IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 18 OF 2023
(Arising from the District Court of Maswa in Criminal Case No. 23 of 2022)

BUNDALA NHELEMKI..... .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order 25.10.2023
Date of Judgment 07.11.2023

MWAKAHESYA, J.:

In the District of Maswa at Maswa the appellant, Bundala Nhelemki, stood charged with the offence of rape contrary to sections 130(1)(2)(e) and 131(3) of the Penal Code. The prosecution alleged that, on the 16th of February, 2022, during daytime, at Mwabayanda village within Maswa District, Simiyu Region, the appellant had carnal knowledge of a girl aged six years. At the trial, the prosecution paraded a total of six witnesses including the victim, who for purposes of concealing her identity I shall refer to as **PW3**, and tendered a total of three exhibits that included the

appellant's cautioned statement (exhibit P1), a PF3 report (exhibit P2) and the appellant's extra judicial statement (exhibit P3).

It was the prosecution's case that, on the material date at the house of one Basu Masasila, **PW1**, the appellant was caught having sexual intercourse with **PW3** in the bathroom of the said house. It was testified by Mabinza Basu, **PW2**, who happens to be **PW3's** brother, that at the moment the appellant was found raping **PW3** he was not wearing his trousers. **PW2** took off to inform his parents about the incident and upon returning they found that the appellant had already left the scene. A search was mounted and the appellant was arrested about a kilometer away and he was subsequently taken to the Mwabayanda village VEO's office while **PW3** was taken to a local health centre. Upon being taken to the police and interrogated the appellant confessed to the rape. On the 17th February, 2022 the appellant was taken to the Malampaka Primary Court where he made an extra judicial statement before a Resident Magistrate, **PW6**, confessing to the rape.

In his defence the appellant denied committing the offence and testified to the effect that the case was made-up as a result of a quarrel he had with **PW1** on the material date. The trial court found the appellant guilty of

the charge and sentenced him to life imprisonment. It is against the sentence that the appellant has lodged the present appeal which is based on five grounds which are to the effect that:

1. The trial magistrate contravened section 127 (1) of the Evidence Act;
2. The trial court erred in law and fact to sentence the appellant without convicting him;
3. The appellant was sentenced without his name being written at the conclusion of the judgment;
4. The appellant's rights were not considered when his cautioned statement and extrajudicial statement were recorded without the assistance of an interpreter; and
5. The trial court erred when one Boniphace Paul was used as an interpreter without being sworn.

At the hearing of the appeal the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms. Wampumbulya Shani and Ms. Happy Chacha learned State Attorneys. The appellant opted to hear the respondent's reply first and later on make a rejoinder.

Responding to the first ground of appeal Ms. Shani submitted that, section 127(1) and (2) of the Evidence Act was adhered to when **PW3** was testifying as she promised to tell the truth. She made reference to the Court of Appeal decision of **Raphael Ideje @ Mwanahapa vs The Dpp**, Criminal Appeal No. 230 of 2019 (unreported). In the alternative, she submitted that, if section 127 was contravened the anomaly is curable under section 388(1) Criminal Procedure Act. She concluded by submitting that, the first ground of appeal must fail.

With regard to the second ground of appeal Ms. Shani submitted that, it is true that the trial court did not convict the appellant before passing sentence. However, she argued that the omission is not fatal since this court can re-evaluate the evidence that was produced before the trial court and convict the appellant accordingly.

Submitting on the third ground of appeal, Ms. Shani was of the view that section 312(1) and (2) of the Criminal Procedure Act does not make it mandatory for the name of an accused person to be mentioned when he is

convicted. After all, in the present appeal the appellant was named at the beginning of the judgment of the trial court and thus when convicting the court had the appellant in mind.

Submitting on the fourth ground of appeal, the learned State Attorney submitted that, the appellant was brought before the trial court on 21.02.2022 and until he entered his defence on 13.06.2022 the trial was conducted using the Kiswahili language without an interpreter. It is only on 13.06.2022 the appellant brought an interpreter. It is obvious that the appellant, in his defence, was able to name witnesses for the prosecution as well as the substance of their testimonies, thus when he is now alleging that he did not have an interpreter when he was making the cautioned statement and extra judiciary statement, he is being untruthful.

She submitted further that, when one looks at the trial court records it can be seen that the appellant understood Kiswahili, for example, when **PW4** was testifying and when **PW6** was tendering the extrajudicial statement the appellant did not cross examination them on the issue that he made those statements while he was not conversant with Kiswahili. This proves that the appellant understood what **PW4** and **PW6** were testifying

about. The appellant bringing an interpreter during his defence was a mere afterthought.

With regard to the fifth ground of appeal, Ms. Shani conceded that the records of the trial court show that the interpreter was not sworn just as the appellant alleges. However, she submitted that, based on her submission on the fourth ground of appeal the appellant was not prejudiced since he understands Kiswahili. It was Ms. Shani's prayer that the appeal be dismissed and the conviction and sentence of the trial court be upheld.

On rejoinder, the appellant did not have anything more to add than to reiterate that his appeal be allowed.

Having gone through the grounds of appeal and the subsequent submissions by the parties, I find it prudent to deal with the second ground of appeal first as it might determine the fate of the appeal before this court. In doing so, I start by reproducing page 20 of the judgment of the trial court which reads:

> *"In the final and from the foregoing discussion, it is the profound view of this court that prosecution has managed to prove its case beyond reasonable doubt that accused person did rape PW3. In effect thereto,*

accused person is convicted for the offence charged under section 235 (1) of the Criminal Procedure Act, Cap. 20, [R.E 2019]."

Section 235 (1) of the Criminal Procedure Act provides that:

"(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code."

It seems obvious that, what the trial magistrate did does not amount to a conviction in the legal sense. Not only that, but the trial magistrate even failed to mention the offence and the relevant provision of the law constituting the offence that the appellant was allegedly convicted of. This offends section 312 (2) of the Criminal Procedure Act which provides that:

"(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

The Court of Appeal has on numerous occasions determined the legal effect of a trial court's failure to enter a proper conviction, see: **Shabani Iddi Jololo and Three Others v The Republic**, Criminal Appeal No. 200 of 2006; **Amani Fungabikasi v The Republic**, Criminal Appeal No. 270 of 2008; **Ramadhani Athumani Mohamed v The Republic**, Criminal Appeal No. 456 of 2015; and **Emmanuel Noa and Others v The Republic**, Criminal Appeal No. 361 of 2016 (all unreported).

In **Ramadhani Athumani Mohamed** (*supra*) the Court of Appeal held that:

> *"Failure by a trial court to enter conviction is an incurable irregularity which will render such judgment and the sentence a nullity."*

In light of the above, I find that the second ground of appeal has merit, there was no conviction entered against the appellant in the District Court of Maswa at Maswa. The judgment of the trial court is hereby declared to be a nullity and, consequently, the appeal before this court is rendered incompetent. This makes dealing with the remaining four grounds of appeal an academic exercise which I will not indulge in and much as the learned State Attorney invited this court to step into the shoes of the trial

court and convict the appellant, having found that the appeal rests on the foundations of a judgment that is a nullity, I respectfully decline the offer.

Due to the fact that this appeal rests on an incompetent judgment, it can neither be upheld nor dismissed. I therefore, proceed to quash the judgment and conviction entered against the appellant and set aside the sentence. The case file is remitted to the trial court with directions to compose a proper judgment in compliance with section 235(1) and 312(2) of the Criminal Procedure Act.

Meanwhile, the appellant is to remain in custody pending the compliance by the District Court of Maswa with the order of this court.

It is so ordered.

DATED at **SHINYANGA** this 7th day of November, 2023

N.L. MWAKAHESYA

JUDGE

07/11/2023