IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 202 OF 2018

YOHANA SAID @ BWIRE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Banzi, J.)

dated the 29th day of June, 2018
in
(DC) Criminal Appeal No. 379 of 2017

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JUDGMENT OF THE COURT

18th September, 2020 & 5th February, 2021

MWARIJA, J.A.:

In the District Court of Ilala at Samora, the appellant, Yohana Said @ Bwire was charged with two counts under the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019) (the Penal Code). In the first count, he was charged with the offence of rape contrary to s. 130 (1), (2) (e) and 131 (1) while in the second count, he was charged with unnatural offence contrary to s. 154 (1) (a) and (2) of the Penal Code respectively. It was alleged

that on diverse dates between the month of March and 2nd April, 2014 at Chanika Masantura area within Ilala District in Dar es Salaam Region, the appellant had carnal knowledge of "Z.F", a girl child aged 9 years by penetrating both her female organ and against the order of nature. For the purpose of hiding her identity, the child who testified as PW1, shall be referred to as PW1 or simply the victim.

The appellant denied both counts and as a result, the case proceeded to trial whereby the prosecution relied on the evidence of six witnesses. At the close of the prosecution case, the trial magistrate found that, whereas the evidence had established a *prima facie* case against the appellant as regards the first count, that evidence was insufficient in respect of the second count. He was therefore, found to have a case to answer in the first count and acquitted of the second count. As for his defence, the appellant relied on his own evidence.

Having considered the evidence tendered at the trial, the learned trial Resident Magistrate found that the prosecution had sufficiently established that the appellant committed the offence of rape against the victim. He was thus convicted and sentenced to life imprisonment. Aggrieved by the

decision of the trial court, the appellant appealed to the High Court. His appeal was unsuccessful hence this second appeal.

The facts giving rise to the appellant's arraignment and his ultimate conviction can be briefly stated as follows: On 2/4/2014 when PW1, who was at the material time a standard III pupil, returned home from school her step mother, Aziza Abdallah (PW2) noticed that she was trudging. When asked about that condition, the victim replied that she was hurt by a stone which accidentally dropped on her leg. PW2 inspected the victim's legs but could not find any signs of injuries. As a result, on 4/4/2014, PW2 decided to take the victim to a dispensary known as Nguvu Kazi where, upon examination by a nurse, one Joyce Mwampaye (PW6), the victim was not found with any injuries on her legs. PW6 found however that the victim had been sexually assaulted.

On that finding, she was taken by PW2 to school where, upon being required to name the person who molested her, PW1 named her schoolmate one Lukumai, a standard III pupil to be the responsible person. However, when that boy was taken to Hospital for medical examination,

the Doctor who examined him expressed that the boy could not have done so because he had not reached the puberty age.

On further questioning by PW2 at home, the victim named the appellant and gave the details of how he used to rape her on three different occasions. On that information, PW2 made a report to Msimbiti Police Station and the victim was issued with Police Form No. 3 (P.F. 3) which she took to hospital for medical examination. She was examined by Dr. Prosperia Joseph Luoga (PW5) on 10/04/2014. In his evidence, PW5 confirmed that the victim was raped. She found further that the victim had whitish discharge from her vagina, the symptom of infection and thus prescribed some antibiotics for her. The witness added in her evidence that, she could not find any signs showing that the victim was sodomized. The P.F 3, in which she posted her findings, was admitted in evidence as exhibit P1.

In her evidence, PW1 narrated to the trial court on how the appellant used to lure and rape her on three different occasions. According to her evidence, the first time when the appellant raped her was in April, 2014. On that day, when she was returning from school and as she was about to

cross the road, she saw the appellant on the opposite side. As there was rainfall and the appellant had an umbrella, he offered to protect her from the rain and thus called her and walked together under his umbrella until they arrived at a certain unfinished building. PW1 went on to testify that, while in that structure, the appellant told her to undress her underpants and lie on her back. She did so and the appellant unzipped his trousers and started to rape her while warning her not to raise any alarm, lest he would kill her. It was her evidence further that, the appellant did so repeatedly at the same place three times and it was during the last incident that she was physically traumatized to the extent that the pains which she sustained made her to walk with difficulty thus drawing her step mother's attention.

Following the report made to the police, and after WP7114 D/C Lucy (PW3) had interrogated PW1, on 10/4/2014 a trap to arrest the appellant was arranged. It was PW3's evidence that, PW1 was required to take the usual route she used to pass when returning home from school. She did so while PW3 and three members of the auxiliary police (polisi jamii) including Florian Paulo Kaijage (PW4) kept on tracking the victim. When the victim crossed the road, the appellant signalled her. She went to him

and while holding her hand, he walked with her to a kiosk in which the business of selling chips was being operated. The appellant was arrested after the victim had disclosed that he was the one who used to rape her.

In his defence, the appellant testified that on 10/4/2014 at 16.00 Hrs; he left his home at Magengeni area, Chanika and went out for shopping. While at the area near a CCM building, he saw her former landlady who was with PW2. He went to a kiosk near a bar where a certain police officer had seated at the counter. Shortly thereafter, he saw her former landlady and PW2 communicating through hand signals and thereafter went to sit closer to him. After a short moment, that police officer told him that he was required to be taken to police station. Another police officer arrived and the duo took the appellant to Chanika Police Station where he found PW1. He was locked up and at about 21.00 Hrs, he was conveyed to Stakishari Police Station.

It was the appellant's defence that the case was framed by her former landlady due to grudges which existed between them as a result of her wife's accusation against PW2 that she used to steal the latter's plates. He testified that as a result of the accusation, PW2 must have

conspired with his former landlady to frame him up. He also challenged the prosecution evidence stating *inter alia,* that the credibility of PW1 is doubtful because at first she named her schoolmate, the said Lukumai as the person who raped her but later changed and said that she was raped by the appellant.

He stated further that, there is inconsistencies in the prosecution evidence with regard to the means of transport used by the members of the auxiliary police who arrested him. He also challenged the reliability of the medical report (exhibit P.1) on the ground that, according to PW5, she examined PW1 on 10/4/2014 while in her evidence, PW2 said that PW1 was taken to hospital on 8/4/2014.

In convicting the appellant of the first count, the learned trial Resident Magistrate relied on the evidence of PW1 which he found to be credible. He found also that such evidence was corroborated by that of PW5, the Doctor who conducted medical examination on the victim. With regard to the appellant's defence, the trial magistrate found that the same did not raise any reasonable doubt to the prosecution evidence. He was of the view that the mentioning at first, by PW1 of another person, as the

one who raped her was due to the threats made to her by the appellant; that he would kill her if she told any person about what he did to her.

On appeal to the High Court, the learned first appellate Judge supported the findings of the trial court. Although she found that exhibit P1 was improperly admitted in evidence because the same was tendered by the prosecutor and therefore, expunged it from the record, the evidence of PW1 which was taken after a *voire dire* test had been properly conducted, was credible. She also agreed with the learned trial Resident Magistrate that the appellant's defence did not raise any reasonable doubt to the prosecution case.

In his memorandum of appeal, the appellant raised six grounds of complaint against the decision of the High Court. They are to the following effect:-

1. That the learned first appellate judge erred in law in upholding the appellant's conviction while the same was based on a defective charge.
2. That the learned first appellate Judge erred in law and fact in upholding the decision of the trial court while in convicting the

appellant, the court acted on the prosecution evidence which was unreliable for being contradictory and inconsistent.

3. That the learned first appellate Judge erred in law by failing to find that the proceedings of the trial court were a nullity as a result of the trial magistrate's contravention of s. 230 of the Criminal Procedure Act [Cap. 20 R.E. 2002].

4. That the first appellate Judge erred in law in upholding the decision of the trial court while in convicting the appellant, the trial Magistrate relied on the testimony of PW1 without giving the reasons for believing her evidence.

5. That the learned first appellate Judge erred in law in upholding the appellant's conviction which was arrived at by the trial court without considering the appellant's defence.

6. That the learned first appellate Judge erred in law and fact in upholding the decision of the trial court while the charge upon which the appellant was convicted was not proved beyond reasonable doubt.

At the hearing of the appeal which was conducted through video conferencing facility linked to Segerea Prison, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Ms. Debora Mcharo assisted by Ms. Saada Mohamed, learned State Attorneys. When he was called upon to argue his appeal, the appellant opted to hear first, the respondent's response to the contents of his grounds of appeal with liberty to make a rejoinder submission, if the need to do so would arise.

In her submission in response to the appellant's grounds of appeal, Ms. Mcharo started by expressing that the respondent was opposing the appeal. She then proceeded to argue the 1st ground and then the 2nd, 4th and 6th grounds of appeal together. She concluded by arguing the 3rd and the 5th grounds together.

On the 1st ground, the learned State Attorney argued that, although in the charge sheet, sub-section (3) of section 131 of the Penal Code was not cited, since that sub-section provides for punishment for the offence which the appellant was charged with in the first count, the omission was not

fatal. She cited the case of **Faraji Said v. Republic**, Criminal Appeal No. 172 of 2018 (unreported) to bolster her argument.

With regard to the 2nd, 4th and 6th grounds of appeal, she argued, first, that the prosecution evidence did not have any substantial contradictions and secondly, that the evidence of PW1 and PW2 was credible. She stressed that the witnesses were credible and according her, that can be gleaned from what transpired during cross-examination. As a result, she went on to argue; having found that PW1's evidence was credible, being the victim of the sexual offence, her evidence was sufficient to found the appellant's conviction. The learned State Attorney cited the Court's decision in the case of **Bashiru Salum Sudi v. Republic**, Criminal Appeal No. 379 of 2018 (unreported) to support her submission. On the appellant's contention that PW1 should not have been found credible because at first, she mentioned her fellow pupil, Lukumai as the person who raped her, Ms. Mcharo opposed that contention. Relying on the case of **Benedict Buyube @ Bene v. Republic**, Criminal Appeal No. 354 of 2016 (unreported), she argued that PW1 gave sufficient explanation, that she did so out of fear of being killed by the appellant who had warned her not to tell any person that he had been having carnal knowledge of her.

As for the 3rd and 5th grounds, the learned State Attorney argued that the two grounds are devoid of merit because, whereas from the original record of the case, the prosecution closed its case, the contention that the appellant's defence was not considered is not correct because the record at page 83 proves to the contrary.

In rejoinder, the appellant insisted that the evidence of PW1 was doubtful on account that it lacked consistence. He submitted first, that the prosecution did not call any witness to prove that Lukumai was incapable of having sexual intercourse and secondly, that the appellant threatened to kill PW1 after he had allegedly raped her.

The appellant went on to argue that, the evidence of PW1 and PW2 is contradictory as regards the date on which the victim was medically examined and the medical personnel who examined her. He contended that in her evidence, PW1 said that she was examined by one Kavishe but that person was not called to testify, Instead it was Dr. Luoga (PW5) who testified that she conducted the medical examination. The appellant maintained that the prosecution witnesses gave inconsistent and contradictory evidence and thus urged the Court to find that the same did

not prove the case against him beyond reasonable doubt. He urged us to allow his appeal and set him free.

We have duly considered the rival arguments made by the learned State Attorney and the appellant. To begin with the 3rd and 5th grounds of appeal, we agree with Ms. Mcharo that the same were raised out of misconception. From the original record, the prosecution closed its case on 17/8/2015. The appellant's contention that the case for the prosecution was not closed, which in any case, would not have been to his disadvantage, is not correct. It is further an incorrect assertion that the appellant's defence was not considered. His defence was considered by the trial court. In his judgment at pages 83 - 84 of the record, the learned trial Resident Magistrate observed as follows as regards the appellant's defence:

> *"However, accused person in his defence told this court that PW1 mentioned someone else knows as Abdul but PW1 said that the accused had threaten to kill her in case she discloses to anyone that why she did not mentioned him at the first instance. Also PW1 mentioned the accused by the name of Abuu,*

because that was the name which accused person told PW1 as his name.

It is the opinion of this court that the accused defence has not filled the gaps in the prosecution case which is strong. Also ***he has failed to raise doubt as to his guiltiness*** *and failed to prove that this case was cooked by mama Mariam.*

[Emphasis added]

That ground is thus similarly devoid of merit.

With regard to the 1st ground, the complaint by the appellant is based on the omission to cite sub-section (3) of s. 131 of the Penal Code which provides the punishment for a person convicted of the offence of rape committed to a girl under the age of ten years. It was the learned State Attorney's submission that the omission did not render the charge fatally defective. She cited the case of **Faraji Said** (supra) to fortify her argument. In that case in which, like in the present case, the penal provision was not cited in the charge, the Court relied on the case of **Burton Mwipabilege v. Republic,** Criminal Appeal No. 200 of 2009 (unreported) to hold that the omission was not fatal hence curable under s. 388 of the CPA:

"As for the penal provision, the section cited was also not proper. Since the victim was 10 years old, the proper punishment section would have been section 131 (3) where life imprisonment is the prescribed minimum sentence, and not section 131 (1) where the minimum sentence is 30 years imprisonment. On the face of it therefore, the charge is illegal in form. But, we agree with Mr. Rwegerera that this is curable under section 388 of the CPA because the irregularity has not, in our view, occasioned a failure of justice."

In the case at hand, although the penal provision was not cited, from the particulars of the offence and the evidence tendered by the prosecution witnesses, the appellant was properly informed of the seriousness of the offence because the victim was a child aged 9 years. It cannot therefore, be said that the omission occasioned a miscarriage of justice to the appellant. We are supported further, by our earlier decision in the case of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported) in which we held that similar omission did not prejudice the appellant because:

"... the particulars of the offence of rape facing the appellant together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices."

In the circumstances, we are of the settled view that the 1st ground of appeal is also lacking in merit.

The 2nd 4th and 6th grounds of appeal challenge credibility of the evidence including that of the victim which was relied upon by the trial court to convict the appellant. It is trite law as stated in the case of **Selemani Makumba v. Republic,** [2006] T.L.R 379 that the best evidence in proving a sexual offence is that of the victim. The Court stated as follows:

"The true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."

In this case, PW1 testified that the appellant had been having carnal knowledge of her on three occasions. The evidence that she had been

raped was supported by PW5. In an attempt to discredit the evidence of PW1 to the effect that he was the one who raped her, the appellant argued that her evidence is unreliable because at first, she mentioned Lukumai as the person who raped and caused her to suffer serious pains on the date when her trudging condition was noticed by her step mother. As sufficiently explained in her evidence, PW1 named Lukumai out of fear of being killed by the appellant who had warned her not to disclose to anyone that he had been having carnal knowledge of her. The trial and the first appellate courts believed the evidence of PW1 as supported by the evidence of the Doctor (PW5) and PW2. On our part, we similarly do not find any substantial contradictions in their evidence.

Furthermore, the contention by the appellant that the evidence of these two witnesses is contradictory as regards the date on which PW1 was examined by PW5 is without merit. PW2 did not say that PW1 was medically examined by PW5 on 8/4/2014. Her evidence was that the medical examination report made by PW5 was posted on the PF. 3 issued at Chanika Police Station on 8/4/2014. The fact that PW1 was medically examined at Nguvu Kazi Dispensary by a different medical personnel does not render the evidence of PW5 invalid on account of being contradictory

to PW1's evidence. It was PW5 who finally examined her at the Regional Referral Hospital, Amana. On the basis of the foregoing, we find no sound reasons to interfere with the concurrent findings of the two courts below. We thus find that the 2nd, 4th and 6th grounds of appeal are also devoid of merit.

In the event, we find that this appeal has been brought without sufficient reasons. The same is thus hereby dismissed in its entirety.

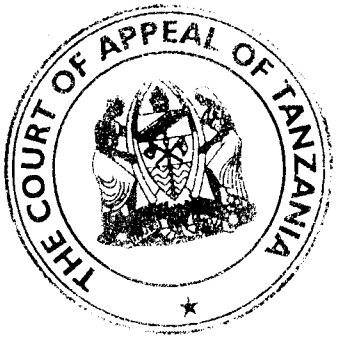
DATED at **DAR ES SALAAM** this 25th day of January, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 5th day of February, 2021 in the presence of appellant in person linked through Video Conference from Ukonga prison and Ms. Monica Ndakidemi, State Attorney for the Respondent Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL