IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., AND MASHAKA, JA.)

CRIMINAL APPEAL N0. 79 OF 2019

CHARLES YONA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salam)

(Mtulya, J.)

dated the 21st day of March, 2019

in

Criminal Appeal No. 143 of 2018

JUDGMENT OF THE COURT

13th July & 2nd August, 2021

MWANDAMBO, J.A.:

The District Court of Kinondoni sitting at Kinondoni, convicted Charles Yona, the appellant of the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2002 – now R.E 2019]. The conviction resulted from a trial in which the charge alleged that he (the appellant), had carnal knowledge with a 12 years girl henceforth to be referred to as the victim or PW5 to hide her identity. The particulars of the offence alleged that on diverse dates, the appellant committed the offence

at Mbezi beach area within Kinondoni District between the months of January and May 2013. The appellant denied the accusations against him.

To prove its case, the prosecution paraded seven witnesses but it is the evidence of three witnesses which was relied upon in finding the appellant guilty as charged followed by conviction and sentence. That evidence came from the victim of the offence (PW5), Mariam John (PW6) who is recorded to have seen the appellant on top of the victim in his house ravishing her on an unspecified date on a Friday in May 2013. That court also relied on the evidence of Hamed Ally Embona (PW7), a medical doctor who examined a girl of 12 years who happened to be PW5, on 15/ 05/ 2013 and found that her vagina had been penetrated.

In its judgment, the trial court was satisfied with the evidence of the victim which it found to have been sufficiently corroborated by PW6 and PW7 whose evidence was supported by the PF3 he tendered in evidence and admitted as exhibit P1. The appellant's appeal to the High Court sitting at Dar es Salaam was unsuccessful. He raised complaints in relation to the defectiveness of the charge sheet, reliance on unsworn testimonies of PW5 and PW6, failure to prove penetration and conviction grounded on evidence which did not prove the charge beyond reasonable doubt. The first appellate

Court (Mtulya, J) did not find merit in any of the grounds. It dismissed them all. It concurred with the findings of the trial court that the offence of rape was proved to the standard required in criminal cases; proof beyond reasonable doubt on the basis of the evidence of PW5 which was corroborated by PW6 as well as PW7. It thus dismissed the appeal which aggrieved the appellant hence, the instant appeal.

The appellant's dissatisfaction with the decision of the first appellate court is upon a memorandum of appeal raising six grounds and two grounds in a supplementary memorandum he subsequently filed. The substantive memorandum of appeal raises the following complaints; **one**, the charge was defective for citing an irrelevant provision in an offence involving rape by a grandfather of the victim; **two,** wrongful reliance of the unsworn evidence of PW5 and PW6; **three,** sustaining conviction on uncorroborated evidence of the prosecution witnesses ; **four**, the appellant was not properly identified by PW5 and PW6; **five**, conviction and sentence grounded on evidence which did not prove the age of the victim; and **six**, the case against the appellant was not proved beyond reasonable doubt. The supplementary memorandum of appeal raises two grounds predicated on procedural irregularities, namely; failure by the trial court to address the

appellant on his right to call witness in defence contrary to section 231 (1) of the Criminal Procedure Act [Cap 20 R.E 2002 now R.E. 2019] (the CPA) and lack of jurisdiction on the successor Magistrate to try the case in contravention of section 214 (1) of the CPA. These two grounds were not raised and determined by the first appellate court. Nevertheless, since they involve issues of law, we shall determine them.

The appellant, who was unrepresented, appeared in person during the hearing. He outrightly urged the Court to consider his grounds of appeal and let the respondent Republic submit in response reserving his right to rejoin afterwards, should that need arise. Ms. Easter Kyara, learned State Attorney appeared for the respondent Republic, resisting the appeal.

Ms. Kyara began her submissions by addressing grounds two and three which she argued as one ground. However, we shall take a different approach. We find it convenient to begin with ground one in the substantive memorandum of appeal which faults the first appellate court on a charge which was allegedly defective. That will be followed by the two grounds in the supplementary memorandum. Essentially, the appellant contends that since PW5 referred to him as her grandparent, the charge should have been one of incest rather than rape on which he was convicted. Ms. Kyara argued

in reply that the relationship between the appellant and the victim was too remote to attract preferring a charge of incest. At any rate, the learned State Attorney argued, there was nothing wrong in law charging the appellant with rape instead of incest had there been facts supporting that charge.

With respect, we agree with the learned State Attorney on both aspects. Firstly, section 160 of the Penal Code makes an offence for a female person of or above 18 years to permit her grandfather, father, brother or son to have carnal knowledge of her. Before she gave evidence, the victim stated that she was 14 years and a student in standard VI. Her teacher, one Marcy Francis Mbega (PW3) stated that PW5 was 12 years when the fateful incident was reported to her in May 2013. PW7 had a similar version. It is thus beyond doubt that PW5 could not have been of or above the age of 18 years and permit the appellant to have consensual sexual intercourse with her. Secondly, as rightly submitted by Ms. Kyara, on the evidence, the appellant was simply a step grandfather. Thirdly, in any event, we also agree with the learned State Attorney that there was nothing legally wrong for the prosecution to prefer a charge of rape in lieu of incest had there been facts supporting prohibited relationship between the

appellant and the victim. This ground lacks merit and is in consequence dismissed.

Next we shall consider the appellant's complaint in ground (1) (a) in his supplementary memorandum of appeal. The complaint is premised on section 231 (1) (2) of the CPA. That section enjoins a trial magistrate at the end of the prosecution's case to address the accused on his right to give evidence on oath or not and to call witnesses, if any. The appellant contends that the trial court did not inform him on his right to call witnesses in defence.

Ms. Kyara submitted that the section was duly complied with and we agree with her. It is clear from page 35 of the record of appeal that after a ruling on a case to answer, the appellant is recorded to have said *"I will defend myself under oath, I will defend myself"*. Although there is no express indication that the trial magistrate specifically addressed the appellant, his response reproduced above militates against his complaint. In our view, the response is indicative of the trial magistrate having addressed the appellant on his rights. Luckily, this is not the first time such a complaint is being raised; the Court has dealt with non-compliance with section 231 (1) of the CPA in various cases, amongst others, **Twalaha Ally Hassan v.**

R, Criminal Appeal No. 127 of 2019 (unreported). The appellant in that appeal was recorded to have said that he will defend on oath and call seven witnesses. The only difference in the two appeals lies in the number of witnesses. The Court found that was sufficient compliance with the provision and rejected the complaint. We shall do alike in the instant appeal as we are satisfied that the appellant exercised his right to defend himself upon oath which he did and on the basis of which the trial court marked his case closed because there was no other witness to call in defence. In consequence, we reject this complaint which takes us to the second complaint in the supplementary memorandum of appeal premised on non - compliance with section 214 (1) of the CPA.

The learned State Attorney conceded that there was non-compliance with section 214(1) of the CPA in that the case was tried by two different Magistrates without any explanation for the transfer. Ms. Kyara was initially quick to point out that under the circumstances, the proceedings before Mushi, Resident Magistrate (RM), the successor trial magistrate from Hon. Rutehangwa, RM were a nullity so was the judgment and the appellant's eventual conviction and sentence. However, the learned State Attorney argued that the unexplained transfer of the case to the successor magistrate

did not prejudice the appellant anyhow amidst the overriding objective engraved under section 3A of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA). She invited us to hold that the transfer of the case could be cured under the overriding objective principle discussed by the Court in **Charles Bode v. R,** Criminal Appeal No. 46 of 2016 (unreported).

As conceded by the learned State Attorney, the record shows that the appellant stood trial before two magistrates. The predecessor was Hon. Rutehangwa, RM who received the evidence of six witnesses before his transfer to another station. It is equally plain from the record that on 25/08/2015 the date on which the trial was to continue with PW7, the case was called on before Hon. Rugemalila, RM who informed the parties of the trial magistrate's transfer. Thereafter, the case came before Hon. Mushi, RM for continuation of the trial on which date, PW7 testified and upon his testimony, the prosecution closed its case. The successor magistrate continued with the case to the end and composed a judgment convicting the appellant which is the bone of the appellant's contention, to wit: lack of jurisdiction in the successor magistrate.

We understood the appellant suggesting as he does that his conviction was entered by a magistrate who had no jurisdiction to continue with the

trial from his predecessor and thus, such conviction cannot stand. As seen above, the learned State Attorney as an officer of the Court shares the view no doubt guided by the Court's previous decisions. However, in view of the overriding objective brought about by section 3A of the AJA she urges us to treat that the irregularity was inconsequential to the appellant's conviction. We shall address this aspect in due course.

Section 214(1) of the CPA has been a subject of the Court's consideration and determination in many of its decisions. The Court has not minced words in holding that non- compliance with the section is fatal to the accused's conviction. See for instance, the cases of: **Priscus Kimario v. R,** Criminal Appeal No. 301 of 2013, **Ali Juma Ali Faizi@ Mpemba & Another v. R,** Criminal Appeal No. 401 of 2013, **Richard Kamugisha@ Charles Samson and 5 Others v. R,** Criminal Appeal No. 59 of 2001, **Emmanuel Jackson Kamwela v. R,** Criminal Appeal No. 482 of 2015 and **John S/o Lukozi v. R,** Criminal Appeal No. 340 of 2014 (all unreported) to mention but just a few. The rationale behind recording reasons for the succession in trial judicial officers was explained by the Court in **Priscus Kimario v. R** (supra) in which it stated: -

"....we are of the settled mind that where it is necessary to re-assign a partly heard matter, to another Magistrate the reason for the failure of the first Magistrate to complete the matter must be recorded. If that is not done it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed..."

In a subsequent decision in **Director of Public Prosecutions v. Laurent Neophitus Chacha & 4 others,** Criminal Appeal No. 252 of 2018 (unreported), the Court reiterated its stance and stated that: -

"... change of trial magistrates is not a simple act to be taken casually but such a serious matter which should be approached with the seriousness it deserves that is to say; whenever it is compelling for a new trial magistrate to take over from a previous one, he must record the reasons for doing so and invite the accused person to express his position if he will require that the witnesses whose evidence had been taken by the previous Magistrate be recalled to testify before a new trial Magistrate.

It is also settled law from the cases cited that non-compliance with section 214(1) of the CPA renders

the proceedings before the new magistrate a nullity for lack of jurisdiction."

We have deliberately reproduced passages from the two cases to stress the rationale behind section 214(1) the CPA and the duty it imposes on trial magistrates whenever there are reasons for a case to be tried by another magistrate in the most compelling reasons such as transfers of judicial officers from one station to another which are by no means not unusual.

We have already alluded to the fact that the predecessor Magistrate would not continue with the trial by reason of transfer was made known to the parties on 25/08/2015 by Hon. Regamalira, RM before whom the case was called on for necessary orders. Admittedly, when the case was called subsequently before Hon.Mushi, RM; the successor magistrate, he continued with the trial without explaining the reason for the succession. Nonetheless, we do not think that was of any consequence. It was not a case of what would otherwise be termed as case-file grabbing. This is so because the parties, the appellant included, were fully aware that the predecessor magistrate had been transferred. It follows thus that since the reason for the transfer of the trial to the successor magistrate was explained in

advance, the issue of lack of jurisdiction to continue with the partly heard case did not arise.

From the foregoing, there can be no doubt that the facts in the instant appeal are not similar to the cases on which convictions were quashed and new trials ordered by reason of lack of jurisdiction by successor magistrates to continue with the trials. Those cases are distinguishable from the instant appeal. They are relevant to cases with similar facts and circumstances it being trite law that each case must be decided on the basis of its peculiar facts.

The above notwithstanding, our reading of some of the cases we have landed our eyes on does not suggest that the Court was addressed on the import of section 214 (2) of the CPA to which we shall turn our attention shortly. The foregoing will be enough to dispose the appellant's complaint on the alleged lack of jurisdiction.

The second but related issue relates to the successor magistrate's failure to address the appellant if he required the witnesses (PW1 – PW6) who had already testified to be re summoned with a view to recommencing the trial. The appellant did not raise it as a complaint but we feel

constrained to address it because it is an essential ingredient of section 214(1) of the CPA, the subject of the issue under discussion. We are mindful that the record does not indicate that the successor magistrate addressed the appellant on this aspect. However, we are not prepared to go as far as saying that the omission had any bearing on the successor magistrate's jurisdiction to continue with the trial and hence holding that the trial before him as well as the judgment a nullity. We say so having in mind the provisions of section 214 (2) of the CPA which stipulates: -

> "(2) *Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial."*

It is plain from the above that before the High Court decides to quash conviction, it must be satisfied of the existence of two conditions. **First**, the appellant's conviction was vitiated by the non-compliance with section 214(1) of the CPA. **Second,** and perhaps the most critical one, the appellant must have been materially prejudiced by the conviction by reason of the evidence not wholly recorded by the successor magistrate. There being no

dispute with regard to the first condition, the issue for determination is whether the appellant was materially prejudiced by the change of trial magistrates. We may pause here and observe that by material prejudice, the legislature meant it to be different from dissatisfaction with the conviction, for the two have different outcomes. Be it as it may, we have already held that much as the appellant's conviction was based on the evidence wholly recorded by the successor magistrate, such magistrate did so with jurisdiction. We have seen nothing suggesting the existence of any wrongful assumption of jurisdiction; case file grabbing so to speak, in the manner discussed in **Priscus Kimario v. R** (supra) warranting the quashing of conviction. Neither has there been any remote suggestion that the appellant was materially prejudiced.

Apart from his bare assertion on the non -compliance with section 214 (1) of the CPA, the appellant did not explain to us in what way he was materially prejudiced by the conviction on the basis of the evidence not wholly recorded by the successor magistrate. In our view, the language of the legislature in section 214(2) of the CPA would tend to suggest that it did not intend to invalidate any noncompliance with section 214 (1) of the CPA except in the most compelling cases upon the courts being satisfied that

there was material prejudice to the accused. In the absence of any evidence proving that the omission to address the appellant in the instant appeal had any material prejudice to him materially, we are left with no other option than holding as we do that the omission was one of the curable irregularities under section 388(1) of the CPA.

The above would have been sufficient to dispose the issue. However, we feel constrained to extend our discussion the more so having regard to the invitation by Ms. Kyara to invoke the overriding objective engraved under section 3A of the AJA discussed in **Charles Bode v. R** (supra). From what we have discussed above, we are increasingly of the view that the omission to address the appellant would attract invoking the overriding objective which appears to be inherent in sections 214 (2) and 388 (1) of the CPA and disregard it as immaterial. In the upshot, we find no merit in this and dismiss it.

Next for our consideration is the complaint in ground two in the substantive memorandum of appeal in relation to the alleged unprocedural reception of the testimonies of PW5 and PW6. Ms. Kyara was quick to concede that there was a twist in the order of the reception of the evidence of the two tender age witnesses but she argued that that was not fatal to

the appellant's conviction. To bolster her submission, she sought reliance from our decision in **Mzee Ally Mwinyimkuu @Babu Seya v. R,** Criminal Appeal No. 496 of 2017 (unreported) for the proposition that swearing of witnesses of tender age before conducting a *voire dire* test is an irregularity which does not go to the root of the evidence so received. When he was given opportunity to rejoin, the appellant was adamant that the two witnesses testified without taking oaths neither did they promise to tell the truth.

The first appellate court did not have any opportunity to express its opinion on this complaint because it was not raised as one of the appellant's grounds of appeal. Nevertheless, since it involves an issue of law we shall determine it. It is common ground that both PW5 and PW6 were tender age witnesses. At the time they gave evidence, section 127 (2) of the Evidence Act [Cap. 6 R. E 2002] required the trial court to satisfy itself that such witnesses knew the meaning of oath and the duty to speak the truth before receiving their evidence. That could only be achieved by conducting a *voire dire* test. This the trial court did as it can be seen at pages 25 and 28 of the record, despite doing so after taking oaths of the respective witnesses. Without any slightest disrespect to the trial court, that was irregular but on

the authority of **Mzee Ally Mwinyimkuu @Babu Seya v. R** (supra), the irregularity was innocuous because it did not go to the root of the matter. In **Mzee Ally Mwinyimkuu @Babu Seya v. R** (supra) we held that despite the trial court affirming the tender age witnesses before conducting the *voire dire test*, their evidence was properly received considering that the voire dire tests revealed that each knew the meaning of oath and the duty to speak the truth.

The circumstances in the instant appeal are similar. The record of the typed proceedings shows **5 x 5** after the introduction of each witness but before giving evidence. The handwritten record shows **s x s** which occurs to us to stand for "sworn and states". It is now clearer to us that PW5 and PW6 were sworn prior to the trial magistrate conducting *voire dire* test on each of them. It turned out that after such tests each demonstrated to know the meaning of oath and the duty to tell the truth before receiving their evidence on oath. As we held in **Mzee Ally Mwinyimkuu**, we are bound to do alike in this appeal by treating the irregularity immaterial resulting in the dismissal of ground two.

Due to the link in ground three and six in the substantive memorandum of appeal, we shall discuss them together later. In the

meantime, we shall consider the appellant's grievance in ground four which is dedicated to identification which we think should not detain us. The appellant does not complain neither has he complained that he was unfamiliar to PW5 and PW6. All what he says is that the duo did not point him during the trial. In as much as it was not in dispute that the appellant was a step grandfather of PW5, he must have been well known to her as well as PW6. It did not require PW5 and PW6 to point the appellant to identify him to complete their evidence. Failure to point him did not arise let alone not being a legal requirement. This ground too is bereft of merit. It is dismissed as well. We shall now turn our attention to ground five.

The appellant complained that the victim's age was not proved, a claim which was resisted by Ms. Kyara, rightly so in our view in the light of the evidence of PW3, PW4 and PW7. In addition, PW5 also stated her age as 14 years. PW3 was a teacher whereas PW4 was a guardian. It is trite that age of a victim can be proved by, among others, a parent, guardian, medical doctor or a teacher. See for instance: **Issaya Renatus v. R,** Criminal Appeal No. 542 of 2015 referred in **Bashiri s/o John v. R,** Criminal Appeal No. 486 of 2016 (both unreported). Be it as it may, there is no suggestion that PW5 was 18 years and consented to sexual intercourse.

In so far as PW5 was below the age of 18 years, it made no difference to the appellant's conviction and sentence. This ground is equally misconceived and is dismissed accordingly.

Finally on ground three and six in which the complaint is that the first appellate court sustained conviction grounded on uncorroborated evidence of PW5 and PW6 and so the case against him was not proved to the standard required in criminal cases. Ms. Kyara argued that the evidence of PW5 was very revealing on how the appellant ravished her and so it did not require any corroboration. All the same, the learned State attorney argued, there was sufficient corroboration from PW6 who saw the appellant on top of PW5 ravishing her.

The learned first appellate Judge concurred with the trial magistrate that PW5 was a truthful witness and her evidence credible. So was PW6. We are inclined to share the same view with the learned first appellate Judge. First of all, it is trite that the best evidence in sexual offences is that of the victim of the offence. Decided cases on this principle are abound represented by Selemani **Makumba v. R** [2006] T.L.R 379, **Hamis Mkumbo v. R**, and Criminal Appeal No. 124 of 2007 and **Rashidi Abdallah Mtungwa v. R,** Criminal Appeal No. 91 of 2011 (both

unreported) amongst others. In upholding the trial court's decision, the first appellate Judge reproduced in extenso the evidence of PW5 (at page 69 of the record) which was quite revealing on how the appellant lured the victim into the house, pushed her to a bed where he removed her underpants and inserted his penis into her vagina. That alone was sufficient to prove rape. There was uncontroverted evidence that before the fateful act, PW5 and PW6 had been playing outside the house and that when PW5 got inside to collect used dishes, PW6 remained outside the house waiting for her friend. Both courts below believed PW5 as a truthful and credible witness and we agree with them. We have not been provided with any reason for us to interfere with the concurrency findings of the two courts below neither have we seen any.

Secondly, there is no legal requirement for corroboration where the evidence of the victim can stand on its own to support conviction particularly in sexual offences where it is a rule that the best evidence must come from the victim. However, had corroboration been required, the evidence of PW6 sufficiently corroborated PW5's testimony. The appellant did not assail the evidence of PW5 and PW6 in cross examination. Indeed, PW6 was so telling such that she even described the appellant's green boxer. She was not

controverted while testifying in cross examination. She told the trial court that after a long wait for PW5's return, she peeped through an opening near the window only to see his father (the appellant) on top of PW5 which forced her to push the door. That forced the appellant to release PW5 and took a trouser whilst PW5 grabbed a khanga. Guilty as the Biblical Cain, the appellant did not end there. He threatened PW5 and PW6 with deaths if they disclosed the incident to anyone to which indeed they did succumb for a while until two days later when PW6 disclosed the ordeal to her mother (PW4) who reported the matter to PW3 resulting into the arrest and ultimately the arraignment of the appellant. PW6 is on record having seen PW5 bleeding from her vagina and escorted her to a wash room to wash her private parts immediately after the ordeal she suffered in the hands of the appellant. With that damning evidence, we are satisfied that the two courts below rightly concurred in their findings that the appellant was guilty as charged relying on the evidence of PW5 and PW6 as well as PW7, the medical doctor who examined PW5 and found her vagina being penetrated.

The totality of the above leads to no other conclusion than that contrary to the appellant's complaints, the case against him was too

watertight to elude a finding of guilt. That conclusion disposes the appellant's complaints in ground three and six against him.

In the event and for the foregoing reasons, having dismissed all grounds of appeal, inevitably, the appeal is devoid of merit and we dismiss it accordingly.

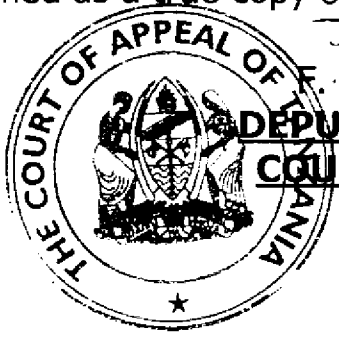
DATED at **DAR ES SALAAM** this 29th day of July, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of August, 2021 in the presence of the appellant in person person linked via-Video conference and Ms. Estarizia Wilson, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL