IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO.88 OF 2019

(Originating from Criminal Case No. 31 of 2014 in the District Court of Mbulu at Mbulu)

DAMIANO QADWE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

12/07/2021 & 19/07/2021

KAMUZORA J,

The appellant Damiano Qadwe was first aligned before the District Court of Mbulu for the offence of rape contrary to section 130 and 131 of the Penal Code Cap. 16 R.E 2002. Briefly, the facts of the case reveal that, on the material date of the alleged incident, the victim met the appellant on her way to Dirimu village. It was alleged that, the appellant grabbed the victim's hand and forced her into the bush where he undressed and raped her. After the rape incident, the appellant retained the victim in the bush for sometimes. The victim informed the appellant that she was in need to go for short call and the appellant allowed her with the condition that she leave her clothes with him. The victim took a chance to escape and, on the way, she met two people among of whom was PW2. She informed them of the incident and they arrested the appellant who was running after the victim and sent both the victim and the appellant to the village office at Dirimu. They latter went with the appellant at the scene and collected the victim's clothes; underwear,

skin-tight and iasso (kitenge). The report was made to the police post at Dongobesh and the victim was issued with PF3 to go to hospital.

The appellant was charged before the District Court for the offence of rape, convicted and sentenced to serve two years imprisonment. Such sentence was enhanced by this court in its revisional proceedings (Criminal Revision No. 2 of 2015) to thirty years imprisonment. On appeal to the Court of Appeal of Tanzania (Criminal Appeal No. 317 of 2016), the Court nullified the revisional order of the High court for being issued without giving parties the right to be heard. However, the Court of Appeal invoked its revisionary powers and enhanced the sentence to thirty years imprisonment. The Court of Appeal was clear that, for avoidance of doubt the enhanced sentence was to be deemed as one imposed by the trial court. The Court of Appeal then gave the appellant a right to appeal to this court against the conviction and sentence if he so desires. The appellant after being successful granted the extension of time to lodge a notice of appeal and an appeal there to, he presented this appeal on the following grounds: -

1. That, the latter presiding trial magistrate erred in law and in fact by not complying with the requirements of section 214 of the CPA (Cap 20 RE. 2002).
2. That, the latter presiding trial magistrate erred in law and in fact by acting upon a defective charge sheet.
3. That, the latter presiding trial magistrate erred in law and in fact when he held that PW1, PW2, PW3, PW4 and PW5 proved the prosecution case beyond reasonable doubt.

When the matter was called in court for hearing, the appellant appeared in person while Ms. Akisa Mhando, learned State Attorney represented the Respondent, Republic. The appeal was argued by oral submissions.

In his submission in support of the first ground of appeal the appellant submitted that, the trial magistrate Hon. Kimario failed to comply with section 214 as he proceeded with hearing of the case without giving reasons for Hon. Kamala's failure to complete the trial of the case. That, such failure contravened the law.

On the second ground the appellant submitted that, the trial magistrate based his conviction on the defective charge sheet as the charge sheet did not mention subsection 1 and 2 (e) of section 130 subsection 1 of section 131 of the Penal Code. It was the appellant's contention that non-citation of the subsections in the section establishing the offence prejudiced him in his defence. He added that even the age of the victim was not mentioned in the charge sheet thus contravening the law.

On the third ground the appellant submitted that, the prosecution side did not prove the charge against him because PW1 failed to explain on how she identified the person who raped her. He insisted that, the identification before the court was a dock identification which is not acceptable under the law. He added that, exhibit P1 was wrongly admitted because it was not read in court after the magistrate admitted the same. He therefore prayed for the court to consider the grounds of appeal and release him from prison.

In her reply Ms. Akisa Mhando supported the conviction and insisted that the prosecution side proved the offence of rape beyond reasonable doubt. She started by submitting on the third ground that, the evidence

of PW1 as per section 62 of Tanzania Evidence Act R.E 2019, is clear and true evidence. That, the victim of the offence explained clearly on how the appellant grabbed and pulled her to the bush where he inserted his male organ to her female organ. That, such evidence was supported by the evidence of PW2 who met PW1 at the scene running from the bush while being chased by the appellant. That, PW2 discovered that PW1 was crying and when he interrogated her, she told him that she was raped by the appellant. That, the appellant was immediately arrested at the scene and sent to the village office. The learned State Attorney referred this court to page 16 of the proceedings paragraph 3 to where PW2 explained that after the appellant was arrested, he took PW2 and PW3 to the scene where they found the victim's properties including shoes, underwear, kitenge and mgolole. The learned State attorney referring page 20 of the proceedings and added that, the evidence of PW3 supported the evidence of PW2 showing that the appellant was arrested on the date of incident and sent to the village office. That, the appellant was interrogated and confessed before the Village Executive officer that he raped the victim. The learned State Attorney insisted that, this evidence is a true and clear proving that the victim was raped by the appellant. The learned counsel also added that, the finding of PW4 who is the doctor who examined the victim reveal that she discovered sperms in victim's vagina proving that she was penetrated. However, the learned State Attorney prayed for the PF.3 to be expunged from record for it was not read in court but she insisted that the Doctor's oral testimony be maintained for what she discovered after examining the victim.

The learned state attorney submitted further that the victim was identified at the scene. That, as the incident took place in morning hours at about 09:00hrs the victims clearly identified the appellant. She added that, the appellant retained the victim for sometimes and she talked to him as he was not ready to release her to go back to her husband until she tricked him that she wanted to go for a short call. The learned State Attorney insisted that, the victim had enough time to identify the appellant and the claim that the appellant was not identified is unjustified. She added that, the appellant was arrested at the scene by PW2 making the appellant's identification very clear. The leaned State Attorney maintained that, the prosecution side proved its case beyond reasonable doubt.

Regarding the proof of age, the leaned state attorney submitted that, the victim was an elderly person aged 72 years and she mentioned her age in court. She was of the view that since the appellant was not charged for rape against the child the prosecution side was not duty bound to prove the age as the victim proved her age.

On the first ground that section 214 was not complied with, the learned State Attorney submitted that, page 20 of the proceedings contains the proof that the said section was complied with. That, the accused agreed to proceed with hearing of the case after the successor magistrate informed him of the change of the trial magistrate and the accused agreed to proceed with the hearing of the case.

Regarding the claim on the defectiveness of the charge sheet the learned State Attorney admitted that the sections were not properly cited as the appellant was supposed to be charged under section 130(1)

and (2)(b) and the sentence section to be 131(1). She however submitted that, the appellant was not prejudiced by non-citation of subsections as he was aware of the charge against him and he even defended himself of the same meaning that he understood the charge against him and that is why he defended himself.

Regarding exhibit PE1 which is the arrest warrant, the learned State Attorney supported the appellant's argument that the same was not read in court after being admitted. She then prayed for said exhibit to be expunged from the records but urged this court to consider the evidence of PW2 as enough evidence proving that PW2 arrested the appellant. That, such evidence was supported by PW3. In concluding, the learned state attorney prayed for this court to uphold the conviction and sentence passed against the appellant.

In his rejoinder the appellant added that, PW1 claimed to have him for the first time on the date of incident but she did not explain how she came to know his name as during evidence she mentioned his name. He insisted that, the magistrate was wrong to believe that the witnesses proved the case while PW1's evidence was based on dock identification and there was no identification parade conducted.

I have considered the trial court records and the submission by the parties. Starting with the first ground it was contended that, the trial magistrate failed to comply with the requirements of section 214 of the CPA (Cap 20 RE. 2002). For purpose of convenience the said provision is reproduced here under: -

> ***"214.-****(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in*

whole or part any committal proceedings is ***for any reason unable to complete the trial*** *or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and* ***the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings.***

The above provision gives mandate to the magistrate taking over the trial to act on evidence or proceedings recorded by the predecessor magistrate. The successor magistrate may also opt to resummon the witnesses and commence trial if it is considered necessary. In number of cases, it was insisted that it is necessary that the reasons for taking over be recorded. In the case of **Salimu Hussein Vs Republic, Criminal Appeal No.3 of 2011 (unreported)** the Court of Appeal made reference to section 214 (1) of the CPA and emphasized as follows:

"..... under this section the second subsequent magistrate can assume the jurisdiction to take over and continue the trial ... and ... act on the evidence recorded by his predecessor only if the first magistrate is for any reason unable to complete the trial at all or within a reasonable time. Such ***reason or reasons must be explicitly shown in the trial court's record of proceedings.***

In the present appeal the trial court records show that, the matter was being tried by Hon. Kamala who recorded the evidence of two witnesses. Then it was reassigned to Hon. Kimario and page 19 of the typed proceedings contains an order for re-assignment. At page 20 of the proceedings, the successor magistrate only recorded that the provision of section 214 of the CPA was complied with and the accused was ready to proceed with the hearing. It is on this basis the appellant is complaining that there was non- compliance of the provision of section 214 of the CPA. It is true that the reasons for the change of magistrate were not recorded. But it is in record that the court informed the accused and he was ready to proceed with the hearing. I believe the court could not have recorded so if the accused was not informed. It must be noted that the essence of giving reasons is to insure fair trial to the accused. That was also so held in the case of **James Maro Mahende Vs Republic, Criminal Appeal No. 83 of 2016 (unreported)** that;

> *"The requirement of giving reason by the successor magistrate is necessary in order to provide semblance of order and to ensure that the accused person gets a fair trial. Apart from the fact that it is a requirement under the law, it is also good practice for the sake of transparency. The accused person has a right to know why there is a new presiding magistrate. In order for the accused person to have a fair trial, he has a right to know any changes relating to the conduct of his case."*

In this appeal, the court having recorded that the provision of section 214 was complied with, it surfaces to say that the accused was informed

on the reasons for the change of the magistrate. It in record that the accused was ready to proceed with hearing of the case and when the witnesses were called in court the appellant cross examined them. It is my conclusion that not recording the reasons in this case did not prejudice the accused/appellant.

On the second ground that the trial magistrate acted upon a defective charge sheet, I also revisited the said charge sheet. The statement of the offence and law read; *"Rape C/S 130 & 131 of the penal Code Cap 16 VOL 1 of the Laws R. E 2002."* The above citation omitted specific subsections to which the accused was charged with and the citation of the law was not proper as there is no law which is cited as Vol. 1 of the Laws R.E 2002. Admittedly specific subsections establishing the offence was not cited on the charge sheet. It is on that basis the appellant insisted that the charge sheet was incurably defective. However, the learned State Attorney maintained that the defects in the charge sheet was curable as they did not occasion any miscarriage of justice to the appellant.

Regarding non citation of the subsections of it is a settled principle that if the non-citation is curable if the court is satisfied that the accused was not prejudiced. The Court of Appeal in the case of **Jamali Ally @ Salum Vs Republic Criminal Appeal No 52 Of 2017** was faced with a defective charge to which the sub-section of section 130 of the Penal Code was not cited in the statement of offence. The Court of Appeal was satisfied that the particulars of the offence and the evidence in record was clear to make the appellant understand the nature of the offence he

was charged with. The court proceeded on finding the defect in non-citation of subsection as curable. The holding of the court read;

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that* ***the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."***

Regarding the wrong citation of the law, that matter was also resolved by the court of appeal in **Criminal Appeal No. 90 Of 2017 William Kasanga Versus Republic.** The Court Appeal came across to the charge sheet to which the appellant was charged with unnatural offence contrary to section 154 (I)(a) (2) of the Laws Vol. 1 RE 2002. The Court of Appeal was clear that there is no law which is cited as Laws Vol 1 R.E 2002 but went on state that the defect was curable as the particulars of the offence efficiently explained the nature of the offence.

In the present appeal, I have a thorough perusal to the particular of offence to which the appellant was charged with. The particulars of the offence are very clear that the appellant was charged for having canal knowledge of the victim without her consent. The particulars of the offence gave the appellant sufficient notice about the date and time when the offence was committed, the village where the offence was committed, the nature of the offence and the name of the victim. It also pointed out the essential ingredient of the offence of rape which is lack of consent of the victim. The evidence of PW1 revealed that she was

grabbed by the appellant and pulled to the bush where appellant raped her. The appellant at all time of the trial was made to understand the nature of the offence he was charged with and he even defended himself against the offence of rape. Thus, the contention by the appellant that he was prejudiced by the defective charge is unfounded. It surfaces to say that the appellant was well aware of the offence against him and the defects in the charge sheet is well curable under section 388 (1) of the CPA. The contention by the appellant that the age of the victim was not mentioned in the charge sheet is unfounded. The requirement for including the victim's age in the charge sheet becomes necessary where the victim is a child and not where the victim is an elderly person. The appellant's suggestion that the proper provision was 130 (1) and (2)(e) is based on the fact that the was a child. But, the proceedings of the case reveal that the victim was an adult. Although the learned State Attorney mentioned that the victim was aged 72 years old, the typed proceedings of the trial court at page 10 reveal that the 72 years age was for the interpreter but the victim was only mentioned as an adult. As the victim was an adult, there was no need to prove the victim's age as it was not an essential ingredient of the offence. The age becomes essential ingredient to be proved in court where the victim is a child (below 18 years) unlike the present case where no allegation that the victim was a child. This ground of appeal is therefore devoid of merit.

Regarding the third ground it was contended that, the trial magistrate wrongly acted on the evidence of PW1, PW2, PW3, PW4 and PW5 and wrongly believed the same to have proved the prosecution case beyond

reasonable doubt. I had ample time to pass through the evidence in record. From the evidence in record, on the material date of alleged incident it was the first time for the victim to meet the appellant. In her own statement she was grabbed by the appellant and forced into the bush by the appellant who then forced himself into her and had canal knowledge of her without her consent. The appellant argued that the victim did not explain how she came to know his name as he was not prior known to her. But the evidence in record is very clear and it was well analysed by the trial court before reaching to a conclusion that the offence of rape was committed by the appellant. The trial court was satisfied with the victim's evidence revealing on how she encountered the appellant on her way to Dirimu village and what the appellant did to her. In her evidence the victim explained that, the appellant grabbed her hand and forced her to the bush where he undressed and raped her. The appellant retained the victim until she tricked him and managed to escape leaving her clothes with the appellant. She was assisted by PW2 who upon interrogating the victim and the appellant who was running after the victim, he took both of them to the village office at Dirimu. I agree with the learned State Attorney that the victim's evidence was direct and clear and it worth believing except for the evidence that the appellant confessed before the VEO. The confession made before the VEO did not carry any weight to the prosecution evidence. But turning to the contention by the appellant that there was no proof on his identification, I find his argument weak. The incident took place at morning hours and the victim spent enough time with the appellant to make her memorise him. The victim's evidence was well supported by the PW2 who arrested the appellant while trying to catch the victim who

had escaped from him. It was further explained that, on reaching at the village office, the appellant disappeared and PW2 was issued with the arrest warrant by the VEO and he managed to arrest the appellant the same day. As the contents of the arrest warrant was not read in court, I concur with the suggestion to expunge the same from record. However, I agree with the learned State Attorney that the evidence PW2 proves that the appellant was arrested on the same day and such evidence was also corroborated by PW3 who is the Village Executive Officer to whom the report on rape was first made. It is also in evidence that after his arrest, the appellant led PW2 and PW3 to the scene where they discovered clothes that were identified by the victim as her clothes which she left at the scene.

In proving penetration, the victim's evidence reveal that the appellant inserted his male organ to her vagina. Such evidence was supported by the Doctor (PW4) who examined the victim. Admittedly the PF3 was not read in court and such defect was well pointed out by the learned State Attorney who urged this court to expunge the same and maintain the Doctors evidence. As there was no dispute that the Doctor who testified in court was the same Doctor who examined the victim, her oral testimony surface to corroborate the evidence of the victim. In her testimony, the Doctor was clear that she discovered discharge on labia majora of victim's vagina proving that the victim was penetrated. PW5 was the investigator who received the victim's clothes that were found and the scene and tendered the same as exhibit in court. It is my conclusion that the evidence of PW1, PW2, PW3, PW4 and PW5 was clear corroborating each other and it created unbroken chain of events

proving that the appellant committed the offence of rape. I there find this ground devoid of merit.

In the final analysis, this court is satisfied that the appellant was properly charged and convicted for the offence of rape. The appeal is therefore dismissed. The appellant shall continue to serve the thirty years imprisonment sentence and since the Court of Appeal was clear that the enhanced sentence was to be deemed as the one imposed by the trial court, the thirty years sentence will run from the date the appellant was convicted by the trial court, that is, from 5th day of February, 2015.

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D.C. KAMUZORA

JUDGE

19/07/2021

COURT: Judgment delivered this 19th Day of July 2021 in the presence of the appellant in person and Ms. Alice Mtenga, learned State Attorney for the Respondent. Right to appeal clearly explained.

THE HIGH COURT OF TANZANIA

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D.C. KAMUZORA

JUDGE

19/07/2021