IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 215 OF 2019

JUMA S/O LWILA @ MASUMBUKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Banzi, J.)

dated the 21st day of December, 2018
in
HC Criminal Appeal No. 28 of 2018

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JUDGMENT OF THE COURT

17th & 19th August, 2020.

NDIKA, J.A.:

In the Resident Magistrate's Court of Njombe at Njombe, Juma s/o Lwila @ Masumbuko, the appellant, was charged with rape, on the first three counts, contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 RE 2002 as well as the offence of impregnating a school girl, on the fourth count, contrary to section 60A (1) of (3) of the Education Act, Cap. 353 RE 2002 as amended by section 22 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. While he was acquitted on the fourth count, his luck ran out as he was convicted of rape on all counts. Consequently, he was sentenced to three mandatory jail terms of thirty years which were to

run concurrently. In addition, he was ordered to pay the victim TZS. 500,000.00 as compensation. His first appeal before the High Court of Tanzania sitting at Iringa against the convictions and sentences bore no fruit, hence this second and final appeal.

The prosecution had alleged before the trial court that the appellant had carnal knowledge of 'MM', a girl aged thirteen years, on three occasions at Mfereke Village within the District and Region of Njombe. The alleged occasions happened on an unknown date in December, 2016, 24th April, 2017 and 2nd July, 2017. As regards the fourth count, the accusation was that the appellant impregnated MM, a Standard Six pupil at Mfereke Primary School, on an unknown date in December, 2016. The appellant denied the charges against him, hence a full trial ensued.

To prove its case, the prosecution presented seven witnesses who included the prosecutrix (PW1). Their testimonies, knitted together, present the following narrative: PW1 lived in the same homestead with her mother Yudith Lupenza (PW2) and the appellant, who happened to be her stepfather. On an unknown date in December, 2016 while PW2 was away, the appellant approached PW1 in the kitchen, grabbed her hand and took her to a bedroom. Having undressed her and himself, he had sex with her. PW1, then aged thirteen years, did not disclose to anyone about that incident

because the appellant had threatened to kill her if she dared spill the beans. The appellant forcefully had sexual intercourse with PW1 in the same bedroom on two further occasions, on 24th April, 2017 and 2nd July, 2017 again while her mother was away.

On 10th July, 2017 PW1's teachers at school, who included PW3 Veronica Malekela, suspected her being pregnant. They took her to a nearby dispensary, the Idundilanga Dispensary, where she got a positive pregnancy test. The matter was immediately reported to the police who then issued PW1 with a formal request for medical examination (PF.3). She was taken to the Njombe Regional Referral Hospital at Kibena where Dr. Barnaba Baraka (PW6) confirmed that she was sixteen weeks pregnant as per the PF.3 (Exhibit A.2).

The court of trial also heard from PW4 Emmanuel Benaya Haule, the Head Teacher at Mfereke Primary School, that when PW1 was interrogated as to who was responsible for her pregnancy, she pointed the accusing finger at the appellant as well as a teenager known as Eddy Kayombo. In response to cross-examination by the appellant, PW1 admitted to have had sex with Eddy once, sometime in December, 2016. The Village Executive Officer Kolani Chabinge (PW5) recounted the appellant's interrogation immediately

after he was arrested. He averred that the appellant was hesitant to answer whether or not he had impregnated PW1.

There was further evidence from the police officer, No. G.1998 D/C Nelius (PW7). He testified that the appellant confessed to have had sex with the prosecutrix twice, on 24th April, 2017 and 2nd July, 2017, as evidenced by a cautioned statement he recorded of the appellant (Exhibit A.3). It is noteworthy that the said statement was admitted after the trial court had conducted an inquiry and ruled that it was voluntary.

In his sworn defence, the appellant denied flat out to have raped or impregnated the victim. He related PW1's interrogation at her school in the presence of her teachers and himself that he named Eddy as the boy that impregnated her. He also blamed PW2 for his travails, saying that she fabricated the case against him in vengeance following his marriage to another woman.

In its judgment, the trial court found it unchallenged that the prosecutrix was a Standard Six pupil at Mfereke Primary School aged thirteen years at the material time. Further, the trial court was impressed by the victim's evidence, which it found credible, that the appellant raped her on the three occasions as alleged and that she could not report the matter due

to the threats the appellant had made. While the court was cognizant that the appellant had confessed in his retracted cautioned statement to have had sexual intercourse with PW1 on two occasions only, on 24th April, 2017 and 2nd July, 2017, it accepted PW1's account that the first time the appellant had sex with her was on an unknown date in December, 2016.

The trial court considered the appellant's defence but rejected it as fanciful as it found no reason for the victim to team up with her mother (PW2) to frame up the appellant while it was undisputed that PW2 was all along unaware of what was going between her daughter and husband.

As regards the charge on the fourth count, the trial court was of the view that it was unproven as PW1 had admitted having sexual intercourse with the fifteen-year-old Eddy Kayombo during the material time, apart from the three occasions she had sex with the appellant. Thus, there was no certainty that the appellant impregnated PW1. The prosecution was blamed for not introducing forensic evidence (DNA evidence) to unravel the mystery.

As hinted earlier, the appellant's first appeal to the High Court was unsuccessful. The court upheld the finding that the charges on the first three counts were sufficiently established.

The appellant now challenges the High Court's decision on six grounds of complaint as follows: **First**, that he was wrongly convicted on a defective charge. **Secondly**, that the testimony of PW1, a child of tender years, was recorded contrary to the dictates of section 127 (2) of the Evidence Act, Cap. 6 RE 2002 ("the Evidence Act"). **Thirdly**, that the mandatory provisions of section 231 (1) (a) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA") were not complied with. **Fourthly**, that the trial court gave no reasons why it believed PW1's evidence. **Fifthly**, that the cautioned statement (Exhibit A.3) was illegally obtained, hence unreliable. And **finally**, that the medical examination report (PF.3 – Exhibit A.2) was not read out.

On 12th August, 2020, the appeal came up before us for hearing in the presence of the appellant, who was self-represented, and Ms. Blandina Manyanda and Ms. Alice Thomas, learned State Attorneys, appearing for the respondent Republic.

As it turned out on that day, the parties addressed us only on the first ground only. The initial view shared by the parties at the hearing was that the appellant was wrongly convicted on the original charge sheet that the prosecution had filed on 24th July, 2017 despite the said charge sheet having been amended subsequently on 13th September, 2017 as shown at page 8

of the record of appeal. That view was reinforced by the absence of any such substituted charge on the record of appeal or the original case file.

On reflection in the course of composing our judgment, however, we became convinced that the substituted charge sheet might have been filed with the trial court but misplaced. In line with our decision in **Robert s/o Madololyo v. Republic,** Criminal Appeal No. 486 of 2015 (unreported), we directed the Registrar to perfect the record of appeal by reconstituting it, an effort which entailed contacting all parties involved in the case at the trial stage. That effort paid off as the substituted charge sheet was promptly retrieved from the records of the office of the Director of Public Prosecutions at Njombe and supplied to the Registrar. Accordingly, we recalled the parties and they appeared on 17th August, 2020 as they did previously.

At this point it bears restating that this being a second appeal, the Court would not normally interfere with the concurrent findings of fact made by the courts below unless they are perverse or demonstrably wrong: 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).

We find it instructive to observe that all the six grounds of appeal except the fourth ground allege procedural infractions. Nonetheless, we think that the sticking question is whether there are strong and compelling grounds for interfering with the concurrent findings of the courts below.

We propose to deal with the contentions alleging procedural irregularities beginning with the first ground of appeal. Finally, we shall deal with the fourth ground of appeal.

The appellant's contention in the first ground is that he was wrongly convicted on the original charge sheet that the prosecution filed on 24th July, 2017 but that it ceased to exist after it was amended subsequently on 13th September, 2017 as shown at page 8 of the record of appeal.

On our part, we have no doubt that the complaint under consideration is plainly misconceived; for, it only came about following the inadvertent but unfortunate omission of the substituted charge sheet from the original record of appeal. Having laid our hands on the substituted charge sheet and examined the record of trial proceedings, we agree with Ms. Manyanda that the appellant's conviction was rightly predicated upon the substituted charge sheet that was filed on 13th September, 2017. The trial record indicates clearly that after the substituted charge sheet was admitted by the trial

Resident Magistrate, it was read out and explained to the appellant who then pleaded not guilty to the offences on all the four counts. We are, therefore, satisfied that the substitution of the charge sheet was done in accordance with the dictates of section 234 (1) and (2) of the CPA. It assures us that the appellant must have understood the nature of the charges against him and that he was given an opportunity to challenge the charges, which is in line with the minimum standards of fair trial as enumerated by the Court in **Mussa Mwaikunda v. Republic** [2006] TLR 387 cited to us by Ms. Manyanda. Without ado, we dismiss the first ground of appeal.

Turning to the grievance in the second ground of appeal that PW1's testimony was irregularly recorded, we hasten to observe that this allegation, just like the previous complaint, has been made out of misapprehension of the law. The appellant contends in his written submissions that the testimony of PW1 was recorded without a *voire dire* examination having been conducted on her to determine if she understood the nature of oath as well as the duty to speak the truth. As correctly argued by Ms. Manyanda, PW1's evidence was properly recorded in terms of section 127 (2) of the Evidence Act, which, as amended by section 26 of the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016, replaced the *voire dire* examination procedure with the requirement for a child witness of tender years to be

allowed to give evidence upon a promise to the trial court to tell the truth. The said provisions now state thus:

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

[Emphasis added].

It is, indeed, evident from the record that PW1, being aged thirteen years at the time she gave evidence on 21st September, 2017, was below the "apparent age of fourteen years" in terms of section 127 (4) of the Evidence Act, hence a child witness of tender years. As such, she was rightly allowed to give evidence after she promised to tell the truth as shown at page 12 of the record of appeal.

Admittedly, PW1 was not asked any preliminary questions on her position as a child witness of tender years before she made her promise to tell the truth as recommended by the Court in **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported). Nonetheless, as we held recently in **Joshua Mgaya v. Republic**, Criminal Appeal No. 205 of 2018 (unreported) referred to by Ms. Manyanda, failure to ask such preliminary questions would not necessarily efface the validity and reliability

of the testimony of the child witness. Inevitably, we find the second ground of appeal lacking in merit.

On the third complaint, the appellant contends that after a ruling of a case to answer was made by the trial court, the said court irregularly addressed him on his rights under section 231 (1) (a) of the CPA in making his defence. He claims that after the trial Resident Magistrate had addressed him on the said rights, he wrongly recorded his response in a manner that does not impute it to him.

Having examined the record of appeal, we go along with Ms. Manyanda's submission that the grievance under discussion is devoid of merit. It is evident at page 39 of the record of appeal that the trial court aptly handled the procedure in question as follows:

> *"**Court:** Accused person addressed in terms of section 231 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 and he responds as follows:*
>
> *I will testify on oath as a witness and I shall not call witnesses. I am ready to defend myself today.*
>
> ***Sgd. S.J. Obasi, RM***
>
> *08/01/2018"*

The above excerpt leaves no doubt that the trial court duly informed the appellant of his rights under section 231 of the CPA and that his election

on how he was to defend himself was properly recorded. It is momentous that he did not suggest to us that his answer to the trial court was distorted. Thus, we are satisfied that there was no abrogation of his fair trial rights under the aforesaid provisions. The third ground ultimately fails.

The foregoing leads us to the fifth ground, which questions the legality and reliability of the cautioned statement (Exhibit A.3). On this ground, the appellant, in essence, argues that the said statement was admitted without PW7 having laid the foundation for its admission; and that after its admission the contents thereof were not read out. He did not say anything in support of his other claim that the statement was illegally obtained.

Conversely, Ms. Manyanda countered that the statement was duly recorded in the course of investigations and admitted in evidence at the trial according to the law. Referring to the trial proceedings at pages 26 to 28 of the record of appeal, she argued that the cautioned statement was recorded from 10:00 to 11:00 hours on 11th July, 2017 after the appellant had been arrested at 07:00 hours on that day. As to the manner the statement was handled after it was admitted in evidence, the learned State Attorney referred us to page 36 of the record, boldly affirming that the contents of the statement were read out.

Having reviewed the record of appeal from page 26, it is notable that the appellant objected to the admission of the statement after it was tendered by PW7 on the ground that it was recorded a week after his arrest on 11th July, 2017 and that he was forced to sign it. In compliance with the law, the trial Resident Magistrate conducted an inquiry into its legality and voluntariness as revealed at pages 28 to 30 of the record. In his ruling, the learned trial Magistrate found that the impugned cautioned statement was recorded from 10:00 to 11:00 hours on 11th July, 2017 after the appellant had been arrested by villagers and handed over to the police at 07:00 hours on that day. We think this finding by the trial court is unassailable and, accordingly, hold that the statement was duly recorded within the four basic hours period in accordance with section 50 (1) (a) of the CPA.

As regards the trial court's handling of the cautioned statement, we would, at first, recall what we said in our decision in **Robinson Mwanjisi & Others v. Republic** [2003] TLR 218. In that case, we stressed not just the need for a documentary exhibit to be cleared for admission and then be actually admitted in evidence but we also underlined the procedural imperative that the contents of such document be read out after is admitted because the party against whom the document is sought to be proved is entitled to know the contents thereof.

In the instant case, the record of appeal at page 36 is clearly at war with what the appellant complained of. It is unmistakable that after the learned trial Magistrate had overruled his objection to the cautioned statement, PW7 laid foundation for the admission of the statement and then tendered it in evidence. After it was admitted, it was duly marked and its contents were read out. For clarity, we wish to extract the relevant part of the record thus:

> *"**PW6 continues:** I recorded the cautioned statement of the accused person called Juma Lwila on 11/07/2017. Juma Lwila is before this court today. I pray to tender the cautioned statement.*
>
> ***Court:** PW7 had identified and tendered the cautioned statement of the accused person as an exhibit. The same is admitted and marked as [Exhibit] A.3. The contents of A.3 are read through (sic) loudly in the presence of the accused person.*
>
> ***Sgd. S.J. Obasi, RM***
>
> *03/01/2018"*

The above excerpt tells it all. We thus agree with Ms. Manyanda that the cautioned statement was lawfully recorded and properly admitted in evidence. The fifth ground of appeal is without any substance. We dismiss it.

The complaint as presented in the sixth ground of appeal that the medical examination report (PF.3 – Exhibit A.2) was not read out need not detain us. Obviously, we note from his written submissions that the appellant amplified that aside from not being read out, the said exhibit was irregularly admitted as it was not tendered by the witness (PW6) who should have offered it to the court and that he was not afforded an opportunity to object to its admission.

Be that as it may, the record of appeal, once again, goes against the appellant's word. It is manifest at page 24 of the record that after PW6 had identified the said exhibit, he tendered it in evidence whereupon the trial Resident Magistrate invited the appellant to comment on its admissibility after it was showed to him. Once again, we feel constrained to let the relevant part of the transcript of proceedings speak for itself:

> *"**Accused person:** I have no objection.*
> ***Court:** PF.3 admitted and marked as [Exhibit] A.2, the same is read out and its contents explained to the effect that the patient was diagnosed to be pregnant.*
>
> ***Sgd. S.J. Obasi, RM***
>
> *12/10/2017"*

The foregoing assures us that the trial court properly handled the exhibit in issue in line with the procedure that we reaffirmed in **Robinson Mwanjisi**

(*supra*). As we are certain that the PF.3 was properly handled, we dismiss the sixth ground of complaint for want of merit.

Finally, we advert to the complaint in Ground No. 4 that the trial court gave no reasons why it believed the evidence of the victim (PW1).

Admittedly, in convicting the appellant, the trial court mainly relied upon the evidence of the victim. Looking at pages 64, 86 to 88 of the record, we note that both the learned trial Magistrate and the learned appellate Judge did not accept PW1's narrative hook, line and sinker. They dealt with her evidence with the judicial care that it deserves. Beginning with the learned trial Magistrate, he evaluated PW1's evidence, at page 64, thus:

> *"... the victim did not have any conflict with the accused person although the accused person claimed that the victim had been influenced by her mother to mention him as a culprit. The version of the victim herein is sufficiently credible as to make this court believe that the victim spoke nothing but the truth ...."*

The learned trial Magistrate reasoned further that the victim could not team up with her mother (PW2) to fabricate a case against the appellant especially in view of the fact that the victim's ordeal went on without her

mother's knowledge and that she only learnt of it upon the sordid incidents being unraveled at PW1's school.

In view of the foregoing, we think that the appellant's claim that trial court did not assign reasons for believing the victim's account is plainly farfetched. We are not surprised that the learned appellate Judge endorsed the full credence given to the victim.

By way of emphasis, we would add, to PW1's credit, that she clearly averred that the appellant ravished her on three occasions. Her narrative of the incidents was found by the courts below to be consistent, truthful and reliable. Certainly, there was delay in reporting the rape incidents but that was due to the threats made by the appellant. Obviously, she would not have risked the appellant making good her threats against her by spilling the beans. Besides, there was obviously an element of shame holding her from disclosing the nasty incidents as the rapist in this matter was her stepfather, a close family member. In the premises, the delay in reporting the incidents would not obliterate PW1's credibility. In the end, we dismiss the fourth ground of appeal.

In conclusion, we find no justification to interfere with the concurrent finding of the courts below, particularly based on the testimony of the victim,

the medical evidence and the appellant's own confessional statement, that the appellant raped the prosecutrix on three occasions as alleged. Accordingly, we hold that the appeal lacks merit. It stands dismissed in its entirety.

DATED at **IRINGA** this 19th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2020 in the presence of the Appellant in person and Ms. Edna Mwangulumba assisted by Jackline Nungu, learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL