IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 476 OF 2020

FRENK ONESMO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Madeha, J.)

dated the 27th day of February, 2020

in

(DC) Criminal Appeal No. 147 of 2019

JUDGMENT OF THE COURT

06th & 14th February, 2024

KWARIKO, J.A.:

In this appeal, the appellant, Frenk Onesmo, is challenging the decision of the High Court of Tanzania, Mwanza Sub – Registry (Madeha, J) (to be referred to as the High Court) which dismissed his appeal against conviction and sentence meted out by the District Court of Chato (the trial court).

Before the trial court, appellant was charged with two offences, namely; *One;* rape contrary to section 130 (1) (e) and 131 (1) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022] (the Penal Code) and *two;* unlawful causing pregnancy to a primary school girl contrary to section 60 A (3) of the Education Act [CAP 353 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. The particulars of the offences were that, between 22nd May and 22nd August, 2017 during day time at Bwanga village within Chato District in Geita Region, the appellant had unlawful sexual intercourse with one 'LBS' (name withheld to disguise her identity), a girl aged fourteen years old and a primary school pupil. As a result, he impregnated her on 22nd August, 2017.

The appellant denied the charge but at the end of the trial, he was convicted and sentenced to thirty years imprisonment in each count and the sentences were ordered to run concurrently.

Before we proceed any further, we find it deserving to revisit material facts of the case which led to the appellant's conviction and ultimately this appeal. On its part, the prosecution case comprised of six witnesses whose evidence is as follows: The victim who was said to be a standard seven pupil in 2017 at Bwanga Primary School, was living with her sister whose husband

is one Kulwa Misungwi (PW2). According to PW2, the victim (PW1) went missing from 18th August, 2017 and when she was found on 21st August, 2017, she said that she had been with the appellant as her lover and they had been making love all along since April 2017. Following that information, the appellant who used to work at PW1's parents' home as bricks maker was arrested and sent to the police station while PW1 was issued with a PF3 to go to hospital for examination. At the hospital, PW1 was attended by Dr. Masanja Ganji (PW5) who stated that, in his examination, he found the victim to be pregnant. A Police Form No. 3 (PF3) was filled which was admitted in evidence as exhibit PE2.

Further, following his arrest on 21st August, 2017, the appellant was interrogated by No. E 7986 Detective Corporal Ilanga (PW6) on 23rd August, 2017 whereas it was said that he admitted the allegations and his cautioned statement was accordingly recorded. This statement was admitted in evidence as exhibit PE3.

On the other hand, the appellant was the only witness in the defence case. In his testimony, he admitted that before his arrest he was working at PW1's parents' home as bricks maker but he denied to have committed the alleged offences.

As indicated earlier, the trial court found that the case against the appellant was proved beyond reasonable doubt and he was forthwith convicted and sentenced as shown above. Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court.

Before this Court, the appellant has raised a total of seventeen grounds of appeal comprised in the memorandum of appeal which was filed on 7th September, 2020 and supplementary memorandum of appeal lodged in Court on 2nd February, 2024. Essentially, those grounds raise the following five paraphrased points of complaints: **One,** the appellant's cautioned statement was taken contrary to sections 50 and 51 of the Criminal Procedure Act; **two,** the PF3 (exhibit PE2) was not properly admitted in evidence; **three,** age of the victim was not proved; **four,** pregnancy of the victim was not proved; and **five,** the prosecution case was not proved beyond reasonable doubt against the appellant.

On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented while the respondent Republic had the services of Ms. Jaines Kihwelo, learned State Attorney.

When we invited him to argue his appeal, the appellant preferred to hear first the reply from the respondent while reserving his right to rejoin should the need to do so arose.

On her part, Ms. Kihwelo took off by stating her stance of opposing the appeal. However, before she could go any further, we asked her to respond to the issue whether the charge which was laid at the appellant's door was proper. In response, Ms. Kihwelo submitted that the charge was not proper for the reason that section 130 (1) (e) of the Penal Code is non-existent. She argued that since the alleged offence is rape, the anomaly could have been cured by the particulars of the offence but it is not the case. She contended that the particulars of the offence refer to the victim as a girl aged fourteen years old but at the same time, it is alleged that the sexual intercourse took place without her consent. She thus argued that, in the circumstance, the charge did not properly inform the appellant what were the allegations against him so that he could properly prepare his defence. On the strength of this submission, Ms. Kihwelo changed her stance and informed us that she was supporting the appeal.

Apart from the foregoing, the learned State Attorney explained other shortfalls on the prosecution case as follows: That, the charge was at

variance with the evidence for the reason that while the particulars of the offence alleged that the victim had sexual intercourse with the appellant between 22nd May, 2017 and 22nd August, 2017, the evidence by the victim is that the sexual relation started in April 2017. That the prosecution did not amend the charge when it found out that the evidence was at variance with the charge.

Moreover, Ms. Kihwelo supported the first ground of appeal, that the appellant's cautioned statement (exhibit PE3) was taken outside four hours from the arrest of the appellant and no extension of time was sought and granted which contravened sections 50 and 51 of the Criminal Procedure Act [CAP 20 R.E. 2022] (henceforth "the CPA"). Additionally, she contended that exhibit PE3 was read out before its admission contrary to law. For these anomalies, the learned State Attorney urged us to expunge the cautioned statement from the record.

As regards the second ground, Ms. Kihwelo argued that the PF3 (exhibit PE2) was not read over following its admission in evidence. As regards this contravention, she contended that this exhibit deserves to be expunged from the record consistent with the decision of the Court in

Chamungo Richard @ Kipingu v. Republic, Criminal Appeal No. 56 of 2022 (unreported).

In relation the fourth ground of appeal, the learned counsel argued that, while the charge alleged that the appellant impregnated the victim on 22nd August, 2017, no evidence was led by the prosecution to prove this matter. She explained that, even PW6, the medical doctor did not prove the age of the alleged pregnancy.

Finally, the learned counsel submitted that when the said shortfalls are taken into account, there is no evidence remaining to sustain the appellant's conviction. She thus implored us to allow the appeal, quash conviction and set aside the sentence against the appellant.

In rejoinder, the appellant had nothing to contribute rather than praying to be set at liberty.

Having considered the grounds of appeal and the submissions from both parties, the issue which calls for our determination is whether the prosecution case was proved against the appellant as required in law. To answer this issue, the guiding settled principle of law is that, the second appellate court as it is in this case, can only interfere with concurrent findings

of fact made by the courts below if there is a misdirection or non-direction made by the courts below on the evidence; see **Osward Mokiwa @ Sudi v. Republic,** Criminal Appeal No. 190 of 2014 (unreported). Other decisions of the Court regarding this principle include the case of **Barnabas William Mathayo v. Republic,** Criminal Appeal No. 254B of 2020; **Faraji Ally Likenge v. Republic,** Criminal Appeal No. 381 of 2016; and **Karimu Jamary @ Kesi v. Republic,** Criminal Appeal No. 412 of 2018 (all unreported).

We shall start with the issue we have raised concerning the propriety of the charge. As rightly submitted by Ms. Kihwelo, section 130 (1) (e) of the Penal Code is non- existent. The offence of rape is described under section 130 (1) while its categories are provided under sub section (2) thereof as follows:

> *"**130.** (1) It is an offence for a male person to rape a girl or a woman.*
> *(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 being his wife, or being his wife who is separated from him without her*

consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(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."

As indicated in the provision above, apart from the description of rape under section 130 (1) of the Penal Code, the same should have been cited together with the category of rape in question. It is settled law that, non or wrong citation of relevant provision of the law is not a fatal irregularity as it is curable under section 388 of the CPA. In our case, the anomaly could have been cured by the particulars of the offence as it was underscored by the Court in the case of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). In that case where there was wrong citation of the relevant law, it was stated that:

> *"In the instant appeal before us, the particulars of the offence were very clear and, in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age."*

However, in the instant case, the particulars of the offence allege that the appellant had sexual intercourse with 'a girl aged fourteen years' 'without her consent'. This phrase connotes two distinct offences, namely statutory

rape which is provided under section 130 (2) (e) of Penal Code, that is having sexual intercourse with a girl of the age below eighteen years and sexual intercourse with an adult woman without her consent which is provided under section 130 (2) (a) of the Penal Code. This mix up brings about confusion as to what exactly was the offence in which the appellant was called upon to plead and ultimately make his defence. Therefore, the particulars of the offence cannot cure the anomaly in relation to non-citation of the relevant provision of law.

Otherwise, the anomaly regarding non-citation of the law could have been cured by the evidence on record. However, although the prosecution alleged that PW1 was a primary school pupil, her age was not proved by herself, her mother 'SB' (name withheld to disguise her identity) who testified as (PW3) or medical doctor (PW5). Further, when the victim appeared before the court to testify, the trial magistrate noted that she was an adult while in evidence she said, she was aged sixteen years. This kind of evidence cannot cure the anomaly in the charge. Accordingly, we have found that the appellant was called upon to plead and was convicted on a defective charge which is fatal to the proceedings.

The finding in relation to the charge could have determined this appeal but we asked ourselves as to what would have been the finding of the Court had the charge been proper. We have thus decided to determine other relevant issues together with the grounds of appeal. We propose to decide another issue relating to the evidence being at variance with the charge which was argued by the learned State Attorney. We are in agreement with her that, while the particulars of the offence alleged that the offence of rape was committed between 22nd May, 2017 and 22nd August, 2017, the victim testified that her sexual relationship with the appellant started in April 2017. Thus, had the prosecution found this variance, they ought to have amended the charge in terms of section 234 (1) of the CPA. However, the prosecution did not comply with the law and therefore the charge remains unproved. See also; **Issa Mwanjiku @ White v. Republic,** Criminal Appeal No. 175 of 2018 (unreported).

We further agree with both parties that the first ground has merit since the appellant's cautioned statement was recorded out of time without extension of time to do so. Thus, contravening sections 50 and 51 of the CPA which provides as follows:

*"**50.**- (1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–*

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.

***51.** - (1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may–*

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period."

According to these provisions, a suspect is required to be interviewed within four hours after his arrest unless time to do so is extended as explained above. In the instant case, the appellant having been arrested on 21st August, 2017, he was interrogated on 23rd August, 2017 and the prosecution neither provided any explanation for the delay nor time was extended for the interrogation. Not only this omission, but also the cautioned statement which ought to have first been cleared for admission, admitted and then be read out; to the contrary, it was read out in court before it was cleared for admission. This was contrary to a settled law as provided in the celebrated case of **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 218. In this case, it was held 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."*** (Emphasis supplied).

See also **Chamungo Richard @ Kipingu** (supra).

On account of these anomalies, the cautioned statement was not good evidence and it deserved to be discarded from the evidence, as we accordingly do.

As regards the second ground, we are in all fours that the PF3 was not read over following its admission as per various authorities by this Court including the case of **Robinson Mwanjisi & Three Others** (supra) and **Daud Rashid v. Republic,** Criminal Appeal No. 97 of 2020 (unreported). This omission vitiated the PF3 which ought to be expunged from the record. For that reason, we expunge it from the record.

We further agree with both parties that the alleged pregnancy of the victim being the crux of the matter was not proved by evidence. Following expungement of the PF3, the remaining oral evidence by the medical doctor (PW6) neither proved the fact that the victim was pregnant nor the age of the pregnancy. In fact, the charge alleged that the appellant impregnated the victim on 22nd August, 2017 while it is common ground that the appellant was arrested on 21st August, 2017. Thus, the prosecution did not explain how he managed to have sexual intercourse with the victim while under custody.

On the strength of the discussion in relation to the preceding grounds of appeal, it goes without saying that the answer to the last ground is in the affirmative, that even if the charge was proper the prosecution case was not proved beyond reasonable doubt against the appellant.

As a result, we allow the appellant's appeal, quash the conviction and set aside the sentence imposed on the appellant. Accordingly, we order release of the appellant from custody unless his continued incarceration is related to other lawful cause.

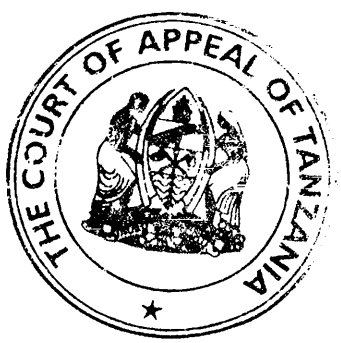
DATED at **MWANZA** this 13th day of February, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2024 in the presence of the appellant appeared in person, unrepresented, and Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Adam Mrusuri and Christopher Olembilesi, Learned State Attorneys for the respondent /Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL