IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 165 OF 2018

BARNABA CHANGALO .... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.. RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Sumbawanga)

(Mgetta, J.)

dated the 26th day of January, 2018
in
Criminal Appeal No. 56 of 2016

....

JUDGMENT OF THE COURT

24th February & 2nd March, 2021

LILA, J.A.:

Barnaba Changalo, the appellant, was arraigned before the district court of Mpanda and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131(1) (3) of the Penal Code [Cap 16 R.E. 2002]. He was sentenced to serve life imprisonment. His first appeal to the High Court failed, hence the present appeal. He is challenging both conviction and sentence.

It was alleged that, the appellant on 27th October 2014 at about 15:00hrs at Milala village within Mpanda District in Katavi Region, did have unlawful sexual intercourse with a school girl aged six (6) years. For purposes of hiding her identity, we shall refer to her as the "victim" in the course of this judgment.

During the trial, the prosecution marshalled five witnesses and produced one documentary exhibit, a PF3 (exhibit P1). No witnesses were called by the appellant in defence other than himself. He was, therefore, the sole defence witness.

The substance of the evidence, albeit in brief, by both sides was that; on 26/10/2014, the appellant, a traditional healer, visited the house of Aziza Athuman (PW3) in which he stayed with the victim (PW1) and one Paschal Adam (PW2). Apparently, the appellant was well received. He spent a night in PW3's house. The following morning (27/10/2014), PW2 left for the farm while the victim went to school. As she was sick, PW3 remained at home. She was given medicine by the appellant and remained in the house. Later that day, PW2 returned from the farm, took food and had a short rest. The victim also returned home from school. As she had a

wound on his hand, the appellant attended it by rubbing on it with some medicine. Then, the appellant pulled her into the bath room, took off his trouser, undressed her and inserted his manhood into her female organ. She felt pain but could not shout because the appellant covered her mouth. Shortly thereafter, PW2 went to the toilet for a shot call only to find the door closed. Upon knocking it, the appellant replied that he was in the toilet. PW2 kept waiting for the appellant to be through but a long time passed. Suspicious of what was happening, PW2 peeped through the door of the toilet. He saw the appellant carnally knowing the victim, his younger sister. Shortly thereafter, the appellant got out from the toilet. PW2 reported the matter to PW3 who, upon checking the private parts of the victim, to her total disbelief, found the victim's vagina swollen and had bruises. With the help of Haji Musa Salumu (PW4), the appellant was arrested and taken to the police station. The victim was later sent to hospital. Mohamed Kabuma (PW5), a medical Practitioner, examined her and found bruises in her vagina and, strange enough for a girl of that age, there was no hymen. He filled a PF3 and tendered it in court and was admitted as exhibit P1.

In his sworn defence, the appellant admitted visiting PW3's house which was just beside the road and spending a night therein. That was following a breakdown of the motorcycle he had hired to rush him to a motor van which he had missed that morning so as to take him to Igora area in Mpanda. He had herbs in his bag. He was taken to Village Chairman where he introduced himself and went back to PW3's house where he spent a night. The following morning (27/10/2014), PW3 reported to him over her aching leg and the victim being bewitched. He started treatment on an agreement of being paid TZs 200,000.00. To his surprise, at 16:20hrs, while having a walk he was arrested by two youths on accusation of raping the victim, which he denied. He was beaten and his TZs 25,000.00 which was in his pocket as well as his shoes were taken away. He claimed that the case was a framed up one by PW3 aimed at avoiding paying him his dues.

After a full trial the trial court was convinced that the prosecution had proved the charge against the appellant beyond reasonable doubt. It convicted him as charged and sentenced him to serve a life imprisonment. Dissatisfied, the appellant appealed to the High Court. He sought to

impugn the trial court's finding upon a four point memorandum of appeal. For a reason to be apparent later,we hereunder recite the said points on which the appellant's appeal was premised:-

1. ***That,*** *the trial court erred both in point of law and fact when it convicted and sentenced the appellant on the offence which was not proved beyond any reasonable doubt.*
2. ***That,*** *your Lordship trial court was erred in law and fact of not discover that the evidence testified in court by PW2 was totally wrong and cooked because if he knocked the door or the toilet, why he failed to enter direct because there is no door and why her daughter failed to raise an alarm for help.*
3. ***That****, the trial court erred both in point of law and fact of not discover that this case was planned by PW1 and PW2 after failing to pay charges of Tshs 200,000/= after treating their grandmother.*
4. ***That****, the trial court erred in law and fact for failure to discover that the evidence testified by PW3 before the court was hearsay evidence.*

In this appeal, the appellant has fronted four grounds of grievances which may be paraphrased thus:-

> *"1. That, the 1st appellate court erred in law to uphold a conviction for failure to note that there were fundamental contradictions and*

inconsistence on the adduced evidence by PW3 and that the trial court wrongly relied on the evidence by PW1, PW2 and PW3 who are family members.

(a) This case is registered as Criminal Case No. 525 of 2014 but the PF3 was referred to Criminal Case No. 522 of 2014 which is a different case.

2. *That, the 1st appellate court wrongly dismissed by appeal basing on PW5 (Doctor) evidence which was problematic. For failure to give details on how the alleged bruises could be caused and that it was filled on the second day.*
3. *That, the 1st appellate court erred in law to dismiss his appeal for failure to consider that the voire dire examination was conducted contrary to the mandatory requirements of the law.*
4. *That, the trial court wrongly upheld the conviction basing on the prosecution evidence without examining and evaluation of his defense evidence which occasioned a failure of justice.*

Before us, the appellant appeared without any legal representation and he was duly linked through video conference from Ruanda Prison. For the respondent, the Director of Public Prosecutions, Mr. Njoloyota Mwashubila, learned Senior State Attorney, appeared and resisted the appeal. The appellant had nothing to add after adopting his grounds of

appeal and urging the Court to allow his appeal. Even in his rejoinder, he reiterated his earlier prayer that his appeal be allowed.

In his response to the appeal, Mr. Mwashubila pressed us to dismiss it for want of merit. Arguing in respect of grounds one (1) and two (2) of appeal, he contended that the Court lacks jurisdiction to entertain them because they are being raised before the Court for the first time as they were not raised and determined by the High Court, the first appellate court. To augment his contention he relied on the Court's decision in the case of **Galus Kitaya vs Republic**, Criminal Appeal No. 196 of 2015 (unreported). In the circumstances, he urged the Court to disregard them. This complaint need not detain us much, for this court has consistently taken stance that in second appeals as is the case herein, unless a new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction. That is in terms of section 6(7)(a) read together with section 4(1) of the Appellate Jurisdiction and Rule 72(2) of the Tanzania Court of Appeal Rules, 2009. Our decisions in the case of **Galus Kitaya vs Republic** (supra) and **Julius Josephat vs Republic**, Criminal Appeal No. 3 of 2017 and **Kenedy Owino Onyango and Others**

vs Republic, Criminal Appeal No. 48 of 2006 (both unreported) cemented that stance. In the instant case we have purposely reproduced the appellant's grounds of appeal fronted before this Court and before the High Court. Upon a close cross-checking of them, it is vivid that grounds one (1) and two (2) which touch on contradictions and unreliability of the testimonies of the prosecution witnesses (PW1, PW2 and PW3), the case number referred in the PF3 and how the Doctor (PW5) arrived at the conclusion that the victim was raped which are factual in nature were not raised and considered by the High Court. We, on the cited provisions and authorities, lack jurisdiction to entertain them. We, accordingly disregard them.

In ground three (3) of appeal, it is the appellant's complaint that the conduct of *voire dire* test was problematic. As the appellant did not elaborate his grounds of complaints, we had the disadvantage of grasping the gist of his complaint. That notwithstanding, the learned Senior State Attorney dismissed this complaint as being unfounded. Examining the nature of questions asked by the trial magistrate and the responses by the victim, he was insistent that *voire dire* test was properly conducted and the

trial magistrate arrived at a conclusion that the victim (PW1) possessed sufficient intelligence and understood the questions and the duty to speak the truth although she did not know the nature of an oath. Her evidence was therefore taken not on oath.

It is noteworthy that in accordance with the charge laid at the appellant's door and evidence led by the prosecution, the offence was committed on 27/10/2014. That was definitely before section 127 of the Evidence Act, Cap. 6 R. E. 2002 (EA) was amended by Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016) which came into force on 8/7/2016. In that amendment, sub-sections (2) and (3) were deleted and substituted with a new subsection (2) which reads as follows:-

> *"(2) 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 to the court and not to tell lies."*

In effect, the amendment did not do away with the requirement for the court to satisfy itself of the child witness's capability to understand the questions put to them and give rational answers in terms of section 127(1)

of EA. That is what is termed as intelligence test. Preliminary enquiries by the court, therefore, are still permissible for that purpose. Instead, it is the conduct of *voire dire* examination so as to determine her understanding of the nature of an oath or affirmation and whether he can give evidence on oath or affirmation in terms of the then subsection (2) of section 127 of EA which was done away. In its place, the amendment introduced the requirement for the child of tender age to undertake the duty of telling the court nothing but the truth and not lies as a condition precedent before reception of his/her evidence (See **Geofrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 and **Yusuph Molo vs Republic**, Criminal Appeal No. 343 of 2017 (both unreported). The present case therefore falls outside the web of the new position. Then, the requirement to conduct *voire dire* examination was therefore mandatory.

With the above legal foundation, we now proceed to determine whether, in the instant case, *voire dire* examination was properly conducted. As alluded to above, the legal position that obtained at the time the offence was committed mandatorily required conduct of *voire dire* examination. That was in terms of section 127(2) of EA. The purpose for

which it is conducted, the procedure and suggested questions to be put to the child of tender age were well elaborated in the Court's decision in the case of **Mohamed Sainyenye vs Republic**, Criminal Appeal No. 57 of 2010 (unreported) which we need not reproduce them herein. But of significance, in that case the Court stated that:

> *"So, the object of conducting a voire dire test is to establish competency of a child whether he is capable of testifying. In case it is found he is not capable of giving evidence either on oath/affirmation or not on oath/affirmation, then his evidence should not be taken. The findings on these points must be recorded on the case record."*

Reverting to our present case, the appellant is reproaching the trial court that it did not conduct *voire dire* examination properly and the High Court for not realizing so. To be fair to both courts below, it is perhaps necessary to reproduce the proceedings of the trial court dated 18/12/2014 as reflected at pages 12 and 13 of the record of appeal:-

> ***"Court:*** *It has appeared before this Court that he accused person is a child. The court directs her to be recorded after the successful passage of the VOWE dire*

examination under section 127 (2) of the ***Evidence Act Cap. 6 R.E. 2002.***

Sgd. C. M. Tengwa

RM

18/12/2014

VOIRE DIRECTION EXAMINATION.

Question: What is your name?

Answer: Zabibu

Question: Where do you reside?

Answer: Milala Mpanda

Question: Where are you schooling?

Answer: Milala Primary School.

Question: Who is your class teacher

Answer: Standard two

Question: Which subject do you study

Answer: Mathematics and Kusoma

Question: Have you ever spoken lies?

Answer: I had never spoken lies

Question: Why?

Answer: I will be beaten

Question: What is the meaning of oath?

Answer: I do not know

RULING

I have examined the questions and answers asked to and answered by the child. It has appeared that she understands what she is doing in school. This exhibits her sufficient intelligence and understanding. Likewise, she has manifested that she understands the duty of speaking the truth. This Court therefore directs his evidence to be taken without oath as she does not understand the meaning of oath."

As may be gleaned from the above excerpt, the trial magistrate posed questions to the victim who was presented as a child aged seven (7) years. Carefully examined, the questions posed tested both her competence to understand and give rational answers to questions posed as well as her understanding of the nature of an oath and the duty of

speaking the truth. Quite clearly, the trial magistrate made the inquiry to the victim and made a finding that she was capable of understanding the questions asked and giving rational answers but he was of the view that she did not understand the nature of an oath, hence a competent witness but who was to give evidence not on oath. Consequently, and rightly so, the learned trial magistrate permitted her to testify not on oath. That was quite in line with the guidelines given by the Court in the case of **Mohamed Sainyenye vs Republic** (supra). That said, we entirely agree with the learned State attorney that the appellant's complaint that the conduct of ***voire dire*** test is wanting, is without merit and we accordingly dismiss it.

The appellant also took exception to the way the defence evidence was treated in ground four (4) of appeal. Basically, his complaint is that the trial court did not analyze and evaluate the prosecution evidence as against that of the defence before discounting the defence evidence and founding his conviction. We need not overemphasize that, in terms of section 312 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA), a judgment must contain points for determination, the decision thereon and the reasons for

the same. That presupposes that the evidence of both sides is properly analyzed and evaluated. It is noteworthy that the appellant's defence was that the case was a framed up one by PW3 so as to avoid paying costs for treating her. We think the record of appeal will bail us out on the impeccable view taken by the learned State Attorney that the appellant's complaint is unfounded. On that we take the trouble of, again, reproducing part of the analysis and evaluation done by the trial magistrate as reflected at pages 44 and 45 of the record thus:-

> *"There is no doubt that the accused person had knowledge of herbs and used his knowledge to medicate the grandmother of the victim. He was similarly a visitor at the compound of the grandmother of the victim. The grandmother of the victim had already developed a trust I and confidence with the accused person due to his medication services which he had already offered. She hardly believed PW2 when he reported to her that the accused person raped the victim.*
>
> *That was why she examined the victim's vagina first before saying anything. PW3 could have not by any means let the accused person be implicated. I agree with the testimony of PW1 of being raped by the accused person and of WP2 particularly of seeing the victim and the raped*

which was confirmed by PW5 was the product of her stay in the toilet with the accused person which was proved by PW2. This indeed is watertight evidence.

Moreover the manner in which the incidence was dealt with and acted upon denies the possibility of coaching the victim to frame the victim. The court has come up with such a conclusions due to the following reasons:- ***First,*** *the grandmother of the victim wanted to assure herself before taking the matter to leaders as she had confidence with the accused person;* ***secondly,*** *there was o delay in reporting. The question of immediate reporting of the offence to relevant authorities has been associated with seriousness and lack of indifference. In* ***Republic Versus Lunamula Ngobo Criminal Session No. 241*** *(HC) (TB) (unreported) Katiti, J. held that ap page 4 held that:-*

Immediate reporting of an incident ...to the authorities, not only such reporting impulsively activated, as soon as the criminal scene is seen, but also such reporting does not permit concoction or contrived afterthought, unlike reporting after a considerable time which shows lack of seriousness, indifference and even rarity of truths and is even permissive of rumours, adulterated truths,

suggestive untruths or may even be outright false concoctions.

The accused person was arrested, immediately taken to the village chairman and ultimately to the police station. This occurred on the same date. The victim was similarly taken to the police and ultimately to the hospital for examination. That is why the doctor alleged the bruises to the fresh. Taking into account the trouble taken by the grandmother of the victim and how expeditiously the matter was dealt with, the court is satisfied that the accused person was not framed. This court is therefore satisfied that the offence was proved beyond reasonable doubts."

With respect, it is deducible from the above excerpt that the trial magistrate dealt with the evidence of both sides. He analyzed and evaluated the evidence and was inclined to discount the appellant's contention that the case was a framed up one. That was sufficient. This complaint is, accordingly, unfounded and we dismiss it.

Before we conclude, we find ourselves obliged to consider one issue we found it crucial. It concerned the age of the victim for which we *suo motu* engaged the minds of the learned Senior State Attorney and the

appellant by asking them to address us on whether or not it was sufficiently proved bearing in mind that the appellant was sentenced to serve life imprisonment in terms of section 131(3) of the Penal Code. In terms of that section, a life imprisonment sentence is desirable to a person who commits an offence of rape to a girl under the age of ten (10) years. Mr. Mwashubila was not hesitant to readily concede that none of the prosecution witnesses was forthcoming on the age of the victim. He was, however, quick to argue that her age could be deduced from the evidence of the witnesses and the way the case was conducted. He argued that *voire dire* test was conducted before her evidence was received which indicated that the trial court was satisfied that she was a child of tender age in terms of the provisions of section 127(4) of the EA which define a child of tender age to mean a child whose apparent age is not more than fourteen years. Upon our further inquiry whether she was under ten years of age, not surprisingly, the learned Senior State Attorney conceded that it was difficult to ascertain. Given the circumstances, he was ready for the appellant to benefit from that uncertainty and he invited the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (the AJA) to revise by quashing and setting aside

the life imprisonment meted out by the trial court and sustained by the first appellate court and substitute for it with thirty (30) years imprisonment. On his part, the appellant, a layperson on issues of law, simply insisted that the victim's age was not proved. With respect, whilst there may be other ways of proving age such as by evidence given by the victim, relative, parent, medical practitioner or where available by production of a birth certificate, like any other fact, age may be deduced from the evidence availed to the court in terms of section 122 of EA [see **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported)]. Applying the same principle to our case, the victim appeared a child such that the court conducted a *voire dire* test during which it became apparent that she was a standard two pupil at Milala Primary School. That inquiry was subsequently followed by a finding that she was competent to testify but not on oath. No doubt, all these circumstances considered, lend assurance that she was a child of tender age. But, like the learned Senior State Attorney, we do not think that, it is safe to extend that to the extent of holding with certainty that she was under ten years of age. The appellant should benefit from the doubt. We accordingly hold that she was above ten years. We are accordingly inclined to invoke the powers of revision under section 4(2) of

AJA to revise the sentence. We hereby quash the life imprisonment sentence and substitute for it with thirty years imprisonment.

All said, save for the sentence which is reduced to thirty (30) years imprisonment, this appeal is dismissed.

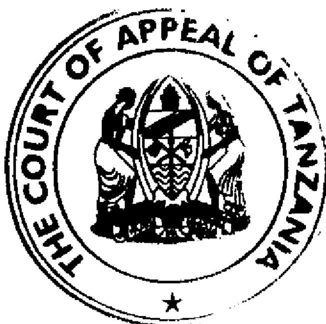
DATED at **MBEYA** this 26th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 2nd day of March, 2021 in the presence of the Appellant in person, unrepresented through video conference and Ms. Monica Ndekidemi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL