IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 264 OF 2020

HASSAN BACHO NASSORO..APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

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

(Ngwembe, J.)

Dated 8th day of June, 2020
in
Criminal Appeal No. 15 of 2020

JUDGMENT OF THE COURT

24th May & 2nd June, 2021.

LILA, J.A.:

The appellant, Hassan Bacho Nassoro, was charged in the District Court of Lindi at Lindi with rape contrary to sections 130 (1), 2 (e) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002 (the Penal Code). It was alleged that on 2nd day of December, 2017 at Matwapwa Mipingo Village within the District and Region of Lindi, he had carnal knowledge of a girl aged fourteen (14) years who we shall refer to as MJ or simply the Victim so as to hide her identity. He denied the charge. Trial ensued and at the end he was convicted as charged and sentenced to a jail term of thirty (30) years

imprisonment. In addition, it was ordered that he should suffer twelve (12) strokes of the cane and pay the victim TZS. 1,000,000.00 as compensation.

The conviction and sentence aggrieved the appellant. His appeal to the High Court was unsuccessful. It was found lacking in merit and was thereby dismissed.

Still aggrieved, he has appealed to this Court advancing four grounds of complaints. We will defer reciting them to a later stage of this judgment.

The prosecution relied on the testimony of five witnesses to prove the charge while on the other side the appellant was the sole witness. The Victim testified as PW2 and her particulars indicated that she was 14 years when she testified on 16/12/2019. She was living with her grandmother and grandfather at Matwapwa village and was in standard five at Matwapwa Primary School. The accused person who happened to be her aunt's husband also resided at the same village. On the material date, as is usual, the Victim left home for school in the morning. She met the appellant who just from nowhere recalled what the Victim had accused him the previous day that he had raped her and signified his intention to accomplish that. To start with, he demanded back the shoes, text books and a pen which he had bought for her. To avoid harassment, the victim

gave back the shoes she wore that morning to the appellant promising to give him the rest of the things upon her arrival at home. She accordingly changed course and took the way back home and the appellant followed her from behind. Somewhere before arriving at home the appellant turned against her and grabbed her, strangled her and let her into the forest where he undressed her under pants. He then undressed himself, took out his penis and penetrated her. So as to ensure that the matter remained a secret and while holding a poisoned knife and machete, the appellant threatened to kill her and burn her grandmother and grandfather's house if she was to reveal the matter to anyone. Upon being released, the victim proceeded to her mother's friend's house one Samir's mother to whom she explained the whole incident. Having heard the matter, the husband of Samir's mother and one Nangigi took her to school where they met two teachers namely Agness and Chalamila whom the matter was reported first. The teachers and the local area leader (PW3) reported the matter to the police station. The victim was taken to Mipango hospital and was later transferred to Sokoine Hospital in Lindi. PW3 gave a similar testimony. At Sokoine Hospital, the Victim was medically examined by Aisha Abdul Ali (PW1), an Assistant Medical Doctor, who was of the finding that there were

fresh bruises in her genital parts and was bleeding. She formed the opinion that she was penetrated by a blunt object which finding she posted on the Police Form No. 3 (PF3) which she tendered in court and was duly admitted as exhibit P1.

On her part, Halima Mohamed Yanda (PW5), the victim's grandmother, told the trial court that upon being informed of the incident by one Fatuma Kinyagati, she went to Mipango Hospital to see the Victim and found her in ill condition and named Hassan Bacho (the appellant) as her ravisher. She also stated that the Victim (PW2) was born in 2005. Ali Hamisi Chitai (PW4), a Matwapwa Primary School Head Teacher, told the trial court that the Victim was a pupil at that school and was registered on 15/01/2015 when she was nine (9) years old as she was born on 27/7/2005 hence at the time he was testifying she was 14 years old. He added that the matter was reported to him by Village Chairman and hamlet leader and when he asked the Victim what had happened she claimed to have been raped by Hassan Bacho (the appellant). He later wrote a letter to the police introducing the Victim as a student at his school (exhibit P2).

The appellant denied the charge. He attributed his arrest and being charged with bad blood between his family and that of his wife caused by a

farm dispute. The quarrel was further precipitated by his act of marrying his wife one Fatu Abdallah without her parents' permission. That, his proposal to marry Fatu was at first turned down. He was advised to try again after three months when he succeeded and the marriage was celebrated on 10/1/2019. However, he went further narrating, after five months his mother in-law (PW5) went to his home and warned him not to visit her place and in any case should find his own parents. Yet again, despite being patient, the mother in-law went to him and asked him to divorce his wife lest be ready to suffer the consequences. He also stated that PW1 did not find sperms in the victim's genital parts. He also dismissed the evidence by PW3, PW4 and PW5 as being hearsay evidence. Above all, he said he was, on 2/12/2019 at 0900 am, arrested and linked with the offence he was charged with.

As shown above, the trial court was inclined that the prosecution had proved the charge beyond reasonable doubt. Relying on the best evidence rule as was propounded by the Court in **Selemani Makumba vs. R** [2006] TLR 379, the learned trial magistrate was satisfied that the victim's evidence clearly narrated the whole ordeal and was impeccable. He was also of the view that her evidence was corroborated by that of PW1 who

testified that she found fresh bruises in the vagina and that the blood was oozing out of it something that established being penetrated by a blunt object. In addition, as the offence charged was statutory rape where proof of the victim's age is of paramount importance, he found the victim's age sufficiently proved by PW2 and PW5. In dismissing the appellant's defence, the learned trial magistrate reasoned that the bruises proved penetration which, in terms of section 130(4)(a) of the Penal Code Cap. 16 R. E. 2002 and the Court's elaboration in **George Mwanyingili vs. Republic**, Criminal Appeal No. 335 of 2016 (unreported), is an essential element in proving rape. The appellant's contention that the testimony by PW3, PW4 and PW5 was hearsay was dismissed on the ground that they told the trial court what they were told by the victim hence not hearsay under section 62(b) of the Tanzania evidence Act, Cap. 6 R. E. 2002 (now Cap. 6 R. E. 2019) (the TEA). In conclusion, the learned magistrate was convinced that despite the victim being the only witness on what happened, in terms of section 143 of the TEA and the Court's decision in **Goodluck Kyando vs. R** [2006] TLR 367, the number of witnesses is irrelevant. Accordingly, the appellant was found guilty, convicted and sentenced as stated earlier. Dissatisfied, he appealed to the High Court.

The first appellate court concurred with the trial court's findings. Like the trial court, it held the view that PW2, being the victim of the offence, in her testimony proved being penetrated by the appellant, her age was sufficiently proved by PW2, PW4 and PW5. Regarding the appellant's defence, the learned judge dismissed it basically because the Doctor who examined the Victim (PW1) found bruises and blood oozing from the victim's genital parts something which proved penetration which is an essential element in proving rape other than sperms as was stated by the Court in **George Mwanyingili vs. Republic** (*supra*), **Godi Kasenegala vs. Republic**, Criminal Appeal No. 271 of 2006, **Baraddi Deo vs. Republic**, Criminal Appeal No. 33 of 2010 and **Mbwana Hassan vs. Republic**, Criminal Appeal No, 98 of 2009 (all unreported). On those bases it found no point to fault the trial court. It accordingly dismissed the appeal.

Still feeling aggrieved, the appellant has come to this Court on appeal. The memorandum of appeal raises four (4) grounds of complaints which can be paraphrased thus:-

1. *That, the evidence by PW2 was irregularly taken for lacking promise to tell only the truth and not lies.*

2. *Exhibits P1 and P2 were irregularly admitted as they were not shown to PW1 for her to identify them.*
3. *The defence evidence was not considered by both courts below.*
4. *All the prosecution witnesses were not affirmed by the court.*

The appellant entered appearance before us personally and was not represented. On the rival side, Mr. Abdulrahaman Mshamu, learned Senior State Attorney assisted by Ms. Eunice Makala and Ms. Rabia Ramadhani, both learned State Attorneys joined forces to oppose the appeal on behalf of the respondent Republic. The appellant adopted his grounds of appeal sought the Court's indulgence on them and allow the appeal.

Mr. Mshamu first directed his arsenals against grounds 2, 3 and 4 of appeal which he said the Court lacked jurisdiction to entertain them on account of being new grounds. He stressed that they were not canvassed and determined by either the High Court or a subordinate court exercising extended jurisdiction. He relied on section 4(1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019. However, on reflection and upon realizing that grounds 3 and 4 were legal matters, he withdrew them from the list. Without any hesitation, we take side with the learned Senior State Attorney that ground two of appeal is based on facts (evidential) for

which the legal requirement, as rightly argued by the learned Senior State Attorney, is that the complaint ought to have been raised and determined by the High Court first before finding its way to this Court. The record is clear that such a complaint was not raised and determined by the High court. It is being raised here for the first time. We accordingly agree with Mr. Mshamu that it is a new ground. It being not a point of law which can be raised at any stage and the Court is obligated to entertain it, in terms of sections 4(1) and 6(7)(a) of the Appellate Jurisdiction Act, Cap. 141 R. ER. 2019 (the AJA) read together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court lacks mandate to entertain it. When we were confronted with a similar issue, in **Galus Kitaya's** case (*supra*), we made reference to our earlier decision in **Nurdin Mussa Wailu vs. Republic**, Criminal Appeal No. 164 of 2004 (unreported) and we stated that:-

> *"...usually the Court will look into matters which came in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."*

(See also **Hassan Bundala @ Swaga vs. Republic**, Criminal Appeal No. 386 of 2015 cited in the case of **George Claude Kasanda vs. The Director of Public Prosecutions**, Criminal Appeal No.376 of 2017, **Jafari Mohamed vs. Republic** Criminal Appeal No. 112 of 2006 and **Hussein Ramadhani vs. Republic** Criminal Appeal No. 195 of 2015 (all unreported).

With that stance of the law, we are barred from considering that ground. We accordingly disregard it.

In his response against ground one (1) of appeal, Mr. Mshamu was brief and precise that as it was sufficiently established by PW2 herself and PW4 that PW2 was, at the time she testified, above fourteen years old, in terms of section 127(4) of the Tanzania Evidence Act (the EA), she was not a child of tender age hence not subject to the provisions of section 127(2) and (5) of the EA.

We think Mr. Mshamu is right. In **Issaya Renatus vs. Republic**, Criminal Appeal No. 542 of 2015 (unreported) we held that a near relative or a teacher is among the persons who can prove the age of the victim who is a school girl. In the present case PW4 was very clear that PW2 was born on 27/7/2005 and was then fourteen years old. Simple calculations

reveal, as rightly argued by Mr. Mshamu, that on 16/12/2019 when she testified she was fourteen years five months and eleven days old. In terms of section 127(4) of the EA which defines a child of tender age to mean "**a child whose apparent age is not more than fourteen years**", it goes without saying that a person of the age from day one to fourteen years is a child of tender age and is subject to the requirements of section 127(2) of the EA. PW2 had crossed over that age by over five months. She was therefore not subject to the requirement of promising to tell only the truth and not lies stipulated under section 127(2) of the TEA. This Court recently thus insisted in **Barnaba Changalo vs. the Director of Public Prosecutions**, Criminal Appeal No. 165 of 2018 (unreported). It was therefore proper for PW2 to be affirmed, as did the trial magistrate, before her evidence was recorded. By doing so, the trial court complied with the provisions of section 198(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019. That provision, in imperative terms, requires every witness to testify either on oath or affirmation except where any other law directs otherwise. PW2 was therefore properly affirmed and there is nothing to fault both courts below. This appeal ground is thus misconceived and we dismiss it.

Ground three (3) of appeal need not hold us much. The appellant's complaint centers on failure by both courts below to consider by analyzing the defence evidence. Mr. Mshamu, after referring to pages 33 to 35 of the trial court judgment and pages 52 to 54 of the High Court judgment where the defence evidence was analyzed, opposed the appellant's complaint. We, again take side with the learned Senior State Attorney that this complaint is unfounded. The record bears out clearly that both courts below analyzed and found the defence evidence unable to shake the strong prosecution case. For avoidance of doubt, we shall let the record tell it all on how the trial court dealt with the defence evidence. Our starting point is pages 33 to 35 of the trial court judgment. The learned trial magistrate first appreciated the appellant's defence in these words:-

> *"But also in this case even if the consent was not an issue, the victim did not consented (sic) to the act and the accused grabbed her into forest and insert (sic) his penis into her vagina, when the DW1 was (sic) said he did not rape the victim as there is no evidence to prove that assertion that he raped the victim he insisted that the assistant medical doctor did not find sperms in the victim's vagina and the victim in her evidence said her evidence is the same*

as the doctor's. While the evidence of PW3, PW4 and PW5 were hearsay evidence."

In analysing the evidence, the learned trial magistrate stated:-

> *"I start with the issue that the clinical officer or Assistant medical Doctor did not find sperms in the victim's vagina. Evidence of the doctor is very clear that she found fresh bruises and blood into the victim's vagina, but she did not find the sperms in the victim's vagina but this is not an issue in rape cases as penetration however slight is enough to prove. And this is according to Section 130(4) (a) of The Penal Code (CAP 16 RE 2002).*
>
> > *"For the purpose of proving offence of rape (a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*
>
> *What doctor confirmed was that the victim's vagina was penetrated by blunt object and it has fresh bruises and blood. Hence the basic element to be proved is the issue that the victim vagina was penetrate and no need to prove the existence of sperms in the victims vagina because penetration however slight is enough to prove Rape. But also the court of Appeal had this to say concerning the*

absence of sperms in victim's vagina in rape cases in the case of ***GEORGE MWANYINGILI VS R CRIMINAL APPEAL NO 335/2016:-***

> *"Once again, we agree with Mr Mtenga that what is important is the fact that there were bruises in the victim girl's female organ, an aspect which was indicative of the fact that there was penetration which is a crucial ingredient of the offence of rape. We similarly agree with Mr. Mtenga that for the same reasons that penetration was vindicated, the absence of sperms in PW3 female organ is not something material in the case".*

The learned trial magistrate also considered the second limb of the appellant's defence and stated:-

> *"Also the accused in this case did say that the evidence of the prosecution was hearsay as he said for example apart from the evidence of PW1 and PW2, the evidence of PW3, PW4 and PW5 was hearsay.*
>
> *I don't support that position that evidence of PW3, PW4 and PW5 were hearsay because what these*

witness testified was what they heard from the victim or doctor for example PW3 who is the harmlet chairman who escorted the victim to Mipingo hospital said he was told by doctor who examined the victim and found she was raped also, she said the victim told her the story about what the accused did to her so they heard directly from the victim."

It is therefore clear from the above excerpts from the record of appeal that the appellant's defence was fully considered and found to be baseless by the trial court.

On its part, the High Court concurred with the trial court's finding that the evidence on record by PW2 established that she was penetrated by the appellant which evidence was corroborated by the Doctor's (PW1) findings as posted in exhibit P1 and the evidence by PW3 and PW4. The complaint was found unmerited and was dismissed. The learned judge's judgment articulates that. After considering various aspects of the case and the evidence of both sides as a whole, the learned judge arrived at this conclusion at page 52 of the record that:-

"Moreover, the victim's clothes became dirty after rape that was evident as testified by PW1,

PW3, PW4 and PW5. Even the medical report indicated that there was bruises and bleeding in ABC's private parts (vagina) due to that act of rape. Thus the evidence adduced by prosecution witnesses proved penetration, identification of the rapist, age of the victim and circumstances led into that criminal act."

This conclusion shows that the evidence of both sides was duly considered. This complaint fails too.

The appellant has complained, in the 4th ground of appeal that all the prosecution witnesses were not affirmed. It is his contention that such witnesses affirmed themselves hence contravening the mandatory provisions of sections 3, 5 and 8(1) of the Oaths and Statutory Declaration Act, Cap. 34 R. E. 2019. To clear the doubt, we hereunder reproduce the relevant provisions:-

"3. Every court shall have the authority, itself or by an officer dully authorized by it in that behalf, to administer an oath or affirmation to any person whom it may lawfully examine upon oath or affirmation.'

5. Every oath or affirmation made under this act shall be made in the manner and in the form prescribed by the rules made under section 8.

8.-(1) The Chief Justice may, with the consent of the Minister, make rules prescribing forms of oaths and affirmations and the manner in which the same may be made.

(2) Rules made under this section may prescribe different forms for different courts or for different classes of persons."

We, in the first place appreciate the fact that oaths, affirmations and declarations are governed by the Oaths and Statutory Declarations Act, Cap. 43 R. E. 2019 (the OSDA). We would wish to add that the First Schedule to the Rules which were made under section 8 provide for the format for administration of oaths and affirmation in judicial proceedings. Rule 1 and 2 provide, respectively, that Christians take oath and moslems take affirmation. For clarity we find, yet again, not out of context to reproduce the nature of oath and affirmation taken.

Rule 2 covers Moslems. They take affirmation. The following is a format for the affirmation:-

"Wallahi, Billahi, Ta "Allah": I solemnly affirm in the presence of the Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth."

Rule 3 covers an affirmation for a Hindu. It says:-

"I solemnly affirm in the presence of Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth."

Rule 4 which covers pagans shows the affirmation for the pagans:-

"I solemnly affirm that what I shall state shall be the truth, the whole truth, nothing but the truth."

The issue before us is whether the prosecution witnesses were properly affirmed. We will, right away, say that the appellant's complaint is without merit. The record bears out that all the five prosecution witnesses were moslems. When recording the particulars of each witness, the learned trial magistrate indicated the religion to which each one professed to be "muslim" which is synonymous to "moslem". He then wrote "affirm and state as follows". A serious reading into the appellant's complaint seems to suggest that by the word "affirm" it meant that the witness took the affirmation himself. Simply stated, the witness was not affirmed or that the

affirmation was not administered to such witness. We do not share that view. If anything, we are firm, it must have been either a slip of the pen or linguistic maze or problem that instead of writing "affirmed" the learned trial magistrate inadvertently wrote "affirm". Even if that might have been not the case, it is our view that being led by the court or an authorized officer of the court is a matter of convenience particularly for those who are illiterate or unfamiliar with the manner of taking an oath or affirmation. It is not uncommon to find judicial officers and other law enforcement officers affirming or taking oath themselves in court before their evidence is recorded in compliance with the provisions of section 198(1) of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA) which, as explained above, mandatorily requires all evidence in criminal trials be taken on oath or affirmation otherwise is no evidence at all. The prime aim is to let the witness promise to tell the truth before the court. It therefore matters nothing whether the witness affirms or takes oath on the one side or is affirmed or sworn, on the other side. It is for this reason that procedural infractions in administering the oath or affirmation are treated by the Court as being not material. We find guidance from our earlier decision in **Asha Huruma vs. Republic**, Criminal Appeal No. 74 of 2005 (unreported). In

that case, two witnesses (PW3 and PW4) were recorded to have sworn instead of being affirmed. The Court stated that:-

> *"We are of the settled opinion that the words "sworn" and "affirmed" mean that the witness be he Christian or Moslem will testify truthfully. In that situation, using the word "sworn" instead of "affirmed" in respect of PW3 and PW4 who undertook to testify truthfully, occasioned no injustice to the said witnesses or to the appellant. The error, we hasten to hold, is curable under section 388 of the Criminal Procedure Act, Cap. 20 for the said error did not prevent PW3 and PW4 from deposing truthfully. It appears to us that swearing or affirming a witness is more a question of semantics because at the end of the day,* ***the goal is to cause the witness to solemnly promise to tell the truth and the truth only.*** *Hence ground one of the appeal is lacking in merit."*

[Emphasis added].

Besides, the word "administer" is not restrictive in meaning. For instance, **Concise Oxford Dictionary**, Tenth Edition, Oxford University Press, when used in legal arena, defines it to mean:-

> *"Direct the taking of an oath"*

And, the word "direct" is defined, among others, to mean:-

> *"Control the operations of..." or "supervise and control..."*

We are therefore of the settled opinion that the phrase *"Every court shall have the authority, itself or by an officer duly authorized by it in that behalf, to administer an oath or affirmation"* used under section 3 of the OSDA does not mean that it is necessary that the court or an officer of the court has to read the oath or affirmation and the person being affirmed or taking an oath shall repeat the words. Instead, the duty of the court or an officer of the court is to supervise the exercise of taking the oath or affirmation whereby it shall be recorded "affirms" or "swear". It is only in situations where the person is unaccustomed with the taking of an oath or affirmation that the court or an officer of the court has to assume the responsibility of reading the oath or affirmation to him to which he shall be repeating the words after him and in such case it shall be recorded "affirmed" or "sworn". To put things in order and in short, a witness may be "affirmed" or may "affirm" if a Moslem and may be "sworn" or "swear" if a Christian. Thus, we are not enjoined in this matter to interpret the

meaning of the above phrase under section 3 of the OSDA narrowly as the appellant's contention seems to suggest.

In conclusion, we are of the view that by writing "affirm" instead of "affirmed" did not occasion injustice to the prosecution witnesses or the appellant and is therefore curable under section 388 of the CPA. In all we hold that all the witnesses solemnly promised to tell the truth and their evidence was valid and was properly acted on to ground the appellant's conviction. This ground, too, fails and is dismissed.

In view of the above findings, the appeal is devoid of merit. It is hereby accordingly dismissed.

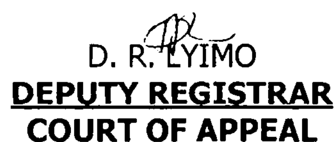
DATED at **MTWARA** this 1st day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of June, 2021 in the presence of the appellant in person and Mr. Abdulrahaman Mshamu, learned Senior State Attorney assisted by Ms. Caroline Matemu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL