IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, WAMBALI, J.A And KOROSSO, J.A.)

CRIMINAL APPEAL. NO. 352 Of 2017

MOHAMED RASHID .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Ruhangisa, J.)

dated the 4th day of November, 2016.
In
Criminal Appeal No. 169 of 2014

.....

JUDGMENT OF THE COURT

26th February, & 16th March, 2020

LILA, J.A

Mohamed Rashid, the appellant, and one Magreth Jacob who is not a party to these proceedings, were arraigned before the District Court of Ilala within Dar es Salaam Region to answer a charge comprising of two counts. For the sake of hiding the identity of the girl, we shall refer to her as the Victim. The charge was couched thus:

> ***"1ST COUNT FOR 2ND ACCUSED DERSONS***
>
> ***STATEMENT OF OFFENCE:*** *CONSPIRACY to induce unlawful sexual intercourse c/s 149 of the Penal Code Cap. 16 of R.E 2002.*

PARTICULARS OF THE OFFENCE: *That Magreth d/o Jacob Tarasa is charged between 9th and 11th days of April, 2012 at Majohe-Kivule area within Ilala District in Dar es Salaam Region by false pretence did permit Mohamed s/o Rashid and another to have unlawful sexual intercourse with the Victim of 17 years by inducing her to stay in their accommodation.*

2nd COUNT FOR 1st ACCUSED PERSON

STATEMENT OF THE OFFERENCE: *Rape c/s 130(1) and 131(1) of the penal code cap 16 of R.E. 2002.*

PARTICULARS OF THE OFFENCE.

That Mohamed s/o Rashid and another who is still at large is charged between 9th and 11th days of April 2012 at Majohe-Kivule area within Ilala District in Dar es Salaam Region did have sexual intercourse with the Victim, a girl of 17 years old."

They pleaded not guilty. Trial ensued and at its conclusion, they were found guilty as charged. Although the appellant was not charged in the first count, they were each sentenced to serve three (3) years imprisonment for the first count. Since this is not one of the grounds of

appeal, we shall delve with it at a later stage in this judgment. It suffices, at this juncture, to say that the appellant was also sentenced for committing the offence charged in the first count. The appellant was sentenced to serve thirty (30) years imprisonment for the second count. Only the appellant was aggrieved by both conviction and sentence. He unsuccessfully appealed to the High Court hence the present appeal to the Court.

A brief background of the case is this. The appellant and one Magreth Jacob although not officially married, were staying together at Majohe-Kivule area. On 9/4/2012, the Victim, then aged seventeen (17) years old, boarded Marning Nice Bus from Lindi to Dar es Salaam. She was going back to her aunt one Shem Mussa Chilala (PW2) with whom she was living at Kigamboni Mjimwema area. The arrangement was that she would be received by PW2 at Mbagala bus stand. Unfortunately, PW2 could not make on time hence she did not find the Victim at Mbagala. Her effort to trace the victim at Ubungo Bus Terminal was unsuccessful as the Victim disembarked the bus at Temeke. As she was about to catch a bus to Kigamboni, she was approached by a certain person she did not know then who presented himself to also be going to Kigamboni. That man took her

into a minibus and after a while they reached a place called Banana whereat they boarded another bus to Gongo la Mboto. Thereafter, they boarded a motorcycle famously called "bodaboda" to Majohe at the appellant's residence. That person, who later on turned out to be Ramadhan, introduced the victim to the occupants of that house (appellant and Margreth) as being his wife. As it was night time (around 19-20hrs), the appellant and Margreth left the victim and Ramadhan in that room wherein the Victim was forcefully undressed and raped. Then Ramadhan left leaving the Victim in the house. As it was a single roomed house, the appellant and Margreth slept on the bed while the Victim slept on the floor. At midnight, the appellant slipped down from the bed forcefully undressed the Victim and had carnal knowledge of her. Unhappy with what had happened to her, she requested to be taken to the ten cell leader a request that was turned down by the appellant and Margreth. Later, Ramadhan went there again and had forceful carnal knowledge with her again and left. Like the previous midnight, the appellant raped her after getting down from the bed.

According to the Victim, in the morning she heard women talking at the place they fetch water and she approached them and sought

assistance to meet the ten cell leader. She was heavily beaten for doing that by the appellant and as she was crying, people turned up for help and forced the appellant to open the door. She was told to hide herself as the appellant opened the door but upon the door being opened she pushed him and got out and narrated the episode to those who turned up consequent upon which the appellant and margreth were arrested and taken to Stakishari Police Station. She was, then, unable to walk and eat properly. She was issued with a PF3 (exhibit P1) and went to Temeke Hospital where she was medically examined.

On her part, PW2 after failing to find the victim at Ubungo Bus Terminal, reported the matter to Changómbe Police Station and was asked to wait for their call if there would be any information about the victim. She was later called by police and was asked to go to Stakishari Police Station whereat she found the Victim in bad condition and could not walk. She took the Victim to hospital after being issued with a PF3 (exhibit P1).

Asenga Philipo (PW3), a Ward Executive Officer (WEO) for Kivule-Majohe, and Hassan Mohamed Kingalu (PW4), a Street Chairman at Kivule-Majohe, were people who went to the appellant's residence and they said when the appellant opened the door a certain girl (the Victim) who was

weak and was asking for help came out. That the Victim told them that she was taken there by a certain man who raped her and left her there where the appellant continued not only to keep her in the room, but also raped her. They said the appellant wanted to run away but they arrested him and a woman he said to be his concubine (Margreth) and took them to Stakishari Police Station.

On his part, Dr. Erasmo Kuwendwa (PW5) who medically examined the Victim told the trial court that he found tear and injuries in the Victim's vagina which suggested that something big, hard and sharp penetrated the Victim's vagina. He, however, said he examined the Victim on 16/4/2012 because on the day she was taken to hospital she was at her menstrual period. D6871 D/SGT Joseph (PW6), who investigated the case told the trial court that the appellant confessed raping the Victim at 0200hrs after one Ramadhan who took the Victim to his residence had left hence he recorded his caution statement (exhibit P2).

In his defence, the appellant admitted Margreth being his concubine and the Victim being taken to his residence by one Ramadhan on 8/4/2012. He also admitted staying with the Victim for two days but since it was a single roomed house they slept together on the bed but Margreth

slept in between so as to separate them. He also admitted Ramadhan coming to his residence and having talks with the Victim and left. That the victim refused taking tea and complained of stomach pains and was crying because she was at her menstrual period. He said he told her to wait for Ramadhan who would give her bus fare so that she could leave the place but when Ramadhan came he had talks with her. That they slept and on 11/4/2012 in the morning, he heard peoples' voices demanding the door be opened and upon opening it, he saw Ten Cell Leader and Street Chairman who arrested him and took him to Stakishari Police Station on allegation of raping the victim despite telling them that he was staying with his mother, his concubine (Margreth) and the victim who was their visitor who was brought there by one Ramadhan. He said those leaders were not ready to listen to him particularly the street chairman with whom he had quarreled over the road construction during which the street chairman claimed that he had abused him.

For reasons to be apparent in the course of this judgment we find it worth to state that the defence evidence by Margreth was, to a large extent, identical to that of the Victim.

At the conclusion of the trial, the trial court was moved by the prosecution case and was satisfied that the charges were fully established against both the appellant and Margreth and it proceeded to convict and sentence them as indicated above.

In protesting his innocence before the High Court, the appellant's appeal bounced because the High Court, apart from being satisfied that the incident was sad, was satisfied that the victim gave a coherent and consistent evidence on what befell on her and found her to be a credible witness. It also found such evidence supported by the evidence of PW3 and PW4. Besides discounting the appellant's contention that the trial magistrate relied on the defence evidence by his co-accused (Margreth DW2) to convict him, the presiding Judge found such evidence to have been corroborated by the evidence of PW1, PW3, PW4, PW5 and PW6. In respect of the complaint on admission of the caution statement, the Judge was of the view that it could not be faulted because it was admitted without any objection or repudiation from the appellant. It, at the end, sustained the appellant's convictions and sentences meted by the trial court.

Still protesting his innocence, the appellant had earlier on filed a memorandum of appeal containing six (6) grounds of appeal which could conveniently be condensed into four grounds; **first**, the charge was defective for not citing the penalty section of rape; **Second**, there was change of trail magistrate without assigning reasons; **third**, the appellant's cautioned statement (exh. P2) and the medical report that is the PF3 (exh. P3) were wrongly admitted hence wrongly relied on to found conviction and **fourth**; the credibility of the prosecution evidence was not assessed and the prosecution evidence did not prove the charge beyond doubts.

Before us, the appellant came up with three supplementary grounds; **first**, *voire dire* examination was not conducted to the victim before giving evidence; **second**, the provisions of section 210(3) of the Criminal Procedure Act, Cap 20 R. E. 2002 (the CPA) were not complied with after the witnesses had completed giving their testimonies and **third**, the substance of the charge was not reminded to the appellant after he was found to have a case to answer and before he rendered his defence.

At the hearing of the appeal the appellant appeared in person and was unrepresented whereas the respondent Republic had the services of

Miss Annunciata Leopord, learned Senior State Attorney and Mr. Adolph Kulaya, learned State Attorney.

The appellant simply adopted his grounds of appeal and left it to the Court to determine the merits of appeal.

Miss Leopord strongly resisted the appeal. Although she conceded that the category of rape the appellant was charged with was not reflected in the charge sheet, she was quick to argue that that infraction is cured by the particulars of the offence and the evidence on record as was narrated by the prosecution witnesses and which the appellant heard them testifying. She contended that the particulars of the offence read to him were clear that he was being accused of having carnal knowledge of the victim who was aged 17 years on 9th to 11th April, 2012 at Majohe-Kivule. In addition, she argued that the evidence by the victim (PW1), her aunt (PW2), VEO (PW3), Street Chairman (PW4) and the doctor (PW5) sufficiently informed the appellant the accusations he was facing in court. To augment her assertions, she referred us to the Court's decision in the case of **Jamal Ally @ Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported). For that reason, she argued that the infraction is

curable under section 388 of the CPA and she urged the Court to dismiss that ground of appeal.

Arguing in respect of ground two of appeal that no reason (s) were assigned when the case changed hands between two magistrates during trial, Miss Leopard pointed out that all the witnesses' evidence were recorded by Hon. E. Mwakalinga, Resident Magistrate and is the one who composed and rendered the judgment to the appellant. She further argued that Hon. Kisoka and Hon. K. Mushi, Resident Magistrates, simply adjourned the case. She insisted that the case was tried by only one magistrate. He urged that ground be dismissed too for want of merit.

In respect of ground three of appeal, the learned Senior State Attorney readily conceded, that the cautioned statement (exh. P2) and the PF3 (exh. P3) were wrongly acted on because they were not read out to the appellant after being admitted as exhibit to enable him understand the contents thereof as was insisted by the Court in the case of **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017 (unreported). She accordingly urged the Court to expunge them from the record.

We now turn to the last ground (ground four) in the memorandum of appeal which is about credibility of the prosecution evidence not being assessed and whether the prosecution had proved its case beyond reasonable doubt. Even after the expunge of the appellant's cautioned statement (Exh. P2) and the PF3 (exh. P3), the learned Senior State Attorney was still insistent that the remaining evidence on record was sufficient to ground conviction. According to her, both courts below examined the evidence by the victim who gave a consistent and detailed account of what befell on her and even during cross-examination she maintained what she had told the trial court during examination in-chief. She argued that both courts were satisfied that the Victim was a reliable and trustworthy witness. And relying on the best evidence rule that the best evidence in sexual offence comes from the Victim, she argued that such evidence was sufficient to found conviction. To substantiate her argument she asked the Court to refer to the decision in the case of **Selemani Makumba vs R**, [2006] cited in the case of **Jamal Ally @ Salum vs Republic** (supra). That aside, she added, the courts below found that the Victim's evidence was corroborated by PW2, PW3, PW4 and PW5. Even Margreth, then 2nd accused, gave identical evidence to that of

the Victim hence supporting what the Victim had told the trial court, Miss Leopord added.

In her short but focused responses to the appellant's additional grounds, the learned Senior State Attorney had it that the trial magistrate did not conduct *voire dire* to the Victim (PW1) before she gave her testimony because she was 17 years old hence section 127(1) of the Evidence Act, Cap. 6 of the Revised edition 2002 (the EA) did not apply.

Regarding non-compliance with the provisions of section 210(3) of the CPA, Miss Leopord submitted that, in terms of the law, only the witness can lodge such a complaint for which the appellant was not among them.

In respect of the appellant not being reminded the charge before entering his defence, the learned Senior State Attorney argued that the record is clear at page 43 that such rights were explained to him and his responses were duly recorded.

For convenience sake, we shall discuss and determine the additional grounds of appeal first and then the grounds of appeal as were presented in the memorandum of appeal.

We shall start with the issue of conducting *voire dire* examination which is the first complaint in the appellant's additional grounds. In terms of section 127 of EA, a child of tender age could testify on oath or not on oath subject to conducting a competency test known in legal parlance as *voire dire.* However, sub-section (5) of section 127 of EA defines a child of tender age to mean a child whose apparent age is not more than fourteen years. In the instant case, the charge, the Victim's evidence and that of her aunt (PW2) clearly show that the victim was 17 years at the time she was raped and she testified in court. As was rightly argued by the learned Senior State Attorney, the requirement to conduct *voire dire* did not apply to the victim. That ground is, therefore, without basis and is hereby dismissed.

Coming to the second complaint that section 210(3) of the CPA was not complied with, like the learned Senior State Attorney, we agree with the appellant that the record bears out that the witnesses' testimonies were not read out to the witnesses after they had testified for them to make any comment. However, we hasten to say that the wording of that section is clear, as was rightly submitted by the learned Senior State Attorney, that the right to demand the evidence recorded be read out is

vested on the witness after he/she has completed testifying. More so, non-compliance with that provision is fatal when the authenticity of the record is at issue (see **Jumanne Shaban Mrondo vs Republic**, Criminal Appeal No. 282 of 2010 (unreported). In our case neither the witnesses nor the appellant had questioned the authenticity of the record that his or her evidence was mis-recorded to the prejudice of the appellant. This ground is, therefore, without merit and is dismissed.

The third complaint that the appellant was not reminded the charge before rendering his defence should not detain us much. It is shown at page 43 of the record of appeal that section 231 of the CPA was explained to the appellant and his responses were well captured that he would testify on oath and he had neither witnesses to call nor exhibits to tender. He was eventually affirmed and gave his defence. It does not occur to us that the appellant could have given such answers had the provisions of section 231 were not fully complied with as is reflected in the record of appeal (see **Chokera Mwita vs Republic**, Criminal Appeal No. 17 of 2010 (unreported). We find that to be sufficient compliance. This ground, too, crumbles and is dismissed.

We now revert to the grounds of appeal comprised in the memorandum of appeal.

As opposed to the appellant's complaint in the first ground of appeal, that the charge placed at the appellant's door did not contain the penalty section in respect of the rape offence, the charge sheet vividly indicates that section 131(1) of the Penal Code Cap 16 R. E. 2002 (the Penal Code), which is a penalty section, was cited. That complaint is baseless. However, the charge is problematic for not indicating the category of rape the appellant committed, for, it indicated section 130(1) only. In view of the alleged rape being committed to a girl aged 17 years old, as was rightly argued by Miss Leopord, the charge ought to have also cited section 130(2)(e) of the Penal Code. She was therefore right to concede to the existence of the anomaly in that context. In such circumstances the issue is whether the appellant was prejudiced and hence the anomaly occasioned injustice to the appellant. We entirely agree with the learned Senior State Attorney that the particulars of the offence and the evidence on record by the victim, PW2, PW3, PW4 and PW5 provided the appellant with sufficient information on the serious nature of the offence he was facing in court. The particulars of the offence quoted above are clear that on 9th- 10th April,

2012, the appellant had carnal knowledge of the victim who was 17 years old at Majohe- Kivule. Besides, the evidence by PW2, PW3, PW4 and PW5 sufficiently explained the circumstances under which the appellant was arrested, narration by the victim and the finding of bruises in the victim's vagina. These facts uploaded in the minds of the appellant with the substance of the accusations laid against him. In the circumstances, failure to indicate the category of rape the appellant committed in the charge sheet did not prejudice the appellant and the anomaly is curable under section 388 of the CPA as was succinctly stated in the case of **Jamal Ally @ Salum vs Republic** (supra). This ground of appeal fails and we dismiss it.

The second ground of complaint is on change of magistrates. We think its resolve is mostly dependent on the revelation of the record of appeal. We have examined the record. The typed proceedings at pages 23 and 32 bears out that Hon. Kisoka RM simply adjourned the hearing of the case the same way Hon. Mushi did at page 87. No trial was conducted by either of them by hearing and recording evidence of any witness. This complaint is, for that reason, baseless and is equally dismissed.

Of course we shall have very little to say in respect of exhibits P2 and P3 which were not read out to the appellant after they were cleared for admission. This forms the crux of the appellant's third complaint. That, as was rightly argued by the learned Senior State Attorney, no doubt, denied the appellant the right to know the contents thereof so that he could marshal or align his defence properly hence liable to be expunged from the record of appeal. We accept as good law the salutary principle of law laid down in **Issa Hassan Uki vs Republic** (supra) (see also **Jumanne Mohamed & 2 Others vs Republic**, Criminal Appeal No.534 of 2015 (unreported) and **Robinson Mwanjisi vs Republic and Three Others vs Republic**, [2003] TLR 218 that any document admitted as exhibit should be read out to the appellant otherwise they are liable to be expunged from the record. In the last case the Court outlined three stages to be followed by the trial court when dealing with a documentary exhibit that:-

> *"...Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

In the circumstances, the appellant's cautioned statement (exhibit P2) and the PF3 (exhibit P3) are hereby expunged from the record of appeal.

Lastly, we turn to consider the last (fourth) crucial issue whether the credibility of the prosecution evidence was assessed and the prosecution proved the charge beyond doubt.

We have found above that the appellant's cautioned statement (exh. P2) and PF3 (exh. P3) were improperly acted on and we expunged them from the record of appeal. Having expunged those two exhibits, the last ground, substantially, raises an issue whether there is still cogent evidence on record on the prosecution side to ground conviction.

It should be emphasized here that it is now settled law that the best evidence in sexual offences comes from the prosecutrix (the victim) (see **Selemeni Makumba vs R**, (supra).

In the present case it was not in dispute that the Victim was lured to the appellant's residence by one Ramadhan and she stayed there in a single bed-roomed house from 9th to 11th April, 2012. That the appellant and Margreth, who he alleged to be his concubine, and the Victim slept in

that room. It was admitted by the appellant that he and Margreth were arrested in the house from which the Victim emerged when PW3 and PW4 went there after being alerted by women who were fetching water. These facts were well appreciated by both courts below.

The crucial issue is whether the appellant had carnal knowledge of the victim. It is evident on the judgments of both courts below that the appellant's conviction was essentially grounded on the evidence by the Victim of the offences and the supporting evidence by PW2, PW3, PW4 and PW5. Both courts were convinced that the Victim was able to give a detailed account of the episode right from the time she was lured by a person who later turned out to be Ramadhan at the bus stand and taken to the appellant's residence at Majohe –Mvule. Both courts below also were moved by the Victim's story that the appellant used, at mid-night, to move down the bed where he slept with Margreth and have sexual intercourse with the Victim on the floor where she slept. Those facts, coupled with the testimonies of PW2, PW3, PW4 and the findings of the Doctor (PW5) were found by both courts below to have sufficiently established the case against the appellant. There is nothing justifying interference with the assessment of the prosecution evidence by both courts below.

We have also examined the evidence by the Victim. Her testimony on record tells it all about what used to happen while in the appellant's house, particularly late in the night:-

> *"After a short time 1st and 2nd accused went out and remained with the person who took me to that place in the house. That person forced me to take off my clothes I refused to undress my clothes what he did, he took me by force and undressed my all clothes and he put his penis into my vagina. I got very much painful for it was my 1st time to have sex. So it was so much painful. I was crying much. He raped me for another hour starting 19.00 hrs to 20.00 hrs. after that the said person who raped me left and 1st and 2nd accused entered into that room I was raped on the floor. When they enter into that room, they went and sleep on the bed and for me I slept on the floor. When it reached mid night at around 23.00 hrs 1st accused step out from the bed and came on the floor where I slept and forced me to undress my clothes and he put his penis into my vagina I got very much painful. 2nd accused was looking at us while I was raped. He also used one hour in rapping me. After he finished he went back on the bed and I remained on the floor till morning*

on 10/4/2012. When it reached morning hours, I called this sister (2nd accused) and asked her in which way she was living. 2nd accused replied to me that, she is living with her husband for 10 years. That is where I told him that I don't know anything concerning the man who took me to that place and so I asked her to take me to the cell leader but she told me she cannot take me to ten call leader without the permission from her husband. When it reached around 12:00 hrs 2nd accused went to call 1st accused in order to take me to ten cell leader after the permission. But what happened is that they took me into the room again and they came out and they closed the door of that room in that matter I remained alone in the room the 15:00 hours, They told me to go and take a shower. So I went at the bathroom I wash myself and well prepared for, I was told that my mother was on her way came to take me back home. So I took my bag waiting outside. But 1st accused told me by holding my hand that I should go in the room and wait for a little bit when I entered in room, that man who took me to that place come and enter into the room where with 1st and 2nd accused unfortunately 1st and 2nd accused went out of room

that led me to remain with only that man. The said person forced me to take off my clothes and put his penis again into my vagina. He did so on the floor I do remember. It was around 19:00 hrs. Then man who raped me went out and 1st and 2nd accused came in. I tried to ask these two to take me back home but they were telling me that, they cannot do so until the one who took me at that place allow then to take me home. So I spend another day in that room. During the midnight 1st accused came again and rape me for the second time.

While 1st accused was rapping me, 2nd accused was looking at us on the next date which was on Wednesday during morning hours at around 6.00 hrs I asked 1st and 2nd accused the permission of me to go at the wash rooms which were outside. When I went outside I saw the women who were fetching water so I went to them and ask for the assistance that I wanted them to take to ten cell leaders. While I was continuing talking with the said woman, 2nd accused came to me and she was listening what I was telling the said women. After she heard, she went back to that room I think she was informing 1st accused what I was telling the said women. After some minutes the 2nd accused

came and asked me to go back in that room I refused to go back 2nd accused went to report that is where 1st accused came to where I was and took me by force up to the room and told me that I have to be beaten. What 1st accused did was, he was showing me how he is beating 2nd accused. So he took a bed sheet and covered 2nd accused and started beating her. So he was doing so while I was looking at them..."

From the above excerpt, we entirely agree with the learned Senior State Attorney that the Victim gave a consistent and detailed account of incidents that happened in the appellant's residence. She ably explained how she was being raped by the appellant. In addition, PW5 who examined the Victim, in clear terms, told the trial court that he found bruises in the Victim's vagina. Both the trial court and the first appellate court analysed the prosecution evidence and came up with a conclusion that the appellant raped the Victim. For that reason, they cannot be faulted on how they arrived at their conclusions on the appellant's guilt. We therefore entirely agree with the learned Senior State Attorney that expunging the appellant's cautioned statement and the PF3 notwithstanding, the evidence by the Victim (PW1) and PW2, PW3, PW4 and PW5 would still be sufficient proof

beyond doubt that the appellant committed the offences with which he was charged and subsequently convicted. His defence that they all slept on one bed and Margreth separated them was highly implausible.

We think it not irrelevant to comment, albeit briefly, on the defence evidence by Margreth, the appellant's then co- accused. In the first place, we agree with the learned Judge that the appellant's conviction by the trial court was not based on such evidence. However, as hinted above, her defence evidence was substantially identical with that of the victim hence incriminating the appellant. We are alive of the legal position that a conviction of an accused person shall not be based solely on a confession by a co-accused (see section 33(2) of EA), but read closely, Margreth's defence amounted to not only an admission of the offence she was charged with but also neatly supported the Victim's story. Such admission, in our view, lends assurance to the Victim's evidence sufficient for sustaining a conviction.

We now turn to consider the issue we had hinted earlier on in this judgment whether it was proper for the appellant to be convicted of the offence in count one.

In the due course of composing the judgment we realised that the appellant and one Margreth were arraigned in court on 16/4/2012 facing a charge dated 16/4/2012 found at page 2 of the record of appeal. In that charge, the duo were jointly and together charged with the offence of conspiracy to induce unlawful sexual intercourse in the first count and in the second count, only the appellant was charged with the offence of rape. On 27/6/2012, the prosecution substituted another charge which is found at page 1 of the record of appeal in which only Margreth stood charged with the offence of conspiracy to induce unlawful sexual intercourse in the first count while the appellant stood charged with the offence of rape. The record further shows that the trial court, at page 87, found them guilty as charged, that is Margreth was convicted as charged in the first count and the appellant was convicted as charged in the second count. However, in imposing the sentences, at page 90 of the record of appeal, the trial magistrate indicated that:-

> *"**1st count**:-*
>
> *All two accused persons will have to serve in prison for 3 years.*
>
> ***2nd count**:-*

1st accused is liable to serve in prison for 30 years.

The terms of imprisonment for 1st accused has (sic) to run concurrent (sic).

It is so ordered."

The above order prompted us to inquire from the parties whether the trial magistrate was right. So as to accord them the right to be heard, we recalled them on 6/3/2020 and asked them to address us on that particular point only.

The appellant, being a layman, simply said it was not proper for him to be sentenced on the offence he was not charged with and left it to the Court to decide on the consequences thereof.

On her part, Miss Leopord argued that as the appellant was not charged and convicted of the offence in the first count, it was improper for him to be sentenced on that count. She accordingly urged the Court to invoke the powers of revision bestowed on the Court under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) to quash and set aside both the sentence meted on the appellant in respect of the first

count and the order that the terms of imprisonment in respect of the appellant should run concurrently.

With respect, we entirely agree with the learned Senior State Attorney that the record is clear that the appellant was not charged and convicted with the offence of conspiracy to induce unlawful sexual intercourse (1st Count). Section 312(2) of the CPA directs that the trial magistrate shall, in the case of a conviction, specify the offence the accused is charged with and the punishment to which he is sentenced. It provides that:-

> *"(2)* ***In the case of conviction*** *the judgment* ***shall specify the offence of which****, and the section of the Penal Code or other law* ***under which, the accused person is convicted and the punishment to which he is sentenced.****"*

From the underlined words it can be deduced that an accused person cannot be lawfully sentenced to any punishment unless and until he or she has been dully charged and convicted of a particular offence which should be explicit in the charge sheet and in the judgment.

Coming to the facts of the present case, it is common ground that the appellant was never charged and convicted of the offence of conspiracy to induce an unlawful sexual intercourse (1st count). He was therefore condemned to serve three years imprisonment for an offence he was not charged and convicted of. That was improper and occasioned injustice to the appellant.

We understand that the appellant did not appeal against his conviction on the first count but we wish to make it absolutely clear that an accused must, in all circumstances be charged and convicted before any sentence is passed on him or her. We think, being a layman, the appellant was under the impression that even after the new charge was substituted, he was still jointly charged with Margreth of the offence of conspiracy to induce an unlawful sexual intercourse (1st count). Unfortunately, this problem went unnoticed by the first appellate Judge.

We accordingly invoke the powers of revision bestowed on the Court under section 4(2) of the AJA to quash and set aside both the sentence of three (3) years imprisonment on the appellant in the 1st count and the order that the imprisonment sentences should run concurrently meted on

the appellant by the trial court and left undisturbed by the first appellate court.

All the above considered, save for the expunge of the appellant's cautioned statement and the PF3 and the quashing and setting side of the sentence on the 1st count and the order that the sentences should run concurrently, we dismiss this appeal. For avoidance of doubt, the appellant is to continue serving thirty (30) years imprisonment for the offence of rape.

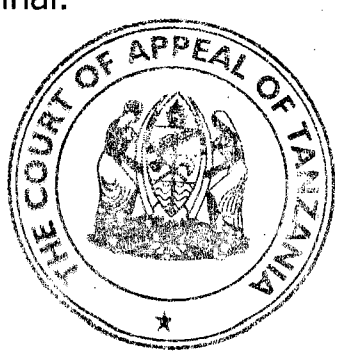
DATED at **DAR ES SALAAM** this 12th day of March, 2020

S. A. LILA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 16th day of March, 2020 in the presence of the appellant in person and Miss. Mwahija Ahmed, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL