IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 564 OF 2016

MAGINA KUBILU @ JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Shinyanga)

(Makani, J.)

dated the 18th day of November, 2016
in
DC Criminal Appeal No. 123 of 2015

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JUDGMENT OF THE COURT

17th & 26th August, 2020

MWAMBEGELE, J.A.:

Before the District Court of Maswa, the appellant Magina Kubilu @ John was arraigned for 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 accusation against him, as gleaned from the particulars of the offence part of the charge, was that on 30.03.2014 at about 1800 hours at Kapilima Street within Maswa District in Simiyu Region, he raped a girl

aged thirteen years. To conceal her identity, we shall refer to the girl as simply "PW1" or "the victim".

The appellant pleaded not guilty to the charge levelled against him. After a full trial comprising four prosecution witnesses and one in defence (the appellant himself), the appellant was found guilty, convicted and sentenced to a prison term of thirty years and ten strokes of the cane. He was also ordered to compensate the victim Tshs. 500,000/=. The conviction and sentence, for obvious reasons, did not amuse the appellant. He unsuccessfully prosecuted his appeal in the High Court before Makani, J. Still aggrieved, he has preferred this second appeal in his quest to assail the verdict of the High Court.

The material background facts leading to the appellant's arrest are found in the testimonies of the prosecution witnesses. They go thus: on 30.03.2014 at about 1800 hours the victim was on her way back home from school when the appellant called her and asked her to enter his room. Upon the victim's resistance for quite some considerable time, the appellant forced her in and, there, he raped her. The appellant, for what

he did to the victim, promised to give her Tshs. 5,000/= on the following day. That day the victim proceeded with her journey back home.

On the following day, the victim went to the appellant's residence to collect the money she was promised by him. Indeed, there, the appellant walked the talk. He gave her the money as promised but at school, little did the victim know that some few days later; on 02.04.2014 to be particular, Devota Japhet Soko (PW4); a teacher at Nyalikungu Primary School where the victim schooling, would be inquisitive. PW4 saw the victim with Tshs. 4,000/= which she reckoned was rather too much for her. Smelling a rat, she embarked on interrogating the victim on the source of the money. Upon enquiry, the victim fumbled. At first she said she was given Tshs. 2,000/= by her grandmother and another Tshs. 2,000/= by her uncle. PW4 found the answers unsatisfactory and therefore wanted to pursue the matter a little bit further. She thus phoned and subpoenaed Bahati Benjamin (PW2); the victim's mother who upon showing up, she was told about the victim having in her possession some money which, to them, was too much for the pupil and had given no sufficient and plausible explanation. The appellant was chastised with some strokes of the cane and that is the point in time when the cat was let out of the bag. She told

PW2 and PW4 that she was given the money by his lover going by the name John; the appellant.

The victim, after obtaining a PF3 from the police, was taken to the Hospital on 03.04.2014 where Dr. Lugaga Vedastus (PW3) examined her and found that she had bruises in the *labium minora* parts of her vagina. The PF3 was tendered and admitted in evidence as Exh. P1. On the following day, the appellant was arrested. He was later arraigned, stood trial, found guilty, convicted and sentenced in the manner already alluded to above.

The hearing of this appeal was conducted through the virtual court services of the Judiciary of Tanzania. The appellant appeared in person; remotely at Shinyanga District Prison. Mr. Nassoro Katuga, learned Senior State Attorney and Ms. Edith Tuka, learned State Attorney joined forces to represent the respondent Republic.

When we called upon the appellant to argue his appeal, he did no more than adopt the memorandum of appeal he earlier filed. He preferred the Republic to respond to his grounds of appeal after which he would exercise his right of rejoinder in case that need would arise.

It was Ms. Tuka who responded to the appellant's grounds of appeal. In her response, the learned State Attorney expressed her stance at the very outset that she resisted the appeal. She combined the first and second grounds of appeal in her response. On the first ground, the appellant faults the first appellate court that it erred in convicting him on the strength of uncorroborated evidence. The learned State Attorney submitted that the record of appeal shows at pp. 8 to 9 that a *voire dire* test was conducted on the victim and at p. 10, the trial court made a finding that the victim possessed sufficient intelligence and knowledge of the duty of speaking the truth and was thus sworn before giving evidence. Such evidence, she submitted, at law, does not need corroboration and may be used to convict an accused person. To buttress this proposition, the learned State Attorney cited to us **Hassan Kamunyu v. Republic**, Criminal Appeal No. 277 of 2016 (unreported).

