IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, KOROSSO, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 187 OF 2018

AMIR RASHID..... ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)

(Phillip, J.)

dated the 18th day of June, 2018.
In
Criminal Appeal. No. 373 of 2016.

.....

JUDGMENT OF THE COURT

26th August & 7th October, 2020

LILA, J.A.:

The appellant, Amir Rashid, with one Asha Charles Jonas (then second accused), who is not a party to this appeal, were arraigned before the Resident Magistrates' Court of Morogoro at Morogoro on a charge comprising two counts. In the first count, the appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) and, in the second count, Asha Charles Jonas was charged with the offence of sexual exploitation of a child contrary to section 138B (1) (a) and (2), both of the Penal Code, Cap 16 of the Revised Edition, 2002 (the Penal Code). They denied their respective charges. Trial ensued

and at its conclusion, each of them was found guilty and convicted. The appellant was sentenced to a jail term of thirty (30) years imprisonment and was also ordered to pay TZS 1,000,000.00 as compensation to the victim. The second accused was sentenced to serve one year imprisonment or to pay TZS 200,000.00 fine. She did not pay the fine hence she was imprisoned. Only the appellant was aggrieved. He appealed to the High Court against both conviction and sentence but was unsuccessful.

For the first count, using the acronym AR or Victim or PW2 as the name of the victim so as to hide her identity, it was alleged that; the appellant on 15th January, 2016 at Usangi Guest House at Madizini area Mtibwa within the District of Mvomero in Morogoro Region, did have carnal knowledge of one AR, a school girl aged 13 years old.

In its verge to prove its case, the prosecution paraded a total of six witnesses and tendered two exhibits namely the PF3 (Exh. P1) and the victim's birth certificate (exh. P2). For the defence, the appellant was the sole witness.

Briefly, the facts leading to the present appeal were as follows; Mwanaidi Mzava (PW1) and Said Ally (PW3), the victim's parents, owned a five roomed guest house which operated in the name of Usangi Guest

Hause. On 15th January, 2016 PW1 assigned the second accused who was assisting her in the chips business the duty to supervise the guest house business. Then came the evening of that day, the second accused handed to PW1 the money she had collected from only four rooms. Having noted that even the fifth room (room No. 2) was put to use, PW1 questioned the second accused the whereabouts of the money collected for that room. In response, the second accused said that room was used by the appellant and AR. To ascertain that information, PW1 questioned AR about the allegation. AR admitted to have had sexual intercourse with the appellant in that room. PW1 did not take it easy. She reported the matter to her husband (PW3) and then to the police. They were given PF3 and went to hospital so that the victim could be medically examined. At the hospital they landed in the hands of Sabuni Halidi (PW6) who medically examined AR and concluded that she was raped as he observed bruises on the victim's private parts. He reduced his observations in writing by filling the PF3 and in it he indicated that condom was used during the sexual intercourse. Even in court, during his testimony, he maintained that he did not proceed to examine whether there was spermatozoa because condom was used. The appellant was arrested by Tiba Hassani (PW4), a militiaman on 16th January, 2016 and was taken to Mtibwa Police station. A policeman one

R. 4691 D/CPL Halfani (PW5) interrogated him and the appellant admitted to have been at Usangi Guest House with his girlfriend one Zuhura. He denied having an affair and having carnal knowledge of AR on that day.

As hinted above, the appellant's first appeal to the High Court was dismissed in its entirety. He lodged a memorandum of appeal consisting of six grounds of appeal to wit;

1. *That, the learned first appellate judge erred in law and fact for failure to observe that the evidence of PW2 was given contrary to section 127 (2) of the Tanzania Evidence Act, Cap 6 RE: 2002 (TEA)*
2. *That, two lower courts grossly erred in law and fact by failing to notice that PW2 failed to prove penetration as required under section 130 (4) of the Penal Code*
3. *That, the learned first appellate judge erred in law and fact for failure to observe that the appellant's conviction was based on a defective charge*
4. *That, the learned trial magistrate erred in law and fact for failure to append his signature in the evidence of the appellant which rendered the proceedings of the lower courts nullity*

5. *That, the learned 1st appellate judge erred in law and fact by relying on the evidence of PW1, PW3, PW4 and PW6 which were contradictory, unreliable and with material inconsistencies whose story failed to corroborate the PW2's story against the appellant*
6. *That, the learned trial court and the 1st appellate judge grossly erred in law and fact in convicting the appellant on the charge which the prosecution failed to prove in their evidence.*

The appellant's appearance from the prison was facilitated through video facilities. He argued the appeal personally as he was unrepresented. The respondent Republic had the services of Ms. Nancy Mushumbuzi and Ms. Monica Ndakidemi, both learned State Attorneys.

At the commencement of the hearing, the appellant sought leave of the Court to add a new ground of appeal which prayer was not objected to by Ms. Mushumbuzi. We granted him leave. The new ground raised was:-

> *"That the first appellate judge erred in law and fact for not considering that the trial magistrate did not comply with the requirements of section 312(1) of the CPA as he did not consider the defence evidence in his judgment before convicting him."*

Exercising his right to first elaborate the grounds of appeal, the appellant opted to adopt his grounds of appeal and urged the Court to consider them and allow his appeal.

Ms. Mushumbuzi responded to the appellant's grounds of appeal on behalf of the respondent Republic.

Ms. Mushumbuzi argued grounds one (1) and two (2) jointly which faulted the learned judge for failure to observe that the testimony of PW2 was irregularly taken for contravening the provisions of section 127(2) of the Evidence Act, Cap. 6 R. E. 2002 (the EA) and also that PW2 did not prove penetration as mandatorily required under section 130(4) of the Penal Code. She contended that the two grounds were considered by the learned judge consequent upon which PW2's evidence was disregarded. She was of the view that having disregarded such evidence it was apparent that there was nobody to prove penetration. That being the case, the learned State Attorney urged the Court not to consider the two grounds since the Republic did not appeal against the learned judge's decision to discount PW2's evidence which finding was in favour of the appellant.

We have, on our part, perused the record of appeal. It is evident that the learned judge gave a deep thought over the appellant's complaint at pages 75 and 76 of the record and seemed to agree with

the appellant that *voire dire* examination was not conducted and, instead, she relied on the evidence of PW1, PW3, PW4 and PW6 to arrive at a finding that they proved the offence charged. The record of appeal bears out that the offence under discussion was committed on 15/01/2016 which was before the EA was amended by Written Laws (Miscellaneous amendments (No. 2) Act, No. 4 of 2016 which became operational on 8/7/2016. The amendment did away with the requirement to conduct *voire dire* test and, in its place, introduced the requirement for the child witness to promise to tell the truth before his/her evidence is taken. So, by 21/04/2016 when PW2 testified, conduct of a *voire dire* test was still a legal requirement. Failure do so was fatal and rendered PW2's testimony ineffectual.[See **Isaya Constantine vs Republic**, Criminal Appeal No. 78 of 2016 in which the case of **Kimbute Otiniel vs. Republic**, Criminal Appeal No. 300 of 2011 (both unreported) was cited]. PW2's evidence was thereby properly discounted by the learned judge. Since that finding was, in our view, correct, we accordingly agree with the learned State Attorney that there is no need to consider the two grounds again. We hereby disregard them.

Submitting in respect of ground three (3) of appeal which touched on the propriety of the charge, the learned State Attorney argued that

the victim of the offence (PW2) was a child of tender age (13 years old) hence preferring the charge under section 130(1)(2)(e) and 131(1) of the Penal Code was proper. Without missing a point, we perused the record and realised that the appellant's complaint was founded on a typographical error in the trial magistrate's judgment which indicated that the appellant was charged under section 130(1)(2)(**a**) and 131(1) of the Penal Code instead of section 130(1)(2)(**e**) and 131(1) of the Penal Code. This complaint was, therefore, a misnomer. The charge was proper. This ground fails.

In ground four (4) the complaint is in respect of failure by the trial magistrate to append his signature after the appellant (DW1) had concluded giving his evidence. The learned State Attorney conceded that the record of appeal bears out that anomaly. Appending signature after close of every witness' testimony is imperative in terms of section 210(1)(a) of the CPA. That section states:-

> *"210.- (1) in trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-*
>
> (a) ***The evidence of each witness shall be taken down in writing*** *in the language of the court by the magistrate or in his presence and hearing and*

under his personal direction and superintendence

and shall be signed by him *and shall form part*

of the record;" (Emphasis added)

The quoted provision is coached in mandatory terms implying that it is imperative that a presiding magistrate has to ensure that he appends his signature after the end of each witness' testimony. The rationale is not hard to find. It lends assurance that such evidence was recorded by an authorised person. We have noted that the record of appeal availed to the Court and obviously a copy supplied to the appellant does not show that the learned trial magistrate complied with the law for want of the magistrate's signature. On the face of it, therefore, the appellant's complaint is justified. However, our perusal of the original record revealed that the learned trial magistrate appended her signature after taking the appellant's defence evidence. Unfortunately the relevant part was not typed. With a serious note, we direct those concerned with proof reading and preparation of records of appeal to diligently perform their duty and ensure that the records of appeal are a true reflection of the contents of the original record. Otherwise, this complaint is, again, not supported by the original record. We accordingly dismiss it.

Responding to ground five (5) of appeal, Ms. Mushumbuzi conceded that following PW2's evidence being discounted, the testimonies of PW1, PW3, PW4 and PW6 could not stand alone and establish the offence of rape. She argued that PW1's and PW3's evidence was hearsay. Elaborating, she said PW1 told the trial court what she was told by PW2 while PW3 also told the trial court what he was told by PW1. In the absence of PW2's evidence, there was nobody to endorse what the two witnesses told the trial court, Ms. Mushumbuzi stressed. We entirely agree with her. We are mindful of the position taken by the Court in the case of **Selemani Makumba vs Republic**, [2006] TLR 384 that best evidence in sexual offences comes from the prosecutrix (the victim). No doubt, discount of the victim's evidence seriously affected the prosecution case in that there was no word of the victim on what befell on her. Otherwise, penetration could be proved by medical examination. Much as courts are not bound by expert opinion, such evidence is material in cases of sexual assault and departure from it requires explanation from the presiding judge or magistrate. Unfortunately though, we are unable to find such evidence from PW6 on account of his testimony suffering from two serious defects. **One**, the PF3 (exhibit P1) was irregularly introduced into evidence on account of having not been read out after it was cleared for admission. **Second**,

his testimony and comments on exhibit P1, did not reflect professionalism. In his testimony in court and remarks on exhibit P1, PW6 indicated that the bruises noted in PW2's genital parts were due to sexual intercourse and that condom was used. Such remarks evidenced that PW6 was influenced by extraneous information he had received instead of basing on what he observed. For embellishment, we wish to refer to a passage of PW6's evidence as reflected at pages 24 and 25 of the record of appeal where he is recorded to have stated:-

> *"...I recall on 15/01/2016 night when I was on duty,* ***I received the patient who was raped,*** *I make* (sic) *examination on her and* ***came to realize the victim was raped*** *due to the fact that there was bruises which was caused by a blunt object. We did not proceed to find out spermatozoa because* ***there was the use condom."*** (Emphasis supplied)

It is our conviction that the above remarks were not what were expected from PW6, a medical practitioner called to give his expert opinion in respect of his observation after medically examining PW2. It is vivid that he was informed that PW2 was raped and condom was deployed in the exercise prior to conducting medical examination. It is not surprising, therefore, that he made such observations or remarks in both his testimony and in the PF3. Although he earlier on introduced

himself to have had thirty years' experience in the field yet his remarks did not reflect his specialised knowledge and skill in the medical profession. He was expected to give remarks based on what he observed. In the circumstances, his opinion was unreliable. That said, we are satisfied that both courts below wrongly relied on PW6's testimony as having proved that PW2 was penetrated hence corroborated PW2's evidence. We would, hurriedly, also add that since PW2's evidence was discounted, there was nothing to corroborate.

Proof of penetration, however slight, is a crucial ingredient in proving the offence of rape in terms of section 130(4)(a) of the Penal Code. The Court had an occasion to elaborate what constitutes penetration in the case of **Hassan Bakari @ Mamajicho vs Republic**, Criminal Appeal No. 103 of 2012 (unreported) thus:-

> *"The other catchword is **penetration**. Simply put, it means the penis **entering** the vagina. Such **entering**, however slight it may be, is an important ingredient to the offence of rape."*

Having discounted the evidence by PW2 (the victim) and that of PW6 (the Doctor), there remains no other evidence that proved the victim was penetrated. The charge of rape cannot stand without proving penetration. Consequently, the prosecution failed to prove the charge against the appellant.

For these reasons, we see no reason to consider the remaining grounds of appeal.

All said, we allow the appellant's appeal, quash the conviction and set aside the imprisonment sentence and an order to pay compensation imposed on him by the trial court and sustained by the High Court. He is to be released from prison forthwith unless he is held therein for any other justifiable cause.

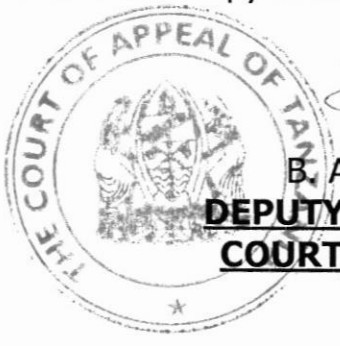
DATED at **DAR ES SALAAM** this 5th day of October, 2019.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 7th day of October, 2020, in the Presence of the Appellant linked through video conference from Ukonga Prison and Ms. Janeth Wagoho, State Attorney for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL