IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 228 OF 2020

SHABANI SAID LIKUBU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwembe, J.)

dated the 24th day of July, 2019
in
Criminal Appeal Case No. 118 of 2018

.....

JUDGMENT OF THE COURT

7th & 11th June, 2021

LEVIRA, J.A.:

The appellant, Shabani Said Likubu was arraigned before the Resident Magistrate's Court of Mtwara Region at Mtwara facing criminal charge of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. He denied to have raped the victim (whom we shall refer as Ms.) and therefore the prosecution had to call a total number of five (5) witnesses to prove the case against him. Upon full trial, he was convicted and sentenced to serve life imprisonment. His first appeal to the High Court was partly successful as the High Court Judge found that the sentence was excessive. It reduced it to 30 years imprisonment. However, the appellant was not satisfied with that

decision of the first appellate court and is now appealing before this Court.

Before dealing with the grounds of appeal, we find it apposite albeit briefly to narrate the background of this case. On 8th May, 2018 at midnight MS (PW1) a girl of 14 years was sleeping in a room with her younger sister one Hapiness. The other room of their house was occupied by the victim's uncle one Lukas Oswald (PW2) with his best friend (Shabani Said Likubu), the appellant herein. While sleeping, PW1 felt something heavy on her chest, she woke up and found the appellant lying on top of her. She pushed him and called PW2 complaining that the appellant had raped her. While responding to the call, PW2 met the appellant at the door coming from the room of the victim (PW1). Upon being asked by PW2 about what he was doing in that room, he admitted raping PW1 and prayed for forgiveness.

In her evidence, PW1 testified that the appellant raped her and she felt strong pain. She said, in her room there was solar light which shined throughout the night so, she was able to identify the appellant. PW2 corroborated the evidence of PW1 and added that he questioned the appellant whether he raped PW1, the appellant admitted and sought for forgiveness as they were friends. The appellant left that house and went to where he was living before the incident. PW2 notified his

brother-in-law one January about the incident and he was directed to report to the village chairperson one Salum Ahmadi (PW3). He so reported and later they (PW2 and PW3) went to arrest the appellant and sent him to the scene of crime. Again, upon being asked by PW3 about what he did, the appellant admitted that he raped PW1. Thereafter, they went to Mtwara Central Police where PW1 was given a PF3 and was taken to Likombe hospital by PW2 and a police woman where she was attended by Dr. George Kaluma (PW4). In his evidence PW4 stated that upon examining PW1's private parts, he found bruises and sperms. He filled in the PF3 which he tendered during trial and it was admitted as exhibit P1.

At the police station the appellant was interrogated by a police officer No. G. 735 D/C Alfred (PW5). According to him, the appellant confessed that he raped PW1. Apart from interrogating the appellant, also PW5 visited the scene of crime and drew a sketch map which was admitted as exhibit P2 during trial.

In his defence the appellant who testified as DW1 denied to have raped the victim (PW1). He claimed that the allegation was cooked against him and he was arrested while at Mzee Ndege's house where he used to work and live as a farm boy. Having weighed the evidence by both sides, the trial court was satisfied that the charge of rape against

the appellant was proved beyond reasonable doubt. Hence, the appellant was convicted and sentenced to life imprisonment. Aggrieved, he appealed to the High Court against both the conviction and sentence. His appeal was partly allowed as intimated above and hence the current appeal challenging the decision of the High Court on the following summarised grounds:-

1. *That the trial court and the High Court Judge failed to comply with the provisions of section 127 (2) & (4) of the Tanzania Evidence Act while taking the evidence of the victim, a girl of tender age.*
2. *That the trial court and the High Court Judge erred in law by failure to comply with the provisions of the Oaths and Statutory Declaration Act in receiving the evidence of PW1, PW2, PW3, PW4 and PW5.*
3. *That both the trial court and High Court erred in law by acting upon exhibits P1 and P3 which were admitted in contravention of section 210 (3) of the Criminal Procedure Act.*
4. *That the case against the appellant was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas, the respondent Republic was represented by

Mr. Kauli George Makasi, learned Senior State Attorney who was assisted by Ms. Eunice Otto Makala, learned State Attorney.

The appellant adopted his grounds of appeal as part of his oral submission and amplified them briefly. He protested his innocence while claiming that he did not commit the alleged offence and the charge against him was nothing but a cooked story. He blamed both courts below for relying much on the prosecution evidence to convict him and uphold his conviction, respectively. He contended that he had no quarrel with anybody but was surprised that he was arrested and charged as intimated above. He therefore urged us to set him free.

In reply Ms. Makala supported the appeal straight away. Submitting on the first ground of appeal, she stated that section 127 (4) of the Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act) recognises a child from 14 years and below as a child of tender age. Before testifying, such a witness is required to promise to tell the truth in terms of section 127 (2) of the Evidence Act. However, Ms. Makala said, when PW1 was testifying before the trial court she was 14 years old but did not promise to tell the truth. She referred us to page 8 of the record of appeal where having recorded the personal particulars of PW1, the court swore her and she continued to testify. This, she said, was a contravention of section 127 (2) of the Evidence Act as the age of PW1 was confirmed by

PW2 and PW5 who also tendered PW1's birth certificate (exhibit P3). However, she said, exhibit P3 was not read over after admission so it deserves to be expunged from the record.

It was her argument, notwithstanding the fact that the victim's (PW1) birth certificate (exhibit P3) may be expunged from the record, the oral account of PW1, PW2 and PW5 was sufficient proof that she was indeed of that age.

Regarding the second ground of appeal, it was Ms. Makala's submission that this ground is misconceived as all the witnesses took oath before their evidence was recorded. She referred us to pages 8, 10, 12, 14 and 15 of the record of appeal where PW1, PW2, PW3, PW4 and PW5 respectively started to record their evidence. As such, she said PW1, PW2, PW4 and PW5 were sworn and PW3 was affirmed. She argued that the complaint by the appellant that these witnesses, particularly, PW1, PW2, PW4 and PW5 did not take oath because the record shows that they were *"Sworn"* instead of *"Sworned"* as the appellant put it, is invalid because they took oath before the court as required by the law. She went on stating that the words "has sworn" appearing on the record of appeal might be wrongly recorded or that recording could be due to language barriers which she argued, is curable under section 388 (1) of the Criminal Procedure Act Cap 20 R.E.

2019 (the CPA). As far as PW3 is concerned, she submitted that the trial court recorded properly that he was "affirmed."

Submitting on the third ground of appeal, Ms. Makala supported the appellant's claim that exhibits P1 and P3 were not read after admission. She referred us to pages 15 and 18 respectively of the record of appeal where exhibits P1 and P3 were admitted but were not read thereafter. She urged us to expunge them from the record.

Ms. Makala supported the fourth ground of appeal to the extent that, the prosecution failed to prove their case against the appellant beyond reasonable doubt because the evidence of PW1 who would prove penetration has no evidential value having been recorded un-procedurally. She argued that, the evidence of the doctor (PW4) credible as it is, only proves that there was penetration as he said he found bruises and sperms in PW1's vagina but who or what caused the said bruises and poured the said sperms he cannot tell. In the circumstances, she urged us to find that the prosecution did not prove the charge against the appellant beyond reasonable doubt.

In responding to the question paused by the court regarding how the preliminary hearing (PH) was conducted by the trial court, Ms. Makala submitted that the proper procedure was not followed. She highlighted that at page 6 and 7 of the record of appeal, while

conducting PH, the trial court did not record facts of the case, instead it mixed what was referred to as **"MEMORANDUM OF P/H ON DISPUTING AND UNDISPUTING FACTS."**

As a way forward, Ms. Makala urged us to allow the appeal, quash the conviction and set aside the sentence and order retrial.

The appellant had nothing in rejoinder, he only urged us to set him free.

Having considered the submission by Ms. Makala, grounds and the record of appeal, we proceed to consider the merits or otherwise of the current appeal. We shall determine the grounds of appeal by following the sequence they were presented.

As far as the first ground is concerned, the issue for our determination is whether or not the trial court complied with the requirements of section 127 (2) and (4) while recording the evidence of PW1. Section 127 (2) of the Evidence Act provides that: *"a child of tender age may give evidence without taking oath or making affirmation but, shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."* The child of tender age is defined under subsection (4) of section 127 to mean "a child whose apparent age is not more than fourteen years."

In the current appeal, the evidence of PW1 was taken upon oath. However, as it was submitted by Ms. Makala, PW1 was a child of 14 years old by the time of recording her evidence. The age of PW1 was first stated by PW1 herself and later confirmed by PW2 who was PW1's uncle *(baba mdogo)* and PW5. Despite the tender age of PW1, the trial magistrate recorded her evidence upon oath and the record is silent on the criteria he used to take that evidence upon oath. To appreciate what happened we find it apt to reproduce part of the proceedings of the trial court:-

> *"**PROSECUTION CASE OPENS***
>
> *PW1 – MS, 14 years, Christian, student in form one, Makonde, Rwelu (v), has sworn and states:-*
>
> *Xd by S/A*
>
> *I live at Rwelu (v)..."*

In our considered view, having discovered that PW1 was a witness of tender age, the trial magistrate ought to have first satisfied himself whether she understood the nature of an oath before swearing her and taking her evidence. We are fortified in this position by our previous decision in **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018 (unreported) at page 13 where we stated:-

"Section 127 (2) as amended imperatively requires a child of tender age to give a promise to tell the truth and not telling lies before he/she testifies in court. ***This is a condition precedent before reception of the evidence of a child of a tender age.***

The question, however, would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a 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 to tell lies."*

[Emphasis added].

We wish to observe that, although PW1 was sworn before taking her evidence, it cannot be said with certainty that by so doing it amounted to promising to tell the truth as it was the case in **Ally Ngozi v. Republic,** Criminal Appeal No. 216 of 2018 (unreported) where the trial magistrate conducted *voire dire* examination before receiving a

sworn account of the victim and the appellant faulted him on ground that, the victim did not understand the nature of oath.

In the circumstances, we find that since the trial magistrate in the current appeal did not bother to ask the victim (PW1) whether or not he understood the nature of oath, the sworn account of PW1 remains with no evidential value as stated by Ms. Makala because the said oath did not amount to undertaking to speak nothing but the truth. The issue we raised is therefore answered in the negative.

The main complaint of the appellant on the second ground of appeal is that the evidence of PW1, PW2, PW3, PW4 and PW5 was recorded in contravention of the provisions of the Oaths and Statutory Declaration Act, Cap. 34 R.E. 2019 (the OSDA) because the court recorded as follows: "has sworn" and "has affirmed". We do not think that we need to take much of our time discussing this ground of appeal following our recent decision in this session here in Mtwara in **Hassan Bacho Nassoro v. Republic**, Criminal Appeal No. 264 of 2020 (unreported) where we stated categorically at page 21 as follows:-

> *"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."

[See also **Ally Ngozi vs. R.,** (*supra*)].

In the light of the above decision, we agree with Ms. Makala that the appellant's second ground of appeal has no merits. The trial magistrate did not contravene the law by writing "has sworn" and "has affirmed" as a way of indicating that the witnesses PW1, PW2, PW4 and PW5 were sworn and PW3 was affirmed.

As regards the third ground of appeal, the appellant's complaint is on reliance by the courts below on exhibits P1 and P3 which were not read out after being admitted. This ground was supported by Ms. Makala. We must admit that upon perusal of the record of appeal, particularly at pages 15 and 18 where these exhibits were admitted respectively, they were not read over for the appellant to understand their contents [See **Robinson Mwanjisi & 3 Others vs. R.** [2003] TLR 218 and **Jumanne Mohamed & 2 Others vs. R**, Criminal Appeal No.

534 of 2015]. Failure to read them in our view, prejudiced the appellant. Consequently, we expunge both exhibits (P1 and P3) from the record.

In the last ground of appeal, the issue to be considered is whether or not the case against the appellant was proved beyond reasonable doubt. In determining this issue, we have to consider that the appellant was charged with rape. For this offence to be proved in the circumstances of the current case, it is elementary that penetration is proved. The best evidence rule states that the best evidence in rape cases comes from the victim [See: **Selemani Makumba vs. Republic,** [2006] TLR – 379]. Applying this rule to the current case, it means that the evidence of PW1 is the best in proving that there was penetration by the appellant. However, having ruled out that the evidence of PW1 is without evidential value while dealing with the first ground of appeal, the remaining evidence which could prove that there was penetration is that of the doctor (PW4) who examined her. The law is settled that every witness is credible – [**Godluck Kyando v. Republic** [2006] T.L.R 363]. In his oral evidence PW4 stated that he medically examined the victim (PW1) and having observed her vagina he found bruises and sperms. We note that, the oral account of PW4 had no conclusion. Although it can be concluded that PW1 was penetrated, we still think,

standing alone, that piece of evidence does not suffice to hold the appellant responsible unless it is corroborated. This is due to the reason that, such evidence only proves that there was penetration but tells nothing about who penetrated the victim (PW1). In holding the appellant liable, it is crucial that the prosecution evidence on record apart from that of PW1 proves that indeed it was the appellant who raped PW1. According to the record of appeal, the next witness who happened to be at the scene of crime was PW2. In his evidence he stated that:-

> *"On 08/05/2018 at midnight I was at home sleeping together with Shabani at sitting room and we were in one bed. While sleeping I heard MS Shouting, "baba mdogo", ngónda kwa dona amenibaka". To hear that I awoke up and headed to the room of MS and met Shabani at the room door. Immediately I asked him as to whether he had raped MS the accused stated admitting to have so raped MS and unsuccessfully sought forgiveness as his friend. The accused left our home and went to where he had lived before."*

When cross examined by the appellant PW2 responded as follows:-

> *"When MS screamed for help, I went inside the room where MS was but I met you at the door and you admitted to have raped MS and sought for forgiveness."*

PW2's account in the above excerpt suggests that the appellant confessed to him that he raped the victim (PW1). The evidence of PW2 in this regard was corroborated by PW3 and PW5 who also said that the appellant confessed to them that he raped PW1. Their evidence is hereunder reproduced.

PW3 at page 12 stated that:-

> *"We took the accused to the victim. When we reached to the victim I asked her and identified the accused as one who was living at her home before leaving that night after he had raped her. I also asked the accused who admitted to have raped the girl and further that he had already sought forgiveness to the young father of the daughter."*

At page 16 PW5 testified as follows:-

> *"In his interview, the accused stated admittedly that on night of 08/05/2018 he a woke up and went outside for short call. That when he*

returned he went direct into the room he found MS sleeping he put aside her bed shirt, undressed her and began having sex with the girl. In the due process MS abruptly awoke and found the accused having sex without her knowledge as she had in deep sleep, she then pushed the accused a side. This accused also narrated to me that meanwhile MS was screaming for help to her young father one Lucas Oswald. The young father did awake and went into the room of MS and met the accused on the door coming out the room (sic) of MS. The accused also said to me that immediately thereafter he left that house."

As we have intimated earlier on, the evidence of PW4 was to the effect that he found bruises and sperms in PW1's vagina. The immediate question that follows is who caused those bruises and left sperms. The answer to this question in our view can be deduced from PW2, PW3 and PW5 who cumulatively testified that the appellant confessed/admitted to them that he raped the victim. In **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (unreported) at page 21 the Court quoted with approval the case of **Posolo Wilson @ Mwalyego**, Criminal Appeal No. 613 of 2015 (unreported) where the Court stated:

"... it is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilian or not, may be sufficient by itself to found a conviction against the suspect."

[See also: **Saganda Saganda Kasanzu v. Republic,** Criminal Appeal No. 53 of 2019].

In the light of the above position of the law, we are settled that since the appellant confessed before PW3 in the presence of PW2 that he raped PW1 that confession is sufficient although we have already said that the best evidence in rape comes from the victim. We think that the evidence on record without that of PW1 is sufficient to prove rape despite the appellant's denial that he did not commit that offence. This approach which we take is not new. When the Court was dealing with an akin situation in **Leonard Joseph @ Nyanda vs. Republic**, Criminal Appeal No. 186 of 2017 (unreported) at pages 15 – 16 had this to say:-

"There is no doubt that the learned Judge was conscious that the best proof of penetration ought to have come from the victim herself but that her testimony along with the PF.3 had been expunged due to the procedural infraction alluded to earlier. He then correctly held that PW2 and PW3 could not be witnesses of the fact

that there was penetration as they could not allude to that fact. Nonetheless, we are decidedly of the view that the learned Judge slipped into error for not considering the testimony of the medical witness (PW4) because it sufficiently established penetration. In spite of the fact that the PF.3 that he had filled out after examining PW1 was discounted, PW4 adduced that the victim had hyperemia arising from friction in the vagina caused by a blunt object. He impeccably concluded that the victim must have had her vagina penetrated by a blunt object. We think that this finding is clear, unblemished and consistent. It corroborates PW2 and PW3's evidence that they found the appellant in the midst of ravishing the victim who was nude and screaming frantically for help all along."

[See also- **Mohamed Seleman @Nyenje v. Republic**, Criminal Appeal No. 108 of 2017 (unreported)].

With respect, we are unable to agree with Ms. Makala that having disregarded the evidence of PW1 and expunged exhibits P1 and P3 from the record, the remaining evidence is insufficient to prove rape. Just as we decided in the immediate quoted decision above. We find that the evidence of PW4, a medical doctor who examined PW1 was corroborated with that of PW2, PW3 and PW5 to whom the appellant

confessed that he raped PW1. We entertain no doubt that the bruises and sperms found by PW4 in PW1's vagina were caused by none other than the appellant who confessed that he raped the victim and asked for PW2's forgiveness.

Before we conclude we think that it is important to remind trial courts the necessity of conducting PH properly. We must say that we were not amused by the way the trial magistrate in this case conducted it. As it was submitted by Ms. Makala, the trial magistrate did not record the facts of the case. He only recorded what he termed as **"MEMORANDUM OF P/H ON DISPUTING AND UNDISPUTING FACTS".** Immediately after that heading at page 6 of the record of appeal, he mixed facts in such a way that it becomes difficult to differentiate disputed and undisputed facts. We shall let the record speak for itself hereunder:

> *"**DATE** – 06/06/2018*
>
> ***CORAM** – M. F. ESANJU – RM*
>
> ***PROS** – Ndunguru – S/A*
>
> ***ACCD** – Present*
>
> ***B/C** – HATIBU*
>
> ***Sgd:- Hon. M. F. ESSANJU – RM***
> ***06/06/2018***

Pros *– Accused is present, this case is due for Phg, we are ready to read our facts, we pray to proceed.*

Accused *– I am also ready for Phg.*

Court *– Let accused be reminded his charge.*

Accused *– I still deny to have raped any girl.*

Court *– EPNG*

Sgd:- Hon. M. F. ESSANJU – RM
06/06/2018

Pros *– We pray to read our facts.*

Court *– prayers (sic) granted.*

Sgd:- Hon. M. F. ESSANJU – RM
06/06/2018

MEMORANDUM OF P/H ON DISPUTING AND UNDISPUTING FACTS

1. *Accused has admitted that he is Shabani s/o Saidi Likubu, 20 yrs, Moslem, peasant, Makonde, Rwelu.*
2. *Accused has admitted to know each other with MS as up to 08//05/2018 they were living in one house.*
3. *Accused has denied to have entered inside the room of MS and thereby raped her at the midnight of 1hrs.*
4. *Accused has denied that MS did shout for help and Lucas Oswald went into the room of MS.*

5. *Accused has denied to have met Mr. Lucas Oswald while coming out from MS's room and instantly prayed for forgiveness.*
6. *Accused has admitted to have subsequently, shifted to another house at the same village, Rwelu at the very night.*
7. *Accused has admitted to have been arrested by Mr. Lucas Oswald and village chairperson while he was in the house he had shifted in the very night.*
8. *Accused has admitted to have been, immediately, set to Mikindani police station before he was taken to Mtwara central police station.*
9. *Accused has admitted to have, on 08/05/2018 at 11 hrs in the morning been interviewed and taken his caution statement.*
10. *Accused has admitted to have stated, admittedly, that he raped the girl but it was after he was beaten at Mtengo police station.*
11. *Accused has admitted to have, on 11/05/2018, stated before justice of peace, confessing to have raped the girl.*
12. *Accused has admitted to have been brought to this court on 15/05/2018 hence this case.*

DISPUTING AND UNDISPUTING FACTS

Accused has admitted contents of paras 1, 2,3,4,5,6,7,8,9,11 and 12 of MPH but accused has denied contents of paras 3,4, 5 and 10 of MPH.

Accused *– Signed*

S/A *– Signed."*

It can be observed from the above extract of PH conducted by the learned trial magistrate that, indeed there was a mixture of disputed and undisputed facts. Instead of recording the facts of the case and prepare a memorandum of undisputed facts, the learned trial magistrate just lumped everything under what he referred to as *"DISPUTING AND UNDISPUTING FACTS.*

It has to be understood that although PH is not an integral part of the trial as it was stated in **Mgonchori (Bonchori) Mwita Gesine vs. Republic,** Criminal Appeal No. 410 of 2017 (unreported) at page 13, still the essence of conducting the same remains. Section 192 (1) of the CPA provides as to why PH should be conducted, it reads:

"Notwithstanding the provisions of section 229 and 283, if an accused pleads not guilty the court shall as soon as convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is represented by an advocate) and the public prosecutor ***to consider such matters as***

are not in dispute between the parties and which wiii promote a fair and expeditious trial."

[Emphasis added].

Therefore, we encourage trial courts to ensure that they conduct PH properly so as to safeguard interests of parties as a way of promoting fair and expeditious trials. Having so stated, we decline the invitation by Ms. Makala who implored us to order retrial due to the procedural irregularity in the proceedings.

For the reasons stated above, we find that the prosecution proved their case beyond reasonable doubt and this appeal is without any merit. We dismiss it in its entirety.

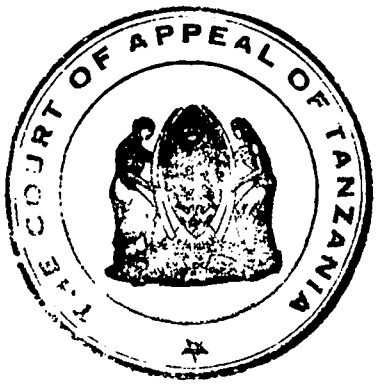
DATED at **MTWARA** this day 11th of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 11th day of June, 2021 in the presence of the Appellant in person and Mr. Abdulrahaman Msham, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL