IN THE COURT OF APEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO.9 OF 2013

LAZARO s/o STEPHANO...APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(H.T. Songoro, J.)

Dated the 13th March, 2011

In

Criminal Appeal No. 240 of 2008

JUDGMENT OF THE COURT

23rd & 30th April, 2013

KIMARO, J.A.:

The appellant was convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code [CAP 16 R.E. 2002]. He was sentenced to thirty years imprisonment. His appeal to the High Court was dismissed. The appellant is still aggrieved, hence this second appeal to this Court.

The appellant came with four grounds of appeal challenging the propriety of the decisions of the two Courts below. First, he challenges the

first appellate Court for failure to see the omission by the trial Court to conduct a "*voire dire*" examination to Happiness Fosita, (PW1) the complainant, before the trial Court took a decision on how her evidence should have been received. He said the omission contravened section 127(2) of the Law of Evidence Act, [CAP 6 R.E. 2002].

Second, he faulted the first appellate Court for failure to see that the trial Court did not comply with section 240(3) of the Criminal Procedure Act, CAP 20]. The trial Court did not inform the appellant that he had the right to have the doctor called for cross - examination if he so desired.

Third, is a complaint that the results of the examination of the doctor that the complainant's private parts were found with spermatozoa should not have been acted upon because there was no proof that they came from him.

Last, is a complaint that the first appellate Court did not see the gap that was left in the prosecution case for failure to call evidence to corroborate the evidence of PW1.

At the hearing of the appeal, the appellant appeared in person. He was not represented. Mr. Hashim Ngole, learned Senior State Attorney represented the respondent Republic.

Shortly, the evidence upon which the appellant's conviction was grounded was that; on 11th April, 2007 at around 13.30 hours the complainant was going to her aunt. On the way the rains started falling. The appellant and another person saw her and called her. She did not respond. The appellant and the other person who was not charged followed her, and pulled her to a stall where the appellant and the other person were selling tomatoes. The complainant, PW1, screamed and shouted for help but nothing fruitful came out of it. The appellant, working in collaboration with the other culprit who managed to escape from the hands of criminal justice, wrapped her hands and covered her mouth to prevent sound from being heard. The appellant then undressed the complainant, laid her on the bed and they raped her in turn. The complainant said both the appellant and the other culprit inserted their penises in her vagina and she suffered a lot of pain and bled.

The evidence that supported the complainant came from Hamisi Fikirini (PW2). The incident of the rape was reported to this witness. He said the victim reported the rape and the pains she suffered. He also told the trial Court that the complainant was not walking properly. He arrested the appellant after the complainant gave his description. Onyango Ibraham, (PW3) testified that on the date of the commission of the offence, as he was walking along the road where the offence was committed, a little boy reported to him that, at the scene of crime, there was a girl who was crying because she was raped. The witness went to the scene of crime where he saw the complainant. She confirmed to PW3 that she was raped. This witness assisted the victim by taking her to the Village Location Chairman. He too, confirmed that the complainant was not walking properly because of the pain suffered because of the rape.

Apart from the oral evidence of the prosecution witnesses, documentary evidence of PF3 was relied upon by the prosecution and was admitted in court as exhibit P1. The results of the examination showed that the complainant suffered bruises at her private parts and semen were also

seen there. The appellant did not raise any objection to the admissibility of the PF3.

The appellant in his defence totally denied the commission of the offence. He also denied that he was selling tomatoes on a stall. He said on that day he was at Kamala Bangwe doing other work not related to selling tomatoes in stalls.

As stated, the trial Court was satisfied that the prosecution evidence proved the offence of rape against the appellant on the required standard. His conviction and sentence were upheld by the first appellate Court.

In arguing the appeal before us, the appellant did not have much to tell the Court. He opted to respond to his grounds of appeal after hearing the views of the respondent on his grounds of appeal. Fortunate for him, the respondent Republic supported his appeal. However, he prayed that the Court orders a re-trial, which the appellant objected to because of the number of years he has already spent in prison.

Expounding on the reasons for supporting ground two of the appeal, the learned Senior State Attorney said the non compliance with section 240(3) of the Criminal Procedure Act is supported by the record of appeal. He agreed with the appellant that the first appellate Court ought to have corrected this irregularity. This ground was raised by the appellant in the first appellate Court. The learned judge on first appeal saw the omission but said that because the appellant did not raise any objection to its admissibility, the PF3 was properly admitted.

With respect to learned judge on first appeal, the appellant was entitled to a fair trial. What a fair trial entails was well explained by the Court in the case of **Alex John V R** Criminal Case No. 129 of 2006 CAT (Unreported). **In essence, what the Court said in the case was that the rights of the accused person as guaranteed by any provision of the law must not be infringed by the Court. The Court has a mandatory obligation of informing the accused person of that right. Whether he chooses to exercise the right or not, is entirely a different matter**. Where the evidence of the PF3 is intended to be relied upon by the trial Court, section 240(3) of CAP 20 imposes a

mandatory obligation on the Court to inform an accused person of his right to have the medical doctor called for cross-examination if he so wishes. The Court has issued a lot of decisions on this matter. The cases of **Kirundila Bangilana V R** Criminal Appeal No.313 of 2007 and **Richard Bulori V R** Criminal Appeal No.25 of 2011(both unreported) are among the authorities.

With respect, we agreed with the learned State Attorney that the

the learned judge on first appeal erred in finding that the first trial Court rightly admitted the PF3. The admission of the PF3 in evidence was right only to the extent that it was admitted after it was shown to the appellant. But that itself, did not take away his right of having the doctor called for cross –examination. We allow this ground of appeal.

As for the complaint by the appellant that he, too, had to be medically examined so as to ascertain whether the spermatozoa that were found on the complainant's private parts came from him, this is a matter which could have been clarified by the doctor through his medical expertise. In this respect, we disagree with the learned Senior State

Attorney that it lacks substance. But since we have already said that the PF3 was wrongly admitted in evidence, this ground is rendered useless.

On the complaint by the appellant that the evidence of the complainant was not corroborated by other witnesses, we entirely agree with the learned Senior State Attorney that it is not the number of prosecution witnesses which matters but their credibility. As correctly pointed out by the learned Senior State Attorney, section 143 of CAP 6 R.E. 2002 does not specify any number of witnesses required to prove any fact. This means that, so long as the trial Court is satisfied with the credibility of a witness, that witness suffices to prove the particular fact in issue. This explains why the Court held in **Salum Makumba V R** Criminal Appeal No. 94 of 1999 (unreported) that the evidence of rape must come from the victim herself. This means that so long as the victim of rape satisfies the trial Court on her credibility that the facts she narrated to the Court on how the offence of rape was commuted are true, all things in the trial being equal, the Court need not call for further evidence to prove the rape. The cases of **Goodluck Kyando V R.,** Criminal Appeal No.118 of 2003 and **Majaliwa Guze V R.,** Criminal Appeal No. 213 of 2004 (both unreported),

also discuss the same aspect on the number of witnesses required to prove a case.

Coming now to the first ground of appeal where the appellant faults the first appellate Court for not correcting the error done by the trial Court for its omission to carry out "*voire dire*" examination before deciding on how the evidence of the complainant would have been received, we must out rightly say that we agree with the learned Senior State Attorney that the record of the appeal is clear on that omission by the trial Court. The record of appeal at page 6 shows that the age of Happyness Fosita (PW1), who gave evidence that she was raped, was 14 years. As submitted by the learned Senior State Attorney, section 127(2) of CAP 6 required the trial magistrate to carry out "*voire dire*" examination of the witness to ascertain her competence to testify, before ascertaining whether to receive the evidence of the complainant at all. It was after the trial magistrate had satisfied herself on the first aspect that the complainant possessed sufficient intelligence to give evidence, that a decision would then have be made on whether her evidence should have been received on oath or not on oath. Section 127(2) of Cap 6 provides:

"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the Court, understand the nature of oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the Court, which opinion must be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

Under the provision of section 127(5) a child of tender age is one whose apparent age is not more that fourteen years. For such a witness, it is mandatory first, to ascertain the competence of the witness to testify. After being satisfied on the competence, the trial Court will then determine whether or not the evidence should be received on oath /affirmation or not on oath/affirmation. The decisions of the Court on this aspect are various. Tthe cases of **Lyego Wilson V R.,** Criminal Appeal No. 194 of 2009, **Alfani Ramadhani V R.,** Criminal Appeal No. 2 of 2011, **Leonard**

Mdemu V R., Criminal Appeal No. 61 of 2008, **Noel Sanjila V R,** Criminal Appeal No. 103 of 2010 are some of them.

Since the trial Court did not address this requirement at all, before receiving the evidence of PW1, the complainant's evidence was wrongly received. We expunge it from the record because of the irregularity.

Having expunged the evidence of the complainant from the record, it means that the evidence of the prosecution which remains on record is not sufficient to prove the prosecution case against the appellant.

The learned Senior State Attorney requested the Court to order a re-trial. In the case of **Fatehali Manji V R.** (1966) E. A. 343 it was held that:

> "*In general a retrial may be ordered only where the original trial was illegal or defective; It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in the prosecution in its evidence at the trial...each case*

must depend on its own facts and an order for retrial should only be made where the interest of justice requires".

The same finding is also given in the cases of **Seleman Makumba**(supra) and **Sultan Mohamed V R.,** Criminal Appeal No. 176 of 2003 (unreported).

In this case we pointed out the faults made by the two lower Courts below. An essential question we have asked ourselves is whether ordering a retrial would be in the interest of justice. We are aware that the offence the appellant committed is a very serious one. Had the irregularities pointed out been dealt with by the two Courts below, the conviction of the appellant would have been appropriate, given the evidence on record. We also understand about the pains, sufferings, injuries and the trauma that the complainant went through because of violation of her human rights by the appellant, through the commission of the offence of rape. What we have given thought to is the fact that the appellant was convicted on 29th June, 2007. Today is 25th April 2013. The appellant has already spent more than six years in prison. At the time the offence was committed, on

11th April 2007, the complainant was fourteen years old. If a retrial is ordered, at the time the complainant will give her evidence, she will no longer be a child witness. This means that the requirement for the trial Court to conduct "*voire dire*" examination will not be there. The complainant will be more than fourteen years then. This means that even the defect the Court thought would be corrected, will have been rendered nugatory. For this reason we do not see the need for making a useless order of retrial. However, we remind all parties involved in the criminal justice system, particularly the Court and the Prosecuting Authority that they must ensure that each party does its duty efficiently, in order to avoid miscarriage of justice through letting offenders go free from their criminal liability because of inefficiency of the Court and the Prosecuting Authority.

Having said and done what the law requires us to do, we allow the appellant's appeal, set aside the conviction and order his immediate release from prison unless he is held there for any other lawful purpose. It is ordered.

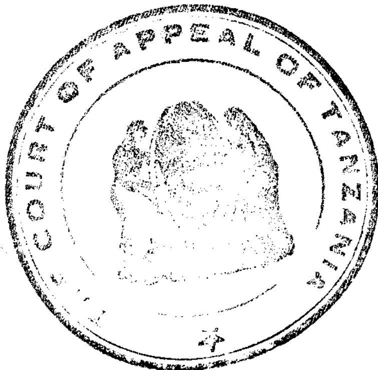
DATED at **TABORA** this 25th day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL