IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 205 OF 2017

(Originating from The District Court of Kilosa at Kilosa, Criminal Case No 313 of 2016 Before: Hon. Khamsini– RM Dated 24th May, 2017)

ABDALLAH NGUCHIKA---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Last order date: 22nd June, 2018
Judgment date: 28th June,2018

MLYAMBINA, J.

The appellant was convicted of rape contrary to section 130 (1) (2) (e) and 131(1) (b) of the Penal Code Cap 16 (R.E. 2002) and sentenced to serve a term of 30 years' imprisonment. Being dissatisfied with such conviction and sentence, the appellant preferred this appeal on the following grounds among others; -

1. That, learned trial Magistrate erred in law and fact in holding that the prosecution side has established its case beyond any reasonable doubt against the appellant.
2. That, the learned trial Magistrate grossly erred in law and fact by convicting the appellant on basis of unjustified corroborated prosecution evidences.

3. That, the trial Magistrate erred in law and fact in admitting into evidence the retracted caution statement made by the appellant to the police without assuming due regards as to the proper and unlawfully ways by which the alleged confession was obtained, That, the proper doctrine of taking caution statement stipulated under Section 28 of TEA (Cap 6 R.E. 2002). Also, it was contrary to section 50, 51, 10 (3) and 57 of the Criminal Procedure Act Cap 20 (R.E. 2002)
4. That, the trial Magistrate erred in law and facts when convicted the appellant on the basis of the tender age of PW2 without to take into consideration that the prosecution side did not establish a prima facie case. It is on charge sheet that PW2 was ten years old and in oral statement alleged nine years old. That, it is a duty of a trial Court to make a finding of the exact age of a child of tender age as stipulated under Section 16 (1) of the Child and Young Persons Ordinance.
5. That, the trial Magistrate erred in law and misdirected himself when convicted the appellant based on the flaw of closed family testimony without taking into consideration on that evidence of one family must be corroborated by other independent witness because there is possibility of fabricating evidence against the appellant.

6. That, the trial Magistrate erred in law and fact when holding PF3 and sustained conviction to the appellant without rape proof or which include PW1 who gave his evidence contrary to Section 2 and 17 of the Medical Practitioner and Dentists Act (Cap 52 R.E.2002).

WHEREOF, the appellant prayed before this Hon. Court to allow this appeal, quash the conviction, set aside the sentence and leave the appellant at liberty.

The appellant has been represented by Omary Ngatanda Advocate. The respondent was represented by the learned State Attorney Christin Joas.

With regard to the first ground of appeal, Omary Ngatanda Counsel for the appellant submitted that, in the cited provisions of law there is no Section 131(1) (b) in the Penal Code Cap 16 (R.E.2002) as it was cited in the charge sheet. Since there is no such provision of law, then the charge sheet become defective for citing non-existing Section. The Counsel refereed us to the case of **Uganda vs Keng'eli Opili (1965) E.A 614** the Court held; -

> "*the error was fundamental one of law in that the accused was charged by non-existing offence. It was not competent for the Court to prosecute on the intention of framers of the charge but must be guided in determining such intention*

by the expression contained in the record of proceedings and the law."

Basing on the **Keng'eli's** decision afore cited, Counsel Omary was of submissions that the defective charge as seen is fatal and thus renders the whole proceedings and decision of the District Court null.

On the second ground, Counsel Omary was of submissions that it is the requirement of the law the statement made to the police officer shall be made voluntarily. This is provided for under the provision of Section 27 (1) of Tanzania Evidence Act Cap 6 (R.E.2002). That, in the proceedings, the Hon. Magistrate did not take the rule of finding out how the statement was taken to the police, nor the said statement was read in the court.

The Counsel maintained that the rule of procedure for taking the statement provided by the Criminal Procedure Act requires a number of factors to be considered. It is under Section 50 (3) of Criminal Procedure Act. The Section requires the suspect be informed of his rights. That, Section 55 provides for the right of the suspect to ask a lawyer or a relative for representation when his statement is taken.

The counsel was of submission that, if one looks on the record, there are no any findings out made by the hon. Magistrate to see whether these procedures were followed.

On the last ground, counsel submitted that it is on record that the age of the victim is said to be 10 years. However, the testimony made by PW2 said that she was of 9 years old. The counsel refereed us to the case of **Mawazo Makiwa vs Republic Criminal Appeal No. 45 of 2013 (unreported),** Hon. Fauz Twaib Judge at page 4 held that; -

> *"the offence with which the appellant was charged is statutorily. The age of the victim is an essential element in that offence, the facts must have said so."*

The appellant's counsel winded up his submission by stating that the Hon. Magistrate must have ascertained the age of the victim before proceeding with the making of the decision.

In reply, learned State Attorney Christin Joas supported the conviction. On the first ground of defective charge, the counsel stated that not all defective charges lead to miscarriage of justice. That, Section 131 which the accused was charged on is all about punishment. So, this Section did not prejudice the accused. It did not leave the appellant unaware of the charge he was facing. Christin counsel refereed us to the case of **Jafari Mohamed vs Republic**

Criminal Case No. 495 of 2016 at page 7 last paragraph, in which the Court stated that; -

> *"we are fully aware that not every defect in the charge sheet would invalidate the trial, as this depends on the particular circumstances of each case, the overriding consideration been whether or not infraction worked to the prejudice of the accused person."*

The learned State Attorney stated that the defect can be cured under Section 388 of Criminal Procedure Act Cap 20 (R.E.2002).

On the second ground of appeal, on involuntariness of caution statement, the counsel argued that, during the tendering of the caution statement the accused never objected the tendering at page 9. So, there was no need of conducting an inquiry while the accused never objected the tendering of the caution statement. In considering the age of the victim on caution statement, the accused knew that he was raping the child at page 2 line 3 it was stated; -

> *"kuhusu kubaka sikufanikiwa kuingiza uume wangu kwa sababu ni mtoto mdogo"*

The State Attorney told us that the appellant was aware that he was attempting to rape a child. That, the victim evidence in rape cases is the best evidence as per Section 127 of Tanzania

Evidence Act. PW1 clearly stated that he was raped by the appellant, before and during the incidence the appellant threatened the victim by using the knife and covered her mouth while raping her. The victim evidence was corroborated by the evidence of a doctor who examined the victim. During examination the doctor discovered some bruises and hymen was removed. PF3 was tendered without objection as exhibit P1.

The respondent therefore prayed the appeal not be allowed.

In rejoinder, Omary Counsel agreed with the holding in the case of **Jafari Mohamed** (*supra*), that, Section 388 of Cap 20 proves for how the defective charge can be cured, however, the counsel was of the view that since the matter is at appeal stage, the charge cannot be cured. That means the charge will remain defective.

In analyzing the afore grounds of appeal, at the outset I'm of general view that at appeal stage, it is not necessary every decision must be turned down. The grounds for the appellate court to look upon are *inter alia* that there are legal and factual anomalies in the decision sought to be challenged. In the case of **Peters v. Sunday Post Ltd. (1958) EA 424** where the Court of Appeal for East Africa set out the principles in which an appellate court to interfere with the lower court decision. It stated: -

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide".

In this rape appeal case, I'm of settled view that this is not one of cases whose decision is to be turned down. In reaching to such finding, the Court shall address itself on five issues to be derived from the appeal grounds and submissions of the parties. These are:

One, whether the charge sheet of the appellant was defective: **Two**, if the first issue is answered in the affirmative, whether the charge sheet can be rectified at appeal stage: **Three**, whether the prosecution side proved their case beyond the shadow of doubt: **Four**, whether the retracted caution statement made by the appellant to the police was lawfully made: **Five**, whether the appellant's closed family testimony was corroborated.

As regards the first issue, Section 131(1) of the Penal Code (*supra*) gives a bottom line limit of sentence for not less than 30 years imprisonment. It states; -

> *"Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case* ***for imprisonment of not less than thirty years with corporal punishment****, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person." (emphasis added).*

It follows true that Section 131 is all about punishment for the one who commits rape cases. Again, it is correct that there is no subsection (b) of Section 131. But in the light of the findings in the case of **Jafari Mohamed,** the appellant should have established that citation of Section 131(b) of Cap 16 worked to his prejudice.

Even if it worked at the appellant's peril, the prosecution case was still backed up with Section 130 (1) (2) (e) of the Penal Code Cap 16 (R.E. 2002). Therefore, the Uganda case (*supra*) cannot bind this Court while there is a clear Tanzanian authority of the case of **Jafari Mohamed** (*supra*).

The answer to the second issue can be expressly found under Section 388 of the Criminal Procedure Act, Cap 20 which states; -

> *"Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act, save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable"*

From the above quoted provision of the law, it is true that a defective charge cannot be rectified on appeal stage. However, as a principle of law, defects of a charge is not fatal. It is the Courts discretion to order for retrial if the error in the charge occasions failure of justice.

The law clearly bars this Court to reverse or alter the decision of the lower court basing on an error alone. So, the argument by Omary Counsel that defective charge in this case renders the

whole proceedings and decision of the District Court null, is not a proper stand of the law.

Coming to the third issue, as stated by learned State Attorney Christin Joas, **Section 127 (7) of the Tanzania Evidence Act, Cap 6 (R.E.2002) (TEA)** gives a clear light that the evidence of the victim carries much weight. It states: -

> *"In Criminal proceedings involving Sexual offences the only independent evidence is that of the Child of tender age of the victim of sexual offences, the Court shall receive the evidence."*

The evidence of the victim in this case was very clear. PW1 stated that he was raped by the appellant, before and during the incidence the appellant threatened the victim (PW1) by using the knife and covered her mouth while raping her. (**see un-numbered page 6 of the typed proceedings).**

Above all, the evidence of doctor established that the victim had some bruises and her hymen was removed. PF3 was tendered as exhibit P1. There was no any objection of such exhibit. For those reasons, we are satisfied that the prosecution side proved their case beyond any reasonable doubt.

On the fourth issue, the appellant maintained that the caution statement of the appellant was admitted without adhering to the

legal procedure. That, the alleged confession was not obtained voluntarily contrary to Section 28 of TEA (Cap 6 R.E. 2002) and section 50, 51, 10 (3) and 57 of the Criminal Procedure Act Cap 20 (R.E. 2002). I had time to go through the records, it reveals the appellant never objected its tendering (see page 9). For that regard, I agree that there was no need of conducting an inquiry while the accused never objected the tendering of the caution statement.

Further scrutiny to the records, I noted there is nowhere to show whether the caution statement was read or not, there is nowhere to show whether the accused was explained of his rights before the caution statement was taken. In the case of **Sia Mgusi at Wambura, Juma Muhende Nyahita at Mugendi Mombasa and Robert Jones Kigosi at Nyamacho v The Republic Criminal Appeal No, 125 of 2015 Court of Appeal of Tanzania (unreported)** had this to hold at page 44 of its decision; -

> *"having found that in the instant case the trial court failed to direct itself properly on the necessity of compliance with the mandatory requirements under section 50 and 51 of the Criminal Procedure Act, we find to have no other option but to expunge the said caution statement tendered and admitted as Exhibit P5)"*

In the light of the foregoing findings, I'm of humble view that the caution statement of the appellant was taken in contravention of Section 51 (3) of the Criminal Procedure Act (supra). Exhibit P5 is therefore expunged.

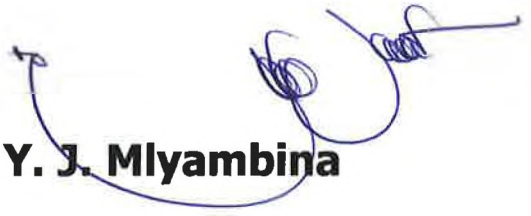
As regards to the fifth issue, the position of law is to be found in among others the case of **Paulo Tarayl v Republic, Criminal Appeal No. 216 of 1994 (unreported)** in which the Court of Appeal had these to observe; -

> *"we wish to say at the outset that it is, of course,* ***not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story.*** *While the possibility that relative may choose to team up and untruthfully promote a certain version of events must be born in mind, the evidence of each of them must be considered on merit, as should also the totality of the story have told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve,* ***but that is not to say a conviction***

based on such evidence cannot hold unless there is supporting by a non-relative"

It is my findings, therefore, that the appellant should have established sufficient explanation to negate the evidence of the accused's relatives. Even if done so, still the evidence on the prosecution side will remain water tight because it was corroborated by an independent doctor. The later never left any doubt that the accused committed the charged offence.

In the circumstances of the afore findings, the decision of the trial Court was reached upon the prosecution side proving their case as per the requirement of the law. Therefore, the appellant appeal is dismissed, the trial court conviction and sentence are upheld respectively. It is ordered accordingly.

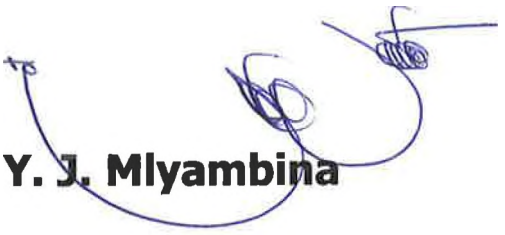


Y. J. Mlyambina

Judge

28/06/2018

Dated and delivered this 28th day of June, 2018 in the presence of the appellant in person and learned State Attorney Bryson Ngidos for the respondent.



Y. J. Mlyambina

Judge

28/06/2018