IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 337 OF 2020

TUMAINI JONAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Decision of the High Court of Tanzania at Dodoma)

(Mlacha, J.)

dated the 19th day of November, 2019
in
Criminal Appeal Case No. 84 of 2018

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JUDGMENT OF THE COURT

9th & 24th August, 2021

KOROSSO, J.A.:

The appellant, Tumaini Jonas was arraigned and convicted in the District Court of Iramba, at Kiomboi of the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 R.E 2002 and sentenced to thirty years imprisonment. The particulars of the charge alleged that on 10/7/2017 at around 13.00hours at Kidigida Village within Mkalama District in Singida Region, the appellant had sexual intercourse with a twelve (12) year old girl who we shall henceforth refer to as "*the victim*" or "*PW1*".

The appellant categorically denied the charges against him, prompting the prosecution side to present and prove its case parading four witnesses that is; the victim (PW1), Abubakar Ramadhani (PW2), Carman Mayomba (PW3) and Teodost Amoros Mushi (PW4). Two exhibits were also tendered; the PF3 (exhibit P1) and the victim's class register (exhibit P2).

The evidence of PW1 who was thirteen (13) years of age at the time was that, she knew the appellant who was her uncle and they lived together in the same house with her grandmother. She stated that on 10/7/2017 around 13.00 hours, during a break, she went home to have something to eat and found her uncle there, alone. After she completed eating and was ready to go back to school, the appellant called her, and upon responding to the call, he grabbed her and proceeded to fulfil his sexual appetite by raping her. Having completed the evil act, he warned the victim not to disclose to anyone what had transpired. PW1 stated that she felt pain during the incident and did not disclose to anyone about what had befallen her. She was unable to attend school for two days and when queried what ailed her, at first, she pretended to have a stomach ache but later she revealed that the appellant had raped her. This led her to be taken to Nkungi Police Station and later to Iyambi hospital where she underwent medical examination conducted by PW3,

a medical doctor. PW3 testified that the examination revealed that the victim's vagina had blood spots and bruises and there was no hymen, which led to a conclusion that PW1 vagina had been penetrated by a blunt object.

The evidence of PW2 the Village Executive Officer was to the effect that on 14/7/2017 he received a phone call from one Samson Rolya who informed him about a rape incident in the village which had occurred in the house of Jonas. He undertook to direct village militia people to proceed to arrest the appellant who had been named as the culprit. On the same day, the appellant was arrested and taken to the police station and subsequently, arraigned in court to face charges as alluded to above.

In his defence, the appellant denied committing the offence and stated that on the date of incident he was the one who had taken the victim, who was sick to the hospital and thereafter returned home. Similarly, he narrated circumstances leading to his arrest and contended that the case against him was fabricated arising from an existing dispute with his stepmother regarding a piece of land.

After the conduct of a full trial, the appellant was convicted as charged and sentenced to thirty (30) years imprisonment. Dissatisfied,

the appellant unsuccessfully appealed to the High Court. Still undaunted, he has now preferred an appeal to this Court faulting the decision of the High Court, armed with a memorandum of appeal containing seven grounds of appeal which, summarized, state as follows: -

1. That the charged offence was not proved beyond reasonable doubt.
2. That, exhibit P1 was wrongly admitted before the trial court.
3. That, the bruises, blood stains and loss of hymen is not an ingredient consisting the offence of rape.
4. That, there was no proof of penetration to warrant conviction.
5. That, failure to testify by the Executive Officer to whom it was alleged that the appellant admitted to have committed rape weakened prosecution case.
6. That, there was violation of section 214(1) of the Criminal Procedure Act, Cap 20 R.E 2002- now R.E 2019 (the CPA).
7. That, failure to call the arresting officer and investigator were to testify weakened the prosecution case.

When the appeal came for hearing, the appellant appeared in person, unrepresented. Mr. Elisante Masaki and Mr. Morris Sarara, both learned Senior State Attorneys appeared for the respondent, Republic resisting the appeal.

The appellant intimated that he has nothing further to amplify with regard to his grounds of appeal and implored us to allow the respondent Republic's side to first respond to his grounds of appeal and reserved the right of rejoinder.

Mr. Sarara who took the lead for the respondent Republic, intimated to respond to the grounds of appeal by arguing the 1st ground of appeal jointly with the 2nd, 3rd, 4th, 5th and 7th grounds and thereafter deal with the 6th ground separately. He prefaced his submissions with the contention that to prove the offence charged the prosecution was required to prove; **First**, that the victim was a child below eighteen years of age. **Second**, that there was sexual intercourse with a child with or without consent with a male, the appellant. **Third**, there was penetration.

The learned Senior State Attorney contended that the prosecution did prove the offence charged against the appellant through four witnesses called to testify at the trial. He argued that the evidence of PW1, the victim was procedurally taken since the law does not require such evidence to be given on oath. He contended further that the prosecution did prove that the victim was under the age of eighteen years as gathered from the evidence of PW4 the teacher, who testified that according to school records, PW1 was born in 2005 and thus at the

time the incident occurred she was 12 years of age. He contended further that the evidence on the age of the victim was further cemented by the evidence of PW3, the doctor who gave evidence that the victim was 12 years old at the time he examined her after the incident.

In confronting the second component in proving the offence charged against the appellant, the learned Senior State Attorney argued that the evidence of PW1 proved that the appellant had sexual intercourse with the victim particularly when she stated that the appellant raped her. He asserted that PW1 narrated the whole incident up to the time she was undressed and raped by the appellant whom she knew as her uncle and they lived in the same house. He stated that PW1 also testified on the threats against her by the appellant if she told anyone about the sexual intercourse, he had with her. According to the learned Senior State Attorney, PW1's testimony on the pain she felt in her private parts after the incident and PW3's testimony that the hymen was not intact when PW1 was medically examined, lead to only one conclusion that penetration was proved.

With respect to the value and weight to be accorded to the PF3 which was admitted as exhibit P1, the learned Senior State Attorney conceded that since upon being admitted, it was not read in court to allow the appellant to understand the substance of the said evidence, it

should be expunged. He argued that this notwithstanding, expunging exhibit P1 from the record does not weaken the prosecution case because the available oral evidence from PW1 and PW3 clearly established that penetration took place, and in essence, proved the offence charged against the appellant.

Tackling complaints in the 5th and 7th grounds regarding failure to call as witnesses for the prosecution the Village Executive Officer, the investigating and arresting officers, the learned Senior State Attorney argued that all the essential witnesses were called to testify. He contended that the evidence shows that PW1's grandmother reported the incident to PW2, who identified himself as a VEO and testified on what transpired after the report, which led to the arrest of the appellant. Mr. Sarara argued that maybe the question should be on the credibility of the witnesses called and not those who were not called since according to section 143 of the Tanzania Evidence Act, Cap 6 R.E 2002 (TEA), it is only those witnesses one who wants to prove a fact, who should be called and not otherwise. On the credibility of the prosecution witnesses, Mr. Sarara, argued that there was a concurrent finding on this by the trial and the first appellate courts that the prosecution witnesses were truthful and reliable. He thus urged the Court to sustain their concurrent findings on their credibility. To bolster this assertion, he

cited the case of **Joshua Chipana @Kidyani vs Republic**, Criminal Appeal No. 336 of 2020 (unreported).

Responding to the 6th ground of appeal, the learned Senior State Attorney conceded to the unexplained change of magistrates in the conduct of trial in contravention of section 214 of the CPA and various decisions of the Court, when a successor magistrate takes over. However, he contended that in the present case, the test which the Court should consider in determination of this ground is whether, failure to record reasons for the change of magistrates did occasion any injustice on the part of the appellant, especially since there is nowhere on record where the appellant complained how he was prejudiced by the irregularity. He thus prayed that we invoke the principle enshrined in Section 3A of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA), and find that, the irregularity was not prejudicial to the appellant. He thus urged us to dismiss the appeal for being unmerited.

The appellant had a brief rejoinder stressing that his grounds of appeal be considered in his favour, his appeal be allowed and he be set free from prison.

We have considered all the grounds of appeal submissions and authorities cited before us. We will start our deliberations by addressing

the points of law raised. The first is one found in the 2nd ground of appeal challenging the admissibility of the PF3 admitted as exhibit P1. It is apparent from the record of appeal, that upon being admitted, it was not read over aloud in court as required by a number of decisions of this Court such as; **Robinson Mwanjisi and 3 Others vs Republic** [2003] TLR 218 and **Lack Kilingani vs Republic**, Criminal Appeal No. 402 of 2015 (unreported). From the said decisions, what is clear is that non-compliance with the same leads to such admitted evidence to be expunged, which we hereby do for exhibit P1.

The 6th ground of appeal is on violation of section 214(1) of the CPA. It is evident at page 23 of the record that C. C. Makwaya, RM took over proceedings from C.P. Singano, RM who had presided over the trial from the start. It is apparent, and conceded by the learned Senior State Attorney that at the time the successor Resident Magistrate took over, as deciphered from the record of appeal, there were no reasons assigned on the said takeover. The learned Senior State Attorney invited us to invoke the overriding principle and find that there was no prejudice occasioned to the appellant and find the anomaly to be minor and curable.

The import of non-compliance of section 214(1) of the CPA has been a subject of scrutiny in various decisions of this Court and held that

non-compliance of the provision is fatal. In **Priscus Kimaro vs Republic**, Criminal Appeal No. 301 of 2013 (unreported) the Court stated 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 must be recorded and that not doing that can lead to chaos in the administration of justice (see also; **Ali Juma Ali Faizi @Mpemba and Another vs Republic**, Criminal Appeal No. 401 of 2013, **Charles Samson and 5 Others vs Republic**, Criminal Appeal No. 59 of 2001 (both unreported).

In a recent decision, that is; **Charles Yona vs Republic**, Criminal Appeal No. 79 of 2019 (unreported), having discussed various decisions of this Court that addressed the import of non-compliance of section 214(1) of the CPA, the Court stated that, when determining this, it is important to consider the peculiarity of circumstances for each case and only in cases with similar facts and circumstances where such conclusion is inevitable. Upon consideration of the said provision, the Court held that before the Court quashes conviction due to non-compliance of section 214(1), it must be satisfied 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."

Finding that the circumstances of this case are also different from many of those cases, we shall apply that holding and the conditions set in this appeal for two reasons. **One,** the appellant made general complaints regarding non compliance with section 214(1) of CPA without explaining how he was materially prejudiced. **Two**, from the circumstances of the case, there is nothing to infer wrongful assumption of jurisdiction or unauthorized case file takeover on the part of the successor Resident Magistrate.

Taking into account the above, we find that the appellant was not materially prejudiced and we hold that, under the circumstances, the irregularity is one that was curable under section 388(1) of the CPA. The 6th ground thus fails.

We now move to the substantive grounds, that is, the 1st, 3rd, 4th, 5th and 7th grounds of appeal which we shall deliberate on them jointly. Our starting point will be to deliberate on the 5th and 7th grounds which questioned some witnesses not being called to testify in court, that is; the Village Executive Officer before whom the appellant's had admitted to commit the offence, the investigator and the arresting officer. The

appellant argument was that not calling these witnesses weakened and left doubts on the prosecution evidence. The learned Senior State Attorney responded stating that the prosecution had called witnesses they needed to prove their case and that they had proved their case and relied on section 143 of the TEA.

We agree with the learned Senior State Attorney that the respondent called all the material witnesses to prove the case, on the strength of section 143 of TEA. Indeed there have been cases including those of murder, where we have sustained convictions where only one witness testified (See, **Yohannis Msigwa vs Republic** [1990] TLR143 and **Anangisye Masendo Ng'wang'wa vs Republic** [1993] TLR 202) to name a few, the important issue being the credibility of the single witness. It was held in **Mwita Kigumbe Mwita and Magige Nyakiha Marwa vs Republic,** Criminal Appeal No. 63 of 2015 (unreported), that the Court looks for quality and not quantity and that the best test for quality of any evidence is credibility.

Undoubtedly, it was for the prosecution to determine the witnesses they wanted to prove the facts requisite to prove their case against the appellant beyond reasonable doubt. The appellant had no role in choosing for the prosecution who to call, be it the investigator, the arresting officer or the VEO. In any case, PW2 who identified himself as

the VEO of the village since 2016. The investigator and the arresting officer did not witness the offence being committed and there was no dispute on the date of arrest. Taking the circumstances of this case into perspective, we find this complaint to be a nonstarter and does not add weight to the appellant's case, since there is nothing to lead us to draw an adverse inference on the fact that the said witnesses whom the appellant thinks were important were not called to testify. In the premises, the 5th and 7th grounds lack merit.

Since the underlying issue amongst all the grounds is whether or not the prosecution proved the case to the standard required, centered on the charging provisions that is, sections 130(1)(2)(e) and 131(1) of the Penal Code. Noteworthy is the fact that under the said provisions, it is immaterial whether or not there was sexual consent. Statutory rape is having sexual intercourse with a girl under the age of eighteen. We thus agree with the learned Senior State Attorney that to prove the charges against the appellant essentially, the ingredients are first, proving that the victim was below eighteen years; second, that a male person (the appellant) had sexual intercourse with the victim, with or without her consent; and third, there was penetration.

With regard to the age of the victim, the testimony of PW4, a teacher at Kidigida Primary School, where PW1 was a student, gave

evidence that according to school records, PW1 was born in 2005 meaning at the time of the incident in 2017, she was 12 years of age. The assertion was corroborated by PW3, who in her oral testimony stated that sometime in July she examined the victim who was 12 years at the time. The credibility and reliability of the two witnesses was asserted by the concurrent findings of both the trial and the first appellate courts and we find nothing to lead us to interfere with the said findings.

Addressing the second ingredient, the position is as what was held in **Seleman Makumba vs Republic** [2006] TLR 379, where the Court described the evidence of the victim of rape as the best evidence. This position is reinforced by the holding in **Victory Mgenzi@ Mlowe vs Republic,** Criminal Appeal No. 354 of 2019 (unreported), which stated that section 127(6) of TEA reiterates that there can be no more direct evidence than the evidence of the victim of the crime concerned. In the instant case, both the trial and first appellate court found PW1 to be a truthful witness and thus her evidence can be relied upon.

PW1 narrated the whole incident on what transpired on the fateful day. In her testimony (at page 7 of the record of appeal) she stated:

> *"On 10/7/2017, I came back from school to eat. It was about 13.00hrs. I found my uncle at home alone.*

My grandmother/father was at the auction. My uncle was alone at home. I then took food and ate, it was ugali and when I was going back to school, my uncle Tumaini Jonas called me, saying he wanted to send (sic) me. I went to him, but when I came to him, he held my hand, closed my mouth with a piece of cloths, removed my clothes- underpants and laid me on the bed and raped me. He then told me that I should not tell anyone, unless he will kill me.... From that day, I felt pain in my private parts, if I walk I felt pain, so on the next day I did not go to school."

The testimony of PW1 that she was raped by the appellant is corroborated by PW3 who testified that:

"A patient was brought to me on July 2017 she was a girl...12 years named (name withheld but she gives the victims name). I was at Hydom Lutheran Hospital. She was brought by her cousin who told me that the girl was raped a week ago. I examined her for HIV and VIDRC. As I examined her vagina, I discovered that she had bruises on the vagina wall and had blood on the vagina. She had lost her hymen at that age of 12 years... The bruises were caused by a blunt object not sharp object."

In essence, relying on the above two excerpts, there is no doubt that PW1 was raped, and from the evidence of PW1, it is the appellant who raped her. Penetration is also proved by the statement by PW1 that

she was raped but also by PW3 evidence that her vagina had bruises and was clearly penetrated by a blunt object. We thus agree with the learned Senior State Attorney that the charge was proved to the standard required. Certainly, taking into account the above, it is clear that in addressing the 1st ground, we also determined the 3rd and 4th grounds. Consequently, in view of the above, the 1st, 3rd and 4th grounds are also unmerited.

In the upshot, we find the appeal to be without merit and dismiss it in its entirety.

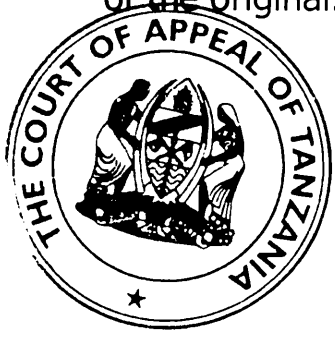
DATED at **DODOMA** this 23rd day of August, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on 24th day of August, 2021 in the presence of the appellant in person and Mr. Matibu Salum, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL