IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 21 OF 2022

(Originating from the District Court of Masasi at Masasi in Criminal Case No.80 of 2020 before Hon. S. M. Mzandah, RM)

MUSSA CLAUD @ISSA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

18/7/2022 & 17/8/2022

LALTAIKA, J.:

MUSSA CLAUD @ ISSA "the appellant" was arraigned in the District Court of Masasi at Masasi charged with the offence of Rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. The particulars of the offence are that on 19th day of June 2020 at or about 21:00 hours at Mandiwa Village within Masasi District in Mtwara Region unlawfully did have carnal knowledge to one "ZM" a schoolgirl, 8 years of age.

When the charge was read over to the appellant, he pleaded not guilty necessitating the trial to commence. According to the records, five prosecution witnesses were called and two documentary exhibits were admitted in order to prove the case against the appellant. The prosecution witnesses were as follows; the victim or "ZM" (PW1), Zainabu Majaliwa

(PW2) the victim's mother, Kitto Faraji Dondidondi (PW3), F8964 D/C Mohamed (PW4) and Peter Nguyamo Shayo, Medical Doctor (PW5). The two admitted exhibits were the appellant's cautioned statement (Exhibit P1) and victim's PF3 (Exhibit P2).

Having convinced that the prosecution had proved its case beyond reasonable doubt as required by law, and having dully considered the defence, the learned trial Magistrate S. M. Mzandah, RM convicted the appellant as charged and sentenced him to serve a thirty (30) years imprisonment term. The appellant is dissatisfied and aggrieved by both conviction and sentence hence this appeal. The appellant has lodged a Petition of Appeal comprising of five grounds of appeal which are paraphrased as follows: -

1. *That the trial Magistrate erred in law by failing to comply with the requirements of section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] when composing a judgment. There was no conviction and sentence entered in the judgment. The appellant was only found guilty but was not convicted and punished (sentenced).*
2. *That, the trial magistrate erred in law and fact in admitting and actin upon exhibit P1 to convict and sentence the appellant while the said exhibit was never proved beyond reasonable doubt it was procured within the requirements of section 50(1)(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019].*
3. *That, the trial Magistrate erred in law and fact by unprocedurally admitting exhibit P.1 in court and using the same to convict the appellant.*
4. *That, there material in consistence with leaves doubts if the alleged victim was raped therefore the offence was not proved beyond reasonable doubts.*
5. *That, the trial Magistrate erred in law by failing to comply with the requirement of section 235(1) and 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019].*

When this appeal was called om for hearing on 18/7/2022, the appellant appeared in person, unrepresented while the respondent Republic enjoyed the services of Mr. Enosh Kigoryo, learned State Attorney. On his part, the appellant prayed that since he was not learned in law, counsel for the respondent submits first as that would enable him to address more specific issues. Nevertheless, he stressed that his petition of appeal contained a detailed explanation of his grounds of appeal.

Submitting against the appeal, Mr. Kigoryo at the outset objected the appeal and stressed that conviction and sentence arrived at by the lower court was proper. Submitting on the first ground, the learned State Attorney argued that the appellant asserted that section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019] was not complied with because he was neither convicted nor sentenced by the lower court contrary to the provision of the law cited. The learned State Attorney maintained that the appellant was properly convicted as per page 14 of the impugn judgment. He stressed that the trial court had explained that it found the accused person guilty of the offence. Mr. Kigoryo argued that the meaning of such words is tantamount to conviction. To buttress his argument, he referred this court to the case of **Imani Charles Chimango vs Republic**, Criminal Appeal No.382 of 2016 CAT, Mtwara (unreported) at page 11 where the Court of Appeal took cognizance of the lower court's records that it found the accused guilty.

The learned State Attorney went on and submitted that even though the Court of Appeal expressed the word convict expressly provided it indicated that a person guilty is an implication that it has convicted him/her. He further stressed that for justice to be done this court should

find that inability to write the word convict does not rule out that the fact the appellant was convicted and declared an offender who is convicted.

On the complaint on sentence, Mr. Kigoryo conceded with the appellant that in the impugned judgement nowhere is indicated that the lower court sentenced the appellant. However, the learned State Attorney submitted that the omission is curable under section 388 of the Criminal Procedure Act. Mr. Kigoryo argued this court to step into the shoes of the trial court and sentence the appellant accordingly. The learned State Attorney further submitted that after convicting the appellant this court would order that the sentence commenced from the date of conviction. To this end, the learned State Attorney prayed this ground to be partly disregarded and that the court finds that such defect did not rule out that the appellant was found guilty of the offence.

Responding to the second and third grounds of appeal where the appellant complained that exhibit P1 (cautioned statement) was unprocedurally admitted, Mr. Kigoryo stated that page 22 of the lower court proceedings shows that when the cautioned statement was tendered, the appellant did not object the same. The learned State Attorney contended that what can be seen in the records from page 21 onwards is that the appellant initially objected but later withdrew the same on his own accord. The learned State Attorney insisted that the withdrawal resulted into admission of the cautioned statement and the same was read out loud in court.

Furthermore, Mr. Kigoryo submitted that it is indicated at page 22 that after the exhibit was read out, the appellant accepted by commenting that he had committed the offence due to influence of the devil. The learned State Attorney stressed that the appellant expressly provided that

it was not right for him to rape his own daughter. To this end, the learned State Attorney argued that the second and third grounds of appeal had no merit and prayed that they are dismissed.

On the fourth ground, Mr. Kigoryo contended that the appellant is complaining that there was inconsistence of the evidence especially pertaining to the dates of the events including the date of the medical examination of the victim, the date that the results of such examination was received and the date of the rape as per charge sheet. The learned State Attorney went further and submitted that it should be noted that even where there are contradictions, they cannot lead to outright doubts unless it is proven that such contradictions have affected the root of the case. Mr. Kigoryo stressed that the contradictions on dates are minor and do happen ordinarily in any case.

To cement his argument, the learned State Attorney referred this court to the case of **Zheng Zhi Chao vs DPP**, Criminal Appeal No.506 of 2019 CAT, Dodoma (unreported). He argued that at page 17 of the referred case the Court of Appeal referred to the case of **Dickson Elia Nsamba Shapwata vs Republic**, Criminal Appeal No.92 of 2007 (unreported) where it stated that "contradictions by particular witness or among witnesses cannot be avoided in any particular case. Normal contradictions or discrepancies occur in any testimonies of the witnesses due to normal errors of observation."

Stressing on the same ground, Mr. Kigoryo argued that the complaint that the charge sheet contained a date that was not proven by the witnesses has no merit. The learned State Attorney contended that fateful date as per chargesheet is not an essential element whose lack of proof could affect the case. To this end, the learned State Attorney

submitted that the available evidence had proved the fact that the appellant had raped his own daughter. He argued this court to dismiss the ground for lack of merit.

Responding to the fifth ground of appeal, Mr. Kigoryo contended that the records are to the effect that the trial court considered the defence evidence can be seen at page 13 and 14 of the impugn judgment. To this end, the learned State Attorney argued that the ground has no merit and prayed this court to dismiss it.

Shortly before concluding his submission, he commented on the correctness of the evidence of PW1. It is indicated that the victim was a girl aged 8. The learned State Attorney went further and submitted that it is indicated that before testifying, the victim promised to tell the truth as per section 127(2) of the Evidence Act [Cap. 6 R.E. 2019]. Mr. Kigoryo went on and argued that as per various decisions of the Court of Appeal there was no preliminary inquiry to prove that the victim was aware of the meaning of truth as well as the duty to tell the truth in court. The learned State Attorney stressed that the lower court arrived in a conclusion without showing how it arrived to the finding that the victim had promised to tell the truth.

To fortify his argument, the learned State Attorney cited the case of **Masanja Makunga vs Republic**, Criminal Appeal No.378 of 2018 CAT, Dar es Salaam (unreported) at 11. Mr. Kigoryo further argued that the Court of Appeal insisted that the procedure be undertaken in order to first to ascertain competence of the witness of the tender age and secondly that the witness is aware of the duty to tell the truth. The learned State Attorney contended that it was not done by the lower court. However, the learned State Attorney submitted that taking into consideration the

evidence of the victim, irrespective of the violation of section 127(2) of the Evidence Act [Cap.6 R.E. 2019] prayed the court to direct itself to section 127(6) of the Evidence Act. Mr. Kigoryo emphasised that the section excepts situations where section 127(2) has not been complied with.

It is Mr. Kigoryo's submission that in the event the evidence of the witness with tender age is found to be credible the same shall be considered. To buttress his argument, the learned State Attorney referred to the case of **Wambura Kijinga vs Republic**, Criminal Appeal No.301 of 2018 CAT, Mwanza (unreported) which has an interpretation of the section. Mr. Kigoryo argued that the court had explained that in spite of noncompliance to section 127(2) the appellant can still be found guilty taking into consideration credibility of the testimony of the victim. In that regard, the learned State Attorney argued that the same is applicable in this case in relation to the evidence of the victim (PW1).

The learned State Attorney submitted on yet another legal issue. He argued that according to the evidence, the appellant is a father of the victim. To this end, the learned State Attorney stressed that the appellant was supposed to be charged for incest by male contrary to section 160 of the Penal Code [Cap. 16 R.E. 2019]. However, Mr. Kigoryo argued, the appellant was charged in the lower court for the offence of rape. Referring this court to the case of **Charles Yona vs Republic**, Criminal Appeal No.79 of 2019 CAT, Dar es Salaam (unreported) at page 5 where the Court of Appeal stated that there was nothing legally wrong for the prosecution to prefer a charge of rape in lieu of incest, the learned State Attorney averred that the trial court was justified in convicting the

appellant as charged and prayed the entire appeal be dismissed. In rejoinder, the appellant had nothing to add.

Having keenly gone through the records of the trial court, grounds of appeal and submissions of both parties, I am fortified that the determination of this appeal hinges on three issues. **One**, whether a proper conviction and sentence was entered in the impugned judgment. **Two**, whether exhibit P1 was admitted in accordance with the procedure. **Three**, whether the prosecution proved the case against the appellant beyond reasonable doubt.

Starting with the first issue, it is at page 14 of the impugned judgment where the learned trial Magistrate scribed as follows: -

> *"Consequently, in terms of section 236 of the CPA, I find the accused person guilty of the offence of rape under section 130(1)(2)(e) and 131(1) of the Penal Code, the prosecution has proved its case beyond all doubts."*

The next question then is whether the above phrase amounts to a conviction as per the dictates of section 235(1) of the Criminal Procedure Act. For ease of reference and indeed avoidance of any doubt, the section reads as follows: -

> *"235.- (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."*

Semantics and legal jargons apart, finding someone guilty of an offence and convicting him or her on a given offence gives this court two different meanings which, although interrelated, are difficult to reconcile.. The phrase finding some guilty of a certain offence precedes the phrase convicting a person on a certain offence. In the present case, the learned

trial Magistrate ought to have taken a further step of convicting the appellant in accordance with the provision of the law that establish the offence. Remaining on the above extracted phrase I am of the settled position that the learned trial Magistrate did not enter a proper conviction in accordance with the section 235(1) and 312 (2) of the Criminal Procedure Act.

The next question is what is the consequences of failure to enter proper conviction? Decisions of the Apex Court are certain that failure to convict the accused is fatal. I am aware of the case **Imani Charles Chimango vs Republic** (supra) cited by the learned State Attorney Mr. Kigoryo. With respect, I am inclined to remind the State Attorney that the Court stressed that for avoiding doubt the word "convict" should clearly and specifically appear in the judgment when the trial court had entered a conviction. To this end, I am of the settled view that the circumstances pertaining to the case at hand and those in the case of **Imani Charles Chimango vs Republic** (supra) are distinguishable.

During my deliberation, therefore, I found support from the decision of the Apex Court in the case of **Ramadhani Athumani Mohamed vs. Republic**, Criminal Appeal No.456 of 2015(unreported) thus: -

> *"Failure to enter conviction is fatal and incurable irregularity which renders such judgment a nullity.* ***Therefore, record should be remitted to the trial court for it to enter conviction and deliver a judgment in accordance with sections 235(1) and 312 of the CPA*** *(Emphasis added)."*

The way forward, which way I am inclined to take shortly, is to nullify and set aside the judgment of the trial court. In the event, since this ground disposes the appeal without considering the other grounds of

appeal, hereby I nullify and set aside the judgment and sentence imposed to the appellant by the trial court.

More importantly, I order that the file in respect of Criminal Case No.80 of 2020 be remitted to the trial court with the direction that the trial Magistrate composes a proper judgment in compliance with the provisions of 235(1) and 312(2) of the Criminal Procedure Act. The order should be implemented immediately after this judgment. For the interest of justice, the right to appeal to either party shall accrue after composing and delivery of a proper judgment.

Meanwhile the appellant should remain in custody pending compliance of the District Court of Masasi with the order of this court.

It is so ordered.

E.I. LALTAIKA

JUDGE

17.8.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 17th day of August 2022 in the presence of Mr. Enosh Kigoryo, learned State Attorney and appellant who has appeared unrepresented.

E. I. LALTAIKA

JUDGE

17.8.2022