IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., NDIKA, J.A. and MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 295 OF 2017

JOACHIM SEBASTIAN ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Arusha)

(Mchome, J.)

dated the 10th day of December, 2002
in
Criminal Appeal No. 63 of 2001

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JUDGMENT OF THE COURT

14th December, 2020 & 11th February, 2021

MWAMBEGELE, J.A.:

This is a second appeal. On 16.04.1999, the District Court of Moshi in Kilimanjaro Region, convicted the appellant of the offence of rape and sentenced him to life in prison. It was alleged that on 03.02.1999, the appellant had carnal knowledge of a girl aged four years and six months. He was aggrieved by the conviction and sentence. His first appeal to the High Court was barren of fruit, for, Mchome, J. dismissed it in its entirety on 10.12.2002. Still aggrieved, he has come to this Court on second and

final appeal having sought and obtained on 29.05.2017 the requisite leave to lodge a notice of appeal out of time.

The facts of the case leading to the appellant's conviction, as can be gleaned from the evidence of the prosecution witnesses, are short. The victim, a girl aged four years and four months, was on 03.02.1999 at about 15:30 hours, together with her two friends of almost the same age; PW3 and another who did not testify, coming from a shop where they had been sent by one Elisongua to buy cigarettes. While on their way, they met the appellant who lured the victim to go with him to the shop where he would buy her biscuits. The victim fell into the trap; she agreed. He carried her on his shoulders and disappeared with her amidst protests from her two friends. However, he did not take her to the shop as promised. Instead, he took her deep into a banana field and started raping her. The victim cried for help to no avail. PW3 and her friend, heard frantic cries from the victim. They went thither only to find the appellant performing on the victim but he could not allow them closer by hurling mud balls at them. The two girls retreated to seek help elsewhere. After he was done, the appellant ran away leaving the victim unconscious.

PW3 and her friend told Eliamani Elisifa (PW4) what had befallen the victim. PW4 went where she was directed was the *loqus in quo* and found

the victim lying helpless by the roadside. She had been ravished. PW4 carried her to her mother, Rosada Ambrose (PW1), who later took her to the hospital for examination and treatment. The appellant was immediately arrested, prosecuted and sentenced as stated above.

In his defence, the appellant simply stated that he was arrested on 03.02.1999 and taken to the police station where the charge the subject of this appeal was preferred against him.

His appeal to this Court comprises the following grounds of complaint; **one**, that the charge was not proved beyond reasonable doubt; **two**, that the charge sheet was incurably defective; **three**, that the *voire dire* examination was not properly conducted before taking and recording the evidence of the victim; **four**, that the appellant's defence was not considered and **finally**; a supplementary ground added at the hearing of the appeal, that the first appellate court did not consider the appellant's grounds of appeal.

At the hearing of this appeal, the appellant appeared in person; unrepresented. Mr. Ignas Mwinuka, learned State Attorney, appeared for the respondent Republic.

In arguing his appeal, the appellant, fending for himself, had very little to submit in his submissions-in-chief. On the defective charge, the

appellant clarified that the provisions referred to in the charge were sections 130 and 131 the Penal Code, Cap. 16 of the Laws of Tanzania as amended by sections 5 and 6 of the Sexual Offences (Special Provisions) Act, 1998 but that no reference was made to subsections (1) and (2) (e) in those sections of the Penal Code. That, he argued, was a fatal irregularity and made the case of **Eliah Bariki v. Republic**, Criminal Appeal No. 321 of 2016 (unreported); the case referred to by the respondent Republic in the list of authorities, distinguishable. The appellant also challenged another case in the respondent's list of authorities; the case of **Ally Ramadhani Shekindo & Another v. Republic**, Criminal Appeal No. 532 of 2017 (unreported) as distinguishable because, there, unlike here, the appellants did not cross-examine the witnesses on the disparity of the scene of crime.

The appellant did not specifically argue other grounds of appeal. However, he encapsulated his arguments in respect of the remaining grounds in the submissions in respect of the general ground that the case against him was not proved beyond reasonable doubt.

On the other hand, Mr. Mwinuka, learned State Attorney, expressed his stance at the very outset that he was not in support of the appeal. Arguing against the ground that the charge was defective, Mr. Mwinuka

conceded that the charge was indeed defective in that it ought to have made reference to sections 130 (1) and (2) (e) and 131 (3) of the Penal Code. However, the learned State Attorney was quick to state that the infraction was not fatal as the particulars of the offence had it that the victim was a girl aged four years and six months. The details in the particulars of the offence, he argued, had the meaning that the appellant was not prejudiced by the omission and hence the same was curable. The defect was thus curable under section 388 (1) of the Criminal Procedure Act, Cap. 20 of the Laws of Tanzania (the CPA). To buttress this proposition, Mr. Mwinuka referred us to our decision in **Ally Ramadhani Shekindo** (supra).

With respect to the complaint that the *voire dire* examination was improperly conducted, the learned State Attorney dismissed the complaint as unfounded. He argued that the requirement of *voire dire* was done away by **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) which had a retrospective application in the appeal under discussion.

Regarding the complaint that the defence was not considered, the learned State Attorney submitted that the complaint had no justification. He referred us to p. 11 of the record of appeal where, he contended, the

appellant's defence was considered. Likewise, the complaint that the grounds of appeal were not considered, the learned State Attorney submitted that all the grounds of appeal were considered by the first appellate court.

With regard to the ground that the appellant was convicted on weak evidence which did not prove the case beyond reasonable doubt, Mr. Mwinuka submitted that the two complaints had no justification. He argued that even if we expunged, the evidence of the victim and PW3 for the supposedly improper *voire dire* examination, there still is enough evidence to implicate the appellant to the hilt. Underpinning this argument, he referred us to the testimony of Alfred Simon Lyimo (PW7) who saw the appellant carrying the victim on his shoulder immediately before the commission of the offence. There is also the evidence of Samwel Zacharia (PW8) who participated in the arrest of the appellant as well as the testimony of PW4 who found the victim unconscious after the depraved act and that of PW1 who took the appellant to the hospital, he contended. These testimonies put together, proved the case beyond reasonable doubt, the learned State Attorney argued.

Having submitted and argued as above, the learned State Attorney implored us to dismiss the appeal.

In a short rejoinder, the appellant submitted that he cross-examined PW1, PW4 and PW7 but that all said they were told that he raped the victim. We understand the appellant was trying to impute the evidence of these three witnesses as hearsay. He urged us to find that the case was not proved beyond reasonable doubt and beseeched us to allow his appeal and, eventually, set him free.

In confronting the grounds of appeal, we shall take the approach taken by the learned State Attorney. With regard to the complaint on the charge being defective, we agree with both the appellant and the learned State Attorney that the charge was indeed defective. The fact that it made reference to the provisions under which the appellant was charged as simply sections 130 and 131 of the Penal Code without any reference to the relevant sub-sections thereof, was, without mincing words, an irregularity. However, as the particulars of the offence part of the charge had details which would have been covered by the omitted sub-sections, and for reasons which will come to light shortly, we are settled in our mind that the ailment was not fatal; it was curable under the provisions of section 388 (1) of the CPA. We hereby proceed to demonstrate why.

We, in the recent past, have pronounced ourselves in no uncertain terms in a number of cases that in situations like the present, the appellant

is not prejudiced by the omission and the infraction will be glossed over. One such case is **Ally Ramadhani Shekindo** (supra) in which we recited the position we took in our previous decisions in **Charles Mlande v. Republic**, Criminal Appeal No. 270 of 2013, **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016 and **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (all unreported) that the ailment is not fatal. In **Charles Mlande**, for instance, we observed that not every ailment in the charge will invalidate the trial. We articulated:

> *"... the statement of offence must contain a reference and, for that matter, a correct reference to the section of the enactment creating the offence. Quite obviously the statement of offence in the case at hand made an incorrect reference.* ***We are, however, keenly aware that not every defect in the charge sheet would invalidate a trial. As to what effect the defect could lead, would depend on the particular circumstances of each case, the overriding consideration being whether or not the infraction worked to the prejudice of the person accused."***
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> [Emphasis supplied].

We reiterated the position in **Festo Domician** and **Ally Ramadhani Shekindo** (supra). Likewise, in **Jamali Ally @ Salum** (supra) in which the particulars of the offence were clear and enabled the appellant to fully understand the nature and seriousness of the offence which he was being tried for, and gave him sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age, we observed that:

> *"... the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, ... the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA."*

See also: **Khamisi Abderhemani v. Republic**, Criminal Appeal No. 21 of 2017 (unreported).

Thus, in the light of the above authorities we have just cited, it becomes apparent that in order to determine the fatality or otherwise of a

misdescription of the charged offence, the bottom line is whether the ailment was prejudicial to the person accused.

In the case at hand, the particulars of the offence part of the charge read:

> *"That Joachim s/o Sebastian charged on the 3rd day of February, 1999 at about 15.30 hrs at Marangu Komalyangwe Village within Moshl District, Kilimanjaro Region did have sexual intercourse with one [name withheld] a girl aged 4 years and six months."*

From the above particulars of the offence part of the charge, we think, the following details are apparent; **one**, the name of the appellant is Joachim Sebastian; the appellant, **two**, the date of the commission of the offence is 03.02.1999 at about 15.30 hours, **three**, the offence was committed at Marangu Komalyangwe Village within Moshi District, Kilimanjaro Region, **four** the name of the victim was disclosed and, **five**, the age of the victim was four years and six months. Thus, going by the authorities we have just made reference to above, we are satisfied that the details in the particulars of the offence part of the charge coupled with the fact that it was read over to him as well as his focused cross-examination of the prosecution witnesses and the evasive way he defended himself,

enabled the appellant to fully appreciate the seriousness of the offence of rape facing him. All these, contrary to what the appellant would want us believe, are not consistent with a person who did not understand the nature of the charge facing him and eliminated all possible prejudices against him. For the reasons we have endeavoured to demonstrate, we, like we did in the authorities cited, find and hold that the failure to cite in the charge the relevant sub-sections of sections 130 and 131 of the Penal Code for which the appellant was arraigned, was an irregularity but was curable under section 388 (1) of the CPA. We dismiss this ground of complaint.

Next for consideration is the complaint regarding the *voire dire* examination. Mr. Mwinuka submitted at one point, citing **Kimbute Otiniel** (supra) that it was not necessary. But at a later stage, he seemed to concede that the evidence of the victim (PW2) and PW3 could be expunged. We have scanned the record of appeal. Having so done, we do not think the testimonies of the two child witnesses were expungable. We are of this view because before the victim testified, the trial Principal District Magistrate recorded:

"... she is not able to say her age. When asked questions she feels shy. She is asked to tell the truth and states..."

Then the trial Principal District Magistrate went on to record the evidence of the victim. Likewise, before PW3 testified, he recorded:

"... [she] does not understand the meaning of oath. She is warned to tell the truth and states ..."

Then the trial Principal District Magistrate proceeded to record the evidence of PW3.

The law applicable then was section 127 of the Evidence Act, Cap. 6 of the Revised Edition, 2002, before being amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 (hereinafter referred to as the Evidence Act). Subsection (2) thereof, as it stood then, read:

"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

In compliance with the above subsection, the courts used to conduct a *voire dire* examination to test; **one**, whether the witness whose age was tender understood the meaning of oath, **two**, if he had sufficient intelligence for the reception of his evidence and, **three**, if he understood the duty of speaking the truth. Case law has it that it was mandatory to record that examination and the finding thereof, failure of which such evidence would be reduced to unsworn evidence of the child which would need corroboration – see: **Kibangeny Arap Kolil v. Republic** [1959] EA 92 and **Remigious Hyera v. Republic**, Criminal Appeal No. 167 of 2005, **Herman Henjewele v. Republic**, Criminal Appeal No. 164 of 2005, **Juma Bushiri v. Republic**, Criminal Appeal No. No. 485 of 2007, **Ali Mohamedi Matingo v. Republic**, Criminal Appeal No. 22 of 2007 (all unreported decisions of the Court).

Adverting to the case at hand, we agree with the appellant and the learned State Attorney that the evidence of PW2 and PW3 was received without a *voire dire* being recorded. On the authority of the decisions just cited above, we are certain in our mind that such evidence was reduced to unsworn evidence of these child witnesses. It needed corroboration. The question which pops-up at this juncture is; was there any evidence to

corroborate this testimony. This is the question to which we now turn. In doing so we will also be answering the complaints that the prosecution evidence was weak and that the case was not proved beyond reasonable doubt.

We agree with Ms. Mwinuka that beyond the evidence of PW2 and PW3, there is evidence which implicates the appellant to the hilt. In finding corroboration in support of the evidence of PW2 and PW3, we will do no more here than reiterate the submissions of the learned state attorney on the point to which we fully subscribe. First, PW7 who knew the appellant as they lived in the same village, testified to have seen the latter carrying the victim on his shoulder and immediately thereafter children told him the victim was "stolen" by a madman. There is also the testimony of PW4 who went to the scene of crime after being told by PW3 and her friend and found the victim lying unconscious by the roadside. PW4 took the victim to PW1 who took her to Imakamu Dispensary and later to Kilema Hospital. PW4 and PW5 physically examined the victim and discovered that she was raped. The testimonies of these witnesses corroborated the testimony of the victim and PW3. The complaint on the improper *voire dire* is therefore without substance. We find and hold that the prosecution evidence on which the trial court founded the appellant's

conviction was not weak; it was strong enough to mount the conviction as it did.

The appellant also complains that his defence was not considered. We have read the record of the trial court and its judgment. Indeed, the appellant did not put up any serious defence, so to speak. He simply stated that at 10:00 am he went to a nearby village to contact a timber dealer. By 12:45 pm he was already back to the village and was together with friends carousing at Eliel's *pombe* shop where he was arrested by PW8 about two hours later. Despite the appellant not bringing forward a meaningful defence, the trial Principal District Magistrate, at pp. 11 and 12 of the record of appeal, reproduced his defence and analysed it against the evidence for the prosecution and felt that his defence was not plausible. The Principal District Magistrate concluded that the victim was raped by none other than the appellant. Backed by the evidence on record, we think this complaint is not only an afterthought but also unfounded. We dismiss it as well.

There was also a complaint by the appellant that the first appellate court did not consider his grounds of appeal. This complaint will not detain us. We have seen the judgment of the first appellate court as appearing at pp. 20 - 21 of the record of appeal. Indeed, it is a short two-page

judgment. However, it was so meticulously written as to cover all the grounds of complaint on the first appeal. This complaint is without substance as well.

In view of the above discussion, we find this appeal lacking substance and, for that reason, we are constrained to dismiss it, as we hereby do.

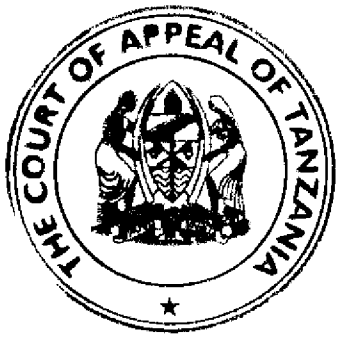
DATED at **DAR ES SALAAM** this 4th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The judgment delivered this 11th day of February, 2021 in the presence of Appellant in person - linked via video conference at Arusha Central Prison and Ms. Mary Lucas 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