IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MJASIRI, J.A., MMILLA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 212 OF 2016

ISMAIL ALLY .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Twaib, J.)

dated 22nd day of February, 2016
in
Criminal Appeal No. 19 of 2013

JUDGMENT OF THE COURT

2nd & 8th May, 2018

MMILLA, J.A.:

On 25.12.2011, PW3 (the complainant), then 12 years of age, was at her grandmother's home one Samoe Bakari (PW1), at Magomeni Chipuputa area within the Municipality and Region of Mtwara. Also present at that home was PW2 Pili Mohamed, the daughter of PW1 and mother of PW3. On that day the complainant, who was known to be epileptic, was seized with that syndrome. On that account, PW1 and PW2 resolved to send her to the appellant, a resident of Chipuputa Mbae Mashariki who was a renowned traditional healer.

The trio luckily found the appellant at his home. After the callers had explained to him the purpose of their visit, the appellant assured them of a befitting treatment. He however, asked them to pay him T.shs 140,000/=. PW1 and PW2 agreed to pay that amount of money, after which the former began the preparations. After assembling the tools of trade, he asked PW1 and PW2 to leave the house so that he and the complainant were left alone therein. PW1 and PW2 obliged; they left the house but hanged around in the compound of that house.

A little while later, PW2 and her mother heard the complainant crying from inside the house and curiously peeped through the window. To her dismay, she saw the appellant raping her daughter. She quickly alerted PW1, after which they courageously stormed into the house. They found the appellant naked and on top of the complainant who was also naked, raping her. They hurriedly rescued the complainant from the lustful clutches of the former, and asked him what he was doing. Astonished, the appellant remained speechless, not even attempting to look them in their eyes. Wisely so, PW1 and PW2 took the complainant and headed to a nearby police station at which they reported the incident. They were given a PF3 and headed to Ligula Government Hospital for treatment. Meanwhile,

the police traced and arrested the appellant. They eventually charged him with the offence of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code Cap.16 of the Revised Edition, 2002.

The appellant's defence constituted of a general denial that he did not commit the charged offence. He had testified that the complainant was possessed by demons, and was trying to run to the ocean. He had to read verses in the Holly Quran in an endeavour to ward off the said demons, in the course of which she began crying loudly. He denied the allegations that he raped the complainant.

At the end of the trial however, he was found guilty, convicted and sentenced to 30 years' imprisonment term. He unsuccessfully appealed to the High Court of Tanzania at Mtwara, hence this second appeal to the Court.

The appellant, who before us appeared in person and fended for himself, filed an eight (8) point memorandum of appeal focusing on the following areas; **one** that, exhibit P1 (the PF3) was wrongly received and relied upon because there was no evidence that it was registered at the hospital at which the complainant was medically examined; **two** that, the

evidence of PW1, PW2 and PW3 was loaded with contradictions which were not at all resolved; **three** that, his conviction was wrongly based on the evidence of witnesses who were relatives of the complainant; **four** that, the prosecution did not prove the case against him beyond reasonable doubt; **five** that, both lower courts wrongly failed to take into account the statements which the witnesses made at the police *vis a vis* the oral evidence they gave in court; **six** that, his defence was not considered; **seven** that, the evidence of PW3 was wrongly received without first subjecting it to a *voire dire* test; and **eight** that, the complainant's age was not established.

The respondent/Republic enjoyed the services of Mr. Ladislaus Komanya, assisted by Ms Mwahija Ahmed, learned Senior State Attorneys. Mr. Komanya stated at the outset that they were opposing the appeal. Upon the appellant's adoption of the memorandum of appeal and his election for the Republic to submit first, we called upon Mr. Komanya to begin.

On taking the floor, Mr. Komanya informed the Court that they were opposing the appeal on the ground that the evidence on which conviction was based was strong, credible and believable.

As regards the first ground, Mr. Komanya submitted that registering a document in the nature of the PF3 constituted in exhibit P1 is not a legal requirement. He contended that since the said document was tendered by PW4, Bernadeta Mwambe, the clinical officer who medically examined the victim, the tendering of that document was in compliance with section 240 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA), and that the appellant was given a chance to cross examine that witness. He submitted therefore that the complaint was baseless and urged the Court to dismiss this ground.

Regarding grounds 2, 3 and 4 which he conversed together because of their relatedness; Mr. Komanya contended that these grounds too were devoid of merit. Relying on the case of **Hassan Bakari @ Mamajicho v. Republic,** Criminal Appeal No. 103 of 2012, CAT (unreported), Mr. Komanya submitted in the first place that the law does not prohibit relatives of a complainant from testifying in a case, and that what matters is whether or not they are credible and reliable witnesses. Mr. Komanya contended similarly that the allegation of there being contradictions in the evidence of PW1, PW2 and PW3 was baseless because the trio testified in common that the red cloth was tied on the complainant's face. He likewise

said that the evidence of those three eye witnesses was properly found by both lower courts to have not only been direct evidence, but also that it was free of any contradictions, credible and believable.

As regards ground No. 5, Mr. Komanya stated that it raises the question of impeachment of the evidence of PW1, PW2 and PW3 in terms of section 164 (1) of the Tanzania Evidence Act, Cap. 6 of the Revised Edition, 2002 (the TEA). He argued that if the appellant intended to shake the credibility of the evidence of those witnesses, he ought to have moved each of those witnesses to tender in court the respective statements they made at police station and cross examine them on the areas he thinks they contradicted themselves. Since the appellant did not do so, he added, he cannot be heard now to assert that their evidence was not weighed as against the said statements they made at police station. He requested the Court to likewise find no merit on this ground.

In the 6th ground, the appellant's complaint is basically that the trial court did not consider his defence, therefore that the first appellate court erred in upholding his conviction. Mr. Komanya submitted in this regard that the appellant's defence was considered, but the trial court found it to

be implausible. Like the other grounds already covered, he requested the Court to dismiss it too.

Mr. Komanya argued the 7th and 8th grounds of appeal together. While the 7th ground alleges that the evidence of PW3 was wrongly received without first subjecting it to a *voire dire* test; the 8th ground is a complaint that no evidence was led to prove the complainant's age.

While admitting that the complainant's *voire dire* was unsatisfactory in as much as it did not say anything concerning whether or not she knew the nature of the oath, Mr. Komanya hastily added however that the trial court pursued the aspect whether the complainant understood the duty of telling the truth, and was satisfied that she did. In the circumstances, he contended that both lower courts correctly relied on her evidence.

On the 8th ground, Mr. Komanya began by admitting that the complainant's age was not established by evidence. He stated however, that it was mentioned in the charge sheet; also that it was mentioned by the complainant on the day she testified in court a year later. Then she was 13 years of age. Mr. Komanya queried however, that the complainant's age was not raised during trial, and that raising it at the level of appeal is

an afterthought. He urged the Court to similarly dismiss the 7th and 8th grounds of appeal.

On the basis of the reasons advanced, Mr. Komanya requested the Court to find the appeal devoid of merit and accordingly dismiss it in its entirety.

On his part, the appellant stated in response to Mr. Komanya's submission on the first ground of appeal that because there was no evidence to establish that the PF3 (exhibit P1) was registered at the hospital at which it was presented; the trial court ought to have regarded it as bad evidence. He emphasized that it was necessary to do so because it is the only way through which forgery may be vouched.

On his second ground of appeal, the appellant was firm that the evidence of PW1, PW2 and PW3 was loaded with contradictions in that while PW1 and PW2 said on entering in the house they found a piece of red cloth inserted into the complainant's mouth, the evidence of PW3 was that her face was covered with a red cloth. He complained that PW1 and PW2 were not truthful witnesses.

Concerning the question of credibility of PW1, PW2 and PW3, the appellant stressed that their oral testimonies ought to have been pegged against the contents of their respective statements they made at police station. He argued that since that was not done; the lower courts ought to have regarded that evidence as uncorroborated, thus unreliable.

The appellant submitted in support of the third ground of appeal that it was not proper for the trial court to find his conviction on the evidence of relatives of the complainant who had their own interests to serve.

Concerning the 7th and 8th grounds of appeal, the appellant submitted that the prosecution was duty bound to lead evidence that could have established the complainant's age; similarly that it was wrong for the lower courts to have relied on the evidence of that witness which was received after an improperly conducted *voire dire*. He pressed the Court to allow the appeal and set him free.

We have carefully gone through the competing arguments of both sides. We crave to begin with the first ground of appeal which queries the failure by the hospital at which the complainant was medically examined to register exhibit P1 (the PF3) so as to vindicate its genuineness.

As correctly submitted by Mr. Komanya, this complaint by the appellant is not a legal requirement. Besides, that document was tendered by PW4, Bernadeta Mwambe, the clinical officer who medically examined the victim as envisaged by the provisions of section 240 (3) of the CPA. As the record will bear evidence, the appellant was given chance to cross examine PW4, therefore that had he doubts that the said document was forged; he was expected to have put forth questions to that effect. Unfortunately, none were asked. In the circumstances, this ground lacks merit and it fails.

Unlike Mr. Komanya who discussed the 2nd, 3rd and 4th grounds together, we think it is convenient to separate the 4th ground so that it may be discussed together with the 6th ground. It means therefore, that only the 2nd and 3rd grounds will be dealt with together. While the 2nd ground touches on the aspects of contradictions, the 3rd one alleges that it was wrong for the trial court to base his (appellant's) conviction on the evidence given by the complainant's relatives.

The complaint on contradictions focuses on what each of the three eye witnesses, PW1, PW2 and PW3 said in respect of the red cloth which

was used by the appellant "in the process of treating the complainant." The appellant asserts that PW1 and PW2 said the piece of cloth was **put in the complainant's mouth** whereas PW3 said it was **tied on her face**, hence that they contradicted themselves on the point.

We have considered complaint; we appreciate that PW1 and PW2 stated in common that on entering in the house, they realized that the complainant's mouth was tied with a red cloth – See page 10, first paragraph and page 12, fourth paragraph respectively, of the Record of Appeal. On the other hand however, PW3 said in that regard that after PW1 and PW2 left her and the appellant tied her with a red cloth on her face.

A close examination of these statements has induced us find that the contradiction is so negligible that it cannot be said it occasioned any failure of justice – See the case of **Dickson Elia Nsamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported) in which, among other things, the Court stated that minor contradictions, inconsistencies, or discrepancies do not affect the case of the prosecution because they do not corrode the credibility of a party's case as does

material contradictions and discrepancies. For this reason, we find and hold that this complaint is not well founded. We accordingly dismiss it.

The next is the ground on which the appellant complains that his conviction was anchored on evidence obtained from the complainant's relatives.

As often stated, it is common knowledge that in any trial, evidence is forthcoming from witnesses who directly or circumstantially witnessed the incident taking place, provided that they may be found to be credible – See the cases of **Hassan Bakari @ Mamajicho v. Republic** (supra), **Hamisi Makarai v. Republic**, Criminal Appeal No. 518 of 2015, CAT, **Esio Nyomolelo & 2 Others v. Republic**, Criminal Appeal No. 49 of 1995, CAT and **P. Taray v. Republic**, Criminal Appeal No. 216 of 1994, CAT (all unreported). In **P. Taray's** case, the Court said that:-

> *"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events, it must be born in*

mind (that), the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously just like the evidence of no-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative."

On the basis of the above, it is clear that the law does not preclude relatives of a particular complainant from testifying in a case to which they directly or circumstantially witnessed the incident taking place, what is important in the witness's testimony is the credibility and reliability of his/her evidence.

Back to the present case, since both courts below found PW1, PW2 and PW3 to be credible and reliable witnesses, we find and hold that this complaint too is devoid of merit. It accordingly fails.

The 5th ground alleges that the both lower courts wrongly failed to take into account the statements which the witnesses made at the police *vis a vis* the oral evidence they gave in court.

We entertain no doubt that the appellant's insistence that the trial court had duty to consider the credibility of the evidence of PW1, PW2 and PW3 *vis a vis* their respective statements made at police station, gravitates on the axis of the question of impeachment procedure of the evidence of any particular witness. Undeniably, on the basis of the appellant's complaint in this case, that is the domain of section 164 (1) (c) of the TEA. That section provides that:-

> *"(1) The credit of a witness may be impeached in the following ways by the adverse party or, with the consent of the court, by the party who calls him –*
>
> *(a) NA*
>
> *(b) NA*
>
> *(c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;*

(d) NA."

As correctly submitted by Mr. Komanya, in order for this to be accomplished, the appellant ought to have demanded each of those witnesses to tender as exhibits in court their respective statements and cross examine them in respect of the areas thought to illustrate or demonstrate contradictions he conceived. Deplorably however, that was not done. In the circumstances, there is no way how the trial court could have endeavoured to do what the appellant is complaining of here. So, this ground as well lacks merit and we dismiss it.

Next is the 6th ground which, as already intimated, will be discussed together with the 4th ground because of their relatedness. While the 4th ground alleges that the prosecution did not prove the case against the appellant beyond reasonable doubt; the 6th ground asserts that his defence was not considered. Unfortunately however, in both cases the appellant did not venture to elaborate.

We wish to preamble the discussion in this regard by restating the cardinal principle of our criminal law that the burden of proof always rests on the prosecution side. The prosecution is required to prove its case

beyond reasonable doubt, except in circumstances where the situation demands otherwise, such as where the accused raises the defence of insanity in which case he must prove it on a balance of probabilities. No duty is cast on the accused to prove his innocence – See the cases of **Joseph John Makune v. Republic** [1986] T.L.R. 44, **Samwel Silinga v. Republic** [1993] T.L.R. 149 and **Mohamed Said Mutulia v. Republic** [1995] T.L.R. 3.

In response to the appellant's complaint that the prosecution did not prove the case against him beyond reasonable doubt, Mr. Komanya was emphatic that the case was proved against him beyond reasonable doubt. His focus was on the evidence of PW1, PW2 and PW3. He also submitted that the appellant's defence was dutifully considered, but was rejected on the basis of the strength of that of the prosecution side.

We have carefully gone through the proceedings on record, the judgments of both lower courts, and the oral submissions of both Mr. Komanya and the appellant before us. We agree with Mr. Komanya that PW1, PW2 and PW3 were the crucial witnesses in this case. While PW1 and PW2 testified in common that upon PW2 realizing after peeping through the window that the appellant was sexually molesting the complainant, she

and PW1 rushed into the house and found the naked culprit in that awful action. On being asked what he was doing, the appellant is said to have turned mum.

On the other hand, the victim child's evidence was equally strong and elaborate. She testified that after a short discussion and negotiation of the cost of treatment, the appellant ordered her mother and grandmother to get outside the house, thereby leaving only the two of them therein. As to what transpired thereafter, we think it is proper to let her speak herself, the focus being on her testimony appearing at page 14, last paragraph over to page 15, first paragraph, of the Record of Appeal. She was recorded to have said that:-

> *". . . as we were there ustadhi (appellant) ordered me to pull off my clothes and then he ordered me to sit down, he then took a red cloth and tied me on my face, he then ordered me to lay down on a carpet and then he laid on top of my stomach the accused person had no clothes by then, the accused took his uboo (penis) and then inserted on my vagina. I felt painful I started crying, the accused person told me not to cry because he was removing poison, I heard voice of my mother . . . ustadhi took a bed sheet and covered himself with it . . .*

ustadhi wanted my mother to settle the matter so as not to attract people, my mother denied to do so . . ."

Surely, this appalling and dreadful evidence was elaborate, strong and believable. On the basis of this, both lower courts held it to be credible, and we fully agree.

Also important for consideration is the evidence of PW4 Bernadeta Mwambe. As pointed out before, she was the clinical officer at Ligula Hospital who medically examined the complainant. On touching the complainant's female organ, she could see that the latter was closing her eyes, which signified that she was experiencing pain. She also found that she had bruises thereat. Besides, upon inserting her finger into the complainant's female organ, the finger came out smeared with sperms, an indication that indeed, the complainant was sexually assaulted.

In sum, though it is the principle that the best evidence in cases of rape come from the victim (**Selemani Makumba v. Republic** [2006] T.L.R. 379), the complainant's evidence in the present case was corroborated in material particulars with that of PW1, PW2 and PW4.

On the other hand, we traversed the trial court's judgment. We satisfied ourselves that that court dutifully considered the appellant's defence as reflected at page 38, first paragraph, of the Record of Appeal. At that page, the trial Court stated that the appellant's defence was outweighed by the cogent and robust evidence of the three prosecution eye witnesses which established beyond doubt that the appellant took advantage of being left alone in his house with the unsuspecting and defenceless complainant, and as already pointed out, sexually molested her. It is on the basis of that revelation that the first appellate court upheld the decision of the trial court. For these reasons, we find no merit in the 4th and 6th grounds as well; we accordingly dismiss them.

To follow is the complaint that the evidence of PW3 was wrongly received without first subjecting it to a *voire dire* test. In this regard, the appellant argued that for that reason the evidence of that witness ought to have been ignored.

As correctly submitted by Mr. Komanya, in the process of conducting the *voire dire* test, the trial court magistrate ought to have embraced both key requirements under section 127 (2) of the TEA. That section provides that:-

"(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."

As it turned out however, the trial magistrate did not adequately lead the witness by asking her questions meant to discover if she knew the meaning of oath. Nevertheless, he did well on the second aspect of establishing whether or not the witness understood the duty to tell the truth, and accordingly made a clear finding that she understood the duty of telling the truth. On the basis of that finding, we agree with Mr. Komanya that the evidence of PW3 was not worthless, but good and reliable evidence. In the circumstances, this ground too is not well founded and it fails.

Finally is the 8th ground which is basically a complaint that the complainant's age was not proven.

In this regard we go along with Mr. Komanya that although it was indicated in the charge sheet that the complainant was 12 years old, also that she stated on the day she testified in court that she was 13 years of age, the position remains that her age was not established by evidence. However, as Mr. Komanya submitted, the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that point. Therefore, raising it at the level of appeal is an afterthought - See the cases of **Edward Joseph v. Republic**, Criminal Appeal No. 272 of 2009, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007, **Nyerere Nyegue v. Republic**, Criminal Appeal No. 67 of 2010, and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013, CAT (all unreported). In the latter case of **Nyerere Nyegue,** the Court stated that:-

> *"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 said."*

As afore pointed out, because the appellant in the present case did not cross examine PW1, PW2 and PW3 on the aspect of age it having been

an important matter, that ordinarily implied acceptance of the fact that the complainant was 12 years of age as was covered in the charge sheet. Consequently, this ground too fails and we dismiss it.

For reasons we have assigned, we find that the appeal lacks merit and we dismiss it in its entirety.

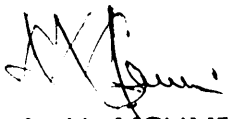
DATED at **MTWARA** this 7th day of May, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.



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