IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 437 OF 2019

JOHN KIHOMBO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 7th day of October 2019
in
DC. Criminal Appeal No. 11 of 2019

JUGMENT OF THE COURT

14th & 23rd September, 2021

MWARIJA, J.A.:

In the Resident Magistrate's Court of Njombe, the appellant, John Kihombo was charged with the offence of rape contrary to ss. 130 (1) & (2) (a) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019) (the Penal Code). It was alleged in the substituted charge, that on 26/1/2018, he did have carnal knowledge of "L.M." (real name hidden for the purpose of protecting the victim's dignity), a woman aged 18 years without her consent. Previously, in the preceding charge however, the

appellant was charged under ss.130 (1) & (2) (e) and 131 (1) of the Penal Code. Paragraph (e) of s. 130 (2) applies to victims of rape who are under the age of 18 years.

The appellant denied the charge and as a result, the case proceeded to a full trial at which, whereas the prosecution called five witnesses, the appellant testified as the only witness for the defence. At the conclusion of the trial, the appellant was found guilty. He was consequently sentenced to thirty years imprisonment. He unsuccessfully appealed to the High Court hence this second appeal.

The facts leading to the arraignment and finally, the conviction and imprisonment of the appellant may be briefly stated as follows: On 26/1/2018 at about 15:00 hrs, L.M. (the victim) who was in the company of Christian Balama and Semeni Ngoda, the children aged 17 and 12 years respectively, went to search for wild mushroom in the forest which is close to two secondary schools of Naboti and MCF. While in the forest, they noticed the presence of a person who had put on uniform akin to the type worn by watchmen or militiamen. That person called them and required them to explain why they had entered into the forest without authorization. The victim explained to him that they were merely mushroom foraging.

Despite the explanation by the victim, that person, told the trio that they were liable to be punished by him and described the types of punishments for each of them. The victim was ordered to frog-jump, Christian to kneel down but Semeni was only ordered to sit down. Shortly thereafter, he ordered Christian an Semeni, one after another, to get out of the forest running. They obeyed and as a result, the culprit remained with the victim alone.

In her evidence, the victim who gave evidence as PW1, testified that, after having remained with the culprit, he took her in the interior of the forest at the area comprised of valleys. At that point, he grabbed her by the neck, fell her down and forcefully had carnal knowledge of her after he had removed her underpants. Having molested her, the culprit ordered the victim to get out of the forest. She went on to state that, she dressed herself and went home where upon she informed her aunt, Josepha Balama, about the incident. PW1's aunt who testified as PW4, reported the matter to the police where, PW1 was issued with a PF3 and went to hospital for medical examination and treatment. She went to Mbugani Hospital and was medically examined by Omari Jeilan, a Clinical Officer. According to his evidence, the Clinical Officer, who testified as PW5, said that upon examining PW1, he revealed that she was penetrated

of her vagina and that he noticed the presence of sperms in her private parts.

Christian and Semeni also testified in the trial court as PW2 and PW3 respectively. In his testimony, PW2 supported the evidence of PW1 as regards what happened after they had entered in the forest and met the culprit who later on, ordered him and PW3 to run away from the forest. It was his evidence further that, he had known the culprit before the date of the incident, that he is the appellant whom he used to see at Naboti Secondary School where he had been taking milk to some of the school's employees.

The testimony of PW1 was supported also by the evidence of PW3 as regards the ordeal which the trio encountered from the time they entered into the forest until the culprit chased her and PW2 out of the forest. It was her evidence further that, PW2 informed her that the culprit was known to him as the watchman of Naboti Secondary School, that he used to see him at that school.

In his defence, the appellant, who admitted that he was until the material time of the incident, employed by Naboti Secondary School as a watchman, stated that he was arrested by the police on 27/1/2018 at his work place. After his arrest, he said, he was taken to police station where

he was locked up for three days without being informed of the reason for his restrainment. It was after the third day of his restrainment that he was informed of the complaint against him that he raped PW1. He went on to testify that, after having stayed in the police lockup for four days, PW1 and some of her relatives were brought to the police station for the purpose of identifying him but could not, at first, pinpoint him to be the person who raped her. He said that, PW1 identified him after being threatened to be charged if she persisted to refuse to point him out as the offender.

The appellant who admitted that he had been known to PW2 before the date of the incident, challenged the evidence tendered by the prosecution witnesses contending that their evidence was contradictory as regards the time of commission of the offence. He asserted that, while PW1 said it was at 15:00 hrs, PW2 said it was at 17:00 hrs. He thus questioned the credibility of PW5's evidence to the effect that PW1 was raped three hours before he examined her.

In her decision, the learned trial Resident Magistrate was satisfied that the appellant was properly identified at the scene of crime by PW2 who had known him before as the watchman of Naboti Secondary School. She was also of the opinion that, from the evidence of PW1 and the fact

that she was left in the forest with the appellant alone as testified by PW2 and PW3, the appellant's guilt was established to the hilt. She found that the appellant's defence did not raise any reasonable doubt in the prosecution evidence.

In upholding the decision of the trial court, the High Court (Matogolo, J.) observed that the evidence of PW1 which was corroborated by that of PW2, PW3 and PW5, was sufficient to prove the case against the appellant. Relying on the case of **Selemani Makumba v. Republic,** [2006] T.L.R. 379, the learned first appellate Judge found that, in any case, the evidence of PW1 in itself was cogent enough to found conviction.

He agreed further with the trial court that the appellant was properly identified by PW1 and PW2 who was known to him before the date of the incident. From the circumstances under which the appellant's identification was made, that it was in broad day light and the fact that PW2 had known the appellant before, it was the learned Judge's view that identification parade was not necessary. He relied to that effect, on the case of **Mustafa Ramadhani Kihiyo v. Republic**, [2006] T.L.R. 323. On those considerations, like the trial court, the High Court was satisfied that the appellant's defence did not raise any reasonable doubt in the prosecution case. The appeal was thus dismissed in its entirety.

As shown above, the appellant was further aggrieved by the decision of the High Court and thus preferred this appeal. In his memorandum of appeal,the appellant raised six grounds. The same may however, be consolidated into four grounds as paraphrased below:

1. That the learned first appellate Judge erred in upholding the decision of the trial court based on the proceedings which were a nullity for the failure by the successor Magistrate to comply with s. 214 of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019].
2. That the learned first appellate Judge erred in law and fact in upholding the trial court's finding that the case was proved beyond reasonable doubt while there was a delay in filing the charge, the fact which, if the trial magistrate had considered would have decided otherwise.
3. That the learned first appellate Judge erred in law and fact in upholding the trial court's decision while the appellant's conviction was based on the evidence which is in variance with the charge because after amendment of the charge, s. 234 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] was not complied with.

4. That the learned first appellate Judge erred in law and fact in upholding the appellant's conviction based on the evidence of PW1 which lacked credibility on account of her delay in naming the appellant immediately after the incident and the evidence of PW2 and PW3 which does not show the efforts made by them to prevent the commission of the offence against the victim.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Yahaya Misango, learned State Attorney. When he was called upon to argue his grounds of appeal, the appellant opted to hear first, the respondent's reply to the contents of the grounds of appeal and thereafter, would make his rejoinder submission, if the need to do so would arise.

Submitting in reply to the first ground of appeal which subsume the 1st, 2nd and 3rd grounds of the appellant's memorandum of appeal, Mr. Misango argued that the appellant's complaint is without merit because his contention is not supported by the record. Section 214 (1) of the CPA on which the appellant based his complaint states as follows:

> *"214 – (1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings."*

Mr. Misango submitted that, according to the proceedings at page 26 of the record of appeal, the successor Magistrate stated the reason for the transfer of the case to him, that it was because the predecessor Magistrate was transferred to another station. The learned State Attorney went on to state that the successor magistrate also proceeded to inform the appellant of his right to require that the witnesses who had already testified be re-summoned and the trial be recommenced. According to the record, Mr. Misango went on to state, the appellant preferred that the

case be proceeded with from the stage at which the predecessor magistrate ended. The appellant did not make any substantial rejoinder to the learned State Attorney's reply submission against this ground of appeal.

Indeed, as submitted by Mr. Misango, the successor Magistrate duly complied with s. 214 (1) of the CPA. This is reflected at page 26 of the record of appeal. The relevant part of the proceedings reads as follows:

> *"**Manja, State Attorney**: For hearing today, the matter was being heard by Hon. Kapokoio who was transferred.*
>
> ***Accused:** I suggest we proceed with the case where it has reached.*
>
> ***Manja, State Attorney:** I also suggest that we proceed [from] where the case had reached.*
>
> ***Court:** This matter was being presided over by Hon. Kapokolo who had recorded testimony of four witnesses. The said Hon. Kapokolo has been transferred to Bukoba. I have read the proceedings recorded by Hon. Kapokolo I have understood them and I will act upon them there will be no need of resummoning the said four witnesses.*

Sgd. M.N. Ntandu, RM

18/7/2018."

It is clear from the above excerpt of the proceedings of the trial court dated 18/7/2018 that the successor Magistrate complied with s. 214 (1) of the CPA. The first paraphrased ground of appeal is therefore, devoid of merit. It is thus dismissed.

The appellant has also complained, in the 3rd ground of appeal, of another procedural irregularity. He contends, in essence, that the decision of the trial court which was upheld by the High Court, is erroneous for having been based on the proceedings which were a nullity for non-compliance with s. 234 (2) of the CPA. Mr. Misango admitted that, after the charge was substituted following the prosecution's realization that the tendered evidence was in variance with the charge, s. 234 (2) of the CPA was not complied with. That provision states as follows:

> *"234 – (1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case*

unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection -

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the Court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined

unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."

It was the learned State Attorney's submission that although after amendment of the charge, s. 234 (2) (b) of the CPA was not complied with by informing the appellant of his right to required that the witnesses be recalled, the omission did not occasion any injustice to the appellant. This, he said, is because it was the age of the victim which necessitated substitution of the charge and thus despite the substitution, the particulars of the offence remained the same. On his part, the appellant did not have any argument to make by way of a rejoinder, understandably because the issue involved in this ground is one of law.

It is a correct position as contended by the appellant and conceded to by the learned State Attorney that, on 14/8/2018 after the charge had been substituted, although the learned trial Resident Magistrate complied with s. 234 (2) (a) of the CPA by taking the appellant's plea, she did not comply with paragraph (b) of that provision.

Having considered the nature of the variance which made the prosecution to substitute the charge and the fact that the appellant's plea

was taken, we agree with Mr. Misango that the omission did not occasion miscarriage of justice. As shown above, the amendment was intended to correct the category of rape shown in the preceding charge because, although the victim was aged 18 years, s. 130 (2) (e) of the Penal Code was cited thus purportedly showing that the victim was a minor. Since therefore, the amendment had the effect of reflecting the proper category of rape based on the age of the victim, such amendment did not, in our view affect the validity of the tendered evidence.

In the case of **Issa Reji Mafita v. Republic**, Criminal Appeal No. 332 'B' of 2020 (unreported), the Court considered the effect of the omission to comply with s. 234 (2) (b) of the CPA in a situation similar to the one in the present case. Having considered the nature of the irregularity, it held as follows:

> *". . . since the amendment had the effect of substituting the incorrect penal provision with the correct one and in view of the fact that the sentence in the substituted charge is lesser than in the initial one, the omission was unsignificant and not prejudicial to the appellant. It did not therefore, affect the substantial validity of the judgment and proceedings of the trial court."*

See also the case of **Samwel Paul v. Republic,** Criminal Appeal No. 312 of 2018 (unreported). In that case, the charge was substituted so as to reflect the proper date of the offence. Like in this case, whereas paragraph (a) of s. 234 (2) of the CPA was complied with, there was an omission to comply with paragraph (b) of that section. Dismissing the argument that the omission had prejudiced the appellant, the Court observed as follows:

> *". . . we find that the failure to recall witnesses is curable since the substitution of the charge sheet did not in any way affect the substance of the evidence given by PW1 and PW2 and thus did not occasion any injustice on the part of the appellant."*

It is trite therefore, that in determining the effect of the failure to comply with s. 234 (2) (b) of the CPA, what is to be looked at as a guiding principle is whether or not the amendment has substantially affected the validity of the evidence. As stated above, in the particular circumstances of this case, the amendment did not have that effect and therefore, did not prejudice the appellant. This ground of appeal is thus devoid of merit.

Reverting now to the 2nd ground of appeal, the appellant challenges the credibility of the evidence which was acted upon to found his

conviction. He contends that there was a delay by the prosecution to charge him after his arrest. He complains that, although he was arrested on 26/1/2018, he was charged in court on 19/2/2018. In his reply, the learned State Attorney argued that the delay did not prejudice the appellant because it did not have any effect on the witnesses' evidence. That notwithstanding, Mr. Misango went on to argue, the complaint was not raised in the trial court.

We think we need not be detained much in disposing of this ground of appeal. As submitted by the learned State Attorney, the appellant did not raise that ground at the trial. Had he done so, the prosecution would have the opportunity of giving the reasons for charging him after the period of about 23 days of the date of his arrest. Being a new ground therefore, the appellant's complaint cannot be entertained at this stage of the proceedings. – See for instance, the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015, **Galus Kitaya v. Republic,** Criminal Appeal No. 196 of 2015 and **Emmanuel Josephat v. Republic,** Criminal Appeal No. 323 of 2016 (all unreported).

In the first case above, the Court observed as follows on that principle:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided, not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

Guided by that principle, we find that this ground is also devoid of merit.

In our considered view, the finding on the 2nd ground answers also the appellant's complaint in the 4th ground of appeal. His contention in that ground is that PW1 delayed to name the appellant at the earliest opportunity. It is his contention also that PW2 and PW3 did not take any efforts to prevent PW1 from being raped by the appellant. The contentions were opposed by the learned State Attorney arguing first, that PW1 reported the incident to PW4 immediately after she had arrived at home and secondly, that PW2 and PW3 could not assist PW1 because they were not aware that the appellant chased them away from the forest with the intention of raping PW1. It is clear however, as stated above that, like in the 2nd ground of appeal, this complaint was not raised by the appellant in his appeal before the High court. The two grounds of appeal are therefore, devoid of merit and are thus hereby dismissed.

In the course of his submission, the appellant raised an additional ground based on the point of law that, the learned first appellate Judge erred in law and fact in upholding the decision of the trial court which was based on insufficient evidence of identification. It was his argument that, since according to her evidence, PW1 did not identify him at the scene of crime, both courts below erred in acting on her identification evidence to convict him. Replying to that additional ground of appeal, Mr. Misango contended that the same is meritless. He argued that, according to the evidence, apart from the evidence of PW1, the appellant was properly identified by PW2 at the scene of crime and that such evidence of identification of the appellant was not doubtful because in his defence evidence at page 37 of the record, the appellant admitted that he was known to the said witness before the date of the incident.

Having considered the evidence on record and the parties submissions on this ground of appeal, we find that, as held by the two courts below, the evidence of identification of the appellant is watertight. As submitted by the learned State Attorney, the appellant had been known to PW2 before the date of the incident. That fact was admitted by the appellant in his defence. PW2's evidence is to the effect that he met the appellant at the scene of crime on the date of the incident. It was during

the day and therefore, the possibility of a mistaken identify could not arise. We do not therefore, find merit in this ground of appeal. Consequently, the same is also dismissed.

On the basis of the foregoing reasons, we are certain that this appeal has been brought without sufficient reasons. We accordingly hereby dismiss it in its entirety.

DATED at **IRINGA** this 23rd day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of September, 2021 in the presence of John Kihombo, the Appellant in person and Ms. Radhia Njovu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL