IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 499 OF 2015

PHILIPO EMMANUEL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Nyangarika, J.)

dated the 10th day of September, 2015
in
DC. Criminal Appeal No. 28 of 2015

JUDGMENT OF THE COURT

19th September & 2nd October, 2017

MUSSA, J.A.:

In the District Court of Mpanda, the appellant was arraigned and convicted for rape, contrary to sections 130(1) and (2) (e) and 131(12) and (3) of the Penal Code, Chapter 16 of the Revised Laws. Upon conviction, he was sentenced to thirty years imprisonment. His appeal to the High Court was dismissed in its entirety (Nyangarika, J.), hence this second appeal. Before we address the issues of contention raised in the memorandum of appeal we think it is necessary to unveil the

circumstances which led to the appellant's arrest, arraignment and his ultimate conviction before the trial court.

From a total of four witnesses and a documentary exhibit, the case for the prosecution was to the effect that on the 24th September 2013, at Nsemulwa area, within Mpanda Township and District, the appellant did, unlawfully, have sexual intercourse with a certain Hadija Omari, who was, then, aged thirteen. The alleged victim was featured into the witnesses' box as prosecution witness No. 1 (PW1), whereupon she was affirmed and introduced herself as a pupil aged 13.

It is significantly noteworthy that, despite her age, PW1 was not subjected to a *voire dire* test as was then required by the now re-enacted section 127 of the Tanzania Evidence Act, Chapter 6 of the Revised Laws. We shall, at a later stage of our judgment, revert to this disquieting aspect of the proceedings below to determine its consequences.

To resume the factual setting, PW1's testimony was to the effect that she was residing at Nsemulwa area with her mother and that she knew the appellant quite well as the latter was married to her sister whom she named as "Edda". For some obscure cause, the prosecution

did not feature any witness in the name of 'Edda" but PW1's mother, namely, Mariam Petro Shaisa gave testimony as prosecution witness No. 2 (PW2). Incidentally, the witness confirmed the detail about the appellant being married to her elder daughter but it is significant to note that, throughout her testimony, PW2 kept referring to her as "my elder daughter" without particularizing her name. Nonetheless, upon our reflection on the defence case, it seems to us that PW2's elder daughter is none other than Fatuma Omary (DW4).

On the fateful day, PW1, PW2 and DW4 were at their Nsemulwa residence. Around 6.00 p.m. or so, PW2 instructed PW1 to go buy some kerosene worth a sum of shs. 200/= at a nearby shop. As PW1 left for the shop, PW2 retired to her bedroom for a rest as she was feeling unwell. According to her, DW4 was just as well resting as she was pregnant and complaining of a headache.

In the meantime, as she walked towards the shop, PW1 came by the appellant whom she asked to buy her a piece of candy and a biscuit. The appellant obliged and, having bought the sweeties, he offered to escort PW1 back home. The appellant then led the little girl into an

unfinished building which was roofed but was without windows and doors. Upon entry, the appellant allegedly got into no good: He undressed his sister-in-law following which he forcefully inserted his manhood into the little girl's vagina and had sex with her. PW1 experienced untold pains, but she was completely helpless as the appellant had gagged her mouth. At the end of the heinous act, the appellant drew out a sum of shs. 11,000/= which he gave PW1. His instructions were that PW1 should deliver a sum of shs. 5,000/= to her sister and retain the remainder for her own use. The appellant also cautioned Hadija not to disclose the intimate incident between them to any person.

From the unfinished building PW1 walked back home alone and, upon entry, she was encountered with an inquisitive gaze of her mother. PW2 was particularly concerned with the late arrival of PW1 and, as she observed her closely, the little girl was seemingly roughed up with bits of grass and sand on her head. Her immediate enquiry to her was as to what went wrong to which she was initially prevaricative but, after a brief dialogue with her sister, Hadija disclosed the detail about being ravished by the appellant. According to PW2, Hadija further disclosed the other

detail about being given by the appellant a sum of shs. 5,000/= with a view to give it to her sister. As to what transpired next, we should let PW2 speak in her own words: -

> *"My elder daughter wondered on how Filipo could give the victim money as he had never done so. She asked me a mobile phone and phoned to the accused and made the speaker louder. The accused received the call. She asked him whether he had met Hadija and replied yes. He said through the phone that he has given her Tshs. six thousand whereby Tshs. 1,000/= was for Hadija and 5,000/= for her own use."*

Thereafter, PW1 led PW2 to the scene of the alleged rape where the kerosene she was sent to buy as well as the pieces of candy and biscuit given to her by the appellant were still there. From there, they proceeded to Mpanda police station onwards to hospital where PW1 was examined by Dr. Japhari Mohamed (PW3) who determined that the victim had traces of male sperms on her genital organ and that she

suffered lacerations on her vaginal vulva. In the aftermath, the appellant was arrested on the same day and formally arraigned on the 30th September, 2013. That concludes the version told by the prosecution witnesses in support of the charge.

In reply, the appellant completely disassociated himself from the prosecution's damning account. Nonetheless, the appellant, a polygamist with two wives, did not quite refute knowing PW1 whom, he said, was a younger sister of his junior wife. His testimony was to the effect that on the fateful day, around 6.00 p.m. or so, he and his senior wife, namely, Esta Lazaro (DW2), departed their residence which is situate at Mpanda Hotel area destined for Nsemulwa area. As it were, the purpose of the visit was to recover a sum of shs. 470,000/= owing to DW2 from a certain Twalib Said (DW3). The couple departed on a bicycle and reached the neighbourhoods of their destination around 6.45 p.m.

Just then, PW1 emerged and informed the appellant that there was a sick child at his junior wife's home. The appellant then left his wife at the spot to converse with PW1. He re-emerged ten minutes later and

told DW2 that he gave PW1 a sum of shs. 5,000/= to hand over to his junior wife. Soon after, the couple located their debtor and after negotiations which lasted for two hours, the parties were agreed on the terms and mode of payment. Having brokered the deal, the appellant and his elder wife departed for their home around 9.30 p.m. and eventually reached home around 1.00 a.m. Moments later, the appellant was arrested and implicated for the rape accusation.

There was further defence evidence from Fatuma Omary (DW4) who introduced herself as a wife of the appellant. As we have hinted upon and, from the tone of her testimony, it is discernible that DW4 is, actually, the much talked about junior wife of the appellant. Her testimony is, to us, indispensable and, for that reason, we deem it instructive to extract her account in full beginning with her evidence in-chief: -

> *"On 24/9/2013 at 19.45 hrs my young sister Hadija Omary brought me Tshs. 5,000/= alleging to have been given by her brother in law for expenses. She told me that her brother in law*

was greeting me. I was with mother. Then mother said: I have got a chance (sic) of implicating my husband. She took my young sister to the police station where she was given a PF3. It was not the first time my sister to allege to have been raped. My sister was not raped. It was mere implication to separate me with Filipo. My mother's aim was to take me back home."

In cross examination she further elaborated: -

"The girl has a tendency of implicating people. She implicated Godfrey and now she has implicated my husband. I do not know the reason why she implicated my husband."

Finally, upon being questioned by the presiding officer, Fatuma concluded: -

"The victim told us that her brother in law raped her. I gave my statement to the police."

On the whole of the evidence, the trial court was impressed by the version told by prosecution witnesses. Speaking of the defence case, the

trial magistrate found the defence witnesses unworthy of belief and, accordingly, held that the defence case did not cast any doubt on the prosecution case. In his own words: -

> *"...DW2 and 4 had interests to serve. The two were wives of the accused person. They ended up speaking lies with a view of serving (sic) the skin of their dear husband."*

More particularly, the magistrate deplored DW2 for testifying that they departed from the house of her debtor at 9.00 p.m. and arrived home around 1.00 a.m. To him, such testimony was incompatible with reality as the distance of two kilometers could hardly involve one such a long time. As regards DW4, there was this remark: -

> *"The demeanor of DW4 was similarly shaken by the public prosecutor when she failed to account why she went to the police as well as led the police to arrest the accused person while knowing that her husband was framed."*

Thus, in the upshot, the trial court was satisfied that the prosecution accusations were proved to the hilt, whereupon the appellant

was convicted and sentenced to the extent we have already indicated. As, again, already intimated, the first appellate court found no cause to fault the verdict of the trial court which was upheld. The appellant presently seeks to impugn the conviction and sentence by way of a memorandum of appeal which is comprised of seven points of grievance.

When the appeal was placed before us for hearing, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Basilius Namkambe, learned State Attorney. The appellant commenced his address by fully adopting the memorandum of appeal but he deferred its elaboration to a later stage, if need be, after the submissions of Mr. Namkambe. Incidentally, in ground No. 5 of the memorandum of appeal, the appellant criticizes the trial court for not subjecting PW1 to a *voire dire* test.

In reply to this complaint, the learned State Attorney hesitated long before he eventually conceded that the appellant conviction was vitiated on account of the trial court's omission to conduct a *voire dire* test with respect to PW1. In adopting such refurbished stance, Mr. Namkambe partly relied upon a recent decision of the full bench in the unreported

Criminal Appeal No. 300 of 2011 – **Kimbute Otiniel Vs. The Republic.** But, even as he so conceded, Mr. Namkambe impressed upon us to nullify the entire proceedings and order a new trial, the more so as the omission to conduct the test was occasioned by the trial court to which the prosecution was not blameworthy.

Addressing the appeal, we should express at once that with seven points of grievance, the memorandum of appeal is lengthy just as the same addresses a variety of matters. Nonetheless, to us, this appeal turns on the grievance relating to the omission of the trial court to conduct a *voire dire* test with respect to PW1.

In this regard, we are keenly aware that the law on the reception of child evidence evolved conflicting decisions of the Court but, in **Kimbute Otiniel** *(supra)*, the Court meticulously pronounced that the consequences of the misapplication or non-direction in the conduct of a *voire dire* test should henceforth be resolved in the following manner: -

> *"1. Each case is to be determined on its own set of circumstances and facts.*
>
> *2. Where there is a complete omission by the trial court to correctly and properly address*

itself on sections 127(1) and 127(2) governing the competency of a child of tender years, the resulting testimony is to be discounted.

3. *Where there is a misapplication by a trial court of section 127(1) and/or 127(2) the resulting evidence is to be retained on the record. Whether or not any credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is at the discretion of the trial court. The law and practice governing the admissibility of evidence; cross examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continue to apply.*

4. *In these same facts and circumstances (i.e. No. 2) where there is other independent evidence sufficient in itself to sustain and guarantee the safe and sound conviction of an accused, the court may proceed to determine the case on its merit, always bearing in mind the basic duties incumbent*

upon it in a criminal trial and the fundamental rights of the accused.

5. *However, in these same facts and circumstances (i.e. No. 2), where the evidence of the child witness is the only, decisive or vital evidence for the prosecution and its consideration would seriously prejudice the accused and his or her basic rights or occasion a miscarriage of justice or would result in an unsafe conviction, the evidence should be discounted and cannot form the basis of a conviction.*

6. *A first appellate court has a prompt and prime duty to ascertain compliance by a trial court with the strict requirements of sections 127(1) and 127(2). It is suitably posed to re-evaluate the matter, including the whole evidence and come to its own conclusion. Where appropriate, it may also order a retrial according to the law and/or make any other lawful order or decision."*

To cull from the extracted holding, the situation at hand falls squarely under item No. 2 which relates to a complete omission by the

trial court to address itself on the requirements of a *voire dire* test. Thus, as correctly conceded by Mr. Namkambe, we are left with no other viable option than to discount and expunge the testimony of PW1 from the record of the evidence.

As we do so, we think it is instructive to interject a remark, by way of a postscript, that, of recent, this long standing requirement of a *voire dire* test was laid to rest upon the enactment of the Written Laws (Miscellaneous Amendments (No. 2) Act, No. 4 of 2016 which was promulgated on the 8th July, 2016. Through this Act, the provisions of subsections (2) and (3) of section 127 were deleted and substituted with the following: -

> *"(2). A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

With this provision, the requirement of a *voire dire* test has been effectively foregone but, as we have hinted upon, our remark is no more

than "a by the way", much as Act No. 4 of 2016 was not in force at the time of the proceedings at hand.

To resume to the matter under our consideration, having expunged the testimony of PW1, we are, admittedly, left with a skeleton of the prosecution case and, worse still, the material account of PW2 automatically depreciates to hearsay testimony. It is, indeed, obvious that this disquieting aspect of the proceeding was occasioned by the laxity of the trial court magistrate and the issue facing us is as to what order should fittingly be made to avoid a failure of justice. Whilst we unhesitatingly accept that the nullification of the entire proceedings of the two courts below is unavoidable, it remains to be considered whether or not an order for retrial is fitting in the circumstances of this case. In that regard, we have dispassionately pondered over Mr. Namkambe's invitation to nullify the entire proceedings with an order for a new trial. True, on several occasions, this Court had ordered a retrial in situations where the trial proceedings were vitiated by the laxity of the presiding officer for which the prosecution was not to blame (see, for instance, the decision in **M'kanake V R** [1973 E.A. 67; as well as the unreported decisions in Criminal Appeal No. 141 of 2010 – **Marko Patrick Nzumila**

V R and; Criminal Appeal No. 199 of 2010 – **Makumbi Ramadhani Makumbi and four others V R**). But, as we shall shortly demonstrate, such is not the sole factor to be taken into consideration and, what is more, even where the prosecution is not the blame-worthy party, it does not necessary follow that a retrial should be ordered. In, for instance, the case of **Fatehali Manji V R** [1966] E.A. 334 the following factors were highlighted: -

> *"In general a retrial will be ordered only when 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 the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;* ***even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be***

made where the interests of justice require it."

[Emphasis supplied.]

We may add to these factors that an order for retrial would not be made where on the whole of the evidence, the conviction is unsustainable. This will certainly guard against the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial.

Having the foregoing considerations in mind, it is now opportune for us to determine whether or not a retrial will meet the justice of this case. The trial proceedings were certainly defective and vitiated but the crunch in this matter, is as to whether the appellant was sufficiently implicated by the evidence. If we may express at once, we purposely unveiled the factual setting in detail to postulate, beyond question, that the prosecution accusation was evenly contested with evidence of a fabrication from the defence which was, to us, barely impeached by the prosecution.

As we have already reflected, to resolve the direct conflict between the opposing versions, the trial magistrate discounted both DW3 and

DW4 as unworthy of credit. As already disclosed, more particularly, the presiding officer deplored DW2 for telling that they departed from the house of her debtor at 9.00 p.m. to arrive home around 1.00 a.m. As it were, the magistrate found such testimony to be incompatible with reality as the distance of two kilometers can hardly involve one such length of time.

With respect, the trial magistrate took into account a detail not canvassed by the evidence. It should be noted that all what DW2 said in her testimony was that *"It takes only thirty minutes from Nsemulwa to Mpanda Hotel"* and, nowhere did she indicate the distance involved was two kilometers. Thus, obviously, the magistrate incorporated an extraneous matter in his impeachment of the witness. In any event, the magistrate did not explore further as, in the testimony of the appellant, there was a detail to the effect that, while proceeding home, they had to stop midway to greet a relative, namely, Patrick.

Coming to his criticism of DW4, we purposely extracted her entire evidence to clearly demonstrate that it is not true, as the magistrate postulated, that the demeanor of DW4 was *"shaken by the prosecutor*

when she failed to account why she went to the police as well as led the police to arrest the accused person while knowing that her husband was framed". As it turns out, that detail is conspicuously not contained in the particulars of DW4's cross-examination. Thus, in his approach to evaluate DW4's evidence, the magistrate similarly allowed speculative views which were not canvassed by the evidence.

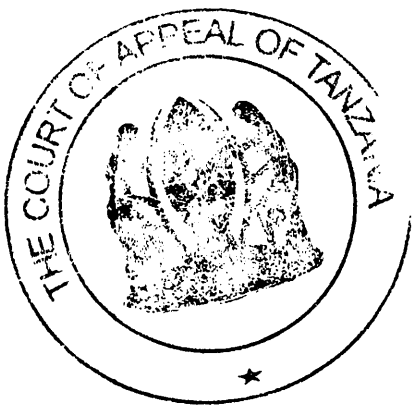
To this end, all things being equal, the defence evidence of fabrication was barely assailed and, for that matter, it evenly stood abreast the prosecution accusation. That being so, we are of the settled view that had the two courts below properly evaluated the evidence as a whole, they ought to have found that the defence evidence was, at least, sufficient to cast a reasonable doubt as to the guilt of the appellant.

All said, we do not think that, in the circumstances of this case, a retrial is justifiable as it will only accord the prosecution to fill in gaps in its evidence in support of its accusation.

In sum, we are constrained to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. In fine, the entire proceedings and decisions of the two courts below are, hereby, nullified. In the result, the appellant's conviction and

sentence are, respectively, quashed and set aside. He is to be released from prison custody forthwith unless if he is detained for some other lawful cause. Order accordingly.

DATED at **MBEYA** this 2nd day of October, 2017.



K. M. MUSSA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL