IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 406 OF 2018

MUSSA SEBASTIANI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Magoiga, J.)

dated the 15th day of October, 2018

in

DC. CRIMINAL APPEAL NO. 45 of 2018

JUDGMENT OF THE COURT

17th March & 15th April, 2021

KITUSI, J.A.:

The District Court of Bagamoyo convicted the appellant with statutory rape under section 130 (1) (2) (e) and 131 of the Penal Code, [Cap 16 R.E 2002] (the Penal Code), satisfied that he had carnal knowledge of a 15-year-old girl (PW2). It sentenced him to the mandatory 30 years imprisonment. The appellant unsuccessfully appealed to the High Court, hence this appeal.

All this began from a somewhat casual background. PW2 was a Primary School scholar during the material time. For some reason her teachers got suspicious and made PW2 go for pregnancy testing,

whereupon she was found to be pregnant, confirming their suspicion. The teachers disclosed this finding to PW2's mother Mwanahamisi Ally (PW1). Upon questioning, PW1 and her husband PW3 were told by their daughter that it is the appellant who had impregnated her.

PW2 made a very brief account of the matter. She stated that from September, 2015 when she was still schooling, she had an affair with the appellant in the course of which she had sex with him on three occasions and that one of those flirtations caused her to get pregnant. PW1, PW2 and PW3 alluded to the fact that when the issue of PW2's pregnancy and his involvement was raised to the appellant he undertook to provide for both PW2 and the would be born child. PW2's further testimony was that the appellant lived up to his promise. The appellant was however, arrested and charged.

The appellant's very brief defence consisted of a flat denial of having had sex with PW2. He alleged that PW2 may have been tutored to testify against him.

The trial Court accepted PW2's version and rejected the defence as an afterthought. On the basis of the famous best evidence rule in **Selemani Makumba v. Republic** [2006] T.L.R. 379, the learned trial

magistrate convicted and sentenced the appellant as shown above. The High Court similarly took PW2's word and concluded that penetration was obvious because she was pregnant and that the appellant was the perpetrator because he did not impeach PW2 by cross - examinations.

This appeal raises nine grounds in the original memorandum of appeal and four grounds in the supplementary memorandum of appeal, filed subsequently. The appellant also filed written arguments which he adopted at the hearing conducted through electronic transmission connected to prison. He did not make any further arguments when invited to. Mr. Emmanuel Maleko, learned Senior State Attorney assisted by Ms. Elizabeth Olomi, learned State Attorney appearing for the respondent Republic, opposed the appeal.

Mr. Maleko ingeniously argued the grounds of appeal in clusters and we appreciate that he made it easy for us. Invariably, all grounds of appeal in the supplementary memorandum of appeal raise complaints that are identical with some of the complaints in the original memorandum of appeal. We wish to say at the very beginning that most of the grounds of appeal except the last three, raise mundane matters, so they do not call for painstaking deliberations.

Grounds 1 and 2 in the original memorandum of appeal as well as ground 4 in the supplementary memorandum of appeal are on the charge sheet. We paraphrase the complaints under those grounds of appeal as follows: -

1. The charge is defective for lacking necessary particulars.
2. There is variance between the charge and its particulars on the one hand and the prosecution evidence on the other.
4. The charge is defective for not indicating the word "*unlawful*".

In the written arguments the appellant drew our attention to the date in the charge sheet showing that the alleged rape was committed in December, 2015 while the prosecution led evidence to show that it was committed in September, 2015. Citing section 132 of the Criminal Procedure Act [Cap 20 R.E. 2002] (the CPA), the appellant wondered how he could be expected to mount a defence against such a case. He also pointed out that Maina, the victim's name in the charge sheet cannot be the same as Naima who testified as PW2. On this argument the appellant cited our decision in the case of **Filbert Alphone Machalo v. Republic,** Criminal Appeal No. 528 of 2016 (unreported).

Mr. Maleko submitted that the charge was not defective except for the sentencing provision not indicating the subsection which, he argued could be cured under section 388 of the CPA. He referred us to the unreported case of **Damian Ruhele v. Republic** Criminal Appeal No. 501 of 2007 in which we held that variance of dates and evidence was curable.

Propriety of charge sheets is increasingly becoming a perennial issue but, in this case, we see no substance in the complaint raised in the first and fourth grounds of appeal shown above. The complaint that the particulars of the offence are not sufficiently disclosed is not consistent with the record. The other complaint raised in ground four is that the charge did not indicate the word "unlawful." This is an uninformed complaint in our view, because the charge laid at the appellant's door accused him of having carnal knowledge of a child, commonly known as statutory rape.

The general rule is that, sexual intercourse is categorized as lawful or unlawful depending on whether or not there is consent from the female complainant. However, statutory rape under section 130 (2) (e) of the Penal Code with which the appellant was charged is an exception,

in that it is considered to be rape whether or not the victim consents to the sexual intercourse. This complaint is dismissed for want of merit.

We shall defer our determination on the alleged variance between the charge and evidence until later. This is raised in ground 2 of the original memorandum of appeal.

The complaint in ground of appeal No. 3 is that the appellant was not supplied with the complainant's written statement as required by section 9 (3) of the CPA.

In the written arguments the appellant submitted that the omission to supply him with the statement of PW2 denied him the right to effectively prepare questions to put to her in the course of cross-examinations. Mr. Maleko conceded to this ground but submitted that the appellant was not prejudiced. However, in a short rejoinder the appellant submitted that he was prejudiced by the non-compliance with section 9 (3) of the CPA.

With respect, we are inclined to agree with the learned Senior State Attorney that the appellant was not prejudiced. Not only did PW2 testify in court under oath after which the appellant was allowed to cross - examine her, but during his defence he made no more than a flat

denial without any reference to PW2's oral testimony. We shall dismiss this ground of appeal.

In the original fourth ground of appeal, the appellant alleges that the victim's age was not proved. He submitted that it was not enough for PW1 (PW2's mother) and PW3 (PW2's step father) to merely state that she was 15 years old without any documentary proof of the date of her birth. Mr. Maleko's response to this argument was that PW2's age was proved by PW2 herself and by PW3. He cited to us the case of **Andrea Francis v. Republic,** Criminal Appeal No. 173 of 2014 (unreported) where we said that proof of age could come from the victim, the parents or one of them, a guardian a birth certificate etc.

We entirely agree with the learned Senior State Attorney again that proof of the age of a victim of statutory rape need not be documentary. This ground has no merits, it is dismissed.

Similarly ground 5 of the original memorandum of appeal deserves to be dismissed. In this ground of appeal the appellant argues that there was no proof of rape because the prosecution did not produce DNA test results to link him with the child, the alleged fruit of the rape. On the other hand, Mr. Maleko submitted that rape is proved by

penetration and not necessarily by DNA test. He referred us to page 23 of the record where the appellant stated that PW2 consented to the sex with him. It is, we think, enough for us to say DNA test is not a popular means of proving rape in our jurisdiction, given its limitations, perhaps. This informs our settled position that the best evidence of rape comes from the victim. See **Seleman Makumba v. Republic** (supra) and **Jaffary Ndabita @ Ngotangwa v. Republic**, Criminal Appeal No. 27 of 2016 (unreported). This ground has no merit, and it is accordingly dismissed.

We have no doubt that even ground 6 of the original memorandum of appeal is based on a misconception. Under this ground of appeal, the complaint is that the prosecution did not prove his arrest. Mr. Maleko's submission on this is that the omission was not fatal, and he cited the case of **Godfrey Gabinus v. Republic,** Criminal Appeal No. 273 of 2017 (unreported), to support his argument. In that case we reiterated the time long position that there is no particular number of witnesses required to prove a fact in a trial. However, we think the question to be addressed is whether the appellant's arrest was an issue when his own testimony established just that. In his brief defence the appellant intimated that after his arrest for an unknown offence, he was

taken to police. There was no need therefore, for the prosecution to prove the appellant's arrest in view of the fact that it was not a disputed fact. We dismiss this ground.

We now revert to the issue of variance between the charge and evidence, a complaint whose determination we had deferred. We have preferred to consider this issue simultaneously with the issue raised in grounds 7, 8 and 9. Mr. Maleko argued these last three grounds together and we go along with his style because they raise the issue whether the prosecution proved the charge against the appellant beyond reasonable doubt.

In the written arguments, the appellant raised the following questions which we think demand our keen consideration: -

> *"And worse still, the evidence of the victim herself doesn't disclose whether she was taken to hospital to establish whether she was raped or was to be examined if she was pregnant, whether she was taken to police station, and at the police station they went to report a rape charge or impregnating a school child and if at the police station PW2 (the victim) mentioned the appellant as the alleged perpetrator of the crime".*

In the course of his submissions against the appellant's arguments, we required Mr. Maleko to rationalize the delay in prosecuting the appellant. The appellant was charged in court on 19/9/2016 to answer for an offence allegedly committed in December 2015. With respect, the learned Senior State Attorney did not offer an explanation. So here comes the appellant's question, did PW2 name him as the perpetrator of the rape? We know too well, that the ability of a witness to name a suspect at the earliest opportunity tends to render assurance to his credibility. See **Jackson Thomas v. Republic**, Criminal Appeal No. 299 of 2013 (unreported). If PW2 had named the appellant as the person who raped her, why did it take another ten months to prosecute him? The delay casts doubt on PW2's credibility and since the best evidence of rape comes from the victim, the prosecution case is rendered weak. The appellant's other question is whether PW2 was taken to police station and what type of complaint was registered. We also ask, why didn't any police officer testify to clarify these questions when we know, too well again, that failure to call material witness invites an adverse inference? See the case of **Yohana Said Nguyeje v. Republic**, Criminal Appeal No. 206 of 2015 (unreported) among others. So, there is only the evidence of PW2 which

is not very free from doubt as we have shown, and only her parents to support her.

There is yet another aspect to consider. PW2 stated that she started seeing the appellant in September 2015 without any mention of anything taking place in December 2015. The charge however specifically alleges that the appellant raped PW2 in December 2015. We find substance in the appellant's complaint that there is variance between the charge and evidence. We agree with Mr. Maleko that in some occasions such as in **Damian Ruhele v. Republic** (supra) we found variance between the charge and evidence to be curable under section 234 (3) of the CPA. We recently took a similar view in **Osward Mokiwa @ Sudi v. Republic,** Criminal Appeal No. 190 of 2014.

However, the evidence in this case unlike in **Osward Mokiwa** (supra) does not even show when was PW2 medically examined and leaves the matter too much speculative. It is our conclusion therefore, that the facts of this case would not justify our finding that the variance is curable under section 234 (3) of the CPA as we did in the cited cases.

We think if the first appellate court had given all these concerns by the appellant a serious thought, it would not have arrived at the conclusion that the prosecution had proved its case beyond reasonable

doubt. We agree that the appellant gave a very feeble account in his defence, but we need not cite any authority for the principle that one may not be convicted on the weakness of his defence.

In the event and for those reasons, we allow the appeal. We order the appellant's immediate release if his continued stay in prison is not for another lawful ground.

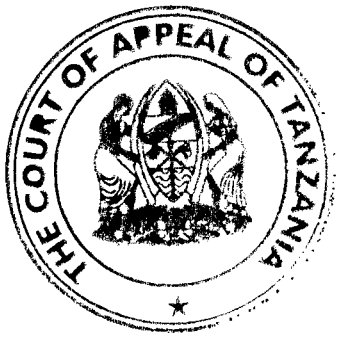
DATED at **DAR-ES-SALAAM** this 13th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 15th day of April, 2021 in the presence of the Appellant in person - linked via video conference from Ukonga prison and Ms. Debora Mushi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL