IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 425 OF 2017

KILAGA DANIEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 19th day of July, 2017
in
Criminal Appeal No. 398 of 2016

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JUDGMENT OF THE COURT

8th & 13th July, 2021

NDIKA, J.A.:

The appellant, Kilaga Daniel, appeals against the judgment of the High Court of Tanzania sitting at Mwanza (Bukuku, J.) affirming his conviction and life sentence for rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019).

It was the prosecution case at the trial that the appellant on 15th March, 2014 at 18:30 hours at Katente village within Bukombe District in Geita Region had carnal knowledge of XYZ [actual name withheld], a girl aged 5 years.

The evidence tended to show that on the fateful evening the victim's mother and father, PW3 and PW4 respectively, were at their local church for choir rehearsal having left their children (the victim and her elder sister – PW2) at their home adjoining the appellant's house. It all began with the appellant luring the victim to his kitchen and giving her groundnuts. PW2 also got into the kitchen and found her younger sister eating groundnuts. She left the kitchen for a few moments but returned later to check on the victim only to find the appellant seated on a chair with his trousers unzipped and the victim naked. She confirmed that the appellant was in the middle of having sexual intercourse with the victim as his penis was in the latter's private parts. The appellant begged PW2 not to disclose the matter, promising to give her money and groundnuts. He handed out some groundnuts to the victim who then went back home along with her elder sister.

PW2 would not keep the matter secret. She reported it to her parents (PW3 and PW4) right upon their return home. To confirm the matter, PW3 inspected the victim's private parts and saw signs that she had indeed been raped. The distressing incident was reported to the village functionaries who included PW5 Swalehe Bulegeya and PW6 Moses Bushanga. In the meantime, the appellant had disappeared.

To support its case, the prosecution, through PW1 WP.3225 Detective Corporal Ellen, tendered two medical examination reports (PF.3s), one, on the victim (Exhibit P.1) and the other, on the appellant (Exhibit P.2). According to Exhibit P.1, the victim's private parts showed bruises with no hymen and that she seemed to have been abused several times. Her HIV test returned a positive result. Exhibit P.2 showed that the appellant was also HIV positive.

In his sworn defence, the appellant denied the charge, raising an *alibi*. He testified that he spent the time between 15:00 and 22:00 hours with a friend, Mayunga Mwangachanga, at Mama Mage's pub at Butambala Centre. Upon returning, he found his home broken into and several possessions stolen therefrom. He reported the matter to PW6 who then informed PW5. Together, they went to his home and while there, on a twist of events, the victim's father (PW4) surfaced and had him arrested on a trumped-up charge. He was immediately taken to the police.

The trial court (Hon. U.S. Swallo, SRM) was impressed by PW2's evidence, which it found credible and reliable, that the appellant had sexual intercourse with the victim aged five years. That evidence was sufficiently corroborated by PW3, the victim's mother, who inspected the victim's private

parts and noted signs that she had been raped. Furthermore, the court considered the appellant's defence but rejected it.

On the first appeal, Bukuku, J. rightly expunged Exhibit P.1 on account of a procedural infraction. Nonetheless, she upheld the finding that on the basis of the testimonies of PW2 and PW3 the charged offence was proven beyond reasonable doubt.

The appeal is predicated on a six-point memorandum of appeal raising the following complaints: **one**, that the *voire dire* examination on PW1 was irregular; **two**, that PW2 and PW3's evidence was unreliable and uncorroborated; **three**, that PW3 was unqualified to give expert opinion whether the victim was raped; **four**, that the appellant's witnesses including one Mayunga Mwangachanga was not called and that failure to do so rendered the trial unfair; **five**, that the appellant's defence was not considered; and **finally**, that the occurrence of rape on the victim simultaneously with the breaking into the appellant's home and the stealing therefrom was not properly investigated.

Before us, the appellant prosecuted his appeal in person via a video link from Butimba Central Prison. He adopted his grounds of appeal and

urged us to let the respondent address us first on the appeal, reserving his right to rejoin at the end of the respondent's submissions, if need be.

For the respondent, Senior State Attorney Ms. Maryasinta Lazaro, who was assisted by State Attorney Ms. Sabina Choghoghwe, valiantly opposed the appeal. In her submissions, she, at the forefront, objected to the sixth ground of appeal on the ground that it was a new not addressed by the High Court. She contended that the Court is precluded to entertain such a new ground unless it was a pure point of law but she did not cite any authority in support of her submission. The appellant, being self-represented and obviously unacquainted with the thrust of Ms. Lazaro's submission, offered no counter argument.

Certainly, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal. This position has been reaffirmed by the Court in numerous decisions – see, for instance, **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016;

and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported). In the case of **Hassan Bundala @ Swaga** (*supra*), the Court stated that:

> *"It is now settled that as a general principle, this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

It is too plain for argument that the ground at hand raises a purely factual contention which was not addressed and determined by the courts below. As rightly submitted by Ms. Lazaro, we are precluded to look into it. Accordingly, we refrain from entertaining it in this appeal.

We now revert to the first ground of appeal, the appellant's contention being that the *voire dire* examination on PW1, a witness of tender age, was irregularly conducted without determining if she possessed sufficient intelligence. Replying, Ms. Lazaro supported the approach taken by the trial court as shown at page 4 of the record of appeal. She argued that the learned trial Magistrate asked rightly questions to determine if PW2 understood the nature of an oath and the duty of speaking the truth. She referred us to the learned trial Magistrate's finding thus:

"Having examined the witness I have found that the witness understands the nature of oath and knows the duty of speaking the truth. Her testimony is therefore received after she is sworn."

Relying on **Soud Seif v. Republic**, Criminal Appeal No. 521 of 2016 (unreported), she submitted that once the trial court had made the above finding on PW2, it did not have to determine if she possessed sufficient intelligence.

It is certain that evidence of PW2 as a child of tender years was supposed to be recorded in terms of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the EA") as it was before it was amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016. The said provision stipulated as follows:

"(2) Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."

The provision required the trial Judge or Magistrate to determine by a *voire dire* test whether a child witness of tender age understands the nature of oath and the duty of speaking the truth before such child's evidence could be taken on oath or affirmation. If not, the court then was required to determine if the child possessed sufficient intelligence to justify the reception of such child's evidence without oath or affirmation. In **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported), the Full Bench of the Court underlined that once the "oath test" has been satisfied, it justifies the reception of evidence on oath or affirmation and that it obviates the need to conduct the "intelligibility test." This observation is at page 65 of the typed ruling of the Court as follows:

> *"We re-emphasize, as we must, that as 'intelligibility' is involved in the conduct of a voire dire under section 127(1) and (2), the misapplication or non-direction on section 127(1) may be atoned or fully remedied by the proper application of section 127(2).* ***Surely, a child witness who can satisfy a court on a voire dire that he or she understands the nature of an oath or the duty of speaking the truth, would also obviously be one capable of understanding questions and providing rational answers to them and thus possessed***

> ***of sufficient intelligence.*** *By construing and applying those provisions that way, repugnancy is avoided and section 127(1) and (2) is best reconciled."* [Emphasis added]

We, therefore, agree with Ms. Lazaro that in the instant case the trial court properly conducted the *voire dire* test on PW2 and rightly allowed her to give her testimony on oath. In the result, the first ground of appeal fails.

We now move to the second and third grounds of appeal, which we intend to determine conjointly. It is the appellant's contention in the second ground that the testimonies of PW2 and PW3 were unreliable and uncorroborated. In the third ground, he contends that PW3 was unqualified to give expert opinion whether the victim was raped.

In her reply, Ms. Lazaro submitted that PW2's evidence, which the trial court believed, did not require any corroboration. As regards PW3, she argued that even though she was the victim's mother, her evidence was in the eyes of the law independent evidence and, therefore, it sufficiently corroborates PW2's evidence. She added that PW3 did not give evidence as an expert but an eyewitness. What she adduced at the trial was direct evidence based on her inspection and view of the victim's private parts.

We wish to repeat that based on the evidence on record, the prosecution case mostly hinged on the evidence of PW2 and PW3 as the medical evidence in support thereof (Exhibit P.1) was rightly expunged by the learned appellate Judge due to a procedural infraction. We have reviewed the testimonies of these witness in the light of the concurrent findings of the courts below.

Beginning with PW2, it is clear that the said courts gave full credence to her, as the only eyewitness, for her graphic and candid narration on how the appellant raped the victim. Both courts took the view that her evidence, given on oath was clear, spontaneous and reliable. As rightly argued by Ms. Lazaro, given that the courts below believed PW2, her testimony did not, in terms of section 127 (7) of the EA (now section 127 (6) following amendment of section 127 by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016), require any corroboration. In **Kimbute Otiniel** (*supra*) we expressed that point by excerpting the following passage from our earlier decision in **Nguza Vikings @ Babu Seya & 4 Others v. Republic**, Criminal Appeal No. 56 of 2005 (unreported):

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter a conviction,* ***it must be satisfied***

> ***that the child witness told nothing but the truth.*** *This means that, there must first be compliance with section 127(2) before involving section 127(7) of the Evidence Act; "Voire dire" examination must be conducted to ascertain whether the child possesses sufficient intelligence and understands the duty to speak the truth. If the child witness understands the duty to speak the truth,* ***it is only then its evidence can be relied on for conviction without any corroboration otherwise the position of the law remains the same****, that is to say that unsworn evidence of a child witness requires corroboration."* [Emphasis added]

As regards PW3, we do not agree with the appellant that she was unqualified to attest as to whether the victim was raped. As rightly contended by Ms. Lazaro, she did not give her testimony as a medical expert. Her evidence was based on her inspection of the victim's private parts. She told the trial court, which believed her, that she saw visible signs that the victim was raped. It is noteworthy that the appellant did not cross-examine her on that aspect, as shown at page 5 of the record of appeal. Furthermore, as her evidence came from an independent source, it corroborated PW2's evidence, which we have said required no corroboration in the first place. In the premises, we dismiss the second and third grounds of appeal.

The complaint in the fifth ground of appeal, that the trial was unfair for the failure to call the appellant's witnesses notably one Mayunga Mwangachanga, is clearly beside the point. In her submission, Ms. Lazaro referred us to pages 8 through 10 of the record of appeal to demonstrate that the complaint is unmerited.

Indeed, at page 8 of the record of appeal, the appellant is shown to have been addressed by the trial court on 21st March, 2014 on his rights under section 231 (1) of the Criminal Procedure Code, Cap. 20 R.E. 2002 (now R.E. 2019) in giving evidence in his defence after the trial court had determined that a *prima facie* case had been made out. The appellant stated that:

> *"I will make my defence on oath. I will call one witness. Boaz Mosses."*

On 24th March, 2014, the case came up in court and the appellant gave his testimony. He then prayed for adjournment of the hearing, which was granted, on the ground that his witness had not turned up. At the next hearing on 26th March, 2014, his intended witness did not show up again. Accordingly, he moved the court to close his case as follows:

> *"My witness is not found. I pray to close my defence case."*

From the above excerpts, it is not true that the appellant intended to produce the said Mayunga Mwangachanga as a defence witness. His complaint that he was prevented to produce the said person as a witness is but a red herring. If he needed the trial court's assistance to procure the appearance of the said Boaz Mosses, he should have asked for a summons to be issued to compel the appearance of that person. It has not been suggested that the trial court withheld such assistance. It is evident from the record that his prayer to have his case closed as he had no witness to produce was voluntary. Inevitably, the fourth ground of appeal fails.

Finally, we deal with the grievance that the appellant's *alibi* was not considered. On this complaint, Ms. Lazaro submitted that the defence was duly considered by the trial (at page 14 of the record of appeal) and the High Court (at pages 52 and 53 of the record of appeal) but that it was rejected by both courts. Indeed, while the trial court stated that the said defence had raised no reasonable doubt, the learned appellate Judge dealt with defence in detail, starting from page 52 where she properly and fittingly addressed the essence of such a defence. We think we should let the record speak for itself:

> *"Finally, the appellant lamented that, the trial magistrate erred to prejudice his defence while it was*

raised. I think what the appellant means here, is the alibi he raised was not considered. The defence of alibi is used when the accused takes the plea that when the occurrence took place he was elsewhere, and that it is extremely improbable that he could have committed the offence. The burden is on the prosecution to prove that the accused was present at the scene and participated in the crime. ***But when the presence of the accused at the scene has been established satisfactorily by the prosecution through reliable evidence, the court would be slow to accept evidence that he was elsewhere.***"[Emphasis added]

The above excerpted observation is a correct exposition of the law. Indeed, when the evidence adduced by the prosecution is watertight that the accused was identified at the scene, his *alibi* would naturally dissipate – see **Fadhili Gumbo Malota & 3 Others v. Republic**, Criminal Appeal No. 52 of 2003 (unreported).

In applying the above position to the facts of the case, the learned appellate Judge acted on the testimony of PW2 finding, as did the learned trial Magistrate, that the appellant was at the scene of the crime at the material time and that his *alibi*, which was unsupported by any witness, had

not raised any reasonable doubt. On our part, we find no cause to interfere with this finding. The fifth ground of appeal falls by the wayside.

In the final analysis, we find the appeal bereft of merit and proceed to dismiss it in its entirety.

DATED at **MWANZA** this 13th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. K. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of July, 2021 in the presence of the Appellant in person linked via video conference at Butimba Prison and Ms. Maryasinta Lazaro, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL