IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.220 OF 2020

NASORO SELEMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the District Court of Kibaha at Kibaha)

(Kibona- Esq, RM)

Dated 12nd March, 2020

in

Criminal Case No. 199 of 2019

JUDGEMENT

18th June & 6th August 2021

Rwizile, J

The appellant was charged of rape, statutory rape contrary to section 130 (1), (2)(e) and section 131(3) of the Penal Code. Facts leading to the case can be stated as hereunder; good enough, they are not in dispute. The appellant lived with his brother (Pw1) in Coastal Region. Pw1, was married to Pw3 and are blessed with four children, among them is Pw2, ZD as the trial court so named her.

On 6th November 2019, Pw1 and Pw3 left home for a shopping. Behind, the appellant was left with children. It has been alleged that as they left, the appellant sent other children away remaining with Pw2 who was by then 7 years old. What followed thereafter is a sad story told by Pw2, Upon coming of her parents, Pw3 and Pw1. She told them, she was raped by the appellant, who by then had disappeared. The legal machinery was put into motion. The police issued a PF-3, and Pw2 was led to the nearby health facility. She was investigated and found had been penetrated. The appellant was arrested on the day that followed. He was brought to justice.

A full trial was conducted. The appellant was found guilty of rape. He was henceforth sentenced to a life imprisonment term. Aggrieved by both conviction and sentence, he is now before this court complaining in a memorandum of appeal with 8 grounds. The same are coached in the following terms;

1. *That, your honourable Judge, the learned trial magistrate grossly erred in law and fact in convicting the appellant where the prosecution evidence does not correlate with the provision of the penal code under which he was convicted as regard to the age of the victim.*

2. *That, the learned trial magistrate erred in convicting the appellant where the victim only promised to tell the truth but never promised not to tell lies contrary to mandatory provision of Section 127(1) of the Evidence Act as amended by Act No. 4 of 2016.*

3. *That, the learned trial magistrate erred in holding the appellant's conviction based on amended charge sheet where appellant was not informed of his right to recall witness if he so wished contrary to mandatory provision of criminal procedure Act [Cap 20 R.E 2002].*

4. *That, the learned magistrate erred in holding Pw3's evidence procured un-procedurally, where the charge sheet was amended after he had been affirmed and was not reminded by court that he was still under oath (refer to page 16 of court proceedings).*

5. *That, the learned magistrate erred in convicting the appellant where court failed to inform him his right to defense contrary to mandatory provision of criminal procedure Act [Cap 20 RE 2002].*

6. *That, the learned magistrate erred in holding to appellant conviction where victims evidence was partly procured un-procedurally as the same was recorded in reported speech contrary to mandatory provisions of criminal procedural Act [Cap 20 R.E. 2002].*
7. *That, the learned magistrate grossly erred in failing to evaluate Pw5's findings exhaustively before convicting the appellant as allegedly charged.*
8. *That, the learned magistrate erred by holding that the prosecution proved their case against the appellant beyond reasonable doubt.*

When the matter came for hearing. The appellant who appeared before me via Video link-up from Ukonga Prison here in Dar es salaam, had no representation. He asked this court to proceed determining the grounds of appeal raised because he does not even know how to read and write. His comment was that he did not commit the offence.

On the contrary, the respondent was represented by Joasi learned State Attorney. On her party she submitted albeit brief on each ground of appeal separately. Commenting on the first ground of appeal, she said, the trial was right to impose a statutory sentence of life imprisonment since the child was 6 years.

The second ground of appeal according to her, the trial court complied with mandatory provisions of section 127(2) of Evidence Act, since Pw2 made a promise to tell the truth. As ground 3, the learned Attorney asked this court to dismiss the same because the charge was substituted under section 234 of the CPA and it was complied with. Dealing with the 4th ground of appeal, it was stated that, Pw3 testified under oath before the charge was amended. I was asked to dismiss this ground as well.

Submitting on ground five, Joasi was of the view that the proceedings of the case at page 25, the appellant testified, he cannot, according to her, say he was not afforded a chance to defend his case. On the 6th ground, it was submitted that Pw2 had her evidence properly recorded. This according to the learned attorney, applies to the evidence of Pw5. She said upon tendering a PF-3, the court was informed of the findings that Pw2 was found with bruises and sperms in her vagina, which is ground 7 of the appeal.

Tackling the last ground of appeal, it was stated that the case was proved beyond reasonable doubt. Pw1, Pw3 and Pw4 witnessed cries of Pw2 who named the appellant right away. In all, this court was asked to dismiss the appeal, since it has no merit.

The appellant as hinted before, being a lay person and not represented. He consistently maintained that he committed no offence and so deserves an acquittal.

Having examined the record, grounds of appeal and submission by the parties. I think, I have to deal with the 3rd ground of appeal which in my view will dispose of the appeal. The same runs as follows;

That, the learned trial magistrate erred in holding the appellant conviction based on amended charge sheet where the appellant was not informed of his right to recall witnesses if he so wished contrary to mandatory provision of criminal procedure Act [Cap 20 R.E 2002].

The learned state Attorney submitted on this ground that since the charge was substituted under section 234 of the CPA, all requirements of the law were complied with. I have visited the trial court record. On 10th February 2020, before Pw3 gave her evidence, the state attorney asked the court to have the charge amended. It appears at page 15 to 16 of the typed proceeding. It went as follows;

PW3:

Name: Amina Abdul

Age: 38 Years old.

Resides: Mlandizi

Occupation: Mason

Religion: Muslim, affirm and state as follows;

***State Attorney**:*

I pray to make amendment on the charge.

Signed: F.L.Kibona – RM

10.02.2020.

Court:

The charge is ready by the accused person in the language he understands.

Signed: F.L.Kibona – RM

10.02.2020.

Accused: *Si kweli.*

Accused: *Accused pleaded not guilty.*

Signed: F.L.Kibona – RM
10.02.2020.

From the above, the proceedings show, neither the learned State Attorney nor the trial court that cited the section giving such mandated. But as it has been submitted by the Joasi, the only section in the CPA that deals with amendment and substitution of the charge is section 234. For reference, it states as hereunder;

> *234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*
>
> *(2) Subject to subsection (1), where a charge is altered under that subsection-*
>
> *(a) the court shall thereupon call upon the accused person to plead to the altered charge;*
>
> *(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-*

examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

(3) …

(4) ....

(5) Where an alteration of the charge is made under subsection (1), the prosecution may demand that the witnesses or any of them be recalled and give their evidence fresh or be further examined by the prosecution and the court shall call such witness or witnesses unless the court, for reasons to be recorded in writing, considers that the application is made for the purpose of vexation, delay or defeating the ends of justice.

Going by the dictates of the law, it is plainly the duty of the court to allow amendment of the charge or substitution of it, if so, asked by the prosecution or it may do so of its own motion, if it discovers material defect in the charge. Then, it has the duty to inform the accused of his rights arising from the action taken.

In this case, it is not known if the court indeed granted the prayer for amendment or allowed as substitution. The record contains two charges one cancelled which was filed on 11th December 2019 and the other one filed on 10th February 2020. I believe this is the one that was placed in record as it has been shown on the proceeding. This means, when the State Attorney asked for an amendment the trial court allowed substitution of the same.

From that, it takes no offence or pleasure in what the trial court did, but the appellant was not addressed on key issues. Such as whether or not he had a comment on the amendment or not, or if he had reason to demand to recall two witnesses that had testified. From the above the legal requirements set under the law were not complied with. The appellant being a lay man and according to him he is not even lettered. The trial court ought to inform him all possible options to take.

Failure to do so, it cannot be said, that the appellant was fairly tried. Fair trial in my view, demands that in an issue of procedure which is a handmaid of justice should be complied with fully. That being the case, this ground of appeal has merit. The remedy is that since all is at the fault of the trial court. I therefore allow the appeal, quash and set aside sentence and conviction. I thereby order a trial denovo before another magistrate with competent jurisdiction.

AK. Rwizile
Judge
06.08. 2021

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

Recoverable Signature

X 

Signed by: A.K.RWIZILE