IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 102 OF 2021

(Arising from Original Criminal Case No. 101 of 2020 of the District Court of Kwimba District at Ngudu. Before Hon. N. D. Ndeku, RM)

DAUD S/O KUHEMA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

01st September, & 13th September, 2021

ISMAIL, J.

The appellant faced three counts which are abduction, contrary to section 133 of the Penal Code, Cap. 16 R.E. 2019; rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code (supra); and impregnating a school girl, contrary to section 60A (1) of the Education Act, Cap. 353 R.E. 2019. The allegation in the charge sheet is that, on an unknown date in May, 2020, at about 09:00 hours, at Manawa village in Kwimba District, within Mwanza Region, with intent to marry or have sexual intercourse, the appellant took away ABC (in acronym), a school girl of 15 years of age,

abducted her against the will of the children, raped and impregnated her, thereby causing her to stop from attending school.

Gathering from the trial proceedings, the said ABC, otherwise known as the victim, was living with his male parent (PW1) at Manawa village and attending Manawa Primary School. Sometime in May, 2020, PW1 allowed the victim to pay a visit to her grandmother who resides in Icheja village. The understanding was that she would spend three days there. It turned out that the victim did not go to her grandparent and her whereabouts could not be established. The matter was reported to Nyambiti police station and, after a search that lasted for two months, it was informed that the victim had been seen at the appellant's home in Iseni village. The information was conveyed to the police who carried out a swoop that led to the arrest of the appellant. The victim was found at the appellant's home.

Subsequent to the appellant's arrest, the victim was taken to Ngudu hospital where a pregnancy test was carried out. It came out that the victim was carrying a pregnancy. It is at that point in time that the appellant was charged and arraigned in court. The appellant denied any wrong doing, simply stating that he was not involved in the alleged offences.

The district Court of Kwimba at Ngudu, before which the appellant was arraigned, acquitted him of the counts of rape and impregnating the victim,

while convicting him of the count of abduction. Consequently, he was sentenced to imprisonment for seven years. This decision was not to the appellant's liking. He decided to take up an appeal against the conviction, raising four grounds of appeal, as follows:

1. *That the prosecution failed to prove the case beyond reasonable doubt.*
2. *That the trial magistrate erred in law and in fact in convicting and sentencing the appellant while the evidence relied on was full of contradictions especially on the date and month in which the incident occurred.*
3. *That the trial magistrate erred in law and in fact in convicting and sentencing the appellant without evidence of the victim of the incident.*
4. *That the trial magistrate erred in law and in fact in convicting and sentencing the appellant in the absence of the evidence of the police officer who investigated the case and a police officer who was involved in the appellant's arrest.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, while the respondent was represented by Ms. Georgina Kinabo, learned State Attorney.

Ms. Kinabo began by addressing the Court on a point of law. This was with respect to the sentence imposed on the appellant. The learned attorney argued that the sentence was beyond the trial magistrate's sentencing powers, and contrary to the provisions of section 170 (1) of the Criminal

Procedure Act, Cap. 20 R.E. 2019 (CPA). Ms. Kinabo argued that the sentence allowed for the trial magistrate's rank is imprisonment for a period not exceeding five years, and not seven years meted out. This considers the fact that this is not an offence falling under the Minimum Sentences Act, Cap. 90 R.E. 2019. She invoked the reasoning of the Court of Appeal of Tanzania in ***Ally Mbega v. Republic***, CAT-Criminal Appeal No. 109 of 2015 (unreported), in which the excessive sentence was termed as *ulta vires*.

Submitting on ground one of the appeal, the contention by Ms. Kinabo is that the offence was proved beyond reasonable doubt. She argued that, in terms of section 134 of the CPA, proof of the offence of abduction entails disclosure of age and lack of consent. With respect to age, the counsel's view is that the same was attested to by PW1, who stated that the victim was 15 years old, having been born in 2005. On the consent, the counsel argued that PW1 testified that the victim's departure from home to the appellant's home was not consented to by the parents or guardian, as she left, telling him that she was going to her grandmother where she did not go, only to be located two months later, at the appellant's home. This was corroborated by PW4, the victim's school teacher. The learned counsel argued that this ground is barren.

With respect to ground two, the respondent's contention is that the charge sheet is clear that the incident occurred in May, 2020 and that this has been testified to by PW1. Ms. Kinabo saw no contradiction on the dates on which the incident occurred. She took the view that this ground is baseless. Regarding ground three, the argument by the respondent's counsel is that, while it is true that the victim did not testify in the case, the case against the appellant was proved. She argued that all ingredients of the offence were proved by PW1. The learned attorney was of the view that presence of the victim would, most likely, be counter-productive as he would have sided with the appellant. She considered this ground barren as well.

Submitting on ground four, Ms. Kinabo took the view that absence of the police officers for testimony is not a violation, especially when it is clear that PW1 went to locate the victim while accompanied by the said officer. His testimony was sufficient to cover what the police officers would cover.

When probed by the Court on the propriety or otherwise of the charge, especially preference of section 133 of the Penal Code (supra), Ms. Kinabo conceded that the appropriate charging provision ought to have been section 134 and that the sentence ought to have been imposed in terms of section 35 which is imprisonment for two years. She urged the Court to make its own conclusion on the matter.

In his brief rejoinder, the appellant maintained that he was not culpable and that when the victim came to his home he was not around and that the victim was completely a stranger to him. He prayed that his appeal be allowed.

Before I review the parties' submissions on the appeal, there is one nagging issue that was brought up in the course of the hearing. This is in relation to the propriety or otherwise of the provision of the law under which the charges were preferred. This is with respect to the 1st count, which is abduction. The contention by Ms. Kinabo is that, noting that the victim was a girl under the age of 15 years, then the appropriate charging provision is section 134 and not section 133 of the Penal Code (supra).

The general position is that, where the charge levelled against an accused is defective on account of citation of a wrong or non-existing provision of the law, resulting in a conviction, the charge is said to be incurably defective, and the accused is said to have been unfairly treated (See: ***Mnazi Philimon v. Republic***, CAT-Criminal Appeal No. 401 of 2015(unreported); and ***Mussa Mwaikunda v. Republic*** [2006] TLR 387). The condition precedent for application of this general rule is that the appellant must have been prejudiced by such omission or error. The exception to this rule was set in ***Jamali Ally @ Salum v. Republic***, CAT-

Criminal Appeal No. 52 of 2017 (unreported), wherein the Court of Appeal made the following observation (at pp. 17 & 18):

> *"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-citation and citation of inapplicable provision in the statement of offence are curable under section 388 (1) of the CPA."*

From the quoted excerpt, the obvious conclusion is that, where the omission has not caused any prejudice to the accused person, then the same is a curable by invoking the Court's power under section 388 (1) of the CPA. The question to be determined with respect to the present appeal is whether the citation of section 133 of the Penal Code (supra), instead of section 134 caused any prejudice to the appellant. My unflustered answer to this question is in the negative. This is in view of the fact that the particulars of the offence, together with the testimony of PW1, enabled the appellant to appreciate the seriousness of the charges which were levelled against him, thereby eliminating any possible prejudices against him. Thus, notwithstanding the concession made by Ms. Kinabo, I am convinced that the error is curable. Consequently, I hereby invoke the provisions of section

388 (1) of the CPA and cure it by substituting of section 133 of the charging provision with section 134 of the Penal Code.

Reverting to the substance of the appeal, the critical question for determination is whether the appeal carries any merit. I will dispose of the appeal following the sequence adopted by the counsel for the respondent.

With regards to ground one the appeal the argument is that the case against the appellant was not proved beyond reasonable doubt. This contention is valiantly opposed by the respondent's counsel. It is common ground that, in criminal proceedings, conviction can only be grounded if the prosecution has adduced evidence that has established the accused's culpability beyond reasonable doubt (See: ***The D.P.P v. Maria Joseph Somba***, CAT-Criminal Appeal No. 404 of 2007; ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (both unreported); and ***Jonas Nkize v. Republic*** [1992] TLR 213.)

In order to arrive at a conclusion that the case against the appellant was proved, it must be established that the testimony was adduced, proving the existence of the ingredients constituting the offence. In the case of abduction, the key ingredients are that:

(i) The accused person took away or detained the victim, a girl of the age below the age of sixteen years;

(ii) The take away or detention was solely with the intent of having sexual intercourse with or marrying the victim by the accused or another person; and

(iii) Such action was done against the will or consent of the parents or guardians.

The key witness who featured for the prosecution was PW1, Kusekwa Masalu, the victim's father, who gave an account of how the victim left home for Icheja village, where she would spend three days, only to find out that she had disappeared to an unknown place, never to be seen until two months later when she was found in the house of the appellant. The witness also testified that, at the time of the incident, the victim was a standard six student at Manawa Primary school, aged 15 years. This testimony was also to the effect that the victim's disappearance was not consented to or permitted by PW1, and that when the victim was located, she was carrying a pregnancy. There was no proof, though, that the appellant was responsible for the pregnancy. The testimony by PW2 was corroborated by that of PW2, Richard Mathias, who was informed of the victim's presence at the appellant's house, and that he found the victim in the house of the appellant's mother.

The totality of this testimony has, in my considered view, proved the existence of all the ingredients that constitute the offence of abduction. It is my conviction that the prosecution proved its case beyond reasonable doubt. Consequently, I hold the view that this ground of appeal is hollow and I dismiss it.

Ground two of the appeal imputes contradictions that allegedly reside in the date on which the incident occurred. No additional submission was made to bring this contention to light. The respondent's counsel has spotted none in the testimony and the charge sheet. This is the view that I fully subscribe to. Both, the charge sheet and the PW1's testimony, are in sync on the date on which the incident occurred. They point to May, 2020, as the date on which the incident occurred. I am not convinced that the appellant's contention in this ground is plausible or backed up by any semblance of factual accuracy worth any consideration. I dismiss this ground as well.

Grounds three and four take exception to the prosecution's failure to bring the victim and two police officers who were involved in the arrest and investigation of the matter. He takes the view that such failure constituted the basis for complaint. I hasten to state that this contention is flawed and baseless. The duty of the prosecution was to prove the case against the appellant, consistent with the provisions of sections 110 and 115 of the

Evidence Act, Cap. 6 R.E. 2019. If this could be done without the presence of the three persons whose non-appearance is complained against, then the prosecution discharged its obligation. It follows that the presence of the said employees would, at best, be a public relations exercise which would add no value to the prosecution's case. I hold that these grounds of appeal are barren and I dismiss them.

Overall, I take the view that the appeal is barren of fruits. I hold that the decision of the trial court to convict the appellant was plausible, based on a sound legal foundation, and I uphold it.

Before I wind down, and having dismissed the appeal, it behooves me to say a word or two on the point of law addressed by Ms. Kinabo. This is with respect to the sentence imposed by the trial court. This is a seven-year custodial sentence meted out by the presiding magistrate. The contention by Ms. Kinabo is that the sentence is in excess of the trial magistrate's sentencing powers which are capped at 5 years. This is in terms of section 170 (1) of the CPA which states as hereunder:

> *"(1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences-*
>
> *(a) Imprisonment for a term not exceeding five years; save that where a court convicts a person*

of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;

Shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge:

Provided that, this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank."

A glance at the trial court's proceedings reveals that the said proceedings were presided over by a judicial officer of the rank of a resident magistrate. This rank is lower than that of a senior resident magistrate in respect of whom the cap imposed under section 170 (1) (a) of the CPA does not apply. It is a rank whose sentencing powers are capped to five years of imprisonment. Needless to say, by imposing the seven-year custodial sentence, the learned magistrate passed a sentence which was manifestly excessive and, therefore, unlawful. He, infact, punched above his weight. What, then, is the consequence of all this? Ms. Kinabo has invited me to revise the sentence with a view to imposing the fitting sentence. I find it to be the legitimate call, and doing so is in coping with

the powers vested in the Court on appeal. These powers are exercised where the trial court has imposed a sentence which is either patently inadequate or manifestly excessive. This position was accentuated in ***Bernadeta d/o Paul v. R*** [1992] TLR 97 the Court held, *inter alia,* as follows:

> "..... *that an appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive*".

See also: ***R v. Mohamed Ali Jamal*** (1948) 15 E.A.C.A. 126; ***James Yoram v. R*** (1951) 18 E.A.C.A. 147; and ***Selemani Makumba v. Republic*** [2006] TLR 379.

Worth of a note is the fact that the Court's intervention in such cases is safeguarded by section 388 of the CPA, and can only be invoked if the irregularity sought to be remedied is of a mammoth proportion, and has occasioned a miscarriage of justice. In my considered view, the infraction committed by the trial magistrate is fundamental and the miscarriage of justice brought about by the irregular imposition is conspicuous and horrendous.

Thus, as I dismiss the appeal, I revise the sentence and substitute the sentence and impose a two-year prison term. This is also in view of the fact that substitution of the charging provision from section 133 to section 134 of the Penal Code (supra,) and the realization of the fact that the latter provision does not expressly provide a punishment for the offence charged under the said provision. In such a case, resort has to be had to section 35 of the Penal Code (supra) which provides for custodial sentence of not more than two years, with or without a fine.

In consequence of the foregoing, I find the appeal barren of fruits. Save for the sentence that has been revised, the rest of the appeal is dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 13th day of September, 2021.

M.K. ISMAIL

JUDGE