IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 208 OF 2018

KIWANO ALOYCE KALONGOLE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Feleshi, J.)

dated the 18th day of April, 2018
in
DC Criminal Appeal No. 90 of 2017

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JUDGMENT OF THE COURT

4th & 11th May, 2020

MWAMBEGELE, J.A.:

The District Court of Iringa sitting at Iringa convicted the appellant, Kiwano Aloyce Kalongole, of rape and unnatural offence contrary to, respectively, sections 130 (1) & (2) (e) and 131 (1) & (3) and 154 (1) (a) & (2) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2019). It was alleged in the first count that on 01.10.2016 at Wenda area in Iringa Rural District in

Iringa Region, the appellant had carnal knowledge of a girl aged seven years. In the second count, it was alleged that on the same date, time and place, he had had carnal knowledge of that girl against the order of nature. He pleaded not guilty to both counts. We shall elsewhere refer to the girl as simply the victim. After a full trial, he was found guilty as charged, convicted and sentenced to thirty years in jail in respect of each count. The sentences were ordered to run concurrently. His first appeal to the High Court (Feleshi, J. – as he then was) made matters worse to the appellant, for the sentence in respect of the second count was enhanced to life in prison. Undeterred, he has come to this Court still protesting his innocence.

At this stage, we find it apropos to narrate relevant background facts leading to the appellant's arraignment as can be gleaned from the record of appeal. It is this: the appellant is the victim's uncle. On 01.10.2016, Luciana Godfrey Mpogole (PW3); the appellant's sister and victim's mother, was in the vicinity of her residence looking for relish for, perhaps, that afternoon's meal. She had left at home the victim and her sister Jenifa Mkonda (PW2); a girl aged nine years.

When still there, the appellant arrived and asked the victim to follow her to his residence to collect a pencil. The victim obeyed. Little did she know that her uncle had an ill motive to ravish her. The appellant took the victim to his residence where she raped and sodomized her. When PW3 returned, she was told by PW2 that the appellant had taken the victim to his residence where he raped her. PW2 examined the victim on her private parts and found that she had bruises in the vagina and anus. She took the victim to her husband Deus Mkonda (PW4) who also inspected her private parts only to find she had bruises in the vagina and anus suggesting that she was raped and sodomized. The victim's parents; PW3 and PW4, reported the matter to Lucas Mwagiza Mbugi (PW5); the Mwela Village Chairman who, with the assistance of a militiaman, arrested the appellant and took him to the Ipamba Police Station where they were given a PF3 and proceeded to Tosamaganga Hospital for medical examination. At the Hospital, David Agripa Mwakatwila (PW6); a clinical officer, medically examined the victim and found her hymen perforated and her anus loose.

In his defence, the appellant narrated how he was arrested on 01.10.2016 and taken to the Police Station where he was made to record a statement in which he denied to have committed the offence of rape. He testified that while at the police station, the victim was given a PF3 and taken to hospital while he was locked up. The appellant complained in defence why he was charged with rape at the outset and later the trial court added another count of unnatural offence at a later stage. When cross-examined, he admitted to have taken his niece to his home where he gave her a pencil.

The appellant was arraigned, convicted and sentenced in the manner alluded to at the beginning of this judgment. In a nine-ground memorandum of appeal, the appellant, essentially, assails the decision of the first appellate court on the following condensed grounds of grievance: **one**, that the appellant should have charged the appellant with two counts from the outset; **two**, a social welfare officer ought to have participated in the proceedings; and **three**, the prosecution did not prove the case against the appellant beyond reasonable doubt. Encapsulated in the third ground are complaints

that; **one**, the testimonies of PW3, PW4 and PW5 were hearsay; they should not have been relied upon to convict the appellant; **two**, the victim did not testify regarding the date, time and place where the incidence occurred and; **three**, the appellant was convicted on his previous bad character.

The appeal was argued before us through a video conference; a facility of the Court. At the hearing, the appellant appeared in person at Iringa Prison and the respondent appeared through Mr. Abel Mwandalama, learned Senior State Attorney who was in the Court premises together with us. When we gave the floor to the appellant to argue his appeal, he adopted his nine grounds in the memorandum of appeal and opted to let the Republic respond to them. He reserved his right to make a rejoinder if need would arise.

In response to the grounds of appeal, Mr. Mwandalama argued the first and second grounds separately and the rest of the grounds were argued together under the head of the last ground which is that the prosecution did not prove the case against the appellant beyond reasonable doubt.

On the first ground of appeal which challenges the first appellate court to have sustained the findings of the trial court while the charge was substituted to include the second count without any prayer from the prosecution, the learned Senior State Attorney submitted that the record of appeal at pp. 6 and 9 shows that the prosecution prayed to substitute the charge. The prayer was granted and the same was substituted as appearing at p. 9 of the record of appeal. In the circumstances, the learned Senior State Attorney submitted, the first ground of appeal was unfounded.

With respect to the second ground of appeal which is a complaint to the effect that a social welfare officer should have participated in the proceedings at the trial court, the learned Senior State Attorney submitted that under the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2019 (the CPA) and the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2019 (the MCA), there is no requirement that a social welfare officer should have been present in the proceedings. The learned Senior State Attorney submitted that the requirement that a social welfare should participate in proceedings

where a child is in conflict with the law is provided for under section 99 (1) (d) of the Law of the Child Act, Cap. 13 of the Revised Edition, 2019 (the Law of the Child). That participation, he argued, is limited to Juvenile Courts established under section 97 (1) of the same Act. He clarified that even in juvenile courts, the law protects a child who is in conflict with the law; not a child witness like in the present case. In view of the fact that the proceedings in the case at hand were not in the Juvenile Court and in further view of the fact that the victim was not an accused person, the presence of a social welfare officer was not legally required, he argued. He thus submitted that the first ground of appeal is without merit.

As regards the rest of the grounds which the learned Senior State consolidated in their argument, he submitted that the prosecution fielded six witnesses in support of its case. The victim, he went on, promised to speak the truth and that was enough under section 127 (2) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (now Revised Edition, 2019) as amended by the Written Laws (Miscellaneous Amendments Act), 2016 – Act No. 4 of 2016

(hereinafter the Evidence Act). The victim; a girl aged seven years, testified that on the material day, the appellant who is her uncle asked her to go with him to his residence to collect a pencil. They went thither but alas! When they entered inside his house, she raped and sodomized her. That after the ordeal, she told Jenifa Mkonda (PW2); her mother and that they went to the Bus Stand to tell Deus Mkonda (PW4); her father and then to the police and Hospital and, eventually, back home. Given that the victim was a witness of truth, he argued, that was enough evidence to mount a conviction against the appellant in terms of section 127 (7) of the Evidence Act.

The learned Senior State Attorney went on to submit that the evidence of the victim was corroborated by the testimonies of PW3 and PW4; the victim' parents, who examined her and found that she had bruises in both her vagina and anus.

Having argued as above, the learned Senior State Attorney contended that the prosecution proved the case against the appellant beyond reasonable doubt and submitted that the appeal is without merit. He thus prayed that the appeal should be dismissed.

In rejoinder, the appellant was brief but to the point. On the first ground of appeal, the appellant complained that the substituted charge sheet was not read to him. On the second ground, he submitted that the social welfare officer should have participated in the proceedings as that is a mandatory requirement of the law. On the third ground, he submitted that the evidence of all witnesses, except for the victim's, was totally hearsay. With regard to the fourth ground of appeal, he submitted that the evidence of the victim should not have been relied upon to convict him as she did not mention the time and date of the incident.

The appellant also complained in rejoinder that he was convicted on the strength of his bad character; not on the strength of evidence as complained in the sixth ground of appeal. That was contrary to the dictates of the law, he submitted.

On the strength of the above submissions, he contended that the case was not proved beyond reasonable doubt and prayed for the appeal to be allowed.

In the light of the foregoing submissions for either side, we think there are three main issues calling for our determination. **First,** whether the substituted charge sheet was done by the trial court unilaterally; without the prosecution having prayed to do so. **Secondly**, whether the presence of a social welfare officer in the proceedings before the trial court was legally required, and if the answer is in the affirmative, what is the status of the proceedings given that the social welfare officer did not participate. **Thirdly**, whether the prosecution proved the case beyond reasonable doubt.

In determining the first issue, we do not think we will be detained by it. This is because, we think, the correct position is as submitted by the learned Senior State Attorney. It is evident at p. 6 of the record of appeal that the prosecution prayed to present a substituted charge. However, for reasons that are not apparent from the record, the substituted charge sheet was not received by the trial court on that date. Instead, the hearing of the matter was adjourned to 13.12.2016. The case went through four adjournments until 30.01.2017 when the prosecution, again, prayed for substitution of the

charge and the prayer was granted. The record at p. 9 shows that the substituted charge was read and explained to the appellant in the language he understood to which he pleaded not guilty to both counts. The trial court entered a plea of not guilty on both counts and, thereafter, a preliminary hearing was conducted. In view of this glaring record of appeal at pp. 6 and 9, we do not think the complaint by the appellant that the trial court unilaterally added the second count without any prayer from the prosecution has any truth. The complaint is, to say the least, devoid of any fleck of truth. In the same token, the complaint that the two-count charge sheet was not read to him is without any speck of truth. If anything, as already stated, the new charge sheet with two counts was received by the trial court at the instance of the prosecution and read out to the appellant in the language he understood and he pleaded thereto. This ground of appeal is without any speckle of merit. It is hereby dismissed.

Next for consideration is the second ground of appeal which challenges the proceedings of the trial court for being conducted without the presence of a social welfare officer. The position of law

on this point is, again, as put forward by Mr. Mwandalama, learned Senior State Attorney; it is the practice in Juvenile Courts established under section 97 (1) of the Law of the Child. That the presence of a social welfare officer is mandatorily required is provided for under section 99 (1) (d) of that Act; the Law of the Child. The composition of the District Court before which the appellant was arraigned, is provided for under section 6 (1) (b) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2019. Under this provision, a District Court is properly constituted if presided over by a District Magistrate or Resident Magistrate. In the premises, the absence of a social welfare officer in the proceedings of the trial court which are the subject of this appeal had no legal consequence. If anything, in terms of section 6 (1) (b) of the MCA, the trial court was properly constituted.

We were faced with an akin situation in the very recent past in the ongoing sessions of the Court at Iringa in **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 – [2010] TZCA 202 at

www.tanzlii.org. In the judgment we rendered as recently as 06.05.2020, we articulated at pp. 13 – 14 of the typed judgment:

> *"... a social welfare officer is required in proceedings in the Juvenile Courts established under section 97 (1) the Law of the Child. The provisions of section 99 (1) (d) of the same Act mandatorily require a social welfare officer to be present during the proceedings in the Juvenile Courts. The presence of the social welfare officer does not envisage situations when the child is a witness; it envisages situations when the child is in conflict with the law; that is, when the child is an accused person. Sections 97 and 99 (1) (d) are under Part IX of the Law of the Child which is titled "A Child in Conflict with Law" and therefore the provisions under that head serves that purpose. In the case at hand, the proceedings were in the District Court whose composition is provided for under section 6 (1) (b) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2019. Under this provision, a District Court is properly constituted if presided over by*

a District Magistrate or Resident Magistrate; a social welfare officer is not listed to constitute the District Court."

For the avoidance of doubt, the phrase "a child in conflict with the law" has not been defined by the Law of the Child. However, UNICEF has defined it as:

"The term 'children in conflict with the law' refers to anyone under 18 who comes into contact with the justice system as a result of being suspected or accused of committing an offence"

[Sourced on 06.05.2020 at https://www.unicef.org/chinese/protection/files/Conflict_with_the_Law.pdf]

In view of the above, we find the complaint in the second ground of appeal wanting in substance and dismiss it.

We now turn to consider the last issue which answers the rest of the grounds of appeal; whether the prosecution proved the case against the appellant beyond reasonable doubt.

On this last issue, we begin our determination with the complaint that the testimonies of PW3, PW4 and PW5 were hearsay. We hasten to answer this issue in the negative. In order to appreciate the gist of this complaint and the decision we are going to make on this complaint, we wish to narrate the substance of each witness. PW3 is the mother of the victim who had gone in search of relish returned only to be told by PW2 that the victim had been raped by their uncle. She interrogated the victim and she was so told. She also examined the victim and realized that she had bruises in both the vagina and anus. PW4 is the victim's father to whom the latter was taken by PW3. He also examined the victim in her vagina and anus and realized that she had bruises in both; the vagina and anus. PW5 was a chairman of the village to whom the incident was reported by PW4. He is the one who facilitated the arrest and the appellant was taken to the police.

Indeed, the three witnesses did not testify to have eye-witnessed the appellant raping and sodomizing the victim. Their role was to tell the trial court what they did after the ordeal and the trial

court applied their evidence in that context. We are certain that the trial court properly used their evidence to corroborate the victim's evidence and the first appellate court was quite in the right track to uphold it. We are fortified in this view by our decision in **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 – [2018] TZCA 20 at www.tanzlii.org in which we were faced with a ground of appeal akin to this. In **George Mwanyingili** (supra) the appellant had complained that the evidence of the victim's father who testified as PW2 to whom the victim reported her being raped and the investing officer who testified as PW3 to whom the appellant was taken after arrest, were hearsay. We articulated at pp.13 – 14 of the typed judgment:

> *"... the evidence of those two witnesses [PW2 and PW3] was important in as much as they told the trial court of the roles they played after they became aware of that incident; PW1 as a responsible father, and PW2 as a dutiful police officer. In fact, both courts below understood and applied the evidence of those two*

witnesses in that context. Thus, this ground is devoid of merit and is likewise dismissed."

On the strength of the foregoing authority, we find and hold that the complaint that the evidence of PW3, PW4 and PW5 was hearsay and ought not to have been relied upon, is devoid of merit and dismissed.

Secondly, the appellant complained over failure by the victim to mention time and date of the incident as being fatal. We haste the remark that the appellant is seemingly trying to cast his net too wide and in that process complaining over very trivial matters. Admittedly, the victim; a child of seven years, did not mention the time and place of the ordeal. However in view of the testimony of PW3 who testified that she left the victim and PW2 at home and returned a few moments later only to find the victim had been ravished, we do not think the failure by the victim to mention time and place was relevant. That failure did not occasion any failure of justice. We find this complaint as without any scintilla of merit and dismiss it.

Thirdly, the appellant complains that he was convicted on insufficient circumstantial evidence. This complaint will not detain us, for we are certain that the appellant was not at all convicted on the strength of circumstantial evidence. If anything, the appellant was convicted on the strength of the testimony of the victim which was corroborated by the testimonies of PW2, PW3, PW4 and PW6. The trial court, in its judgment, stated at p. 31 of the record of appeal:

> *"The law is so clear but only when the child of a tender age is telling nothing but the truth. According to the case at hand, I find the evidence adduced by the child of tender years was nothing but the truth ...."*

Admittedly, the trial court made reference to the act of the appellant luring the victim to go to his residence to take a pencil and the latter being ravished few moments later as circumstantial evidence implicating the appellant to the offences. However, in view of the excerpt just quoted, we are certain that the strength of evidence on which the appellant was convicted, was but the testimony of the victim herself. This complaint is dismissed as well.

Fourthly, the appellant complains that he was convicted on the evidence of bad character. Like the third complaint under this limb, this complaint does not have to detain us, for we are triple certain that the appellant was not convicted on the evidence of bad character. Having gleaned the record of appeal, especially the judgment of the trial court, we have not been able to find anywhere suggesting that the appellant was convicted on evidence of bad character. As already stated, the appellant is casting his net too wide in a bid to save his otherwise sinking boat. This complaint is dismissed as well.

In view of the above findings in which all the grounds of appeal have collapsed, we are of the firm view that the prosecution led sufficient evidence implicating the appellant to the hilt. We find no reasons to meddle with the concurrent findings of the two courts bellow which found the appellant guilty as charged. We also find no reason why we should interfere with the sentence of life in prison enhanced by the first appellate court from one of a prison term of thirty years imposed by the trial court in respect of the second count.

This appeal was filed without any iota of merit. It stands dismissed entirely.

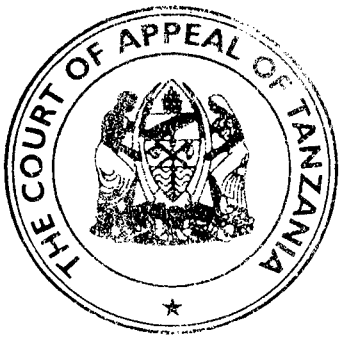
DATED at **IRINGA** this 8th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 11th day of May, 2020 in the presence of the Appellant in person through video conference and the Respondent/Republic absent duly served is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL