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

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 217 OF 2021

(Arising from the decision in Criminal Case No. 245 of 2020 of the District Court of Kinondoni at Kinondoni by Hon. Lyamuya -PRM) dated 20th day of May, 2021, in Criminal Case No. 80 of 2020)

ENOCK BENI @ MBOGO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

23rd February, & 14th March, 2022

ISMAIL, J;

The District Court of Kinondoni at Kinondoni convicted the appellant of rape, contrary to the provisions of section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The allegation is that, on 25th December, 2020, the appellant allegedly had a carnal knowledge of JFK (in pseudonym), a girl of 12 years of age. The incident allegedly occurred at around 8.30 pm in a bush off Bunju – Mabwepande road, at Mambwepande, Kinondoni District, Dar es Salaam Region.

It was alleged that, on the fateful day, PW6 way heading home, riding a motorcycle. Along the way, close to Tumaini Secondary School, he saw a girl (PW3) standing by a motorcycle. On enquiry, he was informed that she was waiting for her aunt and uncle who were in the bush. This drew some suspicion to PW6. He chose to go to a nearby the school and informed a guard (PW7) who, along with PW6 went to the bush where they found the appellant and PW2. When the latter was probed, she admitted that she had just had a sexual intercourse with the appellant. The duo was taken to the school where PW1, the victim's aunt was informed and dashed to the school. They then rushed to Mabwepande police station where a PF3 was issued for the victim's medical examination. The examination showed that PW1 had been penetrated.

After investigation, the police took the view that the appellant was culpable. He was arraigned in court where he pleaded not guilty to the offence. After a hearing that saw the prosecution line up 8 witnesses and one for the defence, the trial magistrate convicted the appellant and sentenced him to imprisonment for thirty years.

This verdict aggrieved the appellant, hence his decision to take a ladder up to this Court. A total of 20 grounds of appeal were raised as paraphrased hereunder:

1. *That the trial court erred in law and fact by convicting the appellant without assessing, analysing and evaluating the prosecution evidence and did not meet the requirements of the law;*

2. *That the trial court erred in law and fact by convicting the appellant based on the testimonies of PW2 and PW3 which was adduced in conformity with the requirement of having conducting a voire dire test as provided for under section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019;*

3. *That the trial court erred in law and fact by convicting the appellant relying on Exhibit PE1 whose admission in court was unprocedural;*

4. *That the learned trial magistrate erred in law and fact by convicting the appellant while relying on Exhibit PE2 which was not read out to the appellant;*

5. *That the trial magistrate erred in law and fact by convicting the appellant while relying on Exhibit P3 which was repudiated and the trial court did not conduct an inquiry to determine its voluntariness before its admission;*

6. *That the trial magistrate erred in iaw and fact by convicting the appellant while relying on Exhibit PE3 which was repudiated and recorded after the lapse of four hours since his arrest;*

7. *That the trial magistrate erred in law and fact by convicting the appellant based on discredited evidence which lacked cogence and*

not corroborated in order to link the appellant with the charged offence;

8. *That the trial magistrate erred in law and fact by convicting the appellant while disregarding contradictions found in the testimony of PW6 and PW7 on the time that the appellant and PW2 were found in the bush;*

9. *That the trial magistrate erred in law and fact by convicting the appellant on reliance of Exhibit PE1 while court failed to allow the carrying out of the appellant's medical examination, including DNA test and sexually transmitted diseases;*

10. *That the trial magistrate erred in law and fact by convicting the appellant on the basis of the visual identification of PW2, PW6 and PW7, while the source and intensity of the light was not explained;*

11. *That the trial magistrate erred in law and fact by convicting the appellant on the basis of the testimony of visual identification of PW6 and PW7 while the source and intensity of the light was not described satisfactorily;*

12. *That the trial magistrate erred in law and fact by convicting the appellant while relying on visual identification which did not meet the requisite standard;*

13. *That the trial magistrate erred in law and fact by convicting the appellant by failing to conduct a proper preliminary hearing and list*

down the memorandum of disputed and undisputed facts, drawing a list of witnesses and a list of exhibits;

14. *That the trial magistrate erred in law and in fact by failing to address the appellant on the prima facie case in terms of section 231 (1) (a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2019, and enable him to prepare his defence;*

15. *That the trial magistrate erred in law and fact by convicting the appellant without reading over the charge and calling upon the appellant to plead not guilty when the defence case opened;*

16. *That the trial magistrate erred in law and fact by convicting the appellant based on unreliable and discredited testimony while PW2 stated that he was not forced into indulging in sex with the appellant.*

With respect to supplementary grounds of appeal the same are paraphrased as hereunder:

1. *That the trial magistrate grossly erred in law and in fact when he allowed to work under the influence of the social welfare officer by including her in the quorum while she was not an officer of the court and interests of PW2 were taken care by the prosecuting state attorney;*

2. *That the trial magistrate grossly erred in law and in fact when he convicted the appellant on the basis of the testimony of PW2 who testified that he was a willing partner;*

3. *That the trial magistrate grossly erred in law and in fact when he sentenced the appellant to a custodial sentence while he was a boy of 18 years of age;*

4. *That the trial magistrate grossly erred in law and in fact by not considering the growing trend of mature girls who indulge in relationship with boys knowing that they below the age of minority and land them in trouble while they walk out freely;*

5. *That the trial magistrate grossly erred in law and in fact when he convicted the appellant based on the testimony of PW1 and PW5 on the status of PW2's mother;*

6. *That the trial magistrate grossly erred in law and in fact when it relied on PW5 on the age of PW2 while failing to conduct an inquiry on the appellant's age.*

Hearing of the appeal took the form of written submissions, filed at the instance of the appellant. The appellant began by attacking the propriety of the judgment appealed against. The contention is that the same did not conform to the provisions of section 312 (1) of the Criminal Procedure Act, Cap. 16 R.E. 2019. The argument by the appellant is that reasons and points for determination were not pointed out as guided by the cited provision and

as accentuated in ***Hamis Rajabu Dibagula v. Republic***, CAT-Criminal Appeal No. 53 of 2001 (unreported); and ***Willy John v. Republic*** [1956] 23 EACA 509.

The appellant further contended that his defence testimony was not considered, an irregularity which he contended vitiates a conviction, as was held in ***Hussein Idd & Another v. Republic*** [1986] TLR 166; and two other decisions. The net effect of all this, argued the appellant, was to invoke ***Fatehali Manji v. Republic*** [1966] EA 343.

With regards to the victim's evidence, the appellant's view is that PW2 and PW3's testimony was taken contrary to the requirements of the law on *voire dire*. The contention here is that questions posed to the witness were not reproduced by the trial magistrate, thereby infracting the position set in ***Mohamed Sainyeye v. Republic***, CAT-Criminal Appeal No. 57 of 2010; and ***Hassan Hatibu v. Republic***, CAT-Criminal Appeal No. 71 of 2002 (both unreported). This, in the appellant's view, rendered the testimony unworthy and requiring corroboration.

The appellant's other point of contestation is that PF3 which was admitted as Exhibit PE1 was tendered by the State Attorney who was not a witness. In this case the prosecutor assumed the role of a witness who could not be cross examined. Besides the irregular tendering of the said exhibit,

the same was not read out to the appellant. The same was said with respect to the victim's birth certificate. This, the appellant contended, went contrary to the position postulated in ***Robinson Mwanjisi & 3 Others v. Republic*** [2003] TLR 218.

Turning on to the appellant's cautioned statement, the contention is that its recording offended the provisions of sections 50 (1) (a) and 52 (1) (a) of the CPA. The argument is that the statement was recorded after the lapse of four hours since his restraint. He contended that the moment he objected to its admissibility the court ought to have carried out an inquiry to determine its admissibility. This is in view of the fact that its admissibility was contested. He further argued that after the said testimony had been admitted, what follows is determination of the weight that it carries. He urged the Court to expunge Exhibit PE3 from the record.

The appellant dwelt on the aspect of identification as well. The contention is that conditions favouring identification, as spelt out in several decisions, including ***Waziri Amani v. Republic*** [1980] TLR 250, were not fulfilled. In this case, the appellant's argument is that PW6 and PW7 who purported to identify the appellant that night did not describe the intensity of the light that aided them to identify the appellant. Their story on the illumination is different from one to the other. The appellant further argued

that the record is silent on the description of the appellant's attire in the night.

The appellant raised yet another issue. This is in relation to variance of time at which the second master and the watchman went into the bush and spotted the appellant and the victim. Whereas PW6 said it was at 8.00 pm, PW7 said it was at 8.30 pm. He read contradictions that cast doubts on the credibility of the witnesses.

The appellant has also taken an exception to the court's failure to comply with the law in establishing the appellant's age before it passed a sentence. He argued that the law prohibits imposition of custodial sentence on a convicted offender whose age is 18 years or less. He was of the view that the proper application of section 119 (1) of the Law of Child Act, Cap. 13 R.E. 2019 would have seen the court impose an alternative sentence to that of imprisonment.

At some point, the appellant offered a counsel on the need to apply DNA tests in cases of this nature, as he thinks that such tests provide some certainty in establishing the offender's involvement in the offence charged. He acknowledged, however, that the process is full of legal difficulties that need to be reviewed.

The appellant wound up his submission by contending that the prosecution did not prove its case beyond reasonable doubt. Overall, he urged the Court to allow the appeal, quash and set aside the conviction and sentence imposed by the trial court, and set him free.

The respondent's submission was equally extensive. With regards to ground one, the argument is that all prosecution witnesses managed to prove the commission of essential ingredients necessary in proving the offence, consistent with the law. With respect to the misgivings on the manner in which the judgment was composed, the respondent was inspired by the holding in in ***Amiri Mohamed v. Republic*** [1984] TLR 138, wherein it was held:

> *"Every magistrate or judge has his or her style of composing a judgment and what vitally matters is that the essential ingredients shall be there and these include critical analysis of both the prosecution and the defence ...."*

The respondent took the view that the appellant's contention that he bore a grudge with PW1 was baseless since the appellant failed to cross-examine PW1 on that fact. It was the respondent's view that such failure by the appellant was in fact an admission. On this, she referred us to the case of ***Ridhiwan Nassor Gendo v. Republic***, CAT-Criminal Appeal No. 201 of 2018 (unreported).

The respondent conceded that the appellant's defence was not considered. She quickly submitted, however, that the remedy in such cases is to have the appellate court step in and evaluate the evidence. She cited the decision of the Court of Appeal of Tanzania in ***Mzee Ally Mwinyimkuu @ Babuseya v. Republic***, CAT-Criminal Appeal No. 499 of 2017 (unreported).

Regarding the 2nd ground, the respondent's contention is that section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 was complied with. The respondent took the view that PW2 and PW3, both children of tender age, were taken through some questions that brought a conclusion that they possessed sufficient knowledge and intelligence to understand their duty of speaking the truth and not to tell lies.

On ground three, the respondent's argument is that, going by the proceedings (page 25), it is clear that Exhibit PE1 was tendered by PW4 and not the state attorney. She found nothing blemished in that respect.

Moving on to ground four, the respondent is in agreement that Exhibit PE2 was not read over to the appellant after its admission, and that the same is liable to expunging. She, however, considered that the testimony of PW5 as sufficient to prove that PW3 was 13 years of age and a minor.

Regarding ground five, the respondent's contention is that, since the raised objection was not based on law, overruling of the objection did not require conducting an inquiry. She argued that this ground of appeal is lacking in merit.

With regards to ground six, the argument by the respondent is that Exhibit P2 was recorded within 3 hours of the appellant's conveyance to the police station, meaning that the law was duly complied with. The respondent took an issue with the raising of the objection at this point of the proceedings while the same ought to have been raised at the point of tendering the said document. He found nothing serious on this contention.

Regarding ground seven of the appeal, the argument by the respondent is that the testimony that was used to convict him was discredited and uncorroborated. The respondent took a critical review of the testimony adduced in court and concluded that the same was worth of relying on. She contended that the testimony proved that the appellant committed the charged offence.

In her submission on ground 8, the respondent admitted that there were contradictions between the testimony of PW6 and that of PW7. She noted, however, that such contradictions were minor and did not shake the credibility of the prosecution's case.

Moving on to ground nine, the respondent's take is that this ground is weak as examination carried out on the victim was enough. There was no need for further examination of the appellant.

On grounds 10, 11 and 12, the respondent defended the identification, claiming that PW6 and PW7 clearly identified the appellant at the scene of the crime and took some time to be with the appellant for the entirety of his restraint.

Regarding ground 13, the contention by the respondent is that the essence of the preliminary hearing is to establish facts which are not in dispute and those that are disputed. It is not intended that witnesses who are not in the list of witnesses should be left out. With respect to the age, the respondent argued that the appellant did not dispute his age when the prosecution contended that he was 20 years of age. The respondent took the view that provisions of sections 231 (1) (a) and (b) and 228 of the CPA were fulfilled.

With regards to ground 16 and grounds 2 and 4 of the supplementary grounds, the argument is that the law is clear that a person whose age is below 18 years cannot consent to the sexual intercourse.

Regarding the presence of the social welfare officer, the respondent is of the view that his presence did not infringe the appellant's rights as it was intended that it takes care of the interests of the victim.

With respect to the proof of the victim's age, the respondent implored the Court to be guided by the decision of ***Byagonza v. Uganda*** [2002] 2 EA 351 which provided for ways through which age of the victim can be proved. In this case, the respondent argued, the testimony of PW2 and PW5 served the purpose and proved that the victim was 13 years old.

In her view, the appeal is destitute of merit and prayed that the same be dismissed in entirety.

These lengthy and rival submissions by the parties bring me to the determination of the key question which is whether this appeal is meritorious.

Ground one has taken an exception to the manner in which the judgment was composed. The argument is that the same did not meet the threshold set for good judgments. As stated by the appellant, this threshold is set under section 312 (1) of the CPA, which provides for what should be contained in judgments in criminal cases. Judicial pronouncements have laid emphasis to this requirement.

My review of the impugned decision leads me to the conclusion that the said threshold was met and that the said decision was compliant. The appellant ought to appreciate that conformity with the requirements of the law does not mean that contents or styles of the composing decisions must be uniform in every decision. It is enough if all what it takes to conform to the law is achieved. In my considered view, the trial court did what was required of it by law. I hold that this ground is hollow and I dismiss it.

Ground two decries the trial court's failure to observe the requirements of the law on *voire dire*. Let me begin by stating that the legal requirement on conducting a *voire dire* test on a child witness has since been vacated. The current dispensation merely requires the child to merely make a promise to tell the truth and no lies. This has to be preceded by posing some simplified questions that are intended to establish the child's ability to know the meaning of and what it takes to make a promise (See: ***Godfrey Wilson v. Republic***, CAT-Criminal Appeal No. 168 of 2018 (unreported)). In this case, the trial magistrate went through all those questions and obtained answers he desired. The contention that I find baseless is that the said questions were not listed. I find this to be the least of the worries compared to the trial magistrate's failure to require the witnesses (PW2 and PW3) to make the promise. They, however, went ahead and swore to tell the truth.

This, to me, was a flaw whose consequence is to render the testimony unsworn, requiring corroboration. In the present case, corroboration of this testimony came from PW4, PW6, PW7, Exhibit PE1 and the appellant's confession (Exhibit PE2). The totality of this testimony beefed up the weight and worthiness of the prosecution's case. In the whole, I find this ground partly meritorious but largely inconsequential.

Ground three of the appeal seeks to discredit the manner in which Exhibit PE1 which is alleged to have been tendered by the prosecutor, instead of PW4, the medical doctor. I find this ground hollow and misleading. As the respondent argued, it is PW4 who tendered the said exhibit, and this is clearly demonstrate at page 25 of the proceedings. The state attorney who was handling the proceedings merely laid the foundation for its admission but actual admission was done by PW4. I find nothing resonating in this ground and I dismiss it.

Ground four has taken a swipe at the failure to read the substance of Exhibit PE2 by PW5. This is a fact that has been conceded to by the respondent and, as rightly contended, the trite position is that such exhibit ought to be expunged as I hereby do. The remainder of the testimony on that is that of PW5, the victim's parent. Though there is a slight typo on the year of the victim's birth, it is a reliable testimony falling in the category of

admissible testimonies. This is in line with a plethora of court decisions including ***Reuben Juma v. Republic***, CAT-Criminal Appeal No. 151 OF 2013 (unreported), in which it was held:

> *"One other of the appellant's complaints was in connection to the age of the victim which he said was not established. We must say right away that this complaint lacks merit. PW1 herself stated in her testimony that in 2009 when she was raped she was 16 years of age. Her own father (PW7) testified that she was 16 years in 2009. In Salu Sosoma v. Republic- Criminal Appeal No. 31 of 2006 (unreported) which was cited by Ms Bilishanga, we stated that* ***a parent is better positioned to know the age of his/her child.***"
> [Emphasis added]

It is on the basis of the foregoing that this ground is dismissed.

The appellant's consternation in ground 5 is the failure to conduct an inquiry before the cautioned statement was admitted in evidence. This ground is based on a flawed conception that every objection merits conducting of the trial within a trial or inquiry. This is not the case. The settled position is that an inquiry would only be conducted if admissibility was challenged on account of involuntariness of the confession. In ***Nyerere Nyague v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (unreported), it was held as follows:

"As we understand it, the law regarding admission of accused's confession under this head is this:

First, a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, ***either that it was not voluntarily made or not made at all*** *(See also* ***Selemani Hassani v R*** *Cr. Appeal No. 364/2008 (unreported);*

Secondly, if an accused intends to object to the admissibility of a statement or confession, he must do so before it is admitted, and not during cross examination or during defence See: ***Shihoze Seni v. R****, (1992) TLR 330);* ***Juma Kaulule v R****, Cr. Appeal No. 281/2006 (unreported)*

Thirdly, In the absence of any objection into the admission of the statement when the prosecution sought it to have admitted, the trial court cannot hold a trial within a trial or inquiry suo motu to test its voluntariness. (See also ***Stephen Jason & Another v. R****, Cr. Appeal No. 79/1999 (unreported))*

Fourthly, ***if objection is made at a right time, the trial court must stop everything and proceed to conduct a trial within a trial (in a Trial with assessors) or inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted***

in evidence. *See also* ***Twaha Ally & 5 Others v R*** *Cr. Appeal No. 78/2004 (unreported)."*[Emphasis is added]

In the instant matter, the appellant mildly objected to the admissibility of the statement but the reason for the objection is that he was interrogated for abusing a woman. This objection was overruled. There was nothing related to involuntariness or otherwise in the extraction of the statement from the appellant as to constitute the basis for holding an enquiry. I consider this ground to be hollow and untenable. It fails.

With regards to ground six, the contention relates to the timing of recording of the statement, and the contention is that the same was recorded after the lapse of four houses set out by law. I have gone through Exhibit PE3 and what comes out is that recording of the statement which began at 0331 hours and ended at 0422 hours. Going by the testimony of PW7 reveals that the appellant was conveyed to the police station 7 hours after his apprehension. This meant that the earliest he was conveyed to the police station was 0300 hours, 30 minutes before the commencement of recording of the statement. Noting that counting of four hours begins from the time an accused is put under restraint and conveyed to the police station, recording of the statement was done within the four-hour period and I find nothing untoward in that respect. This ground of appeal fails.

Ground 7 of the appeal and grounds 5 and 6 of the supplementary grounds of appeal seek to punch holes on the weight of evidence used by the trial court to convict and sentence the appellant. In his contention, such testimony was too insufficient to link him with the charged offence. I refuse to subscribe to this contention. My refusal is based on what I consider to be a decisive testimony of PW2, the prosecutrix of the rape incident, and that of PW5, the prosecutrix's testimony. This testimony proved commission of the sexual act and the fact that the victim was of the age of minority. In terms of the adequacy of the testimony, my conviction is that this testimony met the requirements of the law and it proved the key ingredients of the rape i.e. penetration and age of the victim.

I find nothing convincing in the appellant's contention and I choose to dismiss these grounds of appeal.

Ground eight contends that there was a contradiction between the testimony of PW6 and PW7 on the time they went to the bush to locate the appellant and the victim. A cursory glance at the testimony of these witnesses reveals the variance stated by the appellant. The view held by the respondent is that the differences are minor and of no significance. As I agree with the respondent, I wish to emphasize that contradictions will hold a sway in the proceedings if the same are material, fundamental and

affecting the central story. This trite position was underscored in ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010 (unreported), in which the upper Bench held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."*** [Emphasis added]

See also: ***Disckson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007 (unreported).

In my considered view, the discrepancy cited is quite trifling and having no impact on the central story in the matter. I choose to ignore them and dismiss the ground of appeal.

Ground nine is also destitute of merit because the whole objective of carrying out the medical examination is to see if the victim of the rape incident has been penetrated. This is not intended to establish the real culprit as linkage with the culprit is done through a different set of evidence. It would be an exercise in futility if the examination went far overboard as the

appellant tries to propose. It is a point which is lacking in merit and I dismiss it.

Combining grounds 10, 11 and 12 of the appeal, the appellant's complaint is that visual identification was not carried out properly and in accordance with the law. I wish to state right at the outset that these grounds are baseless and I dismiss them. The reason for that is that this is not one of the cases in respect of which visual identification was necessary or of any significance. The trite law is that, where an accused person is caught in the incident committing the offence he is charged with then identification would not be so important. In this case, the appellant and PW2, the victim of the incident were sexual partners who knew each other very well, and that their encounter on the fateful day was pre-arranged and on consensual basis. Only that the consensus was in relation to an unlawful indulgence. This is one case where visual identification would not be required as the question of identity was not an issue. What was important in this case was whether the appellant committed the rape incident.

The appellant's contention in ground 13 is that the preliminary hearing of the matter was not conducted properly. The list of facts not in dispute and that of facts in dispute was not properly drawn. I have gone through the proceedings and I can confirm that the trial magistrate's conduct of the

preliminary hearing was a step from the ordinary way of doing things. These facts were lumped together without separation between the memorandum of facts not in dispute and those that are disputed. As to whether this misstep is serious, my reaction is that, this is not of any major significance. This position is informed by the fact that the purpose of which preliminary hearing is conducted.

In ***Fungile Mazuri v. Republic***, CAT-Criminal Appeal No. 147 of 2012 (both unreported), the Court of Appeal of Tanzania gave an invaluable guidance on why preliminary hearings are conducted and consequences of not complying with the law. It was held as follows:

> *We have always restated that the intention of the legislature in enacting section 192 of the CPA on holding of preliminary hearing was to accelerate and speed up trials in criminal cases (see- CRIMINAL APPEAL NO. 109 OF 2002,* ***1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (CAT at Arusha) (unreported)****. We have further restated that criminal proceedings can be said to have been vitiated by the omission of the trial court to hold preliminary hearing only when upon perusal of the record it is shown that the appellant's trial was either delayed or caused extra costs or prejudiced the appellants: (see-****1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (supra)****. Mr. Karumuna is with due respect*

correct, there is nothing on the record to show the appellant suffered any delay or extra costs or any other prejudice on the appellant because of the failure to conduct the preliminary hearing."

It is on the basis of the foregoing that this ground of appeal is considered hollow and it is hereby dismissed.

Ground 14 castigates the trial magistrate for not complying with mandatory requirements set out in section 231 (1) of the CPA. The said provision places an obligation on the trial court to accord some rights to an accused person, where the prosecution's case closes and the trial court is convinced that the accused person has a case to answer. This provision states as follows:

"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 The Criminal Procedure Act [CAP. 20 R.E. 2019] 148

(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."

A review of the trial court proceedings reveals that the trial magistrate knew of this obligation and he recorded that such obligation was complied with. While the magistrate chose to be economical with facts, the clear fact is that there is nothing to give credence on the contention that this right was not accorded to the appellant. I find this contention a hard sale and I reject it out of hand. This ground of appeal is dismissed.

In ground 15 of the appeal, the appellant's gravamen of complaint is that he was convicted without reading over the charge to him. He argued that this was in infraction of the law. Sections 228 and 229 of the CPA were cited.

Without wasting the Court's precious time, I dismiss this ground of appeal for being misconceived. The provisions cited deal with the accused's rights and the court's duty when the accused is arraigned in court and be called to take a plea. Depending on the plea that the accused takes, the

subsequent procedure is spelt out in the provisions cited by the appellant. The provisions have nothing to do with what happens after the prosecution has closed its case as the appellant would want us believe. I take the view that this ground of appeal is barren and I dismiss it.

Equally hollow are grounds 16 of the appeal and grounds 2 and 4 of the additional grounds of appeal. The law is clear that consent is immaterial where the victim of a rape incident is below the age of 18 years. In this case, the testimony clearly pointed to the fact that the victim of the rape incident was 12 years of age whose consent to the sexual intercourse would not exonerate the appellant from blemishes that come with what he was convicted of.

Ground 1 of the supplementary grounds has taken an exception to the presence of a social welfare officer in the proceedings over which she had no role. As I agree with the respondent's reason for her presence, I take the view that her presence did not meddle in the activities and powers of the court to dispense justice and the appellant was not prejudiced by such presence. This ground is dismissed.

Regarding the victim's age, I am with the respondent's contention that, in terms of ***Byagonza v. Uganda*** (supra), the testimony of PW2 and PW5 sufficiently proved the age of the victim. I find nothing flawed in that respect,

save for a small typo on the date as testified by PW5. Overall, I find nothing meritorious on this ground of appeal and I dismiss it.

As I conclude by upholding the appellant's conviction of the rape, there is one disquieting issue that is of profound importance and begs for a critical review. This is with respect to the sentence imposed on the appellant, as raised in ground 3 of the supplementary grounds of appeal.

It is common knowledge that the sentence for a rape convict is a custodial sentence of 30 years, if the victim's age is above 10 years of age. This sentence is also imposed where the offender's age is above 18 years. Where age of the convicted offender is 18 years or less, sentence is governed by the provisions of section 131 (2) (a) of Cap. 16, which states as hereunder:

> *"Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall- (a) if a first offender, be sentenced to corporal punishment only."*

Looking at the charge that founded the trial proceedings, I gather that the particulars of the accused person were included. These include the age of the appellant which was stated as 18 years of age. I gather, as well, that the prosecution stated in the judgment (page 8 of the judgment) that the appellant had no previous record of conviction. This implied that the

appellant was a first offender whose manner of sentencing ought to have conformed to the cited provision, which requires that such offender be subjected to corporal punishment only. This means, therefore, that the custodial sentence imposed on the appellant was excessive and unlawful. It has subjected the appellant to more horrible circumstances that do not correspondent with his age.

Applying the provisions of sections 366 (2) and 388 of the CPA, I set aside the sentence imposed on the appellant. Ideally, this sentence ought to have been substituted with the fitting sentence which is corporal punishment. However, since the appellant has needlessly served a much sterner sentence for two years, I order that he be immediately released from prison, unless held for other lawful reasons.

Order accordingly.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 14th day of March, 2022

M.K. ISMAIL

JUDGE