

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 64 OF 2021

*(Originating from Nanyumbu District Court at Nanyumbu in Criminal
Case No.84 of 2019)*

HAMISI HAMIDU ALI@ MPWAPWA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

*Date of Last Order: 11/4/2022
Date of Judgment: 13/7/2022*

LALTAIKA, J.:

The appellant, **HAMISI HAMIDU ALI @ MPWAPWA** was charged before the District Court of Nanyumbu at Nanyumbu with the offence of rape contrary to section 130(1)(2)(b) and 131(1) of the Penal Code [Cap.16 R.E. 2019]. The particulars of the offence were to the effect that on 2nd day of November, 2019 at or about 0400 hrs at Kumbukumbu street in Mangaka village within Nanyumbu District in Mtwara Region, the appellant, wilfully and unlawfully did have carnal knowledge of one FHM a girl of 17 years old without her consent.

When the charge was read over to the appellant, he pleaded not guilty necessitating the trial to commence with prosecution case ending up when defence closed its case. Convinced that the prosecution had

proved its case beyond reasonable doubt, the learned trial Magistrate C.J. David sentenced the appellant to serve a thirty (30) years' imprisonment term. Aggrieved, the appellant has lodged before this court a petition of appeal comprised of three grounds as follows:

- 1. That the trial magistrate court erred in law by non-complying with the provision of section 235(1) and 312 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002]. The trial Magistrate did not consider the defence of the appellant while composing his judgment.*
- 2. That the trial Magistrate erred in law by failing to comply effectively with the provision of section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2002]. The appellant was not convicted therefore the sentence could not stand.*
- 3. That the trial Magistrate erred in law and facts by unprocedurally admitting exhibit P3 in court.*

At the hearing of this appeal the appellant appeared in person, unrepresented while the respondent Republic had the services of Mr. Wilbrood Ndunguru, learned Senior State Attorney.

In support of the of the appeal, appellant gave an account of the matter and submitted that was appealing against both the judgment and conviction. He stressed that he was not the one who committed the offence because he never knew the victim.

The appellant went on to submit that he was not identified. He insisted that he did not commit rape and had even indicated his readiness to go to hospital for a test if that option existed. It is the appellant's submission further that although the victim was taken to hospital for the

medical test, none among his relatives was there during medical examination.

With that introduction which managed to capture the attention of this court especially on the possibility to prove the offence of rape through medical examination of the perpetrator, a possibility that this court leaves for science fiction for now, the appellant prayed that his petition of appeal hitherto filed in this court be adopted and considered a part and parcel of his defence.

Responding to appellant's submissions, Mr. Ndunguru was quick to announce that he supported the judgment and conviction of the trial court. Nevertheless, before he embarked on unpacking the grounds of appeal, the learned Senior State Attorney prayed to draw the attention of this court to the wording of the charge sheet arguing that since the offence involved a child of 17 the appellant faced a statutory rape.

In line with the above, it is Mr. Ndunguru's submission that the particulars of the offence were formulated as if the victim was an adult since it bears facts that the victim was raped without her consent. Winding up his introductory remarks, Mr. Ndunguru was quick to point out that the defect was curable under section 388 of the Criminal Procedure Act, [Cap. 20 R.E. 2019] and stressed that the same did not prejudice the appellant.

Coming to the grounds of appeal, Mr. Ndunguru proposed to merge the first and second grounds asserting that they were both centered on omission of the trial court to consider sections 235(1) and 312(1) of the Criminal Procedure Code Cap 20 RE 2019 herein after the CPA. In other words, the appellant had asserted that he was found guilty but the trial court did not convict him.

The learned Senior State Attorney conceded to the appellant's complaint. He admits that indeed, the trial court only found the accused guilty but did not enter conviction as required by law. However, Mr. Ndunguru asserted, the defect is curable vide the revisionary powers vested to this court to rectify or interfere with the lower court's records. To that end, he prayed this court to enter conviction and pronounce the appropriate sentence.

Submitting on the third ground where the appellant asserted that exhibit P3 (the PF3 of the victim) was not read out loud in court after admission, again Mr. Ndunguru conceded that, as reflected at page 12 of the lower court proceedings the exhibit was not read out loud. In view of that shortfall, the learned Senior State Attorney argued that it is a practice in our jurisdiction that if an exhibit was not read out loud in [the lower] court it must be expunged. However, he stressed that the oral aspects of the evidence remain solid and can be used to convict the appellant. To buttress his argument, Mr. Ndunguru referred this court to the case of **Shabani Saidi Likubu vs Republic**, Crim Appeal No. 228 of 2020 CAT, Mtwara at page 18.

Having gone through the rival submissions, grounds of appeal and the trial court record it is imperative to state at the very outset that my deliberation will be centered on the second ground of appeal namely conviction. There is no doubt that the appellant's submission correctly pointed out that the trial court did not enter a proper conviction as per the dictates of section 235(1) and 312 (2) of the CPA. Now the question that comes to my mind is what is the way forward?

In finding the way forward, I look no further than the wisdom handed down to this court by the Court of Appeal of Tanzania in the case of **Ramadhani Athumani Mohamed vs. Republic**, Criminal Appeal No. 456 of 2015 (unreported) where the Apex Court proffered that:

"Failure to enter conviction is fatal and incurable irregularity which renders such judgment a nullity. Therefore, record should be remitted to the trial court for it to enter conviction and deliver a judgment in accordance with sections 235(1) and 312 of the CPA"

From the above settled position of the law, the circumstances of this case and in the interest of justice, the file in respect of Criminal Case No.84 of 2019 from Nanyumbu District Court is hereby remitted back to the trial court with the direction that the learned trial Magistrate should compose a proper judgment in compliance with section 235(1) and 312(2) of the CPA.

This order should be implemented as soon as practicable. The right of appeal to this court from the decision will accrue to either party from the decision of the judgment of the trial court. For the time being, the appellant should remain in custody pending compliance by the District Court of Nanyumbu with the Order of this court.

It is so ordered.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", is written over the printed name.

JUDGE

13.07.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 15th day of June, 2022 in the presence of Mr. Enosh Kigoryo, learned Senior State Attorney and the appellant who has appeared unrepresented.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika", written over the printed name.

JUDGE

13.07.2022