and after she was released, she went back home. She was caned by PW 3, her mother, after she failed to account for her going home late. Sharifa Ahmad Boi (PW 4), their neighbour, responded to the victim's outcry and the victim stated that she had been raped by the respondent. PW 4 relayed the information to the street chairperson who then informed the police. At the Police Station, the victim was issued with PF 3 (exhibit P 1) and went to Ligula Referral Hospital where she was medically examined by Dr. Hassan Seif Mwakipa (PW 1). According to him, the victim had a visible widening vagina with fresh semen.

After the case for the prosecution was closed, the learned Resident Magistrate gave the following ruling at p. 13 of the typed proceedings:-

'Upon careful reading evidence adduced in court, this court found that the prima facies case was well being established to require the accused person to have the case answer under section 231 of the Criminal Procedure Act'

On 30<sup>th</sup> day of June, 2020, the respondent entered his defence whereby he admitted to have been with the victim on that material day when she was selling some bananas. He also admitted to have heard the victim crying after she was caned by her mother for coming home late. The same respondent admitted to have been arrested and to have no quarrel with the victim.

In her judgment handed down on 31<sup>st</sup> day of August, 2020, the learned Resident Magistrate was satisfied that the age of the victim was amply proved and that on that material day she was at the respondent. She, however, posed two questions. One, whether the offence of rape was proved to the required standard and two, whether the appellant was incriminated.

With regard to the first issue, the learned Resident Magistrate found that penetration which is a crucial ingredient of rape was not proved by the victim. She argued that the victim's narration was short of legal proof and the incident was not well clarified. Further that exhibit P 1 did not indicate sperm being found in the victim's vagina but white matter (sperm) fluids.

Respecting the second issue, it was contended that there was no sufficient evidence to incriminate the respondent. The respondent was, in consequence, acquitted

During the hearing of this appeal on 11<sup>th</sup> day of October, 2021, the appellant was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney, while the respondent did not make any appearance despite being served by substituted service by way of publications. The appeal was, therefore, heard ex parte.

Supporting the appeal, the learned Senior State Attorney submitted that, aside the ground of appeal, they had discovered an irregularity in trial courts' proceedings. According to him, Section 231 (1) of the Criminal Procedure Act [Cap 20 R.E 2019] was violated. He explained that after the respondent was addressed in terms of that section, he was not given his rights of how to defend himself before he entered his defence. Reference was made to page 13 of the typed proceedings. The learned Senior State Attorney cited the case of **Simatton Patsoni @ Toshi v.R.**, Crim. Appeal No. 167 of 2016 to buttress his argument. The case is on authority that non-observance of the said provisions is a fundamental irregularity denying the accused a fair trial and the remedy is to remit the record to the lower court so as to comply with the law.

He, thus, prayed this court to make an order that the record be dispatched to the lower court so that the court complies with what the law dictates and then case would proceed.

I have dispassionately considered the ground of appeal and the submission in support thereof. I have also perused the record of the trial court as indicated above, I am satisfied that the argument on part of the appellant has legal substance. The legal procedure on criminal trials in the subordinate court relating to the time when the prosecution has closed its case is clear. According to section 231 of the Criminal Procedure Act [Cap.20 R.E.2019], if at the close of the prosecution case the court is satisfied that a case has been sufficiently made against the accused, it shall explain to them their right of defence shown therein including the substance of the charge and inform him of his right to give evidence whether or not on oath or affirmation, on his own behalf; and to call witness in his defence. It shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save

where the accused does not wish to exercise and of those rights. The wording in couched in mandatory terms.

As rightly submitted by Mr. Ndunguru, learned Senior State Attorney, , the omission by the trial court was a fundamental irregularity which denied the appellant his right to a fair trial. This, undoubtedly occasioned miscarriage of justice hence vitiating the whole trial court's proceedings.

For those reasons, the proceedings are nullified. The acquittal is set aside. I agree with the learned Senior State Attorney that this is a fit case to be remitted to the trial court so that it complies with the dictates of the law.

Appeal allowed, the record to be dispatched to the District Court for it to conform to the dictates of Section 231 (1) of the Criminal Procedure Act [Cap 20 R.E 2019]. I direct that this should be done by another Magistrate competent to try it. The respondent to be traced and put to trial.



  
**W. P. Dyansobera**

**Judge**

**15.12.2021**

Judgment has been delivered this 15<sup>th</sup> day of December, 2021 in the presence of Mr. Lugano Mwasubula, learned State Attorney for the appellant but in the absence of the respondent.



**W.P.Dyansobera**

**Judge**



IN THE HIGH COURT OF TANZANIA AT MTHWARA