IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 117 OF 2009

HANGWA WILLIAM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction/Judgment of the High Court of Tanzania at Mwanza)

(Rweyemamu, J.)

dated the 17th day of July, 2006
in
Criminal Appeal No. 22 of 2005

JUDGMENT OF THE COURT

24 & 28 FEBRUARY, 2011

MASSATI, J.A.:

The appellant and another person not before us, were charged with the offence of rape contrary to sections 130 and 131 of the Penal Code (Cap. 16 – R.E. 2002. They were alleged to have raped one **PERPETUA d/o KARIST,** a school going girl of 12. The District Court of Sengerema, convicted the appellant and sentenced him to the statutory minimum of 30

years imprisonment. His co-accused was acquitted. His appeal to the High Count was not successful, hence this present appeal.

The facts as found by the two courts below, are that, on 17/6/2004 **PERPETUA,** (the victim) (PW1) and another girl (PW5) were sent to buy some provisions by their grandmother who testified as PW4. The girls lost the money on the way. They went to the appellants' kiosk to plead their loss. The appellant promised to assist them and told them to go to some house. The two girls obliged. They went to the rendzevous, where they met the appellant's co-accused (who was acquitted). He, in turn, informed them that the appellant was waiting for them somewhere else, to where, he in fact took them. That place happened to be behind one Nyamambaya's house, where they found the appellant sitting on a house foundation. PW5 left the victim there. When she returned to the scene later, the victim emerged out of the house crying. She told PW5 that she had been raped by the appellant. When the two girls returned home, the victim told her grandmother of the rape. The grandmother examined her and saw some blood in her vagina before heading for medical examination.

The matter was reported to the police. The two were arrested on the 18/6/2004 and charged with the offence.

The first appellate court, was satisfied that the victim was raped by the appellant who was amply identified and dismissed the appellant's defence of alibi because it did not raise any reasonable doubt to the prosecution case.

At the hearing of the appeal, the appellant was represented by Mr. Anthony Nasimire, learned advocate, and the Republic/respondent was represented by Mr. Steven Makwega, learned State Attorney.

The appellant had initially filed four grounds of appeal, but later also filed a supplementary memorandum of appeal. Mr. Nasimire elected to proceed with the original memorandum of appeal. Out of the four grounds the learned counsel chose to argue only two, the first and the third. The complaints were:

(1) THAT the learned appellate judge erred in law and for failure to observe that the victim (PW1) and PW5 were not accurately subjected to a fair voire dire examination rather, the trial magistrate had relied on personal assumptions with the weakest methodology, that which were not recorded in the trial proceedings (in their true likeness) for the benefit of an appellate tribunal.

(3) That the learned appellate judge had erred in that, by making reference of conclusions and findings of facts relying on the prosecution exhibit P1 (PF3) of the victim, which was admitted into evidence not in conformance (sic) with the law to wit, section 240(3) Criminal Procedure Act (Cap. 20).

Elaborating on each of those grounds, Mr. Nasimire submitted that in arriving at the conclusion whether or not PW1 and PW5 were qualified to testify, the trial court did not record the examination of the infant witnesses in the recommended practice of question and answer. He referred us to the decisions of **JAFASON SAMWEL v. R.,** (CAT) Criminal Appeal No. 92 of 2005 (unreported) and **ALFEO VALENTINO v. R.,** (CAT,

Criminal Appeal No 92 of 2006 (unreported). He went on to point out that, in the circumstances, the appellant was prejudiced and so the evidence of PW1 and PW5 should be discarded.

On the third ground of appeal, the learned counsel submitted that since the appellant was not advised of his right to call the doctor who authored the PF3 (Exh P1) as required order section 240(3) of the CPA, such evidence should also be expunged. In support for the prayer, he again referred us to **JAFASON SAMWEL v. R.,** (supra) and **ALFEO VALENTINO v. R.,** (supra).

He wound up by submitting that once Exh. P1 is expunged, and the testimonies of PW1 and PW5 were discarded, there was no sufficient evidence to sustain the appellant's conviction. So he urged us to allow the appeal.

Mr. Makwega, at first sought to support the conviction. He believed that the trial court complied with the dictates of section 127(2) of the Tanzania Evidence Act (Cap. 6 – R.E. 2002) in recoding the evidence of

PW1 and PW5. His view was that the law does not require the court to record the question and answer to and from an infant witness before taking his/her evidence. But on reflection, he readily conceded that, in the present case, the trial court did not strictly comply with section 127(2) of the Evidence Act, in that out of the three conditions precedent set out in the provision, the trial court only made findings on intelligence of the witnesses, and on their understanding of the meaning of oath. There was no finding as to whether the witnesses understood the duty of speaking the truth.

Mr. Makwega also conceded that Exh P1 (the PF3) was irregularly admitted into evidence contrary to section 240(3) of the CPA. For these reasons, he readily agreed that if the evidence of PW1 and PW5 is discarded, and Exh P1 expunged, there was no evidence left to sustain the conviction. So he prayed to support the appeal and urged us to allow it.

In the course of hearing the appeal, we also asked the learned counsel's views on the appellant's complaint that he had no opportunity to call his witnesses which he had indicated to the trial court. Mr. Nasimire

was of the view that although at the close of his defence, the appellant did not say whether he still intended to call the witnesses he had indicated earlier, there was no record either that the trial court ever attempted to summon the witnesses. This, he submitted, amounted to an unfair trial, warranting an order of retrial. On his part, Mr. Makwega, noted that both the lower court and the High Court were not entitled to treat the appellant's claim so casually. Since there was no indication in the record that the trial court attempted to summon the witnesses, as dictated by section 142 of the Criminal Procedure Act and since the appellant pursued that claim in the High Court, it was a mistake to ignore it.

We think there is considerable force in the learned counsel's arguments. First, it is true that section 127(2) of the Evidence Act, demands that before a child of tender years is qualified to testify in criminal proceedings, he/she must first be examined if he understands the nature of an oath, is possessed of sufficient intelligence and understands the duty of speaking the truth. This Court has, in a number of cases, insisted that findings on those requirements must be recorded in the proceedings, See, AUGUSTINO **LYANGA v. R.,** (CAT) Criminal Appeal No.

105 of 1995 (unreported), **JUSTINE SAWAKI v. R.,** (CAT) Criminal Appeal No. 103 of 2004 (unreported) and **GODI KASENEGALA v. R.,** (CAT) Criminal Appeal No. 10 of 2008. It was emphasized in those decisions that non compliance with that provision might result in the quashing of a conviction unless there was other sufficient evidence to sustain it.

In **GODI KASENEGALA'S** case however, the Court quoted with approval, a passage from a Kenyan case of **KINYUA v. R.,** (2002) 1 KLR 156 that:-

> *"it is important to set out the questions and answers when deciding whether a child of tender years understood the nature of an oath so that the appellate court is able to describe whether this important matter was rightly decided; and that.*
>
> *The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding the duty to tell the truth."*

In the present case the trial court proceeded to take the sworn evidence of PW1 and PW5 (both children of tender years) after satisfying itself that the witnesses possessed sufficient intelligence and understood the meaning of an oath. But, first, the record is silent as the modus of examination of the said witnesses for this court to satisfy itself on its propriety. There is also no finding as to whether the two witnesses understood the duty of telling the truth. On the authority of **KASENEGALA'S** case, we think the provisions of section 127(2) of the Evidence Act were flagrantly breached. As such the evidence of PW1 and PW5 should not have been received at all, and so, should be discounted.

The law as to the admission of medical evidence under section 240(3) of the CPA is also settled. The section requires that where any medical report is received in any evidence in any trial in a subordinate court, the court must advise the accused of his right to call the one who prepared the report for cross examination. If such a report is received in evidence without complying with the provisions of section 240(3), such report must not be acted upon and such a trial could be vitiated, and a retrial ordered. (See, **SULTAN s/o MOHAMED** (CAT) Criminal Appeal No.

176 of 2003; (unreported). **ALFEO VALENTINO v. R.,** (CAT) Criminal appeal No. 92 of 2006. (unreported).

In the present case, the trial proceedings show that the PF3 was admitted as Exh. P1 by PW1, without much ado. The accused/appellant was not even asked if he had any objection, or informed of his right to call the writer of the report for cross-examination. This was wrong. The recommended practice is to expunge the said exhibit P1 as we hereby do.

Both the trial court and the first appellate court justified the appellant's conviction with the evidence of PW1, PW4,PW5 and found that it was corroborated by Exh P1 (the PF 3). We have already discarded the evidence of PW1 (the victim) and PW5 her immediate witness to whom she reported about the rape. The evidence of the victim is the primary evidence, the other pieces of evidence could only come in as corroboration. Once the primary evidence is discarded, and there being no other evidence to prove rape, no amount of other evidence could corroborate it, because there was nothing to corroborate. We therefore find that on the evidence the conviction was not justified.

Before we pen off, we wish to comment on the appellant's complaint that he was not afforded opportunity to call his witnesses. This complaint was in the supplementary memorandum of appeal, but was not pursued by Mr. Nasimire, learned counsel. What we have noted is that when the prosecution closed its case and the accused persons advised of their rights under section 231 CPA, the appellant indicated that he would testify on oath and call 3 witnesses. He proceeded to give the names and addresses of, at least, two of his witnesses. We also noted that during the trial the appellant was in remand custody. At the end of the trial the court recorded that the appellant indicated that:-

"I close my case"

We are not certain, whether the appellant was also asked if he still wanted his witnesses to testify. We think the better practice, in a case like this, where an accused is not defended; is to ask the accused about his intended witnesses and to record his answer. Such practice would satisfy an appellate court that the accused was accorded his rights under the law. Our apprehension is that the trial court may have, either forgotten or just

ignored to grant the appellant's request because there is no evidence on record to show that the trial court ever issued any summonses to his witnesses. The trial court has such power and the duty under sections 142(1) and 231(4) of the CPA, which provide:-

> *142(1) "If it is made do appear that material evidence can be given by or is in possession of any person it shall be lawful for a court to issue summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purposes of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons."*

This applies to the court's general powers to issue process to compel attendance of witnesses. But in particular, section 231(4) of the CPA provides:-

> *231(4) "If an accused person states that he has his witnesses to call but that they are not present in court and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of*

the accused person and that there is likelihood that they could; if present give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses."

This provision specifically applies to accused persons.

There is no indication in this case whether the trial court was even aware of this provision. But what is even more disturbing is that even the first appellate court, did not care to look into the complaint, but just dismissed it with a wave of the hand.

Those disturbing features in the conduct of the appellant's trial, especially his defence; would give doubts to any impartial tribunal, as to whether the appellant received a fair trial. In **SAMWEL LESILWA v. R.,** (CAT) Criminal Appeal No. 160 of 2008 (unreported) this Court found that:

"Failure to hear defence witnesses amounts to unfair trial and vitiates it."

This would have been enough to vitiate the appellant's trial. But for what we have said about the evidence as a whole, we are not inclined to order a retrial as that would not be in the interests of justice. We shall therefore allow the appeal on the ground of insufficiency of evidence. The conviction is accordingly quashed and the sentence set aside. We order that the appellant be forthwith released from prison unless otherwise lawfully held.

Order accordingly.

DATED at MWANZA this 26th day of February, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL