IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 167 OF 2023

(Appeal from the Judgment of the Kisarawe District Court by Hon. Sanga, SRM dated 27th January 2023 in Criminal Case No. 54 of 2022)

RAJABU WAZIRI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 30.10.2023

Date of Judgment: 13.11.2023

DING'OHI, J;

Rajabu Waziri, the Appellant herein, was convicted in *absentia* and sentenced to a term of thirty years imprisonment, for the offense of rape contrary to section 130 (1), (2) (e) of the Penal Code Cap 16 R.E. 2022.

It was alleged, in the trial court (which allegation was disputed by the Appellant) that, on the 8th day of October 2022 during day time at Ngongele area within Kisarawe district, coast region the appellant was arrested while having sexual intercourse with a victim, a girl aged 12 years old.

The Appellant felt unhappy with both the conviction and sentence. He has appealed in this Court raising a total of eight grounds to challenge the above verdict.

In reflection, however, the raised grounds of appeal may be reduced into three. **One** is that the evidence of PW1 (the victim) was wrongly received contrary to the provision of section 127 (2) of the Evidence Act (Cap 6 RE 2019) and section 198 (1) of the Criminal Procedure Act (Cap 20 RE 2022). It is alleged, that the omission renders the PW1's evidence a nullity; **Two**, that the appellant was subjected to an unfair hearing by failure to accord him with an opportunity to show cause on an allegation of jumping bail. It is alleged, that was in contravention of section 226 (2) of the Criminal Procedure Act (Cap 16 RE 2022) and Article 13 (6) (a) of the Constitution of The United Republic of Tanzania, 1977 (as amended from time to time). **Third**, the prosecution has miserably failed to prove its charge against the appellant beyond all doubts as mandatorily and statutorily required.

In this appeal, the Appellant drove himself, unrepresented. The Respondent Republic was represented by Mr. Ditrick Mapunda, the learned State Attorney.

The appeal was ordered to be disposed of by way of filing written submissions which are in place.

Arguing for the first ground, the Appellant submitted that the provision of section 127 (2) of the Evidence Act is very clear that the evidence of the witness of a tender age may be received with or without oath or affirmation provided that the trial court should conduct a brief examination to ascertain whether or not the witness of tender age understands the meaning and nature of an oath or affirmation. In this case, the Appellant submits, that was not done and that the statement of the PW1 lacks evidential value.

On the second ground, the Appellant submitted that he was denied an opportunity to either show cause for the allegation of absconding the bail or give his defense in connection to the charge. He said, on page 14 of the typed proceedings the Public Prosecutor prayed to the Court for the issuance of summons to show cause to the appellant's sureties but what followed is for him to be convicted and sentenced in absentia as there is no record as to whether the sureties brought any feedback as to where about him.

Lastly, the appellant submitted that he was convicted while the prosecution side did not prove the charge against him beyond all

reasonable doubt as required by sections 3(2) (a) and 110 (1) (2) of the Evidence Act, Cap 6 RE 2022. He said, there was a piece of contradictory evidence between the PW1 and PW2. He said during testimony the PW1 told the court that she informed the PW2 about the incident but the PW2 himself did not say as to whether or not the PW1 did tell him about the incident. The appellant cited the case of **ALOYCE MARIDADI vs R**, Criminal Appeal No.208 of 2016 (unreported) where it was observed that;

> *"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses"*

Further, the appellant added two points in submission to challenge the decision of the trial court. First, the incident of rape was not reported to any neighbor or local leader, and; secondly, the PW4(the Dr who examined the victim) did not state if she found any discharge in PW1's vagina.

Under the circumstances, the appellant is of the view that the charge of rape against him was not proved beyond all reasonable doubt. He prays that his appeal be allowed and; that the conviction and sentence imposed upon him by the trial court be set aside.

In reply submission, Mrs. Elizabeth Olomi, State Attorney, conceded that section 127 (2) of the Evidence Act allows a child of tender age to give evidence with or without oath or affirmation but he should promise to tell the truth. She contended that, on page 7 of the trial court's proceedings the PW1 is recorded to have told the court that she understands the meaning of oath and the duty of speaking the truth. She promised to tell the truth and that is when he was allowed to testify. Since she promised to tell the truth, then section 127 (supra) was not contravened.

The learned State attorney cited the case of **SAMWEL ABRAHAM @ CHUMA vs R**, Criminal Appeal No.531 of 2020 (CAT-DSM) where the Court construed that the statement "*I promise to tell the truth because lies is a sin, I will tell the truth" Amounts* to compliance of section 127 (2) (supra). That, section 198 (1) (supra) was no more essential because section 127 (2) (supra) had been complied with.

On the second ground, the learned State Attorney submitted that it is not true that the appellant was denied a fair hearing. She contended it was the appellant who jumped bail immediately after the testimony of the PW3. He clarified that, since the Appellant did not appear in court and was not found, the trial Court was right to proceed in absentia of him under section 226 (1) of the Criminal Procedure Act, cap 20 RE 2022.

However, the learned state attorney submitted, under section 226 (2) (supra) the court is empowered to set aside a conviction made in absentia of the accused person upon good cause. The accused person has to prove that his absence was due to reasons beyond his control and that he had a probable defense on merit.

As to this case, the learned State Attorney contended that the appellant was not heard after he was arrested on the allegation that he jumped bail. Under the circumstances, she said, the case file may be taken back to the trial court for retrial.

On the last ground, the learned state attorney submitted that the appellant was charged and convicted of the offense of rape of a child of tender age. Both the age of the victim and penetration were proved. Regarding penetration, the learned state attorney contended, it was the victim herself who narrated how the accused raped her, and that was the best position as laid down in the case of **SELEMAN MAKUMBA vs R** (2006) TLR 379. Counsel also relied on the case of **ISSAYA RENATUS vs R**, Criminal Appeal No.542 of 2015, which stated that proof of age can be given by a victim, relative, parent, or medical practitioner or where available by the production of a birth certificate.

She added that there is no doubt that it was the appellant who raped the victim because the incident was committed in the daylight and the victim identified the appellant as he knew him even before the incident.

The learned State Attorney prays that this appeal be dismissed and the conviction upheld.

In his brief rejoinder, the appellant reiterated his main submission and stressed that the evidence of PW1 was in contravention of section 127 (2) (supra) and thus it should be expunged from the records. More so, as the counsel for the respondent conceded to the second ground, the appellant argued the Court to resolve the matter in his favor.

The relevant issue is whether this appeal has merit.

I have carefully gone through the trial court's record. I will start with the complaint by the Appellant that he was convicted and sentenced unheard. That is because, If I find that this ground is meritorious, there will be no need to venture into the other grounds.

The trial court record shows that on 7/12/2022 when the case was called for hearing the Appellant was absent. The case was further scheduled for hearing on 21/12/2022. The Appellant failed to attend court as well. On that day the Respondent successfully made a prayer for the issuance of

the arrest warrant against the Appellant. The Appellant was not found for arrest.

On 02/01/2023 the trial court found that the Appellant had absconded bail, it decided to proceed in absentia of the Appellant under section 226 of the Criminal Procedure Act, Cap. 20 RE 2022. By then three witnesses including the victim had testified. That is to say, other witnesses namely; PW4 Dr. Zamzam Yahaya, PW5 MG 581475 Aziz Ibrahim Mbena, and WP 11675 Christina, had testified in absentia of the Appellant.

After the closure of the prosecution case, the ruling followed. In the ruling, the trial court found that the Appellant had a case to answer. It proceeded to compose a judgment which found the Appellant guilty of rape offense as he was charged.

I have considered as to whether that was proper.

At the outset, I will agree with the Appellant that, it is improper to convict a person who is arrested on allegation that he jumped bail without availing him an opportunity of being heard. Since the Appellant was arrested after he was convicted in absentia, the proper procedure was to avail him an opportunity to explain the causes of his non-appearance.

Section 226 (2) of the Criminal Procedure Act provides that;

"Where the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defense on the merit."

Much as the wording of subsection 2 above provides, it was a matter of significant procedure that, soon after the arrest, the appellant had to be heard by the trial court on why he absconded the bail.

In another case of **MAGOIGA MAGUTU @ WANSIMA vs R**, Criminal Appeal No.65 of 2015 (CAT-Mwanza), the Court of Appeal of Tanzania had this to say:

"Finally, we turn to the issue regarding the duty the law imposes on trial magistrates under section 226(2) of the CPA to ask the appellant who had absented from his trial, whether he had any explanation for his absence. It is clear to us that the above sub-section (2) provides a statutory opportunity to a person who fails to appear after an adjournment but is all the same convicted in absentia; to explain why he did not turn up for his trial"

Two things from the above authority, it is the duty imposed by the law on a trial magistrate to ask the convict why he did not show up during the

proceeding of his case, and, also; it imposes a statutory opportunity for the convict to explain why he did not turn up for his trial.

In this case, the record is very clear that the trial court did not avail the Appellant of an opportunity to explain his absence.

The relevant part of the trial court proceedings reads as follows (Quoted from the words of the trial Magistrate);

> *"Date 23/3/2023*
> *Coram: D. Kisoka- PRM*
> *Prosecutor: Kawawa*
> *Accused: Present*
> *Court Clerk: Happy*
> *PP. Your honour this matter is coming today due to the fact that on 26/1/2023 before Hon. Sanga SRM who now is another station. However the surety is coming with accused person who was apprehended after escaping from the court. Your honour S. 226 (1) (2) (3) of Criminal Procedure Act Cap 20, RE 2019 is complied with.*
>
> *Sgd: Hon. D. Kisoka*
> ***PRM***
> *23/03/2023*
>
> ***PP PREVIOUS CONVICTION***
>
> *Have no records of concerning the accused person*

MITIGATION

I'm sick and have my family which depend on me.

COURT

The sentence given to the accused is mandatory this court can not do anything. I passing the sentence as was written by the presiding Magistrate.

Sgned: D. Kizoka, PRM
23/3/2023

Order: *The sentence is starting today after apprehension.*

Sgned: D. Kizoka, SRM

23/3/2023"

The omission is fatal. In the case of **MAGOIGA MAGUTU @ WANSIMA** (supra) it was observed that;

> *"The lay appellant should have been informed that the trial court had the discretion to set aside the appellant's conviction in absentia if the appellant showed that his absence from the hearing was from causes which had no control and that he had a probable defense on the merit"*

There is no dispute that in our case the appellant was not heard after he was arrested for the allegation that he jumped bail. What was done by the trial court, as I have said, was to commit the said appellant to prison

for the execution of the sentence imposed on him on 27/01/2023. That was not proper. The trial court had a duty to make sure that the Appellant was heard over the allegation that he jumped bail.

In the final analysis, appeal is partly allowed. The proceedings of the trial court taken from 02/01/2022 to 18/1/2022 are hereby quashed and set aside. Further, the conviction and sentence of thirty years imprisonment imposed on the Appellant by the trial court are also quashed and set aside. The retrial of the case is ordered from where the PW4 **JUMANNE MASUDI** ended to give his evidence.

At the time of retrial, the Appellant shall remain in remand custody.

It is so ordered.

S.R. DING'OHI
JUDGE
13/11/2023

Judgment delivered this 13th day of November, 2023 in the presence of Mr. Ditrick Mapunda, the learned State Attorney, for the Republic and the Appellant in person.

S.R. DING'OHI
JUDGE
13/11/2023