IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 105 of 2022

MODEST S/O LUCAS @SHILINDE .....APPELLANT

Versus

REPUBLIC .....RESPONDENT

JUDGMENT

Feb. 16th & 23rd, 2023

Morris, J

The District Court of Kwimba (elsewhere, the 'trial court') found Modest Lucas @Shilinde - the appellant above, guilty of two offences. He was charged for abduction [of a school girl*(sic*)] contrary to section 133 and rape under sections 130(2)(e) and 131(1); all of ***the Penal Code***, Cap.16 R.E. 2019. Subsequent to conviction, the convict-appellant was sentenced to a concurrent 4-year and 30-year terms in jail respectively. He was aggrieved by the conviction and sentence. He appealed to this Court.

On record, the appellant was tried for having abducted and raped a girl aged 16 years between February 27th, 2022 and March 2nd, 2022. The

crime was allegedly committed repetitively at Pikiniki Guest House in Ngumo-Ngudu, Kwimba District. The victim was later examined by the medical expert (PW6) who filled the requisite PF3 (exhibit P4).

The appeal is based on six (6) grounds. Paraphrased, they present that: prosecution failed to prove the offence beyond doubts; evidence of PW1 was uncorroborated by independent witness(es); testimony by PW1 and DW2 were contradictory regarding appellant's circumcision; and that the trial court convicted him basing on hearsay evidence of PW2, PW3 and PW4.

The appellant appeared in this Court without a legal representative. Ms. Magreth, learned Senior State Attorney, represented the respondent. However, before allowing the parties to address the Court, I discovered from the records of the trial court that, the trial Magistrate (page 11 of judgement) unilaterally amended the provision of the law under which, according to him, the accused-appellant should had been charged. That is, while the charge sheet stated the provision for the first count as section 133 of ***the Penal Code***, Cap 16 R.E. 2019; the judgment indicated that the appellant contravened section 134 of Cap 16.

In such regard, instead of proceeding with the appeal, I invited the parties to address the Court on the appropriateness of such amendment first. That is, the legal effect of the court amending the charge, at judgment stage; and without according the parties the right to call witnesses in such connection. The appellant submitted briefly that the trial court was not justified to make its judgment based on a section different from the one for which he was charged. According to him, section 133 is about a woman of any age while section 134 relates to a girl below 16 years. He also remarked that, the evidence on record indicates that the victim was then 15 years of age. Hence, he concluded that the court erred. He definitely prayed for acquittal.

On her part, Ms. Mwaseba was aptly concessionary. She quickly voted for the trial Magistrate's err. To her, under section 234 of ***the Criminal Procedure Act***, Cap 20 R.E. 2022; if the charge is amended, it must be read over to the accused for him to plead. Thereafter, witness(es) may be called to testify as appropriate. She accordingly observed that this procedure was not followed by the trial court in the matter from which this appeal emanates. Consequently, the Respondent also noted the anomaly as an error on the trial court's part. This

concession notwithstanding, Ms. Mwaseba invited the Court to order retrial pursuant to section 388 of ***the Criminal Procedure Act***, Cap 20 R.E. 2022.

Having heard both sides of the appeal, I have to make the Court's finding on this very aspect. The Court's verdict is necessary inspite of the Respondent's partial-support of the appeal. One of the justifications for the court's decision is that; whereas the appellant longs for acquittal, Ms. Mwaseba's focal prayer is trial *de novo* (anew). I proceed on such basis. Going by the trial court's judgement, at page 11, the trial Magistrate remarks that:

> "…*baada ya kupitia kwa kina ushaidi (sic) Mashtaka pamoja na kihelelezo (sic) P1 ambayo ni kadi ya Clinic ya binti huyo XYZ ni kwamba XYZ alizaliwa tarehe 18/04/2006 na Mashtaka haya yote Mawili dhidi yake yalitendeka 27/2/2022, kwa mantiki hiyo kifungu sahii(sic) cha sheria katika kosa la kwanza ni kifungu 134 na siyo 133* ***Kanuni ya Adhabu*** *[****Sura Na 16 Rejeo 2022****] kama ilivyoelezwa katika Hati ya Mashtaka kwa sababu wakati shtaka(sic) likitendeka binti huyo alikua(sic) na Miaka 15…"*

The above excerpt is to the effect that, the trial Magistrate realized that the accused had been wrongly charged under section 133 instead of section 134 (both of Cap 16). The victim was a girl aged 15 years then. The duet provisions are reproduced below for ease of comprehension.

> *"**Section 133**: Any person who with intent to marry or have sexual intercourse with a woman of **any age**, or to cause her to be married or to have sexual intercourse with any other person, takes her away, or detains her, against **her will**, is guilty of an offence and is liable to imprisonment for seven years."*

> *"**Section 134**: Any person who unlawfully takes an unmarried girl **under the age of sixteen years** out of the custody or protection of her parent or other person having lawful care or charge of her and against the will of the parent or of that person is guilty of an offence"* [bolding is done for emphasis].

I should swiftly remark, from the outset, that the trial court's observation regarding the contravened provision of the law was valid. The victim of the appellant's alleged action was below 16 years of age. Thus, the appropriate section for such offence was section 134. However, the said court is faultable on three facets. ***One***; its mandate to amend the

charge. That is, whether or not the court was legally vested with powers to amend the charge. ***Two***; the stage at which the amendment was done. ***Three***; the procedure which was or should have been adopted by the court following the amendment of the charge, if at all.

In my well-thought-out view, pursuant to section 234(1) of ***the Criminal Procedure Act***, Cap 20 R.E. 2022; the trial court has no legal mandate to amend the charge on its own. Such role should be performed by the prosecution. The provision under reference has it categorically that, "the court may **make such order** for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case".

The philosophy behind the foregoing task being done by the prosecution is four-fold: ***firstly***; the prosecution is the party responsible for drawing and filing the charge (subject of amendment or substitution). ***Secondly***; it has the responsibility to prove it before the court. ***Thirdly***; in terms of the doctrine of *nemo judex in causa sua* (forum not to judge own cause), the court remains to be an impartial umpire throughout the trial. In ***Mohamed Koningo v R*** [1980] TLR 279, duties of the parties

and of the court were clearly recapitulated. ***Fourthly***, both parties are permitted to recall and examine requisite witnesses. This allowance, promotes the spirit the balanced criminal justice system between them.

Regarding the stage at which the envisaged amendment or substitution of the charge is allowed; the law fixes the phase at, "during the trial". In ***Gharib Ibrahim @Mgalu and 4 Others v R***, CAT Criminal Revision No. 05 of 2019 (unreported), it is authoritatively set a principle by the Court of Appeal that, observance of such stage ensures that justice is done to the accused.

Further, following alteration of the charge, as discussed above, the law requires that the accused must be accorded an opportunity to take a plea to the new charge. In addition, the accused and/or the prosecution may pray for recall of witness for eventual examination; as necessary. That is the import of section 234 (2) & (5) of ***the Criminal Procedure Act***, Cap 20 R.E. 2022. This procedure is a statutory windscreen against the accused being prosecuted for a wrong charge; or accusations for which he has not taken a plea; and/or denying him the opportunity to marshal an effective defence. In addition, the evidence given by the

witness in respect of the previous charge (now altered or changed) lack the probative value to support or defeat conviction.

The consequence of non-adherence to the procedure above is vitiation of the trial. In the cases of ***Gharib Ibrahim @Mgalu*** *(supra);* ***DPP v Rajabu Kibiki***, CAT Criminal Appeal No. 367 of 2017; and ***Ezekiel Hotay v R***, CAT Criminal Appeal No. 300 of 2016 (all unreported), parameters pertaining to the legal architecture under section 234 ***the Criminal Procedure Act***, Cap 20 R.E. 2022 were given the adequate analysis. I entirely subscribe to the holdings of the cited cases. I, thus, conclude that the trial court met a serious legal stumble. Its proceedings, and conviction are, hence, quashed and sentence therefrom set aside.

The above finding and holding notwithstanding, because the trial proceeded on the basis that the victim was not only a school-going pupil but also of the age below 16 years (refer to the charge); this Court orders retrial of the case before the District Court of Kwimba before a different magistrate. I so order in terms of both section 388 of ***the Criminal Procedure Act***; and the holding in ***Fatehali Manji v R*** [1966] EA 341. That is, the decision of this Court is not because of the insufficiency of

evidence and/or with the objective of assisting the prosecution to fill in the evidential gaps inherent in the faulted trial.

In the upshot, the appeal is allowed on a ground different from the ones raised by the appellant. I hereby order the file to be remitted back to the trial court for another magistrate to retry the case appropriately.

It is so ordered.

The right of appeal is also duly explained.

Dr. C.K.K. Morris

Judge

February 23rd, 2023