**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)**

**CRIMINAL APPEAL NO. 401 OF 2017**

**AMOS ROBARE @ JAMES ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania, at Mwanza)**

**(Maige, J.)**

**dated the 31st day of March, 2017**
**in**
**Criminal Appeal No. 195 of 2016**

.....

## JUDGMENT OF THE COURT

19th & 23rd April, 2021

**MWAMBEGELE, J.A.:**

The District Court of Serengeti sitting at Mugumu convicted Amos Robare @ James, the appellant herein, of unnatural offence contrary to section 154 (1) and (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged in the particulars of the offence that on 27.08.2010 at about 09:00 hours at Mugumu Township within Serengeti District, Mara Region, the appellant did have carnal knowledge of a girl aged 10½ years against the order of nature. We shall henceforth refer to the victim as JR

to conceal her true identity. The appellant pleaded not guilty to the charge. After a full trial comprising five prosecution witnesses and the appellant himself for the defence, the appellant was found guilty, convicted and sentenced to a prison term of thirty years. His first appeal to the High Court was barren of fruit, for Maige, J. found the appeal with no scintilla of merit and dismissed it on 31.03.2017. Still wishing to vindicate his innocence, he has come to this Court on a second appeal seeking to assail the decision of the High Court on ten grounds of grievance. However, for reasons that will come to light shortly, we shall not reproduce them here. Neither, for the same reasons, are we going to consider them.

When the appeal was placed for hearing before us, the appellant appeared in person, unrepresented. Ms. Revina Tibilengwa, learned Senior State Attorney, Ms. Gisela Alex, learned State Attorney and Mr. Frank Nchanila, aiso learned State Attorney, joined forces to represent the respondent Republic.

When called upon to argue his appeal, the appellant, fending for himself did no more than adopt the ten ground memorandum of appeal

earlier filed. He thereafter opted to hear the response of the Republic after which, need arising, he would make a rejoinder.

At the very outset of her response, Ms. Tibilengwa supported the appeal. Her concession to the appeal was not pegged on the grounds of appeal but on a legal point to the effect that the court which tried the appellant had no jurisdiction to do so, for the appellant was a child who ought to have been tried by a Juvenile Court. Clarifying, she submitted that the charge sheet upon which the appellant was arraigned indicated that at the time of the commission of the offence he was 17 years of age. He was also 17 years of age when he testified on 14.11.2011 as appearing at p. 20 of the record of appeal. Ms. Tibilengwa went on to submit that the Law of the Child, 2009 (henceforth "the Law of the Child" or simply "the Act") came into force on 01.04.2010. Thus, she went on to submit, the Law of the Child was in force when the appellant is alleged to have committed the offence on 27.08.2010. Section 98 (1) (a) of the Act provides that a child shall be tried by a Juvenile Court and section 99 (1) (a) of the same Act stipulates that the trial of the child shall be conducted

in the presence of a Social Welfare Officer, she argued. In the case at hand, those relevant provisions were not complied with, she submitted.

In view of the above submissions, Ms. Tibilengwa contended that the proceedings of the trial court were a nullity. So were the proceedings before the first appellate court which originated from nullity proceedings. She thus implored us to nullify the proceedings of both courts below. She buttressed this proposition with our unreported decision in **Furaha Johnson v. Republic**, Criminal Appeal No. 452 of 2015 in which we were faced with an analogous situation and nullified the proceedings of both lower courts.

With regard to the way forward, Ms. Tibilengwa was hesitant to pray for a retrial in a proper court, for the appellant has been serving an illegal sentence for about nine years; since 12.07.2012 when he was convicted by the trial court. Also relying on **Furaha Johnson** (supra), she prayed that the appellant should be set at liberty in which we took that course of action.

Given the response by the Republic, the appellant had nothing in rejoinder. He simply asked to be released from prison.

Having considered the learned arguments by Ms. Tibilengwa in the light of the clear provisions of the Law of the Child, we find ourselves unable to disagree with her that the District Court of Serengeti had no jurisdiction to entertain the case against the appellant; a child.

The law of the Child was enacted with a view to, *inter alia*, making provisions for a child who is in conflict with law. The provisions of section 4 (1) of the Law of the Child defines a child as a person below the age of eighteen years. Section 97 thereof establishes a Juvenile Court for purposes of determining matters relating to children. We take the liberty to reproduce the section hereunder. It provides:

> *"**97.**-(1) There shall be established a court to be known as the Juvenile Court for purposes of hearing and determining child matters.*
>
> *(2) The Chief Justice may, by notice in the Gazette, designate any premises used by a primary court to be a Juvenile Court.*
>
> *(3) A Resident Magistrate shall be assigned to preside over the Juvenile Court."*

The Juvenile Court has been bestowed with powers to preside over criminal charges against a child who is in conflict with law. The provisions of section 98 of the Act read:

> *"98.-(1) A Juvenile Court shall have power to hear and determine-*
>
> *(a) criminal charges against a child; and*
> *(b) applications relating to a child care, maintenance and protection.*
>
> *(2) The Juvenile Court shall also have jurisdiction and exercise powers conferred upon it by any other written law.*
>
> *(3) The Juvenile Court shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults."*

The provisions of section 99 (1) (f) of the Act mandatorily require a social welfare officer to be present in the proceedings before a Juvenile Court against a child who is in conflict with law.

The facts of the present case fall in all fours with the facts in **Furaha Johnson** (supra), the case cited to us by the learned Senior State

Attorney. In that case, like in the present, the appellant was a child aged seventeen years. He was charged with the offence of rape in Moshi District Court it being alleged that he committed that offence on 18.10.2010. At the conclusion of the trial, the appellant was convicted as charged and sentenced to life in prison. His first appeal to the High Court (Mwingwa, J.) was futile. On an appeal to the Court, the State Attorney who appeared for the respondent Republic supported the appeal on the ground that the District Court of Moshi was not a Juvenile Court and therefore had no jurisdiction to entertain the matter. The Court held:

> *"The Court takes judicial notice of the fact that the District Court of Moshi which tried the appellant is not a Juvenile Court. Since the appellant at the time of his arraignment and trial was a child, he was not triable by the District Court, but a Juvenile Court. The trial court, therefore, lacked* ***jurisdiction ratione personae*** *to try the appellant. This alone rendered his trial a nullity. But even if the appellant had been tried by the appropriate court, the conduct of the trial in the absence of a social welfare officer would have equally rendered the trial a nullity."*

We are guided by the position we took in **Furaha Johnson** (supra). In the case at hand, it is indicated nowhere that the District Court of Serengeti was sitting as a Juvenile Court when presiding over the charge against the appellant. Neither has it been indicated anywhere in the record of appeal that the Social Welfare Officer was present during the proceedings. The proceedings before it were therefore a nullity. So were the proceedings before the first appellate court, for they stemmed from nullity proceedings.

For the reasons stated, we invoke our powers of revision bestowed upon us by the provisions of section 4 (2) of the Appellant Jurisdiction Act, Cap. 41 of the Revised Edition, 2019 to nullify the proceedings before the trial court. We aiso nullify the proceedings before the first appellate court which emanated from nullity proceedings. In consequence whereof, we quash the judgment of the trial court as well as that of the first appellate court and set aside the sentence meted out to the appellant by the trial court and upheld by the first appellate court. As the appellant has served an illegal sentence for nine years or thereabouts and has been behind bars for about eleven years since his arraignment on 30.08.2010, we agree

with Ms. Tibilengwa that ordering a retrial before a court with jurisdiction will leave justice crying. In its stead, we think, setting the appellant at liberty, as we hereby do, will leave justice smiling. We thus order the immediate release of the appellant Amos Robare @ James from prison custody unless lawfully held there for some other lawful cause.

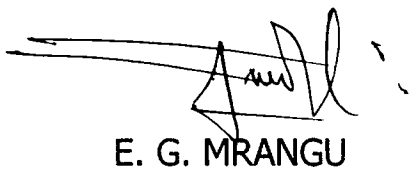
**DATED** at **MWANZA** this 22nd day of April, 2021.

R. K. MKUYE
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

The judgment delivered this 23rd day of April, 2021 in the presence of the appellant in person, and Miss Revina Tibilengwa, 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**