IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 15 OF 2016

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And NDIKA, J.A.)

MASHAKA MUSSA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es salaam)

(Mushi, J.)

dated the 10th day of May, 2012
in
HC Criminal Appeal No. 121 of 2011
.....

JUDGMENT OF THE COURT

23rd October, & 20th November, 2017

MBAROUK, J.A.:

In the District Court of Morogoro at Morogoro, the appellant, Mashaka s/o Mussa was arraigned with the offence of rape contrary to the provisions of Sections 130 (1) (2) (c) and 131 of the Penal Code, Cap. 16 R.E. 2002. He was convicted as charged and sentenced to life imprisonment. Aggrieved by the decision of the trial court, his first appeal before the High Court of Tanzania (Mushi, J.) was dismissed, hence he has preferred this second appeal.

Briefly stated, the facts of the case which led to the appellant's conviction at the trial court was based on five prosecution witnesses, namely Rehema Mathias (PW1) Kazimba Masanja (PW2), WP. No. 1876 D/Cpl. Rukia (PW3), Elizabeth Jacob Lukanda (PW4) and Joseph Aman (PW5).

PW1 (the victim) testified to the effect that, on the fateful day she was heading to fetch water as she felt thirsty. On her way, she went to the appellant's house to ask for drinking water. The appellant invited her inside his house. While inside the house, the appellant grabbed and laid her down and pulled her skirt and underwear. The appellant then forced his penis into the PW1's vagina. She shouted for help as she felt pain.

PW2, testified to the effect that, on 9/11/2010 at about 2.00 p.m., he was at his home with his visitors when suddenly several women approached him and told him that a girl entered into the appellant's house and they heard noises, therefore he went to the appellant's house and through a window he was surprised to see the appellant and PW1 naked. He then asked the appellant, "Mashaka umefanya nini?" The appellant was then caught by those women and several Masai people. PW2 said he then heard the appellant asking for mercy and then told him "wewe rafiki yangu mbona unanipotezea?". He further testified that, those women checked PW1 and found her raped.

PW5 who was the neighbour of the appellant and uncle of PW1 testified that, he was telephoned by Kazumba (not a witness) informing him that his niece had been raped. PW5 hurriedly went to the scene of crime where he found a gathering and the appellant was arrested. The appellant was then taken to Dakawa Police Station where he was detained and PW1 was given PF3 and went to hospital. At the hospital, PW4 examined the victim and eventually found PW1 to have been penetrated by a blunt object in her private parts.

In his defence, the appellant categorically denied to have committed the offence charged against him. He testified that on 9/11/2010 at about 2.00 p.m., he was at his house repairing his bicycle. The appellant further testified that, PW1 lied in court as he never grabbed and raped her. He also added that PW2 also lied in court as he never saw him raping PW1. He further said that, even the doctor (PW4) never saw bruises in the private parts of the victim. The appellant also claimed that he was at loggerheads with PW2 as they were after the same woman called Mama Evisha. For that reason, the appellant asked the trial court to disregard the evidence of those prosecution witnesses.

In this appeal, the appellant appeared in person unrepresented on one hand. Whereas, the respondent/Republic was represented by Ms. Mkunde

Mshanga, learned Senior State Attorney assisted by Ms. Jackline Werema, learned State Attorney.

The appellant preferred the following six grounds of appeal, namely:-

1. *That, the first appellate court, erred both in law and fact by upholding conviction against the appellant on a charge which is full of doubts and not proved beyond reasonable doubt as* voire dire *made from PW1 was irregularly taken.*
2. *That, the first appellate court erred in law and fact by acting on the evidence of PW4 and exhibit P1 (PF3) which were doubtful because the examination did not discover neither bruises nor sperms in the private parts of the victim.*
3. *That, the first appellate court erred in law and fact for its failure to apprehend the evidence adduced, since the actual date when the alleged crime occurred was different from the charge sheet.*
4. *That, the first appellate court erred in law and fact for its failure to observe that there was no any material evidence to prove that the appellant admitted to have*

committed the crime and that the age of the victim was not proved.

5. *That, the first appellate court erred in law and facts for basing on frivolous matter in favour of prosecution and defence case was not considered.*
6. *That, the first appellate court erred in law and fact by not considering that the whole incriminating episode adduced and the charge against the appellant was cooked and planted for the interest of the prosecution, because material witnesses, the women who heard the victim crying were not called to testify.*

At the hearing of the appeal the appellant, opted to allow the learned Senior State Attorney to submit first in response to the appeal and be allowed to give his rejoinder submission if the need arises.

On her part, Ms. Mshanga from the outset opposed the appeal, and prayed to give her response by arguing the 1st, 2nd, 3rd and 4th grounds separately in *sequence* and by combining the 5th and 6th grounds of appeal together.

In her response to the 1st ground of appeal, Ms. Mshanga referred us to pages 6 and 7 of the record of appeal where *voire dire* examination was

conducted on PW1. The learned Senior State Attorney submitted that the trial magistrate was satisfied that the conditions laid down under section 127 (1) and (2) of the Evidence Act were complied with as PW1 was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the meaning of oath. She added that, the trial magistrate's failure to establish and state that PW1 being a child of tender age was intelligent enough did not occasion any injustice. In support of her argument, she cited to us the decision of this Court in the case of **Tumaini Mtayomba v. Republic,** Criminal Appeal No. 217 of 2012 (unreported). For that reason, she urged us to find this ground of appeal devoid of merits.

As to the 2nd ground of appeal, the learned Senior State Attorney refuted the contention made by the appellant that PF3 was silent in proving the offence of rape. She submitted that PW4 positively proved that PW1's private parts were penetrated by a blunt object and led to a dangerous harm. She added that, in proving penetration, it is not necessary to have noted bruises in the victim's private parts. She further submitted that PW4's evidence corresponds with the evidence of PW1 as she testified to have felt pain when she was raped. The learned Senior State Attorney then urged us to find that the requirements under section 240(3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] were compiled with and there is no reason to fault

the trial court's finding which was upheld by the first appellate court. She further urged us to find that, the second ground of appeal has no merit as the issue of penetration was established.

As regards the third ground of appeal concerning the issue of contradictory dates when the offence of rape was committed, the learned Senior State Attorney submitted that, it was a mere typing error as the original record shows that the dates resemble each other, that found in the charge sheet and those which appear in the testimonies of PW1, PW2 and PW3. For that reason, she urged us to find the third ground of appeal devoid of merit too.

As regard the fourth ground of appeal. Ms. Mshanga maintained that there is no flicker of doubt that, the appellant was identified at the scene of crime by PW1, PW2 and PW5 where he was arrested and that the incident occurred during day time and he was well known to those witnesses. Concerning the issue of the age of the victim, the learned Senior State Attorney submitted that the record of appeal shows that the victim herself testified that she was nine years old, a fact that was confirmed by PW5 (the victim's uncle) who testified to that effect too and the Medical Officer PW4. For that reason, she urged us to find the fourth ground of appeal to have no merit.

Lastly, as for the 5th and 6th grounds of appeal, the learned Senior State Attorney submitted that the evidence adduced by the prosecution witnesses PW1 to PW5 did prove the case beyond reasonable doubt. In concretizing her argument, she pointed to us that the incident occurred during day time and PW2 who identified the appellant at the scene of crime testified to have known him for the past twenty years. She said, even the appellant himself admitted to have known PW2. Hence, she urged us to find the 5th and 6th grounds of appeal to be devoid of merit and dismiss the appeal.

In essence, in his rejoinder submissions, the appellant mainly reiterated what he has submitted earlier on in his grounds of appeal and insisted not to have committed the offence.

Minded with the principle that in a second appeal generally we are precluded from interfering with the concurrent findings of fact unless it is shown that there is a misdirection or non-direction, (see **DPP v. Jaffari Mfaume Kawawa** [2981] TLR 149) we will first discuss the question of *Voire dire* examination. In the case at hand, the appellant is complaining on the admissibility of PW1's evidence as a child of tender age. He was of the view that the evidence of PW1 was irregularly taken because the inquiry made by the trial court when *voire dire* examination was conducted was

based on a religious test, which was not proper for determining the intelligence of a child of tender age.

It has to be considered that, generally all witnesses in criminal matters are competent to testify on oath or affirmation unless the court considers that they are incapable of understanding the questions put to them or of giving rational answers to those questions by reason of old age, disease, whether of body or mind.

Section 127 of the Evidence Act reads as follows:-

"*(1) Every person shall be competent to testify*

unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause.

(2) 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 an 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. (Emphasis added).

As provided under subsection (5) of section 127 of the Evidence Act, for the purposes of subsection (2), the expression "child of tender age" means a child whose apparent age is not more than fourteen years. So, subject to the mandatory provision of subsection (2) above, a child of tender age can be a competent and compellable witness in criminal proceedings. The bar from testifying to a child of tender age who does not understand the nature of an oath and if not in possession of sufficient intelligence, which would enable him to discern the difference between right and wrong, is justified on the same basis as the statutory defence of immaturity under section 15(1) and (2) of the Penal Code for children of almost similar age.

It is therefore important that, before the evidence of a child of tender age is taken, a trial court has a duty to ascertain whether such witness is competent to testify on oath or affirmation by conducting a *voire dire* examination test.

There is no hard and fast rule which has been laid down to declare as to which questions are to be asked. Any question may be asked so far as it

can establish the competency of such a child of tender age. For instance, this Court in the case of **Mohamed Sainyeye v. Republic,** Criminal Appeal No. 57 of 2010 (unreported), we provided the following guidelines:-

> ***"PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY.***
>
> ***A. ON OATH***
>
> 1. *The Magistrate or a Judge questions the child to ascertain:*
>   a. *The age of the child.*
>   b. *The religious belief of the child.*
>   c. *Whether the child understands the nature of oath and its obligations, based upon his religious beliefs.*
> 2. *Magistrate makes a definite finding on these points on the case record, including an indication of the question asked and answers received.*
> 3. *If the court is satisfied from investigation that the child understands the nature and obligations of an oath, the child may then be sworn or affirmed and allowed to give evidence on oath.*

4. *If the court is not satisfied that the child of tender age understands the nature and obligations of an oath the will not allow the child to be sworn or affirmed and will note this on the case record:*

B. UNSWORN

1. *If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child* ***two things:-***

   (a) *That the child is possessed of sufficient intelligence to justify the reception of the evidence,* ***AND***

   (b) *That the child understands the duty of speaking the truth. Again the findings of each point must be recorded on the record.*

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)

Court should indicate on the record and the child should not give evidence."

(Emphasis added).

From the above guideline, any question regardless of religion or not may be put to a child. What is important is for the trial magistrate or trial judge to inquire if the child understands the nature of an oath **or** she is possessed of sufficient intelligence and understands the duty of speaking the truth.

In the instant case, the trial magistrate inquired and found that PW1 the child of tender age knew the meaning of an oath. As pointed out by the learned Senior State Attorney not stating that PW1 is not possessed of sufficient intelligence to testify did not occasion any injustice, because the trial magistrate saw the demenour of PW1 and was satisfied that she could proceed to testify on oath. To that end, we see no reason to fault the trial magistrate, and we find the first ground of appeal devoid of substance.

As regards the second ground of appeal, we are of the considered opinion that the appellant's claim that, the first appellate court failed to take precautionary measures following the doubtful evidence of PW4 and the PF3, is baseless. This is because, PW4 examined PW1 and found her to have been penetrated by a blunt object in her private parts. She then tendered the PF3 which was admitted without any objection from the appellant.

There is no gainsaying that, under our Penal Code, the offence of rape can be committed by a male person to a female in one of the two ways.

One, having sexual intercourse with a woman above the age of eighteen years without her consent. **Two,** having sexual intercourse with a girl of the age of eighteen years or below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be proved beyond reasonable doubt is the element of penetration i.e. penetration of the penis into the vagina even to the slightest degree. For instance see our decision in **Masomi Kibasi v. Republic,** Criminal Appeal No. 75 of 2005 (unreported).

It is now settled law that the proof of rape comes from the victim herself. For other witnesses who never actually witnessed the incident, such as doctors may give corroborative evidence. In support of this position, see our decision in the case **Selemani Makumba v. Republic,** [2006] TLR 379 and **Alfeo Valentino v. Republic,** Criminal Appeal No. 92 of 2006 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See, **C.D. de Souza v. B.R. Sharma** (1953) EACA 4. But in the instant case, we have seen no reason to do so. For that reason, we are of the view that apart from the evidence of the victim herself and that of PW2 to the effect that she was raped, the evidence of PW4 and PF3 (Exhibit P1) did corroborate that PW1 was penetrated by a blunt object into her private parts. Hence, that evidence

was enough to prove the essential ingredient of rape. We therefore find the third ground of appeal to lack merit.

As for the fourth ground of appeal concerning the issue of age of the victim, we are of the considered opinion that, there is enough evidence on record to prove that PW1 was a child of tender age. For example, at page 6 of the record of appeal, PW1 herself testified to be nine years old and the appellant did not raise any concern when he was given a chance to cross-examine her. As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness have testified. See the decision of this Court in the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported).

As for the fifth ground of appeal by which the appellant is faulting the first appellate court for basing its decision on frivolous matter in favour of the prosecution and that his defence was not considered, we have gone through the record of appeal and scrutinized the evidence of PW1, PW2, PW3, PW4 and PW5 and arrived at a conclusion that they have proved the offence against the appellant beyond reasonable doubt. Also having revisited the proceedings on record, we have found that his defence was considered by the trial court and did not cast any doubt to exonerate himself from the

offence he was charged with and subsequently convicted. For that reason, we find the fifth ground of appeal devoid of merit too.

As regards the last ground of appeal, the appellant complained that, the charge against him was cooked and planted for the interest of the prosecution, because material witnesses were not called to testify and that the said omission raised doubt on the prosecution's case. **Firstly,** we need not say much on this issue as the same was not raised and considered by the first appellate court, hence to raise it in this second appeal is an afterthought. **Secondly,** it is trite law that no particular number of witnesses is required to be called by the prosecution to prove a case. Section 143 of the Tanzania Evidence Act, Cap 6 R.E. 2002 provides clearly that no specific number of witnesses is required to prove a case. (See, the case of **Emmanuel Luka and Two Others v. Republic,** Criminal Appeal No, 325 of 2010 (unreported). We are of the view that the witnesses who were called by the prosecution proved the case beyond reasonable doubt.

In passing, we have noted in the judgment of the High Court that the first appellate judge misstated the term of imprisonment of the appellant as thirty (30) years, whereas the correct imprisonment term as imposed by the trial court after convicting him, was life imprisonment as the victim of rape was a girl under the age of ten years. (See section 131(3) of the Penal Code).

To make things clear, we therefore restore the findings of the trial court on the issue of sentence as well as conviction.

In the final analysis, we find the appeal devoid of merit and we hereby dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 8th day of November, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is true copy of the original.

C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL