

TANZANIA / JUDGMENT

Criminal Appeal No

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MTWARA AT MTWARA CRIMINAL APPEAL NO. 21418 OF 2024 (Arising from the decision of the
District Court of Nanyumbu at Mangaka in Criminal Case No. 73 of 2023) INNOCENT
CONSTANTINE MSOFI APPELLANT VERSUS THE REPUBLIC
RESPONDENT

JUDGMENT

& October & 3C'October 2024 MPAZE, J.: The appellant has appealed against the trial court's decision convicting him of the offence of rape, contrary to sections 130 (2) (e) and 131 of the Penal Code [Cap 16 R.E 2022] ('the Penal Code'), concerning a child aged 10 years. Dissatisfied with this conviction, the appellant has presented six grounds of appeal, paraphrased as follows;

1. The trial court erred in both law and fact by convicting the appellant under a Charge that failed to specify the category of rape he allegedly committed. The charge inaccurately cited sections 130(I) and 131(1) of the Penal Code, which do not clearly define the offence, rendering the charge defective. i
2. The trial court erred in both law and fact by convicting the appellant without fulfilling procedural requirements. Specifically, the trial magistrate did not issue a ruling on whether a prima facie case was established after the prosecution closed its case, as required by law.
3. The trial court erred in law and fact by convicting the appellant without informing him of his right to present a defence, as stipulated under section 231 of the Criminal Procedure Act, Cap 20 R.E 2022.
4. The trial court erred in law and fact by convicting the appellant despite the prosecution's failure to establish penetration, an essential element needed to prove the offence of rape.
5. The trial court erred in law and fact by failing to comply with section 127(2) of the Evidence Act, Cap 6 R.E 2022
6. The trial court erred in law and fact by convicting the appellant without the prosecution proving the offence of rape beyond a reasonable doubt, as required under section 3(2) of the Evidence Act, Cap 6 R.E 2022. During the hearing of this appeal, the appellant appeared in person, while Ms. Florence Mbamba, the learned State Attorney, represented the

respondent/Republic. 2 Upon being invited to address his grounds of appeal, the appellant prayed that the State Attorney present her submissions first, reserving his right to reply if necessary. Ms. Florence, in her submissions, addressed only the first ground of appeal, asserting that it alone was sufficient to resolve the entire appeal. She argued that the appellants conviction was based on an incorrect provision, which fundamentally undermined the trial court's decision. Supporting the appellant on this ground, Ms. Florence contended that the statement of the offence and its particulars, as charged against the appellant, were inconsistent. She highlighted that this inconsistency Violated section 135 of the Criminal Procedure Act [Cap 20 R.E 2022] ('the CPA'), which mandates that the statement of the offence must cite the correct provision defining the offence. Ms. Florence explained that in the present case, the statement of the offence specified that the appellant was charged with rape under sections 130(1) and 131 of the Penal Code. However, the particulars indicated that the offence involved a child aged 10 years. According to Ms. Florence, for accuracy, the statement of the offence should have also cited section 3 130(2)(e). To support her argument, she referred to the case of Godfrey Mkinqa v. R (Criminal Appeal No. 176 of 2014) [TZCA, 22 July 2016]. Ms. Florence further observed that, upon reviewing page 7 of the judgment, the trial magistrate amended the charge and substituted it without giving the appellant an opportunity to enter a plea on the amended charge. She argued that this procedural oversight was improper and resulted in a miscarriage of justice. Since Ms. Florence argued that this ground alone was sufficient to dispose of the entire appeal, she chose not to address the remaining grounds. The appellant, having reserved his right to reply, appeared satisfied with the State Attorney's support for his appeal and thus opted not to offer a rejoinder. Examining the charge sheet under which the appellant was charged, it is clear that the statement of the offence cited sections 130(1) and 131(1) of the Penal Code. However, the particulars specified that the offence involved a girl child aged 10 years. Based on these particulars, the correct provisions that should have been cited in the statement of the offence are sections 130 (1) (2) (e) and 131(1) of the Penal Code. 4 The trial magistrate identified this flaw during the analysis and evaluation in the judgment, where he stated; 'Before I pinned down, I want to deal with the fact which appeared in charging section. The charge sheet contains sections 130(1) and 131(1) of the Penal Code, Cap 16 R.E 2022. That section 130.(1) creates the offence of rape, while section 131 provides for punishment of the offence once the charge has been proved. Section 130(1) provides; 'It is an offence for a male person to rape a girl or a woman.' The charge sheet in this case, did not specifically provide the type of rape of which the accused was charged. Since the victim of rape was a child, the charge sheet ought to specify the category of rape provided under section 130(2)(e), which provides as hereunder; '130(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the following circumstances;

- (a)
- (b) (c).....
- (d) 5

- (e) With or without her consent when she is under eighteen years of age, unless she is his wife, is fifteen or older, and is not separated from him. Now the charge sheet, as it is in this case, did not mention the above section. The question is whether by not charging the accused person under section 130(2)(e) the accused was prejudiced. It is a rule in criminal that the accused must know the details of the charge he is facing in order to prepare his defence effectively, as enshrined under section 132 of the Criminal Procedure Act, Cap 20 R.E2022. However, in this case, the accused person knew all along the charge with which he was facing. He knew it was a child of 10 years, hence the question of consent was not applicable it was a statutory rape.' As I previously stated, there is no dispute that the charge sheet under which the appellant was read and entered plea cited the wrong provision. This is further confirmed in the judgment of the trial court, as shown above. Nevertheless, while the State Attorney argued that this error was fatal and led to a miscarriage of justice, this court disagrees with that view. Upon examining the particulars of the offence, the testimony of prosecution witnesses, and the appellant's defence, the court finds that this misquotation did not impair the appellant's understanding of the nature of the charge against him. The particulars in the charge sheet, 6 along with the evidence provided at trial, clearly and unambiguously defined the offence, despite the incorrect statutory citation. Furthermore, Ms. Florence argued that the trial magistrate amended the charge within the judgment but did not provide the appellant an opportunity to enter a plea on this amended charge. I have highlighted above what the trial magistrate stated in the judgment regarding the failure to cite the correct section. It is evident that the trial magistrate acknowledged the error and went on to indicate which section should have been used, without formally amending the charge sheet. By doing so, the trial magistrate did not imply that he amended the charge; rather, he was recognizing the error and clarifying Which section should have been correctly applied. The trial magistrate did not end there he further considered whether the failure to cite the correct provision prejudiced the appellant. Ultimately, he concluded that the omission did not prejudice the appellant in any way. I concur with the trial magistrate's assessment that this error neither prejudiced the appellant nor materially affected the fairness of the proceedings. 7 Ms. Florence, in her effort to persuade the court that the error was fatal, cited the case of Godfrey Mkinga v. R. (Supra) I have thoroughly examined this case and acknowledge that it indeed supports her position. However, given that this case was decided in 2016, and considering the established legal principle that, where there are two conflicting positions on a similar issue, the most recent authority should prevail, I must respectfully differ with Ms. Florence's stance. In Malimi Peter v. R (Criminal Appeal No. 480 of 2020) [2024] TZCA 65 (9 February 2024), the Court addressed a comparable situation and stated; 'On our part, we agree with the appellant that in the charge sheet, it is vividly dear that only sections 130 and 131 of the Penal Code were cited, without specifying the relevant subsections and paragraphs. Section 130 addresses various types and circumstances of rape, as does section 131. The subsections and paragraphs were essential to adequately inform the appellant of the specific offence he was facing. While this issue was discussed comprehensively in Mathayo Kingu v. R (CriminalAppeal589 of2015) [2016] TZCA 332, the Court has now applied a prejudice test to determine whether the omission caused injustice

to the appellant. In *Jamali Ally* (supra), the Court examined whether the failure to cite the full provisions prevented the appellant from understanding the seriousness of the offence or hindered his ability to mount a defence, ultimately finding that the particulars of the offence, coupled with the victim's testimony, were sufficient to eliminate prejudice. Thus, the Court concluded that the irregularity was curable under section 388 (1) of the CPA. The Court ultimately upheld the position that such errors are curable under section 388 of the CPA. Relying on this more recent authority, I find that the incorrect citation did not lead to a miscarriage of justice. Therefore, I respectfully disagree with the State Attorney's argument on this ground, as the error does not amount to a miscarriage of justice that would justify overturning the trial court's findings. While the State Attorney argued that this single ground was sufficient to resolve the appeal, she did not address the remaining grounds. However, since this court has concluded that the first ground alone is insufficient to dispose of the appeal, I will proceed to examine the other grounds. In the second and third grounds, the appellant raises concerns regarding non-compliance with section 231 of the CPA. This prompted me to review the record to ascertain the procedure followed after the prosecution closed its case. Upon careful examination of both the handwritten and typed proceedings, I found them to be consistent. On 7th November, 2023 after PW4 completed his testimony, the prosecution prayed to close its case, and the court recorded the following; 'Court: Prayer granted. Prosecution case marked closed on this 7th day of November, 2023. Order: Ruling on 21/11/2023. AFRIC for want of sureties. Sgn 7/11/2023. Date: 21/11/2023 Coram: Hon C J. David SRM For Prosecution: Inspector Lugaila Accused person: Absent B/Clerk: M.M. Mohamed RMA P/P: Your Hon, the case is for ruling; the accused is absent, and we pray for another ruling date. Court: Ruling on 28/11/2023 AFRIC 21/11/2023 However, the record is silent about any proceedings on 28th November, 2023. Instead, the matter resumed in court on 12th December, 2023 as indicated hereunder; io 'Date: 12/12/2023 Coram: Hon C.J. David SRM For Prosecution: Inspector Lugaila Accused person: Present B/C: M.M. Mohamed RMA P/P: Your Hon/ this case is coming for defence hearing; we are ready. Accused: I am ready too. DEFENCE CASE OPEN DW1...1 As reflected in the record, it appears that a ruling regarding the appellant's case to answer was not delivered. Section 231 of the CPA, which the appellant claims was not adhered to, mandates that after the close of the prosecution's case, the court must prepare a ruling on the case to answer. This ruling should explain the substance of the charge to the accused and inform him of his rights to testify, remain silent, and call witnesses. The court must also record the accused's response and allow him the opportunity to enter a defence if he chooses to exercise these rights. See the case of *Maunda Masatu v. R* (Criminal Appeal No 653 of

2020) [2024] TZCA (19 August 2024) 11 The section that the appellant has contested reads as follows;

231. -fl) At the dose of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the court shall again explain the substance of the charge to the accused person and inform him of his right- fa) to give evidence whether or not on oath or affirmation, on his own behalf; and
- (b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then cation the accused person to enter on his defence save Where the accused person does not wish to exercise any of those rights! The proceedings indicate that, although the trial court initially scheduled a ruling date after the prosecution's case closed, no ruling appears to have been issued. Instead, on 12th December, 2023 the defence began, as shown in both handwritten and typed proceedings. This omission reflects a failure to comply with the mandatory requirements of section 231 of the CPA. By bypassing this step, the trial 12 court deprived the appellant of an essential procedural safeguard intended to affirm the prosecution's establishment of a prima facie case, creating a procedural gap. In the case of *Samweli Gitau Saitoti ©Saimoo & Another v, R* (Criminal Appeal No. 5 of 2016) [2019] TZCA 307 (30 August 2019), the Court encountered a situation similar to the one at hand. The Court observed; yAs seen above, it is not dear from the record of proceedings before the trial court that the ruling was delivered on the date scheduled . or any other date. AH the same, the defence commenced on 12th April, 2011 terminating on 18^ January, 2011. However, there is no indication that the trial court paid regard to the provisions of section 231(1) of the CPA.' Following this observation, the Court further stated; ' There is no gainsaying that the trial court overlooked its attention to the provisions of section 231(1) of the CPA. The problem was, in our view, compounded by the absence of the ruling finding the appellants and some of their co-accused with a case to answer. The effect of non-compliance with section 231(1) of the CPA was succinctly discussed in our previous decision in *Alex John v. R.* (supra). We discussed at length in that case the safeguards ensuring the right to a fair trial guaranteed by Article 13(6)(a) of the Constitution, which includes strict compliance with sections 230 and 231(1) of the CPA, among others... We need only repeat what 13 we said in *Alex John v. R.* (supra) that compliance with sections 230 and 231 is mandatory. This Court found merit in the complaint regarding non-compliance with section 231(1) and quashed the appellant's trial for being a nullity' Applying the principle established in the aforementioned authority, it is evident that section 231 of the CPA is not merely a procedural formality. Instead, it plays a crucial role in ensuring that an accused person is fully aware of his rights and the nature of the case against him. This provision enables the court to evaluate whether sufficient evidence exists to justify requiring a defence. Non-compliance with section 231 of the CPA undermines the accused's right to a fair trial and, in this instance, resulted in a miscarriage of justice by depriving the appellant of the opportunity to make an informed decision regarding his defence. The consequence of the trial court's omission, arising from its failure to comply with section 231 of the CPA, necessitates intervention by this court. As previously

established, this oversight resulted in a miscarriage of justice for the appellant Therefore, in exercising my revisionary power under section 373(l)(a) of the CPA, I hereby nullify the proceedings conducted after the close of the prosecution's case, including the judgment of the trial court, and set aside both the conviction and the sentence. 14 Given these circumstances, addressing the remaining grounds of appeal is unnecessary, as the identified non-compliance with section 231 of the CPA is a fundamental defect that undermines the fairness of the trial, resulting in a miscarriage of justice. I therefore nullify the proceedings from the close of the prosecution's case and remit the case file back to the trial court with directions to recommence hearing from that stage. The same magistrate who initially presided over this case shall continue to hear it; if unavailable, another magistrate with competent jurisdiction shall take over. Based on the above discussion, the appeal is allowed to the extent outlined. Meanwhile, the appellant shall remain in custody pending retrial. It is so ordered. omt oaX Dated at Mtwara this.31st day of October, 2024. V ? - JiM.BMpaze A ui A */ /\ */ Judge Court: Judgment is .delivered today in the presence of Ms. Florence Mbamba learned state attorney for the Republic and the appellant. 15

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