IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 449 OF 2017

JUMA SAID ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Shinyanga)

(Makani, J.)

dated the 22nd day of September, 2017
in
(DC) Criminal Appeal No. 11 of 2016

JUDGMENT OF THE COURT

17th August & 23rd September, 2021.

KAIRO, J.A.:

In the District Court of Kahama at Kahama, the appellant, Said Juma was charged with the offence of rape contrary to sections 130 (1) (2) (a) (b) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 [now R.E. 2019] (the Penal Code). It was alleged that on 13th day of September, 2015 at about 00.30 hrs at Malunga Village within Kahama District in Shinyanga Region the appellant had carnal knowledge of a girl aged ten (10) years old. We shall refer to her as the 'victim' or 'PW1" to conceal her true identity. The appellant denied the charge laid against him.

To prove its case, the prosecution paraded four witnesses namely; the victim (PW1), John Ndogoki (PW2)- the father of the victim, Joseph Nelson Mujuni (PW4)- a doctor who also tendered the PF3 which was admitted as exhibit P1 and No. F 6932 DC George (PW4)- an investigator of the case. The appellant was the only witness for the defence.

After a full trial, the appellant was found guilty, convicted and sentenced to a term of prison of thirty years and twelve strokes of the cane. As alleged by the prosecution, it all started when the appellant, a traditional doctor was invited by PW2 to treat him so that he can prosper into his business and further treat the victim to stop her from wandering and moving into neighbours' houses. As part of the treatment, PW2 was covered by blankets and bedsheets in the whole of his body and told not to move until instructed otherwise. Leaving behind PW2 in the main house, the appellant took the victim outside into the toilet situate about 20 meters from the main house in pretext of treating her as well. Then, the appellant told the victim to undress and sit on his lap which she did and he inserted his penis into the victim's vagina. She felt pain but was told not to shout or tell anybody lest the medicine would not work. The appellant then put some medicine into the victim's vagina and rubbed other medicines on her

chest after cutting her with a razor blade and she was told to go to sleep. The victim went to school on the next day but she returned home feeling unwell. PW2 noticed that she was walking abnormally and upon being enquired, she revealed to have been raped by the traditional doctor the previous night. PW2 reported the matter to the local leaders and together they escalated the report to the Police. The victim was taken to the hospital where she was examined by PW3 who established that the victim was raped because her vagina had some bruises and that some sperms were detected into her private parts after applying the vaginal swabs. PW3 filled the PF3 which was tendered and admitted in court as exhibit P1. The appellant was then arraigned in court to answer rape charges to which he denied.

In his defence, the appellant denied the assertions by the prosecution. He contested to have taken the victim outside to treat her. Apart from admitting that he is a traditional doctor and PW2 was his customer, he stated that he was at PW2's house on 7th October, 2015 to treat him and agreed that PW2 would pay him TZS. 200,000.00 for the service but he paid him only TZS. 20,000.00 and was told to wait for two

weeks. That it was during the waiting period when he was arrested and accused of raping the victim.

Upon a full trial, the appellant was found guilty, convicted and sentenced as earlier stated. Being unsatisfied, the appellant appealed to the High Court to no avail, hence this second appeal.

The appellant initially raised five grounds of appeal in the memorandum of appeal. Further on the hearing date, with leave of the Court, he submitted his supplementary memorandum of appeal which contains three grounds of appeal thus, making a total of eight grounds of appeal. We have renumbered the said grounds consecutively starting from those raised in the memorandum of appeal as follows: -

1. *That the successor magistrate erred to proceed with the hearing without taking a fresh plea of the appellant.*
2. *That the evidence of the victim (PW1) was taken in open court contrary to the Sexual Offences Special Provisions Act, 1998 (the SOSPA).*
3. *That the ingredients of penetration were not proved by the evidence of the victim.*
4. *That the trial court erred to find out that the unsworn evidence of the victim was corroborated by PW3.*

5. *That the credibility and reliability of the victim's evidence is questionable as the voire dire test was not conducted.*
6. *That the Clinical Officer was an incompetent person to fill the exhibit 'P1'.*
7. *That the cautioned statement and the charge sheet are at variance.*
8. *That there is no link that connects the appellant with the rape case.*

At the hearing of the appeal, the appellant appeared in person unrepresented. The respondent Republic on the other hand, enjoyed the services of Ms. Salome Mbughuni, learned Senior State Attorney, assisted by Ms. Wampumbulya Shani, learned State Attorney.

When invited to amplify his grounds of appeal, the appellant adopted them and preferred to let the respondent reply first but reserved his right to rejoin if need to do so would arise. Ms. Mbughuni from the outset expressed the respondent's stance to resist the appeal. She went on and informed us that she will respond to all grounds of appeal save for grounds number 1 and 2 which will be addressed by Ms. Shani.

Starting with the first ground, the appellant's grievance is to the effect that, the successor magistrate proceeded to hear evidence without taking his plea afresh. In reply, Ms. Shani submitted that there is no legal

requirement that compels an accused person to enter his plea afresh when the presiding magistrate changes. She elaborated that where there are changes of magistrates during the trial, section 214 (1) of the Criminal Procedure Act Cap 20 R.E 2019 (the CPA) comes into play whereby the accused is required to be informed on the changes and the reason behind and if necessary, the witnesses may be recalled to testify afresh. She also added that, the appellant was not prejudiced in anyway and thus the ground has no merit.

As regards the referred provision of section 214 (1) of the CPA by Ms. Shani, we agree with her that it applies where the predecessor magistrate has heard and recorded part of the evidence in a trial and not in the faulted proceedings where one magistrate presided over the preliminary hearing (the PH) stage and another the trial stage.

Upon re-examining the record of appeal, we observed that, at the beginning of the proceedings, the presiding magistrate was Hon. I.D Batenzi who recorded the appellant's plea and conducted the PH. It was during the PH stage when the appellant entered his plea whereby, he pleaded not guilty to the charge. Later, Hon. R. A. Oguda took over the case and proceeded with the trial to the end. Indeed, the trial was

conducted solely by one magistrate and as such the appellant was not prejudiced in anyway in the circumstances as initially, he entered his plea accordingly. The complaint on succession therefore is misconceived and the first ground of appeal is without merit.

On the second ground of appeal, the appellant complains that, the trial proceedings were wrongly conducted in open court and not in camera thus offending the provisions of section 186 (3) of the CPA as amended by the Sexual Offences Special Provisions Act (SOSPA). Ms. Shani readily conceded to the pointed-out fault. She however submitted that the error was curable under section 388 of the CPA since the appellant has not been prejudiced thereby.

Our starting point in this complaint is the scrutiny of section 186 (3) of the CPA which is alleged to have been contravened. The same provides as follows: -

> "Sec 186 (3) ***Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera*** *and the evidence and witnesses involved in these*

proceedings shall not be published by or in any newspaper or other media..."

[Emphasis added].

The Court stated the purpose for the said procedure in **Gooduck Kyando v. Republic** [2006] T.L.R. 363 when addressing the non-compliance with section 3 (5) of the then Children and Young Person's Act, Cap 13 R.E 2002 which required a similar procedure for proceedings involving a child witness or a child in conflict with the law. The Court observed as follows at page 368: -

*"**The provisions of the Act were designed to safeguard the personal integrity, dignity, liberty and security of women and children.** It is therefore not surprising that in sexual offences, under section 3(5) of the Children and Young Persons Act, such trials are to be conducted in camera so that children as defined under the Act are not, for instance, exposed to publicity which may inhibit a fair trial, subject them to fear, stigma and the like."*

[Emphasis added].

The Court further observed that, though the said procedure was mandatory, but no failure of justice to the appellant has been occasioned and the omission was declared to be curable under section 388 of the CPA. We later took the same stance in **Leonard Salim Kimweri v. Republic**, Criminal Appeal No. 453 of 2015 and **Rajabu Juma Mwelele v. Republic**, Criminal Appeal No 325 OF 2017 (both unreported) and emphasized that the procedure in question was intended to protect the child victim of the sexual offences and not the accused person. In the cited cases, the appellants failed to show how they were prejudiced by the non-compliance and consequently, the Court ignored the irregularity. In the same vein, the appellant herein has failed to show the failure of justice occasioned to him for non-compliance. We hold that, it is not enough to point out the irregularity or omission, but the appellant has to go further to show how he has been adversely affected. With respect, we are inclined to agree with Ms. Shani that, despite the omission, the appellant was not prejudiced in any way. The second ground of appeal therefore fails.

The appellant's complaint in the fifth ground of appeal touches on the credibility and reliability of the victim (PW1) for what he alleges to be

failure by the trial court to conduct *voire dire* test to her, as a result no findings was made if she understood the duty of telling the truth.

Ms. Mbughuni in reply agreed that the *voire dire* test ought to be conducted to the victim before giving her testimony but it was not conducted satisfactorily. She elaborated that the requirement was under section 127 (2) of The Law of Evidence Act Cap 6 R.E 2002 (the Evidence Act) which required the trial court to verify that the child possesses sufficient intelligence to testify and understands the duty of speaking the truth and the nature of an oath. She referred us to page 6 of the record of appeal whereby there were only answers by the victim without the questions asked. Ms. Mbuguni implored us to find that *voire dire* test conducted was incomplete and not that it was not conducted at all as alleged by the appellant. She thus argued, in the wake of an incomplete *voire dire* test, the victim is required to give an unsworn evidence which has to be corroborated and cited the case of **Soud Seif v. Republic,** Criminal Appeal No. 521 of 2016 (unreported) to bolster her argument.

Upon reviewing the record of appeal in the light of the above argument of the parties, we observed that the victim's testimony was taken on 26th November, 2015. By then the amendments of section 127 of the

Evidence Act brought by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 (Act No. 4 of 2016) were not into force yet. As such, the *voire dire* test was required to be conducted under section 127 (2) of the Evidence Act before a child of a tender age could give his/her testimony. Section 127 (2) provided: -

> *"Where in any criminal cause or matter a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation; if in the opinion of the court, which opinion shall be recorded in the proceedings,* ***he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth."***

[Emphasis added].

Being a child of 10 years old, the victim was a child of tender age as per section 127 (5) of the Evidence Act. We wish to reproduce the relevant extract of the *voire dire* test conducted at page 6 of the record of the appeal to appreciate the discussion to follow hereunder: -

"PW1. VICTIM, 10 YEARS, CHRISTIAN, IGEMBESABO KAHAMA.

I am in class three, our Head teacher Rugakingira, our class teacher is Simon, we are seven of us in our father's children, my father John..."

After that the victim started to testify. Looking at the extract above, it is true that the evidence of PW1 (the victim) was taken by the trial court in great violation of section 127 of the Evidence Act. From the above extract of the *voire dire* test we observed that, the trial magistrate did not make any specific findings as to whether or not the victim possesses sufficient intelligence, knows the meaning of oath and understood the duty of speaking the truth before taking her unsworn testimony. We thus agree with Ms. Mbughuni that the *voire dire* test conducted was in contravention of sec 127 (2). The pertinent question that follows is the effect of the irregularity of the victim's evidence. The legal stance on the effect of failure to comply with the procedure for conducting a *voire dire* examination was considered in **Jafari Mohamed v. Republic** Criminal Appeal No. 112 of 2006 (unreported) which was referred in **Soud Seif** (supra) cited to us by Ms. Mbughuni wherein the Court stated: -

