IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 450 OF 2017

BUTONGWA JOHN..APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Makani, J.)

dated the 15th day of September, 2017
in
Criminal Appeal No. 4 of 2017

JUDGMENT OF THE COURT

17th & 26th August, 2021.

KITUSI, J.A.:

After a full trial of Butongwa John, the appellant, on a charge of rape contrary to section 130 (1) (2) (e) and 131 (1); abduction, contrary to section 133, both of the Penal Code (Cap. 16 R.E. 2002) and; marrying a school girl contrary to Rule 4 (2) of the Education Imposition of Penalties to persons who marry or impregnate school girls Rules No. 265 of 2003, the District Court of Bariadi sentenced him to 30 years in jail for the offence of rape charged in the first count. It acquitted him of the second and third counts.

The appellant's appeal to the High Court was unsuccessful. The details of the decision of the High Court from which this appeal arises, though of

particular interest in this appeal, will be referred to later. First, we are going to tell the brief background of the matter.

The victim of the alleged rape is, according to the prosecution, a 17-year-old girl who testified as PW2, and we shall henceforth refer to her simply as such. On 6/5/2015, PW2's father one Maduka Nila (PW4), gave her money to go buy school exercise books from a shop. According to PW4 and PW2's brother one Ngasa Galuji (PW3), the girl never returned home from the shop. Consequently, PW2's family, especially PW3, went out in search for her and managed to find her in Mpanda District on 23/6/2015, about five weeks later. PW2, PW3 and PW4 testified to the fact that she was living in Mpanda with the appellant as his wife.

It is PW2 who told the story of what happened and how she got there. She testified that on 6/5/2015 at about 15:50 hours, as she was proceeding home with the school exercise books she had bought, she ran into the appellant who was accompanied by another man. These two men stopped PW2 and snatched the exercise books from her. It seems that was all these men needed to do, to get PW2 tamed. This is because, she testified that she kept on demanding her exercise books back without success, even as at nightfall when she followed the two men to Mwaswale village, and stayed there for two weeks. She alluded to the fact that the whole mission was to

get her marry the appellant. Sometime during her testimony, when PW2 was responding to the appellant's question; whether she raised any alarm to seek assistance, she stated that she indeed raised alarm, but nobody could hear it because the two men who had taken her hostage by snatching her school exercise books, were singing loudly causing her alarms to go unnoticed.

After the two - week stay in Mwaswale village in Bariadi District, the appellant took PW2 to Mpanda District where she stayed with him for three weeks, before PW3 accompanied by another man known as Michael, got her.

PW2 stated that during her stay with the appellant, she was sleeping with him and having sex with him as his wife. The appellant put to PW2 a gruesome question to tell if she knew him to be a circumcised or uncircumcised person, to which she replied that he was circumcised. As we shall see in his defence, the appellant sought to prove PW2 wrong on that.

The appellant's defence consisted of general as well as specific denials. He denied abducting and raping PW2, but confirmed that he was arrested on 23/6/2015. He also stated that PW2 was 18 years old because she stated that she was born in 1998. To prove PW2 wrong, the appellant said he was uncircumcised, and proceeded to demonstrate it in court. Then he insinuated bad blood between him and PW3, allegedly arising from a business transaction that turned sour.

At this point, we propose to refer to the details of the decision of the High Court, as we earlier promised. It got satisfied that the offence of rape had been proved against the appellant, beyond reasonable doubt.

During hearing of the first appeal, the attention of the learned Judge was drawn to the fact that the trial court had omitted to enter a conviction against the appellant. In dealing with this omission, the learned Judge, referring to the statutory provisions of section 235 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA) went on to state: -

> *"In the absence of a conviction entered in terms of section 235 (1) of the CPA, there is no valid judgment before this court. Taking the route suggested by the learned State Attorney and following the guidance of the Court of Appeal in the case of* ***Matola Kajuni*** *(supra) and* ***Shabani Iddi Joiolo & 4 Others Vs. Republic,*** *Criminal Appeal No. 200 of 2006 (unreported), I am of a strong view that there is need for this court to remit the record to the trial court to enter conviction of the appellant to validate the sentence and the judgment as a whole."*

All would have been well, in our view, if the learned Judge had proceeded to make the order of remission or if she had decided to consider the omission as inconsequential, she would have dealt with the matter in that way. But the learned Judge later concluded as follows: -

"In the strength of the foregoing, the appeal is hereby dismissed. I order that the record be remitted to the trial court to enter a conviction in respect of the accused person (the appellant herein). After the trial magistrate has entered conviction against the appellant the respective sentence and commencement of the sentence shall remain unaltered."

At the hearing of this appeal, we invited Messrs. Jukael Ruben Jairo and Nestory Mwenda, learned State Attorneys, who represented the respondent Republic, to address the propriety of the procedure that was adopted by the High Court.

