IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 345 OF 2014

RAJABU SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Moshi)

(Jundu, J.)

dated the 13th day of November, 2006

in

DC. Criminal Appeal No. 95 of 2003

JUDGMENT OF THE COURT

20th & 26th February, 2015

MUSSA, J.A.:

In the District court of Mwanga, the appellant was arraigned and convicted of rape, contrary to section 130(2) (e) and 131 of the Penal Code, chapter 16 of the law. Upon conviction, he was handed down the statutory minimum sentence of thirty (30) years imprisonment with a corporal punishment of twelve (12) strokes of the cane. His appeal to the High Court was dismissed in its entirety (F.A.R. Jundu, J.), as he then was, hence this second appeal.

At the hearing before us, the appellant was present and fending for himself, unrepresented. The respondent Republic had the services of Mr. Khalili Nuda who was assisted by Ms. Adelaide Kassala, both learned State Attorneys. When asked to elaborate on his points of grievance, the appellant fully adopted his memorandum of appeal and, with leave of the Court, he also enjoined a written submission to further expound on the points raised in the memorandum of appeal. From the adversary side, Ms. Kassala resisted the appeal and fully supported the conviction and sentence. To appreciate the force behind the rival contentions of the parties, it is instructive to explore, albeit briefly, the factual background giving rise to the arraignment, trial and ultimate conviction of the appellant.

From a total of three witnesses and one documentary exhibit, the case for the prosecution was to the effect that on the 10th June 2007, at Mbore Village, within Mwanga District, the appellant had carnal knowledge of a girl named Zulfa Said (PW1) who was, at the material time, under the age of 18 years. In her testimony, Zulfa introduced herself as a twelve year old pupil of Mareti Primary School, Usangi and she further told the trial

court that she resides at Mbore Village with her mother, namely, Anifa Babu (PW3).

Evidence was to the effect that on the fateful day, Anifa departed from her residence around 9:00 a.m. to fetch firewood in the bush. She took along her children, namely, Zulfa, Omari, Babu (PW2) and Mariamu. Whilst in the bush, the family members dispersed in two different directions. More particularly, Anifa and her son, Omari went a different direction from Zulfa, Babu and Mariamu who were together. They arranged to re-assemble at a chosen rendezvous, as and when they were done with the firewood collection.

Around 11:00 a.m. or so, Zulfa, Babu and Mariamu completed the firewood collection and headed towards the rendezvous. On the way, they came across the appellant who requested the young trio to assist him shoulder a log. The youngsters obliged, put down their loads of fire wood and followed him but, soon after, the appellant insinuated that the trio abused him. The appellant was holding a knife and an iron bar in his hands and, just then, he ordered Zulfa to take off her clothes, threatening to kill her in case she shouts. As Zulfa heeded to the command, Babu and

Mariamu were ordered to lie face down, whereupon the appellant covered them with Zulfa's piece of *khanga*. Next, the appellant stripped himself down to nakedness and penetrated his manhood unto Zulfas' vagina. The young girl said she exprienced acute pains and, from the intrusion, she was discharging blood from her privates. Having accomplished the beastly act, the appellant dressed himself and disappeared.

In the meantime, Omari and his mother Anifa had arrived at the rendezvous and the latter was beseechingly calling her three children. Soon after, Zulfa, Babu and Mariam joined her and disclosed to her the despicable predicament which had befallen on Zulfa. Both Zulfa and Babu previously knew the appellant quite well, albeit only facially, as he (appellant) used to work at his father's *shamba* which is located near their own parent's *shamba*. Zulfa and Babu disclosed this detail to their mother who momentarily figured that the ravisher was the appellant. She, accordingly, relayed information to the police who issued a PF 3 and Zulfa was medically examined at Kilaweni Dispensary. The PF 3 was adduced into evidence and marked "PE1." According to Anifa, the appellant was arrested two weeks later as he was not in the village in the immediate

aftermath of the occurrence. With this detail, so much for the prosecution version as unveiled during the trial.

In his affirmed defence, the appellant refuted each and every prosecution detail by putting forth an *alibi.* His account was that throughout the fateful day, he was making bricks at his Kirongwe, Usangi residence. His village is located about seven kilometers from Mbore, where the victim and her family resides. On that day, he said, he did not move a bit from his residence and, in fact, from that day onwards, he was routinely engaged in brickmaking till when he was arrested by the police on the 5th July, 2001. To buttress his *alibi* the appellant featured into evidence his mother and father who are, respectively named, Mwanahamis Rajabu (DW2) and Shabani Ibrahim (DW3). Nonetheless, it is pertinent to observe that whereas (Dw2) only mentioned the 10th, the two elderly witnesses would not recall the exact day or the month when the appellant was fully engaged in brickmaking.

At the close of his reply, the appellant claimed that Anifa was his ex-lover with whom he used to intimately meet at Ngare near his grandfather's *shamba*. The appellant suggested, rather casually, that Anifa's accusation was prompted by the estranged relationship. The irony is

that the appellant did not put this detail to Anifa during her testimony. In reference to the infant witnesses, the appellant did not quite refute their contention that they used to see him frequently as he passed through their village heading towards Ngare. In his own words: "*it was not difficult for them to identify me.*" Having unreservedly disassociated himself from the prosecution accusation, the appellant rested his case.

On the whole of the evidence, the trial court was fully satisfied that the prosecution established its case to the hilt. Accordingly, in a remarkably short judgment, the appellant was found guilty, convicted and sentenced to the extent as already indicated. As, again, already indicated, his appeal to the High Court was dismissed in its entirety. In the present quest, the appellant seeks to impugn the verdict of the first appellate Court upon a memorandum comprised of six points of grievance of which we extract in full with its grammatical misnomers:-

1. *That, the first appellate court grossly erred in law and fact for failing to note that the appellant was not informed about his right requiring the doctor who fill the PF. 3 of the PW. 1 for cross examination. Your lordship, the section 240(03) of*

CAP 20 R.E. (2002) was not complied with. This miscarriage of justice.

2. *That, the first appellate court grossly erred in law and fact for failing to note that the requirements of sect 186(03) of C.P.A CAP 20(R.E. 2002) was not complied with. Your lordships, this is sexual offence the above section should be complied with.*

3. *That, the first appellate court grossly erred in law and fact for failing to warn itself that the evidence of the complainant is totally contradicted itself and it does not warrant the conviction against appellant. Please your lordship reter page 7 line 34 and at page 8 line 31 of the court records and further more at page 8 line 21-23 she consided that she doesn't mentioned the appellant that he is the person who raped her, this was during xxa by the appellant.*

4. *That, the first appellant court grossly erred in law and fact for failing to note that this is a criminal*

case and a serious one for that matter the case investigator was supposed to be summoned as a witness of the prosecution to support their allegation, Your Lordship, the case at hand had lacks of investigative evidence/report.

5. *That, the first appellate court grossly misdirection itself and consequently erred in law and fact for failing note that the lower court judgment has lacks of points of determination. Your Lordships, section 312(1) of C.P.A CAP 20 (R.E. 2002) was not complied with. See the case of* ***GEORGE MIGWE V. R*** *91989) T.L.R. 10.*

6. *That, the first appellate court grossly misdirection itself and erred in law and in law for rejecting the appellants defence of ALIBY, Merely because he doesn't comply with section 194(4) of C.P.A. CAP 20(R.E. 2002). Your lordships although the appellant failed to comply with the section of law the court is not expected not taking into account or*

considering it. Refer in case of (1) ***MASUD AMLIMA V. R.*** *(1989) T.L.R. 25(ii)* ***CHARLES SAMSON V. R*** *(1990) T.L.R 39."*

Addressing us on ground No. 1, Ms Kassala readily conceded that the PF 3 was improperly adduced into evidence, in as much as the appellant was not accorded his right to require the availability of the medical officer who prepared the report in terms of section 240 (3) of the Criminal Procedure Act (CPA). We entirely agree and, to the extent that the mandatory requirement was not complied with, we are constrained to expunge the PF3 from the record of the evidence. The learned State Attorney was quick to rejoin that even without the PF3, there was overwhelming evidence to sustain the conviction. As to whether she is right in so contending will be determined in due course.

Ms. Kassala also candidly conceded to ground No. 2 with respect to the requirement that the evidence of all persons in all trials involving sexual offences should be received in camera. For purposes of clarity, we deem it instructive to reproduce subsection 3 of section 186 of the CPA:-

"Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspapers or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."

It is beyond question that in the case under our consideration, the trial court did not comply with the extracted provision. Whilst conceding to the ailment, the learned State Attorney submitted that omission to conduct the trial in camera is curable under section 388 (1) of the CPA. In her focused submission, Ms Kassala urged that, to the extent that the appellant did not protest on the infraction during the trial, he cannot presently claim that he was prejudiced by the omission to receive the evidence in camera. Again, we entirely agree with Ms Kassala and, in this regard, we find it

opportune to reiterate what we stated in the unreported Criminal Appeal No. 312 of 2007 – **Godlove Azael @ Mbise Vs Republic**:-

> *"In what way was the appellant prejudiced under section 186 (3) of the CPA. Even at the late stage when he made his defence as DW1, he did not protest that since he was charged with a sexual offence, his evidence should be received in camera."*

To say the least, we find no merit in the complaint raised in ground No. 2.

In ground No. 3 the appellant tries to shake the veracity of Zulfa's account. In his written submission, the appellant elaborates that Zulfa did not quite give a description of the appellant as and when she was disclosing the occurrence, at first opportunity, to her mother. Furthermore, the appellant faulted the two courts below for not addressing the contradictions which are apparent in the testimonies of Zulfa and Babu. In this, respect, the appellant had reference to Babu's detail about their

mother calling them from the rendezvous which particular was not told by Zulfa.

To begin with, the complaint about the non-description of the culprit is wholly unfounded. The incident occurred in broad daylight and, as will be recalled, in their testimonial account, both Zulfa and Babu dislosed to their mother the particulars of the culprit whom they had frequently seen and facially knew. By the way, the appellant enhanced the prosecution's version in his concession that the infants used to see him frequently and that it was not difficult for them to identify him. As regards the alleged contradictions, we could not read any inconsistencies between the evidence of Zulfa and that of Babu. It may be that the latter was more detailed in his recollection of the events in the aftermath of the incident. That was, to us, quite understandable given the terrible ordeal to which Zulfa had gone through.

As regards ground No. 4, the complaint was that the investigation officer was not featured by the prosecution a witness. The appellant is seemingly suggesting that the non-calling tended adversely to the case for the prosecution. To this complaint, Ms. Kassala gave a tailored reply: On the terms of section 143 of the evidence Act, no particular number of

witnesses is required for the proof of any fact. We entirely agree, the prosecution is not required to call a superfluity of witnesses to prove any fact in issue. Furthermore, it is not the rule of the thumb that in every criminal case, the investigation officer must be called to testimony. In the particular circumstances of this case under which the determination of the issues of contention was primarily dependent upon the credibility of PW1, PW2 and PW3, it was not quite imperative for the prosecution to feature the investigation officer.

Coming now to ground No. 5, the appellant faults the trial court for non-compliance with the provisions of section 312(1) of the CPA which goes thus:-

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the Presiding Judge or magistrate in the language of the court and shall contain the points for determination, the decision thereon and the reasons for the decision and shall be dated and*

signed by the presiding officer as of the date on which it is pronounced in open court."

Again, the learned State Attorney candidly conceded that in the case at hand the extracted provision was not complied with on account that the judgment of the trial court does not contain the points for determination. Nonetheless, Ms Kassala added that the non-compliance was not fatal to the conviction, the more so as there was sufficient evidence which enabled the first appellate court to consider and sustain the conviction on the merits. She referred us to the unreported Criminal Appeal No. 36 of 2010 – **Evarist Mathias and Two Others V Republic** wherein it was held:-

"...failure to comply with the provision of that section will not necessarily invalidate a conviction if there is sufficient material in the record to enable the appeal court to consider the appeal on the merits."

Indeed, that is exactly what transpired in the situation at hand. Granted that the trial court's judgment did not formulate the points for determination but, on the first appeal, the learned Judge did so and, eventually, found the evidence to have sufficiently implicated the appellant.

We do subscribe to his conclusion and, that being so, we find no merit in the raised complaint.

Lastly, in ground No. 6, the appellant faults the trial court for rejecting his *alibi* simply on account of his non-compliance with subsection 4 of section 194 which imposes the requirement to give prior notice of an intention to rely on an *alibi*. From the records below, it is beyond question that throughout the trial, the appellant did not give prior notice of his defence of alibi just as he did not furnish the prosecution its particulars. In this regard, it is, perhaps, pertinent to reiterate on how the law stands as was succinctly laid down in **Charles Samson V Republic** [1990] TLR 39:-

> *"(i) The court is not exempt from the requirement to take into account he defence for alibi, where such defence has not been disclosed by the accused person before the prosecution closes its case.*
>
> *(ii) where such disclosure is not made, the court though taking cognizance of such defence, may, in its discretion accord no weight of any kind to the defence."*

When all is said and applied to the present situation, we are constrained to observe that in the light of the sufficient and strong prosecution material, the appellants defence of *alibi* was short of casting any doubt and, to that extent, the trial court properly exercised its discretion of not according it any weight.

Thus, all matters considered, we think that this appeal is devoid of any merit and, in the result, the same is dismissed in its entirely.

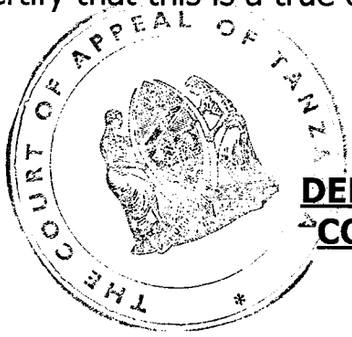
DATED at **ARUSHA** this 25th day of February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



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