IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 69 OF 2021

(Originating from Ruangwa District Court in Criminal Case No. 108 of 2020)

FRANCIS PLACID MZAGA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 9/3/2022
Date of Judgment: 27/4/2022

LALTAIKA, J.:

The appellant herein **FRANCIS PLACID MZAGA**, was charged the by the District Court of Ruangwa at Ruangwa with two counts; 1st count: rape contrary to section 130(1)(2)(e) and 131 of the Penal Code Cap 16 R.E. 2019. 2nd count: impregnating a school girl contrary to section 60A (3) of the Education Act as amended by Miscellaneous Act No.2 of 2016.

The particulars of the offence on the first count are that the appellant, between December 2019 and the 31st day of March 2020, diverse time, at Chikoko Village within Ruangwa District in Lindi Region did unlawfully have carnal knowledge to one "RRM" a girl of sixteen years old. On the second count; the appellant on December 2019 at Chikoko

Village within Ruangwa District in Lindi Region did impregnate one "RRM" a sixteen-years-old school girl of Form Two at Makanjiro Secondary School. When the appellant was arraigned in court and the charge read over to him, he pleaded not guilty to both counts. The matter then went to a full trial.

After the prosecution had closed its case (the details of which IO refrain from narrating for reasons that will become apparent in the course of this judgement) and the ruling on a case to answer had been delivered, the appellant told the trial court that he would testify on oath and parade six witnesses. He also requested for DNA test of the pregnancy. On 22/02/2021 he did not enter appearance; the trial court construed such nonappearance as the appellant had jumped bail.

On 02/03/2021 the prosecution prayed the matter to proceed under section 226 of the CPA. The trial court granted the prayer and the matter was scheduled for judgment on 29/03/2021. However, on 08/04/2021 the prosecution managed to arrest the appellant thus the trial court ordered him to show cause following his absence in court.

The appellant told the trial court that he had visited his parents in Dar es Salaam. The trial court concluded that the appellant had no sound reason for his absence. To this end, it proceeded to pronounce the judgment and sentence. Upon, delivery of judgment under section 226 of the CPA, the trial court convicted the appellant on statutory rape and sentenced him to thirty (30) years' imprisonment. Dissatisfied and aggrieved with the decision of the trial court the appellant has appealed to this court by lodging a petition of appeal comprised of five grounds as the follows: -

1. *That, the trial Magistrate erred both in law and fact for convicting and subsequently sentence the appellant on statutory rape while the charge was not proved beyond reasonable doubt because the age of the alleged victim was not proved on the required standards if at all she was under the age of eighteen years.*
2. *That, the trial Magistrate erred both in law and fact for failure to accord the appellant an opportunity to account for his absence after being re-arrested and state if he had a probable defence on merits which failure vitiates the whole proceedings and orders subsequent thereto because it denied him his fundamental right to be heard.*
3. *That, the court erred both in law and fact to impose conviction and sentence it did rely under section 226 of the Criminal Procedure Act [Cap 20 R.E. 2019] which section was not applicable under the circumstances of the case because the prosecution had already closed its case.*
4. *That, the trial Magistrate erred both in law and fact by unprocedurally admitting exhibit P1.*
5. *That, the trial Magistrate erred both in law and facts for failure to assess, evaluate, analyse and subsequently relied on the discredited and unreliable evidence of PW1 and PW2 for failure to mention the appellant at the earliest possible moment.*

When the matter came for hearing, the appellant appeared under custody while enjoying legal services of Mr. Robert Dadaya, learned Advocate. The respondent Republic on the other hand, was dully represented by Mr. Abdulrahman Mohamed Mshamu, learned Senior State Attorney.

Kickstarting his submission in chief, Mr. Dadaya announced that he was going to argue the first, second and fifth ground of appeal. Although the learned counsel argued the grounds meticulously and some considerable length, I take the liberty to discuss only the second grounds for I am of a considered view that the same is sufficient to determine what next to this appeal.

Regarding the second ground, Mr. Dadaya submitted that the learned Magistrate grossly failed to apply with section **226(2) of Criminal Procedure Act, [Cap 20 R.E. 2019]**. The learned Counsel submitted that as soon as the accused person was rearrested and rearraigned in court, the learned Magistrate had a legal duty to accord the accused person (now appellant) an opportunity to state the reason why he did not enter appearance on the fixed date for hearing.

It is Mr. Dadaya's submission that had the appellant been afforded a chance to explain the reason for his absence the trial Magistrate could have assessed the reason as to whether the absence was due to causes beyond his control and if he had a probable defence on the merits. Mr. Dadaya went on and submitted that had the learned Magistrate satisfied herself on the same she could have set aside conviction, sentence and reopen the proceedings for the accused person to defend himself.

To cement his argument, Mr. Dadaya referred this court to the landmark case of **Olonyo Lemuna and Another vs R** [1994] TLR 54 especially at page 61 where the court observed that the right to be heard is a cornerstone principle of justice and that the appellant deserved a hearing. He also cited the case of **Marwa Mahende vs R [1998] TLR**

249 which reiterated the case of **Olonyo Lemuna and Another vs R** (supra).

Mr. Dadaya submitted further that noncompliance to section 226(2) of the CPA vitiated proceedings. He expounded that vitiation of the proceedings comes into play because the trial court denied the appellant the right to be heard. To fortify his argument the learned counsel referred this court to the case of **Abdallah Hamisi vs Republic**, Criminal Appeal No. 26 of 2005 CAT Tanga where the Appellate Court held that noncompliance with the section 226(2) was fatal. It is Mr. Dadaya's submission that the Appellate Court reiterated the position in the case **Adam Angelius Mpondi vs Republic**, Criminal Appeal No. 180 of 2018.

Still on the same ground, Mr. Dadaye asserted that records of the trial court were silent on what transpired after the rearrest of the appellant. To that end, the learned counsel averred, the Court of Appeal of Tanzania in several occasions including in the case of **Adam** (Supra) referring the case of **Loningo Sangau vs Republic,** Criminal Appeal No. 396 of 2013 (unreported) nullified the proceedings and set aside the conviction and sentence.

Mr. Dadaya prayed this court not to order retrial of the case but rather acquit the appellant. It is Mr. Dadaya's submission that in the present case, an order for retrial would affect the substance of the entire prosecution evidence and prejudice the appellant since, the learned counsel asserted, the trial court had no proof of the age of the victim. Mr. Dadaya referred this court to the case of **Ahmed Sumar vs R [1964] EA 483** where the court provided that where conviction is vitiated by the gap in the evidence or other defects from which the prosecution is to

blame, the court will not order retrial.The learned counsel for the Appellant also referred this court to the case of **Fatehai Manji vs R** [1966] EA 343 and the case of **Paschal Clement Braganza v R. (1957) EA 152** whereby the Court held that retrial order can be issued if the court is of the opinion that on consideration of the admissible or potentially admissible evidence, a conviction might result. He concluded his submission by arguing that there was no water tight evidence to convict the appellant. He thus prayed this court to acquit the appellant.

It was time for the counsel for the Republic to respond. In response, Mr. Mshamu conceded with Mr. Dadaya that the appellant was not afforded a right to be heard. He went further and submitted that section 226(2) of the CPA is coached to require the court whenever it convicted a person in absentia to either proceed with the same or reopen proceedings for the accused person to defend him/herself. It is Mr. Mshamu's submission that the interpretation of the case of **Olonyo Lemuna and Another vs R** (supra) as well as that of **Abdallah Hamisi vs Republic** (supra) is to the effect that when an accused person who was convicted in absentia is rearrested, he must be given an opportunity to be heard.

The learned Senior State Attorney submitted that the right to be heard is one among the fundamental principles of natural justice as provided by Article 13 of the Constitution of the United Republic of Tanzania. In that regard, the learned Senior State Attorney argued that he was in total agreement with his learned brother Mr. Dadaya that the appellant was denied the right to be heard. To fortify his argument Mr. Mshamu referred this court to the case of **Abdallah Hamisi vs Republic (supra)**.

Mr. Mshamu prayed this court to revert the matter to the trial court so that the appellant could be accorded his right to be heard before judgment. The learned Senior State Attorney argued that if this court does not allow the appellant to go back and be given such an opportunity, it would be entering into the shoes of the trial court which did not afford that opportunity in the first place. Mr. Mshamu emphasized that legitimacy and legality of the current appeal must be based on legality and legitimacy of the trial court.

It is Mr. Mshamu's submission further that since the trial court had ruled out that the appellant had a case to answer, he was supposed to be given an opportunity to defend himself before he was convicted. The learned Senior State Attorney argued that it would be very dangerous for this court to turn itself into a trial court and find against other issues even before the right to be heard is exercised. Mr. Mshamu strongly submitted that it was his considered opinion that it would just if this court reverted the matter to the trial court so that the appellant could be afforded an opportunity to explain why he hadn't entered appearance. Mr. Mshamu asserted that doing otherwise would be blessing the illegality of the subordinate court. In a brief rejoinder, Mr. Dadaya reiterated what he submitted earlier.

I have carefully examined the evidence on record and considered the contending submissions of the parties in the light of the adopted grounds of appeal. Coming to the second ground which I have chosen to focus on, it is common ground that, when the appellant was re-arrested and brought before the trial court, the court did not accord him the right to defend himself in the manner he had intended before he absconded. In view of the articulation of the Court in the case **Olonyo** and **Marwa** (both

supra) section 226(2) of the Criminal Procedure was misapplied. As a result, it resulted into denial of the appellant's fundamental right namely the right to be heard. In my view, such misapplication of section 226(2) of the Criminal Procedure Act vitiated the proceedings thereto.

Therefore, I set aside the proceedings and judgment of the trial court and remit the case file to the trial court with the direction that the appellant be given the right to be heard.

In the upshot, I find the appeal is therefore allowed to extent explained.

It is so ordered.

E.I. LALTAIKA

JUDGE

27.04.2022

Court

This Judgment is delivered under my hand and the seal of this Court on this 27th day of April 2022 in the presence of Mr. Wilbroad Ndunguru, learned Senior State Attorney, Ms. Blanket, Advocate for the appellant and the appellant.

E. I. LALTAIKA
JUDGE

27.04.2022