IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 120 OF 2017

MASALU KAYEYE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De-Mello, J.)

Dated the 15th day of April, 2017
in
Criminal Appeal No. 318 of 2016

.....

JUDGMENT OF THE COURT

12th & 17th June, 2020

LILA, JA:-

The District Court of Misungwi convicted **MASALU KAYEYE**, the appellant herein, of the offence of rape. He was charged under section 130(1) (2) (b) and 131 (1) of the Penal Code, Cap 16 RE 2002 (the Penal code) and was sentenced to serve thirty (30) years imprisonment and to suffer six (6) strokes of the cane. The victim of the offence who was a girl aged eleven (11) years shall interchangeably be referred to as the victim or PW1. The appellant unsuccessfully appealed to the High Court hence this instant appeal. He is challenging both the conviction and sentence.

The particulars of the offence which informed the appellant the accusation leveled against him stated that; on 31/7/2013 at about 11.00 hrs. at Kijima village within Misungwi District in Mwanza Region, did unlawfully have sexual intercourse with the victim ***without her consent.***

The brief material facts gathered from the trial court record are not complicated. The appellant was at the material time living in the same house in which the victim and her parents were living and was assisting in grazing goats. That followed the misunderstanding between the appellant and his father which led the appellant to part away from his father's house. All was well for about a month. Came the incident date that is, on 31/7/2013 at about 11:00hrs when the victim and her mother one Kabula Daudi (PW3) were at home. According to the victim and PW2, soon before the victim left to Kijima to collect her sandals; the appellant arrived thereat with his bicycle. The victim asked for the bicycle for use in going to Kijima. However, the appellant asked her to buy cigarette for him and on her return, he carried her on the bicycle and left to Kijima. On the way, according to the victim, at a certain Mkwaju tree, the appellant took the victim to the bushes. As to what exactly happened thereat, this is what she is recorded to have had told the trial court:-

"It was not far from where we left the bicycle to the bushes. At the bush he unzipped, took out his penis, torn apart my skintight and underpants then he raped me. I saw his penis as it was black and had pubic hairs. The penis was long about the length of my palm. I was crying and he took off and run. He stepped into my legs. He was pumping me hard. Nobody came for my rescue. As the accused ran away, I went home. I checked my vagina and saw some semen like milk. I was also torn in my vagina. He did that briefly. I walked home with pain. I showed my mother who washed me. The accused was not at home. Mother saw that I was torn. Later on the accused came home..."

Kabula Daudi (PW3), the victim's mother, gave the same story to that given by the victim regarding what happened before the appellant left with the victim to Kijima. Thereafter, she (PW3) said, after thirty minutes, the appellant returned alone, hurriedly kept the bicycle in the house and left to the bush. Soon thereafter, the victim also appeared while crying and complained that

she was raped by the appellant. Upon checking her private parts, she found it torn and raptured and there were semen. She sent her son to call her husband one Katendele Dotto (PW2) who found the appellant in great fear and was informed of the incident. He (PW2) informed Mpuya Makinina (PW4), a militiaman ("sungusungu"), who arrested the appellant. According to PW2, PW3 and the militiaman, the appellant confessed raping the victim both before them and before the Ward Executive Officer (WEO). The victim was taken to Misasi Hospital for medical examination while the appellant was taken to Misasi Police Station whereat, following his admitting to have committed the offence, his cautioned statement (exhibit P1) was recorded on 8/8/2013 at 14:00hrs. The appellant was thereafter arraigned before the trial court. It is noteworthy that the doctor who examined the victim did not testify and no medical report (PF3) was tendered as exhibit.

In his sworn defence, the appellant told the trial court that the victim is his neighbour at Ibelambasa area and had no any quarrel with her. He distanced himself from the prosecution accusation against him. Apart from admitting that he was arrested on 31/7/2013, taken to Kijima Ward Office and

then to police station and his statement being recorded, he denied confessing before "sungusungu" and in his cautioned statement that he raped the victim.

In convicting the appellant, the trial court relied on six things. **First**; the victim's evidence which, notwithstanding that there was no medical report tendered, it believed to be true that she was raped by the appellant, **Two**; PW3's evidence, that she saw the appellant and the victim leaving to Kijima and later the appellant quickly returning the bicycle and disappearing into the bush, **Three**; PW3's evidence, being a mother of seven children, that she saw the victim's genital parts torn and semen oozing therefrom, **Four**; the appellant's conduct after the incident that he quickly returned the bicycle and disappeared into the bush which suggested guilty consciousness, **Fifth**; the victim's evidence was corroborated by the appellant's cautioned statement in which he confessed raping the victim and, **Sixth**; that the appellant confessed before other people including the Village Executive Officer (VEO), WEO and "sungusungu" (PW4). The trial court was therefore convinced that the charge was proved beyond reasonable doubt, convicted the appellant and sentenced him as indicated above.

On first appeal to the High Court, the appeal was dismissed. It was found that the victim's evidence was clear, reliable and gave a detailed account of what happened and was corroborated by PW2 and PW3. Further, the High Court was satisfied that the appellant's cautioned statement (exh. P1) which was admitted without objection from the appellant strengthened the prosecution case. On the issue of identification, the High Court was satisfied that according to the victim the offence was committed during day-time and she was living together with the appellant hence he was properly identified by the victim. In addition the judge was of the view that failure to call the doctor who examined the victim and tender a PF3 did not upset the prosecution case.

Dissatisfied with the first appellate court finding, the appellant lodged a memorandum of appeal which contained three grounds:-

1. *That the case was not proved beyond reasonable doubt against appellant for failure to prove penetration.*

2. *That the appellate judge misdirected in point of law and facts to dismiss appellant appeal relying on the planted evidence of prosecution side where by failed to call the alleged doctor.*

3. *That the ingredient of rape was not proved and the testimonies of the witness were hearsay evidence with that view the proof of prosecution case is doubtful.*

Before us the appellant who was facilitated to participate in the hearing of this appeal by way of a video link, appeared in person and, like before both courts below, was unrepresented. The respondent Republic had the services of Ms. Dorcas Akyoo, learned State Attorney. Despite conceding that the appellant's cautioned statement (exhibit P1) was taken outside the prescribed period of four hours after his arrest hence subject of being expunged from the record, the learned State Attorney strongly resisted the appeal.

When given opportunity to elaborate his grounds of appeal, the appellant urged the Court to consider the grounds of appeal and allow the same without more.

In opposing the appeal, the learned State Attorney chose to argue grounds one (1) and three (3) jointly and then ground two (2) separately.

Arguing in respect of ground one (1) and three (3), Ms. Akyoo submitted that a careful reading of the victim's account of the incident would clearly show

that penetration was proved. She contended that although the victim all along her evidence maintained that she was raped without giving details of the acts constituting rape, the words "was raped" connoted that she was penetrated. She attributed failure by the victim to give more details with the restrictions attached to traditions which do not allow some words be told openly. She referenced us to the Court's decision in the case of **Hassan Bakari @ Mamajicho vs Republic**, Criminal Appeal No. 103 of 2012 (unreported) to bolster her argument. She went on to argue that the fact that the victim told the trial court that her genital parts were torn, she saw semen (milky material) oozing from it and she walked with pain was sufficient evidence that there was penetration. Further, Ms. Akyoo, submitted that PW3 who checked the victim's genital parts also found it torn and raptured and she, being a seven children mother, saw semen. That evidence which was direct evidence, she argued, corroborated the testimony of the victim.

Failure by the prosecution to call the doctor who examined the victim as complained in ground two (2) of appeal was a non-issue to the learned State Attorney. She argued that, although the victim was sent to hospital for medical examination, it is true that the medical report (PF3) was not tendered in court

as exhibit. She quickly, however, submitted that the prosecution case was not seriously affected thereby because the victim (PW1) and PW3 explained in details the extent of injury sustained by the victim in the course of being penetrated.

Finally, arguing generally on the merits of the appeal, Ms. Akyoo submitted that the victim was believed by the trial court. In view of the Court's holding in the case of **Selemani Makumba vs Republic** [2006] TLR 379 particularly at page 384 that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, Ms. Akyoo contended that penetration was proved and consequently the appellant's guilt was fully proved.

Before she could make her conclusion we wanted to satisfy ourselves whether the charge was proper taking into consideration that the cited offence section made reference to the offence of rape committed with consent which is procured by the use of force, threats or intimidation by putting the victim in fear of death or of hurt or while she is in unlawful detention as opposed to the

particulars of the offence which specifically stated that the victim was carnally known without her consent.

Addressing us on the anomaly, Ms. Akyoo, without mincing words, readily conceded to the infraction but was quick to submit that the age of the victim which was not stated in the charge was proved by PW3, her mother, and that evidence led in court by all the witnesses including the victim who gave evidence after a *voire dire* examination was conducted, sufficiently informed the appellant that the offence he was facing was having carnal knowledge of child under the age of eighteen and consent was immaterial. On that account, she argued, the appellant was not prejudiced and the infraction is curable under section 388(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA). To support her position she referred us to the Court's decision in the case of **Damian Ruhehe vs Republic,** Criminal Appeal No. 501 of 2007 (unreported). She ultimately implored us to dismiss the appeal in its entirety.

The appellant, on his part had very little to say in rejoinder. He simply urged us to allow his appeal and order his release from prison.

We have, on our part, dispassionately considered the appellant's grounds of appeal and the learned State Attorney's submission in opposition to the appeal.

As a starting point, we agree with the learned State Attorney that the appellant's cautioned statement (exhibit P1) was taken beyond four hours after his arrest. No extension of time was sought and granted hence offending the provisions of section 50(1)(a) and 51(1)(a)(b) of the CPA. As proposed by the learned State Attorney, exhibit P1 is hereby expunged from the record.

We wish to, first, consider the issue raised by the Court *suo motu* touching on the propriety of the charge. On this, we appreciate the learned State Attorney's concession to the existence of the apparent anomaly in the charge and we also acknowledge her correctness on the exposition of law as stipulated by the Court in **Damian Ruhehe vs Republic** (supra) that a charge must conform with the requirements of sections 132 and 135 of the CPA in that it should contain the statement of offence stating the specific offence with which the accused is charged and particulars of the offence containing clear information of the nature of the offence charged. We, however, think that in

order to appreciate the anomaly obtaining in the charge we should reproduce both the charge and the cited offence section.

The charge is couched thus:-

> ***"STATEMENT OF THE OFFENCE:***
>
> ***Rape c/s 130 (1) (2) (b)*** *and 131 (1) of the Penal Code Cap 16 (R.E. 2002).*
>
> ***PARTICULARS OF THE OFFENCE:***
>
> *That MASALU S/O KAYEYE is charged on 31st day of July, 2013 at about 11:00 hrs at Kijima village within Misungwi District in Mwanza Region , did unlawfully have sexual intercourse to the victim* ***without her consent.*** *"* (Emphasis added)

And, the offence section cited states:-

> *"(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman*

under circumstances falling under any of the following descriptions:

(a) ..... (N/A)

(b) ***With her consent*** *where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention."* (Emphasis added)

Since the appellant was charged under section 130(1) (2) (b), it is, indeed, clear that consent is a crucial ingredient. That consent should be obtained by force, threat or intimidation or under fear of being hurt or when the victim is in unlawful detention. That said, the particulars of the offence ought to therefore contain the information to that effect and the prosecution is imperatively required to prove that there was consent which was obtained under either of the stipulated circumstances. To the contrary, it is apparent that the particulars of the offence stated that carnal knowledge was *"without her consent"*.

The issue for our resolve is therefore whether the appellant was prejudiced. We have perused and examined the evidence by all the prosecution witnesses and we have no scintilla of doubts that the appellant was not prejudiced. The victim was presented as a child and *voire dire* test was conducted to check her ability to understand questions put to her and give rational answers as well as whether she understood the nature of oath or affirmation. Satisfied that she did not know the nature of an oath or affirmation, the trial court rightly recorded her evidence not on oath. That suggested that she was a child [See **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported)]. That fact was cemented by PW3 who, during her testimony, categorically stated that the victim was eleven years old then. Besides, the victim who was first to testify, gave a detailed account of how she was raped by the appellant while PW3 explained what she was told by the victim and her findings on the victim's genital part that it was raptured. These facts, in our view, provided the appellant with enough information of the nature and seriousness of the accusation against him that he had carnally known a child under the age of eighteen. An identical situation faced the Court in the case of **Jamal Ally @ Salum vs Republic**, Criminal Appeal No. 52 of

2017 (unreported) in which the charging provision was problematic but the particulars of the offence and evidence led by the prosecution witnesses were found informative enough and the Court, among other things, had this to say:-

> *"Where particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he was being tried for, where the particulars of the offence gave the appellant sufficient notice about the date when offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age and* ***where there is evidence at the triai which is recorded giving detailed account on how the appellant committed the offence*** *charged and thus any irregularities over non-citations and* ***citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the Criminal Procedure***

Act, Cap 20 Revised Edition 2002 (the CPA)."

(Emphasis added)

The bolded excerpt clearly shows that defects on the charge may be cured by, among other ways, the evidence on record. We subscribe to that position and since this was what obtained in the present case, we find that the defect was not fatal and is curable under section 388 (1) of the CPA.

We now turn to consider the grounds of appeal. As rightly argued by the learned State Attorney, grounds one (1) and three (3) of appeal fault the finding by both courts below that the charge was proved when there was no proof of penetration. It is trite law, in terms of section 130 (4) of the Penal Code, in proving rape, evidence establishing penetration of the male organ into the female organ is necessary and such penetration, however slight, is sufficient to constitute sexual intercourse. In the case of **Hassan Bakari @ Mamajicho vs Republic** (supra) the Court, with lucidity, explained what is meant by sexual intercourse and penetration. The Court said that the former means penetration of the penis of a male into the vagina of a female while penetration means the act of a penis entering a vagina.

Now, the issue here is whether the prosecution proved penetration. On this, as was rightly stated by the learned magistrate, there is the evidence of the victim as there was no other witness to the incident. She was believed and found credible by the trial court which had opportunity to observe her testifying. It is trite law that determination of credibility by demeanour is the exclusive domain of the trial court which happens to see the witness testifying. More so, every witness is entitled to credence unless we find her evidence self-contradictory or materially inconsistent with the evidence of other witnesses on the same incident. That is how the Court pronounced itself in the case of **Yasin Ramadhani Chang'a vs Republic** [1999] T.L.R. 489 and **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported) both quoted in **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 (unreported), that:-

> *"a witness's credibility basing on demeanor is exclusively measured by the trial court."*

The Court further stated that:-

"Apart from demeanor.... The credibility of a witness can also be determined in other two ways that is, one by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."

[see also **Edward Nzabuga vs Republic**, Criminal Appeal No. 136 of 2008, (unreported)],

We have perused the record and we have seen nothing contradictory in the evidence of both the victim and PW3. In addition, the sungusungu commander (PW4) who arrested the appellant also told the trial court that the appellant confessed before him to have raped the victim. These witnesses gave direct evidence on what they experienced, saw and did. We therefore see no ground to discredit them. The victim gave a detailed account of the incident that the appellant tore her underpants, laid on top of her, pumped her hard and later found milky substance on her vagina and as a result she walked home with pain. She presented herself to PW3 that she was raped by the appellant and the later proceeded to examine her female organ and found it raptured

and with semen. PW3 and PW4 were not also doubted by the trial court. Our evaluation of the victim's evidence, her representing herself to PW3 that she was raped, the evidence by PW3, particularly that there was rapture of the vagina and confession of the appellant before PW4 that he raped the victim lead us to no other conclusion but that there was insertion of the male organ into the victim's vagina. More so, his conduct of putting the bicycle in house and disappearing into the bush was inconsistent with the conduct of an innocent person. Like both courts below, we find that penetration was established.

On the same issue, Ms. Akyoo invited us to deduce penetration from the victim's assertion that she was "raped". She was of the view that the victim was influenced by traditional restrictions hence could not tell everything or the actual act of being penetrated in open court. To augment her assertion, she cited to us the case of **Hassan Bakari @ Mamajicho vs Republic** (supra). We entirely agree with the learned State Attorney that the same way people refer to sexual intercourse or having sex as the act of a male organ penetrating into a female organ, they also refer to being "raped" as the act of a woman or girl being carnally known by a male person, and in most cases without the

woman consenting to the act. In the circumstances, the appellant cannot claim that he was prejudiced by the victim consistently claiming that she was raped. Even looking at the line of defence taken by the appellant in which he denied committing the offence of rape, there is no suggestion that he did not understand the accusation against him. We accordingly find grounds one (1) and three (3) devoid of merit and we dismiss them.

In respect of the second (2) ground, we also agree with the learned State Attorney that, given the fact that the victim, PW3 and PW4 were believed by both courts below, failure to call the doctor who examined the victim to testify or non-production of a medical report (PF3) did not affect the prosecution case. As we have endeavoured to demonstrate above, the evidence by the victim which was corroborated by that of PW3 sufficiently proved the charge against the appellant. In the case of **Edward Nzabuga vs Republic** (supra), the Court had an occasion to consider whether expert opinion or production of medical report (PF3) overrides oral evidence by witnesses who witnessed the event and physically examined a matter and we said that the offence of rape or penetration, can be proved orally and without an expert opinion or oral evidence by experts, that is to say without a doctor who examined the victim

testifying in court and/or tendering a PF3. This observation was made by the Court in the above cited case (**Edward Nzabuga vs Republic**) in which we quoted with approval the observation of the High Court Judge in that case when it went for first appeal, which went thus:-

> "*The issue here is whether only medical evidence is acceptable or admissible in proving penetration or physical injuries to the vagina or body of the victim respectively.*
>
> *I'm afraid that courts of law have been gripped with some sort of phobia to expert opinions in particular medical evidence which they hold to be superior to the opinions or evidence of ordinary people, some of whom have got experience on what they are talking about. It smacks of academic arrogance to doubt the evidence of a woman, an adult, like the sixty two year old PW1 Nahemi Sanga in the case at hand when she says that the appellant's penis penetrated into her vagina, simply because a*

medical report, of a doctor who was not only present at the scene and did not experience the thrust of the penis of the rapist, but depending only on the presence of spermatozoa and bruises in the vagina of the victim to reach his opinion. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

We subscribe ourselves to that exposition of the law and we proceed to hold that oral evidence by PW1, PW3 and PW4 as summarized above, in our view, sufficiently proved that the victim was penetrated and the appellant to be her ravisher. We, accordingly, find this ground having no merit and dismiss it too.

As for the sentence meted by the trial court and sustained by the first appellate court, we find it legal since it is the minimum prescribed by the law and we have no reason to disturb it.

All said, this appeal is without merit. We accordingly dismiss it in its entirety.

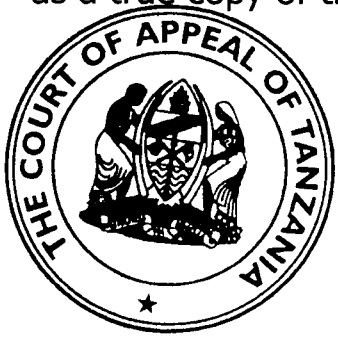
DATED at **MWANZA** this 16th day of June, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 17th day of June, 2020 in the presence of the appellant - linked via video conference Butimba - Mwanza and Ms. Dorcas Akyoo, Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL