

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO 242 OF 2020

*(Arising from Judgement of Bagamoyo District Court in Crim. Case No 259 of 2018
dated 31/08/2020)*

MOHAMED JUMAAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Order: 4/4/2022
Date of Judgement: 13/6/2022

JUDGEMENT

MGONYA, J.

Before this court, is the appeal from Bagamoyo District Court in **Criminal Case No. 259 of 2018**. The Appellant was charged and convicted of Rape contrary to **Sections 130 (1) (2) and 131 (1) of the Penal Code, Cap. 16 [R. E.2002]** and **sentenced to 30 years** imprisonment. The Appellant is aggrieved on both conviction and sentence with total of **twenty (20)** main and supplementary grounds of appeal. However, I will concentrated on the few ground which the Appellant submitted to, as herein below:

- 1. That the learned trial Magistrate erred in law and fact by convicting the appellant relied on a case whereby trial witness's testimonies recorded with noncompliance with a mandatory provision of section 210 (3) of the Criminal Procedure Act, Cap. 20 [R. E. 2002];**
- 2. That the learned trial Magistrate erred in law and fact by convicting the appellant relied on Exhibit P.1 (Birth certificate of PW1), Exhibit P.2 (Clinic Card of PW1) and Exhibit P.3 (PF3 of PW1) at page 19 of 31 line 5-6, page 21 of 31 line 23 while the trial failure to read over aloud the contents to determine their credibility before relied upon as a basis of conviction contrary to the procedure of law;**
- 3. That the learned trial Magistrate erred in law and fact by convicting the appellant relied on Exhibit P.3 (PF3) at page 21 of 31 line 23 and discredited evidence of PW4 at page 20 of 31 line 18-22 while failed to allow examination to the appellant for the analysis of specimen, semens, spermatozoa, viscid fluid, sexual transmission infectious diseases and DNA test for comparison with those findings filed by PW4 in Exhibit P.3 (PF3) to justify**

that whether the accused/appellant had committed the charged offence or not contrary to the procedure of law;

4. ***That the learned trial Magistrate erred in law and fact by convicting the appellant by not reading over the charge to the accused/appellant to enter plea of not guilty when the defence case marked opens at page 25 of 31, c/s 228 and 229 of the Criminal Procedure Act, Cap.20 [R. E. 2002] while the prosecution case for DEFENCE HEARING did not closed its DEFENCE CASE at page 26 of 31 contrary to the procedure of law; and***
5. ***That the learned trial Magistrate erred in law and fact by convicting the appellant while failure to conduct the preliminary hearing contrary to then procedure of law as he failed to list down the Memorandum of dispute and undisputed facts, list of witnesses and list of exhibits at page 7 of 31 contrary to procedure to the procedure of law.***

Therefore, from above grounds of appeal, the Appellant prayed the Honourable Court to allow the appeal, quash the conviction, set aside the sentence and acquit him forthwith.

At the hearing of the Appeal, the Appellant appeared in person while the Respondent was represented by Ms. Rachel Mwaipyana State Attorney. Both parties were granted their prayer by the court to dispose off the Appeal by way of written submissions.

The Appellant submitting on the **first ground of appeal** that the trial court did not comply with the mandatory **section of 210 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]** where the trial Magistrate failed to append her/his signatures after re-examination and to inform the witnesses that were entitled to have read over their evidence and record any comment by every witnesses relating their evidences. Hence resulted to vitiate the authenticity and transparency in criminal trials.

Further, the Appellant submitted on the **second ground of appeal** that the learned trial magistrate relied on **Exhibit P.1 (Birth certificate of PW1), Exhibit P.2 (Clinic Card of PW1)** and **Exhibit P.3 (PF3 of PW1)** to convict the Appellant while the trial court failed to read over aloud the contents of exhibits and to determine their credibility before relied upon as a basis of conviction contrary to the procedure of law.

Moreover, the Appellant submitting on the **third ground of appeal** that, the learned trial Magistrate failed to allow medical examination to the Appellant for the analysis of specimen and **DNA** test for comparison with those findings filed by **PW4** in **Exhibit P.3 (PF3)**. Further, submitting that the prosecution side failed to call the arresting officer to establish if the Appellant was named by the victim and apprehended in connection with the said offence. It is the Appellant's view that failure to link the Appellant to the pregnancy or to justify that the appellant had committed the charged offence weakened the Prosecution evidence.

The Appellant submitting the **fourth and fifth grounds of appeal** collectively that the learned trial court failed to conduct the preliminary hearing contrary to the procedure of law as provided under **Section 192 (3) and (4) of the Criminal Procedure Act** it was submitted that, the court has failed to list down the Memorandum of dispute and undisputed facts, list of witnesses and list of exhibits contrary to legal procedure. Further, as a matter of procedure, the court failed to read over the charge to the Appellant to enter plea when after the defence case marked open, contrary to **Sections 228 and 229 of the Criminal Procedure Act**.

In submitting against the Appeal, the Respondent's counsel, addressing on the **first ground of appeal**, conceded that the Prosecution witnesses' testimonies recorded were not read to them. Is the Respondent view, the position is now curable as per **section 388 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**.

On the **second ground of appeal**, the Respondent's counsel submitting that the Prosecution failed to read over aloud the contents of **Exhibits P1 (PW1's Birth Certificate), P2 (PW1's Clinic Card) and P3 (PW1's PF3)**. It was the Respondent's counsel view that the ground has no merit as the same is curable under **section 388 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]** that the procedure was followed on tendering of documents before the trial court where the Appellant replied that he has no objection upon being asked.

The Respondent's counsel submitting on the **third ground of appeal** that the rape case does not have DNA test in our country. It was submitted that, there is no dispute that the Appellant was having carnal knowledge of the victim PW1 where the best evidence and credible evidence is said to be of the victim as it was held in the case of ***FRANK DEULE @ DAMAS vs REPUBLIC, Criminal Appeal No. 396 of 2018 CAT -Iringa (Unreported)***.

On the **fourth ground of appeal**, the Counsel submitted that it is not a legal requirement or mandatory to read it again during the defence. It was submitted that, on **page 23** of the trial typed proceedings the court ruled that the Prosecution managed to establish *prima facie* case the Appellant has been addressed his rights which complied with **section 231 of the Criminal Procedure Act, Cap. 20 [R. E 2019]**. What was needed is for Appellant to understand the offence charged with and whether he was in the position to defend his case.

Lastly, the Respondent's counsel submitted on the **tenth ground of appeal** that the trial court followed the procedure of Preliminary Hearing and the Memorandum of undisputed facts were drawn whereas. The aim of the plea taking is to accelerate the trial.

The Respondent's Counsel prayed the court to dismiss the Appeal and upheld the trial court conviction and sentence.

The Court in determining the grounds of Appeal, had ample time to go through the parties' submissions and the trial court's records. The court will be moved directly to determine the appeal on those few grounds which submitted by the Appellant that based only on supplementary grounds. The question now is as to whether the Appeal has merit.?

On the **first ground of appeal**, the trial court's record shows that the Magistrate did not append his signature after re-examination and to inform the prosecution witnesses testimonies that were entitled to have read over their evidence and record any comment relating to their evidences. The trial court did not comply with requirement under **Section 210 of the Criminal Procedure Act**. On this, the Respondent's counsel conceded with the Appellant.

However, on **page 26** of the typed proceedings shows that the trial Magistrate read over to the Appellant the testimony before the court and signed. Further, the court's record showed that the Appellant declared nothing to submit. In the case of **FLANO ALPHONCE MASALU @ SINSU & 4 OTHERS, Criminal Appeal No. 366 of 2018 CAT- Mtwara**. Where the court quoted in the case of **ATHUMAN HASSAN VS. REPUBLIC, CRIMINAL APPEAL NO. 84 OF 2013 (UNREPORTED)** the court held:

"the record of proceedings of the trial court shows that there was no compliance with section 210 (3) in the process of recording the evidence of the witnesses. However, we do not see the substance of the appellant's complaint because it was the witnesses who had the right to have the evidence

read over to them and make a comment on their evidence. We do not even think that the omission occasioned a miscarriage of justice to the appellant."

From the above underlined findings, this court subscribes that the Prosecution witnesses' testimonies would not complained to be infringed their right, hence would have not vitiated the authenticity and transparency of the record of the court to the Appellant. Hence this **ground of appeal is meritless.**

Moreover, on the **second ground of appeal** that the **Exhibits P1** (Birth Certificate), **P2** (Clinic Card) and **P3 (PF3)** jointly were their not read aloud after their admission before the court, these exhibits qualified to be expunged from the record as it was stated in the case of ***ISSA HASSAN UKI vs REPUBLIC, Criminal Appeal No. 129 of 2017 CAT-Mtwara (Unreported)***. After expunge of exhibits from the record, the oral testimony of the **PW2** (the father of the victim) and **PW4** (Doctor) will be remained in the record which is suffices the Appellant conviction and do not shake the evidence that the victim was not raped by the Appellant. Further, that the trial court's record speaks itself that the victim PW1 was under **18 years** and PW2 testified as a father and the PW3 was a teacher

who identified the PW1 as her student in her school. On the onus of proof, the Prosecution witnesses **PW1, PW2, PW3 and PW4** proved the case beyond reasonable doubt as required under **section 110 of the Evidence Act, Cap. 6 [2019]**. The **ground of appeal also fails.**

Further, on the **third ground of appeal** that it is the trite law that the victim PW1 testimony was strong and given the high tension to be the best evidence which corroborated by **PW2, PW3** and **PW4** which were enough to prove the case. Further, the examination and analysis of specimen and **DNA** test on the offence of rape is not necessary. The court does not rely on **DNA** to prove case as it was stated in the case of ***FRANK ONESMO vs REPUBLIC, Criminal Appeal No.17 of 2019, HC at Mwanza (Unreported)***. The **ground of appeal fails.**

On the **fourth and fifth grounds of appeal**, all concerning the procedure of taking Preliminary Hearing and to read over to the accused before giving his testimony. The records of the court shows that the Preliminary Hearing taken properly and prompt as required accordingly. The court has listed down the Memorandum undisputed facts were drawn, list of witnesses and list of exhibits at **page 8** of typed proceedings hence complied with the procedure of law. The aim of the plea taking is to accelerate the trial. So as the record convey, the

Appellant was participated in the trial including cross examination to the Prosecution's witnesses until the closure of prosecution case and asked as to whether he will call witnesses. On hearing of defence case, he said that he had no witnesses to call and started to defend this implies that he was aware of the offence charged and defended properly. This **ground is meritless.**

The trial court convicted the Appellant after considering and evaluating the evidence of both parties. It is the record of the court that PW1 was familiar and mentioned the Appellant being the culprit of the alleged offence. In my firm view that no possibility of fabrication in the nature and the victim testimony's evidence adduced before the court, the victim proved to have the pregnancy resulted by the Appellant's acts.

From the above observation, this Honourable Court finds that the grounds of appeal would have not shaken the prosecution evidence therefore conviction and sentence remained intact.

Consequently, I proceed to **dismiss the Appeal in its entirety.**

Right of Appeal is Explained.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA

JUDGE

13/06/2022