IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 329 OF 2018

MARKO BERNARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Mbeya at Mbeya)

(Herbert, SRM. – Ext. Juris)

dated the 18th day of September, 2018
in
DC. Criminal Appeal No. 124 of 2018

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JUDGMENT OF THE COURT

15th & 20th September, 2021

KENTE, J.A.:

Marko Bernard (henceforth the appellant), is a convict currently serving a sentence of thirty years imprisonment which was imposed on him by the District Court of Mbozi District, sitting at Vwawa. That came after he was charged with, and subsequently convicted of rape c/ss 130(1), (2), (e) and 131 (1) of the Penal Code, Cap, 16 RE 2002 (now RE 2019). It was alleged that, on 12th December, 2016 at about 9:00 p.m. at Ivovyo Village within Songwe District in Songwe Region, the appellant had carnal knowledge of a young girl aged eight years to whom we shall hereinafter

simply refer as PW1. The appellant, pleaded not guilty" to the charge, but upon a full trial, he was found guilty and convicted as stated above.

In a nutshell, the evidence leading to the appellant's conviction and sentence, was to the following effect. On 12th December, 2016, PW1 lost physical contact with her mother. In an endeavour to look for her missing mother, she bumped into the appellant who allegedly held her hand promising that he would help her to look for her mother. It is then when the appellant is said to have led PW1 astray to his home and raped her. Having quenched his uncontrollable sex drive by the heinous crime, the appellant allegedly warned PW1 from crying and he went to abandon her at a nearby police station. It remains unclear what followed thereafter but, on the following morning, that is on, 13th December, 2016 at about 8:00 am, one Evans Joseph Mpanji (PW3), the then security secretary for Mpona Ward met Peter Chiganga a village Executive Officer who informed him about PW1's raping on the previous night. In a dutiful manner, the two, joined forces with two members of the peoples' militia to look for the culprit. They were accompanied by PW1 who led them to the house where she was allegedly misled by the appellant and raped but the culprit could not be traced. As they were going back to the village office, PW1 saw the appellant and straightway, she pointed an accusing finger at him for having ravished

her. On being spotted and accused by PW1, the appellant was then and there arrested and taken to the police station where he was detained. PW1 was issued with a police form requesting for medical examination popularly known as the PF3. On being examined by Doctor Charles Mwanshambwa (PW2), PW1 was found to have bruises on her private parts and a perforated hymen.

During the trial, PW1 told the court that, she was able to identify the appellant at the time when she met him and when they were going to his home because it was a moonlit night. The appellant's passionate protestations of innocence before the trial court were in vain. He was convicted as charged and sentenced as previously stated.

Deeply aggrieved by the said conviction and sentence, he appealed to the first appellate court but all to no avail. In this second appeal, the appellant is complaining against the decision of the first appellate court for, **one,** believing the evidence of PW1 which according to him, was not corroborated by the evidence of any other witness, **two,** not taking into consideration that, whereas PW1 was said to be eight years old, no birth certificate was produced to prove her age, **three,** not taking into consideration that he was not properly identified by PW1, **four,** not taking into account that the PF3 (exh. P2) was admitted in evidence without

according him a hearing regarding its admissibility and **five,** not taking into account that the charge against him was not proved beyond reasonable doubt.

Before us, the appellant appeared in person fending for himself. On the other hand, Mr. Njoloyota Mwashubila, learned State Attorney, appeared to argue the case for the respondent Republic. At the outset, the appellant expressed his desire to hear the reply submission to his grounds of appeal by the learned State Attorney after which he would make a rejoinder, if necessary.

Submitting in support of the appeal, Mr. Mwashubila was relatively brief but focussed. When we led him to address the Court on the correctness or else the faultiness of the procedure which was adopted by the trial Magistrate immediately before he went on to take the evidence of PW1 who was a child of tender age, the learned State Attorney told the Court that, the evidence of the victim (PW1) was recorded in contravention of section 127(2) of the Tanzania Evidence Act, Cap. 6 R.E 2002 (now R.E 2019), (the TEA). Mr. Mwashubila went on submitting that, at the time when the evidence of PW1 was taken by the trial court, a child of tender age such as PW1 was required under the law, before giving evidence, to promise to tell the truth and not to lie as opposed to the *voire dire* test

which was conducted by the learned Resident Magistrate of the trial court immediately before she went on to testify.

Mr. Mwashubila invited us to expunge the evidence of PW1 from the record claiming that, the same was taken contrary to the clear provisions of the law. He also submitted that, after expunging the evidence of PW1 from the record, the remaining evidence would not be sufficient to ground a conviction. He pointed out two shortcomings in PW1's evidence namely, **one,** that the evidence of visual identification of the appellant was susceptible to error and **two,** that the actual age of PW1 was not ascertained. In these circumstances, the learned State Attorney was of the view that, an order for a retrial would not be fair. He therefore implored us to allow the appeal, nullify the proceedings, quash the appellant's conviction and set aside the custodial sentence which was imposed on him.

As expected, having heard the friendly submissions made by Mr. Mwashubila, the appellant had nothing substantial to add. He did not want to spoil the beneficial submissions by unnecessary interpolations. To that end, he only joined hands with the learned State Attorney and urged us to order for his release from prison.

Now, going by the record before the trial court (at page 6 of the record of appeal), what transpired immediately before PW1 gave evidence is

reflected by the finding made by the learned trial Magistrate which is couched in the following terms, thus:-

> *"The PW1 did not understand the nature of an oath but she can tell the truth so I hereby proceed to take her evidence, without oath"*

Section 127(2) of the TEA which was already in force on 27th January, 2017 when PW1 appeared to testify in court, provides in clear terms that:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall before giving evidence promise to tell the truth and not to tell any lies".*

The above quoted being the law, it is our respectful opinion that indeed, the learned trial Magistrate strayed into error. Having conducted a *voire dire* test and found out that the child witness did not know the nature of oath, he should not have allowed her to give evidence without oath. Instead, she should have been made to promise to tell the truth and not to lie. In the absence of such a promise, we are inclined to agree with Mr. Mwashubila that indeed, the evidence of PW1 was taken in total violation of the law and, following our earlier decision in the unreported case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), we proceed to expunge the said evidence from the record.

Mr. Mwashubila had another string to his bow. He submitted further that, upon expunging the evidence of PW1 from the record, in the event of a retrial, the evidence of the remaining prosecution witnesses would not be enough to ground a conviction. The learned State Attorney submitted that, if an order for retrial were to be made, that would not advance the prosecution case any further as the evidence of PW1 was materially wanting and the evidence of the remaining witnesses was either equally wanting or else it was hearsay evidence.

After carefully going through the evidence of PW1 as presented before the trial court, we are inclined to agree with Mr. Mwashubila. For, the question which we are required to grapple with here is, if it was not for the expunging of the testimony of PW1 from the record, would that evidence, together with the evidence of other prosecution witnesses be sufficient enough for this Court to uphold the appellant's conviction? With due respect, we think the answer to the above-posed question is in the negative as we shall hereinafter explain.

It is settled law that, in all criminal trials, the prosecution is required to prove the case against the accused person beyond reasonable doubt. It appears to us that, in the present case, given the deficient evidence on the record, even if it were not for the procedural irregularities that have

led to the expunging of the testimony of PW1 from the record and the nullification of the proceedings, we would still hold that the prosecution had failed to attain the evidential standard required by law in order to win a conviction.

Starting with the testimony of PW1 who was the main and the only eye-witness to the rape incident, it is apparent that, she did not put up any plausible explanation as to how she identified the appellant, his physique and attire; the average time he spent with her and whether or not she knew him before the incident. She only told the trial court that she managed to identify him relying on the moonlight. This Court has on several occasions put it clearly that, the evidence of visual identification is invariably of the weakest kind and most unreliable and further that, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. (see: **Waziri Aman v. Republic,** [1980] TLR 250 at 251-252.

In the present case, we find the evidence of PW1 rather wanting and unreliable as it consists a bare assertion that she was able to identify the appellant on the material night which was moonlit. This, in our opinion,

was not enough identification evidence in view of what was held in **Raymond Fransis v. Republic**, [1994] TLR 106 at p. 103 that:

> *"... it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

With regard to the particular assertion made by PW1 that she relied on moonlight to identify the appellant without stating how bright was the said moonlight, this Court had the following to say when faced with a similar situation in the case of **Pontian Joseph v. Republic,** Criminal Appeal No. 200 of 2015 (unreported):

> *"Though under certain circumstances identification relying on moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was "enough moonlight". It is our considered view that, it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained".*

In the second ground of appeal, the appellant had complained that the age of the complainant (PW1) was not proven. Indeed no evidence was forthcoming from the prosecution regarding the age of PW1 and, as a result, throughout the trial, PW1's age remained unascertained. Notably,

the stance of the law is that, in all cases of statutory rape such as the one now under consideration, proof of the age of the victim is cardinal. (see **Rwekaza Bernado v. Republic,** Criminal Appeal No. 477 of 2016 and **Robert Andolille Komba v. DPP,** Criminal Appeal No. 465 of 2016 (both unreported). In the latter cited case, the Court observed that, the law requires that in statutory rape cases, the age of the victim must be proven.

In the instant case, it is apparent that the age of the victim was only cited in the charge sheet and nowhere else save for the assessment made by the trial Magistrate before PW1 gave evidence that she was under ten years. In the unreported case of **Andrea Fransis v. Republic,** Criminal Appeal No. 173 of 2014, the Court had the following to say on the citation of the victim's age by a Magistrate.

> *"... it is trite law that the citation by a Magistrate regarding the age of a witness before giving evidence is not evidence of that person's age."*

Similarly, having found that the age of the victim was not proven by the evidence on the record, the Court concluded in **Robert Andondile Komba,** (supra) that:

> *"... although we agree with the learned State Attorney in her submission regarding the grounds of appeal, our conclusion*

is that, there was no proof of statutory rape because there was no proof of the victim's age."

The only remaining thing that comes to mind in the instant case, is that, perhaps, in order to ascertain the age of PW1, one would have turned to the medical examination report (Exhibit PE1) but the same was neither read out nor were its material contents explained by PW2 to the parties after it was admitted in evidence. The long and short of it is that, the said exhibit was wrongly admitted in evidence and it is hereby expunged from the Court record.

After expunging the testimony of PW1 from the record and, having found the trial of the appellant to have been a nullity, we would have invoked our revisional powers under section 4(2) of the Appellate Jurisdiction Act (Cap. 141 R.E. 2019) (the AJA) to nullify the entire proceedings of the two lower courts and made an order for retrial but for the evidential shortcomings in the prosecution case as amply demonstrated hereinabove. We also have in mind the decision of the erstwhile East African Court of Appeal in **Fatehali Manji v. Republic,** (1966) E.A. 343 from which we can safely deduce that, if not made in a deserving case, an order for retrial, in a criminal case, may provide an opportunity to the prosecution

to go back and fill the gaps which might have been identified and pointed out in the course of appeal

Considering the fact that in the present case, the procedural irregularities leading to the nullification of the trial were essentially raised by the Court of its own accord, pursuant to section 4(2) of the AJA, we hereby nullify the proceedings and judgment, quash the appellant's conviction and set aside the imprisonment sentence meted out on him. We order for his immediate release from prison if he is not otherwise retained for some other lawful causes.

It is so ordered.

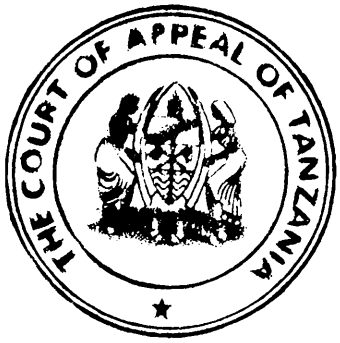
DATED at **MBEYA** this 18th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 20th day of September, 2021 in the presence of the Appellant in person and Mr. Davice Msanga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL