IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A, And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 455 OF 2018

FAUSTINE YUSUPH.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Arusha)
(Mzuna, J.)

dated the 26th day of October, 2018

in

Criminal Appeal No. 26 of 2017

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JUDGMENT OF THE COURT

28th September & 13th October, 2022.

FIKIRINI, J.A.:

This is a second appeal. The appeal arises from High Court decision dated 26th October, 2017, which upheld the decision of the District Court of Mbulu at Mbulu. At the District Court the appellant was charged and convicted with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, and sentenced to life imprisonment. Particulars of the offence stated that on 20th December, 2016, at about 16:00 hours at Uhuru village within Mbulu district in Manyara Region, he did have carnal knowledge with JY or a victim, a girl aged two (2) years. The appellant

denied the charge prompting the prosecution to bring witnesses to prove its case.

To quench their quest, the prosecution called five (5) witnesses and tendered exhibits. In contrast, the appellant neither cross-examined the prosecution witnesses nor mounted any defence, leaving everything to the court's wisdom. The prosecution, through its witnesses, laid before the court the following evidence: on a fateful day, Elizabeth Modest (PW1), the victim's mother, was inside the house carrying out chores, including preparing food, and the cries of JY alerted her. By then, JY was outside playing with Happyness Joseph (PW2). When she went outside, she found the appellant, who had gone to her place to fetch water, was sitting on the ground, holding the crying victim while placing her on his thighs, and despite her cries, was not letting her go. PW1, upon inquiring what had befallen JY, was told by the appellant that JY had fallen. When taken by her mother, JY pointed at her private parts. Questioned by PW1 what had happened to JY, the appellant responded by saying that he had not injured JY. The appellant had at that time placed JY aside and was busy tightening his trousers' belt. PW2's grandmother also came out and ordered the gate

to be closed. The appellant threatened to beat PW2's grandmother, but her uncle came and averted the threats. People gathered, including Maria Khufo (PW4), hamlet's leader. She testified to find the appellant under arrest, and many people had assembled. It was her evidence that the appellant was taken to the Police Station, and JY was taken to hospital after being issued with PF3, after examination of her private parts by WP. 8122 DC Mary (PW5).

Dr. Yustin Bobre (PW3), a clinical officer, attended to JY on 20th December, 2016 and found some bruises and blood in her pelvic region, and no harm had been done to her virginity. The PF3 was tendered amidst objection by the appellant but admitted as PE1.

The appellant did not advance any defence when called up to defend himself. The court pronounced its judgment finding the appellant guilty, convicting him, and sentencing him to life imprisonment.

Aggrieved by the decision, he unsuccessfully appealed to the High Court. The High Court, in its judgment, admitted that the trial was better placed to assess the credibility and demeanor of witnesses, hence it did not find any reason to fault the decision. Undeterred, the appellant has

approached this Court having three (3) grounds of appeal namely: **one,** that the first appellate court erred in fact and law in failing to conclude that the charge sheet was defective, as there was an omission to cite sub-section (3) of section 131 of the Penal Code, **two,** that the first appellate court erred in fact and law in holding that the case against the appellant was proved beyond reasonable doubt, and **three,** that the trial court erred in law and fact by failing to comply with the mandatory provisions of sections 211(1) and 312(2) of the CPA.

The appellant appeared in person unrepresented on the date scheduled for the appeal hearing. Ms. Janeth Sekule, learned Senior State Attorney, assisted by Ms. Upendo Shemkole and Ms. Lilian Kowero, both learned State Attorneys, all represented the Republic.

The appellant filed a statement of his written arguments, arguing on the first ground that the charge preferred against him was defective for failure to cite sub-section (3) of section 131 of the Penal Code, which provides a life sentence for the offence of having carnal knowledge with a child below ten (10) years. His submission was that the trial court should have sentenced him to thirty (30) years imprisonment instead.

On her part, Ms. Sekule, learned Senior State Attorney, supported both the conviction and sentence meted out. Opposing the appeal and she outrightly admitted the defects in the charge sheet, which read rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code rather than sections 130 (1) (2) (e) and 131 (3) of the Penal Code. Despite admitting the infraction, she promptly impressed upon us that the defect is curable under section 388 (1) of the CPA. Her contention was premised on the fact that the charge sheet had fulfilled the requirements of a proper charge as the appellant was availed with all information which included the offence, particulars containing the date and place where the offence was committed and that the victim was two (2) years old girl.

Furthermore, all the prosecution witnesses gave evidence in that regard, reflecting the victim's age. As a result of the information and evidence led during the hearing at the trial court, it allowed the appellant to prepare his defence. Supporting her submission, she cited the case of **Abdul Mohamed Namwanga @ Madodo v. R,** Criminal Appeal No. 257 of 2020 (unreported).

Submitting on the second ground, she contended that the High Court did re-evaluate the witnesses' account. For example, she referred to PW1's evidence, the victim's mother, who gave the victim's age, and that she was born on 29th August, 2014. PW1 also explained what was revealed from the examination of the victim, that she had blood on her private parts. PW1's account was supported by PW2. Probed by the Court if section 127 (7) of the Evidence Act, was complied with. Ms. Sekule, argued that although PW2 was sworn before giving evidence, she did indicate knowing the duty of telling the truth. She argued further that, PW2 gave an account of what transpired, including how the appellant had his zip open and the trousers' belt loose. Adding to PW1 and PW2's version of the story, PW3, the doctor who attended to the victim, concluded that a blunt object bruised the victim. She concluded by submitting that the evidence of PW1, PW2, and PW3 proved penetration.

Moreover, she argued that the court record shows that PW2 was present at the crime scene and when allowed to cross-examine the witness, the appellant failed to exercise his right. Worse still, she submitted, he failed to mount his defence. Combining the two, failure to

cross-examine and later mount his defence leans towards his guilty. Ms. Sekule referred us to the case of **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (unreported). She was thus of the submission that the 1st appellate court fulfilled its duty of re-evaluating the evidence and arrived at a decision upholding the trial court's decision.

Taking up the third ground, Ms. Sekule, submitted that the complaint on non-compliance with section 211(1) of the CPA was baseless because nowhere in the proceedings from when the charge was read over to the appellant, has it been reflected that he did not understand Swahili, the language used in court. Emphasizing her point, she contended that the appellant pleaded not guilty to the charge when it was read to him and during the preliminary hearing, he admitted to his particulars only. Besides, before the High Court, the appellant had the services of an advocate who did not raise the issue of non-compliance to section 211 (1) of the CPA. Thus, the point was raised as an afterthought, stressed Ms. Sekule.

On failure to pronounce or specify the charging and conviction provisions in the trial court judgment pursuant to section 312 (2) of the CPA, Ms. Sekule admitted to the omission, which she contended was

curable under section 388 of the CPA. She contended that the omission has not prejudiced the appellant, as he knew the charge against him, as shown in the trial court judgment.

On the strength of her submission, she urged us to dismiss the appeal and uphold the conviction and sentence.

The appellant had nothing to add in his rejoinder.

We have considered the rival submissions of the parties. To accomplish the task bestowed on us of determining this appeal, we would commence by dealing with the first ground on the defective charge sheet. As admitted by Ms. Sekule, the position we endorse is that the charge sheet is not defective by not citing a sentencing provision. This is because, pursuant to section 132, citing the sentencing provision is not a legal requirement. Similarly, under section 135 of the CPA, it is not a prerequisite on the charge sheet format to spell out the sentence. This requirement has, in essence, been established from practice.

The appellant, in his submission, referred us to the case of **Meshaki Malongo @Kitachangwa** (supra), in which we found that the appellant was prejudiced as he could not mount his defence knowingly upon

conviction the sentence to be meted out, was life imprisonment. Referring to the cases of **Simba Nyangura v. R,** Criminal Appeal No. 144 of 2008, cited in the case of **Marekano Ramadhani v. R,** Criminal Appeal No. 202 of 2013 (both unreported), we underscored that once charged with the offence of rape the appellant must specifically know under which sub-section of section 130 (2) of the offence of rape he would be sentenced, and that description was considered applicable to offences under section 131 of the Penal Code, too. While taking note of the position in the above cases, we must admit that the same was arrived at without fully examining the significance of sections 132 and 135 of the CPA, which do not expressly require the citation of penalty provision. See: **Jafari Salum @ Kikoti v. R,** Criminal Appeal No. 370 of 2017, **Paul Juma v. R,** Criminal Appeal No. 20 of 2017, and **Abdul Mohamed Namwanga @Madodo** (supra), the case cited to us by Ms. Sekule.

From the discussion in the above cited cases, we are of the view that the information in the charge sheet and particulars of the offence, demonstrated the nature of the offence and its seriousness; putting the appellant on alert was sufficient. At any rate, omission to cite a sentencing

provision would not render the charge sheet defective. Such defect is curable under section 388 of the CPA, in line with the position in the case of **Jamali Ally @ Salum v. R,** Criminal Appeal No. 52 of 2017 (unreported).

Consequently, we find this ground lacking in merit.

For a logical sequence of arguments, we shall now examine the third ground of appeal. On this ground, the appellant is complaining that there was non-compliance to sections 211 (1) on the interpretation of evidence to the accused or his advocate and 312 (2) on specifying the offence, under the CPA. For clarity, we extract the said provisions:

> *"211.-(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language understood by him."*

And

> *"312.-(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."*

A thorough perusal of the record shall bear witness to our findings that nowhere in the record has it been shown that the appellant was not conversant with the language being used in court, which, from the record, is shown to be Swahili, such that an interpreter would be required. The appellant entered his plea denying the charge, meaning that he understood what he was being charged with. Likewise, when a preliminary hearing was conducted and facts read out, he replied as reflected on page 4 of the record of appeal when he stated:

"Your Honour, I agree with my name and physical address only."

Again, on page 10 of the record of appeal, when PW3 was about to tender the PF3, and he was asked if he had any objection, the appellant objected to the tendering of the exhibit when he remarked:

"I do object to it because I am not sure whether he is a doctor."

And on page 12 of the appeal record, when PW5 requested to tender the sketch map, the appellant reacted by not objecting to the sketch map's tendering. Again, on page 13 of the record of appeal, when invited to mount his defence, his response was:

"Your honour, I have nothing to say. I leave this matter to the wisdom of your honourable court. I do not have any defence in this case."

The responses above do not suggest that they were made by someone who did not understand the language. We, thus, agree with Ms. Sekule's submission that the complaint that section 211 (1) of the CPA was not complied with is unmerited.

The appellant's further complaint is that section 312(2) of the CPA was not observed by the trial court. It is indeed correct that the trial magistrate did not comply with the dictates of section 312 (2) of the CPA. Ms. Sekule, conceded to the omission and supported by the record, the trial magistrate, on page 23 of the record of appeal, only indicated that the appellant was convicted of rape without backing her pronouncement with a provision of the law. Even though there was an omission, we find, the omission curable. Aside from the fact that the appellant was not prejudiced as from the inception he knew he was charged with what offence and all along the evidence brought to court was to prove the charge of rape he was being charged with. The charging provisions have been clearly spelt out in the first paragraph of the judgment on page 18 of the record of

appeal, that he was charged under sections 130 (1) (2) (e) and 131 (1) of the Penal Code for committing the offence of rape. By mentioning the charging provision, we are of the settled view that the trial magistrate must have in mind the charging provision upon conviction. Nevertheless, we find the omission curable in line with what the Court said in **Samson Bwire v. R,** Criminal Appeal No. 91 of 2018 (unreported).

The second ground on whether the prosecution proved its case against the appellant takes us to who had the onus of proving the case. It is trite law that the onus of proving the charge against the accused lies with the prosecution. There is a long list in that regard, such as **Woodlmington v. DPP** (1935) AC 462**, Magendo Paul & Another v. R** [1993] T.L.R.219 and **Abel Mwanakatwe v. R,** Criminal Appeal No. 68 of 2005 (unreported), to name a few. While the appellant raised this ground, challenging the proof of the prosecution case to the required standard, Ms. Sekule, vehemently argued that the duty of proving the case on the prosecution had been sufficiently discharged. Since the victim was two (2) years old, there was no need to prove consent. The only ingredients left to prove were thus penetration and if the appellant was the culprit. The

prosecution fielded PW1 and PW5 in proving that the appellant was the one who committed the offence. PW1 did examine the victim when she went out responding to her cries, and PW5 examined her when the victim passed through the Police station to be issued with PF3 en route to the hospital. They both found blood on the victim's private parts. PW3 as well examined the victim and found blood on her pelvic area and some bruises caused by a blunt object. The evidence of these three witnesses proved that the victim was penetrated.

Answering as to who committed the offence. Again, there was ample evidence from PW1, the victim's mother and PW2, who both saw the appellant sitting down with the victim placed between the appellant's thighs crying. The appellant's assertion that the victim was crying out loud after falling, but that account is refuted by the fact that when the victim was inspected by PW1, she was found bleeding on her private parts. The appellant was the one found with his zip open and belt loose holding the victim between his thighs, and the victim was crying loudly. Upon inspection, she was found bleeding on her private parts, which was *prima facie* proof that she was raped by none other than the appellant.

The 1st appellate court which dealt with this ground was satisfied that the prosecution discharged its duty proving the case beyond reasonable doubt. We have not seen any reason to differ with the High Court in this regard. We find no merit in this ground and dismiss it.

In fine, we dismiss the appeal in its entirety.

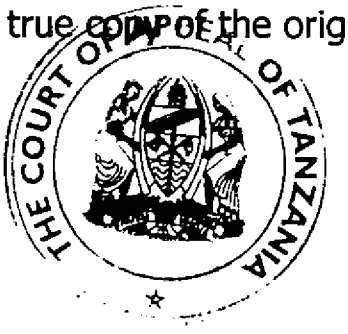
DATED at **ARUSHA** this 7th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 13th day of October, 2022 in the presence of Appellant in person and Ms. Lilian Kowero, State Attorney, for the Respondent/Republic both appeared through Video Link is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL