IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 52 OF 2009

BENJAMINI s/o PHARES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Awasi, EJ.) (PRM)

Dated the 4th day of November, 2008
In
Criminal Appeal No. 12 of 2008

JUDGMENT OF THE COURT

19th & 24th April, 2013

MANDIA, J.A.:

On 8/9/2005 the appellant appeared before the District Court of Kasulu at Kasulu on a charge of Rape purportedly under c/s 5 of the Sexual Offences Special Provisions Act. No. 4 of 1998. As the appearance was made before a Justice of the Peace a plea was not taken. The appellant was remanded in custody until 21/9/2005 when he made an appearance in the same court before a Senior District Magistrate. His plea was taken and he pleaded NOT GUILTY. He was further remanded in custody. On 19/10/2005 a preliminary hearing into the case was conducted and trial fixed for 2/11/2005. On the date of trial two witnesses testified. These are

PW2 Joseph Kinyange and PW1 Senginyimwa d/o Joseph. PW2 testified that he has a daughter who is the fourth born in his family who is PW1 Senginyimwa Joseph, and who is a Standard Six pupil at Kiganamo Primary School. PW1 further testified that Senginyimwa absconded from school and also developed the habit of not sleeping at home from October, 2004. He asked Senginyimwa to disclose the person who enticed her away from home but Senginyimwa did not disclose that person. He added that on 5/9/2005 the appellant went to his home and informed PW1 that he was responsible for the pregnancy which PW1 Senginyimwa Joseph carried. He took the appellant to the local ten cell leader where the appellant repeated his admission of making PW1's daughter pregnant. PW2 then decided to report the appellant to the Police. No Police Officer came to testify in court. The only other evidence on record apart from that of PW2 is that of the victim herself, PW1 Senginyimwa Joseph. She gave her age as fifteen years, and told the trial court that she was a Standard Six Student at Kiganamo Primary School. She went on to say that she knew the appellant as a milling machine attendant at Sofya Market, and that the appellant started wooing her in January, 2005. She said the appellant persistently told her he wanted to marry her, and she resisted because she was a

student. She added that the appellant gave her sh. 1,000= and repeated his promise to marry her, and she finally gave in. She then consented to sexual intercourse with the appellant, and the first time they did it was inside the milling machine where the appellant worked. In May she stopped getting her menstrual periods. The appellant then visited her parents and claimed responsibility for her pregnancy.

After these two witnesses gave their testimony, the prosecution closed its case. Thereafter the trial Court did not bother to comply with the provisions of both Section 230 of the Criminal Procedure Act and Section 231 of the same Act but set the date of judgment.

The trial Court wrote a short judgment in which it found guilty the appellant and sentence him to thirty years imprisonment. The appellant was aggrieved by the sentence and preferred an appeal to the High Court of Tanzania at Tabora. In the memorandum of appeal the appellant raised two issues, namely:-

1) If PW1 was raped as she alleged why did she remain silent after the rape?

2) Why was the doctor who examined PW1 not called as a witness?

The appeal filed by the appellant was transferred to the Court of Resident Magistrate at Kigoma under Section 45 of the Magistrates' Courts Act, Chapter 11 R.E. 2002 of the laws. The learned Principal Resident Magistrate (Extended Jurisdiction) who heard the appeal dismissed it in its entirety. Further aggrieved, the appellant filed the present appeal.

The appellant appeared in person, unrepresented, to argue his appeal, while the respondent/Republic was represented by Ms. Juliana Moka, learned State Attorney. The respondent/Republic informed the Court that it did not support the conviction and sentence. The Court, suo motu, raised the question on whether there was a conviction or not. On a closer look at the record Ms. Juliana Moka joined issue with the Court and remarked that the record at page thirteen showed that the appellant was found guilty but not convicted, and that this offends section 235 (1) of the Criminal Procedure Act, Chapter 20.R.E. 2002. The section reads thus:-

"235-(1) The Court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code.

(2) If the Court acquit the accused it shall require him to give his permanent address for service in case there is an appeal against his acquittal and the court shall record or cause it to be recorded."

Ms. Juliana Moka argued that the failure of the trial Court to enter a conviction went against both section 235(1) and section 312(1) of the Criminal Procedure Act which are all couched in mandatory terms, and that this made the proceedings of the trial Court irregular. The judgment of the first appellate Court does not appear to have noticed this irregularity.

Leaving alone the irregularity we have pointed above, Ms Juliana Moka pointed out to two other procedural irregularities. These are the fact the trial court did not address itself to the provisions of section 230 of the Criminal Procedure Act, where the trial Court was required, after the prosecution had closed its case, to make a finding on whether a prima facie case had been established or not. The trial Court did not also address itself to the provisions of section 231 which required the court to:

(i) explain to the accused person the substance of the charge;

(ii) inform the accused of his right to elect on whether to proceed under section 231 (1) (a) and 231 (1) (b);

(iii) record the answer of the accused or his advocate on how the rights will be exercised; and

(iv) call upon the accused to enter his defence.

At page 74 of the record the appellant is noted as addressing the court thus after the prosecution closed its case:

"I opt not to defend. I leave the matter to the court to produce (sic) judgment."

The trial Court observed the appellant's silence by the following remark:

"The accused opted not to defend and leaved (sic) the matter to this court to pronounce judgment."

Whether or not this observation is an adverse comment on the appellant is moot, but the fact that the trial magistrate chose to make it part of his judgment shows that the appellant's silence influenced him adversely. In law, he could do so under section 231 (3) only if he had complied with the provisions of section 231 (1) (a) and (b), that is, he had explained to the appellant the substance of the charge and had informed him of his rights under sub-sections (a) and (b) of subsection (1) of section 231. The trial magistrate had not observed sub-section (1) so he had no right to make an adverse comment under sub-section (3) of section 231. Again the first appellate Court did not notice this default.

Ms Juliana Moka also drew the attention of this Court to the fact that the charge sheet gave the appellant's age as seventeen years, and this age was not controverted by anybody. While sentencing, the trial Court remarked thus:

> *"Accused is grown up person aged 18 years and that he has.....to reproduce. Accused to sentenced to 30 years jail for the offence of raping a school pupil and made her pregnancy.*
>
> *Signed N. B. Kurwijila*
> *SDM*
> *30/11/2005"*

We noted the dotted lines which indicated that the typescript had omitted a word or words in the original record. The original record we called for showed that one word was omitted, and this is the word "ability." The paragraph should therefore read:

> *"Accused is a grown up person aged 18 years and that he has the ability to reproduce. Accused to sentenced to 30 years jail for the offence of*

raping a school pupil and made her pregnancy (Sic)."

As observed by the learned State Attorney, the age given by the appellant as shown in the charge sheet, seventeen years, was not controverted by anybody. It is only while passing sentence that the trial Court unilaterally increased the appellant's age to eighteen years. We observe that the sentence was passed on 30/11/2005 when the Children and Young Persons Act, Chapter 13 R.E. 2002 of the laws was in force. Under section 16 of the said Act when the age of a child or young person raises doubt, it is the duty of the trial Court to determine the age and make a finding on the disputed age. The trial Court did not determine the age of the appellant as required under section 16 but imposed an age on him. This was yet another irregularity which the first appellate Court did not comment on.

Yet again, as commented by Ms. Juliana Moka, even if the appellant was eighteen years old, section 131 (2) (a) obliged the trial Court to impose a sentence of corporal punishment only on a first offender facing a charge of rape if the offender is aged eighteen years or less. The trial

Court, however imposed a sentence of imprisonment for thirty years for a young person aged seventeen/eighteen who is also shown to be an epileptic. Yet again, the first appellate Court did not notice this anomaly.

Lastly, on a prompting by the Court, Ms. Juliana Moka agreed that section 5 of the Sexual Offences Special Provisions Act did not create the offence of rape but rather amended the section creating the offence of rape, that is, section 130 of the Penal Code. We however agree with her that the error is curable since the offence of rape and its particulars are detailed in the charge sheet. Again the first appellate court did not notice this irregularity.

In conclusion, all we can say is that this appeal has demonstrated that in this case all that could go wrong in the trial Court went wrong, and was never noticed in the first appellate Court. The appellant did not receive any credible trial, and did not deserve the sentence passed on him. Obviously the trial in the court of first instance is a nullity. Ordering a retrial in such circumstances where the appellant has spent about seven years and four months, when he should not have been sent to jail at all, will cause more injustice to the appellant than that which has already been

inflicted upon him. We will therefore not order a retrial. We allow this appeal. As there was no conviction, the sentence is set aside. The appellant should be released from prison forthwith unless he is held on some other lawful cause.

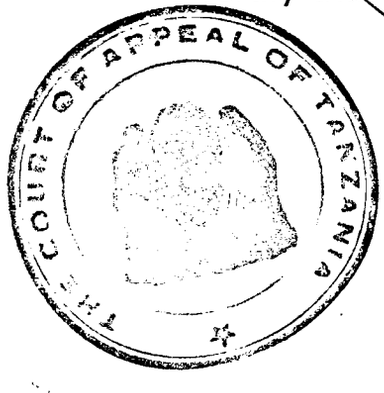
DATED at **TABORA** this 22nd day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL