IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 520 OF 2021

ABDALLAH ALLY MBIKU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara

(Dyansobera, J.)

dated the 2nd day of November, 2020

in

Criminal Appeal No. 58 of 2020

.....

JUDGMENT OF THE COURT

15th & 29th March, 2023

MWANDAMBO, J.A.:

The appellant, Abdallah Ally Mbiku was aggrieved by a decision of the High Court sitting at Mtwara dismissing his appeal against conviction and sentence on the offence of incest entered by the District Court of Kilwa.

The prosecution case was predicted upon allegations that the appellant had sexual intercourse with her daughter whom we shall be referring to as KXX or the victim in this judgment. The allegations constituted an offence known as incest contrary to the Penal Code. In

the alternative the appellant was charged with rape contrary to section 130 (1) and (2) (e) also of the Penal Code. He pleaded not guilty to both count.

The appellant's arraignment resulted from facts which are fairly simple. KXX and the appellant are daughter and father respectively. Apparently, KXX's mother and the appellant had long parted ways but KXX stayed with her father, step mother and her step sisters and brothers. It was common ground that KXX was asthmatic who required regular attention and medication. According to KXX, who was 15 years old and in standard V, on 21/08/2019, in the afternoon, the appellant told her that, he was following up some local medication further for her from traditional healer.

Afterwards, the appellant returned home with some tree leaves meant to be the medication procured from the local medicine man with instructions to put them in a bowl and place the bowl beneath his bed. At that time, KXX's step mother was not present. Moments later, the appellant left in search for another medicine leaving instructions to KXX to sleep in his bedroom ready for administration of the medicine later in the night. KXX allegedly obliged and retired to her father's bedroom but left the door open obeying the instructions from her father. The appellant

is said to have returned home around 23:00 hours and immediately thereafter, he undressed himself, sat on the bed within moments he asked KXX to undress which she allegedly obliged and started administering the medicine on her hands and head before doing so onto the parts of the vagina by inserting his manhood. Despite the painful encounter experienced by KXX and her resistance, the appellant is said to have prevailed and continued to enjoy sexual intercourse with his daughter. After satisfying his sexual urge, the appellant asked KXX to leave the room and clean herself. The record reveals that KXX left to her aunt; Asha Mbiku to break the awful news that very night.

Later the following day, KXX broke the news to her elder aunt by the name of Asia Mbiku (PW2). Over a month later, the appellant was arrested by Millitia men and subsequently charged in the District Court as aforesaid. Thereafter, the trial ensued in which the prosecution produced six witnesses. These comprised KXX (PW1), two of her aunties (PW2 and PW3), Hemedi Abdallah Mkwera (PW4), a Division Officer and Clinical Officer PW5 and PW6 respectively. The appellant's defence was that the case against him was framed up by his two sisters following his refusal to yield to their demand for the sale of a coconut and cashew trees shamba left behind by their parents and that explained the delay in arresting him.

All the same, the trial court found the appellant's defence too insignificant to shake the case for the prosecution which it found to be sufficiently proved to the required standard. It convicted the appellant on both counts and sentenced him accordingly with 30 year's imprisonment each running concurrently.

The High Court, sitting at Mtwara, determined the appellant's appeal predicated upon six grievances all boiling down to the complaint that the trial court convicted and sentenced him on weak evidence which did not prove the charge against him beyond reasonable doubt. Dyansobera, J who heard the appeal found no merit in any of the complaints and dismissed them all and ultimately the entire appeal. Nonetheless, as the second count on rape was preferred in the alternative to incest, the High Court reversed the conviction and sentence on that count sustaining conviction and sentence on the principal count of incest. Still aggrieved, the appellant has preferred the instant appeal upon a memorandum of appeal comprising five grounds and a supplementary memorandum with equal number of grounds. At the commencement of appeal, the appellant who appeared in person, abandoned ground one in the memorandum of appeal challenging conviction and sentence on the alternative count of rape. He similarly abandoned the first ground in the

supplementary memorandum faulting the lower courts for holding that the prosecution failed to discharge its burden of proof cast upon it by section 110 (1) of the Evidence Act because the health expert failed to prove whether the victim's hymen was perforated or not.

Ms. Jacqueline Werema, learned State Attorney who appeared during the hearing of the appeal addressed the Court in support of the appeal arguing that, the evidence upon which conviction was grounded was shaky and incapable of proving incest. This is so, the learned State Attorney argued, the evidence from the victim of the offence was not credible the more so because, although PW1 (the victim) reported the incident to her two aunties shortly after its occurrence, there is no explanation what transpired thereafter considering the delay in arresting the appellant. The learned State Attorney pointed out also that there was no evidence whatsoever as to the person who reported the incident to the Police and how PW5; the Divisional Officer got hold of the information that he acted upon in arresting the appellant on 3/10/2019 more than one month after the occurrence of the incident. Ms. Werema impressed upon us that, since the victim of the offence had a doubtful credibility, her evidence required corroboration by independent evidence which is conspicuously missing. That was so considering that, PW6, a clinical

officer who examined the victim on 04/10/2019, found neither bruises on her vagina nor evidence of penetration since the examination was done long after the lapse of 72 hours of the incident. She reinforced her argument on credibility and the need for corroborative evidence on the Court's decision in **John Ngonda v. Republic,** Criminal Appeal No 45 of 2020 (Unreported).

Before winding up her address, the learned State Attorney summoned our attention to page 17 of the record of appeal showing that the trial court omitted to address the appellant on the substance of the charge and his right to give evidence on or not oath or affirmation and to call witnesses as required by section 231(1) of the Criminal Procedure Act (the CPA). The learned State Attorney urged that; the noncompliance was fatal to the appellant's conviction.

Not surprisingly, upon the respondents Republic's concession, the appellant seized the moment to urge the Court to release him from custody.

Since the matter that the learned State Attorney to which she drew our attention has a bearing on the fairness of the trial and the ultimate conviction and sentence, it behoves us to address it and see whether the

alleged noncompliance did indeed occur and if so, its consequences to the appellant's conviction.

It is plain from the record that after the closure of the prosecution case, the trial Resident Magistrate made a ruling as required of him by section 230 of the CPA that the prosecution evidence had made out a case warranting the appellant to defend. This the learned trial Resident Magistrate did perfectly well. However, having ruled that the appellant had a case to answer, the trial court had another duty cast upon it by section 231(1) of the CPA; to address him on the substance of the charge and inform him of his right to give evidence on or not oath or affirmation on his own behalf and to call witnesses in defence. The record is conspicuously silent on this requirement which can only mean that the appellant was not addressed and informed of his rights before he could be called upon to enter defence in the absence of any indication on the record that he elected not to exercise his rights. The Court has repeatedly addressed itself on this aspect in various decisions but the message does not appear to have sunk well to some trial Magistrates. For instance, in **Maduhu Sayi Nigho v. Republic**, Criminal Appeal No. 560 of 2016 (unreported), the Court emphatically stated:

"...The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such right after having been informed of the same and after the substance of the charge has been explained to him. In the circumstances, the omission prejudiced the appellant. This is more so because he was not represented by a counsel..."

See also: **Frank Benson Msongole v. Republic**, Criminal Appeal No. 72A of 2016, **Alex John v. Republic**, Criminal Appeal No. 129 of 2006, **Jeremia John & 4 Others v. Republic**, Criminal Appeal No. 416 of 2013, **Samweli Gitau Saitoti @Saimoo & Another v. Republic**, Criminal Appeal No. 5 of 2016 (all unreported).

How grave are the consequences flowing from noncompliance with section 231(1) of the CPA has been underscored in the decisions referred to above and many others including; **Mabula Julius & Another v. Republic**, Criminal Appeal No. 562 of 2016 (unreported) in which the Court stated:

"... failure by the trial court to record whether the appellants would call witnesses in terms of section 231 (1) (b) [of the CPA] prejudiced the appellants. The infractions ... is fatal. It vitiated all subsequent proceedings..."

Similarly, in **Cleopa Mchiwa Sospeter v. Republic**, Criminal Appeal No. 51 of 2019 (unreported), the trial court omitted to address the accused person the substance of the charge and inform him of his rights. Concluding, the Court stated that, the omission was prejudicial to the accused as he was not able to exercise his rights. The list is endless but what emerges from the authorities we have referred to is that, where it is satisfied, as it were in this appeal that the trial court proceeded with the defence hearing in violation of the mandatory requirements under section 231(1) of the CPA irrespective of the accused entering his defence, the Court nullified the subsequent proceedings as well as the resultant judgment, conviction and sentence with an order for a rehearing of the defence case upon compliance with the law. We shall do alike in this appeal in the exercise of the Court's revisional power under section 4(2) of the Appellate Jurisdiction Act (the AJA).

Accordingly, in view of the patent violation of the mandatory requirements of section 231(1) of the CPA which impacted the fairness of the trial which went undetected by the first appellate court, we nullify all the proceedings of the trial court immediately after the ruling on a prima facie case to answer together with the judgment and quash the convictions and sentences flowing from the said proceedings. As the trial

court's judgment was a nullity, no appeal could lie to the High Court from a nullity with the net effect that the proceedings of the first appellate court are equally a nullity as well as the judgment dismissing the appellant's appeal which is hereby quashed. Having so ordered, we direct that the record be remitted to the trial court for hearing of the defence case after complying with section 231(1) of the CPA preferably by another magistrate.

Order accordingly.

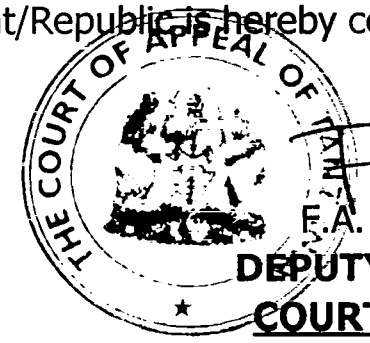
DATED at **MTWARA** this 28th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of Appellant in person and Mr. Enoshi Gabriel Kigoryo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL