

TANZANIA / JUDGMENT

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## operation of section 131

- (3) of the Penal Code as amended by the Sexual Offences (Special Provisions) Act. She maintained that the final effect all of this was that, the High Court had correctly enhanced the sentence. It is common ground that the offence was committed on 14.11.1996. The Sexual Offences- (Special Provisions) Act came into operation on 1.07.1998. 3 Before its repeal therein, section 136(1) of the Penal Code under which the appellant was properly charged provided: "136(1) Any person who carnally knows any girl under the age of fourteen years is guilty of a felony and is liable to imprisonment for life, with or without corporal punishment." (Emphasis added). The prime question for determination by us is whether or not the appellant was properly and lawfully sentenced to a term of twenty years imprisonment by the trial court, and in turn whether or not the High Court was entitled in law to enhance the sentence to a term of life imprisonment. First, going by the terms of section 136(1) of the Penal Code, in our respectful view, the trial court was entitled to impose a term of twenty years imprisonment rather than that of life imprisonment provided for therein. Under section 136(1), it had a discretion to impose a sentence of imprisonment of any term up to that of life imprisonment. With respect, I do not think that the trial court was wrong. Contrary to what was argued by Ms. Mlay, the sentence of life imprisonment was not mandatory under section 136(1). Upon his conviction by the trial court for defilement of a girl under the age of fourteen years, the appellant was liable to imprisonment for life. In *Opuya v Uganda* [1967] E.A.L.R 752 at 754, the erstwhile Court of Appeal for East Africa in considering the word "liable" had this to say: "It seems to us beyond argument, that the words "shall be liable to" do not in clear ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty which may be imposed at the discretion of the Courts. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the Court might not see fit to impose it." When the whole record is scrutinized, in our respectful view the learned District Magistrate after having considered mitigating circumstances advanced by the appellant and cognizant of the prevalence of that offence in the area, exercised his discretion and correctly imposed a sentence of twenty years imprisonment; 5 I I, I Second, with respect, it was a gross misdirection for the High Court to have invoked section 131(3) of the Penal Code, as amended by the Sexual Offences (Special Provisions) Act, clearly not applicable as the offence was committed on 14.11.1996, before that Act came into operation. In other words, it could not have been retrospectively applied. 1 Moreover, the High Court could not have enhanced it to that of life imprisonment under section 136(1) as it was not a mandatory sentence therein nor was there any appeal by the Republic before the High Court challenging the sentence of twenty years imprisonment imposed by the District Court as being manifestly inadequate. I I Third, with greater respect, it would appear to us bearing in mind the sentencing issue that divides the parties and having scrutinized the original record themselves that both the trial court and the High

Court completely omitted to direct themselves on section 170(2)(a)(ii) of the Criminal Procedure Act, No 9 of 1985 governing sentencing by subordinate courts. It provides: "170(r) A subordinate court, may, in the cases in which the sentences are authorized by law pass the following sentences -

- (a) imprisonment for a term not exceeding five years, where a court; (b) if a court convicts a person for a scheduled offence, it may, if such sentence is authorized by law, pass a sentence of imprisonment for such offence for a term not exceeding eight years; (c)

(2) Notwithstanding the provisions of subsection (1)

(a) a sentence of imprisonment:

- (i) for a scheduled offence, which exceeds the minimum term of 1' imprisonment prescribed in respect of it by the minimum sentences Act, 1972; (ii) for any other offence, which exceeds twelve months; (b) (c) shall not be carried into effect, executed or levied until the record of the case, or a certified copy of it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge save that this, section shall not apply in

- In respect of any sentence passed by a Senior Resident Magistrate of any grade or rank. (Emphasis added) The Concise Oxford Dictionary, 1964 Ed. defines the phrase "carry into effect" thus: "conduct off to prison. The term "levy" in the Chambers Twentieth Century Dictionary, 1973 Ed. is said to mean "to carry into effect". ... Bound by section 170(2)(a)(ii), and the proviso thereto, the trial court ought to have sought confirmation of the sentence it had passed from a Judge of the High Court. This it neither did, nor did a Judge of the High Court confirm the twenty years sentence imposed. There is also nothing in the record to satisfy us that the learned trial Magistrate was a Senior Resident Magistrate of any grade or rank for the proviso to section 170(2) to come into play. The result of all this is that, from his conviction and sentence on 20.12.1996 up to now, a period of over fourteen years and four months, the appellant has been effectively carrying out and executing an unconfirmed and unlawful sentence. That could not but have occasioned a very serious miscarriage of justice. As such, section 388(1) of the Criminal Procedure Act cannot salvage the patent illegality and the resulting gross injustice. 8. By the provision to section 170(2)(a)(ii), the sentence should not have been carried into effect, executed or carried out until it had been confirmed by a Judge of the High Court. This it was not. All considered, there is merit in this ground of appeal, which we uphold. Troubled by the manifest injustice arising, and the record before us, the adjoining question we have anxiously asked ourselves is whether we should involve section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 and exercise our revisional jurisdiction by doing what the High Court had omitted to do in confirming, fourteen years and four months later, the sentence passed by the District Court. Given that the appellant has unlawfully carried out a term of imprisonment of over fourteen years and four months; would possibly not be legally eligible to the benefit of a remission of one-third of the sentence during this period

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