IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 353 OF 2019

AMAN ALLY @ JOKA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)
(Kente, J.)

dated the 29th day of July, 2019
in
DC Criminal Appeal No. 32 of 2018

....

JUDGMENT OF THE COURT

23rd April & 4th May, 2021

NDIKA, J.A.:

The appellant, Aman Ally @ Joka, was convicted of rape and unnatural offence before the District Court of Iringa ("the trial court") and was sentenced to twenty-five years imprisonment on each count, both sentences running concurrently. His first appeal against the convictions and sentences was dismissed by the High Court of Tanzania at Iringa, hence this second and final appeal.

It is essential to provide, at the outset, the salient facts of the case. The prosecution produced six witnesses along with five exhibits to establish the

two counts. As regards the first count, it was alleged that the appellant, on an unknown date in March, 2012, at the bus terminal area within Iringa Municipality in Iringa Region, had carnal knowledge of a girl aged eleven years, who, for the sake of protecting her privacy, we will refer to by the pseudonym "ABC" or simply PW3, the moniker by which she testified at the trial. The accusation on the second count was that the appellant, on an unknown date in March, 2012, at the same place had carnal knowledge of ABC against the order of nature.

The facts of the case were succinctly summarized by the learned appellate Judge as follows: PW1 Nora Cosmas Luhwago, the mother of the victim, told the trial court that sometime in March 2012 she found her daughter with a toy laptop. She became suspicious and enquired from ABC as to where she had got it. ABC replied that she had acquired it jointly with her friend, who for protecting her privacy we shall refer to as "IC", using the pocket money which she (PW1) used to give her for use at school. PW1 was unsatisfied and so, she sent her daughter to her friend, PW3 Evona d/o Mwanyika, who happened to be a police officer, for questioning. On being pressed as to the source of the money, ABC let the cat out of the bag by revealing to PW1 and PW3 that the appellant had all along been offering her money in exchange for

sexual favours. Upon that revelation, the appellant was pursued and arrested at his shop by PW2 and police officer No. G.6257 DC Edward (PW5) on 13th June, 2012. PW1 also told the trial court how the appellant attempted to bribe her so as to drop the charge and settle the matter amicably. She lodged a complaint against him resulting in the appellant being trapped, arrested, prosecuted and convicted for the corrupt act aimed at perverting the course of justice.

PW2's evidence dovetailed with that of PW1 on how ABC revealed what had befallen her at the hands of the appellant. She adduced further that on 13th June, 2012 at the police station, she interrogated the appellant who, then, confessed to the offences in a cautioned statement she recorded. The said statement, however, was not tendered at the trial. PW2 recalled further that on 14th June, 2012 she and PW5 searched the appellant's business premises from which they retrieved three pieces of blue canvas (Exhibit P.4) in the presence of a local leader, one Aidan Kanisius Mvula (PW4). The search order/certificate of seizure was admitted as Exhibit P.3. Apart from being signed by PW2, PW4 and PW5, that certificate bears the signature of the appellant.

The most potent tale came from ABC, who was 11 years old at the material time as per her birth certificate (Exhibit P.1). She narrated how the appellant by the lure of money, seduced and abused her on several occasions. The appellant would stop her as she was on the way to school, conversed with her and handed her money ranging from TZS. 5,000.00 to TZS. 26,000.00 on the first three occasions. On the fourth occasion, he intercepted and led her through a small door into a small room behind his shop where there were three pieces of blue canvas (Exhibit P.4) on the ground. There and then, he allegedly undressed her and himself, applied some lubricant on her vagina and anus and then inserted his male member into her vagina and later her anus. When he was through, he threatened to kill her and her mother should she spill the beans. On yet another occasion, he called her, repeated what he did to her on the previous occasion and gave her TZS. 25,000.00. There was another sexual encounter, the third time, after which the appellant gave her TZS. 5,000.00. a few days later he handed her TZS. 45,000.00, which she used to buy a toy laptop. It turned out that this miniature laptop became PW1's cause of concern culminating in the appellant's arrest and trial.

Dr. Lucy Augustine Mbando (PW6), a Medical Officer working at Iringa Regional Officer at the material time, examined ABC on 14th June, 2012. She

presented her findings in a report (PF.3 – Exhibit P.5), stating that the victim had no hymen and that her sphincter muscles looked relaxed. She concluded that ABC must have had "sexual intercourse many times."

When he was put to his defence, the appellant acknowledged his manner of arrest on 13th June, 2012 as narrated by PW2 and PW5 as well as the detail that his shop was searched on the following day and the three pieces of canvas (Exhibit P.4) seized. However, he denied to have sexually abused ABC, saying that had he done so even once, given his bulky physique, ABC would have been seriously hurt and incapacitated such that she would not have been able to go to school. He revisited the evidence of the prosecution witnesses seeking to punch holes in it that ABC was shown to have been used to sexual intercourse and that it was possible she was raped by some other man. He blamed his predicament on the police making him a sacrificial lamb to mask their failure to establish the identity of the real ravisher. He also recanted giving any confessional statement at the police station.

In his judgment, the learned trial Resident Magistrate (Hon. G.N. Isaya) was impressed by the evidence of ABC (PW3) supported by the medical evidence (as per PW6 and Exhibit P.5) that ABC was raped and sodomized. As to who the culprit was, the learned trial magistrate found it proven, based on

ABC's account, that the appellant was, indeed, the perpetrator of the crimes. For clarity, we wish to extract from the trial court's judgment, at page 132 of the record of appeal, thus:

> *"... I have studied the evidence of PW3 (victim). She gave evidence in elaborate manner and boldly. The account of [the] incidences on how the accused started making friendly environment to a child by giving her money and turned to be evil tactics later is nothing but intelligent account and trustworthy evidence from PW3 who found herself trapped within the strong net of a rapist. PW3 in her evidence, did mention the rapist, one 'Joka'.... She located the shop of the rapist at bus stand without a mistake. She described the presence of three canvases in the room (Exh. P.4). All these point to the accused as accurately identified by the victim."*

The learned trial magistrate went on reasoning that:

> *"... the evidence of PW3 who was 11 years old when she was raped and her detailed explanation on how the accused lubricated her vagina with oil and penetrated his penis into her vagina, proceeded to play sex till he quenched his desire, on three different occasions is nothing but rape to a child of tender years."*

Directing his mind to section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the EA") and this Court's decision in **Joseph John v. Republic**, Criminal Appeal No. 267 of 2012 (unreported), the learned trial magistrate accepted and acted on ABC's evidence on the principle that true evidence of rape must come from the victim herself. On that basis, the trial court found the charge of rape proven against the appellant. In the same vein, the court found it proven that the appellant inserted his male member into the victim's anus after he had raped her. This finding was based also on the victim's testimony and supported by the PF.3 (Exhibit P.5) that her sphincter muscles in the anus got relaxed due to sexual acts. The conclusion on the second count was equally that the appellant had carnal knowledge of ABC against the order of nature.

On the first appeal, the learned appellate Judge upheld the trial court's findings after analyzing the evidence afresh. In particular, he found it proven, mainly based on ABC's testimony and PF.3 (Exhibit P.5), that the appellant raped and sodomized ABC. The learned appellate Judge considered the appellant's defence but rejected it.

The appellant has predicated the appeal on ten grounds of complaint as follows: **one**, that Feleshi, J.'s order for recommencement of the trial was not

complied with; **two**, that the evidence of PW1, PW2, PW3 and PW5 was insufficient to found the convictions; **three**, that the prosecution evidence was not properly analyzed; **four**, that the evidence of PW2 was fabricated; **five**, that PW2, a police investigator of the case, who was related to the victim (PW3), concocted evidence; **six**, that the medical evidence based on PW6 and PF.3 (Exhibit P.5) did not prove the ingredients of the alleged offences; **seven**, that no DNA or STD test on the appellant was introduced to corroborate the victim's medical test results; **eight**, that the appellant was not reminded of the charges before he was put to his defence; **nine**, that the appellant's defence was disregarded; and **finally**, that the victim did not raise any alarm during the sexual encounters making it improbable that the offences were actually committed.

At the hearing before us, the appellant, who prosecuted his appeal remotely from Iringa Prison via a video link, adopted his grounds of appeal and reserved his right to rejoin, if necessary. For the respondent, Mses. Blandina Manyanda and Veneranda Masai, learned State Attorneys, strongly resisted the appeal.

We wish to state at the outset that this being a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE

2019 ("the AJA"), to deal with matters of law only but not matters of fact. However, in consonance with our decision in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a litany of decisions that followed, the Court can intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

We propose to deal, at first, with the grounds of appeal alleging procedural irregularities. Here we have in mind the first and eighth grounds. Beginning with the first ground, the complaint is that Feleshi, J.'s order for recommencement of the trial was not complied with.

At the forefront, it is on record that the appellant's initial trial for the two offences commenced on 15th October, 2012 before Hon. F.S.K. Lwila – Principal District Magistrate, who having recorded the testimonies of four prosecution witnesses, was for an undisclosed reason unable to continue with the trial. On 5th November, 2013, Hon. R.B. Massam – Senior Resident Magistrate took over but she was subsequently succeeded by Hon. R.R. Kasele – Senior Resident Magistrate on 30th January, 2014 who concluded the trial. Hon. Kasele

delivered his judgment on 1st June, 2016 in the absence of the appellant who had then absconded while out on bail. He found the appellant guilty of rape. Accordingly, he convicted him of the offence and sentenced him *in absentia* to thirty years' imprisonment.

On appeal by the appellant to the High Court at Iringa, Feleshi, J. (as he then was) found in his judgment dated 16th August, 2017 that when Hon. R.B. Massam took over the trial she did not comply with the dictates of section 214 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA"), requiring the succeeding magistrate to notify the accused of his right to comment on whether or not he wished the witnesses who testified before her predecessor be recalled. On account of this violation, Feleshi, J. (as he then was) nullified the trial court's proceedings that followed after Hon. R.B. Massam's succession as well as Hon. Kasele's judgment. In consequence, the learned Judge ordered that the matter be remitted to the trial court for recommencement of the hearing, before another magistrate of competent jurisdiction, from where Hon. R.B. Massam took over the trial.

The appellant now complains that the aforesaid order by Feleshi, J. (as he then was) was not complied with. For the respondent, Ms. Manyanda

refuted that claim. She referred us to page 84 of the record of appeal, contending that the order was complied with.

Having examined the part of the trial court's proceedings referred to us by Ms. Manyanda, we find without demur that the complaint at hand is without substance. It is clear that when the appellant appeared before Hon. G.N. Isaya on 11th October, 2017 for recommencement of the trial, the learned trial magistrate referred to the consequential order made by Feleshi, J. (as he then was) and addressed the appellant in terms of section 214 (1) of the CPA. In response, the appellant expressed his wish that the trial should start afresh with all the prosecution witnesses being recalled. Certainly, it was within the successor magistrate's absolute discretion to decide whether to continue with the trial from where Hon. Massam took over or to start the trial afresh, if necessary. In the exercise of this discretion, Hon. Isaya granted the appellant's wish. Accordingly, he resummoned the witnesses and recommenced the trial. In the premises, we find the first ground of appeal lacking in merit.

The appellant claimed in the eighth ground of appeal that he was not reminded of the charges against him for his plea to be retaken before he was put to his defence. Ms. Manyanda countered, rightly so, that the grievance was baseless because the law does not provide any such requirement. We are

unaware of any procedure requiring the presiding magistrate to retake the accused's plea immediately before he presents his defence. As long as the presiding magistrate had addressed the accused of his rights in terms of section 231 (1), (2) and (3) of the CPA and that the accused made his election accordingly on the manner he will present his defence, the case must proceed for his defence.

Admittedly, we are aware of a practice, mostly among the magistracy, for reminding accused persons of the charges against them before they take the witness stand but we hasten to stress that it is not a legal requirement. Indeed, in the instant appeal, it is evident at page 116 of the record of appeal, that immediately before the appellant took the witness stand the presiding magistrate took pains to remind him of the charges against him as follows:

> *"Court: The charge is reminded over (sic) to the accused person who is required to plead thereto:*
>
> *Accused: 1st Count: "Si kweli"*
>
> *2nd Count: "Si kweli"*
>
> *Court: Entered as a plea of not guilty to the charges.*
>
> *Sg: G.N. Isaya – RM"*

As we have said, the course taken by the presiding magistrate was unnecessary. In any event, however, we find the eighth ground of appeal meritless. It stands dismissed.

Having disposed of the two grounds above, we now turn to the rest of the grounds of appeal raising evidential issues. We propose, at first, to deal with the fourth and fifth grounds of appeal together before addressing, again conjointly, the second, third, sixth, seventh and tenth grounds. We shall finally round off with the ninth ground of appeal.

The common thread in the fourth and fifth grounds of appeal is that PW2, who was a police investigator of the case and a close relative of the victim, fabricated the case against the appellant.

Admittedly, it is on record that PW2 was godmother to the victim and that, at the request of PW1, she handled the initial enquiries into the matter after ABC was spotted with the miniature laptop. The enquiries led to the revelation that culminated in the appellant's arrest and prosecution. It is also on record that PW2 participated in the arrest and interrogation of the appellant. Apart from allegedly recording the appellant's cautioned statement (which was not tendered in evidence), she supervised the search at the appellant's shop as the executing officer.

Addressing us on the complaint at hand, Ms. Manyanda initially supported the learned trial magistrate's finding, at page 131 of the record of appeal, that PW2 was not by law prevented from investigating and testifying on a matter involving a close relative or friend. On being probed by the Court as to likelihood of conflict of interest, she acknowledged that taking into account the relationship between PW2 and the victim's family as well as her role in the investigation of the case, PW2 was unlikely to be a wholly credible witness. However, she added that the victim's evidence was cogent to prove the charged offences on its own independently of that PW2.

On our part, we agree with Ms. Manyanda that the close relationship between PW2 and the victim's family as well as the multiple roles she discharged in the case rendered her likely to be conflicted. Her impartiality and credibility in the matter was likely to be brought to question. In **Tabu Nyanda @ Katwiga v. Republic**, Criminal Appeal No. 220 of 2004; and **Shani Kapinga v. Republic**, Criminal Appeal No. 337 of 2007 (both unreported), the Court deprecated multiple roles in the investigation, interrogation and recording of statements of suspects because such officers may not be impartial, objective witnesses. However, while we find that PW2 was not a wholly impartial and objective witness, we find no semblance of proof that she

fabricated the case against the appellant. The scant cross-examination the appellant subjected her to, as shown at page 96 of the record of appeal, brought up little, if not nothing. At any rate, the case mostly hinged on the testimony of the victim as well as the medical evidence as opposed to PW2's testimony. As a result, we find the two grounds of appeal at hand unmerited.

We now turn to the second, third, sixth, seventh and tenth grounds of appeal whose thrust is the complaint that the evidence on record was insufficient to found the convictions.

Addressing us on the above grounds, Ms. Manyanda argued that the testimonies of ABC as well as PW1, PW2 and PW5 were not contradictory but consistent and that, on their totality, they proved the offences. She posited that of all evidence, that of the victim, given in graphic details, was the best evidence as held by the Court in the case of **Joseph Leko v. Republic**, Criminal Appeal No. 124 of 2013 (unreported), citing its earlier decision in **Seleman Makumba v. Republic**, Criminal Appeal No. 94 of 1999 (unreported). Coming to the medical evidence as adduced by PW6 and supported by PF.3 (Exhibit P.5), counsel argued that the victim was proved to have had vaginal and anal sex on several occasions as she had no hymen and her sphincter muscles looked relaxed. Referring to page 10 of the typed

decision of the Court in **Mkumbo Hamisi v. Republic**, Criminal Appeal No. 24 of 2007 (unreported), Ms. Manyanda submitted that a medical report only serves as proof of sexual intercourse but it does not prove that there was rape. On the absence of other corroborating medical evidence in form of DNA/STD test results on the appellant, the learned state counsel countered that there was no legal requirement for use of such evidence. She restated that ABC's evidence as well as the medical evidence tendered at the trial were sufficiently cogent. She added that the claim that ABC did not raise any alarm during the sexual encounters with the appellant was immaterial in view of the circumstances of the matter.

In a brief rejoinder, the appellant contended that he did not give the victim any money and that being a hefty man he could not possibly have sex with the victim, a little girl. He bewailed that the victim did not report the crimes promptly. He also complained that there was no proof of the unnatural offence.

We wish to restate that based on the evidence on record, the prosecution case mostly hinged on the evidence of ABC as well as the medical evidence in support thereof. We have reviewed this body of evidence in the light of the concurrent findings of the courts below. It is clear that the said courts gave

full credence to ABC's testimony as she narrated about her painful ordeal at the hands of the appellant, so graphically and in a candid manner. Both courts took the view that her evidence was clear, spontaneous and reliable. In analyzing the evidence both courts directed themselves to the primordial consideration that the best evidence of a sexual offence must come from the victim in consonance with the dictates of section 127 (7) of the EA (now section 127 (6) following amendment of section 127 by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016) – see also **Seleman Makumba** (*supra*). We feel compelled to excerpt a part of ABC's testimony, at page 99 of the record of appeal, as she narrated about the first occasion on which the appellant allegedly abused her sexually after he had taken her into the small room next to his shop:

> *"He asked me not to worry since nobody will see me. He undressed me. He undressed himself too. He took some oil and lubricated me in my vagina and anus. He, thereafter, took his erected penis into my vagina where he played sex and into my anus. When he finished he threatened to kill me and my mother if I said to anybody. I did not like to get killed or my mother to get killed. So, I did not tell anybody. Thereafter, I went to school."*

Like the learned appellate Judge, we take the view that there was no possibility of mistaken identity by ABC of real culprit or that the allegations were fabricated. We also share the learned Judge's opinion that it was more significant and assuring that the victim mentioned the appellant before he was arrested and that her description of the appellant's business premises as well as the small room in which the sexual offences were committed matched squarely with what was found by PW2 and PW5 upon search. That the appellant was the ravisher that abused ABC is clearly unassailable.

It was the appellant's contention that PW6's testimony and PF.3 (Exhibit P.5) did not prove the ingredients of the alleged offences. This argument is clearly flawed. As rightly argued by Ms. Manyanda, PW6 (the medical witness), adduced, as per the PF.3, that she found that the victim had no hymen and her sphincter muscles looked relaxed. This was indicative that the victim had vaginal and anal sex on several occasions. The record is clear that the appellant did not contest this piece of evidence when he cross-examined PW6.

We also find untenable the claim that no DNA or STD evidence on the appellant was introduced to corroborate the victim's medical test results. We endorse the learned state counsel's submission that there is no legal requirement for use of such evidence. In any event, ABC's evidence as well as

the medical evidence tendered at the trial sufficiently established that the victim was sexually abused.

The contention that the victim did not raise any alarm and that she delayed reporting the offences making it improbable that the offences were actually committed is equally beside the point. Her silence and delay do not affect her credibility as a witness or undermine the charges. Her reticence was a result of her having been preyed on by the appellant who then seduced, trapped and dominated her. Apart from her succumbing to giving sexual favours for the lure of money, she could not obviously report the matter to anybody for the fear of a reprisal; that the appellant would make good on his threat to kill her or her mother. At this point, we find no merit in the second, third, sixth, seventh and tenth grounds of appeal. We dismiss them all.

In the ninth ground of appeal, the appellant criticized the courts below for disregarding his defence. It should be recalled that his defence was essentially that the case was a frame-up and that the prosecution witnesses were not believable.

On her part, Ms. Manyanda initially referred us to the trial court's judgment, at pages 129, 130, 131 and 133 of the record of appeal, to demonstrate that the trial court duly considered the appellant's defence. On

being probed by the Court, she conceded that the said portions of the judgment showed that the learned trial magistrate only considered the defence fleetingly. Indeed, it is too plain for argument that the learned trial magistrate gave no more than a cursory consideration of the appellant's defence. That was a serious misdirection. In **Hussein Iddi and Another v. Republic** [1986] TLR 166, we stated that:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

However, Ms. Manyanda quickly put in a rider that the learned appellate Judge stepped in on the first appeal and addressed the said misdirection as he considered the appellant's defence in detail but rejected it.

Surely, the Court has underscored numerous times the duty of the first appellate court to re-evaluate the evidence as a whole so as to come up with its own findings of facts – see, for example, **Siza Patrice v. Republic,** Criminal Appeal No. 19 of 2010; **Maramo s/o Slaa & 3 Others v. Republic,** Criminal Appeal No. 246 of 2011; and **Elinema Kibo v. Republic**, Criminal Appeal No. 138 of 2013 (all unreported). We agree with Ms. Manyanda that in the instant appeal, the learned appellate Judge dutifully discharged his

obligation as he fully considered the appellant's defence and found it to have not shaken the prosecution case. The relevant part of his reasoning and finding is at page 157 of the record of appeal thus:

> *"Moreover, I cannot find any merit in the appellant's complaint that the case against him was a mere fabrication and that he was made a sacrifice after the investigation team failed to establish the identity of the real culprit. I do not see any substance in the appellant's complaint as otherwise one may ask, as what grudge was there for all the prosecution witnesses to set him up in this horrendous crime? For my part, I see none. Instead, the inescapable truth is that the prosecution case was so watertight as to leave the appellant theorizing on how he could convince the trial court to let him get off-the-hook."*

We find no basis to disturb the above reasoning and finding. In the result, the ninth ground of appeal fails.

Based on the foregoing analysis, we uphold the concurrent findings by the courts below that the appellant raped and sodomized ABC. He was justly convicted of rape and unnatural offence.

Finally, we are enjoined to determine the legality and propriety of the sentences imposed on the appellant.

As we stated earlier, the appellant earned a custodial term of twenty-five years on each count, both of which were ordered to run concurrently. The first appellate Judge sustained the sentences. There is no denying that these sentences are below the prescribed minimum penalties. Beginning with rape, which was laid under section 131 (1), (2) (e) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) ("the Penal Code"), since the victim was an eleven years old girl the relevant penalty provision was section 131 (1) of the Penal Code stipulating as follows:

> *"131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and* ***in any case for imprisonment of not less than thirty years with corporal punishment****, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person."* [Emphasis added]

As for the unnatural offence contrary to section 154 (1) (a) of the Penal Code, the prescribed penalty is life imprisonment where the victim is a child

below the age of eighteen years. For ease of reference, we excerpt the said provisions as follows:

> *"154.-(1) Any person who-*
>
> *(a) has carnal knowledge of any person against the order of nature; or*
>
> *(b) has carnal knowledge of an animal; or*
>
> *(c) permits a male person to have carnal knowledge of him or her against the order of nature,*
>
> *commits an offence, and is liable to imprisonment for life and in any case to imprisonment for a term of not less than thirty years.*
>
> *(2) Where the offence under subsection (1) is committed* ***to a child under the age of eighteen years the offender shall be sentenced to life imprisonment.****"* [Emphasis added]

At the hearing, we invited the parties to address us on the legality and propriety of the sentences imposed by the trial court and affirmed by the first appellate court.

The appellant, on his part, argued that the trial court reduced the sentences to twenty-five years imprisonment taking into account the time he had served in prison prior to his retrial. Certainly, it is on record that when sentencing the appellant, the learned trial magistrate is shown at page 134 of

the record of appeal to have considered "the time which has been spent by the convict in prison."

Conversely, Ms. Manyanda submitted that the sentences imposed were illegal and that the learned appellate Judge did not address his mind to the issue. She contended that all the learned trial magistrate had to do was to impose the prescribed minimum penalty for each offence. She thus urged us to invoke our powers under section 4 (2) of the AJA to correct the anomalies.

On our part, we are in agreement with Ms. Manyanda that the two sentences were patently illegal because they were below the prescribed mandatory penalties. We entertain no doubt that the learned trial magistrate had no power under the law to grant any remission to take into account the time served earlier. All he needed to do was to impose the prescribed mandatory penalties. It is unfortunate that this matter escaped the attention of the learned appellate Judge on the first appeal. In the premises, we invoke our revisional powers pursuant to section 4 (2) of the AJA and proceed to set aside the two illegal sentences and substitute for them the sentence of thirty years imprisonment with twelve (12) strokes of the cane, on the first count, and life imprisonment, on the second count, with effect from the date of the

conviction by the trial court. Needless to say, the two sentences shall run concurrently.

In sum, we find the appeal lacking in merit and proceed to dismiss it in its entirety. Nonetheless, the appellant shall serve the enhanced sentences stated above.

It is so ordered.

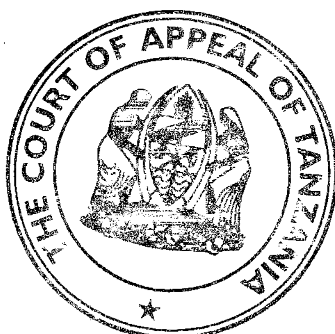
DATED at **IRINGA** this 4th day of May, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 4th day of May, 2021 in the presence of the Appellant linked via video conference at Iringa Prison and Ms. Veneranda Masai, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL