

TANZANIA / JUDGMENT

EMANUEL BARNABAS JUDGEMENT 0001

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB -
REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO. 17202 OF 2024 (Originating from the
decision of the Resident Magistrate court of Kivukoni at Kinondoni in Criminal Case No. 174 of
2021) BETWEEN EMMANUEL BARNABAS APPELLANT
VERSUS THE REPUBLIC RESPONDENT

JUDGEMENT

Date of Last Order: 04.11.2024 Date of Judgment: 25.11.2024 NGUNYALE, J. The Appellant Emmanuel Barnabas was charged before the Resident Magistrate Court of Kivukoni at Kinondoni with two offences; one rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R: E 2019 now 2022] and two, unnatural offence contrary to section 154(1)(a) & (2) of the Penal code [Cap 16 R.E 2019] now 2022. It was alleged by the prosecution that on unknown dates of October 2021 at Kimara B area within Ubungo District in Dar es salaam did have sexual intercourse to one XY a girl of 13 years and on diverse dates did have sexual intercourse to one XY against the order of nature. are appellant entered a plea of not guilty hence full trial was conducted. Upon a full trial, he was found guilty on the first count and he was convicted and sentenced to serve thirty (30) years imprisonment. The appellant being aggrieved by the finding of the trial court, filed this appeal on 18th June 2024 containing five (5) grounds of appeal as follows:

1. That, the learned trial magistrate erred in law and fact to accept and believe the evidence of Pw3 as a gospel truth and acted upon to convict an appellant in absence of assessment of the credibility and reliability of such evidence. 2 That, the learned trial magistrate erred in law and facts to place reliance on the oral evidence of Pw1 and PE3 (Exhibit R1) to prove penetration while such evidence is lacking and valueless.
3. That the learned trial magistrate erred in law and fact to convict and sentence the appellant in the judgement which did not comply with the provisions of section 312(1), (2) and (3) of the Criminal Procedure Act, [cap 20 RE 2022]
4. That, the learned trial magistrate erred in law by holding that the prosecution case was proved beyond reasonable doubt against the appellant as to justify his conviction

5. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant by relying on the contradictory evidence of Pw3. On 05/09/2024, the appellant filed the second set of grounds of appeal containing two grounds which are:
 1. That, the learned trial Magistrate erred in law to convict the appellant basing on the evidence of a child of tender age (PW3) which was illegally obtained.
 2. That, the learned trial magistrate erred in law and fact to convict the appellant without noted apparent variance between charge and evidence led by the prosecution witnesses. On 26th August 2024 when the appeal came for hearing the appellant appeared in person while the respondent had the service of Ms. Edith Mauya, Senior State attorney. The parties consented for the appeal to be heard by way of written submission and the scheduling order was as follows: the appellant to file his submissions by 09th September 2024, the respondent to file his reply by 23'd September 2024 and rejoinder by 30th September 2024. Having perused the court records it is found that only the appellant filed his submissions. The respondent did not file his reply but also did not appear before the court on the dates which were set for judgement. It is a trite law that failing to file submissions in accordance with the order of the Court, is tantamount to failure to appear at the hearing. Failure by the respondent to file written submission, was discussed in 3 the case of Godfrey Kimbe versus Peter Ngonyani, Civil Appeal No. 41 of 2014 the court of appeal had this to say: "In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case" See also the Court of Appeal case of National Insurance Corporation of (T) Ltd & another v. Shengena Limited, Civil Application No. 20 of 2007. Considering the position above, and following the failure of the respondent to file his reply submissions the same is considered as failure to appear at the hearing hence the appeal will be determined ex-parte against him. Again, it is worthy to note that on 05th September 2024, the appellant filed additional grounds of appeal without leave of the court. Generally, the appellant was required to obtain leave of the court to file the additional grounds, but each general rule has an exception depending on the circumstances of each case by considering that the appellant is unrepresented thus a lay person; to me the failure to obtain leave of the court to file the additional grounds of appeal cannot render the same invalid for the reason that the respondent had the full right to reply on the same through their reply submissions. Therefore, in this judgement the two sets of grounds of appeal will be considered to the extent they were submitted. In the course of submitting the appellant only submitted on the three grounds of appeal which are ground 3 & 2 to the 1st set of grounds of appeal and ground 1 in the additional grounds of appeal. Submitting in support of the 3'd ground in the petition of appeal, he stated that the learned trial Magistrate erred in law to convict and sentence the appellant in a judgement which did not comply with the provisions of section 312(1), (2) and (3) of the Criminal Procedure Act, [cap 20 R.E 2022] (The CPA). He submitted that the appellant was charged with two offences but he was convicted and sentenced on the first count for the offence which was not disclosed. Ibis is contrary to the provisions of

Section 312(2) of the CPA. He added that because he was charged with the count of unnatural offence neither the trial court judgement reveals the evaluation and analysis of the evidence nor any finding made by the court on that count of unnatural offence, it is unknown whether the appellant was acquitted or convicted on the 2nd count. It was his submission that the failure of the trial court to comply with the requirement of the law renders the trial court judgement fatally defective. He invited the court to find that the appellant was illegally convicted and sentenced. He invited the court to order his immediate release from prison. In the first ground of appeal that the trial magistrate erred in law to convict the appellant basing on evidence of a child of tender age (PW3) which was illegally obtained he reserved his submission and called the attention of the court to note that PW3 gave her evidence before amendment of section 127 of the Evidence Act by the Written laws (Miscellaneous Amendment) Act No. 11 of 2023 which added subsection (7). He submitted that PW3 being a child of tender age gave her evidence on 02.08.2022 in contravention of section 127(2) of the Evidence Act where the court did not examine PW3 to establish her competence and establish whether she understands the meaning and nature of an oath to justify the reception of her evidence upon oath. He cited the case of Hassan Yusuph Ally versus R, Criminal Appeal No. 462 of 2019 where the court found the contravention of section 127(2) to be fatal and the evidence of the witness was disregarded. He invited this court to find the evidence of PW3 contravened the provisions of section 127(2) because the record is silent about whether she was examined to test her competence and know if she understood the meaning and nature of an oath before she was allowed to testify under oath. To buttress this position he cited the cases of Mohamed Ramadhani @ Kolahili versus R, Criminal Appeal No.396 of 2021; John Mkorongo James versus R, Criminal Appeal No.396 of 2020 and Godfrey Wilson versus R, Criminal Appeal No. 168 of 2018. In support of the 2nd ground of appeal in the petition of appeal which state that the trial magistrate erred in law and facts to place reliance on the oral evidence of PW1 and PF3 (Exhibit P.1) which is wanting, he submitted that the evidence of PW1 and exhibit P.1 (PF3) were relied upon as corroborative evidence which had corroborated the evidence of PW3. It was his view that such evidence is lacking and valueless on the following aspects, one, throughout the evidence of PW1 he never stated about when and where he medically examined PW3 and whether he medically examined the vagina of PW3. Two, the proceedings are completely silent on whether the PF3 was cleared for admission before being received. The omission in the exhibit contravened the requirement in the case of Robinson Mwanjisi & 3 Others V. R, [1994] TLR.218 in which the Court of Appeal outlined the three stages to be observed before a document is admitted in evidence. And three that the evidence of PW3 was received in contravention of section 127 (2) of the Evidence Act hence it cannot be corroborated. It was his prayer the court to find merit in the raised and argued grounds of appeal. Having summarized the submissions in support of the appeal, the court is invited to determine whether the grounds of appeal are merited or not. Taking the course used by the appellant in his submissions I will also start with the 3rd ground in the petition of appeal as to whether the judgement complied with the provisions of section 312(2) of the CPA as submitted by the appellant. The appellant has submitted that the judgement of the trial court did not meet the

requirement of the law under section 312(2) of the CPA. For easy reference, it is wise to reproduce the section here under: "(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." (Emphasis added) From the wording of the section above, it is a mandatory requirement under the law that in case of conviction the offence and the section which creates the offence must be indicated. Failure to indicate the offence and the section which creates the offence is a fatal irregularity. For clear understanding it is pertinent to reproduce the part of conviction in the trial court judgement at page 13 & 14: 'owing to the evidence produced by the prosecution, I am unequivocally satisfied that the prosecution has proved the case against the accused person beyond reasonable doubts on the first count. Consequently, the accused person is hereby found guilty as charged and convicted accordingly.' I have scanned the quoted paragraph above which carries the conviction of the accused person, I have come to the conclusion that the judgement lacked the essential component as rightly submitted by the appellant. That, the conviction did not indicate the offence together with the section which creates the offence, moreover, the appellant was charged with two offences but the judgement is silent on whether the accused was acquitted or otherwise in the 2nd count. This court when faced a similar situation to this in the case of Hussein Malya Ng6mbe versus The Republic, Criminal Appeal No. 88 of 2023 at page 7, it was said : "In my considered view, the absence of specificity of conviction where a person is charged with multiple counts is tantamount to the absence of conviction and renders the judgment defective..... In view of the above, the appeal is incompetent as it emanates from the defective judgment. As such, it cannot be determined on merits... I remit the case file to the trial court for decomposition of judgment according to the law.' This is also the position of the Court of Appeal in the case of Kasim Kasim @Juma versus The Republic, Criminal Appeal No. 503 of 2015 where the court held that: "In view of the invalidity of the judgment for lacking a conviction it follows as the night follows day, that the proceedings and judgment of the High Court are nullity. In the circumstances we hereby quash the proceedings and judgment of the High Court under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] and remit the record to the trial Court with directions to compose a proper judgment in compliance with the law by entering a conviction." The Court of Appeal in a recent case of John Naoyo & another versus The Republic, Criminal Appeal no. 308 of 2021 where the accused persons were charged with three counts but the trial magistrate only make deliberation in two counts it was observed : "We must emphasize that clarity and compliance with the law in composing a judgment of the court is of paramount importance.... In the case at hand, the absence of the finding in respect of the second count and convictions in all counts rendered the judgment of the trial court a nullity. Indeed, no appeal to the first appellate court and this Court can be valid against a nullity judgment.... On the contrary, we hold that it is in the interest of justice to nullify the trial court's judgment and the entire proceedings of the first appellate court followed by and order remitting the file for the trial Resident Magistrate to compose a fresh judgment in accordance with the law' Following the principle in Hussein Malya (supra), Kasim Kasim (supra) and John Naoyo (Supra) I am satisfied that the appeal is incompetent

because it emanates from an invalid judgement following the improper conviction of the appellant but also lacking the findings of the 2-d count. Therefore, the proper remedy is to return back the record to the trial court with an order for re-composition new judgement which will contain a reflection of the offences charged. In the meantime, I order the appellant to remain in custody pending judgement before the trial court. It is so ordered. Dated at Dar es Salaam, this 25th day of November, 2024. D. P.W&'unya JUDGE Judgement delivered this 25th day of November, 2024 in presence of the appellant in person and the respondent represented by Clement Kato learned State Attorney. JUDGE 11

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