IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 135 OF 2017

LYONGO S/O HAMISI @ GEMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mallaba, J.)

Dated the 29th day of March, 2017
in
DC. Cr. Appeal No. 292 of 2016

JUDGMENT OF THE COURT

11th & 17th December, 2020

MKUYE, J.A.:

In the District Court of Tabora at Tabora the appellant, Lyongo s/o Hamisi @ Gembe, was convicted of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) and was sentenced to 30 years imprisonment. It was alleged that on diverse dates between January and February 2016 at Ugowola village, Ufuluma Ward within Uyui District in Tabora Region the appellant had carnal knowledge of S d/o S (name withheld) a standard seven pupil at Ugowola Primary School

aged 14 years. His first appeal at the High Court of Tanzania at Tabora was dismissed for want of merit.

In order to appreciate the sequence of events leading to this appeal we find it appropriate to give a brief background as follows: S d/o S (the victim) (PW1) was a standard seven student at Ugowola Primary School within Ugowola village. The appellant also resided in the same village. It was alleged that on diverse dates between January to February 2016 the appellant enticed the victim to have sexual intercourse by giving her money and they had sex on four occasions. It, however, turned out that after some time the victim became unwell and her aunt, one, Nyamizi Pazi (PW2), on unknown date, took her to the hospital at Ugowola for check-up and it was revealed that she had conceived. Upon inquiry by PW2 as to who was responsible for her pregnancy, she mentioned the appellant. It was the prosecution's case that on 30/3/2016, PW2 convened a family meeting involving some persons such as Sadick Pazi, Salehe Moaji together with the appellant to inquire on the matter and that the appellant allegedly admitted to have had sexual intercourse with PW1 and also his responsibility for her pregnancy. PW2 said, upon telling him to go to the village office, the appellant took his bicycle and disappeared. These facts

culminated into his arrest and arraignment before the trial court and later his conviction as alluded to herein before.

In his defence, the appellant denied involvement in the commission of the offence. He, however, admitted going to PW2's home on 30/3/2016 where, he claims to have been beaten and given poison which precipitated into opening a case against Chausiku, the victim' grandmother and that he was arrested on allegation that he raped PW1.

The trial court convicted the appellant for reasons that **one,** the age of the victim was proved to be below eighteen years old and in particular, it was proved by PW2 that she was 14 years old. **Two,** PW1 proved that she was raped on the principle of law that the best evidence on rape comes from the victim. **Three,** penetration was proved as it caused her to be pregnant (to conceive). **Four,** PW1 mentioned the appellant as the perpetrator.

On appeal in the High Court, though the evidence of PW1 was discounted for being taken without conducting *voire dire* test, it was found that the remaining evidence of PW2 and PW3 was sufficient to prove the charge. In particular, the High Court stated as follows:-

"When the evidence of PW1 is discounted what remains is evidence of PW2 and PW3. PW2 explained how PW1, whose evidence has been discounted, went to him (sic) and he (sic) took PW1 to hospital for medical examination. The examination indicated that PW1 was pregnant. PW1 said that her pregnancy was by the appellant. PW2 also testified that on 30/3/2016, he (sic) called a meeting at his (sic) home, where the appellant agreed to have caused the pregnancy. The other evidence is that of PW3, the doctor who examined PW1 and established that PW1 was 8 weeks pregnant. PW3 also tendered in court as exhibit, the PF3.

In the testimony of PW2, which was not controverted by the appellant, show that, the appellant agreed to have caused PW1's pregnancy. Further, in the meeting of 30/3/2016, which not only did the appellant not dispute, but in fact agreed to it, that he was involved in love making with PW1, a 14 years old. Making love to a 14 years, who is incapable of consenting, amounted to statutory rape. There were, therefore sufficient evidence to prove the appellant's guilty."

The appellant still protesting his innocence, has appealed to this Court on seven grounds of appeal. However, for reasons which will become apparent shortly, we are of the view that the appeal may be conveniently

disposed of on the first and third grounds of appeal which we take the liberty to paraphrase them as follows:-

1. That, the prosecution failed to prove the case beyond reasonable doubt.

3. That, the learned judge erred in law and fact by relying on the hearsay evidence of PW2 and PW3 which could not sustain a conviction after having discounted the evidence of PW1.

At the hearing of this appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic was represented by Ms. Gladness Senya, learned State Attorney.

When the appellant was invited to expound on his appeal, he adopted his grounds of appeal and opted to let the learned State Attorney respond first while reserving his right of re-joining later, if need would arise.

In response, Ms. Senya took off by declaring her stance that she was supporting the appeal. After having done so she sought and was granted leave to begin with ground no. 3 where the appellant's complaint is on the learned judge's reliance on the hearsay evidence of PW2 and PW3 in sustaining the conviction after the evidence of PW1 was discounted.

Essentially, Ms. Senya conceded that after the evidence of PW1 had been discounted for failure to comply with the law, the evidence of PW2 and PW3 could not sustain the conviction since PW2 did not see when the offence was committed; and that she was merely informed by PW1 that it was the appellant who impregnated her which in effect, her evidence was a mere hearsay. As to PW3, she said, he gave an expert evidence after having examined PW1 and found her to be pregnant. In fact, she pointed out that, his evidence neither proved rape nor that it was the appellant who raped her. She added that, even the PF3 (Exh P1) cannot be taken to have proved rape as it proved pregnancy. At any rate, she said, such PF3 ought to be disregarded for having not been read over in court after being cleared for admission.

For those reasons, she urged the Court to find that the prosecution failed to prove its case as was raised by the appellant in ground no.1 and allow the appeal, quash the conviction, set aside the sentence and release the appellant from custody unless held for other lawful reasons.

On his part, the appellant acceded to the learned State Attorney's submission and also prayed to the Court to allow the appeal and set him free.

We have considered the two grounds of appeal and the submission by the learned State Attorney. We are alive that in this case the prosecution lined up three witnesses (PW1, PW2 and PW3) in order to prove its case. When PW1 testified in the trial court as shown at pages 9 to 10 of the record of appeal, she was 14 years old but she was allowed by the trial court to adduce evidence on oath without first conducting *voire dire* test. For that reason, her evidence was discounted by the first appellate court and, rightly so in our considered view, for being taken in contravention of section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 (the Evidence Act) requiring a *voire dire* test to be conducted to a child of a tender age before adducing his /her evidence. On this we are guided by the case of **Ally Hussein v. Republic,** Criminal Appeal No. 293 of 2018 (unreported) where this Court also expunged the testimony of PW3 whose evidence was taken in contravention of section 127 (2) of the Evidence Act.

Nevertheless, as we have alluded herein before, despite the expungement of PW1's evidence, the High Court found that the evidence of PW2 and PW3 still sustained the conviction against the appellant. The question we ask ourselves is whether the evidence of PW2 and PW3 could still sustain conviction against the appellant.

In order to answer the above question, we need to revisit the evidence of the two witnesses. PW2 who was PW1's aunt, testified that she knew S d/o S who was a daughter of her late brother and that she was 14 years old being born in 2002. Sometimes, she became ill as she had headache, stomach pains and was vomiting. That, she took her (PW1) to Ugowola Hospital for check up and on examination she was found to be pregnant. Upon being asked who was responsible for her pregnancy PW1 mentioned Lyongo Hamisi, the appellant. We think, it is not insignificant to point out here that the date when PW1 was taken to Ugowola hospital for examination was not stated. Neither was there any examination report to that effect. However, PW2 testified further that, on 30/3/2016 she convened a family meeting involving Sadick Pazi, Salehe Moaji together with the appellant in which he admitted having sexual intercourse with PW1 and his responsibility for her pregnancy. PW2 said the appellant escaped after being told to go to the village authority. Nevertheless, on re-examination by the prosecutor, she admitted being arrested in connection of poisoning the appellant.

As to PW3, whose evidence was also found to sustain the appellant's conviction, he told the court that he was a doctor at Kitete Hospital and on

19/4/2016 he examined one girl (PW1) who came with her aunt with a PF3. Upon examination of that girl, he found that she was eight weeks pregnant and he filled the PF3 which was admitted as Exh. P1.

We are alive that in the offences relating to statutory rape, proof of the victim's age is of utmost importance. This was emphasized in the case of **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported) where the Court stated as follows:-

> *"We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e) the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available by the production of a birth certificate. We are however, far from suggesting that proof of age, must, of necessity, be derived from such evidence."*

In our case, we do not hastate to state that despite the fact that PW1's evidence was discounted, we are satisfied that the age of the victim (PW1) was sufficiently proved by PW2, her guardian who testified that she was fourteen years old having been born in 2002.

With regard to the issue of rape, it is noteworthy that it entails penetration. According to section 130 (4) (a) of the Penal Code penetration, however, slight constitutes the ingredient of the offence of rape. This was also reiterated in the case of **Amir Rashid v. Republic**, Criminal Appeal No. 187 of 2018 (unreported) in which the Court cited with approval its earlier decision in the case of **Hassan Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012 (unreported) and stated as follows: -

> *"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"*

In the matter at hand, PW2's evidence was to the effect that when she took PW1 to the Ugowola Hospital for examination she was found to be pregnant. Likewise, PW3 who examined the victim on 19/4/2016, found that she was eight weeks pregnant. Nevertheless, none of the two witnesses gave explanation indicating that PW1 was penetrated into her private parts or not. Unfortunately, even PW3 who was an expert witness, apart from conducting pregnancy examination to the victim through

ultrasound machine, he did not go a further step to inspect her private parts to establish penetration or otherwise or even the general condition of her private parts. It was expected that PW3 could have explained the condition of PW1's private parts and how PW1 could have become pregnant and, more so, when taking into account that she went to the hospital with a PF3 and, hence, suggesting that it was a police case.

Of course, we understand that PW3 filled in a PF3 (Exh P1) of which, we agree with Ms Senya that it was uprocedurally admitted as it was not read out after it was cleared for admission. The effect of the PF3 which was not properly admitted is to expunge it as we hereby do. Nonetheless, even assuming that it had been properly admitted in evidence, still it did not show that there was penetration on the victim's vagina as it showed that the victim was found to have pregnancy of 8 weeks without more.

But again, looking at the evidence of PW2 and PW3 in relation to the purported proof of the offence of rape generally, we think, it contradicts each other particularly on the date and the place (hospital) where the victim was examined. We say so because, whereas PW2 said PW1 was taken for examination at Ugowola hospital on date which not specified,

PW3 said, he examined her (PW1) at Kitete hospital on 19/4/2016 and he filled the PF3. In fact, PW2 does not mention Kitete hospital at all and no documentary evidence showing that PW1 was examined at Ugowola hospital was tendered in court. The reason for the discrepancy in evidence between PW2 and PW3 as to the place where PW1 was examined is not known. This discrepancy, in our view, is not minor as it goes to the root of the matter in which in effect vitiated the credibility of PW2's evidence. [See also **Dickson Elia Nsamba Shapwata & Another v. Republic,** Criminal Appeal No. 92 of 2007 (unreported)].

In this regard, we agree with the appellant and the learned State Attorney that after having discounted the evidence of PW1 that she was raped, the remaining evidence of PW2 and PW3 did not prove the offence of rape to which the appellant was charged with.

As regards who committed the offence, PW2 stated that PW1 mentioned the appellant to be responsible for impregnating her; and that the appellant admitted involvement when he was called in a family meeting she had convened on 30/3/2016.

Admittedly, as was rightly submitted by the learned State Attorney, PW2 did not witness when the appellant committed the offence. Her evidence based on what she was told by PW1 and was, indeed, a hearsay evidence which carries no evidential value. (See **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (unreported).

That, the appellant admitted responsibility in the family meeting she had convened, we think, is a word of mouth of a single person as it is not supported by other persons more so when taking into account that in that meeting other people such as Sadick Pazi and Salehe Moaji were in attendance but were not called to testify in court. Apart from that, we find that the evidence of PW2 relating to the appellant's admission to impregnate PW1 to be suspicious. We say so because of the appellant's uncontroverted evidence that he was poisoned when he went at PW2's home on 30/3/2016. Incidentally, this fact was acknowledged in a way by PW2 during re-examination, when she admitted to have been arrested in connection with the poison issue. As it is, it is not clear as to what transpired on the date of the said meeting and what happened from the date PW1 was allegedly examined at Ugowola hospital until on 19/4/2016 when she was taken for examination to Kitete hospital as was testified by

PW3. This, in our view, shakes the credibility of PW2's evidence on the issue of the alleged admission.

As to PW3, we agree with the learned State Attorney that he gave an expert evidence based on the complaints which was sent to him by the police concerning the allegation of PW1 being raped. He was not involved in finding out as to who committed the offence as can be seen in his response at page 17 of the record of appeal on cross examination by the appellant where he said that he did not know who impregnated the victim. We, thus, find merit in ground no.3 of the appeal.

On the basis of what we have endeavoured to demonstrate, we agree with the appellant and the learned State Attorney that after the expungement of PW1's evidence, the remaining evidence of PW2 and PW3 could not sustain the conviction against the appellant. And, therefore, based on the foregoing, we are satisfied that the prosecution failed to prove its case beyond reasonable doubt as per complaint in ground no. 1.

That said and done, we find merit in the appeal. Hence, we allow the appeal, quash the conviction and set aside the sentence meted out against

the appellant. We further order that the appellant be released from custody forthwith unless otherwise held for other lawful reasons.

It is so ordered.

DATED at **TABORA** this 17th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 17th day of December, 2020 in the presence of the Appellant in person and Ms. Gladness Senya, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL