IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 219 OF 2019

PETER SAGADEGE KASHUMA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Masabo, J.)

Dated the 22nd day of May, 2019
in
Criminal Appeal No. 381 of 2018

JUDGMENT OF THE COURT

28th June, & 14th December, 2021.

WAMBALI, J.A.:

The appellant, Peter Sagadege Kashuma appeared at the District Court of Kigamboni where he was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code Cap. 16 R.E. 2002 (now R.E. 2019) (the Penal Code).

It was alleged in the particulars of the charge that on 19th June, 2018 at Mwembemdogo area within Kigamboni District in Dar es Salaam Region, the appellant had carnal knowledge of the girl aged 17 years. For the purpose of protecting her identity, in this judgment, we will refer the girl as the "victim" or "PW1".

In a quest to substantiate the allegation laid in the charge, the prosecution marshalled five witnesses; namely, PW1 (the victim), Sarafina Jacob Malile (PW2), Zuwena Mussa Muhai (PW3), Violet Malile (PW4) and Mussa Mwaki Lachile (PW5). Significantly, the substance of the prosecution evidence was that on the fateful date, that is, 19th June, 2018, the appellant who worked as watchman at a house belonging to Juliet, raped the victim, a housemaid, in one of the room that was usually occupied by PW4. It was further contended that the appellant seized the opportunity to rape the victim because of the absence of PW4 who, on the particular day, spent a night at PW2's residence at Kimara area within Dar es Salaam. Equally important, their employer, Juliet had travelled to Nairobi, Kenya.

On his part, the appellant who defended himself as he had no witness to support his defence, categorically denied to have raped the victim on the alleged date and place. The respective denial is notwithstanding his testimony during the defence that he was together with the victim on that date and place. Noteworthy, in his defence he maintained that though the victim gave him food and tea as requested, he did not enter the house and particularly in PW4's room on that date as alleged by the victim.

At the height of the trial, the Senior Resident Magistrate who presided over the hearing of the case evaluated the evidence for the parties, and in the end she was fully convinced that the victim was a credible witness. She

also found that the victim's evidence was amply corroborated by PW3; a clinical officer who examined her on 20th June, 2018 and confirmed her story that her vagina was penetrated on the material day. Consequently, she found that the prosecution proved the case of rape against the appellant beyond reasonable doubt. She thus convicted the appellant and sentenced him to life imprisonment.

The findings and sentence dissatisfied the appellant, hence he appealed to the High Court against conviction and the severity of sentence as depicted in the petition of appeal which contained three grounds of appeal. As the appellant was represented by the counsel, the High Court heard his written and oral submissions and that of the counsel for the respondent Republic for and against the appeal. Ultimately, the learned High Court Judge dismissed the appeal against conviction, but allowed it with regard to the severity of sentence on the finding that it was illegally imposed by the trial court. She thus substituted the sentence of life imprisonment to thirty years imprisonment as provided under the provisions of the Penal Code under which the appellant was charged. In substituting the sentence the High Court was satisfied that the victim was beyond the age of ten years and not below as erroneously found by the trial court.

Still determined to fault the concurrent findings of the two courts below, the appellant has lodged the instant appeal. It is noteworthy that

initially, the appellant lodged a memorandum of appeal comprising five grounds of appeal. However, through his written submission he lodged in Court before the hearing of the appeal, he sought leave to abandon the first ground of appeal in favour of two grounds of appeal contained in the supplementary memorandum of appeal. The Court granted him the requisite leave as the respondent Republic's counsel had no objection. The respective grounds of appeal can thus be paraphrased and arranged as hereunder:-

1. *That the first appellate court erred in upholding the appellant's conviction while the trial court did not comply with the provisions of section 210 (1) (a) and 210 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019).*
2. *That the first appellate court erred to uphold the conviction of the appellant while the PF3 (exhibit P2) which was relied upon among other evidence was not read over and explained to the appellant after it was admitted in evidence.*
3. *That the first appellate court grossly erred in presuming that the prosecution proved the case against the appellant while the victim (PW1) was not led to identify the appellant in court during the trial by pointing or touching him for the court to verify the alleged identification.*

4. *That the first appellate court wrongly upheld the appellant's conviction based on unjustified corroborated prosecution evidence.*
5. *That the appellant was not given his fundamental right to close the defence case contrary to procedure laid by law.*
6. *That the first appellate court erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.*

The appeal was called on for hearing in the presence of the appellant in person, unrepresented. The respondent Republic was duly represented by Ms. Mwasiti Athumani Ally, learned Senior State Attorney.

Essentially, the appellant adopted his grounds of appeal and the written submission in support of the appeal and requested the Court to find that the appeal is merited, hence order his immediate release from prison custody.

On behalf of the respondent Republic, Ms. Ally resisted the appeal. Submitting in respect of the first ground of appeal, the learned Senior State Attorney argued that though the trial Magistrate did not comply fully with the provisions of section 210 (3) of the CPA, the omission did not prejudice the appellant as he has not explained how he has been affected by that failure. To support her stance, she referred to us the decision of the Court in **William Kasanga v. The Republic**, Criminal Appeal No. 90 of 2017 (unreported). In addition, Ms. Ally contended that the omission of the trial

Magistrate to indicate that the defence of the appellant was formally closed is not fatal in the circumstances of the case at hand as the appellant has similarly not shown in his submission how he was prejudiced. In the premises, she implored us to dismiss the appellant's complaints in the first ground of appeal.

It is settled that the provisions of section 210 (3) of the CPA require the trial Magistrate to read over the evidence of the respective witness if he so demands after the closure of his testimony. In the instant appeal, we have closely examined the record of proceedings of the trial court in the record of appeal and we have found that as reflected at pages 11, 13, 15, 16, 17 and 18 the trial Magistrate indicated as follows at the end of each of the prosecution witness: -

> *"ROFC*
> *S. 210 (3) of the CPA C/W"*

According to the uncontested practice of the trial courts, the acrimony "ROFC" stands for "Read Over and Found to be Correct". On the other hand, the abbreviation "C/W" stands for the words "complied with". It is therefore clear from the record that by indicating as she did, the trial Magistrate complied with the provisions of section 210 (3) of the CPA in respect of all prosecution witnesses.

Nonetheless, as the appellant testified as DW1, there is no indication that the trial Magistrate complied with the provisions of section 210 (3) of the CPA as she did with the prosecution witnesses. The question which follows is whether the omission is fatal.

In his submission, the appellant suggested that though it was his duty to remind the trial Magistrate to read over his evidence, the omission is fatal as being an illiterate person, the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E. 2019 were contravened because the envisaged right of fair hearing was accorded to the prosecution witnesses only.

It is unfortunate that in his written submission the appellant has not indicated whether what was recorded by the trial Magistrate with respect to his evidence during his defence was not correct or that he had any comment to the evidence which was recorded as required by the law. Indeed, he has not impeached the record of what was recorded in respect of his testimony during the defence case on that particular date. That being the case, we entirely agree with Ms. Ally that the complaint of the appellant is unfounded. We have no hesitation to state that in his submission he has not demonstrated that miscarriage of justice was occasioned on his part by the trial Magistrate's non-compliance with the provisions of section 210 (3) of the CPA as we held in **William Kasanga** (supra) and **Yuda John v. The**

Republic, Criminal Appeal No. 238 of 2017 (unreported) among many decisions of the Court. We therefore hold that the decision of the Court in **Mussa Abdallah Mwiba and Two Others v. The Republic,** Criminal Appeal No. 200 of 2016 (unreported) relied upon by the appellant to support his position that the omission is fatal is distinguishable from the circumstances of the instant appeal as in the latter there was complete non-compliance with the provisions of section 210 (3) of the CPA, which is not the case in the instant appeal.

With regard to the complaint of the appellant in respect of the failure of the trial Magistrate to append her signature at the end of his testimony, we are settled that the same is not supported by the record of the trial court proceedings. Admittedly, in the typed record of proceedings there is no indication that the signature of the trial Magistrate was appended. However, having perused the original record, we are satisfied that the provisions of section 210 (1) (a) of the CPA was fully complied with by the trial Magistrate. In the circumstances, we dismiss the first ground of appeal.

Turning to the second ground of appeal, we entirely agree with the concession of the learned Senior State Attorney that the contents of the PF3 (exhibit P1) were not read over to the appellant to enable him to know the information contained therein. As held in **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218 among other decisions of the

Court, it is important to ensure that after the documents is tendered and admitted in evidence its contents must be read over and explained to make them known to the accused. In the event, we disregard exhibit P2 in determining the appeal and allow the second ground of appeal.

Submitting in response to the complaint of the appellant in the third ground of appeal, Ms. Ally argued that in the circumstances of the case at hand, there was no need for the victim (PW1) to identify the appellant by touching or pointing at him when she testified at the trial court as contended by the appellant in his submission. This is because, she stated, the appellant was well known and duly recognized at the scene of crime by the victim on the fateful date. Therefore, she urged us to find the complaint baseless.

We are aware that in support of his complaint in this ground of appeal, the appellant argued that it was important for PW1 to identify him in court. He submitted that this was important because the victim did not prove beyond reasonable doubt that the person who called and grabbed her hand and raped her on that night was the appellant as she might have mistaken with a person who might have entered inside the house unnoticed on the particular day. We note from the record of proceedings of the trial court in the record of appeal that there is no dispute that the appellant and the victim knew each other well before and that they were together on the fateful date. In her testimony, PW1 was firm that they lived together with the appellant

as a family and that before that the appellant had proposed to have sexual intercourse with her, but she refused and the appellant apologized. It is apparent from the record that this piece of evidence was not seriously contradicted by the appellant.

Besides, in his defence, the appellant admitted that he was a watchman and on the particular date they were together with the victim after their employer and PW4 travelled on business trip. It follows that in view of the evidence in the record of appeal the victim knew well the appellant and thus there was no need of pointing or touching him at the trial when she testified. The victim's evidence indicates clearly that the appellant was familiar to her before the incident and that she recognized him at the scene of crime. Consequently, we find no merit in the appellant's complaint and hereby dismiss the third ground of appeal.

The fourth ground of appeal centres on the complaint of the appellant that the victim's evidence was not amply corroborated to justify his conviction on the offence of rape. To this complaint, the learned Senior State Attorney submitted that the first appellate court properly found that the evidence of the victim (PW1) on the issue of penetration which is important in proving the offence of rape in terms of section 130 (4) of the Penal Code was corroborated by the evidence of PW3 who examined her. This is notwithstanding, she argued, the absence of the PF3 which has been

discounted by the Court as its contents were not made known to the appellant. She emphasized that the oral testimony of PW3 indicates that the victim's vagina was penetrated on the material date. She added that the evidence of PW2, PW4 and PW5 also corroborated the testimony of PW1 on the aspect of reporting the incident of rape and the involvement of the appellant within some hours after the commission of the offence. To this end, Ms. Ally urged us to reject the appellant's complaints in the fourth ground of appeal for lacking merit.

We have carefully scrutinized the judgment of the first appellate court in relation to the evidence in the record of appeal and we entirely agree that the victim's evidence was corroborated to ground the conviction of the appellant. Like the two courts below, we are satisfied that PW1 was a credible witness with regard to what transpired on that day concerning the incident of rape and the involvement of the appellant. In her deliberation, the first appellate Judge reproduced the relevant part of PW1's evidence which was not greatly challenged by the appellant during cross examination. Indeed, cognizant of the position that the best evidence in rape offences comes from the victim and pursuant to section 127 (6) of the Evidence Act, Cap 6 R.E 2019, in view of the strength of her evidence in the record, PW1's evidence could have been solely relied upon to ground the appellant's conviction.

Despite discounting the PF3, we are equally satisfied that the oral evidence of PW3 who examined PW1 and came to the finding that her vagina was forcefully penetrated as there was presence of blood stains in the *labia majora* and tear, fully corroborated her evidence. Noteworthy, the first appellate Judge also took trouble to reproduce part of PW3's evidence to show that the issue of penetration was corroborated by the medical examination which was done on her.

We are however alive to the complaint of the appellant that PW3 was not sufficiently knowledgeable and could not distinguish which blood came from the tear caused by forced penetration and which one was caused by menstrual cycle. We find this argument baseless as during cross examination by the appellant, PW3 was firm that the presence of the tear and the blood led her to the conclusion that there was forced penetration of the victim's vagina as she examined her physically after about thirteen hours of the incident of rape. She thus ruled out that the presence of blood in the victim's vagina was caused by menstruation as contended by the appellant.

Moreover, we are settled that the evidence of PW4 to whom PW1 first reported the incident of rape who in turn communicated the information to PW2 some few hours after the incident corroborated her evidence on the commission of the offence and the involvement of the appellant. Besides, PW5, a police officer who issued the PF3 to PW1 for medical examination

and later caused the arrest of the appellant corroborates her story that PW1 reported the incident within reasonable time, that is, just some few hours after the incident of rape. In the event, we find no merit in the fourth ground of appeal and similarly dismiss it.

With regard to the fifth ground of appeal, we join hands with Ms. Ally that though the trial Magistrate did not record that the appellant closed his defence, no fundamental injustice was occasioned on his part. We hold this view because, after a ruling on a prima facie case was made by the trial Magistrate and the appellant was informed of his rights in terms of section 231 (a) and (b) of the CPA, he responded by stating that he had no witness to support his defence. Indeed, despite the appellant's complaint that his defence was not formally closed as required by law, he has not demonstrated in his submission how he has been affected and whether he had anything to say after he completed his testimony and duly cross examined by the public prosecutor. Thus, we hold that the failure of the trial Magistrate to indicate that the appellant's defence was closed did not occasion any breach of his fundamental rights as submitted by the appellant. As a result, the fifth ground of appeal fails, and we hereby dismiss it.

Lastly, in the sixth ground of appeal the appellant strongly maintains that the prosecution case was not proved beyond reasonable doubt because; firstly, the age of the victim was not established citing the decision of the

Court in **Rutoyo Richard v. The Republic**, Criminal Appeal No. 114 of 2017 (unreported). Secondly, that penetration was not proved by PW1, PW3 and exhibit P2. Thirdly, the victim's failure to identify him on the dock as a culprit. Fourthly, the trial Magistrate's non-compliance with the procedure when recording the defence evidence. He has therefore forcefully urged us to find merit in his submission and hold that the prosecution case was not proved to the required standard.

On her part, the learned Senior State Attorney reiterated her submission she initially made on other grounds of appeal in respect of the credibility of the prosecution witnesses in proving penetration which is crucial in proving the offence of rape and the alleged non-compliance with the law by the trial Magistrate. Essentially, she emphasized that in view of the factual settings in the record of appeal, there is ample evidence to support the concurrent findings by the two courts below that the prosecution proved the case against the appellant to the required standard.

On our part, in view of the deliberations and the decision we have reached with regard to the first, third, fourth and fifth grounds of appeal, we entertain no doubt that the prosecution proved the case of rape against the appellant to the required standard. As we have amply demonstrated above, the oral evidence of PW1 sufficiently proved that the appellant was responsible for committing the offence of rape.

Moreover, we are settled that PW3 corroborated the evidence of PW1 with regard to penetration which is a requisite element in proving the offence of rape as provided under Section 130 (4) of the Penal Code. It is noteworthy that PW1's and PW3's evidence when considered together with those of PW2, PW4 and PW5 on the issue of reporting of the incident of rape within reasonable time leaves no doubt that the prosecution witnesses evidence was not seriously shaken by the appellant during cross examination.

On the issue of the age of the victim, we entirely subscribe to the first appellate Judge's finding that PW2 through her oral testimony and exhibit P1 proved that the age of the victim was between 17 and 18 years by the time she testified as she was born on 18/2/2000. It was on that regard that as it was apparent on the record that PW1 was not under the age of ten (10) years, the first appellate Judge reduced the appellant's sentence from life imprisonment to thirty years imprisonment which is consistent with the law regarding the age of the victim.

In the circumstances, we find no justification in the appellant's complaints that the issue of age of the victim was not sufficiently resolved by both the trial and first appellate courts. Consequently, we hold that the decision of the Court in **Rutoyo Richard** (supra) relied upon by the appellant to support his stance on the effect of unresolved age of the victim

is not applicable in the circumstances of the instant appeal. In the result, we dismiss the sixth ground of appeal.

In the end, save for the second ground of appeal which we have allowed, we dismiss the appeal.

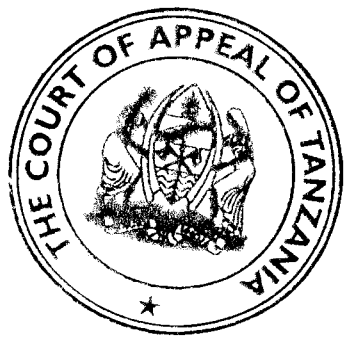
DATED at **DAR ES SALAAM** this 16th day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2021 in the presence of appellant in person linked via video conference from Ukonga Prison and Ms. Florida Wenseslaus, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL