IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 334 OF 2018

OMBENI SANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 13th day of July, 2018
in
DC. Criminal Appeal No. 23 of 2018

.....

JUDGMENT OF THE COURT

17th & 21st September, 2021

KENTE, J.A.:

Ombeni Sanga, the appellant herein, is very much aggrieved by the decision of the High Court sitting at Mbeya Ngwala, J., upholding the decision of the Resident Magistrate's Court – Mbeya which convicted him of the offence of incest by males c/ss 158(1) (a) and 159 of the Penal Code Cap, 16 R.E 20902 (now R.E 2019) and subsequently sentenced him to thirty years imprisonment.

Before the trial Resident Magistrate's Court, it was alleged that on 12th October, 2016 at Itezi Iyunga area within the City and Region of

Mbeya, the appellant had the carnal knowledge of his eleven years old daughter whom we shall hereinafter nickname as PW5.

During the trial, the prosecution called five witnesses and tendered one exhibit (a medical examination report, Exh. PE1) with a view to proving their case. The said witnesses were Detective Corporal Werema (PW1), Wivina Modest (PW2) a medical doctor, Rhoda Gwelela (PW3),the appellant's neighbour, Hamisi William (PW4) a ten cell leader, and (PW5) the victim of the alleged offence.

The evidence led in support of the prosecution case was briefly as follows. The appellant and PW5 were respectively a father and daughter. At the time which is material to the occurrence of the charged offence, PW5 was aged eleven years and she was living with her father, the appellant. On 12th October, 2016 the appellant ordered PW5 to stay home as he went out to cut grass for his indoor cows. After he left, in defiance of her father's PW5, order, went out to play with other children. Upon his return and to his dismay, the appellant found PW5 outside playing in total disregard of his order. He then threatened her that on that day, she would know who he was. He proceeded to cut sticks with which he intended to cane her. He chased and having caught her, he pulled her into his bedroom

where he allegedly gave her two options that is, to be caned or else to allow him to "lay on her," whatever was that second option supposed to mean. Given her tender age, PW5 remained mum for a while after which she begun to cry. The appellant allegedly took a blanket and put a blindfold on her before he went on to undress her and himself and finally inserted his manhood into her private parts.

After satisfying his seemingly irresistible sexual impulses, the appellant went out to feed his cows. That is when PW5 took the advantage of his absence to run away and inform their neighbour (PW3) of what had befallen her. After arrival of some other neighbours who included a ten-cell leader (PW4), the appellant was put under arrest and immediately whisked to a nearby police station. PW5 was subsequently referred to hospital and examined by doctor Wivina Modest (PW2) whose report confirmed that indeed she had been raped. It is on the basis of the foregoing evidence that the denial by the appellant to have had carnal knowledge of his daughter was rejected. The trial Resident Magistrate was satisfied that the case against him, was proved beyond doubt and he consequently proceeded to convict him of incest by males. From the said

decision of the RM's Court, the appellant vainly appealed to the High Court, (sitting at Mbeya), hence the present appeal.

The appellant's memorandum of appeal contains five grounds which can be conveniently summarised as follows:-

1. That the learned Judge of the first appellate court erred in law and in fact in dismissing the appeal relying on the evidence of PW5 in the absence of any other eye witness evidence.

2. That the learned Judge of the first appellate court erred in law and in fact in believing the evidence of PW4 who told the trial court that a blood spattered mattress and clothes were recovered from the appellant's home while the said items were not exhibited in court.

3. That the learned Judge of the first appellate court erred in law in dismissing the appeal notwithstanding the fact that exhibit PE1, a medical examination report was not read out after it was admitted in evidence.

4. That the learned judge of the first appellate court erred in law and in fact in dismissing the appeal without taking into account that the charge against the appellant was not proved to the required standard; and;

5. That the defence of the appellant was not given consideration by the trial court.

Before us, the appellant appeared in person and therefore he had to fend for himself while the respondent's case was argued by the combined forces of Mr. Saraji Iboru, learned Principal State Attorney, Ms. Sara Enesius and Mr. Davice Msanga both learned State Attorneys. On being invited to expound on the grounds of appeal, the appellant simply adopted them and thereafter he successfully requested for the learned State Attorney to start the ball rolling by making a reply submission after which, if it would be necessary, he could make a rejoinder.

Submitting on behalf of the respondent, Ms. Enesius who argued this appeal put forward the argument, in respect of the first and second grounds that, it was not necessary under the law for the evidence of PW5 to be corroborated by some other independent evidence. The learned State Attorney took the view and we think correctly so that, under normal circumstances, sexual offences are committed in secrecy away from the public and further that, PW5 had given sufficient and cogent evidence showing that indeed she was ravished by the appellant on the day of the incident. Ms. Enesius submitted further that, it was not necessary for the mattress and the clothes spattered with blood to be exhibited in court. The thrust of Ms. Enesius' submission was that, in view of the provisions of

s. 127(6) of the Evidence Act, Cap. 6 R.E 2019 (the Evidence Act), the evidence of PW5 in this case did not require any corroboration. In support of the above submission, the learned State Attorney referred us to our decision in **Selemani Makumba V. Republic,** [2006] TLR 379 in which, among other things, this Court observed that, the best evidence of rape or any other sexual offence must come from the victim. The learned State Attorney's point is essentially that, after the evidence of PW5 was given credence by the trial court it could form the basis of a conviction and therefore the appellant's complaint in the first and second grounds of appeal are without basis, both in law and in fact.

As for the third ground of appeal which faults the learned judge of the first appellate court for dismissing the appeal without taking into account the glaring fact that the medical examination report (Exhibit PE1) was not read out in court after it was admitted in evidence, in view of the provisions of s. 6(7) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019, (the AJA) which gives this Court the mandate to deal with the issues of law only as opposed to matters of fact, Ms. Enesius was hesitant to canvass the said ground in her submissions but after we impressed upon her that the appellant's complaint on that aspect was much more of a legal than a

factual issue, the learned State Attorney gracefully conceded that indeed, after it was admitted in evidence, exhibit PE1 was not read out to the parties to enable them to appreciate the nature and implication of the evidence which it contained. However, Ms. Enesius was of the view that, in any way, the appellant was not prejudiced as PW2, a Medical Doctor who examined the victim and prepared the said report, appeared to testify before the trial court and gave oral evidence clearly touching on what was contained in the said exhibit. The learned State Attorney cited the case of **Chrisant John V. Republic,** Criminal Appeal No. 313 of 2015 (unreported) to support of her stance and she finally urged us to dismiss the third ground of appeal for want of merit.

Dealing with the fourth ground of appeal and, in view of the evidence led by the prosecution side, Ms. Enesius was of the view that, all in all, the case against the appellant was proved to the required legal threshold for the prosecution to win a conviction. Once again, relying on the decision of the Court in **Chrisant John** (supra), she submitted that the evidence of PW2, PW3 and PW5 was sufficient enough to ground a conviction. The learned State Attorney credited PW5 for having mentioned the appellant at

the earliest opportunity when she came into contact with PW3 who was passing by immediately after the sexual abuse incident.

Coming to the fifth and the final ground, Ms Enesius submitted very briefly that, as opposed to the appellant's complaints, his defence evidence was considered by the trial and the first appellate court and that, on that account, the complaints in the fifth ground of appeal have neither a factual nor legal basis. She therefore urged us to dismiss the appellant's lamentations for being unfounded.

During his turn, the appellant had nothing meaningful to expound on his grounds of appeal. He only complained, in relatively general terms that, the charge against him was not proven to the required standard. Given the circumstances, we shall proceed to consider the grounds of appeal as presented against the arguments advanced by Ms. Enesius on behalf of the respondent.

It is apparent that, when combined together, the first and second grounds of appeal are centred on the provisions of section 127(6) of the Evidence Act, which was relied upon by the 1st appellate Judge in her impugned judgment and which provides that:

> *"Notwithstanding the preceding provisions of this section, where in Criminal Proceedings involving sexual offence the*

only independent evidence is that of child of tender years or of a victim of a sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of the tender years or as the case may be the victim of the sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

Going by the above-quoted provisions of the law, it is certainly clear that, the only criterion in deciding whether the evidence of a child of tender age or a victim of a sexual offence in a criminal proceeding involving a sexual offence is sufficient to support a conviction, is that the court, for the reasons to be recorded in the proceedings, should be satisfied that such evidence, though uncorroborated, is nothing but the truth.

Evaluating the evidence of PW5 in this case, like the trial Magistrate, the learned Judge of the first appellate court was satisfied that the said evidence of the child victim, whether taken alone or together with the evidence of PW2, was sufficient to support a conviction. She thus dismissed the appellant's flimsy defence version that he was not at home at the time which is material to the commission of the charged offence.

The appellant's main contention here is essentially that, the evidence of PW5, a child of tender age, was not materially corroborated and that the mattress and the clothes which were said to have been splattered with blood as a result of the forced sexual act were not tendered in court as exhibit to render credence to the evidence of PW5. With due respect to the appellant, in view of s. 127(6) of the Evidence Act which we quoted earlier, we find his complaints wanting both in law and in fact. There was overwhelming evidence that after his instructions to PW5 to remain home were thrown out of the window, the appellant went on directing his sexual frustrations to the defenceless little girl who as it turned out, was his own daughter. In the course of the forced sexual encounter, PW5 suffered great pain, cried bitterly and, on being released, she quickly ran away and sought the assistance from the appellant's neighbours. The said neighbours intervened by arresting the appellant and handing him over to the police. Thus, it seems plain to us that the appellant was arrested immediately after he committed the unspeakable sexual act with his own daughter. Indeed, as the learned Judge of the first appellate court held, while following our decision in **Selemani Makumba v. Republic,** [2006] TLR 379, in rape or sexual related cases, the best evidence is the one which

comes from the victim.(See **Edward Nzubuga v. Republic,** Criminal Appeal No. 136 of 2008 (unreported)). For, in our respectful view, if both statutory and case law were to insist on the requirement for corroboration evidence, the journey to victory against the sexual offences which are on the alarming increase would always remain far from being won.

Looking at the case as a whole, it can be said, without the slightest hesitation that, this is one of the few cases where the sexual offence was proven beyond reasonable doubt. The learned Judge of the first appellate court gave credence to the testimony of PW5 which in our respectful view was appropriate under the circumstances, as (PW5) appeared to be a credible witness. In the premises, the first and second grounds of appeal are dismissed for lack of merit.

As for the third ground of appeal, it must be apparent and common ground that, indeed exhibit PE1 was not read out in court after it was admitted in evidence. Needless to say, that omission was contrary to the position of the law as evolved through our various judicial decisions. (See: **Sylivester Fulgence & Another v Republic,** Criminal appeal No. 507 of 2016, **Sumni Amma Awenda v. Republic,** Criminal Appeal No. 393 of 2013 and **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017

all of which are unreported). We therefore find, in the light of the above-cited authorities that, in the instant case, the said exhibit was wrongly admitted in evidence and we accordingly expunge it from the court record.

However, we shall briefly explain why in our opinion, we think the appellant could not have been prejudiced by the omission to read out the contents of exhibit PE1 immediately after it was admitted in evidence.

It is common ground that PW2 appeared to testify before the trial court. Her oral testimony was clear that she examined PW5 and found some raw bruises on her private parts. PW2 also told the trial court that PW5 was bleeding and her hymen was removed. Apart from not objecting to the admissibility of the impugned medical examination report, the appellant did not put any meaningful questions to PW2 suggesting that he did not understand what were the findings by PW2 after she conducted a medical examination on PW5. In fact, contrary to his complaint, the two questions put to PW2 by the appellant during the cross-examination suggest that, he was made aware of what was contained in exhibit PE1. That would appear to support Ms. Enesius' argument that the omission to read out the contents of Exhibit PE1 did not in any way prejudice the appellant because, through the testimony of PW2, the appellant was able

to know the most important part of her evidence as borne out by the two pertinent questions the appellant put to PW2 during the cross-examination. Likewise, the third ground is found to be lacking in merit and in consequence, it is hereby dismissed.

Finally is the complaint by the appellant that his defence evidence was not considered. With due respect, this complaint is without merit. Perhaps it seems that in order for the appellant to believe that indeed his defence evidence was considered by the first appellate court, it must have been accepted and his appeal allowed. That seems to be a common misconception among the appellants in criminal cases and the appellant in the instant case, appears to subscribe to that school of thought.

With due respect, as we have just stated, this is a complaint bereft of merit as the learned Judge of the first appellate court had dutifully considered the appellant's defence (at page 49 of the record of appeal) and finally held that his defence evidence did not introduce any doubt in the prosecution case. We find, in the premise that the appellant's complaint in the fifth ground of appeal is wanting in merit and we accordingly dismiss it.

All in all, it follows in our final view that, the appellant's guilt in this case was proven beyond doubt as found by the trial court and subsequently upheld by the first appellate court, upon appeal. In the event, the appeal is dismissed in its entirety and it is so ordered.

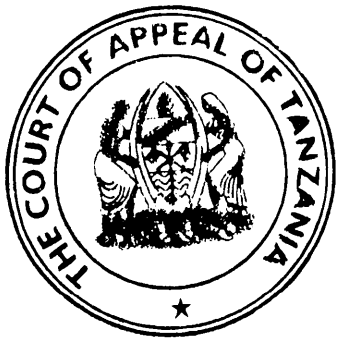
DATED at **MBEYA** this 21st day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 21st day of September, 2021 in the presence of the Appellant in person and Mr. John Kabengula, 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