IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 291 OF 2017

ABIOLA MOHAMED @ SIMBA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Fikirini, J.)

dated the 12th day of July, 2017
in
DC Criminal Appeal No. 12 of 2017
.....

JUDGMENT OF THE COURT

22nd September & 2nd November, 2021

KIHWELO, J.A.:

This is a second appeal by Abiola Mohamed @ Simba who was first arraigned before the District Court of Moshi at Moshi for Rape contrary to Section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 R.E 2002 (now R.E 2019) ("the Code"). He was convicted and sentenced to thirty years imprisonment, and his appeal to the High Court against both the conviction and sentence was unsuccessful.

The facts of this case are not very straight forward but as they can be discerned from the record are as follows: Between 8th and 17th August, 2015 at Dar es Salaam Street area within Moshi Municipality in Kilimanjaro Region,

the appellant, allegedly did rape a girl aged fourteen years, who we shall henceforth identify her as HB, for purposes of concealing her identity. He maintained his innocence when the charge was put to him.

Victoria Baltazari Temba (PW1) a resident of Kirima, Kibosho on 8th August, 2015 in the morning was informed by her daughter HB, a form one student at Kirima Day Secondary School that her school had organised a study tour to visit Nane Nane in Arusha and that PW1 gave PW3 Tshs. 5,000/= and then PW3 left. Unfortunately, that evening PW3 did not return home and PW1's attempt to look for her did not bear any fruits as she came to learn from one sister (a teacher) that the actual amount which was required for study tour was Tshs. 15,000/= and not Tshs. 5,000/= she had earlier on given PW3. PW1 further came to learn that, PW3 was not allowed to join her colleagues for the trip to Nane Nane because she had no enough money for the trip. As efforts to locate PW3 were waning, PW1 was advised to make public announcements through churches and mosques but also report the matter to the police. However, efforts to make public announcements did not bear any fruits.

It was not until 18th August, 2015 at around 21:00 hrs, when PW1 received a call from an unknown caller from Moshi town who informed her

that PW3 was found in Moshi town following which PW1 told the unknown caller who was a woman to take PW3 to Moshi Central Police Station. Thereafter PW1 sent her son Prosper Baltazar Temba who testified as PW2 along with PW2's wife to Moshi town to pick PW3 and upon arrival at Moshi Central Police Station PW2 and his wife found PW3 around the police station and they took her back home.

It was PW3's telling to her mother that on the fateful day she was left at school and remained stranded until in the evening when the appellant came and lured her in pretext that he was going to give her a free ride there but instead took her to his room in town where the appellant locked her in his room and repeatedly raped her for the ten (10) days while under restraint.

During her testimony PW3 while giving account of the 10 days she went missing, said that when her colleagues left for study tour to Nane Nane in Arusha she opted to travel alone to Moshi town in an attempt to find her way to Arusha. Upon arriving at Moshi bus terminal she stumbled upon the appellant who assisted her to board into a bus in which he was a bus conductor in the bus bound for Arusha. The bus left Moshi at 13:00 hrs and arrived in Arusha at 15:00 hrs. On arrival at Arusha the appellant informed

PW3 that it would not be possible to make it to Nane Nane at that time as it was already too late. Consequently, the appellant convincingly told PW3 to remain in the bus and when the bus was full of passengers, they left Arusha back to Moshi and on arrival there around 19:00 hrs the appellant once again convincingly invited PW3 to his house.

PW3 agreed to go with the appellant to his house and on arrival PW3 saw two other women in the appellant's room who initially shared the bed with the appellant while she was left to sleep alone on the mattress on the floor. Later that night the appellant could not stop his temptation as such he woke up and went where PW3 was sleeping, he undressed PW3 then undressed himself and forcefully raped PW3. Initially, PW3 attempted to scream for help but was warned not to do so else she would face dire consequences. PW3 experienced severe pain and blood started coming out of her private parts since until that day PW3 was a virgin. PW3 requested for a place to take shower after that brutal encounter but the appellant did not heed to her request and instead he told PW3 that she will take shower inside that very room they were sleeping. After raping PW3, the appellant went back to the bed where he slept with the two women.

The following morning PW3 woke up just to find herself sleeping alone in that room and the door was locked from outside. She spent the whole day locked inside that room and used a bucket as her loo whenever she felt like going to the loo. Each day the appellant came later at night with food for PW3 to eat. PW3 said that this ordeal went on and on until on 18th August, 2015 when the appellant left and forgot to lock the door from the outside as was always the case. When push came to shove PW3 decided to sneak outside the room, escaped and went to town where she wondered until at 19:00 hrs when she approached the woman who called PW1 and was later taken outside Moshi Central Police Station where PW2 and his wife met her before she was taken back home.

On 19th August, 2015 PW2 took PW3 to Moshi Central Police Station where they reported the matter and a file was open after which they were directed to go to the Gender Desk and a woman police officer interrogated PW3 and took her statement. Then after PW2, PW3 and the police woman left to Mawenzi Hospital where PW3 was medically examined by Peter Mlundwa (PW4) who came to find that PW3's hymen was not intact meaning that she had several sexual intercourse. Fortunately, PW3 was neither pregnant nor HIV positive. The PF3 was tendered by the prosecution and

not objected by the defence but curiously there is no record that it was admitted in evidence.

The appellant who gave his defence by way of an affirmed testimony, utterly denied the charges against him and testified that he is married and lived at Dar es Salaam Street in Moshi and working at Moshi bus stand as an agent of Isamilo bus. He went on to testify that, one day which he couldn't recall he was working in a bus which was plying between Moshi and Namanga and that PW3 was one of the passengers who were travelling to Arusha and Namanga but she couldn't afford to pay her bus fare as such and the appellant was compelled to come to her rescue and paid for her Tshs. 500 while the rest Tshs.2,000 was paid by someone else who was seated next to PW3. On arrival at Arusha PW3 and other passengers disembarked leaving behind passengers destined for Namanga. Later that day, on return from Namanga, the appellant saw PW3 in the bus while he was collecting fare from passengers but did not talk to her because this time around PW3 was able to settle her fare. The appellant testified further that, on arrival at Moshi all passengers disembarked from the bus including PW3 and that the appellant did not see PW3 since then until when the appellant was brought before the court for the allegations of having raped PW3.

At the conclusion of the case for the prosecution and the defence, the learned trial Resident Magistrate found it proven upon the evidence of the prosecution witnesses that the appellant was responsible for the rape of PW3. Accordingly, he was convicted and sentenced as shown earlier. As hinted before, his appeal to the High Court (Fikirini, J.) was unsuccessful. Disgruntled, the appellant further appealed to this Court.

This appeal was initially predicated on self-crafted five-point memorandum of appeal lodged on 27th July, 2018. Later, on 24th August, 2021, the appellant again lodged a self-crafted supplementary memorandum of appeal containing three grounds of appeal.

On our part, we have found that the grounds of appeal raise the following five points of grievance: **One,** that the appellant was charged, tried and convicted based upon a defective charge sheet. **Two,** that the first appellate court erred in not finding that the appellant was convicted by the trial court without indicating the provision of law under which he was convicted. **Three**, that the first appellate court erred in upholding the conviction and sentence which was grounded on weak, inconsistent, incredible, uncorroborated and unreliable prosecution's evidence. **Four,** the

trial and the first appellate court shifted the burden of proof; and **five**, that the case against the appellant was not proved beyond reasonable doubt.

When, eventually, the matter was placed before us for hearing on 22nd September, 2021 the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Verediana Peter Mlenza learned Senior State Attorney and Ms. Lilian Kowero, learned State Attorney. The appellant urged us to allow his appeal on the strength of the grounds of appeal he lodged and which he prayed to adopt. He exercised his right to begin to clarify the grounds of appeal and later the respondent Republic will follow. Ms. Mlenza, gallantly opposed the appeal.

The appellant started by arguing in respect of the second ground of the supplementary memorandum of appeal by challenging the first appellate court which gave an opportunity to the respondent Republic to make a re-joinder submission contrary to the rules of procedure and which according to the appellant occasioned injustice on his part since the first appellate court relied on that re-joinder in upholding the conviction and sentence. To fortify his argument further, he referred us to paragraph 2 of page 74 of the record of appeal where the first appellate court cited the re-joinder submission by Ms. Mcharo, learned State Attorney.

In support of the third ground of supplementary memorandum of appeal the appellant was fairly brief. He contended that the first appellate court erred in not finding that the appellant was convicted without specifying the provision of law under which the appellant was convicted contrary to section 312 (2) of the Criminal Procedure Act, Cap 20 R.E 2002 (now R.E 2019) ("the CPA").

Arguing in support of the complaint that the first appellate court erred in upholding the conviction and sentence which was grounded on weak, inconsistent, incredible, uncorroborated and unreliable prosecution's evidence, the appellant contended that the evidence of PW3 was not corroborated and even the allegations that PW3 took the police to the appellant's home and at the bus stand where the appellant was apprehended was not corroborated by any police officer as no police officer testified in support of the prosecution. He further argued that, the first appellate court erred in upholding the conviction and sentence while the alleged sister (teacher) who was said to have confirmed the version by PW1 and PW3 that PW3 could not fulfil her intention of joining her colleagues to go for study tour because she was short of fare was not supported by testimony of the

said sister (teacher) who did not testify before the court. To bolster his argument, he referred us to page 75 of the record of appeal.

In further supporting this ground of appeal the appellant submitted that, the first appellate court erred in sustaining the conviction and sentence relying on the testimony of PW2 who alleged that PW3 was lost for 10 days but surprisingly there was no evidence of any missing person report which the family filed before the police. He referred us to pages 75 and 76 of the record of appeal to amplify his argument.

The appellant also questioned the credibility of PW3 who testified that she escaped from the appellant's room at 05:00 hrs but stayed in town where she claimed that she did not know anyone until 19:00 hrs when she communicated with her mother through someone else. Furthermore, the appellant questioned the credibility of PW1 and PW2 who testified that PW3 was found outside the police station when they went to pick her but the appellant was surprised why did the family take her to the police the following day instead of reporting the matter the same day they went to take her back home from outside the police station where she was left by the woman who called PW1.

The appellant went further to contend that PW3 was not a credible and reliable witness in that she told one version of the story to her mother while telling a different version before the court where she mentioned that she went to Arusha while she told her mother that she stayed at school where the appellant found her. Finally, the appellant in further discrediting PW3's credibility referred to PW3's testimony at pages 23 and 24 of the record of appeal, where on one hand she testified that she left with PW1's phone while on the other hand she testified that she did not have a mobile phone to call her mother.

On her part, Ms. Mlenza learned Senior State Attorney, did not support the appeal. She submitted that there was no substance in the grounds of appeal and prayed for the dismissal of the appeal in its entirety. In response to the complaints on defectiveness of the charge sheet and non-compliance with section 312 (2) of the CPA she conceded that section 131 of the Code missed sub-section (1), however, the learned Senior State Attorney was quick to argue that, despite the non-citation of sub-section (1) this omission did not occasion any injustice on the part of the appellant who knew very well the offence he stood charged and also the particulars of the offence and therefore curable under section 388 (1) of the CPA. Reliance was placed in

the case of **Jamal Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported).

In response to the complaint on the failure by the trial court to comply with section 312 (2) of the CPA which apart from admitting that the trial magistrate did not comply with section 312 (2) of the CPA, the learned Senior State Attorney argued that, the Court should not find this to be fatal since the appellant was convicted and sentenced according to the provision of section 130 (1) of the Code and that the defect is curable under section 388 (1) of the CPA because no injustice was occasioned to the appellant.

The learned Senior State Attorney subsequently proceeded to address ground 2, 3 and 4 conjointly and was fairly brief contending that the trial magistrate evaluated both the prosecution and the defence case and the appellant was convicted on the strength of the evidence of PW1, PW2, PW3 and PW4 who were found to be credible and cogent. She argued that the appellant was not convicted on the basis of the weakness of the appellant's case. The learned Senior State Attorney referred us to pages 71, 75, 76 and 77 of the record of appeal in amplifying further her argument.

In response to the complaint on improper rejoinder, the learned Senior State Attorney admitted that although it was not appropriate for the

respondent Republic to be given the right of rejoinder, however, the learned State Attorney who appeared before the first appellate court did not add anything new during the rejoinder apart from reiterating what she had earlier on submitted in chief. Finally, the learned Senior State Attorney, argued that there was no speculation by the first appellate Judge as the decision to uphold the conviction and sentence was based upon evidence on record and not anything else.

In light of the rival submissions by the parties, on the grounds of appeal and the response by the respondent Republic, and other points of law, we shall start by addressing the two points of law raised. That is, the outlined defects in the charges against the appellant and the claims that the trial court convicted the appellant without stating the provision of the law upon which the conviction was based.

We are alive that the mode of charging offences is governed by sections 132 and 135 (a) (ii) of the CPA. While section 132 requires that the offence must be specified in the charge with the necessary particulars; section 135 (a) (ii) also provides that the charge must contain the essential elements of the offence and the specific section of the enactment of the law creating the offence. This is vital to enable the accused understand clearly

the charge against him so that he can prepare his defence. See, for example, **Mohamed Koningo v. Republic**, [1980] TLR 279.

There is no doubt in the instant appeal that, having regard to the contents of the particulars of the offence, the relevant provision which should have been cited is sections 130 (1), (2) (e) and 131 (1) of the Code. The issue for determination under the current circumstances is whether the defects that arise from wrong citation, non-citation and citation of inapplicable provisions, prevented the appellant from comprehension of the nature and gravity of the offence of rape for which he faced and from presenting a proper defence and therefore occasioned him injustice.

It is instructive at this interval to bring forth the statement of the offence as well as the particulars of the offence as found in the charge sheet which states:

> ***"STATEMENT OF THE OFFENCE***
>
> *Rape contrary to Section 130 (1) (2) (e) and 131 of the Penal Code [Cap. 16 R.E. 2002]*
>
> ***PARTICULARS OF THE OFFENCE**: ABIOLA S/O MOHAMED @ SIMBA on the 8th to 17th day of August, 2015 at Dar es Salaam Street area within Municipality of Moshi in Kilimanjaro Region, did have carnal knowledge of one HB* a girl of 14 years of age."*

A quick glance at the above excerpt conspicuously shows that sub-section (1) of section 131 of the Code was not cited. However, we ask ourselves two questions; **One**, whether non citation of the sub section prejudiced the appellant, in the sense that, such omission prevented him from comprehending the nature and gravity of the offence of rape he was facing and therefore disabled him from preparing his defence; and **two**, whether that omission is curable under section 388 (1) of the CPA.

Ordinarily, a defective charge renders the proceedings and the resultant decision a nullity. See, for example, **Maneno Hamza v. Republic**, Criminal Appeal No. 338 of 2014; **Mussa Nuru @ Saguta v. Republic**, Criminal Appeal No. 66 of 2017; and **Hamis Maliki Ngoda v. Republic**, Criminal Appeal No. 7 of 2017 (all unreported). But we are mindful of the position of this Court in which it has taken different stance on defective charges. In the celebrated case of **Jamali Ally @ Salum v. Republic** (supra), the Court found among other things that non-citation or wrong citation of the provision in the statement of the offence is curable under section 388 (1) of the CPA. The Court stated that:

> *"Where the particulars of the offence are clear and enabled the appellant to fully understand the nature and seriousness of the offence for which he is being*

tried for, where the particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age, where there is evidence at the trial which is recorded giving detailed account on how the appellant committed the offence charged, and thus any irregularities over ***non citations and citations of inapplicable provision in the statement of the offence are curable under section 388 (1) of the Criminal Procedure Act, Cap. 20 Revised Edition 2002 (the CPA)."*** [Emphasis added.]

In the instant appeal, the appellant was availed with all the necessary information to enable him comprehend the nature and seriousness of the offence. The particulars clearly show the date it was alleged the offence was committed, the place/venue, the victim's name and age as well as the nature of the offence. This together with the evidence presented by the four prosecution's witnesses (PW1, PW2, PW3 and PW4) who gave details of how the appellant committed the offence, cannot in any way lead to any logical conclusion that the appellant was not made aware of the offence he was charged.

We think, with respect, that, the learned Senior State Attorney was undeniably right that the appellant was made aware of the nature and gravity of the offence charged to enable him to enter his defence and therefore, we are of the considered opinion that the non-citation of the relevant sub-section in the statement of the offence is curable under section 388 (1) of the CPA. This complaint therefore has no merit.

The second issue for determination is the complaint on failure by the trial court to comply with section 312 (2) of the CPA which requires the trial court to state the provision under which the accused is convicted at the time of conviction. Clearly, as conceded by the learned Senior State Attorney the trial magistrate at page 53 of the record of appeal, when convicting the appellant did not state the provision of law under which the appellant was convicted as required by section 312 (2) of the CPA. We find it appropriate to reproduce the provision of section 312 (2) of the CPA which states:

> *"In the case of conviction, the judgment shall specify the offence of which, and section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

The issue for consideration before us, is whether failure to state the provision of law under which the appellant was convicted occasioned any injustice on the part of the appellant and whether that is curable under section 388 (1) of the CPA.

We hasten to state that this issue should not detain us much. We are aware that the trial court stated that the appellant was found guilty of the offence of rape and accordingly went ahead to convict him in terms of section 131 (1) of the Code which the trial magistrate specified at the beginning. The appellant as stated above was well aware from the particulars of the offence the nature of the offence he stood charged and its gravity. More so, the trial magistrate at the time of conviction stated clearly the offence upon which the appellant was convicted. We do not find that the appellant was ostensibly prejudiced by the failure to state the law. We are decidedly of the view that this omission did not occasion any injustice on the part of the appellant as such it is curable under section 388 (2) of the CPA. Fortunately, this Court has in numerous occasions taken this position when faced with similar scenario. See, for instance, **Hassani Saidi Twalib v. Republic**, Criminal Appeal No. 95 of 2019 and **Emmanuel Phabian v. Republic**,

Criminal Appeal No. 259 of 2017 (both unreported). It goes without saying that, this ground of appeal as well has no merit.

The next issue for consideration which, we think, will dispose the rest of the grounds of appeal is the complaint that the first appellate court erred in upholding the conviction and sentence which was grounded on weak, inconsistent, incredible, uncorroborated and unreliable prosecution's evidence. There are several principles that govern testimony of witnesses which contain inconsistences and contradictions. **One**, the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether the inconsistences and contradictions are minor or whether they go to the root of the matter. See, for example **Mohamed Said Matula** [1995] TLR 3. **Two**, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See, for example in the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 214 of 2008 (unreported). **Three**, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of

the occurrence. Minor contradictions or inconsistences on trivial matters which do not affect the case of the prosecution should not be made grounds on which the evidence can be rejected in its entirety. See, for example **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 (unreported).

In the present case, the question is whether the alleged contradictions and inconsistences pointed out by the appellant go to the root of the prosecution case. In our considered opinion, in this appeal there are several pieces of the puzzle that when put together do not add up and we shall endeavor to explain. **One**, whereas, PW1 and PW2 testified that PW3 was missing for 10 days but surprisingly the matter was not reported to the police or even community leaders at the material time when PW3 went missing and this defies logic and common sense for any caring family of a child aged 14 years. **Two**, it leaves a lot to be desired that as alleged by PW3 she escaped from the appellant's place at 05:00 hrs in the morning but called her mother at 19:00 hrs late in the evening to inform her of her whereabouts. Bearing in mind that PW3 testified that she was stranger at Moshi town and did not know anyone but yet there was no any plausible explanation of her whereabout that entire day. **Three**, there was no explanation as to why PW2 opted not to report the matter to the police that same day when he went to

pick up PW3 who was just outside the central police station and instead PW2 went with PW3 back home and reported the matter to the central police station the following day. **Four**, PW3 told one version of the story to PW1 regarding what transpired on the day she went missing, while giving another version of the story before the court, and **five**, PW3 gave different versions of the story about mobile phone. While at one point she said that she left with her mother's mobile phone at another point she said that she did not have a mobile phone to call her mother on the fateful day.

In the end, for the reasons we have explained above, we do not think that PW3 was such a credible and truthful witness whose evidence would ground a conviction. With respect, we find merit in the appellant's argument that the prosecution evidence was contradictory and inconsistent.

Undoubtedly, in the present appeal the prosecution case will have been strengthened by evidence of the appellant's neighbours, proof of the appellant's alleged room and the sister (a teacher), although we are alive to the established principle of law under section 143 of the Tanzania Evidence Act, Cap 6 R.E. 2019 that no particular number of witnesses is required to prove any particular fact.

We think it is momentous that we should remark, in passing, that, there is a dire need to exercise extra care in handling cases of sexual offence as we earlier on cautioned in the case of **Mohamed Said v. Republic,** Criminal Appeal No. 145 of 2017 (unreported) in which faced with an akin situation we quoted with approval the cautionary statement of Lord Chief Justice Mathew Hale made in the 17th Century which is still very relevant during our times. The Lord Chief Justice stated in **People v. Benson**, 6 Cal 221 (1856), that rape:

> *"is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent."*

It is a peremptory principle of law that the best evidence of sexual offence comes from the victim. See, for instance, **Magai Manyama v. Republic**, Criminal Appeal No. 198 of 2014 and **John Martin @ Marwa v Republic**, Criminal Appeal No. 22 of 2008 (all unreported). However, we wish to emphasize as we did in the case of **Mohamed Said** (supra) the need to subject the evidence of the victim to scrutiny in order for courts to be satisfied that what they testify is nothing but the truth. The testimony of the victim of sexual offence should not be taken as gospel truth but has to pass the test of truthfulness. It is only through this litmus test that courts

will ensure that only deserving offenders are kept behind bars and the innocent are set free.

It is our conclusion that the conviction rested on weak, unreliable and inconsistent prosecution evidence which should not be left to stand. For these reasons, we find that, the guilty of the appellant was not proved beyond reasonable doubt. We allow the appeal, quash the conviction and set aside the sentence and direct the appellant's immediate release from custody forthwith unless held for other lawful cause.

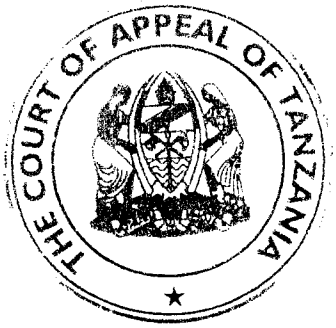
DATED at **DAR ES SALAAM** this 29th day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 2nd day of November, 2021 in the presence of the appellant in person linked via video conference at Kisongo Prison and Mr. Innocent Rweyemamu, learned State Attorney for respondent Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL