IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., JUMA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 235 OF 2012

MOHAMED ABDALLAH MKUWILI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Dar es Salaam)

(Mwaikugile,J.)

dated the 15th June 2011
In
Criminal Appeal No. 70 of 2003

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JUDGMENT OF THE COURT

22nd February & 1st March, 2016

KIMARO, J.A.:

The High Court of Tanzania sitting as a first appellate Court sustained the conviction for rape and the sentence of thirty years imprisonment that was imposed on the appellant by the trial court of the District Court of Kisarawe. Being aggrieved by the decision of the High Court, the appellant filed eight grounds challenging the decision of the first appellate court.

The first ground of appeal can be combined with the seventh ground of appeal. The two grounds of appeal challenges the propriety of the charge

sheet. It is contended that the right provision under which the appellant was supposed to be charged is not cited. The second ground of appeal challenged the evidence upon which the conviction of the appellant was founded. The appellant says that the evidence of the complainant needed corroboration but there was no evidence which corroborated the evidence of the complainant. The complaint in the third ground of appeal was that the PF3 was admitted in evidence without complying with the procedure. Another complaint in the fourth ground of appeal is that there was an important exhibit which was mentioned by a witness, namely an underwear alleged to have been found at the scene of crime but was not produced in evidence. In the fifth ground of appeal the appellants says PW1 and PW2 were children witnesses and their evidence was recorded without a proper "*voire dire*" examination. The sixth ground is a complaint that there was no fair trial because the appellant was denied the right to call defence witnesses.

At the hearing of the appeal the appellant was self-represented. Ms. Mkunde Mshanga, learned Senior State Attorney, assisted by Ms. Clara Chami, learned State Attorney, represented the Republic/Respondent. The appellant opted to respond to his grounds of appeal after hearing what the respondents had to say about his grounds of appeal.

The learned Senior State Attorney supported the appeal and prayed that the appeal be allowed and the appellant be set free. In respect of the first ground of appeal the learned Senior State Attorney admitted that the charge sheet was not properly drawn. The charge sheet was drafted as follows:

"OFFENCE SECTION AND LAW: Rape c/s 130 of the Penal Code Cap. 16 Vol. 1 of the laws as amended by Act No. 4 of 1998.

PARTICULARS OF THE OFFENCE: That Mohamed Abdallah Mkuwili charged on the 26th day of October 1998 at about 14:00 hours at Kimbwanindi village within Mkuranga District, Coast Region did have carnal knowledge to one Chepe D/O Laimu without her consent."

The learned State Attorney said that the charge sheet did not cite the relevant provision of the law under which the offence was committed. Commenting on the evidence that was given by Chepe Laumu (PW1) and the complainant, the learned State Attorney said the age of the witness is shown to be 13. She was a witness of tender age. Since the complainant was under the age of 18 years, the learned Senior State Attorney said, the proper provision for charging the appellant was section 130(1) and 130(2)(e). Citing the cases of **Marekano Ramadhani V R** CAT Criminal Appeal No. 202 of 2013 (unreported) and **Mussa Mwaikunda v R** [2006]

T.L.R. 387 the learned State Attorney said the omission to properly charge the appellant occasioned a miscarriage of justice because the appellant failed to defend himself. The appellant had no response to this ground. He agreed with what the learned State Attorney told the Court.

In as far as this ground of appeal is concerned the error on the charge sheet is apparent. The charge sheet does not cite the proper provision of the law relevant to the age of the complainant. The evidence of the complainant is shown to be 13 years old. The learned Senior State Attorney said the proper provision under which the appellant was required to be charged was section 130(2) (e). The provision reads:

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

As the complainant was under the age of eighteen years, consent was immaterial. Proper particulars had to be given so that the accused/ appellant could know the consequences of the commission of the offence.

In the case of **Mussa Mwaikunda** supra, the Court held that:

> " *It is always required that an accused person must know the nature of the case facing him and this can be achieved if the charge discloses the essential elements of the offence charged."*

The essence of specifying that the complainant was under the age of 18 would have made the appellant become aware that consent is immaterial where the age of the victim of the offence is under the age of eighteen years. That would also have enabled him to prepare for his defence.

As regards ground two, the learned State Attorney submitted that before the evidence of the complainant (PW1) was recorded, a proper "*voire dire*" examination was required to be carried out by the trial court. The examination that was conducted by the trial magistrate before the complainant started testifying, said the learned State Attorney, was not sufficient to establish the competency of PW1 to testify and her understanding of telling the truth. She referred the Court to the case of **Shija Bosco @ Hamis V R** CAT Criminal Appeal No. 208 of 2009 (unreported). What the record shows is that before the evidence of PW1 was received the trial magistrate conducted the following examination:

> "*Court: the witness appears to be a child of tender years and remembers her evidence:*

Witness/Child: I am schooling Muslim School. I know the meaning of speaking the truth, means not speak false. I know the meaning of oath speaking the truth."

Court SGD Hon. S. Mnambya –DM

8/1/1999

COURT: I am of an opinion –that the child knows the meaning of an oath and therefore she will be administered an oath.

SGD : Hon. S. Mnambya –DM

8/1/1999"

After the *"voire dire"* examination the complainant started to testify. The above "*voire dire*" examination is what the learned State Attorney challenges for not meeting the required standard.

Section 127(2) of the Law of Evidence Act [CAP 6 R.E. 2002) reads as follows:

"*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 shall 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."

From the provisions of section 127(2) of Cap. 6 the evidence of a witness of tender age may be received on oath or affirmation only if the witness understands the nature of oath or affirmation and is possessed of sufficient intelligence. Such fact finding must be reflected in the record of the proceedings. In as far as the reception of the evidence of PW1 was concerned, we do not accept the submission by the learned State Attorney that the evidence of PW1 was unjustifiably received by the trial court on oath. The record of appeal shows that the trial magistrate fully complied with section 127(2) of Cap.6. The witness of the tender age (PW1) was asked whether she knew the meaning of oath. Her answer was that she knew the meaning of oath and that was speaking the truth and not telling false. Oxford Advanced Learner's Dictionary says that the word false means wrong; not correct or true. It means that the child witness (PW1) knew the meaning of oath. The decision of the Court in the case of **Kimbute Otiniel V R** CAT Criminal Appeal No. 300 of 2011(unreported) in expounding the meaning of oath quoted the case of **Rex V Pawlyna** [1948] Q. R.226-234 where the Court held that:

> *"An oath is solemn, sacred vow to speak the truth, the whole truth and nothing but the truth: The person who takes the oath impliedly professes that he or she has a consciousness of the duty to speak the truth and has a realization of the consequences of and punishment if willfully making a false assertion."*

The trial magistrate in this case complied with the law before the evidence of the complainant (PW1) was recorded.

The learned State Attorney further faulted the learned judge on first appeal for failure to see that the trial magistrate did not conduct a "*voire dire*" examination on Saidi (PW2) who was also a witness of tender age. With respect to the learned State Attorney, we do not think that the learned State Attorney is supported by the record of appeal. The record of appeal at page 9 shows that before Saidi gave evidence, the trial magistrate conducted a"*voire dire*" examination with a view of being satisfied whether the witness understood the meaning of oath. It was after the witness confirmed that he understood the meaning of oath that he was allowed to testify.

We agree with the learned State Attorney that the evidence of Stephen John Jonas (PW3) is doubtful. His evidence was recorded on oath but his

age is not shown. He is only recorded to be a child. It was important for the trial magistrate to record the age of the witness for purposes of ascertaining whether there was compliance with the law.

The substance of the evidence that was given in the case by the victim of the offence that is the complainant (PW1) was that on the 26th October 1998 at around 2.00 p.m. at Kimanzichana village she was sent by her aunt to call his uncle, one Juma. On the way she met the appellant who took him by force into the bush and raped her. Although she shouted no one heard her because the houses were very far. Her under wear was left at the scene of crime. She tendered in court a PF 3 form but the record does not show that it was admitted in evidence and marked as an exhibit. Saidi (PW2) confirmed that he was with PW1 when they met the appellant who, despite PW1's resistance took her to the bush by force saying that he was going to give her a present. PW3 said he was an eye witness to the commission of the offence. On that day the witness was returning from school. He heard someone shouting I am dying. He went to the area where he saw the appellant committing the offence. The last prosecution witness Juma Abdallah Mpoto (PW4) testified that on the date the offence was committed, he was in his farm cultivating. Saidi (PW2) reported to him that his sister had been caught and taken into the bush. He went to the scene of crime.

At the time he arrived there the appellant had left. The matter was then reported to the chairman and later the appellant was arrested.

The defence of the appellant was that he did not commit the offence. He was arrested on 26th October 1998 when he went to visit one Abunyeni who was indebted to him. On the way he met two young men who arrested him after he had arrived at Abunyeni's home. He said Abunyeni said he did not have the money to pay back. He was arrested and taken to Mwalusembe village where the complainant (PW1), complained that he raped her. He was then taken to the Police Station at Mkuranga and subsequently charged.

Back to the grounds of appeal, the learned Senior State Attorney said the complaint by the appellant in his ground three of the appeal that the PF3 was received in evidence is true because the trial magistrate did not make a record that it was admitted as an exhibit. She said it was also wrongly relied upon to convict the appellant because section 240 (3) of the Criminal Procedure Act, [CAP 20 R.E. 2002] was not complied with. For this ground of appeal it has merit. The record of appeal at page 7 shows that the complainant did say in her evidence that she was producing the PF3 as exhibit. However, the trial magistrate did not make any record for its admission. Despite the omission the trial magistrate relied on the PF3 to

convict the appellant. He said in his judgment at page 22 of the record of appeal that:

> *"In looking at the whole of the evidence on the prosecution side together with the medical evidence on the prosecution side together with the medical evidence that is PF3 proves the complainant was raped and according to the evidence of the complainant herself said she was raped by the accused person. Her evidence is corroborated by the medical evidence of PF3 which report confirms that the complainant was raped. This evidence is good enough to believe that the accused person committed the offence which he has been charged."*

Although the first appellate court noted this error of the trial magistrate it brushed it aside and said that the compliance of section 240(3) of Cap.20 was subject to the accused person requesting the trial magistrate to summon the doctor for cross examination. Since that was not done he had no right to complain. With great respect to the learned judge, we do fault his finding. Section 240(1) of Cap. 20 says that any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be received in evidence. Under sub section 3 of section 240 the court has a mandatory duty to inform the accused person that he/she has the right to have the medical witness summoned for cross examination.

The error committed by the trial court and confirmed by the first appellate court is that there is no record that the PF3 was actually received in evidence. That is one. Secondly, there is no record indicating that the appellant was informed of the right to have the medical witness who prepared the PF3 that was relied upon to convict him summoned and he waived that right. With that omission it means that the medical evidence in the PF3 could not form the basis of the appellant's conviction. In the numerous decisions of the Court decided on this issue the Court emphasized that failure of the trial court to comply with that provision is a fundamental irregularity. The cases of **Juma Chokoro v R** CAT Criminal Appeal No.23 of 1999 and **Kashana Buyoka V R** CAT Criminal Appeal No. 176 of 2004 (both unreported) are among such decision. Where there is such irregularity, the effect of it is to expunge from the record the medical evidence which was unlawfully used and we hereby expunge from the record the medical evidence of PF3.

The appellant raised in the fourth ground of appeal that an under wear found at the scene of crime was not produced in evidence. We agree with the learned Senior State Attorney that its production in evidence was not necessary, given the offence that the appellant was charged with. The appellant was charged with rape. According to section 130 (4) (a) of the

Penal Code, the important ingredient of the offence which has to be proved is penetration of the male organ into the female organ however slight that penetration could be. See the case of **Seleman Makumba V R** [2006] T.L.R. 379.

In grounds six the learned State Attorney supported the appellant that he was denied the right to call the defence witnesses he had indicated that he wanted to summon. This is a true complaint. The record of appeal at page 12 shows that when the accused was addressed by the trial court under section 231 of the Criminal Procedure Act after the prosecution case was closed, the appellant indicated that he had a witness to call. But on 15/04/1999 when the appellant gave his defence, the record does not show that he was given the opportunity to say whether or not he still intended to summon his witness. The omission by the trial magistrate to ask the appellant about that right infringed the right to a fair trial. Just as the prosecution had the opportunity to summon all their witnesses the appellant had a similar right to summon the defence witnesses he thought would assist him to prove his defence case. In the case of **Kabata D/O v R** CAT Criminal Appeal No.281 of 2014 (unreported), the Court held that:

> *" There is no gainsaying that the right of a fair hearing clearly enshrined in the Constitution is synonymous*

with the right to a fair trial. We take it to be common knowledge that one of the basic attributes of this universally recognised attributes is a trial before an impartial court or tribunal."

So it was wrong on the part of the trial court to not afford equal opportunity to the appellant when he gave his defence. The last ground which remains is ground number three. The complaint by the appellant in this ground is that the evidence of the tender age witnesses of PW1, the complainant, PW2 and PW3 was not enough to prove the charge against the appellant. Definitely, there is no sufficient evidence to sustain the conviction. But of most importance is the finding on the charge sheet that it was defective and was not curable. In the case of Mwaikunda (supra), the Court held further that:

"*The defect of the charge in this case was not curable under section 388 (1) of the Criminal Procedure Act 1985 because threatening, an essential element of the offence of attempted rape was omitted from the particulars of the charge and the complainant did not say anywhere in her evidence that she was threatened by the appellant, and there was as such no room for saying that the appellant knew the nature of the case that was facing him; charge that*

does not disclose any offence in the particulars of the offence is manifestly wrong and incurable."

A similar situation applies in this case. Apart from the omission by the prosecution to properly charge the appellant, after expunging the medical evidence from the record, there remains no evidence to sustain the conviction of the appellant. The witnesses are not coherent on how the offence was committed. So even if the charge was properly drawn but we have found that it was not, the evidence which remains on record is not sufficient to sustain the conviction. Ultimately we allow the appeal, quash the conviction and set aside the sentence. We order the release of the appellant from prison unless he is held there for other lawful purposes.

DATED at **DAR ES SALAAM** this 26th day of February, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL