IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 66 OF 2018

CHARLES WILLIAM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Tabora at Tabora)

(Shaidi, PRM - Ext. Jur.)

dated the 17th day of March, 2016
in
(DC) Criminal Appeal No. 24 of 2014

JUDGMENT OF THE COURT

22nd & 30th March, 2022

MWARIJA, J.A.:

In the District Court of Urambo at Urambo, the appellant, Charles William was charged with and convicted of the offence of rape contrary to ss. 130 (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019]. He was found guilty of having had carnal knowledge of a girl aged 8 years. To disguise her name, the child shall hereinafter be referred to as "SM" or the "victim". It was alleged that the offence was committed

on 10/2/2010 at about 9:00 hrs at Luganjo Village in Urambo District within Tabora Region.

When he was arraigned before the trial court, the appellant denied the charge, the result of which the prosecution called a total of five witnesses to testify. On his part, the appellant was the only witness for the defence. Having heard the prosecution and the defence evidence, the learned trial Resident Magistrate found that the prosecution had proved its case beyond reasonable doubt. Following his conviction, the appellant was sentenced to life imprisonment.

Aggrieved by the judgment of the trial court, the appellant appealed to the High Court. The appeal was heard in the Resident Magistrate's Court of Tabora before Shaidi, PRM (Ext. Jur.) who dismissed it for want of merit.

The background facts of the case are not complicated. On 10/2/2010, the victim and her younger sister, Nkingwa Magembe (PW2) were grazing their father's cattle away from home. Later in the day, PW2 returned home and informed her father (PW3) who was with his neighbour, one Ntambilo Masuke (PW4), about a saddening incident that SM had been raped. She named the appellant as the person who committed the offence. In the company of PW4, PW3 rushed to the scene and while on

the way, they met PW1 who narrated the incident to them. Having heard her, PW3 raised an alarm which was responded to by a number of people. A search for the appellant who had fled then began. He was arrested on 11/2/2010, sent to the police and later charged in court.

In his evidence, PW4 stated that, when he inspected the victim, he found that she had bruises and blood stains on her private parts. He found also that she had an injury on her neck. He testified further that, the victim was taken to Usinge Dispensary and later to Urambo District Hospital after a PF.3 had been obtained from Kaliua Police Station. At Urambo District Hospital, she was medically examined by Dr. Francis Ronald Mazigo (PW5). According to his testimony, when he examined the victim on 13/7/2010, he found bruises in her vagina and concluded that she was raped. He posted his findings on the PF.3 which he tendered in court as an exhibit.

The prosecution relied also on the evidence of PW1 and PW2 who were at the material time aged 8 and 6 years respectively hence the children of tender age in terms of the then s. 127 (5) of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act), now s. 127 (4) of the Revised Edition, 2019. From the record, the learned trial Resident Magistrate recorded their evidence in contravention of the provisions of s. 127 (2) of

the Evidence Act which required a *voire dire* test to be conducted before the taking of evidence of a child of tender age.

In his defence, the appellant (DW1) gave evidence exculpating himself from the offence charged. He said that, on 13/2/2010 while in his farm in Luganjo Village with his father, he was approached by a group of persons who were unknown to him. He was arrested and severely beaten by that group of people. They then took him before the Commander of the peoples' militia (sungusungu) and was at that moment informed that he raped PW1. He denied the allegation and the contention that he was known to PW1 and PW2. It was his evidence further that, the case was framed because of grudges which existed between his family and that of PW3, arising from a land dispute.

In convicting the appellant, the learned trial Resident Magistrate relied on the evidence of PW1 which he found to have been supported by that of PW5. He found further that, the appellant was properly identified at the scene of crime because he was known to PW1 and PW2. On the defence evidence, the trial court was of the view that the same was merely an attempt by the appellant to exonerate himself from the offence and thus the same did not raise any reasonable doubt in the prosecution case.

As stated above, the decision of the trial court was upheld by the learned appellate Magistrate. He looked at the evidence generally, without considering the grounds of appeal separately and held that the evidence of PW1 and PW2 was trustworthy and therefore, proved the case against the appellant beyond reasonable doubt. As to the appellant's defence that the case was fabricated, the appellate Magistrate found it to be a mere afterthought.

In his memorandum of appeal, the appellant raised five main grounds of appeal. He complained that the learned appellate Magistrate erred in law and fact in upholding the conviction because; **One,** he lacked jurisdiction to entertain the appeal since the same was not transferred to the Resident Magistrate's Court to be heard by him in the exercise of his extended jurisdiction powers. **Two,** he failed to find that the trial court wrongly acted on the evidence of PW1 and PW2 which was taken in breach of the requirement of conducting a *voire dire* test before it recorded the same. **Three,** the evidence of PW1 and PW2 was not corroborated. **Four,** he failed to find that the evidence of PW4 was wrongly acted upon by the trial court because that evidence lacked support of the evidence from any of the village leaders and **five**, he

upheld the appellant's conviction while the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney. When he was called upon to argue his appeal, the appellant chose to let the learned Senior State Attorney submit in reply to the grounds of appeal but reserved his right to make his rejoinder, if the need to do so would arise.

In his reply submission, whereas the learned Senior State Attorney contended that the 4th ground of appeal is a new complaint, he opposed the 1st and 5th grounds of appeal. He however, conceded to the 2nd ground of appeal. On the 4th ground, the learned Senior State Attorney, contended that, in the first appellate court, the appellant did not challenge the validity of PW4's evidence on the ground of lack of supporting evidence from any of the village leaders. Citing the case of **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2015 (unreported), Mr. Kajiru urged us to disregard that ground of appeal.

Submitting on the 1st ground of appeal, Mr. Kajiru stated that the appeal which was instituted in the High Court, was transferred to the Resident Magistrate's Court of Tabora to be heard by Shaidi, PRM in the

exercise of his extended jurisdiction powers. He referred us to page 38 of the record of appeal on which the order transferring the appeal is contained. He submitted that, the learned appellate Magistrate was for that reason, vested with jurisdiction to entertain the appeal.

As alluded to above, the learned Senior State Attorney conceded to the 2nd ground of appeal that the learned appellate Magistrate erred in law and fact in failing to find that the trial court wrongly acted on the evidence of PW1 and PW2 which was recorded in contravention of s. 127 (2) of the Evidence Act. He agreed with the contention that the learned trial Resident Magistrate did not conduct a *voire dire* test on the said witnesses and submitted therefore, that on the basis of such breach, their evidence should be expunged from the record. He cited the case of **Sylivester Boniphace v. Republic,** Criminal Appeal No. 421 of 2015 (unreported) to bolster his argument. On account of his submission on the 2nd ground of appeal, Mr. Kajiru argued that the 3rd ground is rendered superfluous because the evidence of PW1 was invalid and thus there was nothing which the evidence of PW5 could corroborate.

Notwithstanding his concession to the 2nd ground of appeal, the learned Senior State Attorney opposed the 5th ground of appeal arguing that, even if the evidence of PW1 and PW2 is excluded, the remaining

evidence of PW3 and PW5 suffices to sustain the appellant's conviction. He acknowledged however, that the contents of the PF.3 which was tendered by PW5 was not read out in court and thus prayed that the same be expunged from the record. Nevertheless, he maintained that the oral testimony of PW5 remains to be a reliable piece of evidence to that effect. He thus prayed that the appeal be dismissed.

The appellant did not have any substantial arguments to make in response to the respondent's reply submission. He merely reiterated his defence of denial, that he did not commit the offence charged.

Having considered the submissions made by the learned Senior State Attorney and after having gone through the record, we agree with him that the 1st ground of appeal is devoid of merit. The appeal, which was filed in the High Court, was transferred to the Resident Magistrate's Court of Tabora for hearing before Shaidi, PRM (Ext. Jur.). That was done by the Judge in-charge vide the order dated 26/1/2016 made under s. 45 (1) and (2) of the Magistrates' Courts Act [Cap. 11 R.E. 2002, now R.E. 2019]. We therefore dismiss that ground of appeal.

We also agree with Mr. Kajiru that the 4th ground of appeal raises a matter of fact which was not canvassed and determined in the two courts below. The appellant did not raise the issue concerning validity or

otherwise of PW4's evidence as a result of the failure by the prosecution to call as a witness, any of the leaders of the Village in which the offence was committed. The Court has, in a number of its decisions, pronounced itself to the position that, it would not entertain matters which were not raised and determined in the lower courts. In the case of **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 385 of 2015 (unreported) cited in the case of **Festo Domician** (supra), referred to us by Mr. Kajiru, the Court had this to say on that principle:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal. See for example,* ***Jafari Mohamed v. the Republlc,*** *Criminal Appeal No. 112 of 2006,* ***Richard s/o Mgaya @ Sikubali Mgaya v. the Republic,*** *[Criminal Appeal No. 335 of 2008] and* ***Nazir Mohamed @ Nidi v. the Republic,*** *Criminal Appeal No. 312 of 2014 (all unreported)."*

Guided by the above cited authorities, we decline to entertain the 4th ground of appeal.

Reverting to the 2nd ground of appeal, it is clear from the record that the learned trial Resident Magistrate did not conduct a *voire dire* examination on PW1 and PW2. On the part of PW1, from what was recorded by the trial Magistrate, she was only asked whether she understood the nature of oath and whether or not she understood the difference between the telling of truth and lies. That is found at page 12 of the record which reads as hereunder:

> *"**Court:** The witness is of tender age, she is asked the meaning of [oath], she does not understand but she said she understands the difference of telling oath (sic) and lies that is to say she understands the duty of speaking [the] truth.*
>
> *Sgd.*
> *I.E. Ngaile, RM*
> *20/07/2010."*

The purpose and the way on which a *voire dire* test should be conducted as then required by s. 127 (2) of the Evidence Act was stated by the Court in its various decisions. In the case of **Jafason Samwel v. the Republic,** Criminal Appeal No. 105 of 2006 (unreported) for example, the Court stated as follows:

> *"This provision imposes the duty on the trial magistrate or judge to investigate whether the*

child witness knows the meaning of oath so as to give evidence on oath or affirmation. If the child does not know the meaning of oath, then the trial magistrate or judge must ***investigate*** *whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. If he is satisfied that the child is possessed of sufficient intelligence and understands the duty of speaking the truth, he may receive his evidence though not given on oath or affirmation. In determining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth, the trial magistrate or judge must conduct a voire dire examination. He may put some questions to the child . . . ."*

[Emphasis added].

With regard to the way on which a *voire dire* examination should be conducted, the Court went on to state as follows:

"How a voire dire is conducted appears to be a matter of style. But recording questions and answers appears to be a better way because this enables even an appellate court to know whether the questions asked and the answers given were such that any court of law would have come to the conclusion that the child was possessed of

sufficient intelligence and understood the duty of speaking the truth."

In the case at hand, even though the recording of questions and answers was not mandatory, the trial Magistrate ought to have shown the scope of a *voire dire* test which formed the basis of his conclusion that PW1 possessed sufficient intelligence and understood the duty of telling the truth. From that part of the proceedings which has been reproduced above, there is no gainsaying that, apart from asking PW1 the two questions, the learned trial Resident Magistrate did not conduct a *voire dire* examination on her with a view to ascertaining whether **first,** she understood the nature of oath and **secondly,** whether she was possessed of sufficient intelligence and understood the duty of telling the truth. That purpose could not be achieved by merely asking her whether she understood the meaning of oath and the difference between the truth and lie, without more.

As for PW2, before she recorded her evidence, the learned trial Resident Magistrate stated as follows at page 13 of the record of appeal:

"Section 127 of the Evidence Act Cap. 6 R.E. 2002 is duly complied with. The witness understands the duty of telling the truth."

It is obvious that, as was for PW1, the evidence of PW2 was recorded without a holding by the trial court, of a *voire dire* examination.

On the basis of the foregoing, we agree with both the appellant and the learned Senior State Attorney, that the learned appellate Magistrate erred in failing to find that the evidence of PW1 and PW2 was wrongly acted upon by the trial court to found conviction because the same was received contrary to s. 127 (2) of the Evidence Act. The effect of non-compliance with the provision in question was stated in the case of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011 (unreported). In that case, the full bench of the Court held *inter alia*, as follows:

> *"1. Where there is a complete omission by the trial Court to correctly and properly address itself on section 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted.*
>
> *2. Where there is a misapplication by a trial court of section 127 (1) and or 127 (2) the resulting evidence is to be retained on the record. Whether or not any credibility, reliability weight or probative force is to be*

accorded to the testimony in whole or in part or not all, is at the discretion of the trial court.

3. *In these same facts and circumstances (i.e., No. 2) where there is other independent evidence sufficient in itself to sustain and guarantee the safe and sound conviction of an accused, the court may proceed to determine the case on its merits bearing in mind the basic duties incumbent upon it in a criminal trial and the fundamental rights of the accused."*

In the case at hand, as shown above, there was complete omission to comply with s. 127 (2) of the Evidence Act. Had the learned appellate Magistrate addressed his mind to that crucial point of law, he would have discounted that evidence. Since that was not done, we hereby proceed to discount the same.

That said and done, we now turn to consider the 3rd and 5th grounds of appeal. We need not be detained much in deciding these two grounds of appeal. As for the 3rd ground, having discounted the evidence of PW1 and PW2, we agree with Mr. Kajiru that the complaint by the appellant that such evidence was not corroborated by that of PW5 has become redundant. On the 5th ground, the argument by the learned Senior State

Attorney that, apart from discounting the evidence of PW1 and PW2, the evidence of PW4 and PW5 suffices to sustain the appellant's conviction is, with respect untenable.

In the first place, Mr. Kajiru acknowledged that the PF.3 was improperly admitted in evidence. The position of the law as stated in the case of **Robinson Mwanjisi and 3 Others v. Republic** [2003] T.L.R. 218 cited by the learned Senior State Attorney is that, a documentary evidence tendered as an exhibit, must be read out in court after its admission. The omission to do so renders such a document invalid deserving to be expunged from the record, as we hereby do. Secondly, even though the evidence of PW5 may prove that the victim was penetrated, the probative value of his evidence would only be on corroborating that of the victim. That evidence will not have the effect of proving that it was the appellant who committed the offence. The same position will be of equal effect as regards the evidence of PW4. His testimony was that, he was told by PW2 that it was the appellant who raped PW1. His evidence on that fact is therefore, based on hearsay which cannot be acted upon to found the appellant's conviction.

In our considered view, therefore, there was misapprehension of evidence by the two courts below leading to improper conviction of the

appellant. We thus find merit in the 5th ground of appeal and hereby allow it.

On the basis of the foregoing reasons, the appeal succeeds. In the event, the decision of the appellate Magistrate is reversed. Consequently, the appellant's conviction is quashed and the sentence meted out on him is set aside. He should be released from prison forthwith unless he is otherwise lawfully held.

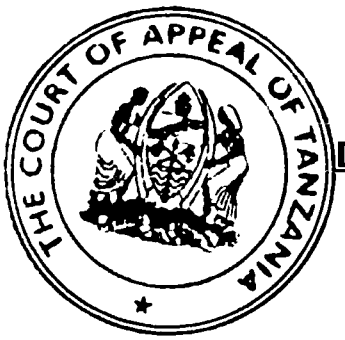
DATED at **TABORA** this 30th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of March, 2022 in the presence of the Appellant in person and Mr. Miraji Kajiru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL