IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 193 OF 2017

BORE S/O CLIFF.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Utamwa, J.)

dated 17th day of May, 2017
in
(DC) Criminal Appeal Case No. 240 of 2016

JUDGMENT OF THE COURT

28th April & 6th May, 2021

MWARIJA, J.A.:

The District Court of Nzega, sitting at Nzega convicted the appellant of the offence of rape contrary to s. 130 (2) (e) and (131) (3) of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). He was found guilty of having had carnal knowledge of a girl child aged six (6) years who, for the purpose of hiding her identity, she shall hereinafter be referred to as "ML" or the victim. The prosecution had alleged in the charge that the appellant committed the offence on 19/2/2016 at about 16:00 hrs at Ndambile area within Nzega District in Tabora Region. The conviction of the appellant, who had denied the charge, was based on the evidence tendered by six

prosecution witnesses. Following his conviction he was sentenced to the statutory life imprisonment.

The facts giving rise to the appellant's arraignment and his subsequent conviction are not complicated. The victim was until the material date, on 19/3/2016, staying with her aunt, Amina Mbushi (PW3) and other PW3's children in a rented house at Ndambile area within Nzega District. The appellant was also staying in the same house in the room which was rented by a woman who was his concubine. The house was the property of the family of Hassan Gulamali Paulo (PW1).

On that date at about 17:00 hrs Mariam Simon (PW2) who was also one of the nine tenants in the said house, discovered that "ML" was not in the company of the children who were playing outside the house. As she was looking for "ML", PW2 saw the former's slippers in front of the door to the room occupied by the appellant's concubine. Being aware that the appellant was alone on that date because his concubine was away, PW2 became suspicious of the victim's presence in that room with the appellant. Together with other tenants, she knocked on the door but the appellant refused to open it.

Coincidentally, PW1 who was on his way to his home met one woman who informed him about the incident. He decided to go to the scene where he found that the door to the room in question had been locked from

inside and the appellant persistently refused to open it. PW1 decided to break it with the assistance of one Yakobo. It was alleged that the appellant was found in the room with the victim. Previously, when the door was being broken, the appellant unsuccessfully attempted to prevent it from being opened by pushing it outward. As PW1 and the said Yakobo managed to break and push the door inside, the appellant was found at the door half naked. He reacted by starting to attack PW1 but since many people had gathered at the scene, they saved him from further beating by the appellant. Thereafter, PW1 went to report the incident to the police. The police arrived and arrested the appellant. After investigation of the case which was conducted by WP 9662 DC Winfrida, the appellant was charged in court.

In her testimony, PW2 testified that after the victim had been taken out of the room, the women who were there including PW3, examined her and found that she had been raped. According to PW3, the victim bled to the extent that she left blood stains in the room in which the offence was committed.

On the second day, that is on 19/3/2016, the victim was sent to hospital where she was examined by Dr. Edward Christian (PW7). Testifying before the trial court, PW7 confirmed that the victim was raped. According to his evidence, her hymen was perforated and there were spermatozoa in

her vagina. The witness tendered the victim's PF3 which was admitted in evidence as exhibit P1.

On her part, the victim who gave evidence as PW4 testified that on the material date, the appellant took her to his room and while in there, he threw her on the bed, covered her mouth and had carnal knowledge of her. She added that, she felt pain and started to bleed from her private parts. Later on, she went on to state, that the door was broken by PW1 and thus managed to get out and on the next day she was taken to hospital.

In his defence, the appellant did not deny that on the material date he was in his concubine's room. He denied however, that he was found with PW4 in the room and that upon being examined she was found to have been raped. It was his testimony that on that day, he was alone in the room because he gave some money to her concubine to take it to his children at Nyasa area. He said that, since he did not go to work because he was a bit moody, he took alcohol and returned to the room to sleep. He went on to testify that, as he was asleep, he heard the door of his room being broken from outside and learnt that it was PW1 who was breaking it. He said that when he went to the door to inquire about that act while bare chested, the people who had broken the door embarked on beating him on allegation that he raped a child.

He went on to state that PW1, who was his friend, had the habit of abusing the tenants and at times maliciously damaging their properties. To curb that habit he said, he used to report him to the police and that included the date of the incident, the result of which he (PW1) was arrested prior to the time of the incident. He went on to give evidence that on that same day, while he was asleep in the room PW1 broke the door to the room from outside. It was his evidence further that he was not found with any child in the room. Moreover, he said, he was impotent and could not therefore commit rape. He complained that the case was framed against him as a result of grudges which existed between him and PW1.

In the decision, the learned trial Resident Magistrate found that the evidence of PW1, PW2 and PW7 was credible and that the same proved the case against the appellant beyond reasonable doubt. The learned Magistrate found that PW2 became suspicious because of the victim's slippers and after suspecting that she might be with the appellant, she knocked on the door but the appellant refused to open it. It was then that PW1 broke it and the appellant was found with the victim therein. The learned trial Resident Magistrate found also that the allegation that the victim was raped was established by her evidence as well as that of PW2 and the Doctor (PW7). With regard to the appellant's evidence that he was

arrested while he was alone in the room, the trial court was of the opinion that the same did not raise any reasonable doubt in the prosecution case.

On appeal to the High Court, the appellant's conviction and sentence were upheld. The learned first appellate Judge was of the view that the evidence that was tendered by the prosecution was cogent. He found that the evidence of PW2 who inspected the victim and that of PW7, the Doctor who examined her, sufficiently proved that fact. The learned first appellate Judge was also of the opinion that, even though the trial court did not properly conduct a *voire dire* test as required by s. 127 (2) of the Evidence Act. [Cap. 6 R.E. 2002, now R.E. 2019] (the Evidence Act) which was applicable at the material time before its amendment by the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016, her evidence could still be acted upon. In the *voire dire* the learned trial Resident Magistrate asked the witness questions which were intended to test whether she understood the nature of oath and the duty of telling the truth but did not inquire whether she had sufficient intelligence.

The trial magistrate found that PW4 understood the duty of speaking the truth and proceeded to receive her evidence. As that evidence required corroboration, the learned Judge was of the view that the same was corroborated by evidence of PW2, PW6 and PW7. He found also that the

age of the victim was sufficiently proved by the evidence of PW1, PW3, PW7 and exhibit P1.

On whether it was the appellant who committed the offence, the learned first appellate Judge found that there was overwhelming evidence of PW1 and PW3 which was to the effect that, the appellant who initially refused to open the door, was found in the room with the victim. Further, that the victim was found bleeding from her private parts and blood drops were seen in the room. Like the trial court, the High Court found that the defence of the appellant was mere denial of the offence and did not raise any reasonable doubt against the tight evidence tendered by the prosecution. He thus dismissed the appeal.

Dissatisfied further, the appellant has preferred this second appeal raising three grounds of appeal. The grounds may be paraphrased as follows;

1. *That the learned first appellate Judge erred in upholding the appellant's conviction while the age of the victim was not proved through the evidence of her parents or by a birth certificate.*
2. *That the learned first appellate Judge erred by failing to find that the evidence of the victim was wrongly received because in conducting a voire dire, the trial court did not ascertain whether she possessed sufficient intelligence.*

3. *That the learned first appellate Judge erred in law in failing to find that the trial court did not properly evaluate the defence evidence, the duty which the High Court did not also undertake because had it done so it would have found that PW1 and PW2 had grudges with the appellant and that therefore the charge was framed against him because of such grudges.*

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Upendo Malulu, learned Senior State Attorney. When the appellant was called on to argue his grounds of appeal, he opted to hear first, the learned Senior State Attorney's submission in reply to the grounds of appeal reserving his right to rejoin if the need to do so would arise.

Submitting in reply to the 1st ground of appeal, Ms. Malulu opposed the appellant's contention that the age of the victim was not proved. She argued that the evidence of the Doctor (PW7) and exhibit P1 proved that the victim was aged 6 years.

On the 2nd ground, Ms. Malulu conceded that the *voire dire* test on PW4 which was mandatory before the amendment of s. 127 (2) of the Evidence Act was not properly conducted. It was her submission however, that the irregularity did not invalidate the victim's evidence save that the same required corroboration which was rendered by the other witnesses'

evidence. To support her argument, she cited the case of **Elias Pesambili v. Republic,** Criminal Appeal No. 484 of 2015 (unreported). She contended that the evidence of PW1, PW2, PW6 and PW7 offered the required corroboration to PW4's evidence.

With regard to the 3rd ground, she argued in reply that the defence raised by the appellant that the case against him was framed by PW1 and PW2 because they had grudges with him was duly considered by the two courts below. She referred the Court to pages 32-33 of the record of appeal to substantiate her argument that the trial court considered that defence.

With those arguments, the learned Senior State Attorney submitted that the appellant's appeal is devoid of merit and thus prayed the Court to dismiss it.

In rejoinder, the appellant argued that in his defence, despite having submitted that he had grudges with PW1 and PW2, he also told the trial court that he could not commit the offence of rape because he was impotent but the two courts below did not consider such defence. He raised yet another ground concerning the charge. He contended that, although it is shown in the charge that the offence was committed on 19/2/2016, the evidence shows the date of the offence to be 19/3/2016. As for the age of the victim, he maintained that her birth certificate should have been tendered in order to prove her age.

To start with the first ground, we hasten to state that we agree with the learned Senior State Attorney that the same is devoid of merit. The fact that none of the victim's parents was called to testify did not, in our view render the victim's age unproved. The age of a child can be proved not only by a parent but also by, among other persons, a doctor or a guardian. – See for example the case of **Elia John v. Republic**, Criminal Appeal No. 306 of 2016 (unreported) in which the Court stated as follows:

> *"It is settled law that proof of age can be done by the victim himself, relative, parent or a medical practitioner leading evidence on that or else by production as evidence of a birth certificate [See **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported)]."*

In this case there is evidence of PW7, the Doctor who examined the victim. He testified that the victim's age was six years. That evidence was not disputed at the trial. This ground of appeal thus fails.

Turning to the 2nd ground, from the parties' submissions, there is no dispute that PW4 was raped on 19/3/2016. This is clear from the evidence of, among others, PW4 herself, PW2 and PW7. The dispute is whether it was the appellant who raped her. In her evidence, the victim testified that she was raped by the appellant who was popularly known to her as Baba

Juma. Narrating what he did after he had pulled her into the room she stated *inter alia*, as follows:

> *"...he did throw me to the bed he covered my mouth so that I could not raise an alarm. He removed my pant and put the saliva in my vagina then he inserted his penis in my vagina I felt pain.... Having inserted his penis there was blood which was coming from my vagina."*

Both court's below found PW4 to be a credible witness and as stated above, the learned first appellate Judge found further that, although the trial court did not properly conduct a *voire dire* test on her, her evidence was sufficiently corroborated. The appellant contests that finding of the first appellate Judge. He contends that the evidence of PW4 is invalid because it was wrongly received by the trial court.

The issue is thus whether or not the evidence of PW4 was properly received and acted upon to found the appellant's conviction. It is correct position, as conceded by the learned Senior State Attorney that *voire dire* test on PW4 was not properly conducted in terms of s. 127 (2) of the Evidence Act as it stood before its amendment. That provision required that, when a witness is a child of tender age, his or her evidence should be received after ascertaining, *inter alia,* that such child witness has sufficient intelligence. The purpose of conducting *voire dire* test and the manner in

which such evidence is to be received was clearly stated in the case of **Hassan Hatibu v. Republic,** Criminal Appeal No. 71 of 2002 (unreported). In that case, the Court stated as follows:

> *"...it is important for the trial judge or magistrate when the witness involved is a child of tender age to conduct a voire dire examination. This is to be done in order for the trial judge or magistrate to satisfy himself or herself that the child understands the nature of oath. If in the opinion of the trial judge or magistrate, to be recorded in the proceedings, the child does not understand the nature of an oath but is possessed of sufficient intelligence and the witness understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation." (See* ***Dhahiri Ally v. R****[1989] TLR 27;* ***Sakina v. R*** *(1967) E.A 403;* ***Khamis Samuel v R****, Criminal Appeal No. 320 of 2010 CAT (unreported);* ***Kisiri Mwita S/O Kisiri*** *v. R [1981] TLR 218 and* ***Kibangeny v. R*** *[1959]EA 94)."*

In the present case, the learned trial Resident Magistrate did not inquire about PW4's intelligence. Her evidence was received after the finding by the trial court that she understood the duty of speaking the truth.

As correctly found by learned first appellate Judge, since the trial court did not completely omit to conduct *voire dire* test, the evidence of

PW4 could not be discounted. In the case of **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011, the Court stated as follows on the probative value of the evidence of a child of tender age taken without full compliance with that provision:

> "Where *there is a misapplication by a trial court of section 127 (1) and /or 127 (2) the resulting evidence is to be retained on the record. Whether or not any credibility, reliability, weight or probative force is to be accorded to the testimony in whole, in part or not at all is at the discretion of the trial court. The law and practice governing the admissibility of evidence; cross-examination of the child witness, critical analysis of the evidence by the court and the burden of proof beyond reasonable doubt, continues to apply."*

In this case, as observed by the learned High Court Judge, the evidence of PW4 required corroboration and we respectfully agree with him that the evidence of PW1, PW3 and PW7 rendered the required corroboration. In the circumstances, we do not also find merit in the 2nd ground of appeal.

In his 3rd ground of appeal, the appellant contends that he was implicated with the offence because of grudges which existed between him and two of the prosecution witnesses, PW1 and PW2. He complains that had that defence been considered, it would have been found that the case

against him was framed. In the first place, we agree with the learned Senior State Attorney that the defence of appellant was considered by both the trial court and the High Court (pages 32-33 and 62 of the record of appeal respectively). The allegation was however, against PW1. From the record of appeal, in his defence, the appellant did not state anywhere that he also had grudges with PW2. Secondly, as found by both lower courts that defence did not raise any reasonable doubt given the circumstances under which, as found above, the appellant was arrested. We find therefore, that such line of defence was an afterthought.

As stated above, the appellant has also in this appeal, raised the issue relating to the variance between the charge and the evidence. He submitted, that whereas the charge shows that the offence was committed on 19/2/2016, the evidence shows to the contrary that it was committed on 19/3/2016. The point by the appellant is therefore, that his conviction was based on a defective charge.

It is true that there is variance between the charge and the evidence and the issue for determination is therefore, whether the discrepancy rendered the charge fatally defective. There is no rule that whenever there is variance between the charge and the evidence then the proceedings are vitiated. Rather, the test is whether the variance had the effect of prejudicing the accused person. In a somewhat similar situation in the

case of **Osward Mokiwa @ Sudu v. Republic,** Criminal Appeal No. 190 of 2014 (unreported) whereas the charge showed that the offence was committed on 22/10/2008, the evidence led by the prosecution indicated that it was committed on 22/11/2008. Considering the effect of the discrepancy, we stated as follows:

> *"In our view, the test applicable by an appellate court when determining, at first, the existence of a defective charge, and secondly, its effect on an appellant's conviction, is whether the conviction based on the alleged defective charge occasioned a failure of justice or pronounced prejudice to the appellant. This test is in consonance with the curative provisions of section 388 of the CPA we referred to earlier. Besides, section 234 (3) of the CPA provides an additional cure to errors on the time stated on the charge, be it the actual hour at which or the definite day on which or month in which the offence was allegedly committed."*

Having found that the appellant was not prejudiced by the variance, the Court found that the defect was curable.

In the present case, it was not disputed that the appellant was arrested on 19/3/2016 in his room. That was the day on which the victim was raped. In his defence, the appellant did not deny that he was charged in relation to the incident which took place on that date although it is shown

in the charge sheet that the offence was committed on 19/2/2016. From his evidence therefore, he was aware and indeed, he focused his defence on the date of the incident referred by the prosecution witnesses in their evidence. We find therefore that the defect in the charge was curable and thus, this additional ground raised by the appellant lacks merit.

On the basis of the foregoing reasons, we find that this appeal has been brought without sufficient reasons. It is hereby dismissed in its entirety.

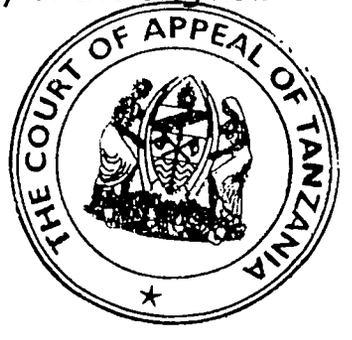
DATED at **TABORA** this 5th day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2021 in the presence of the Appellant appeared in person and Ms. Upendo Malulu, learned Senior State Attorney for the Respondent Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL