**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 70 OF 2021**

(Appeal from the decision of the District Court of Mkuranga at Mkuranga in Criminal Case No. 152 of 2020 before Hon. R.E. Mwaisaka, **RM** dated 21/12/2020)

**ISSA SAIDI SADY................................................................. APPELLANT**

**VERSUS**

**THE REPUBLIC........................................................................ RESPONDENT**

# JUDGMENT

*04th Sept, 2021 & 05th Nov, 2021.*

**E. E. KAKOLAKI J**

The appellant in this appeal is aggrieved with both conviction and sentence imposed on him by the District Court of Mkuranga in Criminal Case No. 152 of 2020, in its judgment handed down on 21/12/2020, against the offence of **Rape**; Contrary to Sections 130(1)(2)(e) and 131 of the Penal Code, [Cap. 16 R.E 2019]. It is learnt from the record that he was sentenced to thirty (30) years imprisonment and ordered to pay compensation of Tshs. 500,000/- to the victim of crime. The appellant is therefore challenging the trial court's decision equipped with five grounds of appeal which are

summarised as follows. **One,** the trial was unfairly conducted for failure of the court to explain to him the charge and inform him of his right to call defence witnesses in contravention of the provision of section 231(1)(b) of the Criminal Procedure Act, [Cap. 20 R.E 2019] (CPA). **Two,** the lower court proceedings were vitiated due to the court's failure to comply with the provisions of section 210(3) of the CPA. **Three**, the compensation order amounting to Tshs. 500,000/- was made without assessment of appellant's ability to pay. **Fourth**, prosecution case was marred with lies and contradictions. **Fifth** and **lastly,** the prosecution case was not proved beyond reasonable doubt against the appellant. With these grounds of appeal the court is invited by the appellant to find this appeal has merit and allow it by quashing the conviction and set aside the sentence and compensation order meted on him.

It was prosecution case that, the appellant on the 22/07/202 at about 18.00 hours at Kikudi-Kimanzichana village within Mkuranga District in Coastal Region had sexual intercourse with one S.H.C (identity protected) a school girl aged at 15 years old. When called to answer the charge the appellant denied the accussations the result of which moved the prosecution to parade five (5) witness to prove its case being PW1 the

victim herself, PW2 and PW5 as victim's mother and father respectively, PW3, the medical officer and PW4, investigation officer. The defendant fended for himself as he had no witness to call. Hearing of the appeal proceeded viva voce and both parties were represented. Mr. Moses Gumba represented the appellant whereas the Respondent enjoyed the services of Ms. Rehema Mgimba, learned State Attorney. In this judgment I am not intending to reproduce the whole submissions as advanced by the parties as I am going to cover them in the due course of addressing the grounds of appeal, if need be.

To start with the first ground of appeal it was Mr. Gumba's contention that, the appellant was wrongly convicted and sentenced as the trial proceeded unfairly and in violation of the provision of section 231(1)(b) of the CPA for failure of the trial court to explain to him his right to call witness. To make the matter worse he submitted, according to page 14 of the proceedings the appellant was addressed in terms of section 293(2) of the CPA and not section 231(1)(b) of the CPA complained of. He argued that was a total denial of his rights as when addressed in terms of section 293(2) of the CPA he is recorded to have replied *"I will defend myself on affirmation"* which response as per the case of **Mabula Julius and Another Vs. R,**

Criminal Appeal No. 562 of 2016 (CAT-unreported), vitiated the proceedings as the omission to address him in terms of section 231(1)(b) of the CPA is fatal one. He therefore prayed the court to find the ground meritorious and on that basis allow the appeal by setting aside the sentence and set free the appellant. In rebuttal Ms. Mgimba for the Respondent while admitting it was an error for the trial magistrate to address the appellant in terms of section 293(2) of the CPA instead of section 231(1)(b) of the CPA, she submitted the omission was not fatal as the same occasioned no any injustice to the appellant. She argued, though section 293(2) of the CPA is applicable to the proceedings before the High Court its contents are similar to those of section 231(1)(b) of the CPA. More so, the appellant understood his rights and that is why he informed the court that he could testify under affirmation the learned State Attorney stressed. She implored the court to find the ground is without merit and dismiss it.

I have carefully followed the fighting arguments by both parties' counsels in regard to this ground. What is gleaned from their submissions is that it is uncontroverted fact that it was an omission for the trial magistrate wrongly addressed the appellant in terms of section 293(2) of the CPA, which

section is applicable to the High Court Proceedings only, the omission which Ms. Mgimba submits is not fatal and occasioned no injustice to the appellant as he was addressed on his rights, while Mr. Gumba is of the contrary view that, it is fatal and denied the appellant of his right to be informed of the right to call witnesses during his defence. Though the object of both provisions applicable in two different courts is to address the accused person on similar rights before entering his defence, I disagree with Ms. Mgimba that the omission by the trial magistrate in this case is not fatal and therefore did not occasion any injustice to the appellant. The provisions of section 231(1)(b) is coached in mandatory terms with intent to safeguard the accused's rights to fair hearing by requiring explanation to him of the charge facing him and inform him of the right to defend himself under oath or affirmation or not as well as his right to call witness, thus assurance of fair trial on his side. Unlike section 231(1)(b) of the CPA which makes it mandatory that charge must be explained to the accused, section 293(2) of the CPA does not contain that mandatory requirement. In this matter the trial magistrate's act of addressing the appellant in terms of section 293(2) of the CPA, I hold denied him of his right to have the charge explained to him before entering his defence. It is from that stance I hold

the view, the omission by the learned magistrate is fatal and therefore vitiated the proceedings as it prejudiced the appellant for failure to have the charge explained to him contrary to what Ms. Mgimba would want this court to believe. The said section 231(1)(b) of CPA reads:

> *231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court* ***shall again explain the substance of the charge to the accused and inform him of his right-***
>
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
>
> *(b) to call witness in his defence,*
>
> ***and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer;*** *and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights. (Emphasis added)*

And section 293(2) provides thus:

*293(2) Where the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of sections 300 to 309 he is liable to be convicted,* ***shall inform the accused person of his right-***

*(a) to give evidence on his own behalf; and*

*(b) to call witnesses in his defence,*

*and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights.*

In light of the above discussion and finding it is no doubt the provisions of section 231(1)(b) of the CPA were defied. The court of appeal in a litany of authorities held the effect of contravening the said provision is to vitiate the proceedings. In the case of **Maneno Mussa Vs. R,** Criminal Appeal No. 543 of 2016, [2018] TZCA at www.tanzlii.org the Court of Appeal when deliberating on the effect of non-compliance of section 231(1) of the CPA had the following observations:

*"Failure by the trial court to comply with the provisions of section 231(1) of the CPA which safeguards accused persons' right to fair trial;* ***is fatal omission.****" (Emphasis supplied)*

Similarly in the case of **Cleopa Mchiwa Sospeter Vs. R**, Criminal Appeal No. 51 of 2019-[2020] TZCA 287 at www.tanzlii.org the Court of Appeal relying on the case of **Maneno Mussa** (Supra) on violation of the provision of section 231(1) of the CPA had this to say:

*"...this Court has oftentimes held that failure to comply with the mandatory provisions of s. 231(1) of the CPA,* ***vitiates subsequent proceedings.****" (Emphasis supplied)*

In view of the above authorities which binds this court and given the fact that the appellant was not addressed in terms of the provisions of section 231(1)(b) of the CPA, it is the findings of this court that the omission was fatal and vitiated proceedings of the trial court. Assuming the appellant understood his rights after being addressed in terms of section 293(2) of the CPA as submitted by Ms. Mgimba hence his response that he would enter his defence under affirmation which fact I have already held herein above was not the case, still I would hold the proceedings were vitiated as there is no proof in record to show he exercised his right to choose whether he wanted to call witness or not, which right if not exercised

vitiates the proceedings too. This position of the law is fortified with the Court of Appeal decision in the case of **Mabula Julius** (supra) when the Court was faced with a similar situation to the one at hand where there was no record to show appellants were informed of their rights to call witnesses, and had the following to say:

> *"...,failure by the trial court to record whether the appellants could call witnesses in terms of section 231(1)(b) prejudiced the appellants.* ***The infraction, on the authority of the decisions cited above, is fatal. It vitiated all subsequent proceedings."*** *(Emphasis added)*

Having found the proceedings before the trial court are vitiated the next question is what is the course to be taken. Mr. Gumba urged this court having so found the proceedings are vitiated to proceed quashing them and set aside the sentence and compensation order the result of which is to set free the appellant. Ms. Mgimba made no respond to this prayer apart from inviting the court to dismiss the ground of appeal. Indeed as submitted by Mr. Gumba the circumstances of this case invites the court to exercise its revisional powers under section 373(1)(a) of the CPA, which I hereby invoke, by quashing the proceedings after the closure of prosecution's case and the judgment thereof. I further set aside the

sentence and compensation order meted on the appellant. Now having so done, the last question is whether the appellant should be returned to the trial court for the court to comply with the law in accordance with the provisions of section 231(1)(b) of the CPA or deserves acquittal under the circumstances of this case as submitted by Mr. Gumba. The answer to this question in my considered opinion is that he deserves acquittal and I will tell why. **One**, it is trite law, in proving sexual offences the best evidence comes from the victim which in this case is PW1. See the case of **Selemani Makumba Vs. R** [2006] T.L.R 379, at page 384 where the Court of Appeal held that, the true evidence of rape has to come from the victim. **Second**, penetration however slight it is, must be proved. See the cases of **Godi Kasenagala vs. R**, Criminal Appeal No. 271 of 2006 (CAT-unreported) and **Mbwana Hassan Vs. R**, Criminal Appeal No. 98 of 2009 (CAT-unreported). In this case is doubtful as to whether the victim PW1 was raped or not as her evidence and that of her mother PW2 contradicts the evidence of PW3, the doctor who examined PW1 and the findings of Exhibit PE1. PW1 at page 5 of the typed proceedings told the court her tale on how the appellant on the evening of 22/07/2020, after grabbing her down and removed her under wear inserted his penis in her private parts

and she felt pains before the incidence was reported to her mother when arrived at home. This piece of PW1's evidence was corroborated by her mother's evidence (PW2) at page 6 of the proceedings, who alleged upon receiving that bad news from PW1 she inspected her private parts and confirmed her to have been raped as there was fluids mixed with blood in her private parts. That evidence suggests the victim sustained bruises in her private parts during commission of the offence. To the contrary on the next day on 23/07/2020 and within 24 hours while admitted at Kilimahewa Health Centre PW3 examined PW1 and filled in the PF3 exhibit PE1 observing and remarking that there was no bruises of *labia majora* or sperms observed though the hymen was not intact. PW3 said the reason for not observing bruises might be caused by the incident taking place quite some time. The contradiction between the evidence of PW1 and PW2 and that of PW3 the doctor who examined her on penetration and availability of bruises in the victim's private parts in my opinion goes to the root of the case and raises reasonable doubt as to whether the alleged rape was in fact committed and it was committed on 22/07/2020. Where contradictions and inconsistencies in the prosecution evidence are major and go to the root of the matter, the same must be resolved in the

accused's favour. See, **Mohamed Matula v. Republic,** 1995 TLR 3 and **John Gilikola v. Republic,** Criminal Appeal No. 31 of 1999 (CAT-unreported). One would expect the victim who was examined in less than 24 hours of the commission of the alleged rape to have been found with fresh wounds or bruises in her vagina if at all the said rape was really committed on 22/07/2020. To contrary the expectations turned out to be a nightmare as the doctor suggested rape if perpetrated was sometimes ago and that is why bruises were never detected. With all that contradictory and doubtful evidence which as already held goes to the root of the case, it cannot be safely stated with certainty that rape offence was proved against the appellant. It is from those reasons I answered the above question positively that with such weak prosecution evidence the appellant deserves acquittal. The first ground of appeal therefore has the effect of disposing of the appeal and I see no any pressing issue that calls me to further consider the rest of the grounds for that will amount to academic exercise in which I am not ready to venture into.

That said and done, this appeal is allowed. As noted above the proceedings of the trial court are hereby quashed, sentence and compensation order meted on the appellant is set aside. This has the effect of ordering

immediate release of the appellant from prison forthwith unless otherwise lawfully held, which order I hereby issue.

It is so ordered.

DATED at DAR ES SALAAM this 05th day of November, 2021.

E.E. KAKOLAKI

**JUDGE**

05/11/2021

Delivered at Dar es Salaam in chambers this 05th day of November, 2021 in the presence of the appellant in person, Mr. Rehema Mgimba, State Attorney for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. KAKOLAKI

**JUDGE**

**05/11/2021**