IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: JUMA, C.J., NDIKA, J.A. And KWARIKO, J.A.)

CRIMINAL APPEAL NO 185 OF 2018

MBARAKA RAMADHANI@KATUNDU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. I. P. Kitusi, J.)

dated the 3rd day of July, 2018

in

HC. Criminal Appeal No. 310 of 2017

JUDGMENT OF THE COURT

12th & 18th February, 2021

JUMA, C.J.:

The appellant, Mbaraka Ramadhani Katundu, was convicted by the District Court of Mkuranga at Mkuranga of the offence of rape contrary to 130(1), (2) (e) of the Penal Code Cap 16. At his trial, the prosecution alleged that on 3/12/2016 at 10:00 hours at Kisemvule villager within Mkuranga District in Coast Region, he had sexual intercourse with a seven-year-old girl, who we will refer to as **RBM**. The trial court sentenced him to life imprisonment. The High Court at

Dar es Salaam in HC Criminal Appeal No. 310 of 2017 dismissed his first appeal. He has preferred this second and his last appeal.

The prosecution's case relied on the evidence of a five-year boy (PW2), who we refer to in his initials **NHC**. The trial magistrate allowed PW2 to give unaffirmed evidence because he understood the duty of speaking the truth. PW2 recalled the day when he, the appellant, and RBM went out to pick mangoes. The appellant pulled down RBM's underpants, unzipped his trousers and inserted his penis into her vagina. Later in the evening, Sophia Baraka Mkwava (PW3) received a call from her husband to inform her about her sibling RBM's illness, who was living up with them during her school vacation. When PW3 arrived home, RBM explained the pain she felt whenever she urinated. RBM explained to PW3 what had happened to her. PW3 took RBM to the hospital. Dr. Joseph Mganga (PW5), an Assistant Medical Officer at Mkuranga Hospital, examined RBM and prepared a Medical Examination Report (Exhibit P2).

The appellant testified to his defence, that, although it is true that he went to collect mangoes in the company of his younger sibling Yusuf where he met PW1 and PW2; he did not commit the offence.

The allegation against him is a fabrication. He traced his misunderstanding with PW3 back to his refusal to guard her house when PW3 planned to travel.

The Memorandum of Appeal has nine grounds of appeal which in their essence, raise one central issue of lack of proof beyond reasonable doubt. He questioned the voluntariness of his cautioned statement, which he had repudiated. He complained of his illegal detention, and the delay in taking him to court made his confession involuntary.

He questioned the unsworn evidence of PW2 and that the record does not show where PW2 promised to tell the truth in compliance with section 127(2) of the Evidence Act.

The Appellant complained that the trial and the first appellate courts relied on a five-year-old PW2 without evaluating his evidence. He blamed the trial court for convicting him because of his mere presence at the scene of the crime. He insisted that it was implausible to have sexual intercourse in broad daylight with his sibling, Yusuf, watching.

He questioned why the victim's underpants was not subjected to DNA analysis to link him to the rape. He further blamed the High Court for relying on the medical examination report (exhibit P2), which the prosecution did not read out to him as the law requires.

The Appellant complained that there was a material contradiction in the evidence of the three witnesses. PW2, PW3, and PW4 differed on how the police traced him and when they arrested him. He blamed the prosecution for failing to bring material witnesses to prove the charge, namely; the officer who issued the PF3, the Appellant's sibling, and the arresting officer.

At the hearing of this appeal on 12 February 2021, the Appellant appeared remotely by video link from Ukonga Prison in Dar es Salaam where he is serving his sentence. The Appellant had earlier on 26/08/32020 filed his written submissions to elaborate his nine grounds of appeal.

Mr. Emmanuel Maleko, learned Senior State Attorney, and Ms. Gladness Mchami, learned State Attorney, represented the Respondent Republic. Mr. Maleko opposed the appeal and urged us to dismiss all the nine grounds of appeal of the Appellant.

Submitting on his second ground of appeal, the appellant blamed the trial magistrate for conducting *voire dire* examination hence relying on a repealed version of section 127(2) of the Evidence Act to test the competence of PW.2 to testify as a witness. The appellant argued that when PW2 took the witness stand on 3/2/2017, the Written Laws (Miscellaneous Amendments) (No.2) Act 4 of 2016 had already amended the Evidence Act 1967. As a result of the amendment, he submitted, by conducting a *voire dire* examination, the trial magistrate fell into a mistake of recording the evidence of PW2 under the repealed section 127(2). He submitted further that as a child of tender age, PW2 should have promised to tell the truth and not tell any lies. As far as the Appellant is concerned, the exchange between PW2 and the trial magistrate does not show PW2 making any such promise to speak anything but the truth. Therefore, he urged us to expunge the evidence of PW2 from the record of appeal.

On the sixth ground of appeal, the appellant faulted the first appellate court for relying on a cautioned statement (exhibit P1) to convict him. He argued that the recording of his cautioned statement contravened section 50 (1) (a) of the Criminal Procedure Act, Cap 20.

He urged us to disregard his statement because the police recorded it outside the statutory period; it, therefore, violated section 51 (1) (b) of the Criminal Procedure Act. He expressed his concern that even after the learned trial magistrate had overruled his objection, he neither allowed the witness to tender it nor let the prosecution read the contents of his cautioned statement, as the procedure requires. He referred us to **ROBINSON MWANJISI AND 3 OTHERS VS. R** [2003] T.L.R. 218 on the correct procedure for admitting documentary evidence.

On grounds number three and eight, the appellant faulted the Judge for failing to live up to the duty of first appellate courts to re-evaluate entire evidence. He submitted that the Judge did not uphold his conviction based on the victim's evidence (PW1). Instead, he relied on the evidence of PW2 without conducting any analysis and evaluation of the evidence. He referred us to this Court's decision in **DAMIAN PETRO AND ANOTHER VS. R** [1980] TLR 260 and submitted that it was not proper for the Judge to uphold his conviction solely on the ground that he was at the scene of the crime.

The Appellant also took exception to the evidence of PW2 because it is implausible for him to have sexual intercourse in front of his kid brother, Yusuf. He submitted that PW2 was too young to give the necessary particulars of how sexual intercourse took place and how the Appellant inserted his penis.

The Appellant urged us to see the material contradictions between the evidence of PW2, PW3, and PW4. These witnesses contradict how the Appellant was traced and arrested.

The Appellant also faulted the first appellate Judge, failing to draw an adverse inference on the prosecution's failure to call three material witnesses. The witnesses are the police officer who issued PF3, the Appellant's kid brother Yusuf, and the member of local militia who the prosecution claim took the Appellant to the police station.

In his eighth ground, the Appellant took issue with how Detective Corporal Sanura (PW4) poorly investigated the case. He wondered why PW4 said he recorded the Appellant's additional cautioned statement which was admitted as exhibit P1 and yet she still claimed that it was not a reliable statement. To support submission, he referred us to the

evidence of PW4, who considered the confessional statement unreliable.

On ground number five, the Appellant submitted that the name of the victim, RBM, was not proved. The record shows her name variously described making it challenging to know whether it is the same person.

Concerning grounds numbers 9 and 7, the Appellant complained that the prosecution case had glaring inconsistencies and contradictions, creating doubt in the prosecution case.

Mr. Maleko, learned Senior State Attorney, opposed the first ground of appeal. He submitted that the appellant's complaint about his prolonged detention by the police did not affect his right to a fair hearing, which included his right to know the charge's substance, cross-examine prosecution witnesses, call his witnesses, and defend himself.

The learned Senior State Attorney agreed with the appellant regarding the evidence of the victims of rape, PW1 and PW2. He submitted that section 127 (2) of the Evidence Act as amended by Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 [Act No. 4

of 2016] allowed witnesses under the age of fourteen, like PW1 and PW2, to give evidence without taking an oath or making an affirmation. However, he added, the law required that they must promise to tell the truth to the court before giving their evidence and not tell any lies. Mr. Maleko agreed with the appellant that because RBM (PW1) did not provide the undertaking to speak anything but the truth before she testified, her evidence cannot be relied on by the court. However, the evidence of PW2 complied with the law.

Mr. Maleko next argued the third ground of appeal where the appellant complained that his mere presence at the crime scene did not mean that he committed the alleged offence. He also questioned why his sibling Yusuf, did not testify. The learned Senior State Attorney dismissed off these complaints. Referring to section 143 of the Evidence Act, Cap 6, he pointed out that the prosecution is not bound to bring any particular witness or number of witnesses to prove any fact; that is, even a single witness may prove a fact. Therefore, he added that absence of Yusuf's evidence did not prevent the prosecution from establishing the offence against the appellant because there were other witnesses like PW2.

Responding to the eighth ground of appeal, where the appellant complained about the contradiction in the evidence of PW2 and PW3; Mr. Maleko submitted that there is no material contradiction in these two witnesses' evidence to affect proof against the appellant. The learned Senior State Attorney also brushed off the appellant's fourth ground where he questioned why DNA was not collected from the victim's underpants. He submitted that proof of rape does not solely rely on DNA evidence. Conviction can be secured by using other evidences including of eye witnesses. He argued that although the evidence of medical examination report (exhibit P2) was expunged from the record, the evidence of the medical officer (Dr. Joseph Mganga—PW5) was sufficient because it covered everything that was recorded in exhibit P2.

Mr. Maleko urged us to disregard the appellant's fifth ground of appeal, complaining over how the name of the victim (RBM) changed over the record of appeal and in such documents as medical examination report. Mr. Maleko submitted that the complaint over changing names is new ground of appeal before this Court. It was never raised and considered by the first appellate High Court. In

urging us to reject this new ground, Mr. Maleko referred us to **KIPARA HAMISI MISAGAA @ MBOMA V. R.,** CRIMINAL APPEAL NO. 268 OF 2017 (unreported) where the Court rejected a ground of appeal, stating that it is not proper to raise a new ground in a second appeal.

On the sixth ground of appeal, the learned Senior State Attorney agreed with the appellant that it was not appropriate for the first appellate judge to rely on the appellant's cautioned statement (exhibit P1), which the trial court had earlier expunged from the record. He however hastened to point out that, removal of exhibit P1 from the record, did not affect the appellant's conviction because there was evidence of PW2, PW3, and PW5 remaining on record, which can still sustain the conviction.

Mr. Maleko conceded the seventh ground of appeal wherein the appellant complained that the trial and first appellate courts were wrong to rely on the medical examination report (exhibit P2), whose contents were not read in court after its admission in evidence. He supported this position by referring us to **AWADHI GAITANI @ MBOMA V. R.,** CRIMINAL APPEAL NO. 268 OF 2017 (unreported),

which reiterated the courts' established practice of reading out the exhibits' contents after the court admits them as evidence. Despite his concession about failure to read out the contents of exhibit P2, the learned Senior State Attorney argued that the testimony of Dr. Joseph Mganga (PW5), the Assistant Medical Officer at Mkuranga Hospital, covered all what was recorded in the expunged medical examination report. To support his position that the evidence of PW5 is still on record, Mr. Maleko referred us to **ISSA HASSAN UKI V. R.**, CRIMINAL APPEAL NO. 129 OF 2017 (unreported).

The learned Senior State Attorney rounded up his submissions by urging us to dismiss the ninth ground of appeal. The appellant complained that the prosecution did not prove its case beyond reasonable doubt. He submitted that the evidence of PW2, PW3, and PW5 on record, is sufficient to convict the appellant. He, in particular, singled out the weight of the evidence of an eye-witness, PW2.

On our part, because this is a second appeal, we shall restrict ourselves to matters of law only. As we said in **NOEL GURTH aka BAINTH and ANOTHER V. R.,** CRIMINAL APPEAL NO. 339 OF 2013 (unreported):

"...on second appeal this Court is mostly concerned with matters of law but not matters of fact. The Court can however interfere with concurrent finding of facts by courts below only where there is misapprehension of the evidence, or where there were mis-directions or non-directions on the evidence, or where there had been a miscarriage of justice or violation of some principle of law or practice."

The learned Senior State Attorney has correctly submitted that the evidence of the victim of rape (PW1) cannot stand. It failed to comply with mandatory safeguards provided under section 127(2) of the Evidence Act as amended by Act No. 4 of 2016. While witnesses who are children under the age of fourteen can give evidence without taking an oath or making an affirmation; before giving their evidence, they are required to promise to tell the truth to the court and not tell any lies. RBM's evidence did not comply with this precondition. The relevant Section 127 (2) states:

127 (2) 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 to tell any lies.

[Emphasis added].

The Appellant and the learned Senior State Attorney rightly submitted the evidence of the victim of rape (PW1) was disregarded because she did not provide an undertaking to speak the truth before she testified. However, we disagree with the Appellant's submission that the question-and-answer session the trial court had with PW2 fell under the repealed section 127(2). Mr. Maleko is right to submit that the procedure of asking PW2 a series of questions is to determine whether PW2 promised to tell nothing but the truth.

The appeal record bears out the Appellant's complaint that the learned trial magistrate admitted his cautioned statement (exhibit P1) without following the procedure. We think the learned trial magistrate rushed to accept the Appellant's confessional statement without first conducting an inquiry, which would have established whether PW4 recorded the confession out of the prescribed time and whether it is voluntary. On pages 16 and 17, the record of appeal shows that on 1/3/2017, the Appellant objected when WP 6156 DC Sanura (PW4) offered to tender his cautioned statement. In his objection, he blamed

PW4 for inducing him to confess on the promise of forgiveness. The learned trial magistrate adjourned his Ruling until 13/3/2017 when he overruled the objection and admitted the cautioned statement without conducting an inquiry.

We think, before overruling the objection, the learned trial magistrate should have first carried out an inquiry to determine the voluntariness of the Appellant's cautioned statement. An inquiry would also establish whether PW5 recorded the confession outside the statutory period. **OMARI IDDI MBEZI, VISITOR CHARLES, JOHN ANDREW & JAFARI IDDI MBEZI V. R.** CRIMINAL APPEAL NO. 227 OF 2009 (unreported), we restated that if the accused person objects to the admission of a cautioned statement (confession) for whatever reason, the trial court must stop the trial and conduct an inquiry, or a trial within trial, to determine the point objected. We agree that the Appellant's cautioned statement be expunged from the record of appeal because the trial magistrate failed to conduct an inquiry to determine its voluntariness.

After expunging the evidence of RBM (the victim of rape), and also expunging the medical examination report, and the appellant's

cautioned statement from the record of appeal; evidence of five-year old PW2 remained on record of appeal. The main issue here is whether the evidence of PW2, that of her sister PW3, and that of the Assistant Medical Officer PW5, is sufficient to sustain the appellant's conviction.

Beginning with the five-year-old witness (PW2), section 127 (2) of the Evidence Act required him to promise to tell the truth to the court and nothing but the truth. Record of this appeal bears out that indeed, PW2 promised to tell the truth and was allowed to testify without making an affirmation. Significantly, PW2 testified as an eye witness who was at the scene of the crime. In criminal proceedings involving sexual offences, where the only independent evidence is that of a child of under the age of fourteen (described as a child of tender age), that piece of evidence must satisfy credibility test provided under section 127 (6) of the Evidence Act. Section 127 (6) states:

> *127 (6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only* ***independent evidence is that of a child of tender years*** *or of a victim of the sexual offence, the court shall receive the evidence, and may,*

after assessing the credibility of the evidence of the child of tender years *of as the case may be the victim of sexual offence* ***on its own merits,*** *notwithstanding that such evidence is not corroborated, proceed to convict, if for* ***reasons to be recorded in the proceedings, the court is satisfied that the child of tender years*** *or the victim of the sexual offence* ***is telling nothing but the truth.*** [Emphasis added].

In other words, the above section 127(6) of the Evidence Act requires the trial and first appellate courts, to assess and record in the proceedings, their satisfaction that PW2 testified nothing but the truth. It is apparent to us that on pages 53-54 of the record of appeal, the learned the first appellate Judge (Kitusi, J. as he then was) expressed his satisfaction that PW2 was a witness of truth:

"However, on the strength of the evidence of PW2 I agree with the learned Resident Magistrate that the appellant is the one who ravished PW1. This is because PW2 and the appellant were acquainted to one another and the rape

took place in broad daylight in the field. The appellant stated in his defence that he had gone to the field in the company of his brother Yusuf, and they met PW1 and PW2, which story endorses that of PW2."

We found nothing that can make us differ from the conclusion reached by the first appellate Judge that evidence of PW2 is evidence of truth, and can stand alone on its own merits, to convict without corroboration as section 127 (6) of the Evidence Act provides.

We therefore believe PW2, when he testified that while on the visit to the bush to collect mangoes, he saw the appellant undressing PW1, unzipping his trousers, and penetrating his penis into her vagina. PW2 heard when the appellant warned his victim not to disclose to anyone about the rape.

We agree with Mr. Maleko's submission that apart from the evidence of PW2, there is corroboration evidence of PW1's sister, Sophia Baraka Mkwava (PW3), who, upon arriving back home in the afternoon, learned about what the appellant had done to PW1. There is also corroboration evidence from Dr. Joseph Mganga (PW5), who

received PW1 at Mkuranga Hospital, physically examined her private parts, and determined that vaginal penetration had taken place.

The Appellant has questioned why his sibling Yusuf did not testify. We agree with the learned Senior State Attorney that under section 143 of the Evidence Act, no particular number of witnesses must prove such fact as the rape of PW1. We think, in the circumstances of this appeal where the prosecution exercised its privilege under section 143 of the Evidence Act not to call Yusuf as its witness, nothing prevented the Appellant from bringing up his sibling to testify for the defence.

Records at the preliminary hearing on 20/1/2017 show the prosecution indicating its intention to call five witnesses; the Appellant did not make any similar indication to call witnesses. Again, when the trial court invited the Appellant to defend himself when the prosecution closed its case, the Appellant indicated that he would testify in his defense, and one Mr. Mbonde would be his only witness. The appellant ended up testifying alone because Mr. Mbonde was out of reach. If the Appellant considered his sibling Yusuf as a material witness, he should have called him to testify.

In the final analysis, we are not in any doubt that the appellant was properly convicted and sentenced of the charged offence of rape. This appeal is without merit and the same is accordingly dismissed.

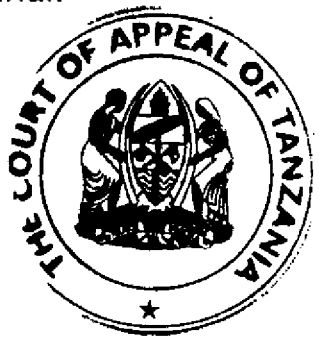
DATED at **DAR ES SALAAM** this 16th day of February, 2021.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

This Judgment delivered on 18th day of February, 2021 – linked via video conference at Ukonga Prison in the presence of the appellant in person and Mr. Benson Mwaitenda, learned State Attorney for the respondent Republic, and is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL