IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 576 OF 2017

ANDREW CHARLES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mansoor, J)

Dated 30th day of November, 2017
in
(DC. Criminal Appeal No. 161 of 2016)

JUDGMENT OF THE COURT

14th & 20th August, 2019
MMILLA, J.A.:

Andrew Charles (the appellant), is currently serving a thirty (30) years' imprisonment term. He was originally charged before the District Court of Dodoma at Dodoma with two counts; rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002; and impregnating a school girl contrary to section 4 of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) Rules of 2003. He was found not guilty and acquitted in

respect of the second count. He however, unsuccessfully appealed to the High Court in respect of the conviction and sentence regarding the first count, hence this second appeal to the Court.

The background facts of the case are simple and straight forward. By May, 2015 the appellant was employed by the complainant's parents, Mr. Mohamed (he did not testify) and Sauda Hamidu Mrisho (PW2) as a watchman at the latters' residential premises at Kisasa area in Dodoma Municipality (now Dodoma City). Then, PW2 and her husband were living at the said area with their children who included PW1 (S.M), a minor who was then 12 years old. It is alleged that the appellant encountered PW1 in the course of his employment. He successfully seduced her, raped and impregnated her.

During trial, the prosecution side called four witnesses of whom the victim girl was amongst and testified as PW1. She told the trial court that in May 2015, the appellant would call her and sexually molest her in an abandoned motor vehicle in the compound of the family's residential house. It was further related that she did not divulge the incident to her parents because she was afraid.

On the other hand, PW2 testified that on 26.6.2015 PW1 called her in her room and informed her that she was not feeling well. She found her vomiting, and purported that she had malaria. She took her to Aga Khan Hospital for their attention. They were asked to return the next day.

On 27.6.2015, PW2 perceived that her daughter's condition had worsened. On that day however, the victim girl disclosed to her mother that the appellant was regularly having sexual intercourse with her, an act which was taking place in an abandoned NISSAN in the compound of their house. That information shocked and frustrated PW2. She took both PW1 and the appellant to police station for their action. PW1 was issued with a PF3 with instructions to PW2 to take her to hospital for medical examination.

PW1 was taken to hospital on 27.6.2015 and was medically examined on that same day. PW2 was informed that the victim girl had nine (9) weeks' pregnancy. She returned the PF3 to the police for their further action.

Dr. Hinja Joseph January (PW3) was the one who medically examined PW1 and tendered before the trial court the PF3 (Exhibit P2).

That witness deposed that the medical examination of that girl revealed she had a 9 weeks' pregnancy.

There was also the evidence of Titus Mwalulefu (PW3 – Sic: PW4), a primary court magistrate who, in his capacity as a justice of peace recorded the appellant's extra judicial statement (Exhibit P3). He testified that the appellant admitted that he had sex with PW1 three times.

In his defence the appellant denied involvement. He maintained that he was framed up by the complainant. He called three witnesses namely; Martin Charles (DW2), Flora Teu (DW3) and Zuena Harun Kishaka (DW4). While DW2 and DW3 said it was Selemani who was having an affair with PW1, DW4 said she knew nothing about that case.

Two sets of memoranda were filed in this Court by and/or on behalf of the appellant. The first set was filed by the appellant in person on 7.5.2018, while the second set was filed on his behalf by his advocate on 10.5.2018.

When the appeal was called on for hearing on 14.8.2019, the appellant appeared in person without his advocate. He informed the Court that he dispensed the services of his advocate and elected to fend for

himself. Likewise, he dropped the grounds of appeal which were filed by his advocate, and chose the appeal to be based on the grounds which were filed by him. We had no problem with his choice.

The memorandum set filed by him raised seven (7) grounds as follows; **one** that, both lower courts erred in law in relying on the evidence of PW1 who was then 12 years old, thus a child of tender age, which was recorded without subjecting her to a *voire dire* test; **two** that, the confession attributed to him was not voluntarily given; **three** that, the victim's birth certificate was admitted in court without giving him chance to say whether or not he had any objection; **four** that, the age of the victim girl was not proved; **five** that, both courts below did not properly analyze the evidence on record; **six** that, the evidence of the prosecution witnesses was contradictory; and **seven**, that both lower courts did not seriously consider his defence. He elected for the respondent/Republic to submit first.

On the other hand, the Republic enjoyed the services of Mr. Morice Sarara, learned State Attorney. At the outset, he informed the Court that he was opposing the appeal.

In the first place, Mr. Sarara contended that except for grounds 1, 2 and 6, the rest were new ones because they were not raised in the High Court. As such, he added, the Court has no jurisdiction to hear and determine them. He urged it to ignore them.

Of the remaining three grounds, Mr. Sarara submitted first on the ground referring to section 127 (2) of the EA. He unhesitatingly admitted that since the evidence of PW1 and PW2 indicated that then PW1 was 12 years old, her evidence ought to have been recorded subject to conducting a *voire dire* test in order to determine whether she understood the nature of oath, and also the duty to speak the truth. Unfortunately, Mr. Sarara went on to submit, the trial court made no attempts to comply with the above mentioned provision, hence that the evidence of PW1 was invalid. He requested the Court to expunge it from the record.

Notwithstanding the just ended submission, Mr. Sarara asserted nonetheless that even in the absence of the evidence of PW1, there was other evidence from other witnesses strong enough to sustain the conviction. Apart from the evidence of PW4 who tendered before the trial court an extra judicial statement (exhibit P3) as evidence, there was also the evidence of PW2, PW3 and PW5. He elaborated that PW2, who as

aforesaid was the mother of PW1, had testified that then her daughter was 12 years old and tendered the latter's birth certificate (exhibit P1) as evidence in court. That witness was the one who took both the victim girl and the appellant to the police after she heard the former's shocking narration to her that the appellant was regularly molesting her.

Mr. Sarara went on to submit that apart from the evidence of PW5 who was the investigator of that case, there was similarly the evidence of PW3 who was the doctor who medically examined PW1 and found that she was sexually violated and had a 9 weeks' pregnancy.

Of major importance, Mr. Sarara asserted, was the evidence of PW4, a justice of the peace who, as aforementioned, recorded the appellant's extra judicial statement which he said was made voluntarily, rightly believed and relied upon. He justified that before recording it, PW4 followed all the formalities. He added that the trial court properly overruled the appellant's objection regarding its admissibility because there were no cogent reasons to establish that he was forced to make it. Besides, Mr. Sarara added, the appellant admitted in his defence that he was not forced to make the statement, but that he made it while under stress which is not

the same as saying it was not voluntary. We pose to say that we share his view.

Mr. Sarara submitted likewise that the appellant unambiguously confessed that he had sexual intercourse with PW1 three times, though he qualified that he did not ejaculate in his victim's female organ. Mr. Sarara concluded therefore that exhibit P2 was strong evidence which, along with other evidence as aforesaid, established that the appellant committed the offence of rape. He urged us to dismiss the appeal.

Mr. Sarara climaxed his submission on ground No. 6 which alleges that the prosecution witnesses gave contradictory evidence. On this, he argued that he examined and compared the evidence of all the prosecution witnesses, but did not find any contradictions. Also, he did not come across any elements which positively suggested that the evidence against the appellant was cooked as he claimed. Mr. Sarara concluded that the evidence against the appellant was real, credible and believable. He asked the Court to dismiss this ground too, and finally dismiss the appeal.

As already pointed out at the start, the appellant dropped the second ground of appeal. Concerning the 6th ground on contradictions, he

refrained from saying anything but left it for the Court to decide. He nevertheless prayed the Court to allow the appeal.

Like Mr. Sarara, we will begin with the observation he made concerning the third, fourth, fifth and seventh grounds of appeal which he said were new because they were not raised in, and determined by the High Court, therefore that the Court has no jurisdiction to determine them.

We painstakingly examined and compared the grounds of appeal which were raised in the High Court reflected at page 54 of the Record of Appeal and those he filed in this Court. We are satisfied that Mr. Sarara's assertion that the third, fourth, fifth and seventh grounds have been raised in this Court for the first time is unassailable.

As we had the occasion to say in the cases of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 and **Emmanuel Josephat v. Republic,** Criminal Appeal No. 323 of 2016, CAT (both unreported), where the grounds of appeal may be raised in the Court for the first time, no doubt, it will not entertain and determine them for lack of jurisdiction. This was elaborately stated in **Samwel Sawe v. Republic** (supra) in which the Court said:-

"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."*

In the circumstances, since grounds 3, 4, 5 and 7 in the present case were not raised in the High Court on first appeal, we abstain to determine them for reason just stated. Thus, those grounds are consequently ignored.

Next for consideration is the first ground of appeal on failure to subject PW1 to a *voire dire* test before the trial court embarked to record her evidence. Mr. Sarara was unhesitant that indeed, that was a fatal omission. He stated that the evidence of that witness ought to have been recorded after complying with the directions under section 127 (2) of the

EA. We are entirely in agreement with both, the appellant and Mr. Sarara. We will explain.

Before the 2016 amendment to section 127 (2) of the EA vide The Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, it 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."*

As we are aware, the meaning of a "child of tender age" is defined under subsection (5) of section 127 of the EA to mean "a child (whose apparent age is not more than fourteen years."

Since the victim girl in the present case was by 8.12.2015 twelve (12) years old, it is indubitable that she was a child of tender age, her evidence ought to have been recorded after complying with the requirements under

section 127 (2) of the EA. Since *voire dire* was not conducted, her evidence was worthless – See the case of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011, CAT (unreported). In the circumstances, we find merit in this ground which we accordingly allow.

Notwithstanding his concession that the evidence of PW1 was recorded in violation of the demands of section 127 (2) of the EA, Mr. Sarara was resolute that there was other solid evidence sufficient to attract the Court to sustain conviction and sentence. He banked on the evidence of PW3, PW4 and partly that of PW2. He detailed the vital parts of the evidence of these witnesses.

We carefully examined and scrutinized the evidence of all those witnesses. From our point of view, we agree with Mr. Sarara that their respective evidence was free from any contradictions, and that we did not find any clues to suggest that it was cooked. To the contrary, we are satisfied that it was strong, credible and believable. We endeavour to illustrate.

To start with, we agree with Mr. Sarara that PW2, the victim's mother, was the one who on 26.6.2015 took PW1 to hospital for treatment

once the latter's illness was communicated to her. On the day that followed, PW1's condition deteriorated, whereof she disclosed to her mother the secret she harboured that the appellant had raped her. At that point in time, PW2 took PW1 and the appellant to police. The significant part of her evidence was in respect of her daughter's age. She said then, PW1 was 12 years old and tendered the latter's birth certificate as evidence.

Next is the evidence of PW3, the doctor who medically examined PW1 when she was taken to him by PW2. Among other things, PW3 testified that PW1 had lost her virginity and that in fact, she had a 9 weeks' and 4 days' pregnancy and tendered in court the PF3 (exhibit P2) to that effect.

On the other hand, PW4 was the witness who recorded the appellant's extra judicial statement. Of course, it was objected to on allegation that it was not voluntarily made, but the trial court overruled the objection after an inquiry was conducted to resolve the protest whereof it was satisfied that it was voluntarily made. We went through the inquiry proceedings and the decision of that court as well as the remarks on the point of the first appellate court. We are in agreement with both courts

below that it was freely offered, therefore, the statement was correctly received as evidence.

We have succinctly examined exhibit P3 which appears at page 41 of the Record of Appeal. We agree with Mr. Sarara that the contents of that document amounted to nothing else but a confession that he raped PW1. For purposes of precision, we desire to quote the salient part of that document as follows:-

> *"May, 2015 mwishoni, alikuja mtoto wa bosi wangu wa kike. Alitaka nikamnunulie laini ya simu na nimsajilie. Alisema nikimsajilia atakuja kufanya mapenzi na mimi. Nilimsajilia na kumpelekea. Aliniuliza je si leo tutafanya mapenzi? Nilijibu ndiyo. Nilifanya naye tendo la ndoa lakini mbegu zangu sikumwagia ndani. . . ."*

Similarly, from the contents of that document the appellant was sincere that he sexually molested PW1 three times.

On the strength of what we have shown above, we agree with Mr. Sarara that even after expunging the evidence of PW1, the remaining evidence is powerful enough to sustain the appellant's conviction and

sentence. Consequently, we hold that the appeal lacks merit. We accordingly dismiss it.

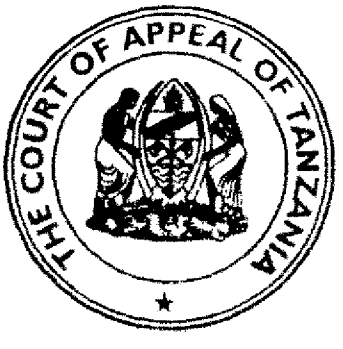
DATED at **DODOMA** this 19th day of August, 2019.

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