IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 343 OF 2017

YUSUPH S/O MOLO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Feleshi, J.)

dated 11th day of August, 2017
in
DC. Criminal Appeal No. 18 of 2017

JUDGMENT OF THE COURT

26th August & 30th September, 2019

MZIRAY, J.A.:

In Criminal Case No. 154 of 2016 of the Resident Magistrates' Court of Njombe, the appellant was charged and convicted in respect of two counts of rape contrary to section 130(1), (2) (e) and 130 of the Penal Code, Cap. 16, R.E. 2002 and to each charged count he was sentenced to thirty (30) years imprisonment with an order for the sentences to run concurrently.

It was alleged in respect of the first count that an unknown day of June, 2016 at Kambarage area within the District and Region of Njombe, the appellant had carnal knowledge of **FIM** (name withheld to hide her identity), a girl of twelve years of age; where in respect of the second count, it was alleged that on 16/7/2016 at the same area, he had carnal knowledge of the said **FIM.**

Discontented, the appellant preferred an appeal to the High Court of Tanzania at Iringa, raising six grounds of appeal to challenge both the conviction and the sentences meted, but all the grounds of appeal were dismissed and the decision of the trial court was accordingly upheld.

Still aggrieved, the appellant has lodged a memorandum of appeal in this Court with seven grounds of complaint to fault the decision of the first appellate court. On quickly going through the grounds of appeal we find that the first ground of appeal in respect of failure to draw inference adverse towards the prosecution case, is a complete new ground which was not raised and canvassed in the first appellate court. The substance in this ground is not a matter of law which could have attracted our attention to intervene and determine it. We cannot therefore entertain this ground

of appeal for want of jurisdiction (See **Abeid Mponzi V.R, Criminal Appeal No. 476 of 2016** (unreported).

The remaining grounds of appeal are to this effect:-

1. *That, the honourable Judge of the High Court erred in law to rely on the testimony of PW1 which is not only contradictory but also fabricated and not credible to form the basis of conviction.*
2. *That, the honourable Judge of the High Court wrongly held that the medical report does not bind the court without reasoning prudently (reasonably) that taking into account the ages of PW1 and the appellant it was not possible to sleep together till in the morning without having sexual intercourse.*
3. *That, the High Court wrongly relied on the cautioned statement to dismiss the appellant's appeal without taking into account that the appellant was beaten severely by PW2 and furthermore that he was the one who took him to the police station hence it was not possible for the appellant to deny. (See page 5 of the trial court proceedings).*

4. *That, the honourable Judge of the High Court erred in law for holding that the cautioned statement was read before the court of law without addressing his mind properly that there was no prayer from the prosecution side to read the said cautioned statement after it has been dully admitted as exhibit.*
5. *That, the High Court misdirected itself to rely on the testimonies of PW2 and PW3 as corroborative to that of PW1 without considering that the said testimonies are wholly based on suspicion and furthermore are purely hearsay.*
6. *That, the High Court erred in law for holding that the prosecution side proved the case beyond reasonable doubt without addressing its mind properly that their testimonies left a lot of doubts unreasonably.*

Before we move further, a brief back ground of the case is necessary. At the material time, **FIM** was 12 years old and was a pupil attending Kambarage Primary School. She is a daughter of PW2 Isaya Samweli Mtitu. Both the appellant and **FIM** knew each other prior to the alleged incident. It is the appellant who in June 2016 started to entice **FIM** by

sending love letters to her using one of his friends called Inno as a go between to accomplish his evil mission. The said letters received positive response from **FIM** who agreed to visit the appellant in one of the evenings at his rented house. On that day which was in June 2016, **FIM** escaped home unnoticed and came to spend the night with the appellant. According to her, on that fateful night the appellant raped her until 5.00 am the next morning when he timely released and escorted her so that she could punctually attend school. The appellant repeated the act on 16/7/2016. On the third time which was on 18/7/2016, **FIM** went and spent a night with the appellant without having sexual intercourse. When she was returning home on the early morning of the next day, at around 5.00 am, she was caught by her father (PW2) who had arranged a trap to nab her. On quizzing her, she named the appellant as the culprit. PW2 together with PW3 Claudius Msemwa (ten cell leader) confronted the appellant who admitted in the presence of **FIM** to have raped the latter on two occasions. The matter was reported to police whereupon **FIM** is alleged to have been issued with a PF3 for medical examination. The police assigned PW4 DC Andrew Fulgence Chogo to investigate the allegation. He cautioned the appellant on 19/7/2016 who voluntarily

elected to give his cautioned statement (exhibit PE- A). The appellant was subsequently brought to justice, where he denied before the trial court to have committed the two charged offences.

In his defence before the trial court, the appellant did not speak anything in relation to the charge. He only explained how PW2 came at his place on the early morning of 19/7/2016 and started assaulting him on accusations that he was having a love affair with his daughter **(FIM).** He denied this accusation. His two witnesses i.e DW2 Getrude Mung'ong'o and DW3 Lina Molo focused their testimonies on the alleged assault perpetrated by PW2 on the appellant. They did not speak anything of the alleged rape.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas on the part of the respondent/Republic had the services of Ms. Blandina Manyanda, learned State Attorney. When the appellant was given the opportunity to elaborate on the grounds of complaint raised in his memorandum of appeal, he elected to let the learned State Attorney submit first and reserved his right of rejoinder, if need would arise.

At the very outset, Ms. Manyanda declared that the respondent was opposing the appeal. She supported the conviction and sentences imposed by the trial court. She was in agreement with the Court's observation that the first ground of appeal raises new issues which were not adjudicated upon by the first appellate court, hence it should be discarded.

In response to the second ground of appeal, the learned State Attorney dismissed the assertion that the evidence of PW1 was contradictory and fabricated. On the contrary, she submitted that the evidence of PW1 at page 14 – 18 of the record has clearly explained how on the two occasions the appellant raped her. She stated that the trial court correctly assessed her demeanour and came to the conclusion that PW1 was a witness of truth. To support her argument, the learned State Attorney referred us to the case of **Selemani Makumba V.R** [2006] TLR 379.

Addressing on the third ground of appeal, the learned State Attorney submitted that though PW1 was not medically examined, still her oral evidence before the trial court was cogent to prove the two offences

charged. She agreed with the first appellate court that expert opinion is not binding to court in arriving to its decision but is rather persuasive. She stressed that a medical report or evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape. She once again referred us to the decision of **Selemani Makumba** (supra).

The complaint in the fourth ground is that the appellant was coerced through torture to give the cautioned statement. In response to this ground, the learned State Attorney referred us to page 24 of the record on which the appellant did not object to the admission of the cautioned statement tendered by PW4. She took us also to page 25 where it shows that the appellant did not cross-examine at all PW4 on the evidence pertaining to the tendered cautioned statement. She then reverted to page 24 where it clearly shows that the cautioned statement was cleared for admission and upon being admitted it was read out to the appellant. It is therefore the contention of the learned State Attorney that the statement was free and voluntary. As this ground of appeal is somehow related to the fifth ground of appeal, she invited us to dismiss the two grounds.

Concerning the sixth ground, the learned State Attorney submitted that the evidence of PW2 and PW3 corroborated the testimony of PW1 because when they confronted the appellant and pointed the offence to him, he readily conceded to have had an illicit affair with PW1. Additionally, she submitted that such evidence is further corroborated by the appellant's cautioned statement which he confessed to have committed the two offences.

The learned State Attorney ended by inviting the Court to dismiss the appeal in its entirety on account of the fact that the case for the prosecution was proved to the hilt.

Immediately after she had rested her submission, the Court raised a pertinent issue as to whether the provisions of section 127(2) of the Evidence Act – Cap 6, R.E. 2002 (as amended) was complied with i.e whether PW1 before giving evidence, promised to tell the truth to the court and not lies. The learned State Attorney was quick to point that the requirement to conduct *voire dire* test to a child of tender age was removed through the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 which came into force on 8/7/2016. With this

amendment, what a child of tender age is supposed to do before giving evidence is to make a promise to tell the truth to the court and not to tell lies, she argued. The learned State Attorney referred us to page 14 of the record where it clearly indicates that PW1 who at the material time was 13 years old gave a sworn evidence without making a promise to the trial court to tell the truth. According to her, failure to comply with section 127(2) (as amended) was an incurable irregularity which render the evidence of PW1 to have no any evidentiary value. However, in the instant case, the learned State Attorney submitted that, much as PW1 did not promise to tell the truth but the remaining evidence of the cautioned statement which has been materially corroborated by the testimonies of PW2 and PW3 was sufficient to ground a conviction.

In rejoinder, the appellant adopted his seven grounds of appeal he lodged before the trial court. He elaborated the second ground of appeal by stating that the evidence of PW1 should not be accorded any weight because she did not promise the court to tell the truth as required by the law. He also challenged the decision of the first appellate court in its finding that medical evidence was not essential in a case of rape. As a

whole he maintained that the case for the prosecution was not proved beyond reasonable doubt; for that reason, he asked for his release.

We start our discussion with the effect of non-compliance with section 127(2) of the Evidence Act (as amended). Our discussion will follow the substance in the decision of this Court in **Godfrey Wilson VR,** Criminal Appeal No. 168 of 2018 (unreported). Prior to the amendment of section 127(2) of the Evidence Act, it was a requirement of the law for a trial magistrate or judge who conducts a *voire dire* test to indicate whether or not the child of a tender age understands the nature of an oath and the duty of telling the truth; and if she is possessed of sufficient intelligence to justify the reception of her evidence. The 2016 amendments through Act No. 4 of 2016 changed the position. The amendment deleted sub section (2) and (3) and substituted with subsection (2) as follows:

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

Under the above amendment, the requirement to conduct a *voire dire* test has been removed. What is paramount in the new amendment is for the child before giving evidence to promise to tell the truth to the court and not to tell lies. That is all what is required. It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record then it is a big blow in the prosecution case.

In the instant case, since the record does not show that such a promise was made by the victim child, the necessary inference we draw is that there was no such undertaking made. If there was no such undertaking, obviously the provisions of section 127(2) of the Evidence Act (as amended) were faulted. This procedural irregularity, in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never testified to the rape allegation against her. It was wrong for the evidence of PW1 to form the basis of conviction as stated in the second ground of appeal.

The third ground of appeal is on failure to tender medical evidence – whether it had any repercussion on the prosecution case. In this case it is not clear whether a PF 3 had been issued to PW1 or that she was medically attended after the alleged rape. We think that this ground should not detain us. We are satisfied with the findings of the two courts below to the effect that expert opinion is not binding to the court in arriving to its decision but is rather persuasive. Also in **Selemani Makumba** (supra) we stated that a medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape. We concluded by stating that "**true evidence of rape has to come from the victim".** That being the position, we find the third ground to be unmeritorious.

We wish to combine ground four and five together. The complaints in the two grounds are that the cautioned statement was extracted under duress and that the document was not first cleared for admission, and after admission it was not read out to the appellant. As correctly observed by the first appellate court, during the admission of the cautioned statement, as reflected at page 24 of the record of the trial court proceedings, the appellant had no objection and when the statement was read over in the

trial court and the appellant invited to put questions as shown at page 25 of the record, he replied, " **I have no question to ask this witness at all** ". Besides, during defence, the trial court proceedings at page 30 of the record of appeal shows that when the appellant was cross- examined by the learned State Attorney, in the fifth answer, he replied that, **"I was not beaten or tortured at Police Station".** That is a confirmation that he gave the cautioned statement freely and voluntarily. Also at page 58, it clearly shows that the statement was read over to the appellant. We are therefore of the firm view that the cautioned statement was free and voluntary. To us, grounds 4 and 5 are baseless.

In dealing with the sixth ground, we find that after we have ruled out the evidence of PW1 to have no evidentiary value, the remaining evidence which link the appellant with the two rapes is the cautioned statement and the evidence of PW2 and PW3. The appellant has complained in this ground of appeal that the evidence of PW2 and PW3 is hearsay. However, as rightly pointed by the learned State Attorney, the evidence of both Pw2 (Victim's father) and PW3 (a ten cell leader) who apparently is an independent witness is also clear that the appellant admitted having sexual relationship with PW1. The trial court assessed their demeanor and found

trial court and the appellant invited to put questions as shown at page 25 of the record, he replied, " **I have no question to ask this witness at all ".** Besides, during defence, the trial court proceedings at page 30 of the record of appeal shows that when the appellant was cross- examined by the learned State Attorney, in the fifth answer, he replied that, **"I was not beaten or tortured at Police Station".** That is a confirmation that he gave the cautioned statement freely and voluntarily. Also at page 58, it clearly shows that the statement was read over to the appellant. We are therefore of the firm view that the cautioned statement was free and voluntary. To us, grounds 4 and 5 are baseless.

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them as witnesses of truth. Their evidence, certainly corroborated the cautioned statement the appellant gave to the police. In his own evidence at page 30 when he was being cross-examined by the learned State Attorney he stated on oath that he was not beaten or tortured at the Police Station, an assertion which reinforces the quality of the cautioned statement.

In the light of the foregoing, we are settled in our minds that the case for the prosecution was proved beyond reasonable doubt. We dismiss the appeal in its entirety.

DATED at **DAR ES SALAAM** this 10th day of September, 2019.

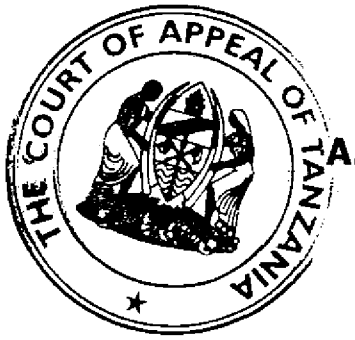
R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2019 in the presence of the Appellant in person and Mr. Alex Mwita learned State

Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.



L. M. CHAMSHAMA
A.G:DEPUTY REGISTRAR
COURT OF APPEAL