IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A., and KITUSI, J.A.)

CRIMINAL APPEAL NO. 458 OF 2017

FADHILI MAKANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Mutaki SRM Ext. J.)

Dated 21st September, 2017
in
Criminal Appeal No. 42 of 2017

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JUDGMENT OF THE COURT

31st March & 3rd April, 2020.

KOROSSO, J.A.:

The appellant Fadhili Makanga was, in the District Court of Momba at Chapwa, charged of rape contrary to section 130(1)(2)(e) and 131 (1) of the Penal Code Cap 16 Revised Edition 2002 (the Penal Code). His appeal to the High Court was unsuccessful and undaunted he appealed to this Court.

The facts of the case which led to the conviction of the appellant are that, on the 1st of April 2016, Rista Joel (PW1) was sitting in the sitting room of her house when she saw the victim, being a child of 15 years henceforth we shall refer her as "victim" or "PW5", passing where she was sitting walking unevenly and looking in pain. When asked what

had happened, the victim failed to respond. The next day, PW1 queried again the victim on what had transpired since she was still walking as if in pain. It was then that the victim informed PW1 that the appellant had hurt her. She narrated the sequence of events while crying stating that, the appellant had come to the house the previous day and called her, and then he took her to the milling machine, undressed her under pants and inserted his male organ into her female organ. After checking the story with the victim's younger sister, who told PW1 that the appellant usually pinches the victim's breast when they go to the milling machine, PW1 took the victim to the hospital after getting a PF3 from the police. The report to the police led to the appellant's arrest on 2nd April, 2016.

After a full trial where the prosecution marshalled six witnesses and three exhibits to prove their case, and the appellant who had pleaded not guilty, offered one witness that is, himself, the appellant was convicted and sentenced to thirty (30) years imprisonment and to suffer twelve (12) strokes.

The memorandum of appeal filed on the 27th December 2017 is predicated on seven grounds of appeal which have been summarized and condensed as follows:

1. *The learned Senior Resident Magistrate with extended Jurisdiction erred in law and fact when he dismissed the appeal basing on confessional*

statement and the extrajudicial statements while the cautioned statement was recorded outside the time prescribed.

2. *The learned Senior Resident Magistrate with extended Jurisdiction erred in law and fact when he dismissed the appeal relying on the evidence of PW4 and PW5.*
3. *The learned senior resident magistrate with extended jurisdiction erred in law and fact when he dismissed the appeal by disregarding the evidence of PW4 and convicted the appellant basing the evidence of PW5*
4. *The learned senior resident magistrate with extended jurisdiction erred in law and fact when he dismissed the appeal by regarding the evidence of PW2 which explained in court the she witnessed when the appellant hold her sisters' breast and not raping her.*
5. *The learned senior resident magistrate with extended jurisdiction erred in law and fact when he dismissed the appeal by relying the evidence of PW1 which was hearsay.*
6. *That, the learned senior resident magistrate with extended jurisdiction erred in law and fact when he dismissed the appeal despite the fact that the prosecution side did not prove the case beyond doubt.*

When the appeal came for hearing the appellant was unrepresented and fended for himself and on the part of the respondent Republic, Ms. Zena James, learned State Attorney entered appearance. Before venturing into arguments related to the grounds of appeal filed, the Court *suo motu* raised an issue for the parties to address it. The issue was on the mental status of the victim (PW5) having regard to the statement of the doctor, Dr Adrian Kundebye Biseko (PW4) that the victim was mentally retarded as found at page 11 of the record. PW4 stated that; "... *the said girl was of mental retardation*" when responding to a question from the trial Resident Magistrate and also this assertion found in the PF3 (Exhibit P2) found at page 22 of the record. In the PF3 it states that the victim examined had mental retardation.

The learned State Attorney's response was that the charge sheet does not reveal the mental state of the victim and thus the charge is defective in both the statement and the offence particulars. She was thus of the view that with that defect the appellant was not properly charged. She also contended that, not revealing the mental status of the victim in the charge led the court to fail to consider this aspect during the proceedings and this meant that the proceedings were unfair to the appellant. It was the learned State Attorney's standpoint that taking into consideration the fact that the victim was mentally retarded, the proper

section to charge was section 130(1) 2(c) and 131(1) of the Penal Code, a preposition which was later reversed, by the learned State Attorney stating that upon reflection the appropriate section to charge the appellant was section 137 of the Penal Code. All in all, the learned State Attorney's argument was that the charge was fatally defective and thus vitiated the trial.

Addressing the way forward on this, the learned State Attorney stated that in view of the fact that the victim is mentally retarded, it is without doubt that she was not a competent witness to testify. That taking into consideration that the best evidence in rape charges is that which emanates from the victim, a position restated in various cases including **Nelson Tete vs Republic**, Criminal Appeal No. 364 of 2008, the fact that her evidence was considered, means her testimony is unreliable. That under the circumstances her evidence has to be disregarded. She thus prayed that under the circumstances, the Court should nullify the proceedings through its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2019 (the AJA).

The appellant being a layperson had nothing substantive to respond on the issue apart from supporting the learned State Attorney's submission on the matter.

Having gone through the submissions and arguments before us our starting point will be addressing the issues which we raised, that is, on the import of the trial court and the first appellate court failing to address the fact that the victim (PW5) was mentally retarded as per the evidence of PW4, a doctor who examined the victim and also in the PF3 and are part of the record of the trial court.

In the present case, the charge against the appellant reveals that the victim was fifteen (15) years of age at the time the alleged rape took place, without any reference as to her mental status. It is also evident that the trial proceedings, did not consider the fact that the victim was mentally retarded. This being the situation, we find at this juncture, the relevant issue is to consider the victim's competence to testify in court. Section 127(6) of the Evidence Act states that:

> "*A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them, be competent to testify*".

Therefore this provision clearly highlights the fact that unsoundness of mind shall not by itself invalidate the competency of the witness to testify in court. To that effect, meaning that where there is a witness of unsound mind, the court must satisfy itself that the witness is prevented

by his/her condition from understanding the questions put to him and giving rational answers.

In the present case, PW5 gave her testimony in court, and the trial court believed her evidence. But unfortunately in the proceedings and judgment there was no finding that the victim, by reason of her unsound mind was found by the court to understand the questions put to her and gave rational answers and therefore a competent witness as required by the law.

In convicting the appellant, the trial court relied squarely on the evidence of PW5, the victim on the offence charged against the appellant, holding that the said evidence was enough in line with the case of **Selemani Makumba vs Republic, Criminal Appeal No. 94 of 1999** (Unreported).

The trial court also found the evidence of PW4 and Exhibit P2 which stated that despite the victim being in her menstrual period, that there was no hymen in her female organ corroborated the evidence of PW5 on material facts. This finding on credibility of PW5 was also supported by the first appellate court, finding no reason to interfere the finding on the fact that the victim was a credible witness. With regard to the evidence of PW4, the first appellate court in considering this evidence warned itself on the fact that such evidence is opinion evidence which

does not bind the court and that despite PW4 stating no evidence of penetration, that penetration was proved by PW5, the victim herself, holding that such evidence is sufficient to prove a charge.

While we are aware that apart from the said testimony of PW4 and PF3 there is nothing else in the record which reveals the mental state of the victim, but under the circumstances, and the provisions of Section 127(6) of the Evidence Act, we are of the view that the trial court upon becoming aware that the victim was mentally retarded, since PW4 testified and Exhibit P2 was admitted before the victim testified, it was duty bound to address this issue of the mental status of the victim and especially the competency and reliability of her evidence within the lines of section 127 (6) of the evidence Act in an endeavor to ensure the trial against the appellant is fair. Failure to do that has left doubts on the competency of the victim to testify against the offence charged.

In this case without doubt, the trial court's conviction against the appellant is grounded to a great extent on the evidence of PW5, this can also be discerned in the judgment of the first appellate court, which found no need to even consider the evidence of PW4, holding that the evidence of PW5 as a victim was sufficient.

Taking all these factors into consideration, failure to determine whether PW5 alleged to be of unsound mind, was capable of

understanding the questions put to her and give rational answers and therefore competent to testify and put the finding on record was fatal and an incurable defect. Since this discredited the victim's evidence, its evidential value cannot stand on its own to prove the case against the appellant.

On whether the charge was defective or not, we are of the view since, the victim being under eighteen years of age, the charge preferred against the appellant under the circumstances was proper, since the said provision, that is section 130(1)(2)(e) and 131(1) of the Penal Code, specifically addresses raping a girl under the age of eighteen (18) years regardless of her mental status of the victim. The age of the victim was proved by the testimony of PW1, her mother. At the same time we have failed to find any specific provision addressing raping a girl of unsound mind under the age of eighteen years. Section 130(2)(c) criminalizes raping a woman of unsound mind and section 137 of the CPA addresses defiling of idiots and imbeciles but do not specify the age factor.

Having found that PW5 is an unreliable witness considering her mental state and considering the well settled principle that the best evidence in a charge related to sexual offences comes from the victim, then taking into consideration the weakness of the remaining prosecution

evidence, it is clear that the charges against the appellant were not proved to the standard required.

We have considered the evidence available against the appellant, and find that there are a lot of gaps in the evidence before the court. Apart from PW5, there was no other witness who proved that the appellant did rape PW5.

In the end, the doubts in the prosecution evidence should benefit the appellant. Therefore, the appeal is allowed and the conviction of the appellant is quashed and sentence set aside. The appellant should be released from custody unless otherwise lawfully held.

DATED at **MBEYA** this 2nd day of April, 2020.

S.A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of April in the presence of the appellant in person and Ms. Sara Anesius, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

DEPUTY REGISTRAR
COURT OF APPEAL