The gist of the second ground, Ms. Tuka argued, is a complaint that the victim was not credible. She submitted that this complaint is far from truth because the victim eloquently narrated what transpired from p. 10 to p. 11 of the record of appeal how the appellant raped her after she was coming from school and promised to be given money for that occurrence

on the following day. The victim collected the money from the appellant as promised and she was found in possession of part of that money at school. The learned State Attorney added that at p. 47, the learned trial magistrate found the victim as a witness of truth. Ms. Tuka relied on our decision in **Selemani Makumba v. Republic** [2006] T.L.R. 379, at p. 384 where we held that true evidence of rape has to come from the victim. She submitted that the victim herein, a child of tender years, proved that there was penetration and found by the trial court to be a credible witness.

The complaint on the third ground of appeal is that the appellant was denied of his right to call his witnesses. Ms. Tuka submitted that the record shows at p. 27 that the appellant wished to call witnesses in his defence. He asked for summonses to issue to his witnesses and the prayer was granted, she submitted. However, at p. 35, Ms. Tuka went on, the appellant prayed to close his case efforts to trace his witnesses having failed. In the premises, she argued, the trial court did not deny him the right to call his witnesses. This complaint on denial of the right to call witnesses is therefore unfounded, she contented.

The learned State Attorney combined grounds five and six which challenge the way the PF3 was received in evidence and that without it, the witnesses should not have beeen believed. She admitted that the PF3, undoubtedly, was not procedurally adduced in evidence in that it was read and explained before admission. That, she submitted, was a fatal error as the Court held in **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R 218. She added that the exhibit (the PF3) was tendered in evidence by the Public Prosecutor which was also fatal. The learned State Attorney thus had no qualms if the PF3 would be expunged from the evidence. However, she argued, the contents of the PF3 were covered by the oral testimony of Dr. Lugaga Vedasto (PW3) who prepared it. That sufficiently proved the evidence that would have otherwise been found in the PF3 because expert opinion does not override the oral evidence of the witness who physically examined the victim, she submitted. For this proposition, the learned State Attorney, relied on our decision in **Masalu Kayeye v. Republic**, Criminal Appeal No. 120 of 2017 (unreported) – [2020] TZCA 302 at www.tanzlii.org, at p. 20 of the typed judgment at which we observed that expert opinion or production of a PF3 does not override the

evidence of a witness who physical examined the victim. This complaint is also without merit, she contended.

In response to ground seven; a complaint that the appellant was not taken to court timely contrary to section 32 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2019 (the CPA), Ms. Tuka submitted that, indeed, the record bears out that the appellant was arrested on 04.04.2014 and taken to court on 14.04.2014. That, she submitted, offended against the provisions of section 32 of the CPA. However, the learned State Attorney was quick to submit that the provision relates to investigation procedure under Part II of the CPA; the complaint therefore had no bearing on the trial. It should be disregarded, she submitted.

The last ground is a general one; that the case for the prosecution was not proved beyond reasonable doubt. Ms. Tuka responded that, in view of the arguments fronted in the above grounds, the case against the appellant was proved beyond reasonable doubt through the evidence of the victim supported by PW2, PW3 and PW4. Ms. Tuka thus submitted that the appeal was without merit; it should be dismissed.

In a short rejoinder, the appellant lamented that he was framed. He did not disclose the reasons why he was so framed. He added that his name was not John but agreed that it was the name of his grandfather. He submitted that he has never worked with Ndegesera Company as claimed by the appellant who said she was raped by a certain John who worked with Ndegesera Company. The appellant thus prayed to be released from prison custody by allowing his appeal.

In determining this appeal, we shall confront the grounds in the order they appear. The first ground of appeal is a complaint that the first appellate court erred in convicting the appellant on the strength of uncorroborated evidence. We take the complaint on this ground as hinging on the argument that the testimony of the victim needed corroboration. Let us, first, expound the law as it stood then; when the offence under consideration was committed. We wish to acknowledge that we grappled with the point at some considerable length in **Hassan Kamunyu** (supra); a case cited and supplied to us by the respondent Republic. As we are certain that the position of the law that was applicable then in that case is relevant in the case at hand, we shall reiterate that position here.

The law applicable then was section 127 (2) and (7) of the Evidence Act, Cap. 6 of the Revised Edition, 2002, before being amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (the Evidence Act). Subsection (2) thereof, as it stood then, read:

> *"(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."*

And subsection (7) of the same section (before being renumbered by the amending Act) read:

> *"(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case*

may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

In **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005 the Court interpreted the tenor and import of the then subsection (2) and (7) of section 127 of the Evidence Act:

"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction, it must be satisfied that the child witness told nothing but the truth. This means that, there must first be compliance with section 127 (2) before involving section 127 (7) of the Evidence Act; "Voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth, it is only then its evidence can be relied on for conviction without any corroboration otherwise the position of

the law remains the same, that is to say that unsworn evidence of a child witness requires corroboration".

The foregoing stance was re-endorsed by The Full Bench of the Court in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) in the following terms:

"... section 127 (7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127 (2) emanates from a properly conducted voire dire thereunder; however it does not dispense with or remove the requirement of corroboration where the evidence taken originates from a misapplication or non-direction of section 127 (2)."

Reverting to the case at hand, the record bears out at p. 8 that the trial court conducted a *voire dire* test to first ascertain if the victim knew the nature of oath so that she could be sworn before adducing evidence. That was compliance with section 127 (2) of the Evidence Act after which the trial court found at p. 9:

"The child knows God and knows about the nature of oath. So her evidence will be taken on oath"

The learned trial court magistrate did not stop there. He took yet a second step to test the intelligence of the victim by another *voire dire* and at p. 10, he made the following finding:

> *"I find that basing on the above examination, a child is intelligent enough and she knows the duty to speak the truth."*

Flowing from the above, we must confess to our being unable to comprehend the complaint by the appellant on the first ground of appeal. If anything, we are satisfied that the learned trial court magistrate strictly complied with the provisions of sections 127 (2) and (7) of the Evidence Act, as they stood then. Indeed, this is one of the cases in which a trial magistrate complied with those provisions to the letter. Hon. T. J. Marwa, Resident Magistrate deserves a pat on the back for this job well done. It is an example to be emulated.

In view of the above, we are settled in our mind that such evidence could stand alone and capable of mounting a conviction on the appellant. We find no merit in the first ground of appeal.

On the second ground of appeal, the appellant seeks to impugn the first appellate court for believing the victim who, to him, was not a credible

witness. With due respect, we find ourselves unable to agree with the appellant. With equal due respect, we agree with Ms. Tuka that the victim was but a credible witness, for she eloquently recounted what befell her with considerable consistency. She narrated on how the appellant raped her on the material day in the evening when she was returning home from school and how she was promised to be given Tshs. 5,000/= on the following day. Indeed, on the next day, the victim was hypnotized by the Tshs. 5,000/= she was promised; she went to the appellant's residence and collected the money. She also narrated how her teacher (PW4) saw her with part of the money, how her mother (PW2) was called and how some strokes of the cane were administered on her which made her unveil the truth and the immediate arrest of the appellant. Such eloquence, in our considered view, does not put the victim in the realm of witnesses who are not credible. She was a credible witness and the trial court was quite in the right track to take her as such. As we held in **Selemani Makumba** (supra); the case cited to us by Ms. Tuka, true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. We are satisfied that the victim in the case at hand

discharged her duty as required by **Selemani Makumba** (supra. This being a statutory rape, she proved penetration in her testimonial account and on that aspect, the testimony of PW3; the Doctor who medically examined her, gave credence to her testimony. The second ground of appeal is also without merit.

Next for consideration is the third ground of appeal which is founded on the complaint that the appellant was denied of his right to call his witnesses. The record has it at p. 27 that the appellant wished to call Petro Mgasa, Mama Tugema, Mary Makonda, Mama Masha and Kiserya Charles of Wambura Street in Maswa Township as well as a certain Amos who worked with Ndegesera Company. He asked summonses to issue to them. It is not apparent on record that the said summonses were issued to the appellant's witnesses but the appellant prayed to close his case on account that efforts to trace his witnesses was barren of fruit. We will let the appellant's words appearing at p. 32 of the record paint the picture. He is recorded as saying:

> *"I am ready to defend my case today and I will defend myself as my witnesses seem not to respond to witnesses' summonses."*

We agree with Ms. Tuka that it is shown nowhere on the record of appeal that the appellant was denied of his right to call his witnesses. The blame on the trial court denying him of the right to call witnesses is not backed by the record of appeal and thus dismissed.

We now turn to consider grounds five and six which are that the PF3 was not procedurally received in evidence and that in its absence, the witnesses should not be believed. Ms. Tuka conceded to the fact that the procedure was flouted in the reception of the PF3. We also agree. As we observed in **Robinson Mwanjisi** (supra):

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial."*

We made corresponding remarks in **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 (unreported) in which we alluded to the three stages expounded in **Robinson Mwanjisi** (supra) of **clearing**, **admitting** and **reading out** which evidence contained in documents invariably pass through before they are exhibited in evidence.

In the case at hand, the PF3, as appearing at p. 21 of the record, was read and explained before its admission. That, on the authority of **Robinson Mwanjisi** (supra) and **Lack Kilingani** (supra), was a fatal infraction. We acquiesce to arguments by both parties and expunge Exh. P1 from the evidence.

However, the foregoing notwithstanding, as rightly submitted by Ms. Tuka, the contents of the PF3 were eloquently covered by the oral testimony of Dr. Lugaga Vedasto (PW3) who prepared it. We agree that the testimony of PW3 sufficiently proved the evidence that would otherwise have been found in the PF3. As we observed at p. 20 of the typed judgment in **Masalu Kayeye** (supra), relying on our previous unreported decision in **Edward Nzabuga v. Republic,** Criminal Appeal No. 136 of 2008, an expert opinion cannot override oral evidence of a person who witnessed the incident and physically examined a victim. We added that penetration can be proved orally by the victim and other witnesses; without an expert opinion or oral evidence by experts.

We therefore find and hold that penetration in the present case was proved even without the expunged PF3. The fifth and sixth grounds of appeal are therefore without merit.

The seventh ground of appeal will not detain us. It is a complaint that the appellant was not taken to court timely contrary to the provisions of section 32 of the CPA. As rightly put by Ms. Tuka the record shows that the appellant was arrested on 04.04.2014 and taken to court on 14.04.2014. That was contrary to section 32 of the CPA which requires that an accused person should be taken to court within twenty-four hours after being taken into custody. However, we agree with Ms. Tuka that this had no bearing on the trial. We therefore disregard this ground of appeal.

Last for consideration is ground eight which is a general complaint that the prosecution's case was not proved beyond reasonable doubt against the appellant. We agree with Ms. Tuka that the prosecution's case was proved beyond reasonable doubt through the testimony of the victim supported by PW2, PW3 and PW4. For the avoidance of doubt, we are not prepared to buy the appellant's episode that the victim said she was raped by a certain John who worked with Ndegesera Company. The record of

appeal does not back the appellant's contention. This assertion if found in the testimony appellant himself.

In the upshot, we find and hold that this appeal is wanting in merit. It is consequently dismissed entirely.

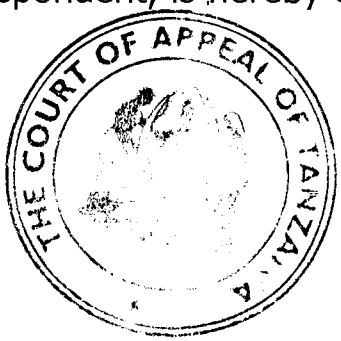
DATED at **SHINYANGA** this 25th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 26th day of August 2020, in the presence of the Appellant in person via video link and Ms. Edith Tuka, Messrs Nestory Mwenda and Mafuru Moses, The learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL