IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

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

CRIMINAL APPEAL NO. 18 OF 2019

MWALIMU JUMANNE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

dated 13th day of December, 2018
in
HC. Criminal Appeal No. 221 of 2018

JUDGMENT OF THE COURT

21st April & 12thMay, 2021

KITUSI, J.A.:

The appellant was charged with statutory rape under section 130 (1) (d) (e) and 131 of the Penal Code, on allegations that on diverse dates between 2016 to January 2017 he had carnal knowledge of a six-year-old girl who testified during the trial as PW2. We shall maintain reference to her as PW2 or victim. The District Court of Temeke before which he stood trial convicted the appellant and sentenced him to 30 years imprisonment, and further ordered him to pay Tzs 300,000.00 to the victim in

compensation. He unsuccessfully appealed to the High Court, and this is his second appeal.

The facts are simple though disgusting, considering the age of the alleged victim. On 19/1/2017 Lesle Mchopa (PW1) arrived home past midnight only to be told by his wife that their daughter who was seven years had been ravished. PW1 confirmed his wife's story when he checked the girl's vagina as it was wide open and discharging. When PW1 interrogated his daughter as to what had happened to her, she refused to divulge any information to him. She however told PW1's wife in the presence of one Mama Muddy, the landlady, that it was the appellant who had raped her after luring her into his bedroom. According to PW1, even when Mama Muddy asked PW2 whether it could be one Brian who raped her, she insisted that it was the appellant.

We note that PW1's wife and Mama Muddy did not testify at the trial, a fact which we will revert to at some point before concluding our deliberations.

The victim testified in support of her father's version, giving details some of which unnecessary, of how the appellant went about in ravishing

her. At the time of testifying, PW2 said she was seven years. She stated that the appellant sent her to buy top - up voucher for his mobile phone. When she was delivering the voucher to him in his room, he had sex with her. There was also evidence of a medical doctor (PW3), that when he examined PW2 on 21/1/2017, he observed raptured hymen, enlargement of the girl's vagina and discharge from it.

In defence, the appellant totally denied the allegation and raised an existing conflict with PW2's mother as the source of the fabricated accusations. He stated that he had a conflict with PW2's mother over a flash disk which he picked on the way but which the said woman claimed to be hers.

In convicting the appellant, the trial court accepted PW2's account that it was him who raped her. The learned trial magistrate posed a rhetoric, why would PW2 single out the appellant even after Mama Muddy had suggested the possibility of one Brian being the villain. The trial court's conclusion therefore, was that the appellant was the culprit. The High Court took the same view and added that the appellant's disappearance

from the area of his usual residence after the alleged rape for five months suggested his guilt.

Before us, the High Court is faulted on a total of ten grounds, that is, five grounds in the initial memorandum of appeal and other five grounds in the supplementary memorandum of appeal. The appellant had also presented written arguments for our consideration, and he did not have much to say at the hearing. He prayed that on the basis of the grounds of appeal and the written arguments, we should allow the appeal and restore his freedom.

Ms. Faraja George, learned Senior State Attorney appeared for the respondent Republic assisted by Mr. Benson Mwaitenda, learned State Attorney. Ms. George was outright in support of the appeal mainly on the basis that the evidence of PW2 who is the star witness, was not recorded in compliance with the law. Before that, she identified grounds of appeal which she said are new and should not be addressed. These are grounds 1, 2, 3 and 4 of the memorandum of appeal, as well as grounds 1, 3 and 5 in the supplementary memorandum of appeal. With respect, we agree with the learned Senior State Attorney, that this Court may not determine points

which were not earlier raised and determined by the High Court. This is the settled law which we have had occasion of reiterating in many of our previous decisions such as, **Sadiki Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012, **Abedi Mponzi v. Republic**, Criminal Appeal No. 476 of 2010, both cited in our recent decision in **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 (all unreported). We also agree with her that the grounds of appeal she identified as new are, indeed, new. In view of that position of the law, we shall not determine those new grounds except those grounds raising points of law such as ground 3 in the memorandum of appeal raising the issue of defect in the charge, ground 4 in the memorandum of appeal alleging that there was no proof of the victim's age, and ground 3 in the supplementary memorandum of appeal which raises a complaint that PW4's testimony was recorded without him taking oath.

There is not much to go by however, and we will place little significance on two of the complaints so that we deal with a more deserving complaint on the evidence of PW2, the alleged victim of the offence. In short, we find no merit in the complaint that the charge is defective, because after taking a good look at that charge sheet, it is not.

We similarly find no merit in arguing that the victim's age was not proved, because the opposite is, actually the case. Evidence of the victim's age came from the victim herself and PW1, her father. The law is clear and settled that proof of the age of the victim of sexual offences may come from a birth certificate or the victim herself or parents. See, **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported).

We have also considered the complaint that PW4's evidence was recorded without him taking oath. We need not mince words; the complaint has merit. The law is settled that evidence recorded without oath or affirmation is of no value without corroboration. See **Raphael Mhando v. Republic**, Criminal Appeal No. 54 of 2017 (unreported). And so is the evidence of PW4 in this case; it is of no value without corroboration. However, all these are not determinant matters as we have earlier intimated.

The main question for our determination here, which Ms. George rightly spent time on, is whether the two courts below were correct in relying on the evidence of PW2 to conclude that it is the appellant who raped her. This takes us to the manner in which that witness, being 7

years old at the time of testifying, was made to pass out as a competent witness.

The appellant submitted on this ground quite impressively in his written arguments, pointing out that the law requires a witness of tender age to make a promise to tell the truth. Ms. George submitted in support of that argument and invited us to disregard the evidence of PW2 in this case because her testimony was not preceded by her promise to tell the truth and not to tell lies, as required by the current law.

The law before 2016 was that for a person of tender years to be allowed to testify, he or she had to satisfy the court during a voire dire test, that he or she was competent to do so with or without oath, depending on the finding of the trial court. After 2016, vide section 127 (2) of the Tanzania Evidence Act Cap 6 brought about by Act No. 4 of 2016 which came into force on 8th July 2016, a person of tender age may testify without oath, but all what such a witness needs to do is to promise to tell the truth and not to tell lies. Was that procedure followed in this case?

With profound respect, the procedure adopted by the learned trial magistrate in this case was totally different and strange. Here is what happened: -

> *"PW2, 7 years, Student, Kijichi, Makua, Christian*
>
> ***XD By S/A***
>
> *I have 7 years and I am studying at Kijichi primary school and I am in Std 1.*
>
> *I am praying at KKT church. God likes the ones who say the truth and God does not like lies. If I will say lies God will burn me by fire. My mother's name is Vailet and my father is..."*

That procedure conforms to neither the old position of the law, nor the present procedure. We gather that the trial magistrate was obviously trying, without conducting a voire dire, to get the witness make her promise to tell the truth. Unfortunately, the learned trial magistrate surrendered to the prosecuting State Attorney, the duty of ascertaining PW2's competence to testify, and that is not what the law mandates.

We think even after doing away with the requirement of conducting a voire dire examination, trial magistrates retain the duty of assessing the

witnesses of tender age before they allow them to testify with or without oath. This has to be done before the witness is left at the disposal of the prosecutor whose only role is to lead him to narrate the facts of the case as he knows them. In the case of **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we issued some guidelines which we now reiterate: -

> *"The question however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows: -*
>
> 1. *The age of the child.*
> 2. *The religion which the child professes and whether he/she understands the nature of oath.*
> 3. *Whether or not the child promises to tell the truth and not lies.*
>
> *Thereafter, upon making the promise, such promise must be recorded before the evidence is taken".*

These guidelines have been subsequently followed, such as in **Selemani Bakari Makota @ Mpale v. Republic,** Criminal Appeal No.

269 of 2018; **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 and; **Medson Manga v. Republic**, Criminal Appeal No. 259 of 2019 (all unreported). In all those cases we made it clear that in the absence of a promise to tell the truth and not to tell lies, the testimony of a child of tender age is of no evidential value.

So, here we are, with no evidence from the victim, nor from her mother and Mama Muddy to whom she disclosed her ordeal. There will be no evidence left to ground the conviction because a good part of what was testified to by PW1 as to the perpetrator of the rape, is mere hearsay. There are still questions that linger. For instance, why did Mama Muddy suggest to PW2 that Brian could be a suspect? Why is the charge so unspecific as to the date of the alleged rape, being from 2016 to January 2017 and yet PW1 and PW2 referred to a specific date?

With PW2's evidence out of consideration, and in view of the doubts shown above, we find merit in the appellant's 5th ground of appeal that the charge was not proved beyond reasonable doubt. For the reasons shown, we allow the appeal, quash the conviction, set aside the sentence as well

as the order of compensation, and order the appellant's immediate release from prison, if he is not otherwise lawfully held.

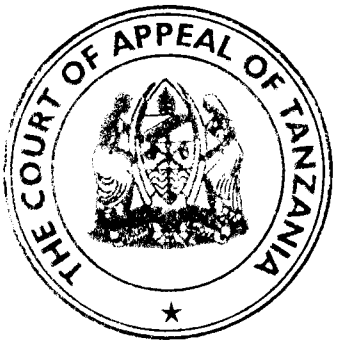
DATED at **DAR-ES-SALAAM** this 10th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 12th day of May, 2021 in the presence of the Appellant present in person and Ms. Daisy Makakala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL