IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 127 OF 2019

TWALAHA ALLY HASSAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)
(Matuma, J.)

dated the 21st day of March, 2019
in
DC Criminal Appeal No. 364 of 2018

.....

JUDGMENT OF THE COURT

28th May & 9th June, 2021

NDIKA, J.A.:

The appellant, Twalaha Ally Hassan, was convicted of rape before the District Court of Rufiji at Kibiti ("the trial court") and was sentenced to thirty years imprisonment. He was also ordered to pay the victim TZS. 1,000,000.00 as compensation. His first appeal to the High Court of Tanzania at Dar es Salaam against the conviction, sentence and compensation was barren of fruit, hence this second and final appeal.

At the outset, it is essential to provide the salient facts of the case. The prosecution produced nine witnesses along with four exhibits to prove the

charge that the appellant, on 16th December, 2017, at or about 14:00 hours at Kikale Village within Kibiti District in Coast Region, had carnal knowledge of a girl aged fifteen years without her consent. For the sake of protecting the victim's privacy, we will refer to her by the pseudonym "ABC" or simply PW1, the moniker by which she testified at the trial.

The appellant was a teacher at a *madrasa* in Kikale Village offering elementary instruction on the religion of Islam. On 16th December, 2017, at or about 14:00 hours, ABC went to the *madrasa* to seek permission from the appellant for her younger sister (PW4) to stay home so as to attend to pressing domestic chores. After she reported the matter, the appellant tricked her to get into his bedroom in an adjoining home whereupon he burst forth to seize and lay her on his bed. While muffling her screams with his hand, he undressed her skirt and underwear and then inserted his penis into her vagina. Once he was through, he opened the door and let her go while urging her to keep the matter secret. As she left the place she was in too much pain and blood was oozing from her private parts. According to ABC, she trudged back home but found nobody there and decided to walk to her grandmother's home.

The first person ABC met shortly after her ordeal was PW8 Mwanaisha Juma Mlay, also known as Nyamlawa. PW8 took ABC to PW2 Fatuma Hamisi Mnete as she had to attend to other business. Both PW2 and PW8 recounted that ABC revealed to them that the appellant had raped her. PW3 Amina Hamisi as well as PW4 also told the trial court that they saw ABC at her grandmother's home crying in anguish while claiming that the appellant had raped her. After ABC's parents (PW5 and PW6) as well as the village functionaries had been alerted, the incident was reported to Kibiti Police Station who then issued a formal request for medical examination on the victim (PF.3). ABC was subsequently taken to Kibiti Health Centre where Dr. Sadock Gwanda Bendiko (PW7), Assistant Medical Officer at Kibiti Health Centre examined her.

In his medical examination report (PF.3 – Exhibit P.2), PW7 stated that the victim exhibited pain in the genital area and that there was a visible *"tear on left labia minora. Bruises seen on vagina walls, bleeding per vagina. No hymen."* He concluded that the injury and loss of hymen were caused by a blunt object having penetrated PW1's vagina. Along with Exhibit P.2, he tendered a letter of referral from the Clinical Officer of Kikale Village

Dispensary (Exhibit P.1) upon which the victim was referred to Kibiti Health Centre.

Police investigator, No. WP.10879 Monica Thomas (PW9) testified on various aspects of the investigations into the matter. She tendered in evidence two exhibits: the first one was PW1's bloodstained underwear (Exhibit P.3) that she wore on the fateful day and a hoe (Exhibit P.4) that she had allegedly retrieved from the appellant which her younger sister had taken to the *madrasa*. It was both in the victim's evidence as well as the testimony of PW9 that she (PW1) handed over the underwear to the police after she reported the allegation against the appellant.

In his defence on affirmation, the appellant denied the accusation against him, raising an *alibi*. While admitting that he was at his home as well as the adjoining *madrasa* in the morning, he testified that he rode to the nearby Mtunda Village in the afternoon and later to Luponda area. He only came back home in the evening. His wife DW5 Sophia Said as well as DW2 Amiri Ramadhani Malengo, DW3 Mustafa Mzee Mwinongwa and DW4 Idd Juma Sagulaga supported his *alibi*. In essence, these witnesses averred that the appellant was neither at his home nor at the *madrasa* when the alleged incident occurred between 14:00 and 15:00 hours on the fateful day.

In his judgment, the learned trial Resident Magistrate (Hon. M.J. Kayombo) found it proven that the appellant had sexual intercourse with the victim without her consent. He mainly based his finding on PW1's evidence, which he believed to be true, as well as the evidence of the prosecution witnesses that saw her crying in agony shortly after the incident. He also took into account PW7's expert evidence and Exhibit P.2 (PF.3) establishing the penetration of the victim's vaginal orifice that caused bruises on vaginal walls and plucked away hymen. The learned magistrate castigated the appellant for failing to give notice of his intention to rely on the defence of *alibi* in terms of section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) (henceforth "the CPA") and ultimately rejected it on the ground that it did not rule out the possibility that he left the *madrasa* area after the alleged rape had occurred.

On the first appeal, the learned appellate Judge upheld the trial court's findings after dutifully subjecting the evidence to a fresh scrutiny. In particular, he found it proven that the appellant tricked the victim to get into his home and that:

> *"innocently PW1 entered the house only to find that the appellant was already behind her closing the door*

and dragged her into his bedroom whiie covering her mouth by hand and later used his vest to cover her mouth. The appellant then undressed and forcefully penetrated his penis into her vagina. She felt pain and started to bleed as a result she ruptured and sustained bruises caused by the forceful penetration."

The appellant initially predicated the present appeal against the High Court's decision on fourteen grounds of appeal contained in the memorandum of appeal lodged on 2nd December, 2019. These grounds were followed up by six further grounds presented in a supplementary memorandum of appeal filed on 16th September, 2020. In their totality, the aforesaid twenty grounds raise the following complaints: **one**, that the charge against the appellant was fatally defective; **two**, that the testimonies of PW3 and PW4 were improperly recorded; **three**, that section 231 of the CPA was violated; **four**, that Exhibits P.1 and P.2 were improperly admitted; **five**, that the chain of custody of Exhibits P.3 and P.4 was broken; **six**, that the prosecution evidence especially that of PW1, PW2 and PW8 was contradictory and unreliable; **seven**, that there was no comparable medical evidence on the appellant to link him with the alleged rape; **eight**, that the defence of *alibi* was not considered; and **finally**, that the charge was not proven beyond reasonable doubt.

At the hearing of this appeal, the appellant adopted his grounds of appeal and urged us to allow the appeal. For the respondent, Ms. Jennifer Massue, learned Senior State Attorney, who teamed up with Ms. Jacqueline Werema, learned State Attorney, strongly resisted the appeal.

It is ineluctable to state at this point that this being a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 ("the AJA"), to deal with matters of law only but not matters of fact. However, in consonance with our decision in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a litany of decisions that followed, the Court can only intervene in respect of evidential matters where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

We propose to begin with the first ground of appeal. It is the appellant's contention that the charge against him was fatally defective for being laid under wrong provisions and that there was a variance between it and the evidence. Admittedly, the appellant had raised a more or less similar complaint on his first appeal.

For the respondent, Ms. Werema conceded that the impugned charge, laid under sections 130 (1) and (2) (b) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) (henceforth "the Code"), should have been preferred under paragraph (a) of subsection (2) of section 130 read together with the rest of the cited provisions. Moreover, she admitted that the trial was bedevilled by two variances between the charge and the evidence: first, that while the charge mentioned the victim as a fifteen-year-old girl, the evidence disclosed that she was eighteen years at the material time. Secondly, the middle name by which the victim identified herself at the trial differed from the one stated on the charge sheet. However, the learned State Attorney put in a rider that the conceded errors did not prejudice the appellant because he defended himself properly and that he did not dispute the victim's identity as he did not cross-examine her on it. She thus urged us to find the errors curable under section 388 of the CPA.

It is common cause that charge was laid under section 130 (1) and (2) (b) of the Code. For clarity we reproduce the relevant part of the aforesaid provisions thus:

> *"130.-(1) It is an offence for a male person to rape a girl or a woman.*

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) ***not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;***

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) [Omitted]

(d) [Omitted]

(e) [Omitted]"[Emphasis added]

In the circumstances of this case where the victim was an eighteen-year-old woman and that she was allegedly carnally known by the appellant without her consent, category (a) of the offence, as shown above, ought to have been cited as the charging provision but it was not. Category (b) was inapplicable because it was not alleged that the incident involved the victim's consent having been obtained by the use of force, threats or intimidation. We would, therefore, agree with the parties that this defect offends section 135 (a) (ii) of the CPA that requires every statement of the offence charged to contain an accurate reference to the provision creating the offence

concerned. Nevertheless, we are settled in our mind that the particulars of the offence, in whole, are very clear and that they disclose the offence of rape under section 130 (1) and (2) (a) of the Code as it was alleged that the appellant had carnal knowledge of ABC without her consent. The details disclosed gave the appellant sufficient notice of the nature of the offence charged, the act constituting the offence, the date and place where it was allegedly committed and the name of the victim. Besides, looking at the testimonies of all nine prosecution witnesses as well as the appellant's relatable and attentive cross-examination of the witnesses and the manner in which he defended himself, we take the view that he understood that he was facing the charge of having sexual intercourse with ABC without her consent. Accordingly, we are inclined to find, as did the first appellate Judge, that the appellant was not prejudiced by the defect in the statement of the offence.

We are fortified in our view by the position we took in **Khamisi Abderehemani v. Republic**, Criminal Appeal No. 21 of 2017 and **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (both unreported), where we confronted analogous scenarios. While in **Khamisi Abderehemani** (*supra*) the statement of the offence in the charge sheet under which the appellant was tried for rape cited sections 130 (1) (2) (e)

and 131 (1) instead of the applicable sections 130(1), (2) (b) and 131 (1) of the Code, in **Jamali Ally** (*supra*) the applicable provisions of sections 130 (1) (2) (e) and 131 (2) were not cited. In both decisions, we held that the non-citations or citations of inapplicable provisions on the charge sheets occasioned no injustice as the particulars of the offence sufficiently disclosed the charged offence and that the prosecution's evidence on record gave a detailed account of the incident to enable the appellant appreciate the case against him and defend himself effectively. The defects, therefore, were held to be remediable under the curative provisions of section 388 of the CPA.

By the same token, we do not find any ostensible prejudice against the appellant by the two variances between the charge and the evidence. Although the charge stated the victim's age as being fifteen, which would not have entailed proof of the victim's consent to sexual intercourse, it was clearly particularized in the charge that the sexual act was done without the victim's consent. This matched with the victim's evidence that she did not consent to the sexual act. At her age of eighteen, proof of absence of consent was a statutory imperative.

The conceded discrepancy in the victim's middle name is equally of no moment. As rightly submitted by Ms. Werema, the victim's identity was not in

dispute at the trial and that the appellant did not cross-examine her on the correctness of her middle name.

Based on the foregoing discussion, we find the complaint in the first ground of appeal wanting in merit. It stands dismissed.

The essence of the second ground of appeal was that the testimonies of PW3 and PW4, who being aged twelve and thirteen years respectively were children of tender years, were recorded contrary to the dictates of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) (henceforth "the EA"), as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016. For the respondent, Ms. Massue conceded to the anomaly and urged us to expunge their respective accounts.

Indeed, it is vivid on the record that the two witnesses of tender years gave evidence on affirmation without any prior determination by the learned trial magistrate whether or not they understood the nature of affirmation. For clarity we extract section 127 (2) of the EA currently governing the reception of evidence of a child of tender years thus:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall,*

before giving evidence, promise to tell the truth to the court and not tell any lies."

The above provision has been discussed in a litany of decisions of the Court: see, for example, **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018; **Hamisi Issa v. Republic**, Criminal Appeal No. 274 of 2018; **Issa Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018; **Shaibu Nalinga v. Republic**, Criminal Appeal No. 34 of 2019; **Medson s/o Manga v. Republic**, Criminal Appeal No. 259 of 2019; and **Mwalimu Jumanne v. Republic**, Criminal Appeal No. 18 of 2019 (all unreported). In **Issa Nambaluka** (*supra*), the Court discussed the import of the above provision thus:

"*From the plain meaning of the provisions of sub-section (2) of s.127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however,*

silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not."

The Court went further that:

> *"It is for this reason that in the case of* ***Godfrey Wilson v. Republic,*** *Criminal Appeal No. 168 of 2018 (unreported), we stated that,* ***where a witness is a chiid of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness.*** *If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies."* [Emphasis added]

The position of the law is, therefore, that a child witness of tender years can only give evidence on oath or affirmation if the trial court has determined, after asking pertinent questions, that he or she understood the nature of oath or affirmation – see also **Hamisi Issa** (*supra*). If the witness does not understand the nature of oath or affirmation, then his or her

evidence may be recorded upon his or her promise to tell the truth. In the instant case, the trial court hastily recorded the testimonies of the two witnesses on affirmation without having determined if they understood the nature of affirmation. This was a fatal infraction, rendering the two witnesses' accounts lacking in evidential value. We thus find merit in the second ground of appeal and proceed to discard the testimonies of the two witnesses. We hasten to say, however, that whether this finding will have any bearing on the outcome of the appeal will be determined later when considering the ninth ground of appeal.

The complaint that section 231 of the CPA was violated is clearly beside the point. Having scanned the record, at pages 30 to 31, we are satisfied that after the trial court had rendered its ruling that a case had been made against the appellant to require him to present his defence, the court dutifully addressed him on his rights and manner to present his defence in terms of the above-cited provision. This is so because the appellant was recorded to have replied to the court that *"I will defend myself on oath. I have seven witnesses to call."* Accordingly, the third ground of appeal fails.

The complaint in the fourth ground should not detain us. Ms. Massue conceded, and we agree with her, that Exhibits P.1 and P.2 were improperly

admitted in evidence. For their respective contents were not read out after they were received in evidence following being tendered by PW7. In consonance with our decision in **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 218 on the procedure for handling admitted documentary exhibits, we discard the two exhibits. As a result, we find merit in the fourth ground of appeal. Whether this finding will be decisive on the outcome of the appeal will be determined later in the judgment when dealing with the final ground of appeal.

There is not much to go by in the grievances in the fifth and seventh grounds of appeal. It is clear on the record, as regards the fifth ground of appeal, that the appellant's conviction was not founded on the bloodstained underwear (Exhibit P.3) allegedly worn by the victim or the hoe (Exhibit P.4) that she allegedly collected from the *madrasa* on the fateful day. To be sure, neither the learned trial Resident Magistrate nor the learned first appellate Judge made any finding on the cogency and reliability of the two exhibits in the case. Equally untenable is the contention in the seventh ground of appeal that the prosecution produced no comparable medical evidence on the appellant to link him with the alleged rape. Certainly, there is no legal requirement for the use of such evidence on the alleged perpetrator to prove

rape – see **Aman Ally @ Joka v. Republic**, Criminal Appeal No. 353 of 2019 (unreported). In any event, the case mostly hinged on ABC's evidence as well as the medical evidence adduced by PW7. We will determine later whether this body of evidence sufficiently proved the charged offence but at this point we dismiss the fifth and seventh grounds of appeal.

We now turn to the contention in the sixth ground that the prosecution evidence especially that of PW1, PW2 and PW8 was contradictory and unreliable. Submitting on this contention, Ms. Massue referred to the testimonies of PW1 and PW8, at pages 11, 12 and 25 of the record of appeal, and argued that there was no discernible contradiction on the chronology of events that followed after the victim had left the scene of the crime after the alleged rape had occurred.

We have reviewed the relevant parts of the record including those Ms. Massue referred to. Contrary to the learned Senior State Attorney's submission, we are of the view that there was a contradiction between the testimonies of PW1 and PW8 as to how and when the two witnesses met after the alleged rape occurred. According to PW1, after the fateful incident she trudged back home but found nobody there and decided to walk to her grandmother's home. Along the way, she bumped into PW8 who then took

her to PW2. On her part, PW8 averred that while returning home from her farm she saw PW1, from a distance of about fifteen metres, coming out of the appellant's backyard. Her attention was drawn by the fact that PW1 was crying in agony. She then took her to PW2 as she had to attend to other business. Based on PW8's evidence, PW1 did not go straight to her home first before she met PW8. The question, then, is what effect does this discrepancy have to the prosecution case?

It is germane to observe at this point that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In **Evarist Kachembeho & Others v. Republic** [1978] LRT n.70 the High Court observed, rightly so, that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

In the same vein, this Court had observed earlier in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human memory and if the contradictions or discrepancies in issue are on details, the Court may overlook such contradictions or discrepancies.

In the instant appeal, the discrepancy between the testimonies of PW1 and PW8 is clearly a minor incongruity. Whether PW1 bumped into PW8 before or after PW1 had gone to her home directly from the scene of the crime is a minute detail which appears to have been caused by lapse of memory. Anyhow, it does not detract from the prosecution case that PW8 saw a distraught and weeping PW1 shortly after the fateful incident and that she learnt from her that the appellant had raped her. Consequently, the sixth ground of appeal fails.

In the eighth ground of appeal, the appellant criticized the courts below for ignoring his defence of *alibi*. On her part, Ms. Massue referred us to page 53 of the record of appeal showing the trial court's judgment, contending that the appellant's *aiibi* was duly considered and rejected by the trial court. We agree. For clarity, we wish to let the aforesaid part of the trial court's judgment speak for itself:

> *"... it is noted in the evidence of the accused that he actually pleads alibi. However, his plea was not communicated to the prosecution as required by s.194 of the Criminal Procedure Act, Cap. 20 R.E. 2002 and even if this section had been complied with would not have been accepted because the accused's*

evidence shows that he left the madrasa area after the act of rape had taken place."

It is clear to us from the above excerpt that despite the appellant failing to furnish due notice of his intention to rely on the defence of *alibi* in terms of section 194 (4) of the CPA, the trial court considered his *alibi* and found that it did not exclude the possibility of him being at the scene of the crime at the time the victim was raped. Certainly, this finding was not challenged by the appellant on his first appeal. Having reviewed the record, we see no basis to disturb this finding. In the result, the eighth ground of appeal falls by the wayside.

Finally, we are enjoined to determine whether the charge against the appellant was proven beyond reasonable doubt. On this issue, Ms. Massue firmly urged us to uphold the concurrent finding by the courts below based on the testimonies of PW1 and PW7 that the appellant raped the victim as alleged. She contended that PW1 established in believable evidence that the appellant had sexual intercourse with her without her consent and that PW7 confirmed that the victim sustained injuries due to forceful penetration by a blunt object into her vaginal orifice.

We are in agreement with the learned Senior State Attorney that based on the evidence on record, the prosecution case mostly hinged on the evidence of ABC as well as the medical evidence in support thereof. We have re-appraised this body of evidence in the light of the concurrent findings of the courts below. To begin with, it seems too plain for argument that on the evidence on record it was proven that ABC was raped on the fateful day. Although we discarded the medical examination report (Exhibit P.2), ABC's evidence that she was sexually abused without her consent was confirmed by PW7 in his testimony that she sustained injuries due to forceful penetration by a blunt object into her vaginal orifice. The record is clear that the appellant did not contest this piece of evidence when he cross-examined PW7.

As to who was the perpetrator, the courts below gave full credence to PW1's testimony naming the appellant as the ravisher. It is clear that PW1 narrated about her painful ordeal at the hands of the appellant, so graphically, consistently and in a truthful manner. Both courts took the view that her evidence was clear, spontaneous and reliable. It occurs to us that in examining the evidence both courts had in mind the primordial consideration that the best evidence of a sexual offence must come from the victim in

consonance with the dictates of section 127 (6) of the EA – see also **Selemani Makumba v. Republic** [2006] T.L.R. 379. Moreover, to her further credit, according to both PW2 and PW8, she named the appellant as the perpetrator of the crime at the earliest opportunity after she met PW8, at first, and PW2, afterward. In this regard, it is apt to recall our observation in the case of **Marwa Wangiti and Another v. Republic** [2002] T.L.R. 39 that:

> *"**The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility**, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."* [Emphasis added]

It is also re-assuring that after the victim had mentioned the appellant as the perpetrator, the incident was reported to the village functionaries and later to the police and that the appellant, by his own admission in evidence, at page 33 of the record of appeal, was arrested promptly at 17:00 hours (about two hours after the crime had been committed). That the appellant was the ravisher that abused ABC is clearly unassailable.

Based on the foregoing analysis, we uphold the concurrent findings by the courts below that the appellant raped ABC. He was justly and rightly convicted of rape. We thus dismiss the ninth ground of appeal.

In the final analysis, we find the appeal lacking in merit and proceed to dismiss it.

DATED at **DAR ES SALAAM** this 8th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered on this 9th day June, 2021, in the presence of appellant unrepresented-present in person and Ms. Mwasiti Athuman Ally, learned Senior State Attorney, for the Respondent/ Republic is hereby certified as a true copy of the original.

K.D. MHINA
REGISTRAR
COURT OF APPEAL