IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL No. 73 OF 2023

(*Originating from Criminal Case No. 82 of 2022 in the District court of Kibaha at Kibaha)*

ABDUR KARIMU SHAMIRI @ KARIMU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 4-9-2023
Date of Judgment: 16-10- 2023

B.K.PHILLIP,J

The appellant herein was arraigned in court on two counts, to wit; rape contrary to section 130 (1),(2) (e), 131(1) and abduction contrary to section 134 and 35 of the Penal Code [Cap 16 RE 2022]. He denied to have committed the offences aforesaid. In proving its case the prosecution paraded four witnesses. The appellant was the only witness for the defence case. The case was heard on merit and he was found guilty, consequently he was convicted and sentenced to serve thirty (30) years imprisonment. Aggrieved with the judgment of the lower court, the appellant lodged this appeal.The appellant's ground on appeal are reproduced verbatim hereunder;

i) *That the trial learned Magistrate erred in law and facts by composing a judgment that is silent to the offence of abduction as whether the accused is (guilty/not guilty), (convicted/not convicted) of the offence of abduction as charged.*

ii) *That learned Magistrate erred in law and fact by convicting without relying to any of the admitted exhibits (exhibit P1 and P2 which were essential to the prove of the counts.*

iii) *That, the trial learned Magistrate erred and fact, by ignoring the contradiction in evidence with regard to PF3 (exhibit P1), PW1 testified to have filled it on 24.06.2022 while the same is dated 13.6.2022.*

iv) *That the trial Learned Magistrate erred in law and fact by failure to satisfy herself as to the voluntariness, correctness of the testimony of PW3 (the victim) who was punished and kept in lock up for 2 consecutive days, under influence of her parents, therefore PW3 testimony was not voluntarily.*

v) *That the trial Magistrate erred in law and in fact by failure to consider reasonable mistake of fact that PW3 was a student therefore, mistake of age, which was pleaded by the appellant honestly and not contested by the prosecution side.*

vi) *That the trial Magistrate erred in law and in facts that the prosecution side failed to prove their case without reasonable doubt.*

Briefly, the prosecution's case was as follows: between 11th and 16th June 2022, in the Maili Moja area within Kibaha District in the Coastal Region, the appellant had sexual intercourse with a 15-year-old girl, a Standard Four pupil at Maendeleo Primary School. In this case, she will be referred to as "SD" or "the victim" for the purpose of protecting her identity. On 11th June 2022, the appellant unlawfully took SD from her parents' custody and stayed with her from 12th June to 16th June 2022. On June 18th June 2022, PW2, while at his residence, noticed that SD was not around. He asked SD's friend about her whereabouts, and her response was that she did not know where SD was. At 8:00 PM, SD returned home and promised to explain her absence and where she had been. On 16th June 16 2022, SD told PW2 that she had been with her lover. He then took her to the appellant's residence. Upon entering the appellant's house, PW2 asked the appellant if he knew the victim. In response, the appellant admitted that he knew SD as she was his lover, and he was not aware that she was a student. Thereafter, PW2 took SD to the hospital. After undergoing a medical examination, the results showed that she had no bruises on her genital area but had been penetrated.

PW3 (the victim) informed the court that on 11th June 2022, she went to Maili Moja and passed by the appellant's shop. She was called by the appellant, who told her that he loved her. Later, they went to the

appellant's residence, ate, and after some time, undressed. The appellant took her to bed and inserted his penis into her vagina. She stayed at the appellant's home for several days. When she returned home, she told her parents that she had been staying with the appellant at his home.

PW1, the doctor at Tumbi Hospital, testified that on 24th June , 2022, he was at his office. He received SD for a medical examination, which revealed that she had no bruises but had lost her virginity, indicating penetration. Moreover, he found that she was not pregnant and did not have HIV. PW1 filled in the PF3.

On the other side, the appellant denied the charges. His defence was as follows: That on 12th June, 2022, when he woke up in the morning, he found three people outside his residence with SD crying. They asked him if he knew SD, and he replied that he did. Later on he was called by the chairperson of his area and asked to go to the police station. On 5th July 2022, he went to the police station, where he was interrogated. He denied committing the offences charged against him.

When this appeal was called for hearing, Mr. Shabani Mwaite, a learned counsel and Mr. Clarence Maige, a learned State Attorney appeared for the appellant and respondent respectively. The appeal was heard by way of written submissions.

Submitting for the first ground of appeal, Mr. Mwaite argued that the appellant was charged with two counts, namely Rape and Abduction. However, the proceedings and judgment are silent on the court's findings

regarding the offense of abduction. He went on submitting that the appellant was neither found guilty nor convicted of the offence of abduction. He contended that the trial Magistrate did not determine the said offence as if the appellant was charged with one count only. He was of the view that the trial court's failure to determine the offence of abduction renders the lower court's proceedings null and void. To support his arguments, he cited the provision of section 235(1) of the Criminal Procedure Act ("CPA") and the case of **Haji Makame Shaali Vs. Director of Public Prosecution, Criminal Appeal No. 308 of 2017** (unreported), in which the Court of Appeal interpreted section 219 of the Criminal Procedure of Zanzibar, which is *in par materia* with section 235 (1) of the CPA. He also submitted that the omission to determine the offence of abduction renders the trial court's judgment null and void, as per section 312(1), (2), and (3) of the CPA.

In rebuttal, Mr. Mhoja conceded that the appellant was charged with two counts, Rape and Abduction and at the close of the prosecution case, a *prima facie* case was established in respect of both counts. The first page of the trial court's judgment shows that the accused person was charged with two offences. However, after summarizing the evidence, the trial Magistrate seems to have focused on the first count only and did not determine the second count, despite witnesses testifying about it. Relying on the provision of section 235 (1) of the CPA , Mr. Mhoja argued that it is clear that after hearing the parties and their witnesses, the court has to either convict the accused and pass sentence or acquit or discharge him.

He pointed out that as the provisions of the law cited herein above are couched in mandatory terms thus, the trial court was expected to convict or acquit the accused person as law does not offer any other remedy apart from conviction or acquittal. Moreover, Mr. Mhoja argued that the provision of section 312(1) of the CPA was not complied with, and under the circumstances, the appellate court cannot step into the shoes of the trial court; rather, it should quash the judgment and set aside the orders arising thereof, and remit the case file to the lower court so that the trial Magistrate can compose a fresh judgment in which she/he will make a determination of both counts. He referred this court to the case of **Sosthenes Bruno & another Vs. Flora Shauri, Civil Appeal No. 81 of 2016** (unreported) to support his arguments.

In rejoinder, the appellant joined hands with Mr. Mhoja, stating that the judgment is defective for failing to determine the second count. However, he implored this court to set aside the impugned judgment and set him free. He strongly refuted Mr. Mhoja's view that the case file should be remitted to the trial court. To support his stance, he cited the case of **Abdallah Ally Vs. The Republic, Criminal Appeal No. 253 of 2013** (unreported).

In this case, it is not in dispute that the appellant was charged with two counts: Rape and Abduction, and he was convicted of rape only. The second count was left undetermined, meaning the court did not make any decision regarding it. The dispute between the parties in this issue is the

appropriate legal remedy following the omission committed by the trial court, which rendered its judgment defective. The question is whether to quash the impugned judgment and order a trial *de novo* or to quash the impugned judgment and set the appellant free. Let me point out that the case of **Abdallah Ally** (supra), cited by the appellant in his rejoinder to support his stance that the appropriate legal remedy is to quash the impugned judgment and set him free is distinguishable from the facts of this case. In the former case, the Court of Appeal noted that the trial court sentenced the appellant without first convicting him, and the charge sheet was defective. Thus, the court made a finding that ordering a retrial of the case would not meet the interests of justice. In the case at hand, there is no argument that the charge sheet was defective, and the trial court did not make a determination of the second count at all. However, upon perusing the provisions of sections 235 (1) and 312 (1) of the CPA, I am of the settled view that in the circumstances of this case, the appropriate legal remedy is to set aside the impugned judgment and order the case file to be remitted to the trial court for the trial magistrate to compose a fresh judgment, as I shall elaborate on shortly.

It is on record that upon the closure of the prosecution case, the trial court made a finding that the appellant had a case to answer on both counts. Consequently, the appellant defended himself on both counts. Therefore, it was imperative for the trial court to make a determination of both counts. There is no way the court can receive evidence from both sides and leave the matter undetermined. Justice demands that any matter brought before

the court has to be determined to its finality thus, it is the finding of this court that the impugned judgment is defective. Therefore, I hereby set it aside and order the case file to be remitted to the trial court for composition of a fresh judgment by the trial magistrate in which she will determine both counts. Under the circumstances, I cannot make the determination of the remaining grounds of appeal. It is so ordered.

Dated this 16th day of October 2023.

B.K. PHILLIP

JUDGE.