"...before receiving evidence of a witness of tender age, the trial court must ascertain that the child is possessed of sufficient intelligence to justify the reception of the evidence and whether the witness understands the duty of speaking the truth... It is only then the trial court should proceed to determine whether the evidence should be received on oath or without oath. ***For the failure to comply with the procedure for conducting 'voire dire' examination properly the issue before us is what would be the effect of the omission? Fortunately, this is an issue which need not detain us. As correctly pointed out by both learned counsel for the appellants and the learned Principal State Attorney the position of law is settled. The omission brings such evidence to a level of unsworn evidence of a child which requires corroboration..."***

[Emphasis added]

The stated stance was endorsed in **Kimbute Otinel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported) when we restated that improper conduct of the *voire dire* test only reduces the testimony of the victim to unsworn evidence which requires corroboration before the trial court can

safely rely on it to ground conviction. We wish to reproduce the extract of the relevant holding in **Kimbute Otinel** (supra) for reference: -

> *"We readily agree with Mr. Pande and Professor Rutinwa that* ***section 127 (7) only obviates the need for corroboration, direct or circumstantial where the evidence taken under section 127 (2) emanates from a properly conducted voire dire there under; however, it does not dispense with or remove the requirement of corroboration where the evidence taken originates from a misapplication or non-direction of section 127 (2).***"

As rightly submitted by Ms. Mbughuni, in the instant case, on account of omission to conduct proper *voire die* test, the unsworn victim's evidence is subject to corroboration. We will determine whether her evidence was corroborated or not, when determining the third and fourth grounds of appeal below which are to the effect that there was no proof of rape. Besides, the appellant attacked PW3's credence for what he alleges delay to treat the victim and thus his evidence was not required to corroborate the unsworn evidence of PW1 because her evidence was not reliable.

Ms. Mbughuni refuted the appellant's argument insisting that the victim was raped and her evidence was appropriately corroborated by PW2, her father and PW3 (Clinical Officer) who examined her and found sperms and bruises in the victim's private parts. PW3 then filed the PF3 but since the document was not read over after it was admitted, she prayed the Court to expunge it from the Court record. She however argued that the oral evidence of PW3 suffices to corroborate the evidence of the victim. With regards to the delay to treat the victim, Ms. Mbughuni elaborated that the incident occurred on 13th September, 2015 at 00.00 hrs. and she was treated on 16th September, 2015, that is after about 48 hours, which she argued does not preclude the fact that the victim was raped, besides it was not unreasonable delay. She further submitted that the stance of the law is to the effect that penetration however slight is sufficient to prove the offence of rape as per section 130 (4) (a) of the Penal Code. She added that since the victim was found with bruises and sperms into her private parts, then penetration was proved. She thus concluded that the third and fourth grounds have no basis.

Legally penetration however slight is enough to prove the offence of rape as per section 130 (4) of the Penal Code. The victim testified that the

appellant raped her and warned her not to cry or reveal to anyone otherwise the medicine would not work. She however revealed to her father (PW2) on the incident on the next day after having been noted walking abnormally. The law is settled that, in sexual offences, the best evidence comes from the victim; see **Selemani Makumba v. Republic** [2006] T.L.R. 379.

It is true that the victim's evidence was found by the trial court to be credible and reliable. As rightly submitted by Ms. Mbughuni, the victim's evidence was first corroborated by PW2, her father who testified that when the appellant came at their home to treat him, he covered him with bed sheets being part of treatment. He then took the victim outside and stayed with her for sometimes and later they slept. On the next day the victim went to school but when she returned, PW2 noticed that she was walking abnormally. When asked as to what happened, she told him that she was raped by the appellant and she was taken to the hospital for examination. The victim's evidence was further corroborated by PW3, the clinical officer who examined her and found bruises and discharge with sperms into her vagina confirmed through vaginal swab examination. We understand that PW3 has accordingly filed PF3 but as rightly submitted by Ms. Mbughuni,

the same was not read over, as such the same is to be expunged from the Court record as we hereby do.

The appellant seems to suggest that there is no proof of a penis entering the victim's vagina since the victim has also testified that some medicine was inserted into her vagina. However, the finding of bruises and sperms by PW3 into the victim's vagina negates that proposition. With regards to the alleged delay by PW3 to treat the victim, we agree with Ms. Mbughuni that the lapse of 48 hours since the incident occurred to when the victim was examined by PW3 is not inordinate having in mind that the victim was warned not to reveal to anyone and she only revealed the incident after being noted to be walking abnormally. We thus hold that the delay to treat the victim did not impeach the evidence that she was raped by the appellant.

Connecting with the sixth ground wherein the appellant complains that, the clinical officer was an incompetent person to fill exhibit P1 thus the document is inadmissible. Ms. Mbughuni rebutted the contention arguing that the clinical officer are Diploma holders, thus medical practitioners. According to the Dental and Medical Practitioners Act, they are mandated to examine such victims. In his rejoinder, the appellant

insisted on his stance arguing that, the cited Act by Ms. Mbughuni was applicable before the offence was committed as such his argument still stands.

Before we proceed, we wish to state that exhibit P1 is not part of the record of appeal after being expunged following the omission to read it over after it was admitted. We further wish to state that when the offence was committed in year the 2015, the law applicable was the Medical Practitioners and Dentist Act, Chapter 152. However, a clinical officer was not defined therein. It is also pertinent to note that the said definition is also missing in Medical, Dental and Allied Health Professionals Act, 2017, No. 11 of 2017. Nevertheless, this is not the first time the Court is being confronted with a controversy at hand and the Court had resolved that a clinical officer is a qualified medical practitioner authorized to conduct medical examination. On our part we still maintain the stance we took in our previous decisions regarding the issue in **Charles Bode v. Republic,** Criminal Appeal No. 46 of 2016, **Julius Kandonga v. Republic**, Criminal Appeal No. 77 of 2017 and **Filbert Gadson @ Pasco v. Republic,** Criminal Appeal No. 267 of 2019 (all unreported). In **Charles Bode** (supra) at page 16, the Court defined the term 'clinical officer' as follows: -

"A gazetted officer who is qualified and authorized to practice medicine. A clinical officer observes, interviews and examines sick and health individuals in all specialties to document their healthy status and applies pathological, radiological, psychiatric and community health techniques...."

In the same vein, the clinical officer herein is authorized to practice medicine. He was thus competent to examine the victim which he did and established that the victim was actually raped. In the light of the above discussion, we find the third, fourth and sixth grounds of appeal to be devoid of merit.

With regard to the seventh ground, the appellant's grievance is to the effect that his cautioned statement is at variance with the charge sheet. In reply, Ms. Mbughuni stated and rightly so that the appellant did not record the cautioned statement at the police. As such there is nothing before us to compare with the charge sheet. We thus find the ground to be superfluous.

As for the eighth ground, the appellant is faulting his conviction on ground that the evidence adduced by the prosecution was not proved to the required standard. In rebuttal, Ms. Mbughuni argued that the case was proved beyond reasonable doubt and the appellant was properly convicted.

From what we have discussed above, the victim's account that she was raped by the appellant was corroborated by her father (PW2) and the medical doctor (PW3). All these witnesses were found to be credible by the trial and first appellate courts to which we agree with and basing on their testimonies, in our view, the case was proved beyond reasonable doubt. In the circumstances therefore, we find the eight ground of appeal wanting. In the upshot, the appeal lacks merit and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 16th day of September, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered on 23rd day of September, 2021 in the presence of the Appellant in person, who appeared through video facility linked from Shinyanga prison and Mr. Nestory Mwenda, learned State Attorney for the Respondent who is also appeared through video facility linked from the High Court Shinyanga, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL