

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

CRIMINAL APPEAL NO.32 OF 2022

(Originating from Criminal Case No. 82/2021 Babati District Court at Babati)

ABDALLAH MUNA..... APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

30/11/2022 & 25/01/2023

GWAE, J

In the District Court of Babati at Babati (herein the trial court), the appellant, Abdallah Muna was indicted, tried and convicted of the offence of incest by male contrary to section 158 (1) (a) of the Penal Code (Cap 16, Revised Edition, 2019).

It was the prosecution version that, the appellant had sexual intercourse with his sister; a girl aged 16 years at the commission of the offence. That, on 25th August 2021 at 03: 00 hrs at Ng'wawarai village within Babati District in Manyara Region the appellant went to the residential house of his parents wherein the victim and her young brothers

(Michael and Tito) were sleeping. He broke the door, entered and started undressing the victim. The victim flashed her torch only to discover that the person who was violently undressing her was his elder brother, appellant who eventually forcibly inserted his genital organ to the victim's vagina.

After his ejaculation, the appellant ordered the victim to look at the wall so that he could put on his shorts and ordered them (victim and his young brothers) not to shout otherwise he would kill them with a panga. That, on the material date, the appellant's mother and his stepfather were not at their residential house. PF3 ("PE1") reinforced the prosecution evidence in regard the offence of sexual intercourse allegedly committed by the appellant.

Whilst the appellant's defence was to the effect that, he did not commit the offence he stood charged with. He added that, he was in not good terms with his stepfather (PW3). His testimony about the alleged misunderstandings between his stepfather and him was substantiated by that of his biological mother (DW3).

After close of the parties' case, the trial court found the appellant guilty of the offence and it proceeded sentencing him to the term of thirty years imprisonment. However, in its style, the trial court held and I quote;

"In the upshot, I can say that the prosecution case is proved beyond any reasonable doubt. The evidence by the prosecution side must be strong and water tight. I find the accused by the name of Edward Shadrack guilty to the offence by male contrary to section 158 (1) of the Penal Code (Cap 16 R.E, 2019 and I proceed to convict him accordingly".

Aggrieved by both conviction and the sentence merited thereof, the appellant opted to filing this appeal armed with five grounds of appeal to wit;

1. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant by illegally basing on the victim's evidence whereas the victim was of 11
2. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant for his failure to discover that the case came from grudges between the appellant and the father of the victim who is the stepfather of the appellant as the two were not in good terms.
3. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant for his reliance of the uncorroborated and contradictory evidence of the victim

4. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant for his failure to make deep determination and evaluation of the prosecution evidence especially testimony of DW2 who is the biological mother to the victim
5. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant on the unproven charge.

On the 5th day of October 2022 when this appeal was called on for hearing, Mr. Raymond Kimu, the learned advocate appeared representing the appellant. He sought leave to file additional grounds of appeal and the leave was granted. Consequently, the appellant duly filed his supplementary grounds of appeal comprised of the following grounds of appeal;

1. That, he trial magistrate erred in law and fact by proceeding to convict and sentence the appellant relying on the contradictory evidence of the PW1, PW2 and PW5 on the time and date the incident occurred and arrest of the appellant

2. That, he trial magistrate erred in law and fact by proceeding to convict and sentence the appellant regardless of the constrictive variance of the charge sheet and the evidence of prosecution
3. That, he trial magistrate erred in law and fact by proceeding to convict and sentence by relying on the evidence of PW2 contrary to the provisions of the law (Failure to admit the PW1 and PW2 on voire Dire test)
4. That, he trial magistrate erred in law and fact ruling out that the appellant had a case to answer without making findings and reasons for the particular decision or ruling
5. That, he trial magistrate erred in law and fact by proceeding to convict and sentence premising from the judgment which has great irregularity or error as it has found the accused one Edward Shadrack guilty of an offence with instead of the appellant

This appeal was disposed by way of written submission. Arguing for the appeal, Mr. Kimu argued 1st ground and 3rd ground to supplementary ground of appeal herein above. The appellant's complaints in these grounds are on the alleged failure to conduct voire dire test to PW2, a

child of tender age in order to determine whether the child possessed sufficient intelligence and understanding the nature of speaking the truth. He argued this court to refer to **Kimbute Otiniel vs. Republic**, Criminal Appeal No. 300 of 2011 (unreported-CAT) and **Jumanne Manoja vs. Republic**, Criminal Appeal No. 404 of 2019 (unreported-CAT) as well as in the case of **Afson Samwel vs. Republic**, Criminal Appeal No. 34 of 2018 (unreported-CAT) where it was stated;

"In determining whether the child is possessed of sufficient intelligence and understands the nature of speaking the truth, the Magistrate or judge must conduct a voire dire examination. He may put some questions to the child and from his answer, he may be able to determine whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. Recording questions and answers appears to be better way because this enables even an appellate court to whether the questions asked the answers given were such that any court of law would have come to the conclusion that, the child was possessed of sufficient intelligence and understood the duty of speaking the truth".

The learned counsel for the appellant added that, the testimony of PW2 which was to corroborate that of the victim was wrongly recorded and therefore unreliable so does that of PW1, the victim though exempted

under section 127 (4) of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019.

Challenging the weight of the evidence of the victim (PW1) relied by the trial court, Mr. Kimu stated that, the same is not credible since it was not supported by any other pieces of evidence and no reason given by the trial court. Hence, the same should pass the test of truthfulness. Bolstering his argument, the appellant's counsel invited the court to the case of **Mohamed Said vs. Republic**, Criminal Appeal No. 24 of 2021 (unreported-H.C)

Elaborating the 2nd ground in the supplementary petition of appeal relating to the complained inconsistencies and contradictions of the evidence adduced by the prosecution witnesses. In this complaint, Mr. Kimu argued that, there is serious contradiction as to the date of the occurrence and date of arrest of the appellant since the victim testified that, the offence was committed on 25/08/2021 at 03: am whereas PW5 testified that he arrested the appellant on the 25th day of August 2021 at 16: 00 hrs. According to the appellant's counsel, the noted contradictions go to the root of the case. He cited the case of **Sylivester Stephano v. The Republic**, Criminal Appeal No. 527 of 2016 when the Court of Appeal

with approval of its decision in **Said Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported).

Explaining the 2nd supplementary petition on the alleged variance on the contents of the charge sheet with the evidence of the prosecution on the time of commission of the offence as Pw1 testified that it was at 3:00 AM while the learned trial magistrate through his judgment stated that it was at 21:00 hrs. He argued that, the variance in question occasioned miscarriage of justice because it denied the appellant the to know exact the time of the commission of the offence and in aw renders a charge to remain unproven. He referred the case of **Abubakar Rashid v. Republic**, Criminal Appeal No. 24 of 2021 (unreported) this court sitting at DSM.

In the 5th ground to the supplementary petition of appeal, the counsel for the appellant submitted that, the one who was found guilty is no other than an accused person called Edward Shadrack as depicted in the trial court judgment at page 6. He went on arguing that, the decision which erroneous bears erroneous fruits. He then urged this to refer to the decision in **Oysterbay Properties Ltd and another v. Kinondoni Municipal Council and five others**, Civil Revision No. 4 of 2011 (unreported) where the Court of Appeal of Tanzania held that since the

decree was defective, thus all its subsequent orders were lacking legs to stand. He further pondered the prosecution evidence by stating that, evidence adduced by PW3 and PW4 is nothing but a mere hear say pieces of evidence.

Lastly, the appellant's advocate argued that, according to evidence adduced by DW2 who is the mother of the victim as well as that of the appellant there is a great possibility of framing or manufacturing the case against the appellant by the PW3, the appellant's step. Concluding his submission, Mr. Kimu stated that, the conviction be quashed and the sentenced meted to the appellant be set aside since all grounds of appeal meritorious.

In her reply, the Republic through Ms. Alice Mtenga learned state attorney argued the 1st ground to the petition of appeal and ground 3rd in its supplementary as argued by the appellant's counsel. She maintained that the legal requirement to conduct voire dire was erased through Written Law (Misc. Amendments (Act No. 4 of 2016 whereby sub section (2) and (3) of Tanzania Evidence Act (supra) were repealed and substituted by subsection (2) of the Act. According to the learned state attorney, it was sufficient and proper for the trial court to rely on the

evidence adduced by a person of tender age (PW2) who promised to tell the truth and not lies.

Admittedly, She went on stating that though PW2 falls within the ambit of section 127 (2) which was not complied with as the said child took an oath. She however argued that, failure to do so is not fatal as was stressed in the case of **Wambura Kigingwa v. The Republic**, Criminal Appeal No. 301 of 2018 (unreported), the Court of Appeal sitting at Mwanza had these to say;

*“ ..We are satisfied that it is not possible to convict a culprit of a sexual offence where section 127 (2) of the Evidence Act is not complied with, provided some conditions must be observed to the latter. The Conditions are; **first**, that there must be clear assessment of the victim’s credibility on the record and **second**, the court must record reasons notwithstanding non-compliance with section 127 (2), a person of tender age still told the truth”.*

It was her opinion that the coherence of the testimony of PW2 plus other pieces of evidence adduced by prosecution witnesses especially PW1, victim. She urged this court to refer to the judicial decision in **Shani Chamwela Suleiman vs Republic**, Criminal Appeal No. 301 of 2018 (unreported-CAT). More so, the learned state attorney for the Republic

argued that the best evidence in sexual offences is that of the victim as the case here. According to her opinion, the testimony of PW1 is sufficiently credible even without corroboration.

Ms. Alice also responded to the appellant's assertion that the evidence adduced by PW3 and PW4 is hearsay by stating that PW4, medical practitioner diagnosed that, the victim's vagina had blood stains and there was a sign of penetration adding that the testimony of PW3 is corroborative to the evidence of the victim.

On the complaints as to the contradictions and inconsistencies of the prosecution evidence relating to the date and time of commission as well as the date the appellant was apprehended. She strengthened her argument by judicial precedents in **Daniel John Mwakipesile v. Republic**, Criminal Appeal No. 449 of 2019 and **Emmanuel Lyabonga v. Republic**, Criminal Appeal No. 257 of 2019 (both unreported-CAT). She however argued that time is not an essential ingredient in proving rape as was held in **Yustus Aidan v. Republic**, Criminal No. 454 of 2019 (unreported-CAT).

On the 5th ground of the supplementary petition on the complaint that the one who was found guilty was a person known by the name of Edward Shadrack, she admittedly argued that the trial court did not

properly convict the appellant instead, it convicted the said Edward Shadrack. She thus prayed for an order remitting the file to the trial court for proper conviction.

Lastly, the learned state attorney responded to the complaint that the ruling on whether there was a case to answer not, it was the view of the representative of the Republic that there was a proper ruling and in term of section 131 (1) (a) (b) of the CPA.

Alternatively, the learned stated attorney prayed for an order-directing retrial of the matter if the court will find discrepancies in the judgment, conviction and proceedings

In his rejoinder, the appellant's counsel reiterated the stance in the case of **Afson Samwel vs. Republic** (supra) and stated that the voire dire test is very important to secure the promise from a child of tender. Therefore, according to him, the evidence adduced by PW1 that was to be supported by that of PW2 remains uncorroborated contrary to section 127 (6) of Tanzania Evidence Act save hearsay evidence adduced by PW3 and PW5.

Reiterating his argument in chief on the 3rd ground of appeal to the supplementary petition, the counsel for the appellant rejoined to the

respondent's submission by stating that, the contradictions on dates and time of the occurrence go to the root of the case, lowering credibility of the evidence of PW1 and PW5. Equally, Mr. Kimu maintained that, the trial court ruling on whether the appellant had a case to answer it had to bear findings and reasons thereof in order to enable him to properly defend the charge.

After I have outlined what transpired in the District Court and before this court at the appeal stage, it is now the time for the court to determine the appellant's grounds of appeal contained in the Petition of Appeal and its supplementary as presented and argued by the parties. However, I find it apposite to start with the 5th appellant's complaint in the supplementary petition of appeal with effect that, the trial court did not convict the appellant except one Edward Shadrack.

As complained and admitted by the appellant's counsel and counsel for the Republic respectively, the trial court judgment clearly depicts at page six that, the one who was found guilty of the offence of Incest by Male contrary to section 158 (1) of the Penal Code (Supra) and convicted was an accused person known by the name of "Edward Shadrack". It follows therefore; the appellant was not convicted of the offence, which he stood charged with, but the said Edward Shadrack. That being the

case, the question that follows for determination by the court is, whether such defect appearing in the impugned judgment may invalidate the trial court's judgment. It is the requirement under section 312 (2) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019 that after conviction by the trial court, 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. The court of Appeal in **Amani Fungabikasi vs. The Republic**, Criminal Appeal No. 270 of 2008 (Unreported) held;

"It is true, as contended by Ms. Pendo Makondo that in the light of the above short coming we would make an order for a retrial. But it is also true that we could have easily set aside the decision of the High Court and consequently direct that, the record be remitted to the District Court so that it enters a conviction."

According to section 312 (2) and (3) of the Act and the decision of the Court of Appeal quoted above, it is the requirement of the law that, the trial court in its judgment has to do the following. **Firstly**, either enter conviction or acquittal in respect of an accused person and specify an offence of such accused person is found guilty or acquitted. **Secondly**, specify a provision of the applicable law and **thirdly**, imposition of an

appropriate sentence against the accused person shall follow after his mitigation.

In our instant criminal matter, it is quite clear that, the one who was convicted was the person known by the name of Edward Shadrack and not appellant, Abdallah Muna. Nevertheless, the trial court after mitigation plainly sentenced the appellant. I am of the firm view that, a conviction entered against the accused should be directed to such accused who shall be sentenced per section 312 (2) of the Criminal Procedure Act (supra) or set him free in case of acquittal in terms of sub section (3) of section 312 of the Act.

In other words, a judicial conviction and sentence should be directed to one accused or more than one accused person if they are jointly and together charged with an offence in a charge and not a conviction against a person not charged.

The trial court judgment cannot therefore be left to stand because the conviction was entered against a person who was not charged. Thus, no valid trial court judgment which the court can uphold or dismiss this appeal. We would not however discuss the second suggestion of remitting the record so that the District Court enters conviction as well as the question of retrial for reasons we shall give here under. Entering a conviction to a person not charged instead of the accused person charged,

in my view constitutes serious irregularity. The error in question affect the substantial validity of the judgment.

Having determined the 5th ground to the supplementary petition of appeal, I am not therefore justified to proceed determining other grounds of appeal since this appeal is not proper before the court and by doing so it will preempt a decision on future competent appeal if preferred by either party after proper conviction.

Exercising powers as they are provided under Section 366 (1) (a) (i) of the Criminal Procedure Act, Cap. 20, Revised Edition, 2019, I direct that, the file be expeditiously remitted to the trial court for it to specifically made a finding as to who between the said **Edward Shdarack** and **appellant** is guilty of the offence of Incest by Male c/s 158 (1) of the Penal Code (supra). In the event, the appellant is properly convicted of the offence he stood charged with; the sentence shall start running from the date of his illegal conviction that is 23rd December 2021.

Order accordingly.




M. R. GWAE
JUDGE
25/01/2023