IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 33 OF 2021

(Originating from Criminal Case No. 93 of 2020 of the District Court of Magu)

MASHAKA MASALA @ EZEKIEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 28.06.2021

Date of Judgment: 29.06.2021

A Z. MGEYEKWA, J

The appellant, **Mashaka Masala @ Ezekiel** appeared before the District Court of Magu on 15th April, 2021 whereby the appellant faced charges on two counts. The first count, rape contrary to sections 130 and 131 (1) of the Penal Code Cap. 16. [R.E 2019].

It was alleged in the particulars of the offence by the prosecution that, the appellant on 7th July, 2020 at Lutale village within Magu District in Mwanza Region, the appellant did have carnal knowledge to one Happyness D/O Dioniz a girl of 17 years old a student at Lutale Secondary School without her consent.

On the second count; Abduction contrary to section 133 of the Penal Code Cap.16 [R.E 2019]. The prosecution alleged that Mashaka S/O Masala @ Ezekiel charged that on 7th July, 2020 at Lutale village within Magu District in Mwanza Region, the appellant did take one Happyness D/O Dioniz a girl of 17 years old a student at Lutale Secondary School out of the protection and custody of her parents with the intent to marry her.

After the charge was read over and explained to the appellant, he pleaded not guilty. To prove their case, the prosecution summoned seven witnesses and tendered three exhibits, namely; a PF3, Attendance Register, and Admission Register which were admitted at the trial as exhibits P1, P2, and P3 respectively. After the closure of the prosecution case, the appellant was found with a case to answer, he subsequently defended himself and tendered no exhibit.

At the conclusion of the trial, the learned trial magistrate composed his judgment in which she found the appellant guilty of the offence he was alleged to have committed. On the first count, the appellant was convicted and sentenced to imprisonment for thirty years, and on the second count, he was convicted and sentenced to serve 7 years imprisonment. The sentence to run concurrently.

The appellant now seeks to impugn the decision of Magu District Court upon a Petition of Appeal comprised of five grounds of appeal as follows:-

1. *That, the trial magistrate's court erred both in law and facts to admit alleged confession in the caution statement into evidence while knowing the same not to have adhered to justices of peace regulations/guidelines worst still the same was illegally obtained/procured.*
2. *That the Hon. trial Magistrate was not properly guided when he convicted the appellant on an offence of rape whose constitutive ingredients were apparently lacking including a description by the victim of how she was raped.*
3. *That, the Hon. trial Magistrate erred in law to convict the appellant basing conviction on alleged age of minority of the victim which was never legally proved.*

4. *That, the appellant's conviction does not stem from the trial court's objective and balanced appreciation of the whole evidence from both sides which makes the verdict against the appellant a unilateral skewed project full of bias.*
5. *That, PW6's evidence vide exhibit P2 does not support/corroborate the case of rape as no bruises lacerations even spermatozoa, any discharge, and swelling of the vulva are established on the victim to establish rape.*

Following the global outbreak of the Worldwide COVID-19 pandemic (Corona virus), the hearing was conducted via audio teleconference whereas the appellant and Ms. Sabina, learned State Attorney for the respondent were remotely present.

After adopting his grounds of appeal comprised in memoranda, the appellant opted that the learned State Attorney should respond to grounds of appeal first reserving his right to rejoin after hearing the learned State Attorney.

At the outset, Ms. Sabina expressed the stance that the respondent was supporting the verdicts of the trial court. The learned State Attorney started his onslaught by attacking the first ground of appeal which challenges the

cautioned statement. Ms. Sabina argued that the cautioned statement was not tendered in court therefore thus the appellant's ground is demerit.

Submitting on the second ground that relates to ingredients of the offence of rape. Ms. Sabina contended that the ingredients of rape were proved, she referred this court to the testimony of PW1, who testified that the appellant inserted his penis in her vagina. The learned State Attorney went on to state that PW1 evidence was corroborated by other prosecution witnesses. She stressed that the best evidence comes from the victim herself. Fortifying her position she referred this court to the case of **Selemani Makumba v R** [2006] TLR 376. She insisted that the victim was credible and the court believed her and there was no need for consent because she was below 18 years old.

As to the third ground, that the age of the victim was not proved. The learned State Attorney without qualms stated that the age of the victim was proved by herself and his father. She added that the victim testified to the effect that she was 17 years old. Likewise, her father stated that her daughter was 17 years old. To fortify her submission she referred this court to page 6 of the trial court proceedings and the case of **Salu Sosoma v Republic**, Criminal Appeal No. 32 of 2006 (unreported).

Regarding the defence case, Ms. Sabina conceded that the trial court did not consider the defense case in its judgment. She submitted that the trial court in its judgment analysed the prosecution case only without analysing the defence case. She went on to state that the trial court did not state the reasons for his decision. Ms. Sabina urged this court to re-evaluate the defence case. However, she remarked that the trial court found that the prosecution evidence was heavier than the defence case.

With respect to the fifth ground, that the evidence of PW6 and the exhibit P2 does not corroborate the case of rape, the learned State Attorney was brief and straight to the point. She submitted that PW6 evidence and exhibit P2 supported the case of rape. To bolster her position she referred this court to page 17 of the trial court proceedings.

In a short rejoinder, the appellant had nothing new to add. He urged this court to allow the appeal and set him free.

Having summarized the submissions and arguments by both sides, I am now in the position to determine the grounds of appeal before me. I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the onus of proof lies with the prosecution to prove that the defendant committed the offence for which he

is charged with. In this case at hand, the issue is *whether the prosecution case was proved beyond a reasonable doubt.*

Before I proceed to determine the grounds of appeal, I called upon the learned State Attorney and the appellant to address this court on a point of law. When I was composing my judgment I noted that the charge sheet was altered, the subsection and subparagraph of section 130 of the Penal Code Cap.16 [R.E 2019]. In her submission, the learned State Attorney concedes that the charge sheet was defective. However, in her view, she stated that the defect is curable under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2019]. Ms. Sabina stated that section 130 of the Penal Code Cap.16 [R.E 2019] is in regard to an offence of rape though the same is cited without any subsection the particulars of the offence suffice to mean that the appellant was convicted for statutory rape thus he was well informed about the offence which he has committed.

I find it wanting to explore and expose the charge sheet which lays the foundation of the prosecution case which rendered the appellant's conviction. Unfortunately, I find defects on the charge sheet that needs careful consideration since the charge sheet is the foundation of the

prosecution case, any defects on it should first be discussed and if need be I shall move to the advanced reasons by parties over the grounds of appeal.

The record reveals that the prosecution filed a charge sheet on 24th July, 2020, and the alteration was made in handwriting but the records are silent as to who made the alteration and when. Also, there is no order of the Court to such alteration worse enough the sub-paragraph is not visible.

Ms. Sabina urged this court to disregard the subsection and subparagraph and consider the information provided on the particulars of the offence while at the beginning she admitted that an altered charge sheet is defective. Had it had been that the prosecution charge sheet was brought under section 130 of the Penal Code Cap.16 [R.E 2019] without citing the relevant subsection and subparagraphs that creates the offense, then I could proceed to determine whether the omission of citing subsection and subparagraphs are curable under section 388 of the Criminal Procedure Code Cap. 20 [R.E 2019].

However, in the instant case, the charge sheet was altered. In my view as long as the charge sheet was altered the same diminished the genuity of the charge sheet. Therefore, the cited case of **Masalu Kuyeye v Republic** (supra) is distinguishable from the instant appeal. In the cited case, the

charge was not defective only the section was incomplete and the particulars of the offence were elaborative. In the present appeal, the charge sheet is defective, thus, I am asking myself whether a defective charge can initiate a charge against the accused person?

It is worth noting that criminal proceedings are initiated by a 'charge and determination of the competence of a charge is important in order to proceed any further on any other matters for determination in the appeal before the Court. Since the alteration goes to the root of the case as alluded earlier, the same renders the charge sheet incurably defective and the consequence of a defective charge is to nullify the trial court proceedings.

In nullifying the proceedings of the lower court on the same problems, the Court of Appeal of Tanzania in the case of **Zebedayo Mtetema v Republic**, Criminal Appeal No. 484 of 2015, held that:-

> *" In the instant case, there is no order of the Court to make the alterations seen therein. Also, no signature and date when such alterations were made.* ***It is very dangerous to rely on unauthenticated alterations. Surely, the defect rendered the charge sheet incurably defective, I, therefore, find all the proceedings before the trial Court and the High Court a nullity,***

quash the conviction and set aside the sentence". *[Emphasis added].*

Applying the above holding of the Court of Appeal of Tanzania, in the like manner, the instant appeal before me, the proceedings, conviction, and sentence cannot be left to stand.

This being the position, I move to consider the way forward in this appeal with the above findings such as ordering a retrial. There are various decisions of the Court of Appeal of Tanzania on when it is suitable to order a retrial. In the case **Fatehali Manji v Republic** (1966) EA 343, the court provide well-articulated guidelines on whether or not and when to order a retrial. The guidelines have been adopted by the Court of Appeal in of Tanzania in various decisions such as in the cases of **Sultan Mohamed v Republic**, Criminal Appeal No. 176 OF 2003, (unreported), **Timoth Sanga, and another v Republic**, Criminal Appeal No. 80 of 2015, (unreported), **Said Mohamed Mwanatabu @ Kausha and another v Republic**, Criminal Appeal No. 161 of 2016, (unreported) and in the case of **Simon Kitalika & 2 Others v Republic** (supra). In the case of **Mayala Njigailele v Republic**, Criminal Appeal No. 490 of 2015 (unreported), the Court of Appeal of Tanzania held as follows: -

"Normally an order of retrial is rented, in criminal cases/ when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case, the charge sheet is incurably defective/ meaning it is not in existence/ the question of retrial does not arise".

From the above authority, it is clear that in cases such as an appeal before this court, where a charge is fatally defective, it will be an exercise in futility to order a retrial because, as stated by the Court of Appeal of Tanzania in the case of **Mayala Njigailele v Republic** (supra) that:-

"a retrial is normally ordered on assumption that the charge is properly before the court".

In the event having in mind to the aforesaid, I find that having decided that the proceedings of the trial court was based on a defective charge, and meaning that the charge not being properly before the court, and thus the said proceedings are a nullity, the same cannot be cured. In the circumstances of this case, an order of retrial will not serve the interest of justice. The apparent deficient is most likely to be rectified by the prosecution in the event an order of retrial is made to the prejudice of the appellant.

I think the above discussed deficiencies sufficiently dispose of the appeal. I shall, therefore, not delve to consider the grounds of appeal for the same

will not serve any useful purpose since this point of law suffice to dispose of the appeal,

For the reasons I have endeavored to demonstrate, I entirely allow the appeal. In consequence, I quash the proceedings and judgment of the trial court and the convictions. I also set aside the sentences. The appellant be released from prison forthwith unless held therein for another justifiable cause.

Order accordingly.

Dated at Mwanza this date 29th June, 2021.

A.Z.MGEYEKWA

JUDGE

29.06.2021

Judgment delivered via audio teleconference on 29th June, 2021 whereas the appellant and Ms. Sabina, learned State Attorney for the respondent Republic were remotely present.

A.Z.MGEYEKWA

JUDGE

29.06.2021

Right to appeal fully explained.