IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 34 OF 2022

(C/F Criminal Case No. 54/2020 Hanang' District Court at Katesh)

DAUDI S/O RASHID..... APPELLANT

VERSUS

THE D.P. P ..... RESPONDENT

JUDGMENT

31/08/2022 & 21 /10/2022

GWAE

In the District Court of Hanang' at Katesh ("the trial court"), the appellant, Daudi Rashid was arraigned, tried, convicted and sentenced to thirty (30) years imprisonment for the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (Code).

It was alleged by the prosecution side that, on the 23rd day of April 2020 at Murumba within Hanang' District in Manyara Region, the appellant did have sexual intercourse with one BA, a girl of 15 years old. The name BA is a name referred for hiding identity of the victim as required by the procedural law.

The substance of the prosecution evidence that lead to the conviction and sentence of the appellant can be summarized as herein under, that, on the 20th April 2020 at about 17: 00 hrs, a mother of the victim (PW1) requested the victim to get prepared for the safari from Dirma village in Hanang' District to Dodoma Region however the victim is said to have shortly disappeared and she never turned back till when she was found in a company of the appellant.

PW1 further continued looking for her daughter on 22.04.2020 at Nangwa area without success but only to be told that, the victim was seen with a man heading to Murumba village where she eventually managed to find the victim in a company of the appellant. The testimony of PWI which is further to the effect that, the appellant was seen with the victim, was corroborated by that of the victim and the evidence adduced by PW2, Paul John who testified to the effect that, he rid the appellant with his motorcycle. That, the appellant while under police custody, he confessed the offence. It is the testimony of the victim that, the appellant had started seducing her with a view of marriage and that, on 23rd April 2020 the appellant forced her to have sexual intercourse adding that, her mother came to the place (Mulumba area) where she spent nights with the appellant from 22 /04 /2020 to 26th April 2020.

On the other hand, it was the appellant's version that, he did not commit the offence of rape to the victim save that on 26th April 2020 when he was at Dirma area he was arrested for the allegation of abduction of a girl. The appellant further patently denied to have given his statement to the police officer (PW5), except that he was forced to sign the already written paper.

Aggrieved by the trial court's conviction and sentence, the appellant has knocked the doors of the court equipped with extensive Petition of Appeal comprised of eight (8) grounds of appeal namely;

1. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant on a charge which was /is defective and contradicting itself in showing in the copy of the proceedings and judgment to be the offence of rape c/s 130 (1 (g) and 131 (1) of the Penal Code, Cap 16 Revised Edition, 2019 while in the judgment the charge shows rape c/s 130 (1) (20) (e) and 131 (1) of the Penal Code Cap 16 Revised Edition, 2019
2. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant after he failed to note that there was a variance between the charge and evidence

adduced by the prosecution witnesses as the charge tells the accidence to occur on 20.04.2020 at 17: 00hrs in Dirima village and on 20.04.2020 at Murumba village as the PH. Facts after substitution tells in paragraph or line 3 while the testimony or evidence of the victims shows or testified before the trial court to be raped by the appellant on 23.04.2020 at Murumba village. This raises doubts to the prosecution case.

3. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant to serve thirty (30) years imprisonment based on the sharkable, uncorroborated prosecution evidence as the trial court failed to note that, the evidence of police investigator (PW2) who testified that the complainant is Helena and not the victim in the hand at hand and that of the doctor who testified that the victim lost her virginity which is in proper way of proving the offence of rape
4. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant in conducting the case or trying the case at hand unfairly and unprocedurally hence, he failed to comply with mandatory provision of section 234 (1) of CPA after substitution of the charge also section 214 (1) of the CPA was not properly complied with after the case

was re-assigned to Honourable S.S. Mushumbuzi where the appellant was not even given chance to be asked on the same

5. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant to serve thirty (30) years imprisonment in a misdirection by the trial court in believing that PW1 motor cyclist (PW1) carried the appellant with his friend not the victim to Nangwa for the agreed sum
6. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant after he failed to draw an adverse inference to the prosecution side after it had failed to summon or call material witnesses that is those Militia and sister who were alleged to arrest the appellant living with the victim as husband and wife who from their connection transaction equation were able to satisfy to the material facts
7. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant where the age of the victim was not ascertained. Hence, failure even to summon a teacher of any school in order to cement the allegation that the victim was a girl of 15 years or 16 age who is student or pupil

8. That, the learned trial magistrate grossly erred in law and fact to convict and sentence the appellant on the charge of the offence of rape which was not proved beyond reasonable doubt and to the required standard of law by the prosecution side, hence left some doubts as it left some crucial matters unsolved to the prosecution side

On 27th day of July 2022, the appellant sought and obtained leave of the court to file his additional grounds of appeal, these were;

1. That, the trial court in law and in fact in sentencing the appellant in a case where there are serious procedural irregularities
2. That, the trial Magistrate erred to convict to convict the appellant by basing on the evidence of PW3 (the victim) which was unlawfully recorded contrary to section 127 (2) of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019
3. That, the trial Magistrate erred to convict to convict the appellant by basing on Exhibit P1 (cautioned statement) which was illegal and unlawful

This appeal was disposed of by way of written submission after the appellant's prayer followed by court's consideration that, the appellant is layperson who was not represented by an advocate. The parties' written submissions were subsequently filed in conformity with the court's order. Since the appellant's grounds of appeal are eleven and lengthy, I find it to be apposite if I consider parties' submissions in each ground of appeal alone with their court's determination.

In the **1st ground** of appeal on the alleged defective charge. The appellant submitted that, the typed proceedings, judgment and charge exhibit that provisions of the law for the offence of rape were; section 130 (1) (g), 130 (1) (20) of the Code, section 130 (1) (20) (e) and 131 (1) of the Penal Code (supra) respectively. According to the appellant, the prosecution side did not enable him to know the charge facing him thereby causing him not to effectively make his defence. He then invited the court to the case of **Qajni Hiary vs. Republic,** Criminal Appeal No. 295 of 2016 (unreported) with approval of the case of **Abdallah Ally v. Republic,** Criminal Appeal No. 295 of 2016 unreported where the Court of Appeal state;

> *"Being found guilty on a defective charge based on wrong and /0r defective non-existent provisions of the law is evident that the appellant did not receive a fair trial. The*

wrong and or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware of what he was facing".

Arguing the **1st ground,** the learned counsel for the Republic stated that, the appellant was properly charged and appropriate provisions of the law were accordingly cited after an amendment of the charge and also the prosecution evidence clearly disclosed the offence leveled against the appellant.

Examining the trial court's records, it is plainly clear that, in the former charge duly admitted on 1st day of July 2020 and the one which substituted the former charge admitted on 18th day of August 2020 refer appropriate provisions that is section 130 (1) (e) and section 130 (1) of the Code unlike the appellant's assertion. However, in the judgment at page 1, provisions of the law cited therein are; section 130 (1) (20) (e) and 131 (1) of the Code. That was wrong as alleged by the appellant however I find the same to be typographical errors which are curable under section 388 (1) of the Criminal Procedure Act, Cap 20, Revised Edition, 2019 (Herein the CPA) which reads;

"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".

Considering the error so appearing in the judgment, in my firm opinion, it does not go to the root of the case since the provisions cited in the charge sheet are proper and taking into consideration that, the accused when required to plead to the charge, he pleaded not guilty to the charge which substituted the former one. The case of Abdallah **Ally v. Republic** (supra) cited by the appellant is therefore distinguishable from the instant criminal matter**.** The 1st ground of appeal is therefore misplaced.

Regarding the **2nd ground** on the complained variance on the date and place appearing where the crime occurred rendering charge to be defective. Going through the submission by the parties and record, it is observed that the judgment indicates that the date of occurrence to be 20th April 2020 at Girma Village as per former charge whereas in the later charge it is shown that, the sexual intercourse incidence occurred on 23rd

April 2020 at Murumba Village. With the date and place appearing on the substituted charge, I find nothing inappropriate since the error was cured by the latter charge sheet.

However, I have an observation that, the learned trial magistrate to had misapprehended or rather overlooked that, there was a substitution of the charge sheet, in my view, this might have caused him not properly apprehend some pieces of evidence especially, exactly date and place the offence of rape was committed and to ascertain whether there were contradictions that go to the root of the case or not. The learned counsel for the Republic attempted to convince the court that, the defects were cured by the testimonies of the victim, PW3, PW1 and PW2. Nevertheless, when I carefully scrutinize the evidence on record I found the inconsistencies as to the date of the incidence since the victim, PW4 though wrongly indicated as PW3 who testified that on 20th April 2020 is when she met the appellant who abducted him and took her where he was living till morning (21/04/20220) when both embarked the motorcycle of PW2 (PW1) and went to Mulumba village via Nangwa area but the appellant did not rape her on that material date (22nd April 2020) till 23rd April 2020 adding that on 26th April 2020 is when they were arrested. And when I look at the testimony of the victim's mother it seems as if the

victim was found with the appellant on 22nd April 2022. Perhaps it is apposite if parts of the testimony of the victim's mother are reproduced herein under;

> *"On 20/04/2020 at 17:00 hrs I was at home doing my activities....BA did not prepare, she went outside..... I did not find her till evening time. on the following day I went to wareta where the father of BA lives but I did not find her. On the following day I went to Nangwa, we were informed that BA was with one man heading to Mulumba village I reported to police. I went to Mulumba village I found the accused with my daughter BA".*

Since the victim's evidence is to the effect that the appellant did not have carnal knowledge with her on the date of abduction or on the following day except on 23rd day of April 2020, I think if the trial magistrate apprehended the fact that, the former charge was substituted probably he could have noticed the contradictions of the evidence as to the date of incidence as rightly complained by the appellant and then be in position to weigh on whether such contradiction go to the root of the case or not. Therefore, the 2nd ground of appeal is not devoid of merit. It is allowed to the explained extent.

On the **3rd ground** on the appellant's complainant that, the case was marred with serious irregularities namely; failure to comply with section

214 (1) of CPA since the case was heard by two magistrates, violation of section 127 (2) of Tanzania Evidence Act, Cap 6, Revised Edition, 2019, (TEA), Failure to comply with section 231 CPA since the appellant was not given his right to summon his witness and that, the evidence of victim, PW4 was unlawfully recorded. Also the age of the victim was not proved at the required standard and lastly, wrong reliance by the trial court of the cautioned statement of the appellant to forming basis of the impugned conviction.

It well established principle of the law as envisaged under section 214 (1) of the CPA that an accused must be informed of reason (s) of the change of trial magistrate. Hence, either successor trial judicial officer or trial predecessor if possible must assign reason for him failing to preside over the case or trial successor to inform the accused of reason as to why the predecessor has failed to conclude the trial. This position of the law has been consistently stressed in a chain judicial decisions for instance in the case of **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported) the Court of Appeal had occasion to interpret section 214 of the CPA and had these to comment:

> *Where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete must be recorded. If that is not*

done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed".

Also in **Emmanuel Malobo vs. Republic,** Criminal Appeal No. 356 of 2015 (unreported) when the Court of Appeal of sitting at Mwanza interpreted section 299 (1) CPA which is mutatis mutandis with section 214 of the Ac and it had these to say;

*"It is our understanding that, this provision sets out **two necessary conditions** that must be met before a trial proceeds before a successor judge. **The first** condition is that there must be a reason that should be made known to the accused why the predecessor judge could not complete the trial. The second condition-precedent is that the accused must be informed of his right to resummons the witnesses or any witness, if he so wishes, But the successor judge also has discretion to re-summon witnesses (bold supplied)".*

(See also **Liamba Sinanga v. Republic (**1994) TLR 97–CAT and in a legal personal representative of late **Ramadhani Abas**) **vs. Masoud Mohamed Joshi and two others**, Civil Appeal No. 109 of 2016 (unreported) whose decision was delivered on 11. 09.2019 by the Court of Appeal of Tanzania where recording of reasons for taking over was found to be fundamental and failure to do so amounts to procedural

irregularity which goes to jurisdictional matter, going to the root of the case.

In our present case, the trial predecessor is the one who is found to have lucidly informed the appellant on 1st day of August 2020 at page 8 of the typed proceedings that, the case was duly re-assigned to Hon. Mushumbuzi RM (trial successor) because he had been transferred to the station. Thus, in my considered view, the appellant was notified of the reason for re-assignment as rightly argued by the counsel for the DPP. It follows therefore, the trial predecessor though not directly informed the appellant reason of the re-assignment but in essence he informed the appellant of equal distribution of cases among magistrates available at station following transfer of the trial successor to Hanang' District Court, the reason which was aimed at expeditious disposal of the cases.

Therefore, the complaint by the appellant that, section 214 (1) of CPA was not complied lacks merits since re-summoning witnesses was previously mandatory by subordinate courts unlike to the current legal position that is before an amendment of section 214 of CPA by virtue of Written Laws (Misc. Amendments) Act No. 9 of 2002 (See the case of **Liamba Sinanga v Republic (**1994) TLR 97.

As to the Complaint on failure to comply with section 231 of CPA. As correctly argued by Ms. Mtenga, the trial court records reveal that, the appellant was addressed in terms of section 231 of CPA and he made replies thereto that, he would defend himself upon oath. Construing the words spoken and recorded by the trial court, it seems that, the appellant was informed of his right to call witnesses on his behalf. This complaint lacks also merit.

On the appellant's complaint that the evidence of the victim was recorded contrary to the law, the appellant tried to persuade the court that the testimony of the appellant was not recorded after full compliance of provision of section 127 (2) TEA. I have considered the arguments of both sides however I have noticed that both parties misapprehended the gesture of the testimony of PW4. The PW4's evidence is not of tender years old, she was by then 15 or 16 years' old. Subsection (4) of section 127 of TEA reads;

> *"(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means a child whose apparent age is* ***not more than fourteen years*** *(emphasis supplied)".*

Being the wording of the statutory provision quoted above which define the meaning of the term "child of the tender age" denoting that young person

must be below the age of 14 years old as opposed to the victim in our case. It follows therefore, the victim was to take oath or affirmation as the case may be. I am alive of the principle provided under section 127 (2) of CPA that a witness of tender age must promise to tell the truth and not to tell lies and that intelligence of such witness must be tested as argued by both parties (See a decision of the Court of Appeal in the case of **Isaya Constantino vs. Republic**, Criminal Appeal No. 78 of 2016 (unreported). However, the trial court's typed proceeding reveal that, the learned trial magistrate did consider the victim as the witness of tender age which is not the case here. That, being the court's finding, the trial court's act of treating the victim as the one of tender age is not backed by any evidence on record. Therefore, the evidence of the victim was to be recorded after she was duly sworn. Due to failure by the trial court to ensure that the victim was sworn, her testimony for that reason is hereby expunged or discarded.

Now, as to the complaint on the cautioned statement, the record of the trial court reveals that the trial magistrate admitted the cautioned statement (PE1) despite the fact that, it was objected. Without much ado, this cautioned statement was unprocedurally received since no inquiry that was conducted prior to its receipt. PE1 therefore falls short of the requirement of the law as was re-affirmed by the Court of Appeal in **Makumbi Ramadhani Makumbi & 4 others vs. The Republic**,

Criminal Appeal No. 199 of 2010 (Unreported) where the Court of Appeal had the following to say;

> *"...We now hold without any demur that subordinate courts have a duty to hold a trial within trial whenever an accused confessional statement is either repudiated or retracted before it is admitted in evidence. Once an objection is made by the defence after the trial court has informed the accused of his right to say something in connection with it, which is an unavoidable duty on the part of the court, the trial court must stop everything and proceed to conduct a trial within a trial, giving such side opportunity to call a witness or witnesses in support of its position"*

Failure to conduct the trial within trial or an inquiry where the trial is without aids of assessors renders the admitted cautioned statement in appeal to being expunged as I hereby do. Assuming the statement was procedurally admitted yet the same is all about the offence of abduction and not rape as it entails that, it was the victim who solicited the appellant to go with her with aim of marriage as she was no longer interested in pursuing her education. The said statement also does not unveil if the victim was raped.

Regarding the complaint on the alleged failure to prove the age of the victim, I am not convinced by the submission by the DPP that, this court

should not consider this kind of complaint on the basis that, the appellant did not raise it during hearing. I am saying so for an obvious reason that, it is always the duty of the prosecution to prove ingredients of an offence against an accused person to the required standard in criminal cases. In our case, it goes without saying that, the age of the victim in sexual offences especially rape where the victim is said to be under the age of 18 years is very vital and the onus of proof is inevitably on the shoulders of the prosecution notwithstanding if the defence raised concern or not during trial.

The age of the victim was to be proved by her mother, PW1 but that was not the case as she testified nothing on the victim's age, victim herself by producing a birth certificate or stating the year of birth or any other person in authority or a person who was present during her birth. This legal position was similarly stressed **Andrew Francis Andrew Francis vs. Republic,** Criminal Appeal No. 173 of 2014 (unreported) where the Court of Appeal at Dodoma at page 5 of the judgment correctly held that:

> *"Under normal circumstance evidence relating to the victim's age would be expected either of the following, victims, both of her parents or a guardian, a birth certificate, etc".*

In light of the above, it cannot be said that the appellant owed a duty of proving the age of the victim in his detriment unless it was him who wanted to prove that, he was under 18 years' old at the time of the commission of the offence for his own benefit. In our case, the testimony of the victim is to the effect that, she was 16 years of age when she appeared for testimonial purposes, this kind of evidence would suffice to a certain decree regarding her age. The prosecution is therefore urged to discharge her duties accordingly in respect of the age of victims who are below 18 years old (statutory rape) instead of relying on the weakness on the side of the defence.

Having expunged the testimony of the victim, cautioned statement and other shortfalls as explained herein above, the prosecution side therefore remains with scanty evidence to sustain conviction. And for the stated reasons there are no wanting reason to be curtained determining other grounds of appeal.

In the upshot and the reasons that I have demonstrated herein, this appeal is meritorious, it is hereby allowed. The appellant shall be released from prison as soon as practicable unless he is held therein for some other lawful cause.

It is so ordered.

DATED at **ARUSHA** this 12th day of October, 2022

M. R. GWAE
JUDGE
21/10/2022

Court: Right of appeal fully explained

M. R. GWAE
JUDGE
21/10/2022