Initially, Mr. Mwenda submitted that the procedure was consistent with what the Court has been doing in similar cases, citing the case of **Mabula Makoye And Another vs. Republic**, Criminal Appeal No. 227 of 2017 (Unreported). However, when we prevailed on the learned State Attorney whether the order of remitting the record to the trial court after the High Court had dismissed the appeal, was in line with the decisions of the Court on the point, he conceded that in view of that error, it was not. He therefore prayed that we should invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E 2002] (the AJA), to rectify the error.

We accept that invitation, but before we attempt that rectification, we have deemed it relevant to appreciate the fact that there have been different views on the consequences of omission by the trial court to convict an accused person before sentencing him. At the very outset, we must say that the fact that there are different positions on the point is understandable, because each case has its own peculiar circumstances. There are more than two main options to be taken, in our view. One is to order for a retrial, and another is to set aside the decision of the High Court and remit the record to the trial court for it to enter a conviction. However, sometimes the Court has been taking neither of the first two options as in the case of **Abdallah Ally vs. Republic**, Criminal Appeal No. 253 of 2013 (unreported). In that case we stated, *inter alia*: -

> *"As in **Fungabikasi** and **Mlugani** (supra), we have also found it appropriate in the circumstances of this case not to order for a retrial or to set aside the decision of the High Court and remit the record to the trial court to enter a conviction. We have refrained from taking either of the two routes because in our view, it would be a futile exercise on our part and it will not serve the best interest of justice."*

As far back as 2013 in **Ally Rajabu & 4 Others vs. Republic,** Criminal Appeal No. 43 of 2012 (unreported), the Court took the view that

the infraction could be cured by section 388 of the Criminal Procedure Act, [Cap 20 R.E 2002] (the CPA). It quoted its earlier decision in **Bahati Makeja vs. Republic,** Criminal Appeal No. 118 of 2006 (unreported): -

> *"It is our considered opinion that section 388 is absolutely essential for the administration of justice under the CPA. There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative then many proceedings and decisions will be nullified and reversed. We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provisions of section 388. We are, therefore, of the well decided view that the interpretation of the word "shall" given in section 53(2) of Cap 1 must be subjected to the protective provisions of section 388 of the CPA."*

In **Mabula Makoye** (*supra*), we made this statement: -

> *"We think, with the overriding objective in our midst, the position taken in **Musa Mohamed** (supra), **Ally Rajabu & 4 Others** (supra) and **Amitabachan Machaga @ Gorong'ondo** (supra), would be the most progressive path to take in the determination of this appeal. That is why, we think, the first appellate court took a proper path to entertain the appeal, despite the omission by the trial court to*

enter a conviction before sentencing the appellants. After all, that infraction prejudiced nobody, not even the law."

From the examples of caselaw that we have picked, both old and contemporary, the Court has always found ways of dealing with the omission to enter conviction. However, with respect, the route taken by the learned Judge in this case is not one of those that are known. The Court had an occasion to discuss a similar scenario in **Emmanuel Noa & 2 Others vs. Republic**, Criminal Appeal No. 361 of 2016 (unreported), and it stated: -

> *"At this juncture, we wish to state that in view of the clear position of the law in this area, we are compelled to comment, with profound respect, that the procedure adopted by the learned first appellate judge to dismiss the appellant's appeal for lacking merit and thereafter remit the file in Criminal Case No. 15 of 2013 with direction to the trial magistrate to enter conviction was improper. This is so because upon finding that there were no convictions entered against the appellants, the trial court's judgment was rendered a nullity hence no appeal could stand before the High Court [see **Jonathan Mlunguani v. Republic**, Criminal Appeal No. 15 of 2011 (unreported)]."*

Similarly, in the instant case, we think the learned Judge's route was not consistent with any of the previous decisions on the point. We quash the High Court's order of remission of the record as well as the District Court's order of conviction which was entered when the proceedings before the High Court had been concluded. In the interest of justice, we shall step into the shoes of the High Court and do what we did in **Ally Rajabu & 4 Others vs. Republic**; **Abdalla Ally vs. Republic** and **Mabula Makoye & Another vs. Republic** (*supra*). And that is, we are satisfied that the appellant was not prejudiced by the omission to convict, so we shall proceed with the determination of the appeal on the merits.

On the merits of the appeal, Ms. Mapunda urged us to dismiss it on the ground that the best evidence of the alleged rape came from the victim (PW2) and the two courts below found her a truthful witness. She cited the cases of **Isaya Renatus vs. The Republic**, Criminal Appeal No. 542 of 2015 and **Edson Simon Mwombeki vs. The Republic**, Criminal Appeal No. 94 of 2016 (both unreported). The learned State Attorney cited the same two cases to argue that proof that PW2 was 16 years, came from her father (PW4). Further, she submitted, it was not necessary to adduce the evidence of local leaders of Mpanda who allegedly assisted PW3 in tracing PW2, nor the evidence of the owner of the house in which the appellant and PW2

allegedly lived. Ms. Mapunda concluded by submitting that the contradictions in PW2's testimony were resolved.

On his part, the appellant simply prayed that we allow his appeal on the basis of the grounds raised, and restore his freedom.

That the best evidence of sexual offences comes from the victim, is too familiar a principle to require more justification from us. The cases of **Seleman Makumba vs. Republic** [2006] T.L.R 379 and many others on the point, including those cited by Ms. Mapunda, now form a settled principle. On that basis, the best evidence of rape in this case has to come from PW2. We have already made reference to the evidence of PW2, the victim, but all the same, we are going to make it our duty to examine whether she is a reliable witness. We are aware that we seldomly do so, this being a second appeal, and that only when we are satisfied that there was misapprehension or misdirection on the evidence, may the Court re-evaluate it. In **Omari Mussa Juma vs. The Republic**, Criminal Appeal No. 73 of 2005 (unreported), the court cited two of its previous decisions on the point, which are; **Salum Mhando vs. The Republic** [1993] T.L.R 170 and **Deemay Daati & 2 Others vs. The Republic**, Criminal Appeal No. 80 of 1994 (unreported). In the latter case it was stated: -

> *"It is common knowledge that where there is misdirection on evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

We shall examine the quality of PW2's evidence, but before we do so, there is one little observation we need to make in relation to a procedural issue. It must be recalled that the appellant had earlier wanted PW2 to state whether he was circumcised or not. Later in his defence, the appellant appears to have demonstrated in court that he was uncircumcised, and the record clearly shows: -

Court*: Accused shows the court and he is uncircumcised.*

Was it proper for the learned Magistrate to go to that extent and record what he personally observed? Would that procedure apply if the Magistrate and accused happened to be of opposite sex? In our view, this was too much of an indulgence on the part of the learned Magistrate, because in an adversarial system as ours, the court ought not to risk taking part in such inquiry. If the learned Magistrate considered that fact relevant for the determination of the case before him, he should have ordered the appellant examined by a medical personnel who would then submit a report. But as we shall soon see, the learned Magistrate later ruled the fact not relevant in

the determination of the case, which then makes the whole exercise to have been uncalled for.

Now back to PW2's evidence and our appreciation of its quality. We have said in **Manyanda Ncheya vs. The Repulic**, Criminal Appeal No.437 of 2017(unreported), that only the demeanour of a witness is a preserve of the trial court. Consistence and coherence of a witness may be assessed even on appeal; therefore, we shall evaluate PW2's evidence in relation to other evidence on record. We begin with her age. PW2 stated at page 21 that in 2015 she was in Form Two and she was aged 16, but according to her father (PW4), in 2015 PW2 was 17, because he testified that she was born in 1998. Another doubtful fact is the date of the alleged abduction and the date the matter was reported to Bariadi Police station. PW2 said she was abducted on 6/5/2015 at 15.50 hours. According to PW3 and PW4 the disappearance of PW2 was not immediately reported to the police, obviously because it must have taken them time to conclude that she was not going to return home on that day. However, the investigator of the case, WP Neema (PW5), testified that she was assigned the case file involving PW2's abduction on 6/5/2015 in the morning. Was she assigned to investigate a case involving an offence that was yet to be committed? Then, there is the issue of whether or not PW2 raised alarm to seek assistance. Of course, this would not be relevant except for assessing credibility. PW2's contention that

she raised alarm but that the captors muffled it by raising songs, does not make sense at all and it is, in our view, a plain lie. This fact dents PW2's credibility.

Last to consider is the issue whether or not the appellant was circumcised. This again would not necessarily be relevant in proving rape. However, we understand that there are occasions when facts otherwise irrelevant may become relevant. This is what section 13 (b) of the Tanzania Evidence Act, [Cap 6 R.E 2002] (The TEA) provides: -

> *"13. Facts not otherwise relevant are relevant-*
>
> *(a) ....*
>
> *(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."*

In resolving this issue, the learned Magistrate concluded as follows at page 34 of the record of appeal: -

> *"The fact that the accused person is not circumcised while PW2 said he is circumcised does not prove that PW2 is a liar as it does not go to the root of the matter."*

With respect, when considered along with the other inconsistencies we have demonstrated above, that fact affects PW2's veracity and raises doubt in the prosecution case

As we conclude, we find PW2 unreliable, and that the decision that was reached against the appellant based on her evidence, cannot stand. Thus, we allow the appeal, quash the judgments of the District and High Court and set aside the sentence. We order the appellant's immediate release if he is not being held for another lawful cause.

DATED at **SHINYANGA** this 25th 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 26th day of August, 2021 in the presence of the Appellant in person, unrepresented and Mr. Venance Mkonongo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL