IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MSOFFE, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 116 OF 2013

MARIO ATHANAS SIPENG'A.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mtwara)

(Lukelelwa, J.)

dated the 4th day of July, 2005
in
Criminal Appeal No. 40 of 2005

JUDGMENT OF THE COURT

18th & 21st November, 2014

ORIYO, J.A.:

The appellant seeks to challenge the conviction of rape entered against him by the District Court of Newala at Newala and the sentence of thirty (30) years imprisonment imposed. His first appeal to the High Court was not successful hence the second appeal to this Court.

The uncontroverted facts that led to the conviction and the sentence mainly came from the testimonies of the victim, (PW2), her sister, (PW3), their father, (PW1) and the author of the cautioned statement of the appellant, (PW4). The testimonies of the prosecution witnesses were further corroborated by the defence (DW1). It was alleged at the trial that at around

17.00 hours on 16th November, 2003, PW2 together with PW3 left their parents' home and went around the cashewnut farms in their area carrying buns for sale. On reaching the cashewnut farm where the appellant worked, they sold some of the buns to him. The appellant showed an interest in PW2 and as they got engaged in conversation, PW3 went ahead with the sale of buns, leaving PW2 and the appellant together. It transpired that in the absence of PW3, the appellant raped PW2 and caused her to suffer grievous harm. When PW3 returned, she found the appellant sexually assaulting PW2 who was by then bleeding from her private parts. Back home, PW3 reported the incident to their mother who in turn informed her husband, (PW1) and the latter reported the matter to the Village Authorities. The appellant was subsequently arrested and sent to a police station. PW2 was issued with a PF3 for examination and treatment. The Chief Medical Officer of Masasi District confirmed the presence of bruises found in the private parts of PW2. His opinion was that

> "- *the bruises seen*
>
> - *were highly suggestive of a*
>
> - *blunt object having*
>
> - *penetrated the baby's*

- vagina."

The cautioned statement of the appellant authored by PW4 was admitted in evidence without any objection from him, in which the latter confessed to the commission of the offence, with the consent of PW2.
At the trial the appellant repeated what he had stated in the cautioned statement. When the cautioned statement was tendered at the trial as an exhibit, the appellant was required to state if he objected to its admission and he is on record to have stated the following, in reply at page 11 of the record:-

"No objection as I wrote the same myself."

At the closure of the prosecution case, the appellant was called upon to make his defence. He repeated the confession made in his cautioned statement and stated that he presented cashewnuts to PW2 to ameliorate the injuries she had sustained.

The appellant appeared alone at the hearing of the appeal. He did not have much to tell us apart from asking the Court to allow the appeal. The respondent Republic was represented by Mr. Hashim Ngole, learned Senior State Attorney and Mr. Paul Kimweri, learned State Attorney. Mr. Ngole addressed the Court.

In his memorandum of appeal, the appellant challenges the High Court decision on five (5) grounds which can be conveniently summarized into three (3) grounds as follows:

1. That the courts below erred in grounding conviction on the basis of the evidence of family members (PW1, PW2, PW3).
2. That PF3 was admitted contrary to the dictates of section 240 (3) of the Criminal Procedure Act.
3. That the trial was not held in **camera**, contrary to the law.

Resisting the appeal generally, Mr. Ngole, learned Senior State Attorney, submitted that on the whole, the appeal lacked merit. Responding to ground one of appeal on the evidence of family members, he submitted that though true, the law does not prescribe against conviction based on the evidence of family members.

We agree with the learned Senior State Attorney that what is at stake here is the **competence**, **credibility** and **reliability** of the witnesses. In the case of **Esio Nyomolelo and two Others vs Republic** Criminal Appeal No. 49 of 1995 (unreported), where the Court was seized of a similar complaint, it was stated:-

> *"It is common knowledge that in any trial, evidence is forthcoming from witnesses who directly or circumstantially witnessed the incident taking place....*
>
> *The fact that they are related to the deceased is in our view irrelevant. They were witnesses of credence and were believed by the trail judge. We see no reason for casting doubt on their evidence."*

See also the Court's decision in **Tatizo Juma vs The Republic**, Criminal Appeal No. 10 of 2013, (unreported).

In the present appeal, PW2 was raped and PW3 witnessed part of the sexual assault. PW2 and PW3 reported the incident to their parents which eventually led to the arrest and the prosecution of the appellant. PW4, the policeman who authored the caution statement, however, was not a member of the family. He testified that the appellant confessed to have raped PW2. As stated earlier, the appellant freely agreed to have the confessional statement admitted as an exhibit at the trial. In the circumstances of this case, the prosecution evidence was corroborated by the evidence of the appellant.

Therefore this ground lacks merit and it is dismissed.

Regarding the complaint that PF3 was wrongly relied upon as the law relating to its admission was not complied with. The learned Senior State Attorney conceded to the irregularity and submitted that the same ought to be expunged from the record.

Admission of Statements in court by medical witnesses which include PF3, are governed by **section 240 (3)** of the **Criminal Procedure Act**, which states as follows:-

> *"(3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate summon and examine or make available for cross-examination the person who made the report; and* ***the court shall inform the accused of his right to require the person who made the report to be*** *summoned in accordance with the provisions of this subsection."*
>
> (Emphasis supplied).

In view of the clear mandatory language exhibited in **section 240 (3)**, it is uncontroverted that the appellant was not informed of his right to have the medical officer summoned for cross-examination if he so wished; see the cases of **Mahona Sele vs Republic**, Criminal Appeal No. 188 of 2008, **Hassan Amri vs Republic,** Criminal Appeal No. 304 of 2010 and **Tatizo Juma vs Republic**, (supra), (all unreported).

On our part, we agree that the evidence of the PF3 was **illegally** admitted in evidence, thus infringing on the rights of the appellant.

In similar circumstances, where PF3 was illegally admitted, the Court stated as follows, in the case of **Ally Mohamed Makupa vs Republic**, Criminal Appeal No. 2 of 2008, (unreported):-

> *"It is true that PF3 (Exhibit P1) would have supported the commission of the offence. But rape is not proved by medical evidence alone. Some other evidence may also prove it."*

In the event, we order the evidence of PF3 to be expunged from the record. We are however, satisfied that even without the evidence of PF3 there still remains on record overwhelming evidence of rape against the

appellant by PW1, PW2, PW3 and as corroborated by the oral evidence of DW1 at the trial and his cautioned statement.

Lastly is the complaint that the trial was not conducted in **camera**. In response, the learned Senior State Attorney conceded but was quick to add that although the law imposes an obligation on a trial court to sit in **camera** in certain cases, proceedings conducted in open court are not a nullity unless it can be shown that a miscarriage of justice has occurred.

We think that the correct legal position is as was stated by the learned Senior State Attorney. In terms of **sections 186 (3), Criminal Procedure Act** and **3 (5), Children and young Persons Ordinance**, (Cap.13), an obligation is imposed on trial courts to sit in **camera**. It does not, however, mean that all proceedings held in open court are a nullity merely for having been so conducted unless it could be shown that a miscarriage of justice occurred; see **Herman Henjewele vs Republic**, Criminal Appeal No. 164 of 2005 (unreported).

In the present case, there is no evidence of miscarriage of justice occasioned to any party.

This ground also lacks merit and it is dismissed.

We feel constrained not to conclude our decision without discussing albeit briefly, the inconsistencies on record regarding the age of PW2. Starting with the charge sheet, the age of PW2 is shown to be nine (9) years at the time of the incident. When PW1 testified on 26/2/2004, he stated that his daughter was then ten (10) years old. After a lapse of another four (4) months, that is on 28/4/2004, when **PW2**, testified, the court record showed her age was thirteen (13) years. Apparently, these contradictions were not addressed by the trial court. They were raised for the first time in the first appellate Court by the learned State Attorney who represented the respondent Republic.

The appellant was charged and convicted under sections 130 (1), (2) (e) and 131 (1), (3) of the Penal Code. Section **130 (1)** provides:-

> *"It is an offence for a male person to rape a girl or woman."*

Subsection (2) thereof states:-

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:-*

(a)-(d) Not applicable.

*(e) with or without her consent when **she is under eighteen years of age**, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."*

In our view, in terms of the clear provisions of section 130 (1) and (2) (e), in order to qualify for the statutory protection in sexual offences, clear evidence has to be led to establish the age of the victim of sexual offence.

Faced with the inconsistencies in the prosecution evidence as regards the age of PW2 at the time of the incident, the age of PW2 in this case remained unascertained. To us, what can be discerned from the evidence of PW1, PW2, PW3 and PW4, is that PW2 was below the apparent age of fourteen (14) years. We say so because PW1 testified on her age as **nine years** at the time of the incident and ten years in the following year and it is generally accepted that a parent is best placed to know the age of a child.

In the case of **Salu Sosoma vs Republic**, Criminal Appeal No. 32 of 2006 (unreported), the father of the victim had testified as to the age of the victim and this Court observed:-

"The evidence of Maiko Lubola, PW2, the father of the victim, was cogent to ground a conviction. ***We are mindful of the fact that a parent is better positioned to know the age of his child."*** (Emphasis supplied).

In the case of **Emmanuel Kibona and Others vs Republic** [1995] TLR 241 in similar circumstances where the age of a child was at issue, the High Court held:-

"Evidence of a parent is better than that of a medical doctor as regards that parent's child's age."

See also **Edward Joseph vs Republic**, Criminal Appeal No. 272 of 2009, (unreported).

The evidence of PW1 on the age of PW2, in the present case, is corroborated by the testimonies of PW3, the elder sister of PW2. PW3 put her own age at 16 years as of 1/9/2004 which appears relatively practical, compared to that of his young sister, PW2.

In the final analysis therefore, we are satisfied, like the two courts below, that the prosecution proved its case beyond reasonable doubt. The appellant was correctly convicted of statutory rape in terms of **sections 130 (1), (2) (e) and 131 of the Penal Code**. Consequently we dismiss the appeal in its entirety.

DATED at MTWARA this 20th day of November, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL