IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 113 OF 2017

(From Original Criminal Case No. 33/2016 in the District Court of Ngorongoro at Loliondo by Hon. D.S Nyakunga, DRM dated 12th day of July, 2017)

SAIMA S/O KASIANDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL.

S.M. MAGHIMBI, J:

The appeal before me is against conviction and sentence passed on the appellant in Criminal Case No. 33/2016 at the Loliondo District Court. At the District Court, the appellant was charged with and convicted on three distinct counts and was subsequently sentenced to a total of 36 years imprisonment on all counts. The first count that the appellant was charged with was rape c/s 130(1) &(2)(a) and Sect 131(1) of the Penal Code, Cap. 16 R.E 2002 (The Penal Code), whereby it was alleged that on or between the unknown times of the days of August and October at Malambo Village within Ngorongoro District of Arusha Region, the appellant had sexual

intercourse with the victim/complainant. On this first the appellant was sentenced to serve an imprisonment term of thirty years. The second count was assault causing actual bodily harm c/s 241 of the Penal Code to which it was alleged that on or between the unknown times of the days of August and October, 2016 at Malambo Village within Ngorongoro District of Arusha Region, the appellant willfully and unlawfully assaulted the victim by using stick before raping her. On the second count he was sentenced to serve one year imprisonment. The third count was defilement of a husband of a wife under 15 c/s 138 of the Penal Code, the appellant was alleged to have committed the offence on the 24th day of August, 2016; at day time at Malambo Village within Ngorongoro District of Arusha Region; when he willfully and unlawfully married the victim who was aged 14 years without her consent. On this count he was convicted and sentenced to serve 5 years imprisonment. Aggrieved by the conviction and sentence, the appellant lodged this appeal to which he has raised six grounds of appeal that:

1. .....

Before this court, the appellant was represented by Mr. Shillinde Ngalula while the respondent the republic, was represented by Ms. Cecilia Foka, learned State Attorney.

Mr. Shillinde begun his submission by addressing the third ground of appeal that the charge sheet was defective by demonstrating the particular of the defectiveness of the charge sheet. His main contention was that the particulars of the offence of rape and of the third count were inadequate.

He submitted that for the offence of rape, the particulars of the offence in the charge are insufficient and inadequate rendering the charge sheet incurably defective. That undoubtedly, the prosecution omitted to mention the date and year in which the accused committed the offence charged c/s 135(f) of the Criminal Procedure Act, Cap. 20 R.E 2002 ("The CPA"). He argued further that on the same count of rape, the words "without consent" are missing as the charge sheet simply say that the appellant willfully and unlawfully had sexual intercourse with one .... A girl of 14 years. Mr. Shillinde pointed out that Section 132 of the CPA provide that:

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

He argued that the purposes of giving out the particulars of the charge is to enable the accused to plea on the account of the particulars given and allow the accused to prepare defence in response of the particular offence and the particulars. That the trial court did enter the conviction on the first count without critically considering the facts on the particulars which are contained in the charge sheet. What was expected of the prosecution based on a particular charge was for their evidence to establish that the victim was raped in the manner provided under the provisions of Section 130(1)(2)(a) and Section 131 of the Penal Code. He submitted further that in the Section 130(1)(2)(a) it was essential for the period and lack of consent be explained to the accused to make it a proper offence. He hence

argued that the omission is so fundamental and cannot be cured by the provision of Section 388 of the CPA. It occasioned miscarriage of justice and prejudiced the appellant as the particular of the offence were not clear to the appellant for him to put a defence hence it was quite unsafe for the trial magistrate to convict the appellant in the first count without ascertaining the correctness of the offence charged in which the particulars of the offence of rape were insufficient and defended defectively.

Mr. Shillinde submitted further that the offence may have been committed at any time which we do not know when and it may have been consented by the alleged victim. That if the prosecution was quite clear that the appellant had sexual intercourse with a girl of 14 years, the proper provision of law would have been Section 130(1)(2)(e) and Section 131 of the Penal Code in which consent is immaterial. He hence argued that the appellant was charged under the wrong provisions of the law.

As for the 3rd count, Mr. Shillinde submitted that the particulars don't support the offence charged. That in general, the particulars speak about forced marriage by simply saying "Saima Kaisando charged that on 24/08/2015 at the day time at Marambo Village within Ngorongoro District in Arusha willfully and unlawfully did marry one Natajeo Paulo a girl aged 14 years with or without her consent" while the offence itself is defilement by husband and a wife. He hence argued that the law u/s 138 of the Penal Code is clear and is speaking about a girl marriage and the husband who attempts to have sex before she reaches 15 years of age while the particulars in the charge sheet talks of forced marriage. That the particulars of the offence do not support the offence itself which is an

irregularity which cannot be cured by the provisions of Section 388 of the CPA. He hence argued that the failure of the trial magistrate not to realize that the charge sheet upon which the accused was charged in the 1st and 3rd count was defective, nevertheless went ahead convicting and sentencing the appellant to 30 years in the first count and to five years in the 3rd count. That it was an error of law and it occasioned miscarriage of justice, he hence urged this court to quash the conviction and set aside the appellant's sentence in count one and three.

On the first ground of appeal, Mr. Shillinde submitted that the trial court proceeded to hear the evidence of a child PW1 alleged to be a child of tender years without her promising the court to tell the truth and not to tell lies which was contrary to mandatory requirement of the provisions of Section 127(2) of the evidence Act, Cap. 6 R.E 2002 as amended by Section 26(a) of the Written Law (Misc. Amend) No. 2(Act) of 2016 (Collectively referred to as The Evidence Act). He submitted further that a child of tender age is defined under Section 127(4) as amended by Section 26(e) of the Evidence Act to mean a child whose apparent age is not more than fourteen years. That the complainant in this case was the age of 14 years hence subject to the mandatory provisions of Section 127(2) of the Evidence Act as amended and the trial court was duty bound to ensure that the witness being of tender age was to promise the court to tell the truth and not lies. Mr. Shillinde submitted further that such promises must be vividly exhibited to the satisfaction of the court before the witness is allowed to give evidence by oath or affirmation. That the witness was not subjected to that process instead the witness was called to testify without

making that promise and the evidence was given under oath. He argued that under the circumstances, the evidence given under oath has to be reduced to unsworn evidence which needed enough corroboration in order to amount to a conviction.

He then moved to make a quick scanning of the evidence to corroborate the evidence pf PW1, which according to him, would be the evidence of PW2, PW3, PW4, PW5 and PW6. He argued that those pieces of evidence are much contradicting and rendered the evidence unreliable to convince the court to enter conviction against the appellant. Demonstrating on the contradictions, Mr. Shillinde submitted that while PW1 told the court that the accused is her husband whom they have stayed under one roof for above a year, the PW2 and PW3 said that the appellant married the PW1 by force and was raped and beaten by the appellant. That at large the evidence was hearsay as nobody testified to have seen the appellant raping and beating the victim. The version of PW6 is far by what was said in court by PW1 and PW2.

Mr. Shillinde submitted further that on the hand, the evidence of PW4 a police officer indeed was hearsay and unreliable as he did not see the appellant raping and beating the victim. That the evidence of PW5 the nurse did not mention the appellant as a person who had beaten and raped the complainant save that the PF3 filled by PW5 and received as exhibit P1 said that PW1 was beaten by one Saima Kaisando and that the diagnosis she did indicated bruises on the face, arm and knees and forced sex with the named appellant. Further that the evidence of PW5 is contrary to law because the witness convicted the appellant in the PF3. He argued

that as a nurse, she was also not entitled by law to fill the PF3. That the PF3 said there was a discharge from her vagina while the witness was taken to her two months after she escaped from the accused person.

On those submissions on contradictions of evidence Mr. Shillinde prayed that the conviction is quashed and the sentences passed on all counts be set aside for the non-compliances with the law as elaborated.

Going to the second and fourth grounds of appeal which Mr. Shillinde argued jointly, he submitted that the age of the victim was not ascertained. That it is general principle, u/s 144 of the Evidence Act, that the burden of proving the case against the accused lied to the prosecution, to which he cited the case of **Jonas Nzige Vs. R 1992 TLR 213**. He argued that the appellant was charged with serious offences hence the prosecution was duty bound to prove the case beyond reasonable doubt. That on the offence of rape, the prosecution side was required to prove beyond reasonable doubt that there was no consent or that there was penetration of PW1. That the evidence of PW1 referred to the appellant as her husband whom they have lived for one year before she ran out of the boma (pg 10). On page 11 when cross examined, PW1 said the appellant married her and there were many people who came to the marriage. At page 4 the trial magistrate held that:

> *"The PW1 told her that the accused was her husband and he used to frce her to have sexual intercourse while in the house. Such evidence was supported by the evidence of Hamada PW2. But in*

defence the appellant testified that the PW1 was his wife married under Maasai customary law".

He submitted that his understanding and interpretation of Section 130 (2)(a) of the Penal Code is that once it is demonstrated in court the complainant is the wife of the accused whom she had sexual intercourse with her husband then consent is immaterial. That the evidence relied by the prosecution to convince the court that the accused did not marry the complainant legally centered on the age and consent of the complainant/parent/court. Mr. Shillinde admitted to be aware of the provision of Section 13 of the Law of Marriage Act which restricts marriage according to age. His argument was that for special circumstances, the law allows a girl of 15 to be married with consent from her father.

The prosecution were duty bound to prove to the court first the age of the victim beyond all reasonable doubt that the victim was below the age of marriage consent was not sought in accordance to the law. He argued that the charge sheet show that Natajeo Paulo was 14 years of age and could be married upon consent of the court. That out there the marriage is illegal and amount to rape regardless whether or not parent consented to the marriage. Hence the prosecution did not prove that the girl was 14 years and the age was an issue while constructing a judgment in order to amount to a conviction. Further that it is pertinently clear on page 4 of the proceedings that the appellant raised a doubt on the age of the victim when cross examined by the prosecution. That he said he did not know the exact age of the wife but he guessed it to be 17/18. Further that EXP2 a cautioned statement, reads on page 2 that the appellant said *"Nameta*

Paulo Masiyaya akaniambia subiri akikua atakuwa mke wako" so when they married on that date 24/08/2016 the appellant was quite sure that the victim was a grown up woman because he waited for her for some years and at the time he went for marriage he was clear the girl was majority of age. He argued that the prosecution was duty bound to establish the issue of age which was necessary to prove the offence of rape and the court was supposed to set age as an issue before entering a conviction on the offence of rape and defilement by husband.

Mr. Shillinde went on to submit the other issue, which is whether or not the appellant legally married the appellant. He argued that the court established that the marriage was illegal and forced but had the magistrate clearly evaluated the evidence of PW1, PW2 and PW3 he would realize the witnesses were totally lying about the forced marriage. That if PW2, the mother of the victim was not aware of her daughter being forcefully married, she remained quiet for 2 months without reporting the incident to the proper authority. That it was until when the police out of curiosity when the appellant brought the victim to the police station is when the police doubted the age of the victim and issue a PF3 for the victim to be examined by medical practitioner. That such conduct seem that the mother of the victim knew about the marriage and the age of the victim and she was aware of the process of marriage under the Maasai customs but she u-turned after not getting a blanket from the appellant. That it would have been good case if it was proved that the victim was under the age of fourteen which was not done.

He submitted further that the prosecution did not prove the 3rd count of defilement. That they support the appellant procured forced marriage to the appellant and that there was no consent at marriage hence the appellant raped PW1. He argued that once the court has convicted the appellant on the offence of rape, the third count was not applicable as the proper way was to charge the appellant in alternative which was not done. Further that the particulars of the offence do not support the charge, he hence prayed that the court quash conviction on the third count.

He submitted further that on the 2nd count of assault, the offence was not proved beyond reasonable doubt. He argued that in the judgment, the trial magistrate relied and convicted the appellant on the evidence of PW5 the nurse and EXP1 tendered in court. that Section 4 of the penal Code defines harm as any bodily hurt, disease or disorder whether permanent or temporary. That the evidence of PW5 at page 19, said after doing examination she found siemen white, she did not have bruises and she was not a virgin and said that it seems the victim has been raped. He submitted further that the PF3 also indicated bruises on the left arm, left knee and forced sex. He argued that by looking at this evidence, it was not enough in the sense that the victim herself never demonstrated the injuries while giving her evidence in court and the court never bothered to inquire and see whether what was said by the nurse was really correct. That in fact, the evidence is highly unrealistic because it is cooked considering the nature on how the PF3 was filled by the nurse. That it mentioned the appellant and showed biasness from the beginning and she had no

mandate to fill the PF3. Further that the magistrate was supposed to doubt such a piece of evidence before he decided to convict on such evidence.

He argued that the PF3 has discrepancies in terms of the date the PF3 was issued by police authority and the date it was taken by victim to the police and the date the nurse filled the PF3. That it was issued on 11/10/2016 and PW4 said he issued a PF3 on 12th when the victim was brought by appellant at the police station. PW1 said they brought the PF3 on the same date the 12/10/2016 but looking at the PF3 itself it was filled on 19/10/2016. He argued that the evidence had a lot of doubts which could not warrant a convictionp of assault. He hence prayed that the court quash and set aside the conviction and sentence on the offence of assault.

On the fifth ground of appeal, Mr. Shillinde submitted that the judgment is contrary to Sect 312 of the CPA which requires a judgment to contain point of determination, the decision thereon and the reasons for the decision. He argued that the judgment does not contain the point for determination and the reasons for the decision. It just contains the summary of evidence and scanned vague analysis of it.

As for the last ground of appeal that the learned trial magistrate failed to scrutinize the evidence, his submission was that according to the evidence on record, the prosecution evidence was so weak taking into account that the charge sheet was defective and the evidence adduced was so weak and contradicting. On the other hand, submitted Mr. Shillinde, the appellant's evidence was so straight that he married the victim PW1 and that they were husband and wife. He argued that had the trial magistrate

properly addressed the evidence on record, he would have seen the weakness of the prosecution evidence which would not amount to a conviction. That because this is a first appellant court, the court has a duty to step into the shoes of the trial court and evaluate the evidence and make proper findings. In that respect he rested his submission with a prayer to this court that the conviction is quashed and sentence set aside and the appellant is freed from prison.

In her reply, Ms. Foka supported the appeal on the ground that there are several irregularities in the file by the prosecution side. In her brief submissions, she first agreed with Mr. Shillinde that the charge was defective as it did not clearly state the particular of the offence which the appellant was charged with. That it is mandatory that the particular of the offence when read to the accused should be clear on the offence so as not to prejudice the accused person because he is supposed to plea to what the charge states. That if the charge is incurable defective to occasion a miscarriage of justice to the accused, it cannot be cured by Section 388 of the CPA. She hence prayed that this appeal is allowed by quashing the sentence and setting aside the sentence as it was prayed by the advocate for the appellant.

On my part, I have considered the grounds of appeal and the submissions by both parties and have gone through the records of this appeal, my findings shall begin with the third ground of appeal, that the trial magistrate grossly erred in law and in fact for convicting and sentencing the appellant to thirty six (36) years imprisonment without due consideration to the charge sheet which was defective in form and the

contents of the particulars of the 1st and 2nd counts of the offences charged. I have gone through the charge sheet, the accused was charged with three counts as follows, on the first count the statement of offence was Rape c/s 130(1)(2)(a) of the Penal Code. The Section reads 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 sexuai 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;*

The particulars of the offence on the 1st count were that between the day of August and October at unknown time at unknown times of the days of August and October, at Malambo Village within Ngorongoro District of Arusha Region, the appellant willfully and unlawfully did have sexual intercourse with one Natajeo d/o Paul, a girl aged 14 yrs. As correctly submitted by Mr. Shillinde, the particulars of the offence did not auger with the offence that the accused was charged with. To begin with, the appellant was charged with the offence of having sex with a woman without her consent. However, the particulars imply that the appellant had sexual intercourse with a girl who is under the age of eighteen hence the specific offence would have been under the provisions of Section 130(1)(2)(e) of the Penal Code, whereby given that the victim is under the age of 18, consent was immaterial. Had the prosecution intended to take

the root they have taken, of charging the accused under the Section 130(1)(2)(a) of the Penal Code, then the issue of consent of the victim should have been crucial and featured in the charge sheet. That was not the case in this particular case.

Going through the evidence, and for the sake of argument, my presumption is that the prosecution charged the accused person with the particular offence because the evidence indicate that there was a marriage between the appellant and the victim, hence the Section 130(1)(2)(a) of the Penal Code was invoked because the victim was the accused wife. This being the case, then the issue of consent and the fact that the victim was his wife, should have featured in that charge sheet. Another crucial discrepancy observed in the charge sheet is the fact that the particulars of offence in the charge sheet did not indicate the year in which the victim was raped. The charge sheet merely uttered that the offence took place between the day of August and October. It did not explain which year was the offence committed. The issue of time in proving sexual offence is crucial. This was emphasized by the Court of Appeal sitting in Arusha in **Criminal Appeal No. 337/2015, Yust Lala Vs. R** (unreported) when it held:

> *"In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1"*

The position below makes the time of the commission of the offence crucial with regard to the time that the alleged offence is reported. It goes to the root of the credibility of a witness hence the credibility of the evidence

adduced by the prosecution. In our case at hand, worse enough, the charge sheet omitted to mention the year which the offence was committed. The omission is crucial and goes to the root of the provisions of Section 132 of the CPA which requires a charge to contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

Having made those observations and findings, I find that the charge sheet on the 1st count was defective and contrary to the provisions of Section 132 of the CPA. The defect is not curable under the provisions of Section 388 of the CPA. Consequently, the conviction of the appellant on the first count of rape is hereby quashed and set aside.

Going to the third count of defilement of a husband of a wife under 15 c/s 138 of the Penal Code, the appellant was alleged to have committed the offence on the 24th day of August, 2016; at day time at Malambo Village within Ngorongoro District of Arusha Region; when he willfully and unlawfully married the victim who was aged 14 years without her consent. The Section 138 that the appellant was charged with has several sub-sections providing for different circumstances and acts by different kinds of people which may amount to the offence of Defilement of a husband of a Wife. Each of the sub-sections in that section identifies a different kind of scenario hence it was crucial for the prosecution to specify the category of scenario that the accused was charged with. The charge is silent as to which sub-section hence which scenario the appellant fell under. The defect goes to the root of Section 132 and not curable under the provision

of Section 388 both of the CPA hence the conviction founded on that defect cannot be left to stand. Consequently, the conviction of the appellant on the 3rd count is also quashed and set aside.

This leaves me with the second count, assault causing actual bodily harm, c/s 241 of the Penal Code, the particulars being that between the unknown times of the days of August and October, 2016 at Malambo Village within Ngorongoro District of Arusha Region, the appellant willfully and unlawfully assaulted the victim by using stick before raping her. Before I go into analyzing the details of that count, it is pertinent that I now turn to the first ground of appeal, that the evidence was taken contrary to Section 127 of the Evidence Act, as amended by Section 26(a) of the Written Laws Misc. Amendments (No. 2) Act, No. 04/2016. The specific provision provides:

> *"A child of tender age* ***may give evidence without taking oath or making an affirmation****, but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

The provisions of the cited Section makes an option to the court that a child of tender age may either give evidence under oath or may give evidence without taking oath or making an affirmation for as long as she promises to tell the truth and not to tell lies. Therefore on those circumstances when the child does not make an oath or affirmation that she is required to promise to the court to tell the truth. In the case at hand, the record is clear that the PW1, aged 14 gave sworn evidence before the court hence there was no need to promise to tell the truth. The situation would have been mandatory had the child witness not understood

the nature of taking oath. The ground is without merits and is hereby dismissed.

The remaining grounds of appeal are mainly based on the misapprehension of evidence adduced at the trial. Mr. Shillinde argument on this ground was based on the adduced evidence. That the PF3 filled by PW5 and received as exhibit P1 said that PW1 was beaten by one Saima Kaisando. Further that PW1's diagnosis indicated that she had bruises on the face, arm and knees and forced sex with the named appellant. He argued that in the judgment, the trial magistrate relied and convicted the appellant on the evidence of PW5 the nurse and EXP1 tendered in court. That Section 4 of the Penal Code defines harm as any bodily hurt, disease or disorder whether permanent or temporary. That the PF3 indicated bruises on the left arm, left knee and forced sex. He argued that by looking at this evidence, it was not enough in the sense that the victim herself never demonstrated the injuries while giving her evidence in court and the court never bothered to inquire and see whether what was said by the nurse was really correct. He went on that in fact, the evidence is highly unrealistic because it is cooked considering the nature on how the PF3 was filled by the nurse.

On my part I have gone through the evidence adduced at the trial, particularly by PW1, the victim herself. She testified that:

> *"He used to force me to have sex with me, I told him that I feel pain, but he continue to have sex with me for several times. He always beat me with a stick. He used to send me to the forest to*

graze his cattle. He always came at the bush here I am grazing animal and beat me."

That evidence from the victim is sufficient that the appellant was beating her. This evidence was corroborated by that of PW5, the nurse who examined her and observed bruises on her body. In my strong view, given the circumstances of forced marriage alleged by the PW1 and PW2 and not particularly denied by the appellant; it would have been difficult to have insisted on the testimony of an eye witness who witnessed the appellant beating his wife. The evidence of PW1 the victim, the PW5 the nurse and PW2 the victim's mother who heard from her child was sufficient to warrant the conviction of the appellant on this count.

On the fifth ground of appeal that the judgment did not contain the points for determination, Mr. Shillinde submitted that the judgment is contrary to Sect 312 of the CPA which requires a judgment to contain point of determination, the decision thereon and the reasons for the decision. He argued that the judgment does not contain the point for determination and the reasons for the decision. It just contains the summary of evidence and scanned vague analysis of it. Having gone through the trial court judgment, the learned trial magistrate held on page 6 of his typed judgment that:

"The issue is whether the prosecution proved their case beyond all reasonable doubt to convict the accused person".

This is clearly the issue that the trial magistrate addressed himself while determining the case before him. I am trying to imagine why the two

learned Counsels from both sides overlooked this issue while it was clearly laid down in the judgment of the trial court.

The record is further clear that after identifying the issue for determination, the learned trial magistrate started analyzing the evidence from page 6 until page 8 when he reached his verdict. Whether the analysis was vague or not is not a matter for the learned counsel to determine, for as long as there was determination. Had it been an academic exercise, then Mr. Shillinde would have had an opportunity to criticize the vagueness of the analysis, but as far as this case is concerned, he is addressing the issue to the wrong forum. The records loudly stands that the points of determination were identified, evidence analyzed with reasons and a decision made. The fifth ground of appeal is hence dismissed.

Having made the above findings, this court partly allows the appeal by quashing and setting aside the conviction and sentenced passed on the first and third counts. However, the conviction of the accused on the 2nd count is well founded and is hereby upheld; the sentence of one year imprisonment passed by the trial court is also upheld. The same shall however run from the date that the appellant was first convicted by the trial court which is the 12th day of July, 2017.

Appeal Partly Allowed.

Dated at Arusha this 04th day of July, 2018.

(SGD)
S.M. MAGHIMBI
JUDGE

I hereby certify this to be a true copy of the original.

DEPUTY REGISTRAR
ARUSHA
10/07/2018