IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 142 OF 2021

(Originating from criminal case No 71 of 2020 in the District Court of Kwimba at Ngudu)

LAURENT MALISELI @ DEO ..... APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

22nd February & 1st April, 2022

Kahyoza, J:

The District Court of Kwimba convicted **Laurent Maliseli @ Deo,** the appellant, with two offences; **one**, attempted rape; and **two**, assault causing actual bodily harm. It imposed an imprisonment sentence of thirty years for the offence of attempted rape and five years for the offence of assault causing actual bodily harm. Aggrieved, the appellant appealed to this Court.

The appellant raised four grounds of appeal, which climaxed to the following issues-

1. whether the prosecution proved the appellant guilty beyond reasonable doubt.
2. whether there are procedural irregularities, which vitiate the appellant's conviction and sentence.
3. whether the charge sheet was defective.

4. whether the trial court skipped to consider the appellant's defence.

The appeal was heard orally. The appellant relied on the grounds of appeal. He had nothing to add. Ms. Meli, the respondent's state attorney opposed the appeal. I will refer to her submission while considering the issues raised by the appeal.

Background of this matter is that **Laurent Maliseli @ Deo** was allegedly attempted to rape XX (name withheld), his mother on 13.06.2020 at around 10:00 hrs at Mahinga village within Kwimba district. **Laurent Maliseli @ Deo** was also charged with the offence of assault causing actual bodily harm in the second count. The appellant pleaded not guilty. The trial court after a full trial, convicted **Laurent Maliseli @ Deo** with the offence of attempted rape and assault causing actual bodily harm.

The facts leading to the appellant's arraignment, prosecution and conviction, as can be gathered from the record, are not much complicated. It was common ground that the appellant is XX's biological son. On the fateful date the appellant grabbed XX, pulled her to his house and threw her down. He held XX down, undressed and forced her legs apart. He took out his elected genitalia out to ravish her mother. While forcing XX to open legs, the appellant injured her. XX shouted for held, people including Machiya (**Pw2**) responded. Machiya (**Pw2**) saw the appellant lying on top of her mother, XX. Machiya (**Pw2**) witnessed XX and the appellant naked, and the latter lying on top of XX holding his genitalia. He pushed the appellant off XX's body. The appellant threatened to fight and injury

Machiya (**Pw2**) with a hoe. The appellant escaped as many people responded to the call for help.

Samwel (**Pw3**) was called at the scene to take the victim to hospital. He deposed that he took the victim, XX to police and the hospital at around 10.00 am. Faridi Salehe (**Pw5**) attended XX at 1:00 pm. XX had injuries on her left leg. He tendered a PF.3 as exhibit PE1. The contents of exhibit PE1 was read to the appellant.

The appellant gave a brief defence. He deposed that he was not at the scene of the crime. He was at his business place. In the evening, he went to his home place prepared food and went to his mother. He denied attempting to rape her. He deposed that the villagers beat him basing o fabricated facts.

I now consider issues raised.

Did the prosecution prove the appellant guilty beyond reasonable doubt?

The appellant complained in the first ground of appeal that the prosecution did not prove him guilty beyond reasonable doubt. Ms. Meli, the respondent's state attorney opposed the first ground of appeal. She submitted that the prosecution did prove the appellant's guilty beyond reasonable doubt. She contended that XX, the victim of attempted rape who happen to be the appellant's mother, proved the offence beyond reasonable doubt. She submitted that XX explained how the appellant undressed her, forced her down, took out his sexual organ, forced her legs

open to commence sexing her. She explained how Machiya (**Pw2**) rescued her. She concluded that XX was the best witness.

Undisputedly, in sexual offence cases, the best evidence comes from the victim. See the case of **Selemani Mkumba v. R.** [2006] T.L.R. 2. In this case, the best evidence came from XX, the victim of attempted rape. XX is the appellant's mother. XX and his son the appellant had no quarrels. She had therefore no reason to fabricate evidence. The offence was allegedly committed during the day, to be precise, at around 10:00 am.

I totally agree with the state Attorney that XX gave an account of events. She explained how the appellant grabbed her, pulled, and undressed her. The appellant took out is elected penis to rape her. Thanks to Machiya (**Pw2**) who rescued her. The victim deposed that she sustained injuries as the appellant forced her legs open. Machiya (**Pw2**) found the appellant lying on top of XX both naked and the appellant holding his elected penis. No doubt the appellant was all out to rape his mother, XX. Machiya (**Pw2**) stopped the appellant from raping his moter by pushing him off his mother. Aggrieved the appellant threated to injure Machiya (**Pw2**) with a hoe.

The facts of this case proved beyond all reasonable doubt that the appellant attempted to rape his mother. He undressed her, put off his clothes, forced her legs open held his elected penis while lying on top of her prey. The facts prove nothing put the offence of rape. The appellant did everything it takes to commit the offence of rape, except penetration.

The appellant's acts were more than indecent assault and shot of rape for want of penetration.

I find that the prosecution proved not only beyond reasonable doubt that the appellant attempted to rape his mother but beyond all scintilla of doubts. The appellant's complaint in the first ground of appeal is baseless. I dismiss the first ground of appeal.

Did the trial court commit procedural irregularities, which vitiate conviction and sentence?

The appellant complained without explaining that the trial court wrongly convicted and sentenced him to thirty years imprisonment on account of procedural irregularities.

The respondent's state attorney submitted that she was unable to find the irregularities except as to the charge sheet which will be dealt under the third ground of appeal.

I scrutinized the proceedings and found no glaring irregularities. One of the irregularities I found was the fact that on the date the prosecution commenced its case the court did not read the charges to the appellant. However, the court had previously read the charges to the appellant when he appealed for the first time and before it conducted preliminary hearing. Hence, the appellant knew the nature of the offence he stood charged. I do not think that that; irregularity or omission in this case, had prejudiced the appellant and occasioned any miscarriage of justice to warrant nullifying the entire proceedings. It is settled that before nullifying criminal

proceedings because of irregularity, it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned failure of justice (See **Michael Luhiye VR** [1994] TLR 181).

In addition, the proceedings revealed that the trial court did not write down what it explained to the appellant after it found him with a case to answer. The record shows that appellant was addressed in terms of section 231 of the **Criminal Procedure Act**, [CAP 20 R.E 2019] (the **CPA**). The record reads-

> ***"COURT:*** *The accused person has a prima facie case on all witness (sic) implicated the accused. Section 231 of the CPA complied with all accused rights explained.*
>
> *Sgd by J. JADADI –RM*
>
> ***Accused:*** *I am ready for defence to day."*

I am alive of the position of the law expounded by the Court of Appeal in **Abdallah Kondo v R.,** Criminal Appeal No. 322/2015 (CAT Unreported) that to comply with section 231 of the **CPA**, a trial court must **to record what it informs the accused and his answer to it.** It held-

> *"Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.*

*"**Court**: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence.*

***Accused response**: ... '[record what the accused says).'"*

It is obvious that the trial court did not comply with the requirement of section 231 of the CPA. However, given the appellant's response quoted above, I am of the considered view that the trial court did comply with the requirements of section 231 of the **CPA** as expounded by the Court of Appeal. Thus, the trial court's failure to write what it informed the appellants in terms of section 231 of the **CPA**, did not occasioned miscarriage of justice.

I also noted that the appellant defended himself on oath without being told what other options he had and the court recording the option he selected. As stated earlier, I do not find the omission occasion miscarriage of justice. The irregularities pointed above are curable under section 388 (1) of the CPA, which states that-

388.-(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice,

the court may order a retrial or make such other order as it may consider just and equitable.

I dismiss the second ground of appeal for want of merit

Was the charge sheet defective?

The appellant complained that the trial court erred to ground his conviction on a defective charge sheet.

The State Attorney admitted that the charge sheet was defective as it did not specify the paragraph of sub-section (2) of section 132 of the Penal code the appellant was charged. She quickly submitted that the irregularity was curable as the particulars explained the nature of the offence. She submitted that particulars of the charge sheet depicted that the appellant attempted to rape XX, aged 46 years. She added that failure to mention the paragraph of sub-section did not prejudice the appellant. She concluded that the prosecution tendered evidence that the appellant attempted to rape his mother. To support her position, she cited the case of **Masalu Kayeye v. R.**, Criminal Appeal No. 120/2017 (CAT unreported), where the Court of Appeal held that

> *"...where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged and thus any irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the Criminal Procedure Act, Cap. 20 Revised Edition 2002 (the CPA)."*

I totally agree with the State Attorney that the omission to specify the paragraph of sub-section (2) of section 132 of the Penal code under which the charge of attempted rape was grounded, did not occasion any injustice. The charge sheet disclosed that the appellant attempted to rape XX, whom he knew was his mother. Also, the victim's age was disclosed in the charge sheet. The appellant knew that he attempted to rape XX, a woman. In addition, the evidence on record detailed that the appellant attempted to rape XX, his mother. The purpose of omitted paragraph is to show the age of the victim for the purposes of determining the sentence. I, therefore, do not find that the omission *in fact occasioned a failure of justice*. It is curable under section 388 (1) of the **CPA**.

I find the third ground without merit.

Did the trial court skip to consider the appellant's defence?

The appellant complained in the fourth ground of appeal is that the trial court did not consider his defence.

The respondent's State Attorney refuted the allegation. She argued that the trial court considered the defence. They only shortcoming is that the trial court did not make findings. She concluded that the irregularity was curable as the first appellate court has the privilege to re-evaluate the evidence.

It is established that failure to consider the defence renders the judgment a nullity. Failure to consider the defence may be cured by the first appellate considering the defence while re-evaluating the evidence. It

is one of the duties of the first appellate to re-appraise the entire body of evidence on record including the defence, confirm or make its own findings. See the cases of **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported) and **Josephat Joseph v. R**., Criminal Appeal No. 558/2017, a few to mention.

The record shows unequivocally that the trial court did not consider the appellant's defence. This court being the first appellate court has a duty to consider to reconsider the evidence on record, which I now do. The appellant's defence was that he was not at the scene of the crime and a general denial that he did not commit the offence. The appellant raised a defence of *alibi* while defending himself. The law is clear, it requires a person who intends to rely on the defence of *alibi* to give notice of that intention before the hearing of the case, section 194(4) of the CPA. If the notice is cannot be given at that early stage, the said person is under obligation, then, to give particulars of *alibi* before the prosecution closes its case.

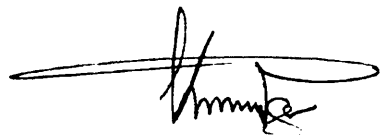
As the appellant did not comply with the requirement of section 194(4) of the CPA, there is nothing to detain me. I attach no weight to his defence of *alibi*, it was an afterthought. The Court of Appeal in **Mwita Mhere and Ibrahim Mhere v. Republic** [2005] TLR 107, stated that the defence *alibi* would be relied upon when the requirements under section 194 of the CPA are complied with.

Even, if, the appellant had given prior notice under section 194(4) of the CPA, still I would have accorded no weight to his defence of *alibi*. The

appellant was charged for attempting to rape his mother during the day. It is very unlikely for the appellant's mother to fail to identify her own son during the day. There was yet the evidence of Machiya (**Pw2**) who found the appellant naked on top of his naked mother. Machiya (**Pw2**) knew the appellant very well. The appellant's defence of *alibi* did not in any way punch holes to the prosecution's identification evidence. I therefore, find that that the appellant's defence did not raise any reasonable doubt. Consequently, I uphold the fourth ground of appeal but after re-evaluating the evidence I find the appellant's defence too weak to raise any reasonable doubt.

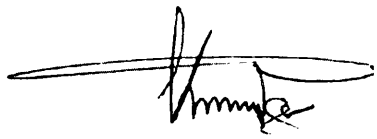
Finally, I find the appeal without merit. I dismiss it in its entirety and uphold conviction and sentence. It is so ordered.

Dated at Mwanza this 1st Day of April, 2022.



J. R. Kahyoza
JUDGE
1/04/2022

Court: Judgment delivered in the presence of the appellant and Ms. Revina Tibilengwa, PSA for the Respondent. Right to further appeal explained. Ms. Jackline (RMA) present.



J. R. Kahyoza
JUDGE
1/04/2022