IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.40 OF 2023

(Appeal from the Decision of the District Court of Mkuranga at Mkuranga before Hon. K.P. Mrosso, RM dated 1st June, 2022 RM in Criminal Case No. 320 of 2021)

FAMILY SAUTI @ VANGANYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

POMO, J

The Appellant, FAMILY SAUTI @ VANGANYA, is not happy with the decision of Mkuranga District Court (the trial court) convicting him of the charge of unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code, [Cap. 16 R.E.2019] the offence he was charged by the Respondent republic. Following the conviction, he was sentenced to serve life sentence together with an order requiring him to pay the victim compensation of Tshs 500,000/-. This decision was handed down by the trial court on 1st June, 2022 Hon. K.P. Mrosso, RM, hence this appeal

Briefly stated, on 24th December, 2021 the Appellant was arraigned before the trial Court facing the charge of rape contrary to section 130(1), (2),(e) and 131(1) of the Penal Code [Cap.16 R.E.2019]. According to the particulars in the charge, on 10th day of December, 2021 at about 19:00hrs at Dundani kwa Jumanne Mzee, Dundani village within Mkuranga District in Coastal region the Appellant did have sexual intercourse with PW2 (name withheld to hide her identity as a child) a child aged eight and half years old. The Appellant denied the charge and consequently, the respondent republic called in court four witnesses to prove the offence. These were Otoke Said Kido PW1 the mother of the victim, the victim PW2, Andreas Elias Matambo PW3 and lastly WP 2732 D/SSGT Salma PW4.

It was the above witnesses' evidence that, on 11th December, 2021 about 18:00hrs Otoke Said Kido (PW1) the mother of the victim while washing her children's clothes, which included those of the victim (PW2), noted that PW2's underpants had blood stains. Her inquiry from the victim (PW2) on the blood stain found on her underpants, unveiled that she had been known against the order of nature by the Appellant the time she took back to him the hammer they had earlier borrowed. This was after the victim openly revealed to her mother PW1 that the appellant committed such

offence to her. That, she was dragged by the Appellant inside his house, covered her mouth with a cloth, tied her hands and took out his penis and inserted it in her anus.

The horrible news PW1 received from the victim shocked her and immediately started screaming for help. Following that, the matter was reported to Mkuranga police station. At the police station, they were issued with PF3 (Exhibit P.E.2) for medical examination of the victim (PW2). Andreas Elias Matamba PW3 is a medical doctor who examined the victim (PW2). According to him, the examination revealed that the victim's anal sphincter was loose which is an indication she was canally known against the order of nature.

Consequently, the appellant was arrested and arraigned in court on 24th December, 2021 for the offence of rape the charge which came to be substituted on 7th February, 2022 by the Respondent republic. As earlier hinted, the Appellant was convicted by the trial court and sentenced to serve life sentence. Unhappy with the decision, the Appellant has approached this court with the instant appeal armed with 10 grounds of appeal. Readymade, I hereby reproduce them: -

1. *The learned trial magistrate erred grossly erred in law and fact by convicting and sentencing the appellant in a case where the magistrate misdirected herself by recoding the evidence of PW2 (the victim) in contravention of section 127(2) of the Tanzania Evidence Act as PW2 was not (asked) tested on whether she understands the nature of an oath or not before promising to tell truth and not to tell lies*

2. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where the victim (PW2) testified in contradiction to section 198(1) of the CPA as PW2 testified without oath or affirmation and no reason was ascribed to that omission by the court*

3. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where section 234(2)(b)(5) was badly violated as the witness who testified before the charge was substituted was not recalled, and no reason was ascribed to that omission by the court*

4. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where section 132 and 135(f) of the CPA is violated making the charge fatally defective regarding the time the offence was committed*
5. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where the magistrate fraudulently imported an exhibit (Exhibit PE.1) which never*

existed in the court proceedings and relied on it to condemn the appellant

6. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where the age of the victim is fabricated to constituted a statutory rape*

7. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on contradictory evidence of PW1; PW2; PW3; and PW4 as they all testified a contradictory version in regarding the time of their conduct in this case*

8. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a case where none of the neighbours who came at the alarm of PW1 including the V.E.O who informed the Police as alleged testified in court*

9. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on the evidence of a doctor who failed to describe the victim he examined as he did not mention the name of the alleged victim in this case*

10. *The learned trial magistrate erred in law and fact by convicting and sentencing the appellant relying on false testimony of PW2 a habitual liar who chose to (dribble) lie to her mother (PW1) when she asked her to tell the source of the blood in her under pant*

The appellant fended his appeal himself unrepresented while the Respondent republic had legal representation of Mr. Emmanuel Maleko, learned Senior State Attorney. The Appellant having prayed and supported by Mr. Maleko, that appeal hearing be by way of written submission, I granted the prayer and ordered the same be heard by way of written submissions.

For the reason to be apparent shortly, I will commence with the third ground of appeal.

Submitting on the 3rd ground, it is the Appellant's argument that the learned trial magistrate violated section 234(2)(b) of the Criminal Procedure Act, [Cap. 11 R.E. 2019] (the CPA) for failure to recall witnesses who testified before the respondent republic substituted the charge and no reason was given by the learned trial magistrate to that effect. Before substitution of the charge, the witnesses who had already adduced evidence are PW1 and PW2. The learned trial magistrate didn't inform the Appellant his right to demand PW1 and PW2 be recalled when the charge was substituted. To him, that is a fatal omission and, in support, he referred this court to the case of **Republic versus Jumanne Mohamed** [1986] TLR 231

Responding to the ground, Ms. Rose Ishabakaki, learned State Attorney, argued that section 234(2)(b) of the CPA imposes a duty to the accused person to demand for recalling a witness when the charge is substituted. That, as it is evident at page 12 of the proceedings, the charged was substituted but the Appellant didn't demand witnesses to be recalled which meant he was satisfied, and the amendment didn't cause him any injustice. She asked the ground be dismissed for lack of merit

In rejoinder, the Appellant reiterated the violation by the trial magistrate of section 234(2) of the CPA referring to his earlier on cited case of **Republic versus Jumanne Mohamed** [1986] TLR 231 also cited the case of **Shani Kapinga versus Republic**, Criminal Appeal No. 337 of 2007 CAT at Iringa (Unreported).

Having heard both sides rival submissions, the issue for determination is whether this ground is merited. From both sides' submissions, and as evidenced at page 12 of the typed proceedings, they are in agreement that the charge against the appellant was on 7th February, 2022 substituted. Also, they are at one that the learned trial magistrate didn't inform the Appellant the right of demanding witnesses who had given evidence before substitution be recalled. What is at stake is, **firstly,** whether the learned trial

magistrate had a duty of informing the Appellant the right of demanding for recalling witnesses who testified in court prior to substitution of the charge and **secondly**, if the appellant was prejudiced anyhow.

Let us remind ourselves what was the first charge and the substituted one. It is on record, the first charge which was read over the accused person on 24th December, 2021, its statement of offence, read thus: -

> *"**RAPE** contrary to section 130(1), (2), (e) and 131(1) of the Penal Code, [Cap. 16 R.E.2019]"* while the one substituted on 7th February,2022 reads thus *"**Unnatural offence** Contrary to Section 154(1)(a) & (2) of the Penal Code, [Cap. 16 R.E. 2019]"*.

Section 234(1) & (2) of the CPA alleged to be violated by the trial magistrate provides thus: -

> *"**S. 234 –(1)** where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, 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 unless, having regard to the merits of the case, the required amendments made under the*

provisions of this subsection shall be made upon such terms as the court shall seem just.

(2) *- subject to subsection (1), where a charge is altered under that subsection –*

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) ***the accused person may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused person*** *or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice".

The above section was once considered by the court in the following cases, among others, **Shani Kapinga versus Republic**, Criminal Appeal No. 337 of 2007 CAT at Iringa; **Omary Salum @ Mjusi vs Republic**, Criminal Appeal No. 125 of 2020 CAT at Dar es Salaam (Both unreported); **Republic versus Jumanne Mohamed** [1986] TLR 231.

For instance, in **Shani Kapinga** case (**supra**) the court of appeal citing with approval the high court case of **Jumanne Mohamed** case (supra), had this to state at pp. 8 - 9: -

> *"The learned Samatta, J as he then was had an occasion to consider the effect of failure by a trial court to comply with the provision of Section 234(2)(b) of the Criminal Procedure Act in the case of R vs Jumanne Mohamed [1986] TLR 231. In similar circumstances, it was held that the court is under a duty to inform the accused of his rights and find out from him which rights he proposes to exercise. In addition, the learned Samatta, J., stressed that the accused reply should always be reflected in the record of the case. In the case of JUMANNE, the High Court held that failure to comply with the provisions of section 234(2)(b) of the Criminal Procedure Act was a serious error capable of vitiating the decision arrived at by the trial magistrate. At page 234 it is stated:*
>
> > *"The* ***failure on the part of the learned trial magistrate to comply with s. 234(2)(b) of the Act*** *in the instant case was,* ***in my settled opinion, a serious***

error, capable in law of vitiating the decision he arrived at, at the end of the trial*".*

We feel duty bound at this juncture to state that the Court is not duty bound to follow decisions of lower courts. ***The decision of JUMANNE has been cited because it is a sound reasoning and we adopt it****".*

In **Omary Salum @Mjusi** case **(supra)** the Court of Appeal, confronted with akin situation, had this to state: -

"It is important to note that the substituted charge had added another count of rape while the former charge had only a single count of grave sexual abuse. It goes without saying that, the five witnesses had testified only in respect of the offence of grave sexual abuse. ***Thus, it was imperative for the court to inform the appellant his right provided under the cited provision of the law for him to choose whether or not to exercise it****.*

Often, the Court has pronounced that failure to comply with the provisions of section 234(1) and (2) of the CPA, renders the proceedings a nullity. One of such pronouncements is in the case of ***Tluway Akonnay v. R*** *[1987] TLR 92 and* ***Omary Juma Lwambo v. R****, Criminal Appeal No. 59 of 2019 (unreported). For instance, in the latter case the Court referred to its previous decisions in relation to non-compliance with the said provision of law and stated thus:*

> *"The above being the effect of **failure by the trial court to comply with s. 234(1) and (2) of the CPA** after substitution or alteration of a charge, we similarly find that, in this case, **the omission rendered the proceedings which followed after the date of substitution of the charge, a nullity**".*
>
> *Likewise, in the instant case failure by the trial court to comply with the provisions of section 234(1) and (2) of the CPA renders the proceedings subsequent to the substitution of the charge on 7th May, 2019 a nullity and so is the proceedings of the High Court which arose from nullity proceedings".*

Applying the above decisions in the instant case, it is obvious that the trial court didn't discharge its imperative duty of informing the appellant his right of demanding recalling witnesses who by the time of substituting the charge had already testified in court. These are, for that matter, Otoke d/o Said Kido (PW1) and the victim (PW2) who adduced their evidence on 26th January, 2022. Likewise, the argument by Ms. Ishabakaki, learned state attorney that the accused had a duty to demand and did utilize that avenue and is not prejudiced anyhow, can not hold water in presence of the above illustrated stance of the Court of Appeal decisions

From the foregoing, therefore, I find merit in the Appellant's third ground of appeal, that the trial court conducted trial of the case against the Appellant in violation of section 234(2)(b) of the CPA henceforth the proceedings subsequent to the substituted charge made on 7th February, 2022 became nullity proceedings. Thus, I allow the ground of appeal.

What is the way forward then? Since the trial court proceedings are nullity, the same could have attracted for an order of retrial of the case. I will seek guidance from the decision **in Fatehali Manji versus R** [1966] EA 341 where it was held:

> "*In general, a retrial may be ordered only where the original trial was illegal or defective;* ***it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial*** *…. Each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it".*

Having read the trial court record, in my considered view, the interest of justice does not call for the order of retrial of the case on the ground that,

taking that course will amount to giving chance the respondent republic to fill in gaps of the prosecution evidence. This is based on the fact that, compliance of section 127(2) of the Evidence Act, [Cap. 6 R.E. 2019] by the trial court before recording the victim (PW2)'s evidence, a child of tender age, is not certain equally so is victim's age. The uncertainty of age is apparent when the trial magistrate imported from nowhere Exhibit PE.1 a clinic card which had never been tendered in court but referred at last paragraph of page 8 to page 9 of the trial court judgment. More so, the evidence of the medical doctor, the usefulness of it, is for proving commission of the sexual offence and not who committed it, therefore can not be used to identify the accused as the culprit. PW1 and PW3 are not eye witnesses to the alleged commission of the offence

Basing on the findings above, I allow the appeal. The trial court proceedings are hereby nullified so is the judgment thereof, conviction and sentence. Consequently, I hereby acquit the Appellant and order his immediate release from custody unless is otherwise held for other lawful cause

It is so ordered

Right of Appeal explained to an aggrieved party

Dated at Dar es Salaam this 16th day of November, 2023

MUSA K. POMO

JUDGE

16/11/2023

Court: - Judgment delivered this 16/11/2023 in the presence of the Appellant and Rose Ishabakaki State Attorney for the Respondent only

Sgd: S. B. Fimbo

Deputy Registrar

16/11/2023