IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUSSA, J. A., MWARIJA, J. A., And MWANGESI, J. A.)

CRIMINAL APPEAL NO. 77 OF 2016

1. JANUARY ALHAJI ---------------------------------- 1st APPELLANT
2. PATRICK SARPIS MSUYA -------------------------- 2nd APPELLANT

VERSUS

THE REPUBLIC -- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania
Moshi District Registry)

(Sumari, J.)

Dated the 15th day of February, 2016
In
Criminal Appeal No. 4 of 2015

JUDGMENT OF THE COURT

6th & 13th March 2018

MWANGESI, J. A.:

At the District court of Mwanga in Kilimanjaro Region, the appellants herein alongside three others namely, Charles Nathanaery Kiure @ Nguto, Khadija Juma Yazidu and Namwaka Omary Mbwana, stood jointly and severally arraigned for three counts. The appellants were the second and third accused respectively. In the first count, which was for the first, second and third accused, they were charged with the offence of causing grievous harm contrary to section 225 of the Penal Code Cap 16 R.E 2002 **(the Code)**. The particulars of the offence were to the effect that, on the

3rd day of November, 2013 at about 1800 hours at Lembeni village within Mwanga District in Kilimanjaro Region, the accused did jointly and together, unlawfully cause grievous harm to one Alex Hamad @ Hamisi by biting him (sic) on his hands using a piece of wire and causing him to suffer grievous harm.

For the second count which was also for the first, second and third accused, they were charged with the offence of unnatural offence contrary to section 154 (1) (a) and (c) of **the Code.** It was the case for the prosecution that, on the same date, place and time as in the first count above, the accused jointly and together, did carnal knowledge to Alex Hamad @ Hamisi a boy aged sixteen years against the order of nature.

The third count which was for the fourth and fifth accused, was counselling another to commit an offence contrary to the provisions of section 24 of **the Code.** The particulars were to the effect that, on the 3rd day of November, 2013 at or about 1700 hours, at Lembeni village within Mwanga District in Kilimanjaro Region, the duo did jointly and together, counsel the first three accused persons above, to commit an offence to wit:

unnatural offence to Alex Hamad @ Hamis, a boy aged sixteen years against the order of nature.

All charges were resisted by the respective accused and thereby, obligating the prosecution to summon eight witnesses to establish the guilt of all. On their part in defence, the accused relied on their own sworn testimonies and never summoned any witness.

The findings of the learned trial Resident Magistrate after evaluating the evidence which was placed before him, was to the effect that the appellants herein, were guilty to the offence which they were charged in the second count, of committing unnatural offence. On his part, the first accused was found guilty to the first count, whereas, the third and fourth accused, were acquitted and set free as the charge against them was not established.

Dissatisfied by the decision of the trial court, the two appellants challenged it in the High Court to no avail. Their appeal was dismissed for want of merit and hence, the instant appeal. Their joint grounds of appeal are comprised into two sets. The first set was lodged on the 11th July, 2016, containing six grounds, while the second set was of additional

grounds numbering five, which was filed on the 4th July, 2017. Additionally, the appellants filed a joint written submission in amplification of their grounds of appeal, which was done in terms of Rule 74 (1) of the Court of appeal Rules, 2009 (**the Rules**). In essence, all grounds of appeal boil on the question of the evidence that was relied upon in holding them culpable to the charged offence.

The brief facts of the case as could be grasped from the evidence of the prosecution witnesses is that at the material time, the complainant (PW1), was a student studying at Nyerere Secondary school. On or before the date of incident, he overheard some news alleging that, he had attempted to rape a daughter of Khadija Juma Yazidu (4th accused), who happened to be his teacher and were staying in the same area in the school compound. Thereafter, on the fateful day, while on his way from the bus stand, where he had gone to visit a friend towards his home, he was abducted by the first accused, who was in the company of the second accused. The two took him to the home of the first accused, where he was carnally known against the order of nature by the accused persons. A complaint was lodged to the relevant authorities and as a result, the

accused were arrested and charged with the offence, which is the subject of this appeal.

During the hearing of the appeal before us on the 6th March, 2018 the appellants appeared in person unrepresented and hence fended for themselves, whereas the respondent/Republic had the services of Ms Rose Sulle and Ms Penina Ngotea, both learned State Attorneys.

In their oral submission to argue the appeal, the appellants prayed to adopt their written submission. As indicated above, their main complaint in their grounds of appeal, centered on the evidence that was used by the two Courts below to hold them culpable to the offence wherein they were convicted of. Additionally, they complained about the failure by the first appellate Judge to consider their defence evidence and also, being sentenced without conviction.

On her part, the learned State Attorney, supported the appeal arguing that, **firstly**, the identification alleged to have been made by the complainant (PW1) to the appellants was not cogent enough so as to leave no doubt because, the description of his assailants was not made. And, such uncertain identification was the one used by PW8 to arrest the

appellants. In line with the holding of this Court in the case of **Masaga Lugembe Vs Republic,** Criminal Appeal No. 24 of 2013 (unreported), the learned State Attorney submitted that, it was unsafe to rely on such testimony to found conviction to the appellants.

Secondly, the learned State Attorney challenged the identification parade that was conducted to identify the assailants by PW1 for the reason that, it was conducted in blatant violation of the procedure that included, the failure to give description of the persons who were to be identified. Under the circumstances, the identification parade register which was tendered by PW7 as exhibit had no any evidential value. To substantiate her contention, the learned State Attorney cited the decision in the case of **Francis Majaliwa Vs Republic**, Criminal Appeal No. 238 of 2008, in reliance.

And thirdly, the learned State Attorney was at one with the appellants on their complaint that, they were sentenced without being convicted. Even though this complaint was raised in the first appellate Court, it was overruled by the learned Judge in the first appeal for the reason that, the omission occasioned by the trial magistrate was curable

under the provisions of section 388 of the Criminal Procedure Act, Cap 20 R.E 2002 (**the CPA**). In the view of the learned State Attorney, the position taken by the learned first appellate Judge was improper in that, the circumstances of the cases relied upon were distinguishable from the case at hand. To that end, she invited us to allow the appeal because it was meritorious.

There are basically two issues that stand for our deliberation and determination in regard to this appeal. **First**, whether or not the case in the impugned decision, was established to the hilt against the appellants as held by the two lower Courts. **Secondly,** whether or not, the omission by the trial magistrate to enter conviction before sentencing the appellants was curable under the provisions of section 388 of the **CPA**.

We propose to start with the second issue. Our task in this issue is to consider whether the omission by the trial magistrate to enter conviction before sentencing the appellants was curable under the provisions of section 388 of the **CPA**. It was the view of the learned first appellate Judge that, the omission did not occasion any injustice to the appellants and thereby, invoking her revisional powers to enter conviction to the

appellants under the equity principle of "*treat as done that ought to have been done*". In so doing reliance was placed on the decisions of this Court in the cases of **Bahari Makenja Vs Republic,** Criminal Appeal No. 118 of 2006, **Daud Norbert Vs Republic,** Criminal Appeal No. 242 of 2009 and **Ally Rajab and Four Others Vs Republic**, Criminal Appeal No. 43 of 2012 (all unreported).

Our going through the decisions relied upon by the learned first appellate Judge in her judgment, we are inclined to buy the views of the learned State Attorney that, those decisions were distinguishable from the instant case. In the case of **Bahati Makeja** (supra) for instance, the bone of contention was the import of the word "shall" under section 293 (2) of the **CPA,** which was said to contradict the intention contained in the provisions of section 388 of the same Act. The Court held in its findings thus:

> *"Section 388 is absolutely essential for the administration of justice under the* ***CPA.*** *There are 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 doubt in our minds that the criminal law system would be utterly*

crippled without the protective provision of section 388".

In our understanding of the holding above is that, the innocuous instances under which the word "shall" has been used in the **CPA,** was not envisaged to include the "shall" which has been used under section 235 (1) of the Act. Our stance is corroborated by the words "not every time", which has been used in the decision, meaning that not every shall applied in the Act, has to be treated so. Additionally, our stance is substantiated by the many decisions made by the Court wherein the term "shall" under section 235 (1) of the **CPA**, has always been interpreted to impose an imperative duty as contained in section 53 (2) of the Interpretation of Laws Act, Cap 1 R.E 2002, as will shortly be shown below.

In regard to the case of **Daud Norbert** (supra), the situation was a bit different from the case at hand in that, in the same there were a number of irregularities occasioned by the trial court that included failure to convict before sentencing. As a result, the Court acquitted the appellant and set him at liberty reserving the reasons. The discussion on failure to convict and the provisions of section 388 of the **CPA**, arose in the course of giving the reasons and the Court stated that:

> *"Our decision to allow the appeal, set aside the sentence and order for the appellant's immediate release unless otherwise lawfully held, was based on the following considerations. Both Mr. Mnyele and Mr. Kweka apparently had similar views. First and foremost was the procedural irregularity that led to the appellant being sentenced to a prison term of thirty years without first having been convicted of the alleged offence of armed robbery."*

The Court went on to state that:

> *"The Court is empowered under section 388 of the* ***CPA****, to use its discretion and correct such discrepancies. It can however, invoke such powers, if in its considered view, such error, omission or irregularity did not occasion failure of justice. We have carefully looked into the matter and came to the conclusion that the errors above did occasion a failure of justice. Therefore, section 388 of the* ***CPA*** *cannot be invoked to rectify the said errors."*

Our interpretation of the holding of the Court above is that, the provisions of section 388 of the **CPA,** could not be invoked to rectify the errors noted in the proceedings among which, the most pronounced one was that of failure to convict before sentencing, because the errors occasioned injustice to the appellant. Under the circumstances, it could not

be said that, the decision in that case was in support of the stance taken by the learned trial Judge. The same was therefore as well distinguishable as it was for the first case above.

We are however in agreement with the learned first appellate Judge that, the stance which she took is supported by the decision in **Ally Rajabu and Others Vs Republic** (supra). Such fact notwithstanding, it is our argument that, **first**, the stance offends the statutory stipulation under section 235 (1) of the **CPA**, which has been couched in mandatory terms with the use of the word "shall" thus:

> *"The Court, having heard both the complainant and the accused person and their witnesses and 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."*

[Emphasis supplied]

The context that the word "shall" imports an imperative obligation to be performed is obtainable from the wording in the provisions of section 53 (2) of the Interpretation of laws Act, Cap 1 R.E 2002, (**the Interpretation Act),** which bears the wording that:

"Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

Secondly, the stance is in contradiction with different other decisions of the same Court both before and after its delivery. It was held in the case of **Shabani Iddi Jololo and Three Others Vs Republic,** Criminal Appeal No. 200 of 2006 (unreported), which was held before that:

*"In the absence of conviction under section 235 (1) of the **CPA,** there was no valid judgment upon which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no legs to stand on. In fact, technically the appeal to the High Court was in the circumstances against sentence only because there was no conviction."*

See also the subsequent decisions in **Amani Fungabikasi Vs Republic,** Criminal Appeal No. 270 of 2008, **Zacharia Henry Mahush and Two Others Vs Republic**, Criminal Appeal No. 204 of 2010, **Juma Sackson @ Shida Vs Republic,** Criminal Appeal No. 254 of 2011 and **Joseph Kanunkira Vs Republic,** Criminal Appeal No. 387 of 2013 (all unreported).

In light of the foregoing, we entertain no doubt that, the position of case law has remained to be supportive of the statutory stipulation in as far as "shall" as used under section 235 (1) of the **CPA** is concerned. In that regard therefore, in invoking her revisional powers under the provisions of section 273 (2) of the Criminal Procedure Act in terms of section 388 of the same Act, to cure the anomaly that had been occasioned by the trial court, and thereby entering conviction to the appellants was improper.

Ordinarily, as it is, we would have easily nullified the judgment of the High Court and remitted the record to the trial court with directions to do the needful. Nonetheless, before doing so, we consider pertinent to look on the evidence available in the record, if it justifies such an order. This is the gist of the second issue, which is whether the case against the appellants was established to the hilt.

In upholding the decision of the trial court, the first appellate Judge supported the views of the trial magistrate in believing the testimony of the complainant (PW1). Even though the evidence of this witness was never corroborated by any other evidence, it was the argument of the first appellate Judge that, the trial magistrate was justified to believe him that,

he sufficiently identified the appellants on the fateful date because the condition was conducive, and hence, upheld the finding.

Nevertheless, our perusal, understanding and appreciation of the evidence on record, we are strongly convinced that, the testimony of PW1 was unsafely relied upon to found conviction to the appellants. As it was observed by the learned State Attorneys both in the first appellate Court and before us, there was no sufficient evidence to establish that, the complainant (PW1) accurately identified the appellants. This is from the fact that, there was no any description given by PW1 describing at the very least, on how his assailants appeared on the date of the incident including their appearance and the attires, which they were putting on. In our view, such factors were pertinent as it was held in the case of **Francis Majaliwa Deus Vs Republic** (supra).

In the circumstances, an order to the trial magistrate to enter conviction to the appellants, will serve no useful purpose other than subjecting the appellants to further unnecessary hardships, after having already languished in jail for quite some time, for no founded reasons. We thus invoke our revisional powers under the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (**the Act**), to quash the

judgment and proceedings of the High Court, and order for immediate release of the appellants from custody unless they are otherwise lawfully held for some other grounds.

Order accordingly.

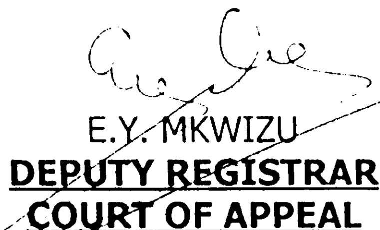
DATED at **DAR ES SALAAM** this 12th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
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