IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., LUANDA, J.A, MASSATI, J,A.)

CRIMINAL APPEAL NO. 48 OF 2010

ANTHONY SAMWEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Munuo, J.)

dated the 8th day of March, 1999
in
Criminal Session Case No. 6 of 1997

JUDGMENT OF THE COURT

30 April & 17 May, 2012

NSEKELA, J.A.:

The appellant Anthony Samwel was convicted of incest by males contrary to section 158(1) of the Penal Code, Cap. 16 R.E. 2002 by the High Court, (Munuo, J.) as she then was, and was sentenced to life imprisonment. Aggrieved by that decision, he has now appealed to this Court. At the hearing of the appeal, the appellant appeared in person,

unrepresented. The respondent Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney.

Five grounds of appeal were filed and at the hearing, the appellant asked and was given leave to add additional grounds. In reality he was repeating some of the written grounds of appeal or was modifying or expounding on them. The appellant did not wish to argue them but waited after Mr. Zakaria Elisaria, learned Senior State Attorney, had addressed the Court resisting the appeal.

It is alleged in the particulars of offence that the appellant on the 15.7.1993 at Mahida Village, Rombo District, Kilimanjaro Region did have carnal knowledge of his daughter, Anna Anthony. The case for the prosecution revolved around PW1, Anna Anthony who was 11 years of age when the offence was committed. PW1 alleged that on the material day while at home alone with her father (the appellant) the latter called her to his bedroom, ordered her to undress and lie on his bed. She was threatened to be beaten if she refused to comply. She did comply and

whereupon the appellant had sexual intercourse with her. On the following day, she informed her mother, who at the time was separated from her father. The matter was reported to the Police and she was taken to Huruma Hospital where she was examined by PW2, Dr. Sister Safari and Exhibit P1, PF3 was issued.

The defence of the appellant was essentially to the effect that PW1's mother Dionista conspired with her daughter PW1 in order to "fix" him and that the charge against him was sheer fabrication. The second line of his defence was that on the 16.9.93 he was under police custody and so could not have committed the offence.

The trial judge's decision in convicting the appellant is challenged on five grounds, namely –

(i) that the trial court did not conduct a preliminary hearing in terms of Section 192 of the CPA;

(ii) that the offence the appellant was charged with was a sexual offence which was to be conducted in camera;

(iii) that the sentence imposed upon the appellant was contrary to law;

(iv) that the evidence of PW1, the victim, contained material discrepancies;

(v) that generally, the evidence was insufficient to warrant the conviction of the appellant.

Mr. Elisaria conceded that the trial court did not conduct a preliminary hearing but submitted that the failure by the trial court to conduct a preliminary hearing did not vitiate the trial proceedings. The main purpose of a preliminary hearing in a criminal trial was to expedite the trial and the appellant did not show in what way he was prejudiced. He added that the prosecution duly established its case by calling evidence. He cited the case of **RAYMOND SILAYO v THE REPUBLIC** Criminal

Appeal No. 232 of 2008 (unreported). As regards the sentence that was imposed upon the appellant, the learned Senior State Attorney submitted that the trial court had discretion under Section 158 (1) of the Penal Code before its repeal by Act No. 4 of 1998, and the trial court duly exercised its jurisdiction in sentencing the appellant. Mr. Elisaria also conceded that the trial was not conducted in **CAMERA** as required under Section 186(3) of the Criminal Procedure Act Cap. 20 R.E. 2002 (CPA). However, he submitted that the appellant did not show how he was prejudiced by the trial not being held in **CAMERA**. In addition, such non-compliance was curable under Section 388 of the CPA. Lastly, the learned Senior State Attorney submitted that the evidence adduced before the trial court was sufficient to ground the appellant's conviction. In his view the alleged discrepancies in the testimony of PW1 were inconsequential.

We start with the complaint that the trial of the case commenced without conducting a preliminary hearing in terms of Section 192 of the CPA. In this appeal there was total non-compliance with Section 192 of the CPA. Section 192(1) of the CPA provides –

> *"192 (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty, the court shall as soon as is convenient held a preliminary hearing in open court in the presence of the accused or his advocate if he is represented by an advocate and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and* ***EXPEDITIOUS TRIAL*** *(emphasis added).*

This provision must be read together with rule 3 of the Accelerated Trial and Disposal of Cases Rules, 1988 GN No. 192 of 1988 which reads –

> *"(3) In every case where a person charged pleads not guilty to the charge the presiding magistrate or judge* ***shall hold a preliminary hearing*** *on the day when the person charged or arraigned in the presence of his advocate either at his first or subsequent appearance in court, or pleads not guilty, if this is not possible, then as soon as it is practical." (emphasis added).*

It is evident from these provisions that where a person charged pleads not guilty to the charge, then soon thereafter a preliminary hearing has to be conducted by the trial magistrate or judge according to the procedure prescribed in Section 192. It is common knowledge that the purpose of Section 192 of the CPA and the Accelerated Trial and Disposal of Cases Rules, 1988 was to expedite criminal proceedings. In the case of **EFRAIM LUTAMBI v THE REPUBLIC**, [2000] TLR 265 this Court had this to say –

> *"We wish to observe that the provisions of Section 192 of the Act are very useful in the administration of criminal justice. They were intended by the legislature not only to reduce the costs of criminal trials in the country, but also to ensure that those trials are, without prejudice to the parties, conducted expeditiously."*

The learned Senior State Attorney did not dispute that the trial court did not conduct a preliminary hearing as required by Section 192 of the

CPA. The question for consideration and determination is whether the proceedings at the trial were thereby vitiated.

If the procedure stipulated in Section 192 of the CPA is not strictly followed, for instance, the court fails to draw up a memorandum of undisputed facts; fails to read them over and explain them to the accused so that he understands them, then the preliminary hearing will be of no use and all material facts will have to be proved by evidence (see **MT. 7479 SGT. BENJAMIN HOLELA v R** [1992] TLR 121). This means that the expected advantages of Section 192 will not be realized, but it does not mean that the trial proceedings will be vitiated. In the case of **JOSEPH MUNENE AND ANOTHER v THE REPUBLIC**, Criminal Appeal No. 109 of 2002 (unreported) this Court stated that –

> *"... we are satisfied that the proceedings which were conducted without invoking the procedure laid down under Section 192 of the Act, were not vitiated."*

Under the circumstances, this ground of appeal fails.

The next ground of complaint was to the effect that the trial was not conducted in terms of Section 186(3) of the CPA as amended by the Sexual Offences Special Provisions Act, Act No. 4 of 1998 which provides –

> *"(3) Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or on any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical profession.*

Admittedly the offence with which the appellant was charged is an offence created in Chapter XV of the Penal Code. The evidence was to be received by the court in **CAMERA**. This was not done. In addition PW1, the complainant, was under eighteen years of age and therefore her

evidence had to be adduced in **CAMERA** as well. Again, this was not the case. Under the circumstances, the appellant has every right under Section 186(3) of the CPA to complain that the law was not complied with. However, with respect, we are not persuaded that the proceedings conducted in contravention of Section 186(3) of the CPA and section 5 of the Children and Young Persons Act, necessarily nullify such proceedings. This Court in the case of **GODLOVE AZAEL @ MBISE v THE REPUBLIC** Criminal Appeal No. 312 of 2007 observed as follows –

> *"The provisions of the Act we are designed to safeguard the personal integrity, dignity, liberty and security of women and children. It is true that the complainant, PW1 the victim of rape was covered by section 3(5) of the Children and Young Persons Act and the trial should have been held in **CAMERA**, but testified in open Court. In what way was the appellant prejudiced under Section 186(3) of the CPA."*

During the trial, the appellant was represented by Mr. A. Shayo, learned advocate, who did not draw the attention of the Court that the

appellant was charged with an offence whose proceedings were to be conducted in **CAMERA**. We are aware of the mandatory nature of Section 186(3) of the CPA as amended read together with Section 53(2) of the Interpretation of Laws Act, Cap. 1 R.E. 2002. This Court in Criminal Appeal No. 118 of 2006 **BAHATI MAKEJA v THE REPUBLIC** (unreported) stated that the word "shall" in the CPA is not imperative as provided for by section 53(2) of Cap. 1 but was relative and subjected to Section 388 of the CPA. The Court also stated that –

> *"It is our considered opinion that Section 388 is absolutely essential for the administration of justice under the CPA. There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative then many proceedings and decisions will be nullified and reversed. We have no flicker of doubts in our minds that the criminal law system would be utterly crippled without the protective provision of Section 388."*

With respect, we are in agreement with this observation. This procedural irregularity is curable under Section 388 of the CPA. It did not occassion any injustice to the appellant.

We now proceed to the complaint on the sentence imposed upon the appellant. The learned trial judge sentenced the appellant to life imprisonment. It was alleged in the particulars of offence that the appellant committed the offence on the 15.7.1993 before the coming into force on the 1.7.1998 of the Sexual Offences Special Provisions Act, 1998. The law then under Section 158(1) of the Penal Code, provided as follows –

> *"158(1) Any male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony, and is liable to imprisonment for five years:*
>
> *Provided that if it is alleged in the information or charge and proved that the female person is under the age of twelve*

> *years,* ***the offender shall be liable to imprisonment for life*** *(emphasis added)*
> *(2) ...*
> *(3) If the male person attempts to commit any such offence as aforesaid he is guilty of a misdemeanour".*

The question of punishment cannot be discussed without linking it with the conviction of the appellant. As stated before the appellant was convicted under Section 158(1) of the Penal Code before its amendment by Act No. 4 of 1998. The first issue is to resolve as to whether or not the conviction was justified in law. PW3, Dr. Sister Safari, Doctor-in-Charge of Huruma Hospital examined PW1 on the 17.7.93. Her report is in the following terms –

> *"The child has being (sic) raped on Thursday night of Friday:*
> *Varginal Examination*
> *Slight foul smelling discharge*
> *Small laceration left side inside the left labia*
> *No Tear*
> *Attempted Sexual intercourse."*

The victim PW1 in her evidence testified in part as follows –

> *"He ordered me to undress. He was sleeping on his bed in his room. At that time I was in the room with the accused. When the accused told me to undress I refused and cried out. He said he would beat me up if I cried out. Out of fear of the accused assaulting me, I undressed and slept on his bed, it was the only bed in the room. The accused was naked when he ordered me to undress and lie on the bed. The accused sexually assaulted me I was injured... the accused sexually assaulted me for a long time."*

When examined by the second assessor, PW1 said –

> *"When the accused called me into his room, he was dressed but when I entered the room he closed the door and undressed and then forced me to undress and sleep."*

From this evidence, can we conclude positively that the appellant had carnal knowledge with PW1? We are constrained to say no! The appellant attempted to commit the offence of incest by males under the old Section 158(3). There was no evidence to prove the offence under Section 158(1).

On conviction under Section 158(1), the appellant was only guilty of a misdemeanour. The appellant was therefore wrongly convicted and sentenced under Section 158(1) of the Penal Code before its repeal. Even then at that time, the sentence imposed was manifestly excessive. Section 158(1) then read as follows –

> *"158(1) Any person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony, and* ***is liable to*** *imprisonment for five years:*
>
> *Provided if it is alleged in the information or charge and proved that the female person is under the age of twelve years, the offender shall be liable to imprisonment for life." (emphasis added)*

We have examined the particulars of the offence and they did not allege that PW1 was under the age of twelve years though there was evidence that she was under twelve years of age when the offence was committed.

Apart from this, the sentence under the repealed Section 158(1) was manifestly excessive. In the case of **OPOYA V UGANDA** [1967] E.A. 752, the defunct Court of Appeal for East Africa, in construing the words **"shall be liable to"** observed as follows at page 754B –

> *"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."*

The appellant attempted to commit the offence under the repealed section 158(1) and so we convict him under Section 158(3) of the Penal Code. The purported term of life imprisonment was contrary to law.

We now come to the complaint on the alleged discrepancies in PW1's evidence. The appellant contended that PW1 contradicted herself during her examination in chief when she in effect testified that when her father

called her to his bedroom, he was naked. However, when the second assessor examined her, she stated that the appellant was dressed, in other words, he was not naked. As a court we must examine her evidence in its totality. It is the duty of the court to separate grain from chaff. The fact of the matter is that the appellant called PW1 to his bedroom, ordered her to undress and lie on his bed and he proceeded on to undress himself in order to satisfy his passion. This is the offence, the appellant is charged with. The so called discrepancy was not material to the conviction of the appellant.

In the result, we allow the appeal to the extent explained above. The conviction for incest by males is set aside and we substitute therefore a conviction for attempted incest by males c/s 158(3) of the Penal Code. Section 35 of the Penal Code Cap. 16 R.E. 2002 provides as follows –

> *"35. When in this Code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both".*

The appellant was convicted on the 8.3.1999 and by now he has served close to thirteen years. We therefore sentence the appellant to such term as will result to his immediate release unless otherwise held for some other lawful cause.

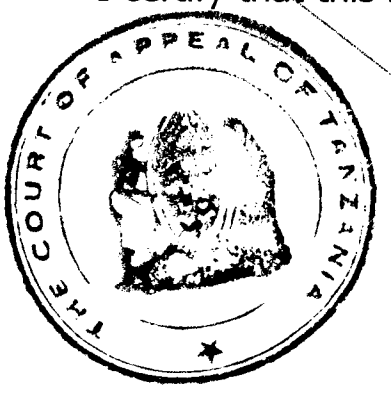
DATED at **ARUSHA** this 8th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL