IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 229 OF 2017

MACHEMBA PASTORY.....1ST APPELLANT
FIKIRI KALIWA.....2ND APPELLANT
HASSAN MALECHA.....3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ruhangisa, J.)

dated the 3rd day of March, 2017
in
DC Criminal Appeal No. 97 of 2015

JUDGMENT OF THE COURT

20th & 25th August, 2021.

KITUSI, J.A.:

This is an appeal from the decision of the High Court, dismissing an appeal by the appellants against the conviction and sentence in two counts of gang rape, contrary to section 131 A (1) and 131 (2) of the Penal Code [Cap. 16 R.E. 2002], and one count of armed robbery, contrary to section 287A of the Penal Code.

It was alleged, and testified in proof of the fact, that on 4/1/2008 at around 04:00 hours, people broke into the house of one Benjamin Sayi (PW1), in which Salima Tawa (PW2), Rehema Benjamin (PW3) and Baraka Benjamin

(PW4) were sleeping. PW2 and PW3 testified that they were raped by the second and third appellants respectively, as the others watched, and after that the bandits made away with certain items of value. PW4 testified in support of those facts and stated that, from the sitting room where he was sleeping, he heard PW2 and PW3 cry, and he saw the armed bandits make away with money, a mobile phone battery and clothes. This was after they had eaten rice and beans they found in the house.

The District Court of Kahama which conducted the trial, and the High Court of Shinyanga sitting on first appeal, got satisfied that PW2, PW3 and PW4 were truthful witnesses and that they identified the appellants as the villains. The appellants were sentenced to 30 years for each of the counts of gang rape and also to 30 years for armed robbery. The sentences were ordered to run concurrently. That was on 1/12/2008. However, vide an inspection note dated 2/2/2010, Kaduri J set aside the sentence of 30 years for gang rape as being contrary to section 131 A (2) of the Penal Code, and substituted it with life imprisonment.

At the hearing of this appeal, the appellants entered appearance without legal representation, while the respondent Republic had the services of Ms. Wampumbulya Shani and Ms. Immaculata Mapunda, both learned State Attorneys. It was Ms. Mapunda who argued the appeal.

The appellants had lodged separate memoranda of appeal, which however, raised more or less common issues for our consideration. They raised, and we are going to consider, two technical errors that escaped the attention of the two courts below. The first is that, though PW2 and PW3 were witnesses of the age below 14 years, no *voire dire* test was conducted by the trial court before each testified. This complaint was raised in ground 1 of the second appellant's memorandum of appeal and ground 2 of the third appellant's memorandum of appeal. The second complaint is in respect of the offence of armed robbery and the omission to name in the charge sheet, the person against whom the alleged violence was directed. This complaint was raised by all appellants in their respective memoranda of appeal.

When they were invited to argue their appeal, the appellants just adopted their memoranda of appeal and prayed that on the basis of what is contained therein, we allow the appeal, quash the convictions and set aside the sentences. Ms. Mapunda supported the appeal mainly on the two complaints which we have referred to a while ago.

The learned State Attorney submitted that it is settled law that the best evidence of rape comes from the victims, in this case PW2 and PW3. She further submitted that since PW2 and PW3 were witnesses of tender age, a *voire dire* test in terms of section 127 of the Evidence Act, Cap. 6 R.E. 2002 (the TEA) as it stood then, was supposed to be conducted. She then submitted

that the omission to conduct a *voire dire* examination on PW2 and PW3 rendered their testimonies unworthy, and leaves the two counts of gang rape to have been unproved.

Ms. Mapunda also supported the complaint regarding the charge of armed robbery not specifying the person against whom the alleged violence was directed. She prayed that we should allow the appeal, quash the convictions and set aside the sentences, with an order that the appellants be set free.

With respect, we agree with the learned State Attorney that the best evidence of sexual offences comes from the victim. See the case of **Seleman Makumba vs. Republic**, [2006] T.L.R. 379, **God Kasenegala vs. Republic**, Criminal Appeal No. 10 of 2008 and **Alex Ndendya vs. Republic**, Criminal Appeal No. 3 of 2017 (both unreported). That means, the best evidence to prove gang rape in this case ought to come from PW2 and PW3, who were aged 13 and 12 years respectively, in 2008. In 2008 when PW2 and PW3 testified, there was still a statutory requirement for trial courts to conduct a *voire dire* test in respect of witnesses of below the age of 14 years. In **Gadiel Emmanuel Orio vs. Republic**, Criminal Appeal No. 538 of 2016 (unreported), after reproducing section 127 of the TEA as it stood then, we stated the following: -

"Over the years, the Court has persistently held that by virtue of the foregoing provisions, a duty is imposed on trial Magistrates or Judges to investigate whether or not a child witness knows the meaning of an oath so as to give evidence on oath or affirmation. If the child does not know the meaning of an oath or affirmation, then the presiding officer must investigate whether or not the child witness is possessed of sufficient intelligence and understands the duty of speaking the truth. If the finding of the latter instance is in the affirmative, the child witness may give evidence though not on oath or affirmation....

Such investigation process was dubbed voire dire examination and in the unreported Criminal Appeal No. 57 of 2010 – ***Mohamed Sainyenye v. The Republic,*** *the Court laid down in detail the procedure for a voire dire examination test."*

As that procedure was violated in this case, the evidence of PW2 and PW3 needed corroboration. See **Kimbute Otiniel vs. Republic**, Criminal Appeal No. 300 of 2011 (unreported). However, there was no such corroboration in this case and thus, the charges of gang rape were not proved, as submitted by Ms. Mapunda.

On the charge of armed robbery, it was couched in the following manner:-

*"**3RD COUNT:-** ARMED ROBBERY c/s 287A OF THE PENAL CODE CAP. 16 R.E. 2002.*

***PARTICULARS OF THE OFFENCE:** That Machamba s/o Pastory, Paul s/o Kambi, Fikiri s/o Kaliwa and Hassan s/o Malecha are jointly and together charged on 04th day of January 2008 at Butambala village within Bukombe District in Shinyanga Region, did steal various clothes valued at Tshs. 60,000/= one bag valued at Tshs. 15,000/= a battery of mobile phone valued at Tshs. 10,000/= total valued at Tsh. 85,000/= the property of one Sai Benjamin and immediately before at or after such stealing did use pangas and clubs in order to effect that stealing."*

Clear from the cited charge sheet, there was no mention of the person or persons against whom the said violence was directed. This was against the settled law as demonstrated in case law such as, **Mawazo Juma vs. The Republic**, Criminal Appeal No. 208 of 2017 and **Joseph Maganga Mlezi vs. The Republic**, Criminal Appeal No. 536 of 2015 (both unreported). In the former case, we quoted the following passage from **Kashima Mnaeli vs. Republic**, Criminal Appeal No. 78 of 2011 (unreported): -

"Strictly speaking, for a charge of any kind of robbery to be proper, it must contain or indicate actual personal violence or threat to a person whom robbery was directed. Robbery as an offence, therefore, cannot be committed without the use of actual violence or threat

to the person targeted to be robbed. ***So, the particulars of the offence of robbery must not only contain the violence or threat, but also the person on whom the actual violence or threat was directed.***"

Therefore, once again we agree with Ms. Mapunda and find merit in the grounds of appeal that raised the defect in the charge.

Consequently, and for the reasons stated, we allow the appeal, quash the convictions and set aside the sentences. We order the release of the appellants immediately unless they are being held for some other lawful cause.

DATED at **SHINYANGA** this 24th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 25th day of August, 2021 in the presence of the Appellants in person, unrepresented and Ms. Wampumbulya Shani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL