IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 489 OF 2016

SAMWELI S/O MNYONGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgement of High Court of Tanzania at Mbeya)
(Levira, J.)

dated the 13th day of October, 2016
in
Criminal Appeal No. 43 of 2016

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JUDGMENT OF THE COURT

23rd & 27th August, 2019

NDIKA, J.A.:

This decision resolves the appeal of Samwel s/o Mnyonge, the appellant, seeking to reverse and set aside the judgment of the High Court (Levira, J., as then was) sitting at Mbeya dated 13th October, 2016 affirming the judgment of the District Court of Mbarali at Rujewa (the trial court) dated 6th January, 2011 by which he was convicted of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap. 16 RE 2002 (the Code). The appeal, too, challenges the sentence of life imprisonment and twelve strokes imposed on the appellant.

The background to this appeal is briefly as follows: on 11th February, 2014 around 16:00 hours, a child aged 5 years and ten months, who we shall refer to as "AJ" or simply PW1 so as to protect her privacy, was readying herself to go back home after her day at a nursery school in Madibira, Mkunywa Village in Mbarali District. Rather unexpectedly the appellant showed up at the school at that time and picked her on his bicycle. Instead of taking her home, he rode to a nearby maize farm where he undressed her and forced his male member into her anus. PW1 told the trial court that she cried as she felt too much pain and bled from her anus. In the course of that traumatic encounter, she fell unconscious. When she regained consciousness she found herself at a hospital.

In that fateful late afternoon, PW5 Tulia Kitu @ Senditu, also a resident of Madibira, was fetching firewood when she heard a child crying frantically. She rushed to the scene where she found PW1, in school uniform, on the ground with the appellant. The appellant hurriedly picked his bicycle and fled the scene as his victim fainted and bled from her private parts. PW5 knew the victim and so, she took her to her parents' home where she found her mother, "MP" (PW2) and father. She narrated the incident and mentioned the appellant, a fellow villager, as the ravisher. She recalled that at the scene the appellant wore a green shirt and a pair of black trousers.

PW2 adduced that PW1 was her daughter; that she was born on 20th January, 2009 as per a postnatal clinic card that she tendered – Exhibit P.1. She confirmed receiving her unconscious daughter from PW5 that fateful day. After PW5 had narrated to her what had befallen PW1 at the hands of the appellant, she examined PW1's private parts. Rather harrowingly, she found the victim's vagina and anus bleeding and completely ruptured (*njia ya haja kubwa na ndogo zimeungana*). She took her daughter to a police station at the village where the incident was reported and a PF.3 issued. Thereafter, she rushed PW1 to Mahango Health Centre and later to Mafinga District Hospital. Due to the severity of the victim's injuries, she was transferred to the Muhimbili National Hospital where she was attended to until her discharge on 20th October, 2014, eight months after the vicious and distressing sexual attack on her.

Dr. Stella Msangi (PW4), a medical doctor at Mafinga District Hospital, recounted that she attended PW1 on 12th February, 2014 and filled out a PF.3 (Exhibit P.2). She found her rectum and vagina ruptured. Quite chillingly, she adduced that:

> *"I examined the child; her private parts were completely destroyed. Her vagina was joined with her anus. I took her to the theatre and attended her .... I*

admitted the child for several days .... Nilishona nyuzi nikamlaza, baada ya muda nikaona kimeachia, haja kubwa inatokea katika sehemu ya haja ndogo. I decided to refer the victim to the Muhimbili National Hospital."

There was further evidence from No. E.8265 D/Cpl. Roman (PW6), a police investigator. He said that his colleague, No. C.8273 D/SSgt Bernard, interrogated the appellant, who, then gave a cautioned statement by which he confessed to the offence. As his colleague could not appear at the trial, he purportedly tendered the statement under section 34B (1) of the Evidence Act, Cap. 6 RE 2002 (the EA). It was admitted as Exhibit P.4 without any objection from the appellant.

When he was put on his defence, the appellant denied on oath to have ravished the victim. He accused the victim's mother (PW2) of framing up the charge against him. He claimed that she owed him TZS. 30,000.00 for services he rendered fetching firewood and supplying water for her. In cross-examination, he acknowledged knowing the victim as a schoolgirl.

The learned trial Resident Magistrate found PW1's evidence credible and that it linked the appellant to the criminal act committed on 11th February, 2012 and that it was sufficiently corroborated by the evidence of PW2, PW4

and PW5 as well as the documentary evidence admitted in evidence – Exhibits P.1 to P.4. Accordingly, the learned trial Resident Magistrate convicted the appellant of the charged offence and sentenced him to life imprisonment with twelve strokes.

As hinted earlier, the High Court dismissed the appellant's first appeal as it affirmed the trial court's finding that there was sufficient evidence to sustain a conviction against the appellant. Apart from confirming the sentence imposed on the appellant by the trial court, the learned High Court Judge, pursuant to the provisions of section 31 of the Code and section 348 (1) of the Criminal Procedure Act, Cap. 20 RE 2002, ordered the appellant to pay the victim TZS. 500,000.00 as compensation for expenses incurred in respect of her treatment.

Being aggrieved by the outcome of his first appeal, the appellant has come to this Court in this second appeal raising a total of seven grounds of complaint, which, in our view, crystallise into six points of grievance: **first**, the evidence that he was recognised at the scene of the crime as the culprit was not watertight; **secondly**, that the conviction was unsustainable on account of being founded upon hearsay evidence adduced by PW2 and PW4; **thirdly**, that *voire dire* examination on PW1 was improperly conducted rendering PW1's evidence liable to be discounted; **fourthly**, that the cautioned statement

(Exhibit P.4) was wrongly admitted in evidence; **fifthly**, that the first appellate court wrongly dismissed his appeal without evaluating the evidence on record including the defence evidence; and **finally**, that the prosecution did not, on the whole, establish its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person while Ms. Prosista Paul and Mr. Ofmedy Mtenga, learned State Attorneys, represented the respondent.

On his part, the appellant adopted his grounds of appeal and urged us to allow his appeal. He then rested his case.

Replying, Ms. Paul vigorously opposed the appeal. She denied the complaint that the appellant was not identified, contending that based on the evidence of PW1 and PW5, the appellant was positively recognized at the scene as the conditions were conducive for an unmistaken identification.

On the complaint that hearsay evidence was wrongly relied upon to found conviction, the learned State Attorney submitted that it was wrong to characterize the testimonies of PW2 and PW4 as hearsay. She contended that both witnesses gave relevant direct evidence on the incident. Referring to PW2's evidence appearing between pages 11 and 14 of the record of appeal, she argued that PW2 gave evidence on the age of the victim, her condition

after she was brought home after the attack and her treatment at the three hospitals she attended after the matter was reported at the Police Station at the village. The evidence of PW4, a medical witness, was, too, not hearsay; she testified on her medical findings from her examination and treatment of the victim at Mafinga District Hospital and her referral to the Muhimbili National Hospital. She also tendered in evidence a PF.3 (Exhibit P.2).

Addressing us on the conduct of *voire dire* examination on PW1, Ms. Paul made two points: first, she argued that as revealed by the record of appeal at pages 8 and 9, the learned trial Resident Magistrate rightly conducted the test on PW1 as she was a child of tender years to determine if she, inter alia, understood the nature of an oath. Secondly, the learned State Attorney conceded that even though the learned trial Resident Magistrate ordered that PW1's evidence be made on oath after he had found that PW1 understood the meaning of oath, he did not have PW1 sworn before she adduced her evidence. For all intents and purposes, therefore, PW1's testimony amounted to unsworn evidence, she argued. Being unsworn, PW1's evidence ought to be corroborated and that in the instant case that evidence was sufficiently corroborated by the independent evidence of PW5 who found the appellant in the midst of the sexual attack on PW1. On this point, she relied on the decisions of the Court in **Mtendawema Said v. Republic**, Criminal Appeal No. 199 of

2011 and **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (both unreported).

As regards the complaint that the cautioned statement (Exhibit P.4) was wrongly admitted in evidence, Ms. Paul argued that the said grievance was a non-issue as it was raised and dealt with by the High Court on first appeal. That court upheld the complaint and proceeded to expunge the statement from the record.

Coming to the claim that the evidence on record particularly the defence was not evaluated and considered, Ms. Paul argued that the learned appellate Judge reviewed all the evidence and noted that the defence evidence was not considered. She thus considered the appellant's defence at pages 71 and 72 of the record but she gave it no weight as she took the view that it was clearly an afterthought.

Finally, the learned State Attorney disputed the claim that the prosecution did not, on the whole, establish its case beyond reasonable doubt. She submitted that the evidence of PW1, PW2, PW4 and PW5, on the whole, proved the charged offence beyond reasonable doubt. She thus beseeched us to dismiss the appeal as she concluded that the conviction, sentence and compensation order were proper in law.

When invited to rejoin, the appellant maintained his innocence and stated that he was leaving the matter to the wisdom of the Court.

We wish to state at the very outset of our determination that this being a second appeal, the Court is only entitled to interfere with the concurrent findings of fact made by the courts below if there is a misdirection or non-direction made by the courts below on the evidence: see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In our determination of the appeal, we shall be guided by this principle.

We begin our determination of the appeal by addressing the first complaint, which raises the issue whether the appellant was positively identified at the scene. Having examined the evidence on record, we wholly agree with the learned State Attorney that the evidence of PW1 and PW5 leaves no doubt that the appellant was positively recognised at the scene. We have taken into account that the sexual attack occurred in broad daylight at 16:00 hours; that both witnesses knew the appellant just as the appellant admitted in his evidence at page 27 of the record that she knew the victim as a school girl as well as her mother; and that PW1's evidence tallies with that

of PW5 who found the appellant in the midst of the revolting sexual attack. It is significant that PW5 described the clothes worn by the appellant at the material time, which she said were a green shirt and a black pair of trousers. There was no chance of a mistaken identification. Given these circumstances, we find no cause to upset this concurrent finding of the courts below based on evidence that was found credible and reliable. In consequence, we find no merit in the first complaint, which we dismiss.

Coming to the grievance that the appellant's conviction was unsustainably made on hearsay evidence, we are, once again, persuaded by the learned State Attorney's submission that this complaint lacks substance. Although it is undeniable that PW2 and PW4 were not at the scene when the criminal act was committed on PW1, it would be wrong to characterize their testimonies as hearsay. In our view, there was nothing hearsay about PW2's account on the victim's age at the material time as attested by the postnatal clinic card (Exhibit P.1), her condition immediately after she was brought to her by PW5 after the attack and her treatment at the three hospitals she attended following the matter being reported at the Madibira Police Station. By the same token, the evidence of PW4, the medical witness, was direct evidence, not hearsay, as she testified on her medical findings from her examination and treatment of the victim at Mafinga District Hospital, as

demonstrated by PF.3 (Exhibit P.2), and her referral to the Muhimbili National Hospital for further management. Again, we find no substance in the complaint at hand. It stands dismissed.

Next, we consider the grievance on the conduct of *voire dire* examination on PW1.

It is common ground that at the time PW1 testified she was aged 5 years and ten months and therefore in terms of section 127 (5) of the EA she was a child of tender age. It was the requirement of the law under 127 (2) of the EA as it was then that:

> *"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."*

The above provision imposed the duty on the presiding magistrate or judge to conduct a *voire dire* examination before receiving evidence from a witness of tender years. The test involved investigating and determining

whether the child witness knows the nature of an oath so as to give evidence on oath or affirmation. If yes, his evidence would be received on oath or affirmation. If the child witness does not know the meaning of an oath, the trial magistrate or judge must then investigate and determine whether he is possessed of sufficient intelligence and understands the duty of speaking the truth to warrant reception of evidence without oath or affirmation – see, for example, **Jafason Samwel v. Republic**, Criminal Appeal No. 105 of 2006 and **Kimolo Mohamed @ Athumani v. Republic**, Criminal Appeal No. 412 of 2015 (both unreported).

In the instant case, we agree with Ms. Paul that the learned trial Resident Magistrate rightly conducted the *voire dire* examination on PW1 and found that she understood the nature of an oath and ordered that her evidence be received on oath. We are also in agreement with the learned State Attorney that despite the aforesaid order of the trial court, PW1 gave her testimony without taking oath, thereby relegating her evidence to an unsworn statement. On the authority of **Kimbute Otiniel** (supra) and **Mtendawema Said** (supra) cited to us by Ms. Paul, despite the misapplication of the *voire dire* test PW1's evidence was to be retained on the record and acted upon as unsworn evidence – see also **Kimolo Mohamed @ Athumani** (supra). As an unsworn statement, it required corroboration although it could also be acted upon

without corroboration if the court was satisfied that it was nothing but the truth.

In our view, even if PW1's unsworn statement is taken to require corroboration, there was ample evidence to that effect. First and foremost, PW5's straightforward and convincing account detailing what she found at the scene corroborated PW1's claim that it was the appellant who ravished her. Secondly, the testimonial accounts of PW2 and PW4 confirmed the nature and extent of the injuries PW1 suffered at the hands of the appellant. We are satisfied that although the trial court and the first appellate court erred in failing to consider PW1's evidence as unsworn testimony, they looked at the evidence on the record in its totality and righty convicted the appellant on it. In conclusion, while we agree that PW1 gave evidence irregularly without an oath, we dismiss the complaint under discussion as the appellant's conviction, on the evidence on record, ultimately remains unshaken.

The ground of appeal faulting the courts below for acting on a cautioned statement (Exhibit P.4) that was wrongly admitted in evidence should not detain us. As rightly submitted by Ms. Paul, the learned appellate Judge dealt with a similar complaint in the first appeal and found merit in it. As shown at pages 69 and 70 of the record, the learned appellate Judge found, at first, that

the statement was wrongly tendered by PW6 instead of No. C.8273 D/SSgt Bernard who allegedly recorded it. Secondly, she held that the said statement was wrongly admitted under section 34B (1) of the EA. She reasoned, rightly so in our view, that the said provision only governs production and proof of written statements of witnesses who, for good cause, cannot be procured to appear at the trial and that it does not extend to admission of cautioned statements. In the end, she expunged the said statement from the record. Given this position, we were taken aback that the appellant complained of the cautioned statement which is no longer part of record and was ignored by the first appellate court in determining the tenability of his conviction. We would, therefore, dismiss the complaint under discussion for lacking merit.

We now address the contention that the first appellate court wrongly dismissed the appeal without evaluating the evidence on record including the defence evidence. We hasten to say that there is absolutely no substance in this complaint. The record suggests to us that the learned appellate Judge appreciated the settled position that a first appeal should be in the form of a re-hearing and that she had the duty to re-consider and re-evaluate the evidence and draw her own conclusions. Apart from reviewing all evidence on record, the learned appellate Judge considered the defence evidence which she had found to have not been duly considered by the trial court. At pages

71 and 72 of the record, she took the view that the defence was but an afterthought. We wish to let the record speak for itself:

> *"The appellant contended that the charges against him were falsely framed as he was not paid his money by PW2. Such an allegation had no basis at all. The proper person who ought to have had grudges against the other was supposed to be the appellant himself because he was the one who was not paid. Also there was no scintilla of proof that the appellant took any initiative to demand what was due to him before the incident he is facing.* ***From whatever dimension, I am of the considered view that the appellant's allegations were just an afterthought. Had the trial court considered them, it would not have changed its findings.*** *"*[Emphasis added]

We think the above position is justified. However, by way of emphasis, we would add that the claim that the charge was a product of grudges holds no water for one more reason. The accusation against the appellant was at first made by PW5 who said she found him in the midst of committing that depraved and appalling sexual act on PW1. PW2 was, therefore, not the source of the accusation. That belies the appellant's defence as he even failed to cross-examine PW5 on her graphic details of what she found at the scene of

the crime. The only thing the appellant could muster was asking PW5 about the description of his attire at the scene. PW5 dutifully described the outfit as a green shirt and a pair of black trousers. Without further ado, we dismiss the ground under consideration as it is bereft of merit.

Finally, we deal with the general complaint that the prosecution did not, on the whole, establish its case beyond reasonable doubt.

We think that based on the evidence adduced by PW1, PW2, PW4 and PW5 augmented by the documentary evidence on record, the appellant's conviction is well founded. Apart from PW1 pointing an accusing finger at the appellant as her assailant, PW5 corroborated that evidence as she adduced graphically about what she found at the scene in broad daylight. Shortly thereafter, the appellant escaped. The testimonies of PW2 and PW4 provide further corroboration on the injuries sustained by PW1 in her private parts. On the totality of the evidence on record, there was no doubt that the appellant had carnal knowledge of AJ, a girl of five years, against the order of nature. He was rightly convicted of the charged offence and awarded the life sentence and twelve strokes. We should add that the first appellate court rightly intervened and imposed on him an order for compensation in the sum of TZS. 500,000.00. In conclusion, we dismiss the appellant's final ground of appeal.

In the final analysis, we find the appeal unmerited. It stands dismissed in its entirety.

DATED at **MBEYA** this 26th day of August, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL