IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 452 OF 2015

FURAHA JOHNSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mwingwa, J.)

Dated the 15th day of July, 2015
In
DC Criminal Appeal No. 40 of 2013

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JUDGMENT OF THE COURT

26th July & 1st August, 2016.

RUTAKANGWA, J. A.:

The appellant first appeared before the District Court of Moshi district ("the trial court") on 27th September, 2010, to answer a charge of rape. According to the charge sheet, dated the same day, he was seventeen (17) years old.

When the charge was read over and explained to him in open court he unequivocally denied it. Following this denial, a preliminary hearing was held by the trial court on 18th October, 2010. At this hearing, the appellant denied all the allegations put forward by the prosecutor going

to implicate him with the charge of rape. He only admitted his name, **age**, place of domicile, etc. His trial eventually took off on 24th January, 2011, at which the prosecution called three (3) witnesses. The appellant who testified on oath, on 13th June, 2011, gave his age as 17 years and called no witness on his behalf.

At the conclusion of the trial, the learned trial Resident Magistrate found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. The appellant unsuccessfully appealed the conviction and sentence to the High Court sitting at Moshi, hence this appeal.

The appellant lodged a memorandum of appeal containing five (5) grounds of appeal, which he subsequently supplemented with another 4-point memorandum of appeal, all of which he never elaborated on.

Notwithstanding the appellant's failure to highlight on his grounds of complaint, the appeal was supported by the respondent Republic, but from a different dimension. Ms. Gaudensia Joseph, learned State Attorney for the respondent Republic, rested her support for the appeal on a purely legal foundation.

It was Ms. Joseph's strong and only point of contention that the trial of the appellant was marred by one fatal irregularity. This was failure to give effect to the mandatory provisions of the Law of the Child Act, 2009 (No. 21) ("the Act"). Her elaboration of this point was admittedly, formidable.

In perfecting her position, Ms. Joseph pointed out that up to the stage when the appellant was called upon to defend himself, it was not in dispute that he was 17 years old. This position never changed until the conclusion of the trial as no evidence was given to prove otherwise, she went on to argue. In view of this, the appellant for all intents and purposes, was a child under the provisions of the Law of the Child Act ("the Act"), she urged. On the basis of this fact, she stressed, the trial of the appellant should not have been conducted in the absence of the social welfare officer. It was her strong argument that the presence of a social welfare officer is one of the conditions precedent for the conducting of valid criminal proceedings against an accused child. To fortify her stance she made reference to section 99 (1) (d) of the Act.

In response to a question posed by the Court, Ms. Joseph further bolstered her position in support of the appeal by confidently asserting that apart from the non-compliance with the mandatory provisions of section 199 (1) (d) of the Act, the appellant was not tried by a proper court. To her, the proper trial court would have been a Juvenile Court presided ever by a Resident Magistrate and not a District Court.

On account of the above patent irregularities, Ms. Joseph pressed us to nullify the proceedings in the trial court, quash and set aside the appellant's conviction and sentence and set him at liberty unconditionally.

After going through the clear provisions of sections 4 (1), 97 (1) and (2) and 99 (1) (d) of the Act, we have found ourselves in full concurrence with the paralyzingly convincing submission of Ms. Joseph. Unassailable as it is, it unerringly points out the incurable irregularities committed by the trial court which clothed itself with the jurisdiction it did not have of trying, convicting and imposing an illegal sentence on the child appellant. We are holding so without any demur as the submission of Ms. Joseph has the backing of the law as demonstrated hereunder.

Section 4 (1) of the Act provides as follows:-

4-(1). A person below the age of eighteen years shall be known as a child.

It is also provided thus in section 97 (1) and (2):-

97-(1). There shall be established a court to be known as the Juvenile Court, for purposes of hearing and determining child matters relating to children.

(2) The Chief Justice may, by notice in the ***Gazette,*** *designate any premises used by a primary court to be a Juvenile Court.*

It is the Juvenile Court which under section 98 (1) (a) of the Act, shall have power to hear and determine criminal charges against a child.

It is partly provided as follows in section 99 (1) (d) of the Act:-

99 (1). The procedure for conducting proceedings by the Juvenile Court in all matters shall be in accordance with rules made by the Chief Justice for that purpose, ***but shall, in any case, be subject to the following conditions-***

(d) a social welfare officer shall be present.

[Emphasis provided].

The Court takes judicial notice of the fact that the District Court of Moshi which tried the appellant is not a Juvenile Court. Since the appellant at the time of his arraignment and trial was a child, he was not triable by the district court, but a Juvenile Court. The trial court, therefore, lacked ***jurisdiction ratione personae*** to try the appellant. This alone rendered his trial a nullity. But even if the appellant had been tried by the appropriate court, the conduct of the trial in the absence of a social welfare officer would have equally rendered the trial a nullity.

For the foregoing reasons, we find merit in this appeal but only on the basis of the legal point raised by Ms. Joseph. We accordingly, under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, nullify the appellant's trial, conviction and sentence, and proceed to quash and set them aside. We order the immediate release from prison of the appellant, who has been under custody for almost six (6) years, unless he is otherwise lawfully held.

(d) a social welfare officer shall be present.

[Emphasis provided].

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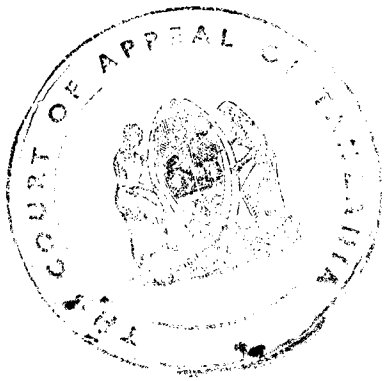
DATED at **ARUSHA** this 27th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL