IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

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

CRIMINAL APPEAL NO. 223 OF 2017

OSWARD CHARLES ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ruhangisa, J.)

dated the 16th day of December, 2016
in
DC Criminal Appeal No. 22 of 2015

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JUDGMENT OF THE COURT

21st & 28th August, 2020

MWAMBEGELE, J.A.:

Before the District Court of Shinyanga sitting at Shinyanga, the appellant Osward Charles was arraigned for two counts. **One**, rape contrary to sections 130 (1), (2) (e) and 131 (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). **Two**, impregnating a school girl contrary to rule 5 of the Education (Imposition of Penalties to Persons who marry or Impregnate a School Girl) Rules, 2003 – GN No. 265 of 2003; made under section 35 (3) of the Education Act, Cap. 353 of the

Revised Edition, 2002 (the Education Rules). The particulars of the offence in the first count alleged that the appellant, between November, 2012 and September, 2014 at Kitangili area within the District and Region of Shinyanga, had sexual intercourse with a girl aged twelve years old. On the second count, it was alleged that the appellant impregnated a school girl aged twelve years old. To protect her modesty, in this judgment, we shall refer to the girl as simply PW1; the title under which she testified.

After a full trial comprising three witnesses and one documentary exhibit for the prosecution and one defence witness; the accused himself, he was convicted on both counts and sentenced to life in prison in respect of the first count and two years in prison or to pay a fine of Tsh. 1,500,000/=. His quest to assail the convictions and sentences in the High Court was partly successful, for Ruhangisa, J. upheld the convictions in respect of both counts and the sentence in respect of the second count. The sentence in respect of the first count was reduced to one of thirty years in prison. Still protesting his innocence, the appellant lodged this second appeal on four grounds of grievance, that is:

1. That, the evidence of PW1; a child of tender age was invalid and baseless, since the mandatory requirement of law as to *voire dire* test was not conducted;
2. That, Exhibit P1 (PF3) was irregularly tendered in evidence because the appellant was not informed his right for the doctor who prepared it to come to testify on it;
3. That, the crime of rape was not established to the yardstick or standard of law as the medical report did not connect the appellant with crime; and
4. That, it is trite law that conviction should not rely on the poor or weak defence of the appellant.

When the appeal was placed for hearing before us on 21.08.2020, the appellant appeared in person by a video link connected to Shinyanga District Prison. The respondent Republic appeared through Mr. Nassoro Katuga, learned Senior State Attorney assisted by Mr. Jukael Jairo and Ms. Immaculata Mapunda, learned State Attorneys.

When we called upon the appellant to argue his appeal, fending for himself, he did no more than adopt his four-ground memorandum of

appeal he earlier lodged in the Court. He, however, intimated to the Court that, need arising, he would make a statement in rejoinder.

It was Mr. Katuga who expressed the response that, generally, the respondent Republic resisted the appeal. He told the Court that in confronting the grounds of appeal, Mr. Jairo would address the Court on the first two grounds and the last two grounds would be addressed by Ms. Mapunda.

In his response to the first two grounds, Mr. Jairo, in principle, conceded to both. He clarified in respect of the first that it was true that the *voire dire* test was not conducted in respect of PW1 whose age was tender. In terms of section 127 (4) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (the Evidence Act), PW1 whose age at the material time was not more than fourteen, she was a child of tender years and thus her testimony needed to have been prefaced by a *voire dire* test. That was not done but, he submitted, in terms of the decision of the Court in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) in which it was observed that each case should be determined on its peculiar circumstances, the omission was curable under sections 388 (1) of the Criminal Procedure Act, Cap. 20 of the Revised

Edition, 2002 (the CPA) and 3A of the Appellate Jurisdiction Act, Cap. 141 of Revised Edition, 2002 (the AJA). On that note, Mr. Jairo submitted that the omission did not prejudice the appellant, thus, it should be ignored. Probed by the Court on the holding in **Kimbute Otiniel** that a testimony by a child of tender years made without a *voire dire* test must be discounted, the learned State Attorney, upon mature reflection, had no serious qualms if PW1's evidence would be discounted.

With regard to ground two; a complaint that the PF3 was not procedurally tendered in evidence, the learned State Attorney also conceded that the complaint was genuine. He submitted that the exhibit was tendered in evidence but it was not read out in court after its admission. He added that the appellant was not told his right under section 240 (3) of the CPA. On this ground, he urged us to expunge the PF3. He, however, contended that still there was other independent evidence on which to mount a conviction against the appellant.

Addressing us on the third ground of appeal to the effect that the case against the appellant was not proved beyond reasonable doubt in the absence of the PF3, Ms. Mapunda submitted that there was enough circumstantial evidence implicating the appellant with the commission of

the offence to the hilt. Ms. Mapunda relied on our decision in **Issa Ramadahni v. Republic**, Criminal Appeal No. 409 of 2015 (unreported) at p. 4 where we observed that there are instances in which criminal charges may be proved without the victims of crimes testifying in court. She clarified that Regina Charles (PW2); the appellant's wife, testified that she found the appellant in PW1's room several time in suspicious circumstance and when she inquired why; the appellant had always been aggressive and on one occasion he beat her severely. All along he had been very jealous with PW1, she added. This witness testified further that the victim was once interrogated by her uncle only to confess that she used to have sexual intercourse with the appellant, he submitted.

The learned counsel added that Rehema Niganya (PW3); a neighbour, also testified that PW1 once told her that the appellant used to have sexual intercourse with her since 2012. That PW3 asked the appellant as to the truth of PW1's statement but that the appellant responded that there was no harm in sleeping with his daughter. The third ground of appeal was therefore without substance, she submitted.

The last ground is a complaint that the appellant was convicted on the weakness of his defence. On this ground, Ms. Mapunda submitted that

the defence supported the prosecution's case and that on the authority of **Goodluck Kyando v. Republic** [2006] T.L.R. 367, each witness is entitled to credence. So was the appellant, she contended. It was her further view that the two courts below were thus quite right to believe what the appellant said in defence. Ms. Mapunda added that the appellant admitted in defence at pp. 30 to 31 that he used to have sexual intercourse with PW1 on permission of PW2 and that he was responsible for her pregnancy. He maintained that story in mitigation; at p. 46.

Having submitted as above, Mr. Katuga chipped in to submit in conclusion that despite the respondent's concession to the first and second grounds of appeal, there was ample other independent evidence to support the conviction of the appellant as submitted by Ms. Mapunda. The learned Senior State Attorney thus submitted that the appeal should be dismissed.

In a short rejoinder, the appellant submitted that he was framed by PW3 with whom he was in bad blood. He denied to know PW1. On being probed why PW2; his wife should testify against him as well, the appellant retorted that she was tutored what to say by PW3. He added that PW2 was also in bad terms with him over the money he got from Coca-cola company where he previously worked.

In determining this appeal, we shall consider one ground after another in the order they appear in the memorandum of appeal paraphrase above.

The first ground is a complaint that the testimony of PW1 should not have been taken into account because no *voire dire* test was conducted before taking that evidence. Mr. Jairo first thought the infraction was curable by the provisions of section 388 (1) of the CPA but upon mature reflection, he changed the goal post by saying the testimony of PW1 could be discounted. We think Mr. Jairo is right. The fact that the testimony of PW1; a child of tender years was taken without a *voire dire* test being conducted, removed the probative value of that evidence. That this is the law was succinctly stated in **Kimbute Otiniel** (supra) wherein the Full Bench held at p. 75 of the typed judgment:

> *"Where there is a complete omission by the trial court to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted."*

In the premises, the two courts below should have discarded the testimony of PW1 failure of which left justice crying. The first ground of appeal has merit.

With regard to ground two; a complaint that the PF3 was not procedurally tendered in evidence, the learned State Attorney also conceded that the complaint was genuine. We also agree. The exhibit was tendered in evidence by PW1 without clearing it for admission and after it was admitted, it was not read out in court. As if that was not enough, the appellant was not told his right to have the medical personnel who prepared it to be summoned for his cross-examination by the appellant as required by the provisions of section 240 (3) of the CPA.

We are in agreement with Mr. Jairo on this argument. The record of appeal, as evident at p. 18, shows that the PF3 was tendered by PW1 without it being cleared for admission. Neither was it read out after it was admitted. To make matters worse, the appellant was not afforded the right to call the maker of that document; that is, the medical personnel who examined and posted the results on it. By not clearing it for admission and not reading it out after admission offended the procedure laid down by case law. In **Magina Kubilu @ John v. Republic**, Criminal

Appeal No. 564 of 2016 (unreported), a decision we rendered in the ongoing sessions of the Court here at Shinyanga, we relied on our previous decisions in **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R 218 and **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 (unreported) to underline the **clearing**, **admitting** and **reading out** process which evidence contained in documents must invariably pass through before they are adduced in evidence. In **Robinson Mwanjisi** (supra), for instance, we observed:

> *"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 think this is a settled and sound principle of procedure which we are not prepared to depart from in this judgment. On the authorities of **Robinson Mwanjisi**, **Lack Kilingani** and **Magina Kubilu @ John** (supra), we find and hold that for failure to **clear** and **read out** the PF3 in the case at hand, the exhibit was not procedurally introduced in evidence. In all the above instances, we said the infraction was fatal and expunged the relevant exhibits from evidence. We will do the same here.

While still on the same ground, we also agree that failure to intimate to the appellant of his rights to have the maker of that medical document summoned for cross-examination, blatantly disregarded the mandatory provisions of section 240 (3) of the CPA. There is a litany of decisions of the Court which hold that the ailment is fatal - see: **Prosper Mnjoera Kisa v. Republic**, Criminal Appeal No 73 of 2003, **Meston Mtulinga v. Republic**, Criminal Appeal No. 426 of 2006, **Arabi Abdu Hassan v. Republic**, Criminal Appeal No 187 of 2005, **Ahmad Mangwalanya v. Republic**, Criminal Appeal No. 105 of 2010, **Hamisi Saidi Butwe v. Republic**, Criminal Appeal No. 489 Of 2007 and **Alfeo Valentino v. Republic**, Criminal Appeal No 92 of 2006 (all unreported), to mention but a few.

For failure by the courts below to **clear** and **read out** the PF3 and its omission to tell the appellant his right to have the medical personnel who prepared it called for cross-examination in terms of section 240 (3) of the CPA, we hold that the shortcoming was fatal and expunge the PF3 from the record.

The third ground is to the effect that the offence of rape was not proved. On this ground, Ms. Mapunda submitted that the charges leveled

against the appellant were proved to the hilt even without the evidence of the victim. For this proposition, she cited to us **Issa Ramadhani** (supra) for reinforcement. She submitted that the testimonies of PW2 and PW3 as well as that of the appellant, proved the case against the appellant. We agree. We hereby demonstrate why. PW2 testified that the appellant had been sneaking to PW1's room frequently and she had made follow-ups regularly and found him there. Likewise, PW3 once probed the appellant if it was true that he used to have sexual intercourse with PW1 and that he said there was nothing wrong with it. And, as if to clinch the matter, the record bears out that the appellant did not deny that he used to have sexual intercourse with PW1 and that he actually impregnated her. He is recorded as saying that he did so because PW2 asked him to do so in order that she could be healed from the ailments facing her. To appreciate what the appellant said in defence, we will let the record paint the picture. At p. 30 the appellant is recorded as saying:

> *"... my wife told me that in order to get relief for her pains the herbalist told her, and I obliged, to have sexual intercourse with her daughter [PW1]. That is why my wife called her daughter to sleep on our bed ... my wife permitted me to have sexual*

intercourse with her daughter [PW1] for the whole night."

At p. 31, during cross-examination, the appellant is recorded as saying:

"I had sexual intercourse with [PW1] for two months continuously. I never denied that the pregnancy of [PW1] is mine. The consequence of that sexual intercourse [is that] the victim got pregnant."

When the trial court found him guilty and convicted, before the sentences were passed on him, he is recorded as saying in mitigation:

"I beg the court be informed that since I was born in 1969, I have never committed rape ... I committed for permission of my wife, I had sexual intercourse with that girl since 2012 up to September, 2014. This issue is well known by my brother in law Elias Kishiwa and it is in order that my wife can get relief for her sickness which is not working until now."

On appeal before the High Court, though he changed goal posts stating PW1 was his wife, the appellant did not deny having sexual

intercourse with her and admitted that he was responsible for her pregnancy. He is recorded by the High Court at p. 55 of the record as saying:

> *"[PW1] whom I am alleged to have raped was brought to me by Juma Mahushi of Tinde as an orphan. He gave her to me because I was not married so I could live with her. She was of the age of majority because she was born in 1995 and she consented to the union. I came to realize that she was a daughter of my former wife who I was no longer living with. I stayed with her since 2011 – 2014 when I was arrested. She has a baby with me born when I was already in custody."*

Flowing from the above, we think, even after discounting the testimony of PW1, there was ample evidence from PW2 and PW3 that the appellant used to have sexual intercourse with PW1. In **Issa Ramadhani** (supra), the case cited to us by Ms. Mapunda, we had the view that conviction of an accused person can be sustained even without the victim testifying in court, particularly when there is other sufficient independent evidence. We found solace on that stance from our previous unreported decisions in **Abdallah Elias v. Republic**, Criminal Appeal No. 115 of

2009, **Haji Omary v. Republic**, Criminal Appeal No. 307 of 2009 and **Fuku Lusamila v. Republic**, Criminal Appeal No. 12 of 2014. We reproduced the following excerpt from **Haji Omary** and which we think merits recitation here:

> *"The law recognizes that there are instances where charges may be proved without victims of crimes testifying in court. Take murder for example where the victims are deceased. Senility, tender age or disease of the mind may prevent a victim from testifying in court (See section 127 of the Evidence Act) but this does not mean that a charge cannot be proved in the absence of the victims' testimony. In this case the victim was a four year old child. He was indeed a child of tender age. Though we agree that ideally the reason for the non-taking of the testimony of the victim should have been entered on record, however, such failure neither weakened the case for the prosecution nor resulted in a failure of justice."*

The appellant's situation is exacerbated by the fact that he did not throw any reasonable doubt on the prosecution's case. Instead, he

supported it. On this, we find it irresistible to reproduce what the first appellate court observed at p. 62 of the record:

> *"What the appellant was required to do at that time was to cast doubt on the prosecution case by punching holes in the prosecution evidence in order to benefit from the doubt. Instead of casting doubt, the appellant admitted to have raped PW1 several times under the pretext of doing so with the consent of her mother PW1. In fact the appellant had no defence to make."*

We share the same sentiment with the first appellate Judge. Given the position of the law alluded to above, we find the appellant's complaint on this ground; that the case against him was not proved beyond reasonable doubt because there is no PF3 to implicate him or that PW1's testimony has been discounted, to have no substance. Of course we are aware that a PF3 would help only to ascertain that rape has been committed. On the contrary, it cannot prove who committed that rape – see: **Parasidi Michael Makulla v. Republic**, Criminal Appeal No. 27 of 2008 and **Burundi Deo v. Republic**, Criminal Appeal No. 33 of 2010 (both unreported). We agree with Ms. Mapunda that the third ground of appeal is without substance. We accordingly dismiss it.

The last ground is a complaint that the appellant was convicted on the weakness of his defence. We, like Ms. Mapunda, find that this complaint has no merit. The appellant's defence has never, at any point in time, been weak. He testified as he did and the trial court believed him, as Ms. Mapunda submitted, on the authority of **Goodluck Kyando** (supra).

We think this appeal was not filed with sufficient merit. However, as we stated at the beginning of this judgment, the appellant was sentenced to two years in jail or to pay a fine of Tshs. 1,500,000/=. We are afraid this sentence contravened the provisions of rule 5 of the Education Rules. The rule provides:

> *"Any person who impregnates a school girl shall be guilty of an offence and shall be liable on conviction to imprisonment of a term not less than three years and not exceeding six years* ***with no option of fine.***"
> [Emphasis ours].

In view of the above, we think providing an option of fine in respect of the second count, the trial court offended the provisions of rule 5 of the Education Rules under which the appellant was charged in the second

count. We thus set aside the option to fine in the sentence imposed by trial court and upheld by the first appellate court.

Except for the minute variation above, we find this appeal without merit and dismiss it.

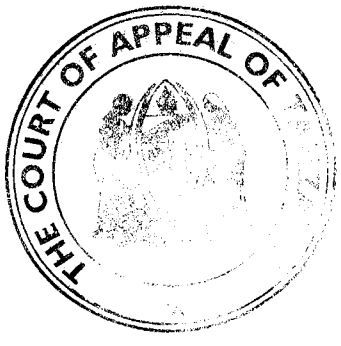
DATED at **SHINYANGA** this 27th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 28th day of August 2020, in the presence of the Appellant in person via video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL