IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 231 OF 2021

(Originating from Criminal Case No 304 of 2017 of Kinondoni District Court, at Kinondoni before Hon. Kiliwa -RM)

YUDA RAMADHAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 24th October, 2022

Date of Judgment: 2nd December, 2022

E.E. KAKOLAKI, J.

Before the District Court of Kinondoni at Kinondoni, the appellant Yuda Ramadhani was arraigned accused of Rape; contrary to section 130 (1), (2), (e), and 131 (1) of the Penal Code, [Cap 16 R.E 2002] Now R.E 2022. It was prosecution case that, on diverse dates of January, 2017 and July 2017, at Saranga area within Ubungo District in Dar es Salaam Region, appellant had canal knowledge of a girl of 15 years. To protect her identity in this judgment the girl will be simply referred as JP or the victim.

When called to answer the charge, the appellant flatly denied his accusation, the fact which prompted the prosecution to parade six (6) witnesses while relying on one (1) documentary exhibit PF3, while the defendant fended himself without tendering any exhibit. After full trial, the trial court was satisfied that, the prosecution proved its case to the required standard of proof, thus convicted the appellant and awarded him the statutory sentence of 30 years imprisonment.

In quest to assail the conviction and sentence, the appellant lodged this appeal armed with 16 grounds of appeal in which during the hearing which proceeded by way of written submission he argued on five grounds and by inference dropped the rest. Mainly his five (5) grievances are the following:

(1) That, there was noncompliance with section 210 of CPA by the trial court.

(2) That, the evidence of PW2 was recorded unprocedurally.

(3) That, there was irregularity on admission of exhibit P1 (the PF3).

(4) That, the prosecution case was not proved beyond reasonable doubt.

(5) That the sentence was excessive and contrary to section 131 (1) (2) (a).

On the basis of the above grounds of appeal, the appellant is praying this Court to allow the appeal, quash the conviction, set aside the sentence and set him free. As alluded to above, the appeal was disposed by way of written submission, and during the hearing the appellant appeared in person, while respondent was represented by Ms. Jenipher Masue, learned Senior State Attorney. The scheduled orders for filing the submissions were followed by the parties save for the rejoinder submission in which the appellant indicated no interest to do, thus waiving his rights to.

In support of the first ground of appeal, appellant submitted that, during the trial when receiving both prosecution and defence evidence, the trial magistrate acted in contravention of section 210 as firstly, he did not append his signature after re-examination, and secondly, he did not inform each and every witness that the right to have his/her evidence read over to him and comment or correct where necessary as it was stressed in the case of **Mussa Abdallah Mwiba and 2 Others Vs. Republic**, Criminal Appeal No. 200 of 2016 (unreported) at page 10-13. He argued, it was mandatory for the trial magistrate to discharge such duty of informing each witness of his right to have their evidence read over so as to ensure authenticity of the recorded evidence. And added that, the omission by the magistrate to

append his signature after taking down the evidence of each witness is also incurable irregularity in the proper administration of criminal justice. In winding up on this ground he said, the rationale behind section 210 (3) of the criminal Procedure Act is to ensure authenticity and transparency in the criminal trials.

Responding to this ground of appeal, Ms. Masue admitted that the law under section 210 (1) (a) and (3) of the CPA imposes duty to the trial magistrate to inform each witness of the right to have his evidence read over to his and in fact read it over to him, for him to make any comment where need be. It was her submission however that, such mandatory duty was discharged by the trial magistrate, hence the ground is destitute of merit.

It is true and I embrace parties' submission that under section 210(3) of the CPA, the trial magistrate or Judge has a duty to inform the witness of his right to have his evidence read over to him if he so wishes, and that, the magistrate shall record any comment which the witness may make concerning his evidence. The section states;

> (*3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall*

record any comments which the witness may make concerning his evidence.

To properly attend appellant's complaint on this ground I took effort to revisit the lower courts hand written record, which genuinely reflects what transpired. It is trite law that court record is serious document in its nature as the presumption is that it accurately represents what happened in court, hence cannot be easily impeached or nullified without sufficient cause. These are not my own words by the standing of the Court in **Halfani Sudi Vs. Abieza Chichili**, [1998] TLR 527, where it was held that:

"(i) A court record is a serious document It should not be lightly impeached. (ii) There is always a presumption that a court record accurately represents what happened in court."

Glancing at the record, it is the discovery of this Court that the said complained of section was complied with when recording witnesses' evidence, except for the defence evidence where the record does not suggest its compliance. Nevertheless, the principle of law is always that, where there is failure or omission by the trial Court to comply with procedural requirement of the law in the course of trial, the question posed to the appellate court before nullifying or impeaching the proceedings, is whether such failure or omission occasioned any miscarriage of justice on the

complaining party. That position of the law was re-stated in the case of **Flano Alphonce Masalu @ Singu and 4 Others Versus R**, Criminal Appeal No. 366 of 2018 (CAT-unreported), where the Court observed:

> *"...in our earlier decision in **Jumanne Shabani Mrondo Versus Republic**, Criminal Appeal no 282 of 2010 (unreported) where we confronted an identical irregularity; **we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice**." (Emphasis added)*

Applying the above principle of law, to the circumstance of this cases, it is my considered position that, the omission by the trial court to comply with section 210(3) of the CPA when recording appellant's defence was a lapse which did not occasion any failure of justice on his part hence curable irregularity under section 388 of the same Act. I so find as in his submission the appellant did not come forth to indicate to this Court as to how was affected by such omission by the trial Court. There is no any complaint that, part of his defence was not recorded or that there were some additions to justify his complaint. In view of those reasons, I find the first ground has no substance and therefore dismiss it.

Next is the second ground of appeal where the appellant faults the trial court for convicting him basing on the evidence which was unprocedural taken as

the child was not of tender age but the trial court conducted voire dire test. He submitted that, it is no longer a requirement of law to conduct voire dire test to establish whether the child is intelligent before reception of his evidence instead, a witness of tender age is now required to promise to the Court to tell the truth before giving her/his testimony. Appellant lamented that, in this matter the trial court conducted voire dire test to PW2 who was not a child of tender age for being 15 years old.

In reply, it was Ms. Masue's submission that, the victim's evidence was properly recorded on affirmation and taken into consideration after the Court was satisfied that PW2 was competent to render evidence on oath given her age of 15 years old. She referred the court to page 11 of the proceedings. According to Ms. Masue, section 127 (2) was complied with hence the ground should fail.

Having considered and internalized parties' submission with regard to this ground it is my opinion that, the same need not detain this Court. This is so because the principle remains the same in consideration of complaints of this nature whether the omission or irregularity occasion an miscarriage of justice on the complaining party as it was also held in the case of **Richard Mebolokini v. R**, [2000] TLR 90, where the Court had this to say:

> *"…the principle of law is that where there is failure or omission to comply with a procedural requirement in the course of trial, the question the appellate court should ask itself before it can nullify or impeach the proceedings, is whether such failure or omission occasioned a miscarriage of justice on the part of the party complaining."*

See also the case of **Jumanne Shabani Mrondo v. R**, Criminal Appeal No. 282 of 2010 and **Flano Alphonce Masalu @ Singu and 4 Others** (supra).

My review of records as unearth the truth as reflected at page 11 of the proceedings that, the trial magistrate conducted voire test to the victim before her evidence was taken to the victim who was the child of 15 years of age but not of tender age as specified section 127 (4) of TEA. However, after conducting the said voire dire, PW2's evidence was recorded by the Court under oath, which I find to be a proper course. Under the circumstance and in absence of any explanation from the appellant on how was he prejudiced by such omission, I find the omission was not fatal as PW2's evidence was correctly taken, therefore the second ground also has no basis and I discard it.

The next for determination is the third ground in the list above on the complaint of irregularity in admission of Exhibit P1, the PF3. In this ground

the appellant faults the trial court for accepting the medical report exhibit PE1 which was not read aloud after being admitted. According to him, it is imperative for the presiding officer to read and explain its contents, so that the accused can understand the nature and facts founded on that document. He referred the court to the case of **Robinson Mwanjisi and Others Vs. Republic** [2003] TLR 218. He then contended that, the requirement is mandatory and non-compliance leads to expunge of the said document and so prayed this Court to do.

Responding to this ground of appeal, Ms. Masue admitted that exhibit PE1 was not read over. She therefore implored the court to expunge the said document. That aside however, she was of the view that, even if the said PF3 is expunged from the record, still the evidence of PW2 is strong and credible enough to support appellant's conviction. She referred the court to the case of **Seleman Makumba Vs. Republic** (2006) TLR 379, where it was held that, in sexual offences the best evidence comes from the victim if the court is satisfied that such witness is credible and reliable. She urged the Court to find the victim's evidence sufficient enough to prove the offence against the appellant.

I have carefully considered the submission by both parties as well as perused the trial court's records in view of satisfying myself of the complaint raised in this ground of appeal. It is conspicuously seen and therefore undisputed fact as rightly submitted on by both parties that, after admission of exhibit PE 1, the PF3 was not read aloud as per the requirement of the law. It is true and I embrace to both parties' submission that, failure to read aloud the document after their admission is prejudicial to the accused's right of fair hearing for denying him with an opportunity to know the nature and content of the document tendered against him. There is a number of decisions of this Court and Court of Appeal clarifying that stance. For stance, In the case of **Robinson Mwanjisi Vs. R**, [2003] TLR 218, the Court of Appeal explained that:

> *"…whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

The consequences of the omission to read aloud the admitted documentary exhibit are well explained in various cases including the cases of **Robert P Mayunga & Another Vs. R,** Criminal Appeal No. 514 of 2016, **Hussein Said Said @baba Karimu @ white and Another Vs. Republic,** Criminal Appeal No. 298 of 2017 Cat AT Dar es Salaam and **Kifaru Juma Kifaru and**

Others Vs. R, Criminal Appeal No. 126 of 2018 (All CAT-Unreported). In the case of In **Robert P Mayunga & Another Vs. Republic** (supra) on the same point the Court stated that:

> *"Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark not only on what to cross examine but also to effectively align or arrange his defence. The denial, therefore, abrogates the appellants right to fair trial…"*

From the above cited authority, rationale behind reading out a document after admission is to make the other party aware of the content of the said document so admitted so as to be in a position of marshalling an informed and rational defence.

The essence of reading out exhibits immediately after being cleared for admission was overemphasized in the case of **Shabani Hussein Makora v Republic**, Criminal Appeal No. 287 of 2019, where the Court of Appeal had this to say:

> *"It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or*

understanding the contents of the exhibits because each party to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidences adduced or observations filed or made with a view to influencing the court's decision."

The issue that follows is whether Exhibit PE1 in the present appeal should suffers the consequences of being expunged from record. It is undisputed fact as rightly admitted by Ms. Masue that, the said exhibit was not read aloud after its admission hence prejudiced the appellant for being denied knowledge of its contents so as to enable him query its contents. I am aware of the situation where resistance to expunge the exhibit obtained in violation of that mandatory procedure of the law can be taken particularly where its contents is discussed at length by the witness and cross examined on by the accused person. See for example the case of **Shabani Hussein Makora Vs. Republic**, Criminal Appeal No. 287 of 2019 (CAT-unreported). However in this matter that was not the case as my revisit of the evidence of PW3 at pages 17-18 of the typed proceedings leads me to the conclusion that, the witness did not discuss the contents of the said PF3 nor did the appellant cross examine her on its contents. This tells it all of the effect suffered by the appellant for not reading aloud the admitted document (PF3) as he was

denied of the right to hear and comprehend the nature of the evidence contained therein. It is from that fact I find the ground with merit and proceed to expunge the said PF3 (exhibit P1) from the record.

I now move to the fourth appellant's complaint in that, the prosecution case was not proved beyond reasonable doubt. It was his submission that, prosecution failed to prove penetration, which is an essential ingredient in rape cases. He viewed that, it is not enough for the prosecution through victim (PW2) to make a bare assertion that the prosecutrix was raped, as evidence ought to be given to prove penetration even if to the slightest degree. He relied on the case of **Daniel Mshambala Vs. R**, Criminal Appeal No. 10 of 2008. He contended that in this case, the prosecution did not prove penetration rather relied PW2's on assertion that, the appellant was her lover and that they had sexual intercourse on several occasions hence the appellant was responsible for the pregnancy.

He contended further that, the witnesses' evidence did not link the appellant with the alleged dates of commission of the crime which is contrary to the law as per the case of **Ryoba Mariba @ Mungare vs Republic,** Criminal Appeal No. 74 of 2003. He went on to argue that, PW2 was the only witness to the occurrence of rape and her account on such occurrence should be

corroborated. According to him, as per section 127 (7) of TEA, the law imposes two important duties upon the trial court, first upon receipt of uncorroborated evidence of the victim of sexual offences to make assessment of the credibility of the witness and proceed with conviction if satisfied that, the victim of the sexual offences told nothing short of the truth. He faulted the trial court for being impressed by the prosecution evidence especially that of PW2 while from her evidence could not corroborate her evidence on sexual occurrence, as a result she did not at all disclose commission of the offence any person. He went on arguing that, PW2 failed to name the suspect of rape at the earliest possible opportunity as it is stressed in the case of **Marwa Wangiti Mwita and Others Vs. The Republic**, Criminal Appeal No. 6 of 1995 (CAT-unreported), as an assurance of the culprit or perpetrator of the offence.

On that note, he submitted that PW2 withheld the detail of sexual occurrence for quite a while as was not sure of the perpetrator hence was incredible and unreliable witness.

In response, Ms. Masue submitted that, the law under section 130 (4) of the penal code cap 16 R.E 2022 provides that, for the purposes of proving the offence of rape, penetration however slight, is sufficient to constitute the

sexual intercourse necessary for proving the offence. In her view, the ingredient of penetration was proved by the testimonies of PW1, PW2, PW3, PW4 and PW5. She said, PW2 told the court that appellant raped her five times at the appellant's resident. She added that the doctor also told the court that, upon inspecting PW2, he found PW2 was four months pregnant thus, the prosecution proved the element of penetration through the testimonies of PW1, PW2, PW3, PW4 and PW5.

I have dispassionately considered the submission by both parties regarding this ground of appeal and accorded it with the weight it deserves. I have also scrutinized the available records in search of the truth. It is uncontroverted fact to this Court that, the appellant was charged of the offence of raping a 15 years old school girl contrary to among others, contrary to section 130 (1), (2) (e) of the Penal Code, in which consent to sexual intercourse is immaterial if the victim is under 18 years of age. Section 130(1),(2)(e) of the Penal Code states that,

> *130 (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

In essence for the prosecution to secure conviction in this category of rape, it has to prove that the victim was a child under 18 years of age, and that she was carnally known by the appellant. There is pleothora of authorities supporting the above stance such as the case of **Robert Andondile Komba Vs. DPP**, Criminal Appeal No. 465 of 2017, **George Claud Kasanda Vs. DPP** Criminal Appeal No 376 of 2017 CAT at Mbeya, **Isaya Renatus Vs. Republic,** Criminal Appeal No. 542 0f 2015, CAT at Bukoba (Unreported) and **Jackson David @ Linus Vs. Republic**, Criminal appeal No. 284 of 2019 CAT at Bukoba (Unreported) and **Rutoyo Richard vs R**, Criminal Appeal No. 144 of 2017.

It is also the legal stand as enunciated in the case of **Selemani Makumba** (supra) that, in sexual offences the best evidence comes from the victim of sexual offence and the court can convict basing on uncorroborated evidence of such victim if satisfied that, the child of tender years or the victim of the sexual offence is telling nothing but the truth. See also section 127(6) of the Evidence Act. In the present appeal, the evidence of the victim (Pw2) was very clear in her testimony at pages 11-13 of the typed proceedings that,

when approached by the appellant since January 2017, she accepted and they had sex 5 times in his room as lovers. Even when subjected to cross examination by the appellant at page 13 PW2 remain firm and unshaken in her testimony appellant was the only man she had sex with and they never used condom. To prove that she was sure of her testimony was ready even to test blood of the child. In short to bring the above discussion into picture here is PW2's evidence during cross examination and I quote from page 13:

> ***XXD by Accused:*** *All the statements are correct. You are the only man I have sex with. We never used condom. You are the one we did have sex. You can check the blood of a child.*

From PW2's firm evidence as noted in the excerpt above it is no doubt there was penetration as the two had sex which bore the fruit of pregnancy and PW2 was expecting a child. As there is no doubt that PW2 was pregnant and since she confirmed that they had sex with the appellant only I am satisfied that penetration was proved even in absence of PF3. Notably the victim was 15 years old at that time as proved by PW1, thus the appellants assertion the victim did not prove penetration rather banked on assertion that, the appellant was her lover is wanting in merit, since there is proof by PW2 that, they had sexual intercourse on several occasions leave alone the fact that in

statutory rape like the one under consideration consent is immaterial. As there was nothing to doubt PW2's evidence her testimony though not corroborated I find was sufficient enough to convict appellant with the offence that was placed at his door. Therefore, this ground also lacks merit.

Next is the appellants assertion that, the trial magistrate did not make an inquiry to the appellant's uncontroverted evidence regarding his age being under eighteen years by sentencing him excessively or procedurally and in contravention of the mandatory provision of the Penal Code [Cap 16 R.E 2002] under section 131 (1), (2) (a). In reply, Ms. Masue submitted that, when entering his defence on 17/04/2018, the appellant was 18 years meaning that, when the incident occurred in January 2017, he was under 18 years, therefore a minor the fact which the prosecution was not disputing. Under the circumstances she referred the Court to section 119 of the Law of the Child Act [Cap 13 R.E 2019] which provides that, a child shall not be subjected to custodian sentence. She was of the vied that the sentence of 30 years meted to the appellant under the circumstances was contrary to the law.

This point too need not take much of my time. It is true as submitted by Ms. Masue that section 119(1) of the Law of the Child Act, [Cap. 13 R.E 2019] is

categorical that, a child shall not be sentenced to imprisonment. The prohibition is embedded in section 131(2) of the Penal Code, providing for the punishment to a male child offender of sexual offences, by providing non-custodial sentence punishments. Section 131(2) of the Penal Code provides thus:

> *131(2) 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;*
> *(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;*
> *(c) if a third time and recidivist offender, he shall be sentenced to five years with corporal punishment.*

Having revisited the record, the charge sheet suggest that appellant was of 18 years old during commission of the crime. However as reflected at page 37 of the typed proceedings during defence case the appellant informed the court that he is a boy of 18 years old, the fact which remained unchallenged by the prosecution in which Ms. Masue confesses now to be so. Under the circumstances the Court was bound to inquire into his age before proceeding to sentence him for 30 years imprisonment as it did. Indeed the sentencing

of the appellant proceeded in violation of the law both section 199(1) of the Law of the Child Act and section 131(2)(a) of the Penal Code, as being the first offender no doubt the suitable sentence to him would be corporal punishment. Therefore, this ground has merit.

In totality save for the grounds on irregularity of admission of exhibit P1 (PF3) which was expunged and legality of sentence, the rest of the grounds of appeal are hereby dismissed. The appeal is therefore partly allowed allowing the same in respect of the sentence meted on the appellant but dismissing it regarding his conviction.

Now since the appellant was illegally serving custodial sentence since May 2018, I see no need to replace his sentence with the sentence befitting the child offender, rather than setting aside the sentence of 30 years imprisonment and order his release unless otherwise lawful held.

It is so ordered.

Dated at Dar es Salaam this 2nd day of December, 2022.

E. E. KAKOLAKI

JUDGE

02/12/2022.

The Judgment has been delivered at Dar es Salaam today 02nd day of December, 2022 in the presence of the appellant in person, Mr. ……., State Attorney for the Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
02/12/2022.