IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J. A., KWARIKO, J. A. And MWANDAMBO, J. A.)

CRIMINAL APPEAL NO. 195 OF 2018

MASOUD MGOSI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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

(Mwenempazi, J)

dated the 20th day of June 2018
in
Criminal Appeal No. 105 of 2017

JUDGMENT OF THE COURT

15th September & 8th October 2020

MWANDAMBO, J.A.:

Masoud Mgosi, the appellant herein, was tried and convicted by the District Court of Kisarawe at Kisarawe of the offence of rape of a school girl of 11 years. Upon conviction, he earned a sentence of 30 years' imprisonment. The High Court of Tanzania sitting at Dar es Salaam dismissed the appellant's first appeal hence, this second and final appeal before the Court.

According to the charge which the appellant was called upon to plead, the prosecution alleged that on 16th September, 2016 at 09.00 hours at Mtamba Village, Kisarawe District, the appellant had carnal knowledge of

a school aged 11 years contrary section 130 (1) (2) (e) and 131(1) of the Penal Code [Cap. 16 R.E 2002] (the Penal Code). We shall be referring to the victim of the offence as BM or PW1 as the case may be to hide her true identity.

Briefly, the evidence which the trial court found the prosecution had proved its case on the required standard and convicted the appellant as charged was as follows: On the material date at or about 10.00 hours, Gaudensia Lazaro (PW2), a resident of Mtamba Village saw BM coming from a bush. PW2 inquired BM why she was there instead of being at school. She directed her to leave for school. Bendita Ernest (PW3) also a resident in the same village saw PW2 interrogating BM on the material date and time. Later on, PW3 went to see PW2 asking her which direction BM came from the moment she met her. It appears that PW3 became curious because she had seen the appellant few minutes earlier coming out of a bush. Suspicious of the unusual coincidence, PW3 went to see BM's uncle, Athanas Ernest (PW4) who enlisted the assistance of Mariam Mwalimu (PW5) to interview BM on the information that PW3 had relayed to him. According to PW5, BM confessed to her being carnally known by the appellant in exchange of TZS 1,000.00. On those revelations, the appellant was summoned by the ten cell leader and the Hamlet Chairman. Subsequently, the matter was reported to the police where WP No. 6132, DC Marcelina (PW6) was assigned to

investigate the matter which entailed interviewing the victim and the witnesses who claimed to have seen the victim leaving the bush as well as the appellant and PW5. At PW6's instance, BM was taken to Kisarawe Hospital where Dr. Innocent Mkini (PW7) examined her on 20th September 2016. PW7's findings after the examination revealed presence of bruises inside the victim's vagina and loss of virginity. PW7 posted his findings in a PF3 which was tendered and admitted in evidence as exhibit P1.

BM testified as PW1 after answering some preliminary questions the trial court branded as *voir dire* examination. PW1 told the trial court that on the material date she was on her way to school. Somewhere in between, she was lured by the appellant who was in the bush to go and collect TZS 1,000.00. However, upon reaching the place where the appellant was, he fell her down, undressed her underpants and unleashed his manhood which he inserted into her vagina and after finishing he released her and thereafter proceeded to school. It was her further testimony that the ordeal on 16th September, 2016 was the third in the hands of the appellant.

The appellant's defence was rather sketchy. He is recorded to have said that he was away from the village on that day. Satisfied that the prosecution proved its case on the standard required, the trial court found the appellant guilty as charged. It convicted and sentenced him as alluded to above.

The appellant's appeal before the first appellate court was premised on 8 grounds of grievances ranging from irregularity in conducting a *voir dire* test to lack of sufficient evidence to prove the case against him beyond reasonable doubt required in criminal cases. In its judgment, the High Court (Mwenempazi, J) found nothing to fault the trial court's findings which resulted into the appellant's conviction. The High Court was alive to the law regarding *voir dire* which was no longer a requirement before receiving the evidence of tender age witnesses following the amendment to section 127 (2) of the Evidence Act [Cap. 6 R. E. 2002 now- R.E. 2019] by the Written Laws (Miscellaneous Amendments) (No.2) Act, No. 4 of 2016, henceforth to be referred to as the Act. Whilst noting the irregularity in the reception of PW1's evidence through a *voir dire* examination, instead of requiring her to promise to tell the truth and not lies as required by section 127 (2) of the Act, the first appellate court found that irregularity inconsequential. It took the view that PW1's evidence was credible and held that the evidence had been sufficiently corroborated by PW2.

By reason of its reliance on PW1's evidence, the first appellate court rejected the appellant's complaint on his defence of *alibi* which it held to have been wanting.

Protesting his innocence, the appellant faults the first appellate court in his memorandum of appeal containing 6 grounds of appeal. Essentially, his

main grievances are; **one**, the proceedings before the trial court were a nullity for failure to comply with the provisions of section 210 (3) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the CPA); **two**, irregular reception and reliance on the testimony of PW1 in the absence of any indication that she understood the nature of oath or had sufficient intelligence of speaking the truth or a promise to tell the truth; **three**, reliance on PW4's evidence who had not been listed as one of the prosecution witnesses during the preliminary hearing; **four**, reliance on contradictory, inconsistent and incredible evidence of PW2, PW3, PW4 and PW5; **five**, trial court's failure to make a ruling on whether the appellant had a case to answer before being called upon to defend himself contrary to section 230 of the CPA; and, **six**, failure to make a proper evaluation of the evidence.

At the hearing of the appeal, the appellant was connected through a video link facility from the prison, unrepresented. The respondent/Republic was represented by Mr. Yussuf Aboud assisted by Ms. Sylvia Mitanto, both learned State Attorneys.

Before the hearing could kick off, the appellant sought and was granted leave to add four more grounds of appeal. However, for reasons which will become apparent later, we do not think it will serve any useful purpose narrating them in this judgment. Otherwise, the appellant beseeched the Court to determine the appeal in his favour on the basis of all of the grounds

of appeal. He did not have anything useful to add other than pleading with us to release him so he could rejoin his family.

Mr. Aboud was emphatic supporting the appellant's conviction and sentence. Whilst conceding to the complaint on non-compliance with section 210 (3) of the CPA, the subject of ground one, Mr. Aboud argued that such irregularity did not prejudice the appellant. According to the learned State Attorney, despite the non-compliance complained of, the appellant had opportunity to cross examine all witnesses for the prosecution. He urged us to dismiss this ground for lack of merit.

Upon examination of the record, there is no dispute that the trial court recorded evidence without informing witnesses of their right to have their respective evidence read over to them in pursuance of section 210 (3) of the CPA. The section stipulates:

> *"(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

The rationale behind the section is not far to seek. It was intended to promote transparency in the administration of criminal justice thereby guarding against distortion in the recording of evidence by the witnesses.

Luckily, the Court has dealt with similar complaints in various of its previous decisions including; **Republic v. Hans Aingaya Macha,** Criminal Appeal No. 449 of 2016**, Jumanne Shabani Mrondo v. Republic,** Criminal Appeal No. 282 of 2010, **Athumani Hassan v. Republic,** Criminal Appeal No. 84 of 2013 (all unreported). What is gathered from the above cases is that it is the witness who has the right to complain against the trial court's failure to read evidence to him. It is also evident from the above cases that the complaint can only be fatal where the authenticity of the record is in issue. There is nothing on record in this appeal that there was any complaint before the trial court that the appellant exercised his right to have his evidence read over to him. Similarly, the authenticity of the record is not in issue and thus as rightly submitted by Mr. Aboud, the irregularity did not prejudice the appellant in any manner considering that he exercised the right to cross-examine all witnesses for the prosecution. Consistent with the holdings in our decisions in **Hans Aingaya Macha, Jumanne Shabani Mrondo** and **Athumani Hassan** (supra), the irregularity premised on non- compliance with section 210 (3) of the CPA is inconsequential; it is curable under section 388 (1) of the CPA. In the upshot, ground one is destitute of merit and we dismiss it which takes us to ground two.

Addressing the Court in ground two, Mr. Yussuf conceded that there was non- compliance with the provisions of section 127 (2) of the Act in that

that PW1's evidence was received without her promise to tell the truth and not lies. For that reason, he invited the Court to expunge PW1's evidence on the authority of our decision in **Ibrahim Haule v. Republic,** Criminal Appeal No. 398 of 2018 (unreported). Like any other good soldier, the learned State Attorney was still adamant that there was sufficient evidence to prove the offence against the appellant as rightly held by the High Court. However, he abandoned his argument midway upon realising that in the absence of the victim's evidence; the best evidence in sexual offences, the other evidence from PW2, PW3, PW4 and PW5 was too weak to prove that the appellant committed the offence. He thus conceded that the case against the appellant was not proved on the required standard hence warranted an order for acquittal. We respectfully agree with the learned State Attorney.

It is common ground that PW1 was 11 years at the time of commission of the alleged offence on 16th September 2016. At that time, section 127 (2) of the Act had already been amended doing away with the requirement to conduct a *voir dire* test before receiving evidence of a tender age witness. Apparently, despite the amendment, the learned trial magistrate took upon himself and conducted what he called a *voir dire* anyway as reflected at page 5 of the record. The trial court missed the boat both ways. In the first place *voir dire* examination was no longer a legal requirement. Secondly, even assuming it was, there is nothing from the record reflecting its opinion that

PW1 possessed sufficient intelligence to justify the reception of her evidence and understood the meaning of oath or the duty of speaking the truth in case her evidence was not taken upon oath as it were. The first appellate court rightly found that the trial court had strained into an error in conducting the *voir dire* test which was no longer required following the amendment to section 127 (2) of the Act. It rightly held that what was required of the trial court was to require PW1 to promise to tell the truth and not lies before receiving her evidence which was not done. All the same, the first appellate Judge took the view that the infraction was not fatal because PW1 had not only adduced credible evidence but also her evidence was corroborated by PW2 proving that the appellant had committed the charged offence. The first appellate court did not have regard to the wanting *voir dire* examination had section 127(2) been the same as it was before its amendment.

As seen earlier, Mr. Aboud was man enough to concede that in the absence of a promise from PW1 to tell the truth and not lies before her evidence was received as required by section 127 (2) of the Act, her evidence was invalid. He invited us to expunge it on the authority of **Ibrahim Haule** (supra). We agree with the learned State Attorney that PW1's evidence was invalid because she did not promise to tell the truth and not lies as required by section 127 (2) of the Act. Like we did in **Ibrahim Haule's** case (supra) we hereby expunge that evidence from the record. Having expunged PW1's

evidence, the remaining evidence from PW2, PW3, PW4, PW5 and PW6 is wholly hearsay. It was incapable of incriminating the appellant of the charged offence. On the other hand, PW7's evidence is no better. It was only capable of proving that PW1's vagina was penetrated but, as rightly submitted by Mr. Aboud, there will be no evidence proving that it is the appellant who had unlawful carnal knowledge of BM on the material date. This is so because none of the witnesses who testified during the trial saw the appellant committing the alleged offence. All what is gathered from the record is that those witnesses, in particular, PW2 and PW3 testified on suspicions rather than on what they saw on the material date and time. It is trite law that suspicion however strong it might be is not enough to find an accused guilty of an offence he is charged. See for instance: **MT. 60330 PTE Nassoro Mohamed v. Republic,** Criminal Appeal No. 73 of 2002 and **Halfan Ismail @ Mtepela v. Republic,** Criminal Appeal No. 38 of 2019 (both unreported).

The upshot of the above is that both courts below erred in concurring that the case against the appellant was proved on the required standard. Specifically, the first appellate court strayed into a serious error in holding as it did that notwithstanding the irregularity in the reception of PW1's evidence contrary to section 127 (2) of the Act, such evidence was all the same credible and capable of proving the offence charged along with PW2's

evidence. In the event, we are constrained to uphold ground two which is sufficient to dispose of the appeal in the appellant's favour. The judgment of the first appellate court is in consequence reversed, the conviction quashed and the sentence set aside. The appellant is to be released forthwith from custody unless he is held therein for another lawful purpose.

Order accordingly.

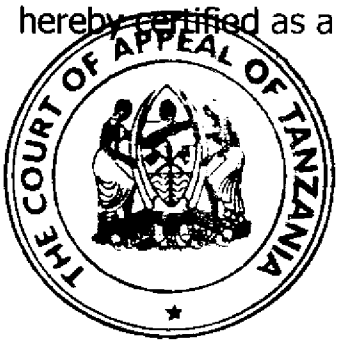
DATED at **DAR ES SALAAM** this 8th day of October, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on 8th day of October, 2020 in the presence of the appellant in person-linked via video conference and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL