IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 291 OF 2016

SUNGURA ATHUMAN ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

Dated the 6th day of May, 2016
in
DC. Criminal Appeal No. 21 of 2016

.....

JUDGMENT OF THE COURT

31st August & 19th November, 2018

MUSSA, J.A.:

In the District Court of Shinyanga the appellant was arraigned for rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Edition 2002 of the Laws of Tanzania. The particulars of the charge sheet alleged that on a divers day in March 2015, at Upongoji area, within the Municipality of Shinyanga, the appellant had sexual intercourse with a certain "M.J." (PW1) who then was ten years of age.

The appellant denied the charge following which the prosecution featured five witnesses and one documentary exhibit (P1) comprised of a Police Form No. 3. In reply, the appellant had himself as a sole witness and, as it were, he completely disassociated himself from the prosecution accusation.

At the height of the trial proceedings, the trial Magistrate was impressed by the version told by the prosecution witnesses and, accordingly, found the prosecution case to have been established to the hilt. In the result, the appellant was convicted but, in the course of so convicting, the learned trial Magistrate said thus:-

> *"... so the accused person convicted (sic) as per S. 312 (1) of CPA (Cap. 20 R.E. 2002) (sic) after observation of the whole evidence done by this Court."*

Upon conviction, the appellant was sentenced to a term of thirty years imprisonment. His first appeal to the High Court was dismissed in its entirety (Makani, J.), hence this second appeal which is upon a memorandum of appeal with a supplementary memorandum attached to it.

The two memoranda may conveniently be crystalized and paraphrased as follows:-

1. **That the *voire dire* examination was inadequately conducted;**
2. **That there was no proof of age of the alleged victim;**
3. **That the case for the prosecution was undermined by contradictory evidence from its witnesses;**
4. **That the trial Magistrate erred in predicating the conviction under section 312 (1) of the CPA;**
5. **That the PF. 3 was improperly adduced into evidence; and**
6. **That the trial Magistrate did not consider the appellant's defence.**

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Margareth Ndaweka, learned Senior State Attorney, who was being

assisted by Mr. Shaban Massanja, learned State Attorney. As it turned out the appellant fully adopted his two memoranda of appeal but deferred their elaboration to a later stage, if need be, after the submissions of the respondent. For her part, Ms. Ndaweka commenced her address by fully supporting the conviction as well as the sentence meted out against the appellant. Nonetheless, ahead of our consideration and determination of the points of contention, we think it is pertinent to outline, albeit briefly, the factual background giving rise to the apprehension, arraignment and the eventual conviction of the appellant.

Our starting point is the evidence of the alleged victim (PW1). The witness introduced herself as a ten years old and, thus, the Court had to conduct a *voire dire* test ahead of everything. During the exercise, the court put to her several questions before making a finding to the effect that she understood the nature of an oath and PW1 was, accordingly, sworn.

In her sworn testimony, PW1 told the trial court that she was a standard IV pupil at Kambarage Primary School and that she knew the appellant as a resident of Upongoji area within Shinyanga Municipality. Her evidence was to the effect that someday in March 2015 she was walking

towards home after knocking off from school. Midway, she bumped across a friend of hers whom we shall henceforth refer as "MT." As it turned out, MT asked PW1 to escort her to Upongoji to which request the latter obliged. MT then led PW1, to the house of the appellant unto which both entered and found the appellant therein. MT allegedly informed the appellant: "*This is the girl,*" whereupon the latter welcomed the visitors to his bedroom. According to PW1, whilst there, to her surprise, MT undressed her and, soon after, the appellant inserted his manhood into her vagina. PW1 claimed to have felt untold pain in consequence of which she cried but her wailing was discontinued by the appellant amidst a threat that he would stab her. At the end of the ungodly act the appellant rewarded PW1 with some sweets.

Thereafter, PW1 returned home but she did not disclose what befell on her to her grandmother, henceforth referred to as (PW2). She, however, told her that she was unwell following which PW2 took her to Shinyanga Government Hospital where she was attended. According to PW2, that was on the 2nd March, 2015. A little later, on the 5th March, 2015 PW2 took PW1 to her school where the head teacher punished her with a cane for not attending school for five days. It was in the course of the chastisement when PW1 revealed her ordeal with the appellant.

A good deal later, on the 23rd March, 2015 the despicable episode was eventually reported to Shinyanga Police Station before a woman police Constable (PW4). Soon after, PW1 was presented to a medical officer whom we shall simply call (PW5) of Kambarage health Centre, for medical examination. Having examined her, PW5 found the genital organs of PW1 to be in order without any bruises or tears. The little girl was however, without the hymen and the medical officer formed the opinion that PW1 had been exposed to sex several times. According to a detective Corporal, simply named as (PW3), the appellant was apprehended in April 2015 after having bumped across a relative of PW1. With this detail, so much for the version which was unveiled by the prosecution witnesses during the trial. It is, perhaps, pertinent to observe that, save for PW5, the evidence of all the prosecution witnesses was not, at all, tested by the appellant in cross-examination.

We have already intimated that the appellant gave sole testimony in which he completely disassociated himself from the prosecution accusation. His account was to the effect that on the 8th April, 2015 he was confronted by two persons while having lunch with his paternal uncle and family. Those two told him that he was required at Shinyanga Police Station. He

heeded to the call and, upon reaching there, he was, to his surprise, implicated by the rape accusation of which he knew nothing about. That concluded the appellant's version of the accusation against him.

We have already indicated the extent to which both courts below were impressed by the version as told by the prosecution witnesses. Again, as we have hinted upon, Ms. Ndaweka commenced her address by supporting the conviction as well as the sentence meted out against the appellant. To begin with, she, nevertheless, conceded that the learned trial Magistrate wrongly predicated the conviction under section 312 (1) of the CPA in lieu of the provision under which he was charged with. The learned State Attorney was however quick to rejoin that the shortcoming did not occasion any miscarriage of justice and was, to that extent, curable under section 388 (1) of the CPA. As regards the appellant's other points of grievance, Ms. Ndaweka approached them generally and submitted that, on the whole, the evidence was overwhelmingly against the appellant and left no doubt that he, indeed, committed the offence charged.

As the learned Senior State Attorney concluded thus, we intervened to enquire from her as to whether or not the failure to feature MT during the trial either as an abettor or a witness could prompt an adverse

inference being drawn against the prosecution. To this enquiry Ms. Ndaweka conceded that an adverse inference may, indeed, be in the offing and, in fact, our intervention completely derailed the learned Senior State Attorney to the extent of refurbishing her earlier stance by not supporting the conviction upon a second thought.

Speaking of the rule on adverse inference, it is not quite the obligation of the prosecution to call a superfluity of witnesses. On the contrary, the prosecution is expected, as it is, indeed, in the best interests of justice, for it to always be concerned with the shortening of trials. Thus, where in a particular case, an incident is deposed by a large number of witnesses, the non-featuring in court of some of the witnesses should not be taken as a cause for disbelieving the prosecution version. Nonetheless, the general and well known rule is that the prosecution is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, are vital and able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution (See – **Azizi Abdalah Vs The Republic** [1991] TLR 71).

In the matter at hand, there was no telling whatsoever from the prosecution, let alone a sufficient one, as to why it did not feature the referred to MT either as an abettor to the crime or as a witness. As it were, MT outspokenly featured in the testimony of PW1. If the prosecution was not minded to employ her for use, the proper approach would have been to discard her at the closure of its case and offer her to the defence. As that was not done, an adverse inference is, indeed, in the offing and, we are afraid to say, the same throws into doubt the entire account of PW1.

As fate would have it, the absence of MT is not the only disquieting aspect of the case giving rise to this appeal. It is evident from the trial court's judgment that the learned Senior District Magistrate did not, at all, consider the defence version ahead of his decision to uphold the prosecution version without more. That was the judgment which was upheld by the High Court which fell into the same trap of not considering the appellants defence. As it turns out, in his fourth ground of complaint, the appellant criticizes both courts below for turning a blind eye to his defence.

It is now settled that failure to consider the defence case is fatal with the effect of vitiating a conviction (See, for instance, **Lockhart – Smith Vs Republic** [1965] E.A. 211; **Elias Steven Vs Republic** [1982] TLR

313; **Hussein Iddi & Another Vs Republic** [1986] TLR 283; and the unreported Criminal Appeal No. 19 of 2010 – **Siza Patrice Vs Republic.**)

With the foregoing shortcomings in mind, we are constrained to allow the appeal and hold that it is unsafe to sustain the conviction of the appellant. The same is, accordingly, quashed just as the resultant sentence is set aside. As such an order will suffice to dispose of the appeal, we need not belabor on the other complaints raised in the appellant's memoranda. In the end result, we order the appellant's immediate release from prison custody unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 20th day of September, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL