IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI., J.A. And MWAMPASHI., J.A.)

CRIMINAL APPEAL NO. 321 OF 2019

EDWARD NYEGELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaganda, J.)

dated the 13th day of July, 2005

in

Criminal Appeal No. 32 of 2004

.....

JUDGMENT OF THE COURT

15th & 24th March, 2022

KITUSI, J.A.:

Originally the appellant appeared before the District Court of Songea on a charge of rape under section 130 (1) (2) (e) and 131 (3) of the Penal Code as amended by sections 5 and 6 of the Sexual Offences Special Provisions Act No. 4/1998. It was alleged that he had carnal knowledge of a girl aged 5 ½ years, to be referred to as PW4.

The trial ended with a conviction of the appellant followed by a custodial sentence for life. The appellant's first appeal was dismissed by the High Court, hence this second appeal predicated on four grounds.

What brought all this to the appellant is briefly as follows: Doris Mbilinyi (PW2) who was 12 years, lived with the alleged victim (PW4) in the house of Ditric Danda (PW1) the father of PW4. On 6/12/2003 when PW2 and PW4 were taking shower, PW2 noticed a bad smell on PW4 and raised the issue with her. PW4 told PW2 that the appellant who was their neighbour, had raped her. In her testimony, PW4 stated that on the fateful day the appellant called her into the kitchen where he pulled her pants down and had carnal knowledge of her.

On hearing PW4's story, PW2 related it to PW1 who, in turn, informed one Protus Lwena (PW3) a Chairman of local security. The two men took the appellant and PW4 to police and they testified that during interrogations he kept on denying involvement in the commission of the alleged offence. A PF3 was issued for PW4's medical examination which, the prosecution maintained, confirmed that indeed she had been raped. That PF3 was tendered by PW1 and admitted as Exhibit 1.

The appellant's defence included an assertion that he was impotent and that he could therefore not rape anyone. He had raised this line of defence very early in the day in the course of cross examining PW1, who agreed with him that an impotent man cannot have sex with a woman. A Dr. Ndiu (DW2) testified in support of the

appellant's impotent story. He said he worked with the government Hospital in Songea and recalled to have previously attended the appellant on the problem of impotency. He identified a letter dated 20/10/2003 addressed to "WHO IT MAY CONCERN" revealing the appellant's impotence and stated that he was the author of that letter. However, DW2 did not impress the learned trial magistrate as a truthful witness and we shall have occasion to discuss the conclusion of the two courts below on that.

The appellant's other front was that he did not see eye to eye with PW1, the latter accusing him of having illicit sex with his wife by using supernatural means. He said that he reported PW1's allegations of witchcraft but the local leaders would not take any action even when he made follow ups.

He also raised an alibi alleging that he had travelled away to a farm field with colleagues, one of whom testified in support as DW3. All this fell on deaf ears because the District Court found PW4's story impeccable and rejected that of the appellant. Specifically rejecting the testimony of DW2 the learned Resident Magistrate said:

> *"With due respect to Dr. Ndiu, I hold and find that he lied to this Court. Subsequently, I reject*

his evidence in total. It is all a fabrication. That (sic) mark the end for 2nd issue."

The second issue referred in that excerpt *was "whether accused's defence of impotence is genuine or not".* The third issue was *"whether the accused's defence of alibi is genuine or not".* The learned trial Resident Magistrate having answered the second and third issues in the negative and having answered the first issue (whether PW4 was raped) in the affirmative, proceeded to address the fourth issue which was *"if the answer to the first issue is YES, who is responsible".*

The learned Resident Magistrate's answer to the fourth issue was:

"As for the last issue as to whether accused person is responsible for raping PW4, this is simple, taking into account the findings of the previous issues and circumstances surrounding that evil act. I hold accused person responsible for having carnal knowledge (sic) with PW4 a girl of 5 years. I subsequently convict him as charged."

The High Court upheld this decision, so the appellant was dissatisfied as we have already said earlier. Of the four grounds of appeal raised in the memorandum of appeal, the first ground reads thus: -

"1. That the High Court erred in law and fact to uphold the decision of the trial court without considering that the evidence of the victim (PW4) was not corroborated by any other prosecution witness".

Ms. Hellen Chuma, learned State Attorney who represented the respondent, took the view that the above ground of appeal is sufficient to dispose of the matter. We share her view and we will mainly address arguments in relation to the first ground of appeal. We shall address the second and third grounds of appeal only as corollary to the first ground of appeal. The appellant chose to let Ms. Chuma address us first.

Ms. Chuma was in support of the appeal mainly on the ground that reception of PW4's evidence did not comply with the dictates of section 127 (2) of the Evidence Act, Cap 6, 1967 (TEA) as it stood in 2003 when the said witness testified.

That section provided: -

"127 (2) 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).*

Ms. Chuma's submission on the first ground of appeal was that PW4 being 5 ½ years old at the time she entered the witness box, was supposed to be subjected to a *voire dire* examination in terms of section 127 (2) of TEA reproduced above. Referring us to the relevant page in the typed proceedings, she invited us to interrogate whether what transpired justified the learned Resident Magistrate's conclusion that led to the reception of PW4's sworn testimony.

The relevant part of the proceedings reads as follows: -

> ***"P.W.4:*** *5 ½ years*
>
> *Xd by Court*
>
> - *I use to go to school. I study at Madaba. My School is Madaba. My teacher is Taweta. I use to go to church.*
>
> ***Court****: -Witness is intelligent and active. She knows the nature of an oath.*
>
> *S. and S."*

We take "S and S" to stand for "Sworn and States". Ms. Chuma went on to submit that apart from the conclusion that PW4 possessed sufficient intelligence and knew the nature of an oath, which she faulted as wrong because there was no basis for concluding so, it was incumbent upon the learned Resident Magistrate to indicate if he was satisfied that the witness understood the duty of telling the truth. Since according to her, that finding is not reflected in the proceedings, the learned State Attorney moved us to treat PW4's evidence as that of an unsworn witness, requiring corroboration.

She submitted further that PW2 would have corroborated PW4's testimony but her testimony was also fraught with irregularities similar to those of PW4. Nor would the PF3 (Exhibit P1) be of any assistance as it was wrongly tendered by PW1 who was not the author, and it was not read out after admission. On those grounds, she prayed for the appeal to be allowed.

The appellant thought he should add a few nails in the coffin of the prosecution's case. He submitted that it is not true that PW4 though a child, could not lie, because, he submitted, often times children lie to their parents that they had been to school while they had not. He also

wondered how PW1, not a government official, would have custody of the PF3 and tender it in court.

We begin by subjecting to scrutiny, the finding of the learned judge on first appeal. The relevant part of her decision was as follows: -

> *"The trial court found the child intelligent enough and that she knew the nature of an oath.... The medical report was also in support (sic) to P.W.4's evidence.... I cannot therefore fault the trial court's decision for considering the victim's evidence and find the appellant guilty".*

At once, we wonder if the learned trial Resident Magistrate considered the victim's evidence at all. We shall come to that in due course. Presently, we wish to examine Ms. Chuma's argument on how a *voire dire* examination ought to be conducted as the law stood then. We will demonstrate it by reproducing extensively the Court's illustration made in the case of **Mohamed Sainyeye v. Republic**, Criminal Appeal No. 57 of 2010 (unreported): -

> *"In a summary form the procedure to ascertain whether a child of tender age is competent to testify is as follows:*
>
> *PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY*

A. <u>ON OATH</u>

1. *The magistrate/ Judge questions the child to ascertain.*

   (a) The age of the child.

   (b) The religious belief of the child.

   (c) Whether the child understands the nature of oath and its obligations, based upon his religious beliefs.

2. *Magistrate makes a definite finding on these points on the case record, including an indication of the questions asked and answers received.*

3. *If the court is satisfied from the investigation that the child understands the nature and obligations of an oath, the child may then be sworn or affirmed and allowed to give evidence on oath.*

4. *If the court is not satisfied that the child of tender age understands the nature and obligations of an oath, he will not allow the child to be sworn or affirmed and will note this on the case record:*

B. <u>UNSWORN</u>

1. If the court finds that the child does not understand the nature of an oath, it must, before allowing the child to give evidence, determine through questioning the child ***two things****: -*

(a) That the child is possessed of sufficient intelligence to justify the reception of the evidence, ***AND***

(b) That the child understands the duty of speaking the truth. Again, the findings of each point must be recorded on the record.

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)

Court should indicate on the record and the child should not give evidence".

In the present case, we do not see how the learned Resident Magistrate got satisfied that PW4 understood the nature of an oath and its obligations, because the fact that the witness said she used to go to church, only tells us of her religious belief, which is direction (b) above. Without compliance with direction (c), the fact that PW4 used to go to church, does not justify the conclusion that she appreciated the nature of an oath. Therefore, the oath was wrongly administered by the learned Resident Magistrate before recording of PW4's evidence, as correctly submitted by Ms. Chuma.

Ms. Chuma invited us to treat PW4's evidence as unsworn. We would have gone along with the learned State Attorney had the proceedings shown that she understood the duty of telling the truth as required by the second part of the illustration, but we are afraid there is no such indication. It is therefore our conclusion that PW4 was an incompetent witness and her evidence had no value; same as it was concluded in the case of **Mohamed Sainyeye** (supra).

It was also submitted by Ms. Chuma that PW4's evidence needed corroboration. With due respect, we do not think that is correct because, having disqualified her as incompetent, no corroboration would resurrect her status.

However, we are aware that in some circumstances, rape may be proved without evidence of a victim. See our decisions in **Leonard Joseph @ Nyanda v. Republic,** Criminal Appeal No. 186 of 2017 cited I another case of **Shaban Said Likubu v. Republic**, Criminal Appeal No. 288 of 2020 (both unreported). That becomes possible where there is evidence, say medical evidence, from other witnesses.

Is there such evidence in this case? There is none, because the medical doctor who attended PW4 was not called to testify. Incidentally, the appellant raised this fact in the second ground of appeal. As for the

PF3, as submitted by Ms. Chuma, it was not read out after admission. Ms. Chuma invited us to expunge the PF3 and we do. If the medical doctor who prepared the PF3 had come forward to testify on its contents, that evidence would have been considered. See our decision in **Chrizant John v. Republic** Criminal Appeal No.313 of 2015 (unreported). But as we have said, that is not the case here.

We had promised to deliberate on whether indeed the learned Resident Magistrate considered the prosecution evidence. He did not. Although this is no longer decisive now, we feel obliged to point out that the court appears to have convicted the appellant because his alleged impotence was not proved. With respect, it is settled law that an accused cannot be convicted on the weakness of his defence. In **Sostenes Myazagiro @ Nyarushashi V. Republic**, Criminal Appeal No. 276 of 2014 the Court held: -

> *" It is the principle of the law that, the burden of proof lies on the prosecution and the accused bears no duty to prove his innocence".*

Had the learned Resident Magistrate approached the defence case from the point of view that it only needed to raise a reasonable doubt, the conclusion might have been different. To the contrary, even the

framing of issues were designed to require the appellant prove his allegation of impotence and alibi.

All said, we find merit in the first, second and third grounds of appeal. Consequently, we allow the appeal, quash the conviction and set aside the sentence. The appellant should be released forthwith unless held for some other lawful cause.

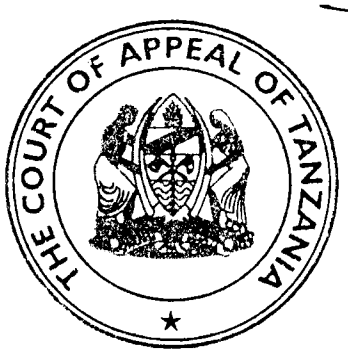
DATED at **IRINGA** this 23rd day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of appellant in person and Ms. Magreth Mahundi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL