

TANZANIA / JUDGMENT

JUDGEMENT Crispinus Zephania1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA [DAR ES SALAAM SUB
REGISTRY CRIMINAL APPEAL 26176 OF 2024 Ref no 202409112000026176 [Originating from the
judgement of Kinondoni District Court. in criminal case No.216 of

2023. delivered on 16th August 2024, Hon. F. MHINA-PRM CRISPINUS
ZEPHANIA.....APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGEMENT:

12th Dec 2024 & 24 Feb 2025 KIREKIANO J The appellant was a teacher at Mount Kibo Primary School in Dar es Salaam. According to the charge at the trial court, the appellant faced two counts of rape and unnatural offence. In the first count, it was alleged that between January 2022 and April 2023, the appellant did unlawfully have carnal knowledge of a girl aged 9 years, contrary to 130 (1)(a), (2), and 131(1). It was also alleged in the second count that the appellant did have carnal knowledge of the girl against the order of nature contrary to section 154 (1). The two counts were all preferred under the Penal Code Cap 16 [RE 2019]. 1 It is noted here that the name of the girl was stated in the charge but for good reason in this judgement I shall sufficiently refer to her as “the victim”. The appellant pleaded not guilty to the charge. The prosecution side paraded four witnesses; PW1 Rehema, PW2, the victim (PW3), Dr. Rehema Seif Jafari, and PW4 D/ CPL Linus the investigator. In substance, the prosecution case was that, PW1 Rehema, was the victim's grandmother, the victim was born on 10.9.2015 and thus aged 9 years and was in boarding school at Mount Kibo Primary School. On 6th April 2023, when the child came back from school for the holiday, PW1 noticed that she was in bad health condition. When she asked the victim what was wrong, she said she was fasting (Ramadhan). However, when the two were eating at night, the victim told PW1 that teacher Crispinus (the appellant) used to penetrate his penis into her anus and into her vagina, which affected her as she would pass stool without control. She reported the matter to police at Kawe and was given PF3 for the medical attention of the victim. At Mwananyamala Hospital, the victim was attended by PW3 Dr Rehema Nyambarya. This was on 13/4/2023. Upon examination, it was PW3 findings that the victim was not a virgin, and on her anus, her muscles were loose to the extent that faeces came out 2 unresisted. She opined that there was evidence of penetration on the victim’s genital and anal parts. She tendered her findings in PF3, which was admitted as Exhibit P1. The victim testified as PW2. According to

her, between Jan 2022 and April 2023, she was in class two, where she was taught Mathematics by the appellant. During then, the appellant use to call her in the absence of other students for purpose of doing class work but would penetrate her. This was repeatedly done; she reported the matter to one teacher Luoga who promised to talk to the appellant but did nothing. The appellant was arrested and PW4 J.79 D/CPL Linus investigated the case. According to him, in the file there was a statement made by the victim that on different occasions while at school in Mount Kibo, she was being raped by the appellant, and she reported it to another teacher who took no action. He also said that they went to the alleged scene of the crime, where the victim showed him a canteen. The area appears to be a busy area, but the victim told him that at the time she was being raped, there was no movement of people. He also said he found no CCTV footage because the area did not have a camera. That was according to the school administration. 3 On his part the appellant made defence as DW1Crispinus he denied committing the offence, he questioned that the prosecution evidence did not show if there was a DNA test conducted. He said the alleged scenes of crime that is classroom and canteen were inconsistent and busy areas and easily visible from the outside. According to him the victim must have been abused before she was enrolled at the said school. The trial court was satisfied that the charge was proved in the required standard. It relied on the evidence of the victim corroborated by the evidence of the doctor who examined her. The trial court was not convinced with the defence, it thus convicted the appellant as charged and inflicted a mandatory sentence of life imprisonment in jail. Aggrieved with the judgement and sentence, the appellant preferred this appeal, setting forth the grounds hereunder. During the hearing, the same at the option of the appellant was condensed to six major complaints thus; One, the appellant was convicted and sentenced unheard contrary to article 13 6 (a) of the constitution of the united Republic of Tanzania, 1977 (amended from time to time). 4 Two, the learned trial magistrate erred in law and facts by convicting the appellant based on the prosecution evidence adduced in court which was incredible, improbable untruthful, unreliable and insufficient of proof beyond all reasonable doubts Three that the court was duty bound to draw an inference adverse to the prosecution for the failure to trace and/ or parade a teacher Mr Luoga named by Pw2 (victim) and PW4 (D/CPL-LINUS) Four, the trial court strayed in not observing, determining, weighing and considering the doubts raised by the defense witness. Five that the trial court's judgement was lacking and or defective as it did not indicate the points of determination and reason for conviction as stipulated by the provisions of section 312(1) of the Cap. 20. sixth; that Hon F.R. MHINA -PRM took over the case from HON. V. KASSEKO -SRM in violation of section 214 (1) of the Cap. 20 R.E 2022 the omission renders the particular proceedings and judgement composed a nullity. The appeal was heard by written submissions. The appellant was unrepresented, while the respondent had the service of Miss Jackline Werema learned senior state attorney. 5 On the first ground, the appellant argued that, on page 30 of the proceedings, he had intended to call five witnesses, and on page 37, the record shows that only one of the appellant's witnesses appeared in the court. He said he was convicted and sentenced in absentia, but the record does not show whether or not the provision of section 226 (2) of Cap. 20 [RE. 2022] was complied with. He argued that the trial court was duty-bound to ask the appellant whether or not he had sound reasons for not in court and grant him an opportunity to decide whether or not he wished his witnesses to be called and testify in court. On the second complaint

on sufficient of evidence, he argued that the trial court ought to satisfy itself upon assessment of the credibility, truthfulness, and reliability of evidence of PW2 who was a child and victim. According to the appellant the victim's evidence was contradictory on the scene of the crime. Whether it was a classroom or at canteen. In this he cited the decisions in Aloyce Maridsadi V. R, Criminal Appeal No 208 of 2016(unreported) but also Bahati Makeje V.Republic Criminal Appeal No. 118 of 2006 to the effect that the victim can not be believed on lies and contradiction and implausible evidence. 6 He wondered why the victim PW2 did not tell anyone in the first-place alleging threats but she managed to tell a teacher, Mr. Luoga and others. As such he said the circumstances of the scene of the crime were not conducive for commission of the alleged offence several times as asserted by PW2 (the victim) and no witnesses was paraded to explain the circumstances surrounding the scene of the crime and the physical interaction between the appellant and PW2 (victim). This was because it was alleged offence was committed in diverse dates between January 2022 to April 2023, more than a year. He also doubted the delay of PW1 to report the incident to police from 6th March to 13 March 2023. He said delay to name or report the incident to anybody else about a year affected the credibility of the witness. On the on third complaint the appellant pressed why the said Mr. Luoga was not summoned to testify in court on the "fact in issue". He did not narrate that "fact in issue" but relied on the case of Hemed Said Vs Mohamed Mbilu [1984] T.L.R, 113 where the court held that; where, for undisclosed reasons, a party fails to call a material witness on his side, the Court is entitled to draw an adverse inference. 7 On forth complaint, he argued that the defense evidence asked many, questions to the prosecution case where the prosecution did not disapprove the same or answer to the questions, such as the contradiction of the scene of crime lack of evidence of CCTV footages, He cited the decisions In Hussein and Another V.R [1986] T.L.R,166, But also Lokhart Smith V.R, [1965] E.A211 and Okoth Okale Vs. Uganda [1965] E.A 555. To the effect that, it was a serious misdirection on the part of the trial court to deal with the prosecution evidence on its own without-considering the defense evidence. On the fifth complaint he submitted that the learned trial Magistrate erred in law and fact by composing a judgment contrary to the provisions of section 312(1) of cap 20 R.E 2022. This is so because the Judgment lacks the points for determination and reasons for the conviction. On the sixth complaint he said the succession of this case from Hon. V. KASSEKO-SRM to Hon. F. MHINA - PRM was made in non - compliance with the provisions of section 214(1) of the Cap. 20 R.E 2022. The omission was fatal and incurable as it affected the transparency and fairness in the proceedings. 8 On her part Miss Werema for the respondent argued that, the appellant had already defended himself before judgement was delivered in absentia and he was represented by an advocate who prayed to close the defence case after the defence witness DW1 had finished testifying. Hence section 226 (2) of CPA is not applicable. On the second complaint, she said the prosecution was required to establish that there was penetration both in the vagina and anus, the victim was below 10 years and that it is the appellant who committed the said offence. She said these were proved since penetration was stated by the victim and corroborated by the evidence of PW3 a medical doctor. She cited Joseph Versus Republic Criminal Appeal No 124 Of 2013 where it was held that the evidence of pain experienced by the victim was relevant to prove penetration. With regard to the age of the victim was proved by PW1 who is the guardian as well as the victim herself. Hence

proper persons to prove age of the victim as stated in the case of Isaya Renatus Versus Republic, Criminal Appeal No 542 Of 215 9 With regard to the argument on contradiction on scene of crime that is whether it was canteen or class room. Miss Werema conceded that PW2 testified to be in classroom while PW4 who is the investigator testified to be in canteen. However, she took a stance that the said contradiction is minor and does not go to the root of this case. She cited, Marmo s/o Slaa Hofu & 3 Others Versus Republic, Criminal Appeal No.246 of 2011 (Unreported), that; "Normal discrepancies are bound to occur in the testimonies of witness, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. On delay of PW1 to report the matter to the local government leaders or police station from 06/04/2023 to 13/04/2023, this delay was explained, as she was admitted in the hospital having fainted after the granddaughter told her that she was raped. On the third ground on the aspect of failure to call the said teacher Luoga as a Witness, Miss Werema cited the case of Bonus Nchimbi Versus Republic, Criminal Appeal No 347 Of 2022 but also, section 143 of the Evidence Act, arguing that there is no particular number of witnesses which 10 is required in proving an inevitable fact, what matters is the weight of evidence and credibility of a witness present. On the fifth ground on failure to consider the defence evidence, Miss Werema argued that, the Court can remedy the shortfall in such an omission by stepping into the shoes of the trial court and consider the defence evidence and determine whether it casts any doubt on the prosecution evidence. She cited decision in Erick Michael Versus Republic, Criminal Appeal No 80 Of 2020. As such she joined hands with the appellant that the judgement did not comply with section 312(2) of CPA as it does not state the offence of which and section of the penal code or other law that the appellant is convicted and punished. She was of the view that this was curable under section 388 of the CPA. She again asked this court to remedy the situation, this court being a first appellant court. On the last complaint on change of Magistrate Miss Werema was of submission that the said change did not prejudice the appellant she cited the case of Charles Yona V. The Republic, Criminal Appeal No. 79 Of 2019 (2021) Tzca 339; [02 AUGUST, 2021, TANZLII], addressed about the issue of change of magistrates. It stated that; 11 "For the conviction to be quashed on account of non- compliance of section 214 (1) of the CPA, two conditions must be satisfied; one, the appellant's conviction was vitiated by the non-compliance with section 214 (1) of the CPA and two, the appellant must have been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate. She also cited the decision in In the case of STEPHANO S/O VICTOR @ MLELWA VS REPUBLIC (CRIMINAL APPEAL 257 OF 2021) [2023] TZCA 152 (29 MARCH 2023) it was held that; "The omission did not prejudice the appellant since throughout the trial, he did not complain and neither did he state in the ground of appeal as to how he was prejudiced" In his rejoinder the appellant reiterated his submission in chief arguing that the delay by the victim to report was not explained. On the first ground he said having stated that he would have four witnesses the record does not show if he changed his intention. He emphasised he was not heard properly He also said the prosecution ought to have summoned the head of the school to state whether he had any particular information about the offence, He said the failure of the trial magistrate to abide by section 312 CPA was not curable by section 388 CPA. He cited the case of MKAIMA 12 MABAGALA V.R, Criminal Appeal No. 267 of 2006 (Tanzilii) where the Court, among

others, stated that the judgment it ought to contain an objective evaluation of the evidence for the defence which is balanced against that of the prosecution to find out which case among the two is more With regard to the last ground, non-compliance with section 214 (1) of Cap. 20 R.E 2022, he humbly submitted that the court's failure to comply with the law prejudices the parties, and the omission amounts to a miscarriage of justice and constitutes a mistrial. On my part, I will start with the first complaint on the right to be heard and non-compliance with section 226 (2) of CPA cap 20. I note that the right to be heard is so fundamental, as rightly submitted by the appellant. In Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy Civil Application No. 33 of 2002 (unreported), the court of appeal held that: "The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be. 13 Now the appellant claims that he informed the trial court that he would have five defence witnesses, but he did not change this, even after the trial court proceeded under section 226 of the Criminal Procedure Act, Cap 20. From the record, it is correct that on 17.7.2024, the appellant indicated that he would have five witnesses. However, on 19.7.2024, having made his defence as DW1, the trial was adjourned the case to 22.7. 2024. On that date, the accused defaulted appearance. It also appears that there were defence witnesses available; the record reads; S/A - Your Honor, the accused is not present today, and we do not have any information. However, his witness came and he said he did not know what to say concerning this case. We pray for another date. Court: The accused has jumped bail; an arrest warrant should be issued. SA - We pray for an arrest warrant for the accused. Court: An arrest warrant will be issued for the accused. sgd 22/7/2024 Mhina PRM 14 Then on the other date that is 23.7.2024 the appellant defaulted appearance again and it was at this stage the trial court reserved judgement. The record shows, Date Tue Jul 23 2024 Coram: F. R. MHINA (PRM) Prosecution TUMPALE (SA) FATUMA (RMA) Court 226 of the CPA Cap. 20 R.E 2022. Sgd 23/7/2024 Orders: 1 – Arrest warrant still in force 2 – Judgment on 16/8/2024 Rereading the record above shows that the judgment was delivered as scheduled on 16.8.2024. Nothing on record indicates whether the trial court considered why the appellant defaulted appearance on the indicated dates and whether he was heard if he intended to have more defence hearing. I have quoted at length what appeared in the proceeding because it appears there is confusion in the proceedings in this court, the file containing 15 proceeding appearing not to be in respect of this case; Miss Werema was made to believe that there was a defence hearing closed by an advocate on 23.7.2024 in favour of the appellant. The very proceedings reads: - Tue Jul 23 2024 Coram: F.R. MHINA (PRM) TUMPALE (SA) ADV. GEOFREY RUIANJI & SALAHA HAMISI both for the accused person. S/A – The case is coming for the continuation of the defense hearing. Adv. Godfrey: We are also ready to proceed. Court: The witness is reminded that she is still under oath. Having given the same thought, it is apparent that the entry was a misplaced record. This is because while what happened on 23.7.2024 purport to be evidence of DW1, the hearing of DW1 (the appellant) was already on record. I any case even assuming the same involves this case the is nothing indicating the previous order was vacated. Now, section 226 (2) of the Criminal Procedure Act provides that. "226 (2) Where the court convicts the accused person in his absence/ it may set aside such

conviction, upon being satisfied that his absence was from causes over which 16 he had no control and that he had a probable defence on the merit "(Emphasis supplied). In absence of the record on what transpired and whether the appellant was heard on reason causing his absence and whether he had probable defence (from the other witnesses as indicated) It would mean that, the proceedings did not meet the standard expected in compliance of section 226 (2) CPA and thus prejudiced the appellant. In Pusindawa Losilo vs Republic (Criminal Appeal No. 313 of

2021) [2024] TZCA 183 (18 March 2024) Citing the position stated in Olonyo Lenuma and Lekitoni Lenuna v. TheRepublic [1994] T.L.R. 54 the court of appeal held as follows: "In our view, the sub-section (that is, section 226 (2) of the CPA) is to be construed to mean that an accused person who is arrested following his conviction and sentenced in absentia should be brought before the trial court first, and not to be taken straight to prison.... The need to observe this procedure assumes even greater importance, bearing in mind that by and large, accused persons of our community are laymen not learned in the law and are often not represented by Counsel. They are not aware of the right to be heard, which they have under the sub-section. It is, therefore, imperative that law 17 enforcement agencies make it possible for the accused person to exercise this right by ensuring that the accused, upon his arrest, is brought before the Court that convicted and sentenced him to be dealt with under the sub-section." (Emphasis supplied) From the foregoing, this ground of appeal is meritorious; the trial court proceedings from 23.7.2024 are vitiated in noncompliance with section 226

(2) CPA cap 20. This court exercises its revisional powers under section 29

(b) of The Magistrates' Courts Act [CAP. 11 R.E. 2019] and quash the trial court record from 23.7.2024, including the judgement. The direction is given that the trial court should comply with section 226 CPA by asking the appellant to be heard whether he had a defence and, if so, proceed to hear it before composing the judgement. In the meantime, the accused shall remain in custody, awaiting an appearance before the subordinate court. Dated at Dar es Salaam this 24 February 2025. 18 A J KIREKIANO JUDGE 24.2.2025 19

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