IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 347 OF 2017

ABRAHAM IDDI ALUTE @ NGUDU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mansoor, J)

Dated 6th day of June, 2017
in
(DC. Criminal Appeal No. 72 of 2016)

JUDGMENT OF THE COURT

13th & 20th August, 2019

MMILLA, J.A.:

This is a second appeal by Abraham Idd Alute @ Ngudu (the appellant). It is against the decision of the High Court of Tanzania at Dodoma which upheld conviction and sentence of thirty (30) years' imprisonment meted out against him by the District Court of Singida at Singida (the trial court). In the trial court, he was charged with and convicted of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code).

The brief background facts of this case were that on 8.5.2015 the complainant (S.B.) who testified as PW1, a minor who was then 14 years old, encountered the appellant on her way back home from Unyambwa village where she had gone for milling purposes. The appellant, who had covered his face, grabbed her from the back, covered her mouth with one hand and dragged her into the bush whereat he wrestled her down, removed her skirt and underpants, after which he raped and sodomized her. It was alleged that she bled at both those areas.

At a certain stage in the course of raping her, the appellant uncovered his face, something which provided PW1 the opportunity to see her assailant's face. She said she identified him because he was a person familiar to her. PW1 added that she did not scream for help because the appellant threatened to kill her if she did. According to her, the appellant left the scene after he was done. It was then that she hurriedly proceeded with her journey back home.

On the way, she met her parents who were looking for her. She promptly related the incident to her mother. On arrival home her mother examined her. After confirming that she was indeed raped, she and her husband Abubakar Ismail Ngwati (PW3) reported the matter to the village

chairman. The latter organized the villagers and left as a group for the mission to trace and arrest the appellant in his village. Luckily, they found and apprehended him. Thereafter, they referred the matter to the police at which the victim girl was issued with a PF3 with instructions to her parents to take her to hospital for medical examination and treatment. It was said that the complainant was admitted at Singida Government Hospital for three (3) days. Eventually, the appellant was charged in court as already stated.

On his part, the appellant elusively denied involvement in the commission of the charged offence. He in particular asserted that he did not know the victim girl. His defence was rejected for reasons which were given by both courts below.

The appellant filed an eleven (11) point memorandum of appeal. A close examination of those grounds however, reveal that ground No. 6 has been repeated in the 7th ground, therefore in reality there are only 10 of them as follows:-

(i) That, the evidence of PW1 was improperly relied upon because the trial court recorded it without conducting a *voire dire* test as demanded by law.

(ii) That, both courts below wrongly relied on the confession which he had retracted, and that the police officer who recorded it did not write his Force Number, also that he did not append his signature at the end of the statement.

(iii) That, the first appellate court improperly upheld the decision of the trial court because it ignored the fact that the case was tried by two magistrates, and that the second magistrate took over the trial of the case from the first magistrate without assigning reasons for the takeover.

(iv) That, his conviction was wrongly upheld by the first appellate court because the age of the complainant was not proved.

(v) That, both courts below did not properly analyze the evidence before them.

(vi) That, both courts below did not properly consider his defence.

(vii) That, the first appellate court wrongly upheld his conviction because it was based on the weakness of his defence.

(viii) That, both courts below wrongly relied on the cautioned statement he allegedly offered to police because it was not corroborated by an extra judicial statement.

(ix) That, the first appellate court erred in upholding his conviction because it was founded on weak and contradictory evidence of the prosecution witnesses.

(x) That, the first appellate court improperly upheld his conviction because it was based on a defective charge in so far as the particulars of the offence omitted to mention that the victim girl was under the age of 18 years.

When the appeal came for hearing before us on 13.8.2019, the appellant appeared in person and was not represented; whereas the respondent/Republic enjoyed the services of Ms Salome Magesa, learned Senior State Attorney, assisted by Ms Karen Mrango, learned State Attorney.

At the commencement of hearing, the appellant requested the Court to adopt his grounds of appeal and chose for the Republic to respond while reserving his right to make a rejoinder. On that basis we invited Ms Magesa to make their submission.

At first, Ms Magesa expressed the view that she was supporting the appeal, only to change her stand at a later stage that she was supporting conviction and sentence.

The learned Senior State Attorney started her submission with a challenge that except for the first and eighth grounds of appeal, the rest of them were new grounds in so far as they were not raised in the first appellate court. As such, she maintained, the Court has no jurisdiction to entertain them. She urged us to ignore them. That being the position, she added, only the first and eighth grounds qualify to be addressed.

As regards ground No. 1 alleging that the evidence of PW1 was improperly relied upon in that the trial court recorded it without conducting a *voire dire* test as demanded by law, the learned Senior State Attorney submitted that the allegation is baseless because according to the testimony of PW1 and PW2, by 2015 the victim was 14 years old. As such, she added, the recording of her evidence was not subject to compliance with section 127 (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the EA) in terms of subsection (5) of that section. She requested the Court to find no merit on this ground, resulting in its dismissal.

On the other hand, the appellant's complaint in respect of the 8th ground is that the cautioned statement ought not to have been relied upon because there was no extra judicial statement to corroborate it. In that

regard, Ms Magesa said the complaint lacks merit because that is not a requirement of law. She pressed us to dismiss it too.

Ms Magesa wound up her submission that the evidence of PW1 was clear that though the appellant had at first covered his face, he uncovered it in the course of raping her, thus affording her the chance to see his face. She comprehended that he was a person familiar to her. Ms Magesa added that PW1's explanation of that person to her parents enabled the appellant's apprehension on the same night, therefore that she was a witness of truth as contemplated by section 127 (7) of the EA. She also referred us to the evidence of PW2, Juma Mpwani Ngwari (PW4) and Dr. Tresphory Boniphace Kamushaga (PW5). She contended that while PW2 had inspected PW1 and confirmed that she was sexually assaulted after finding that she was bleeding at her female organ and the anus, PW5 was the doctor who medically examined the victim girl and that he detected trauma at her carnal and anal, suggesting that she was sexually assaulted. On the other hand, PW4 had recorded the appellant's extra judicial statement and admitted commission of the offence. Basing on this evidence, she urged the Court to dismiss the appeal in its entirety.

On his part, the appellant did not have anything useful to present, except his repeated request for the Court to uphold the grounds he raised and allow the appeal.

We have carefully considered the submission of the learned Senior State Attorney. We think we should likewise start with the concern that some of the grounds of appeal appearing in the appellant's memorandum in this Court are new as they were not raised in the first appellate court.

We analytically compared the grounds of appeal which the appellant raised in the High Court appearing at pages 45 of the Record of Appeal and those which he raised in this Court. We satisfied ourselves that grounds Nos. 2 to 7, and then 9 to 11 were not raised in the first appellate court. In other words, they have been raised in this Court for the first time. We asked ourselves whether or not the Court may decide a ground(s) which was not raised in and decided by the High Court on first appeal. In our view, the answer is in the negative.

There is a multitude of cases, including those of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009, CAT (both unreported) in which the

Court commonly held that where such grounds may be raised in the Court for the first time, then it will have no jurisdiction to entertain them. While relying on the earlier case of **Abdul Athuman v. Republic** [2004] T.L.R. 151, the Court resolutely stated in **Samwel Sawe v. Republic** (supra) that:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R.*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

It follows therefore, that since grounds 2 to 7, and then 9 to 11 in the present case were not raised in the High Court on first appeal, *ipso jure* the Court has no jurisdiction to determine them. Those grounds are consequently ignored.

As already pointed out, the first ground of appeal alleges that the evidence of PW1 was incorrectly relied upon because the trial court recorded it without conducting a *voire dire* test as mandated by law. As already pointed out, Ms Magesa rebutted that assertion. She held the view that the trial court rightly received the evidence of that witness without first subjecting her to a *voire dire* test by virtue of section 127 (5) of the EA because PW1 was then 14 years old. With great respect, we do not agree with her.

Our starting point is section 127 (2) of the EA which prior to the 2016 amendment vide The Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 provided 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."* [We own the emphasis].

On the other hand, the expression *"**a child of tender age**"* is defined under subsection (5) of section 127 of the EA. It says:-

> *"(5) For the purposes of subsections (2), (3) and (4), the expression "**child of tender age" means a child (whose apparent age is not more than fourteen years.**"* [The emphasis is ours].

The immediate issue is whether this provision excludes a person aged 14 years from the category of **a child of tender age** such that his/her evidence may be recorded without subjecting him/her to a *voire dire* test.

In our firm view, the answer is in the negative. The phrase "**not more than fourteen years**" suggests that a 14 years old child is **a child of tender age** because he/she is not more than 14 years, therefore that her/his evidence must be recorded subject to a *voire dire* test – See the cases of **Amos Palanzi v. Republic**, Criminal Appeal No. 137 of 2012, **Lazaro Stephano v. Republic**, Criminal Appeal No. 9 of 2013, **Alli Ramadhani v. Republic,** Criminal Appeal No. 205 of 2013 and **Mussa Kiula v. Republic**, Criminal Appeal No. 283 of 2014, CAT (all unreported). That being the position, it is not correct to assert that PW1, then aged 14 years, was by the operation of subsection (5) of section 127 of the EA not

required to be subjected to a *voire dire* test. To the contrary, she was **a child of tender age** whose evidence could properly be received subject to a *voire dire* test. In the circumstances, the first appellate court ought not to have left her evidence to stand – See the cases of **Mussa Kiula v. Republic** (supra) and **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011, CAT (unreported). In both those cases, it was commonly held that where there is a complete omission by a trial court to correctly and properly address itself on sections 127 (1) and (2) governing the competency of a witness of tender years, the resulting testimony is to be discounted.

For reasons we have just assigned, we are constrained to, and we hereby expunge from the record the evidence of PW1. In the end, this ground has merit and we allow it.

The eighth ground of appeal alleges that both courts below wrongly relied on the cautioned statement which the appellant offered to police because it was not corroborated by an extra judicial statement.

Having considered the nature of the argument advanced by the appellant, we think this ground should not unnecessarily detain us. While we appreciate that the cautioned statement was relied upon by both courts

below, we nevertheless hasten to agree with Ms Magesa that reliability on that document was not subject to having it been corroborated by an extra judicial statement because that is not a requirement of law. Thus, this ground lacks merit and we dismiss it.

The immediate issue however, is whether having invalidated the evidence of PW1; is the remaining evidence strong enough to sustain the appellant's conviction? We do not hesitate to answer it positively. We will demonstrate.

There are two other witnesses (PW2 and PW5) whom we think, gave evidence which, when considered together with the appellant's cautioned statement which was recorded by PW4 and tendered in evidence as exhibit P2, is strong enough to sustain the conviction and sentence.

As may be recalled, after she was released by her sexual assailant, the victim girl hurriedly proceeded with her journey home. On the way she met her parents (PW2 and PW3) who had decided to trace her after she had delayed to return home. PW2 testified that her daughter informed her about the ordeal she suffered in the hands of the appellant. On arrival home **she examined her and found that she was bleeding at her female organ**

and the anus. She and her husband reported the incident to the village leadership, whereupon the appellant was traced in his village and apprehended on that same night. The matter was eventually reported to police.

On their part, the police prepared a PF3 and instructed the victim's parents to take her to hospital for medical examination and treatment. The trial court received evidence from PW5, the doctor who medically examined the victim girl and tendered in court the PF3 as evidence. He recorded in that PF3 that she had "anal – carnal trauma", which was supportive of the evidence of PW2 who examined her daughter that she was sexually assaulted.

Further corroborative evidence came from exhibit P2, a cautioned statement which, as aforesaid, was offered by the appellant to PW4. In that document (it is at pages 31 to 33 of the Record of Appeal), the appellant admitted that he raped the victim girl. To quote him verbatim, the appellant said in part at page 32 of that statement that:-

> *"... nikiwa naelekea nyumbani nilikutana na Binti ambaye sio wa pale Kijijini petu na wala simfahamu nikamwita akaja nikaongea naye yaani nikamtongoza*

akakataa ndio mimi nikaona bora nitumie nguvu nilimkamata kwa nguvu nikamburuza mbali na majumba kuona hapo sionekani kwa urahisi ***nilimvua chupi yake na nikaanza kumuingilia huyo Binti hakupiga kelele ndio nikawa nahangaika kuingiza nilipoona mboo yangu haipiti kwa huyo Binti ilibidi nimuachie*** *na mimi nikaondoka zangu nikaenda kulala . . . ."*[The emphasis is ours].

This was a clear confession that he committed the charged crime. We note however, his remark that "***nilipoona mboo yangu haipiti kwa huyo Binti ilibidi nimuachie"***, meaning that after finding that his penis was not penetrating; he decided to release her. This may connote that he did not fully penetrate her vagina.

It should be recalled however, that PW2 said on examining the victim, she found that she was bleeding at her vagina and anus, which means the tempering with her vagina as well as department two (the anus) was real. As we are aware, our law is clear that penetration, however slight, constitutes rape. This is in terms of section 130 (4) (a) of the Penal Code which states that:-

(4) For the purposes of proving the offence of rape–

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

For reasons we have assigned, we think that notwithstanding the expulsion of the evidence of PW1, the rest of the evidence was strong enough to sustain the conviction. Thus, we find no merit in the appeal. We accordingly dismiss it.

DATED at **DODOMA** this 19th day of August, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of August, 2019 in the presence of the Appellant in person and Mr. Harry Mbogoro, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL