IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 72'A' OF 2016

FRENK BENSON MSONGOLE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mwangesi, J.)

dated the 09th day of July, 2012

in

Criminal Appeal No. 49 of 2010

JUDGMENT OF THE COURT

15th & 19th August, 2019

MUGASHA, J.A.:

In the District Court of Mbeya the appellant was arraigned for three counts: Rape contrary to section 130(2) (e) of the Penal Code Cap 16 RE: 2002; Abduction Contrary to section 246 and 249 of the Penal Code and causing a pupil not to attend school regularly contrary to section 35(3) of the Education Act Cap 353 RE: 2002. After a full trial, he was acquitted of the 3rd count and convicted on the first two counts and sentenced to thirty

years imprisonment in respect of the first count and three years imprisonment for the second count which were to run concurrently.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the first appeal was dismissed hence the present appeal. In the Memorandum of Appeal he has lodged five grounds of complaint. However, in view of what will be apparent in due course we shall not reproduce the grounds of appeal.

The facts which led to the appellant's conviction and sentence came from the evidence of PW1 the victim; her grandparents Amina Wilson Shomali and Hussein Shomari who testified as PW2 and PW3 respectively; Tumaini Lusajo (PW4) the victim's aunt, the investigator D2218 Cpl Anyimike (PW5) and Solomoni Swila the Medical Doctor who testified as PW6. PW1 was aged seventeen years, a student at Bonde la Usangu Secondary School and residing with her grandparents. On 29/05/2009 at about 14:00 hrs she went to visit her uncle at Tukuyu without notifying her grandparents. While on the way, she claimed to have been seduced and succumbed to the appellant's advances as they ultimately went to Lake Rukwa where they cohabited as married couple. They stayed at Lake Rukwa for two months

and later shifted to Vwawa and Tunduma. Subsequently, they decided to move to Chimala. However, having boarded a bus when they reached at Uyole, PW1 was seen by her aunt (PW4) who directed her to alight from the bus. As PW1 heeded to the direction, the appellant became furious and asked PW4 as to why she was taking away his wife namely PW1. PW4 informed the appellant that PW1 was a student who was being traced after having disappeared from the residence of her grandparents. Thereafter, PW1 was taken back to her grandparents and the appellant was arrested by the Police. PW1 was issued with a PF3, taken to the hospital for medical examination where it was confirmed that she was two months pregnant. Subsequently, the appellant was arraigned in Court.

At the hearing of this appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Mwajabu Tengeneza and Mr. Ofmedy Mtenga, both learned State Attorneys.

Ms. Tengeneza rose to inform the Court that the trial was vitiated because of the procedural irregularity for non-compliance of the provisions of sections 230 and 230 (1) of the Criminal Procedure Act Cap 20 RE: 2002 (the CPA). She pointed out that, while the prosecution case was not closed,

on record there is no Ruling of a case to answer was made and the appellant was not addressed on his rights regarding the manner in which he could make his defence. She argued this to have prejudiced the appellant and as such the trial was vitiated. To support her propositions she referred us to the case of **ABDALLA KONDO VS REPUBLIC,** Criminal Appeal No. 322 of 2015 (unreported).

As to the way forward, she submitted that, though a remedial measure would have been to return the case file to the subordinate court for it to comply with the required procedure; however such recourse would not serve any useful purpose because there is no evidence to prove the charge against the appellant. In this regard, she submitted that, **One,** the age of the victim being a crucial element of the charged offence of rape was not proved by any of the prosecution witnesses which rendered the charge not supported by the evidence. **Two,** the abduction was not proved in the absence of the evidence that PW1 was abducted since the record shows that PW1 and the appellant met and agreed to go to Lake Rukwa. Ultimately, the learned State Attorney urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap 14 RE: 2002 (the AJA), quash the

conviction, set aside the sentence, nullify the High Court proceedings and set the appellant at liberty.

When probed by the Court if the District Court of Mbeya had jurisdiction to try offences alleged to have been committed outside that district the learned State Attorney conceded the same to be irregular.

On the other hand, the appellant being a layman had nothing useful to add apart from asking the Court to set him free.

After a careful consideration of the submission of the learned State Attorney, the issue for over determination is the propriety or otherwise of the trial on account of procedural and jurisdictional errors. We have opted to commence with the procedure which governs the close of the prosecution case which is regulated by the provisions of section 230 of the CPA which stipulate as follows:

> *"If at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to*

any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person."

In a criminal trial, after all the prosecution witnesses have testified, the prosecution shall close its case. Thereafter, the trial court shall proceed to make a Ruling as to whether there is a case to answer or not. The essence of closure the prosecution case was emphasized in the case of **ABDALLAH KONDO** (supra) where among other things, the Court categorically stated that, the prosecution is at liberty to close its case when satisfied that the evidence adduced by their respective witnesses is sufficient.

In the case at hand, having resumed the defence case without the prosecution closing its case, technically, the trial court did close the prosecution case as reflect at page 22 – 23 of this record. Such stance was irregular because it is settled that the prosecution has control over all aspects of criminal prosecution and proceedings – see **DIRECTOR OF PUBLIC PROSECUTIONS VS IDDI RAMADHANI FERUZI**, Criminal Appeal No. 154 of 2011 (unreported). Moreover, it was not the intendment of the Legislature to mandate the trial court with power to close the prosecution case because

that would be prejudicial to the prosecution and block it from calling more witnesses to prove its case.

Subsequently, where the Court is satisfied that the prosecution evidence has established a *prima facie* case, it will require an accused person to make a defence in relation to the offence charged or a cognate offence under which he is liable to be convicted. The manner in which an accused person can make a defence in a criminal trial is governed by the provisions of section 231 (1) of the CPA which gives the following directions:

> *(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right–*
>
> > *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*

(b) to call witness in his defence,

and 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 person does not wish to exercise any of those rights".

It is crystal clear that, before the accused person makes his defence, the trial court is mandatorily required to address him on the rights and the manner in which he shall make his defence.

In the matter under scrutiny after PW6 had testified at page 23 of the record of appeal, after the prosecution addressed the trial court that, the case was ready for defence and the appellant indicating his readiness to be heard, the trial magistrate proceeded to hear the testimonial account of the appellant who was the only witnesses for the defence. However, the trial magistrate did not address the appellant on the manner in which he was to give his defence which was irregular. We are thus in agreement with the

learned State Attorney that, the infraction was fatal considering that the appellant who was not represented by an advocate was unaware on the manner in which he was supposed to give his defence. As such, the trial was vitiated occasioning a miscarriage of justice on the appellant who was denied a fair trial.

We have also gathered that, the charge which was laid against the appellant was titled as *"IN THE DISTRICT/ RESIDENT MAGISTRATE'S COURT OF MBEYA AT MBEYA"* which seems to have been the source of confusion which ensued as we shall soon demonstrate. The respective charge was admitted in the Resident Magistrate's Court of Mbeya which was the proper court mandated to adjudicate offences alleged to have been committed within the Region of Mbeya in whose precincts Rungwe and Mbozi Districts fall. However, as it was correctly conceded by the learned State Attorney, the appellant was tried at the District Court of Mbeya which was irregular because it was not vested with requisite territorial jurisdiction to take cognizance of the offences allegedly committed in Rungwe and Mbozi Districts. We say so because jurisdiction is vested by law which means the authority of court to entertain, hear and determine cases subject to

prescribed reference to territorial limits. See- **MTWA MICHAEL KATUSA VS THE REPUBLIC,** Criminal Appeal No. 577 of 2015 (unreported). Under section 40 of the Magistrates' Courts Act **[CAP 11 R.E. 2002],** a district court shall have and exercise original jurisdiction in all proceedings of a criminal nature in respect of which jurisdiction conferred on a district court by any such law for the time being in force. In this regard, Part VI B of the CPA regulates among other things, place of trial whereby section 181 states as follows:

> *"When a person is accused of the commission of any offence by reason of anything which has been done or of any consequence which has ensued, the offence may be inquired into or tried, as the case may be, by a court* ***within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."***
> [Emphasis supplied]

In a nutshell, the trial will take place in a court which is within the local limits of the place where the offence is alleged to have been committed. Thus, in the light of the stated position of the law, the appellant ought to have been charged and tried at the Resident Magistrate's Court of Mbeya and not the District Court of Mbeya. Therefore, since the District Court of

Mbeya lacked territorial jurisdiction to try the appellant, it embarked on a nullity to entertain and try Criminal Case No. 202 of 2009.

In view of the said infractions, ordinarily we would have returned the case file to the trial Court to comply with the aforesaid procedural mandatory dictates of the law. However, as correctly pointed out by the learned State Attorney such order will not serve any useful purpose and it will not be in the interests of justice because there is no evidence to prove the charge against the appellant. We shall give our reasons.

At the outset we wish to restate the position of the law that, in criminal charges the burden is on the prosecution to prove the charge beyond reasonable which entails parading the evidence which must prove each and every element of the offence. In the case at hand, the appellant was charged and convicted with rape and abduction of an 18 years old girl. The charge of rape was preferred under section 130 (2) (e) of the Penal Code which provides as follows:

> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under*

circumstances falling under any of the following descriptions:

(a) not applicable;

(b) not applicable;

(c) not applicable;

(d) not applicable;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man".

While the charge sheet shows that PW1 was 17 years at the time of occurrence of the alleged rape that is between May – November, 2009, four months later she gave her testimonial account after having introduced herself during the trial as reflected at page 11 of the record as follows:

"PW1 Edina d/o John, 18 years, I was a pupil, Christian, Sworn"

This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim. See- **NALONGWA JOHN VS REPUBLIC**, Criminal Appeal No 588 of 2015

(unreported).At page 13 of the record of appeal, when PW1 was cross examined by the appellant about her age she replied as follows:

" I am aged 18 years."

With this account it is not possible to gauge if at the time of the alleged rape she was 18 years or otherwise. More significantly, none of the prosecution witnesses including the grandparents of the victim testified on the age of PW1 which rendered the essential element of age not proved. Apart from the trial court acknowledging that the prosecution did not parade evidence on the age of PW1, it did not consider the adverse effect of the same considering that the age of the victim was the essential element in proving the offence of rape to which the appellant was arraigned. Moreover, before the High Court, though it was the appellant's complaint that the age of the victim was not proved, the High Court dismissed the complaint having concluded that:

> *"Although the victim seems to have consented with the idea of living with the appellant, however the law is very clear that if the woman is below the age of eighteen then a man who is having an affair with her is said to have committed the offence of rape...."*

With due respect to the finding of the first appellate court, notwithstanding the position of the law as reflected in the charge sheet, failure to prove the age of the victim rendered the charge not supported by the evidence and as such, it was not proved beyond a shadow of doubt that rape was committed by the appellant.

We now turn to the count relating to abduction an offence created under section 246 and 249 of the Penal Code. Abduction is defined under the provisions of section 246 of the Penal Code as follows:

> *"A person who by force compels, or by deceitful means induces, any person to go from any place is said to abduct that person".*

Moreover, kidnapping or abducting with intent to wrongful confinement is categorized under section 249 of the Penal Code as follows:

> *"Any person who kidnaps or abducts a person with intent to cause that person to be secretly and wrongfully confined is guilty of an offence and is liable to imprisonment for seven years.*

In terms of the law, the essential elements in the offence of abduction include compulsion by force or by deceitful means inducing a person to go from any place and wrongfully confining such person. The question to be addressed is if the prosecution did parade the evidence to prove the commission of the offence of abduction? We are inclined to answer this in the negative because according to the evidence of PW1, she voluntarily agreed with the appellant to go Lake Rukwa, Vwawa and Tunduma and cohabit as wife and husband. As such, there is no scintilla of evidence that PW1 was abducted and wrongfully confined by the appellant.

Thus, having seriously considered the propriety of criminal charges against the appellant, we agree with the learned State Attorney that the prosecution did not prove the charges laid at the appellant's door because there is no evidence in support of the charge. In this regard, we are satisfied that it will not serve any useful purpose to order a retrial or else it will be utilised by the prosecution to fill in the evidence gaps.

In view of the pointed out anomalies, we invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act **[CAP 141 R.E.2002]**, to nullify the entire proceedings of the trial and first appellate courts, quash

and set aside the conviction and sentence. We order the appellant to be released forthwith unless he is otherwise held for another lawful cause.

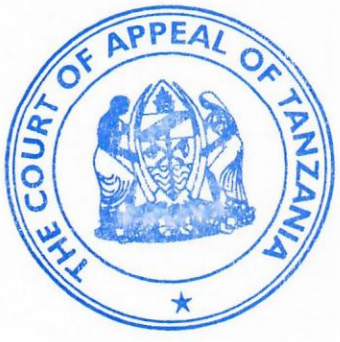
DATED at **MBEYA** this 17th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2019 in the presence of Ms. Prosista Paul, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL