IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 369 OF 2019

FRANK JULIUS NDEGE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Masabo, J.)

Dated the 31st day of July, 2019
in
HC Criminal Appeal No. 356 of 2018

JUDGMENT OF THE COURT

30th September, 2021 & 10th February, 2022

WAMBALI, J.A.:

Frank Julius Ndege, the appellant, appeared before the District Court of Kinondoni (the trial court) where he faced the charge of rape of a girl aged seven (7) years old contrary to the provisions of sections 130 (1) (2) (e) and 131 (1) and (3) of the Penal Code, Cap 16 R. E. 2002 (now R. E. 2019) (the Penal Code). For the purpose of this judgment, we will refer to the girl as "the victim" or "PW2".

It was plainly laid down in the particulars of the charge placed before the trial court that on 17th January, 2014 at Goba Kinzudi area

within Kinondoni District Dar es Salaam Region the appellant had unlawful carnal knowledge of the victim. The allegation was strongly disputed by the appellant as he pleaded not guilty to the charge.

The prosecution relied on four witnesses, namely; Perus Daudi (PW1), the victim (PW2), Lilian Marwa (PW3) and WP SGT Peace (PW4). In addition, a copy of the PF3 was tendered by PW3, but the trial court simply "marked it as an Id". According to the record of appeal, PW3 tendered a copy of the PF3 because the original was in the custody of the victim's parent.

Essentially, the substance of the prosecution case was that on the material date, that is, 17th January, 2014, the appellant who found the victim and two other children picking mangoes at Mzee Msingi's premises where he also resided, chased them and ultimately he got hold of the victim and pulled her into his room, laid her on the bed, undressed her clothes and inserted his penis into her vagina. The information on the incident was reported to PW1, the victim's mother by other children, including Chakupewa who were together with the victim on that particular day but managed to escape from the scene of crime after the appellant had the victim under his control.

PW1 who went to the scene of crime accompanied by the said children, called the victim's name and she replied while inside the

appellant's room. PW1 then peeped through the window and saw the appellant taking a bush knife. She thus sought help from neighbours who responded and arrived at the scene of crime. Nonetheless, when the appellant was requested to open the door he refused. According to the evidence in the record the door was forcefully opened by those who responded to the alarm and when PW1 and others entered the room, they found the appellant and the victim who was bleeding profusely from her vagina. The victim was taken to Mwananyamala Hospital for medical examination and treatment. The appellant was subsequently arrested and sent to police station.

PW3, the Assistant Medical Doctor who examined the victim on the date of the incident found that she had been severely injured in the inner part of the vagina which had raptured and she thus decided to stitch the respective part to prevent further bleeding. Nevertheless, as the injury was severe and there was no sufficient medical equipment at Mwananyamala Hospital, she referred the victim to Muhimbili National Hospital for further treatment. In short, PW3 concluded that after the examination she discovered that there was penetration into the vagina due to the existence of perennial tear and the damage to the labia minora of the victim's vagina.

As intimated above, the appellant denied the prosecution version of the allegation. On his part, he testified that as he was involved in a business of selling clothes, on 15th January, 2014 he was apprehended by some persons he did not know, who demanded to be paid Tshs. 20,000/= to secure his release. As he had no money to give the said persons, he was handcuffed and taken into the Bajaji and sent to Kawe Police Station where he was locked up for two weeks. He testified further that on 23rd January, 2014 he appeared before Kawe Primary Court where he was charged with the offence of doing business in an unauthorized area and that after he pleaded not guilty to the charge and was not granted bail, he was sent to Segerea Remand Prison. Particularly, in his further testimony, the appellant stated that on 24th June, 2014 he was surprised to appear before the District Court of Kinondoni charged with the offence of rape which he did not commit. Indeed, he denied to know the victim and any other prosecution witnesses who testified at the trial.

At the height of the trial the learned Resident Magistrate evaluated the evidence for both sides and found the appellant guilty of the offence of rape. She therefore convicted and sentenced him to thirty years imprisonment.

The appellant's attempt to appeal to the High Court against the trial court's conviction and sentence encountered an obstacle as his complaint with regard to conviction was dismissed and the sentence of thirty years imprisonment was enhanced to life imprisonment.

It is thus against the decision of the High Court that the appellant has approached the Court on six grounds of appeal contained in the substantive and supplementary memoranda of appeal. For the sake of convenience, the respective grounds of appeal may be summarized, compressed and rearranged as follows: -

1. *The first appellate judge erred in law by sustaining the appellant's conviction and enhancing sentence based on the evidence of the victim (PW2) which should have been expunged as it was taken in violation of section 127 (2) of the Evidence Act.*
2. *The first appellate judge erred in law and in fact to find that the evidence of PW1 and PW3 corroborated the evidence of PW2 (the victim) which also required corroboration because: -*
   (i) The PF3 was not legally tendered and admitted in evidence.
   (ii) The trial court failed to draw adverse inference to the prosecution case for its failure to summon some material witnesses who would have corroborated

the evidence of PW1 including the children who accompanied the victim to the scene of crime and those who allegedly arrested the appellant and sent him to police station.

3. *The first appellate judge erred in law and in fact by upholding the appellant's conviction while the prosecution evidence failed to establish the appellant's apprehension in connection with the offence charged in disregard of the defence evidence.*
4. *The first appellate judge erred in law and in fact for holding that the appellant's defence of alibi did not conform to the requirement of section 194 (6) of the Criminal Procedure Act (CPA) while the appellant has no burden to prove the truth of his defence.*
5. *The first appellate judge erred in law and in fact in upholding the conviction of the appellant while the prosecution case was poorly investigated for the failure of the investigator to visit the scene of crime to ascertain the veracity of the evidence of PW1 and PW2 contrary to the procedure laid by law.*
6. *The first appellate judge erred in law for illegally and un-procedurally sentencing the appellant excessively contrary to section 131 (2) (a) of the Penal Code.*

The appeal was called on for hearing in the presence of the appellant in person, unrepresented, whereas Ms. Anna Chimpaye and Ms. Monica Ndakidemi learned Senior State Attorney and State Attorney respectively appeared for the respondent Republic.

In his brief submission, the appellant implored us to consider his grounds of appeal and the written submission he lodged in Court earlier on and allow the appeal. He maintained that he was surprised to be charged, convicted and sentenced of the offence of rape which he was not arrested in connection with, as testified in his defence.

In response to the first ground of appeal, Ms. Chimpaye readily admitted that the trial court Resident Magistrate partially complied with the provisions of section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 (now R.E. 2019) before she allowed PW2 to testify. She explained that the trial court Magistrate simply concluded that PW2 knew the meaning of the truth without showing how she conducted the *voire dire* examination and indicating whether the victim possessed sufficient intelligence to testify. However, she submitted that the trial court's omission is curable as the evidence of PW2 which falls into the category of unsworn evidence was fully corroborated by the evidence of PW1 who witnessed the arrest of the appellant at the scene of the crime. She added that PW2's evidence was also corroborated by the testimony of

PW3 who conducted a medical examination after the incident and found that the victim's vagina was penetrated on the material day and thus the offence of rape was established. To support her submission, she referred us to the decision of the Court in **Soud Seif v. The Republic**, Criminal Appeal No. 521 of 2016 (unreported). In this regard, she implored us to dismiss the first ground of appeal.

It is noteworthy that the complaint of the appellant in the first ground of appeal concerning the inability of the trial court to conduct *voire dire* examination properly before PW2 (the victim) testified, was also raised before the first appellate court and decided accordingly. Nevertheless, before us through the appellant's written submission, relying on the decision of the Court in **Godi Kasenegala v. The Republic**, Criminal Appeal No. 10 of 2008 (unreported), the appellant has urged us to upset the decision of the first appellate court on this issue. Basically, he pressed us to disregard or expunge the evidence of PW2 and thereby hold that in the absence of her evidence, the prosecution case was not proved to the hilt.

We have carefully scrutinized the proceedings in respect of the evidence of PW2 and like the first appellate judge, we are satisfied that the trial court did not properly conduct the *voire dire* examination. Indeed, as stated in **Soud Seif** (supra), we have no hesitation to

emphasize that in view of the dictates of the provisions of section 127 (2) of the Evidence Act as constituted before the amendment in 2016, the purpose of conducting *voire dire* examination was to determine the competence of a child of tender age to ascertain whether she possesses sufficient intelligence and understands the nature of an oath.

However, it is equally settled that failure of the trial court to comply fully with the procedure of conducting *voire dire* examination reduces the recorded evidence to a level of unsworn evidence of a child, which requires corroboration. For this stance, see; **Kisiri Mwita v. The Republic** [1981] T. L. R. 218, **Dhahiri Ally v. The Republic** [1989] T. L. R. 27, **Deema Daali and Two Others v. The Republic** [2005] T.L.R. 132 and **Jafari Mohamed v. The Republic**, Criminal Appeal No.112 of 2006 (unreported), to mention but a few.

It is noteworthy that the above position was endorsed by the Full Bench of the Court in **Kimbute Otiniel v. The Republic**, Criminal Appeal No.300 of 2011 (unreported).

Turning to the circumstances of the present matter, we entirely agree with the finding and holding of the first appellate judge that as *voire dire* examination was partially conducted, the evidence of PW2 was reduced to unsworn evidence that required corroboration. The remedy thus is not to expunge or disregard it in determining the fate of the

prosecution case as argued by the appellant. Therefore, in the light of the settled position, in the instant appeal, the evidence of PW2 cannot be relied upon in the absence of corroboration. Nevertheless, at this point, since the other complaint of the appellant in the second ground of appeal is lack of corroboration, we will deal with this issue at an appropriate stage.

Ultimately, to sum up our determination in the first ground, we hold that the first appellate judge correctly found and held that the evidence of PW2 could not be disregarded due to the trial court's partial compliance with the provisions of section 127 (2) of the Evidence Act (as it was before the amendment effected through Act No.3 of 2016). We thus dismiss the first ground of appeal for lacking merit.

The complaint of the appellant in the second ground of appeal is that the evidence of PW1 and PW3 which also required corroboration cannot corroborate the evidence of PW2 because: first, the PF3 was not legally tendered and admitted in evidence; and second, that some of the material witnesses who alleged to have witnessed the arrest of the appellant at the scene of the crime were not summoned to testify at the trial. To this end, relying on **Aziz Abdallah v. The Republic** [1997] T. L. R. 71, the appellant has strongly urged us to expunge the PF3 from

the record of proceedings and thereafter draw an adverse inference to the prosecution case for failure to summon important witnesses.

In reply, Ms. Chimpaye conceded that though PW3 tendered a copy of the PF3, it was not formerly admitted by the trial court as exhibit as required by law. She thus argued that the PF3 could not have been relied on in evidence by the trial and first appellate courts to ground the appellant's conviction. However, she submitted that even after disregarding the PF3, the oral evidence of PW3 who examined the victim suffices to show that there was penetration into the vagina of the victim, which is an essential requirement for the proof of the offence of rape as prescribed under section 130 (4) of the Penal Code. She added that the evidence of PW3 therefore corroborates that of the victim (PW2) that she was raped.

On the other hand, the learned Senior State Attorney contested the appellant's submission that the non-summoning of some witnesses who witnessed his alleged arrest weakened the prosecution case and thus the trial and first appellate courts would have drawn an adverse inference. She submitted further that the evidence of PW1 who was among the persons who participated in the arrest of the appellant at the scene of crime and sent the victim to Mwananyamala Hospital and Muhimbili National Hospital on the same day of the incident is sufficient

to corroborate the evidence of PW2 that she was raped by the appellant. She emphasized that in terms of section 143 of the Evidence Act, the prosecution is not bound to summon all witnesses who are mentioned to have witnessed the incident irrespective of their importance. In her submission, depending on the circumstances of each case, some material witnesses may suffice to prove that the accused committed the offence.

On our part, in the first place, we agree with the learned Senior State Attorney that as the PF3 was not legally admitted in evidence, it could not be relied upon to support the prosecution case. In this regard, the reliance on the PF3 by both the trial and first appellate courts was improper. We thus disregard the PF3 in determining this appeal.

However, as correctly submitted by Ms. Chimpaye, despite disregarding the PF3, the oral evidence of PW3 who examined the victim (PW2) remains intact in the record of proceedings. Indeed, as properly found by the first appellate judge, PW3 testified in clear terms on the substance of her findings after she examined PW2. Particularly, in her examination she discovered that the victim's vagina had been penetrated on the material day. We further gather from the record of appeal that in her oral testimony, PW3 plainly explained that there was

perennial tear and damage to the labia minora which caused severe bleeding and as a result she stitched the damaged part to prevent further bleeding. In this respect, we are satisfied that the oral evidence of PW3 sufficiently corroborated the evidence of PW1 on the issue of penetration. Besides, according to the record of appeal, PW3's oral evidence was not seriously challenged by the appellant during cross-examination. In this regard, we wish to reiterate what we stated in **Ally Mohamed Makupa v. The Republic,** Criminal Appeal No. 2 of 2008 (unreported) that: -

> *"In case of this nature a PF3 is not the only evidence to prove that the offence of rape was committed, other evidence on the record can as well do so".*

Moreover, we are satisfied by the reasoning and finding of the first appellate judge that PW1 who witnessed and participated in the arrest of the appellant at the scene of crime is a credible witness and sufficiently corroborated the evidence of PW2 on the incident concerning the occurrence of rape and the involvement of the appellant in the commission of the offence. Similarly, we note that the evidence of PW1 was not challenged during cross-examination as she was firm that she found PW2 with the appellant in one of the rooms at the scene of crime and that the victim was sent by her to hospital after she reported to the

police. PW1 also confirmed that the appellant was arrested on the same date of the commission of the crime, that is, 17th January 2014 immediately after the door of the house in which he was with the victim was forced open by those who went to the scene of crime.

In the circumstances, having considered critically the evidence of PW1 and PW3, which firmly and sufficiently corroborate the evidence of PW2, we do not think the non-summoning of the children who were chased by the appellant and other persons who witnessed his arrest can weaken the prosecution case on the occurrence of rape and the involvement of the appellant. In the event, we find the appellant's complaint in the second ground of appeal to have no basis and hereby dismiss it.

In the third ground of appeal, the appellant's complaint is that his alleged apprehension at the scene of the crime was not fully established by the prosecution evidence in view of his defence at the trial court.

Responding to the submission of the appellant with regard to the complaint in the third ground, Ms. Chimpaye argued that the evidence in the record casts no doubt that the apprehension of the appellant in connection with the offence of rape was done at the scene of the crime as testified by PW1 and PW2. She therefore requested the Court to consider the appellant's complaint as baseless and dismiss it.

On our part, we are of the settled opinion that the appellant's complaint is unfounded. We are aware of the appellant's defence that he was arrested on 15th January, 2014 in connection with the offence of doing business in an unauthorized area and that he was not involved in the commission of the offence of rape, which he was ultimately convicted with sentenced by the trial court and confirmed by the first appellate court.

Nonetheless, we take cognizance of the evidence of PW1 which corroborated the evidence of PW2 that the appellant was arrested at the scene of crime on the material day and sent to police. More importantly, the evidence of PW1 and PW2 concerning the appellant's arrest at the scene was not seriously challenged during cross-examination. We further note from the record of appeal that the appellant did not cross-examine PW2 on any issue concerning her testimony on the incident. Indeed, when the appellant cross-examined PW1 on the occurrence of the incident and his involvement, she was firm that she found him in the house together with the victim (PW2) and that he was taken to the police on the same date. In this regard, in the light of the ample evidence of PW1 and PW2, we think the story of the appellant that he was arrested by unknown persons on 15th January, 2014 in connection with a different matter is an afterthought. The appellant could have cross-examined PW1 and PW2 on the issue of his arrest to dispute the

allegation. He cannot thus bring this complaint during the second appeal. Indeed, his failure to cross examine the witnesses on such an important matter indicates that he agreed with the evidence of the respective witnesses (see **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 - unreported). In the result, we dismiss the third ground of appeal.

With regard to the complaint of the appellant concerning the first appellate judge's deliberation and conclusion on the issue of alibi, Ms. Chimpaye supported her finding that the appellant's defence of alibi was rejected as it had no basis. She submitted that though the appellant did not issue the notice under section 194 (2) of the CPA, the first appellate court properly considered his story which was brought up during his defence as required under section 194 (6) and rejected it. In the circumstances, she invited us to reject the appellant's complaint against the finding of the first appellate court.

There is no doubt that the appellant's defence of alibi was not raised by giving prior notice as required under section 194 (2) of the CPA. It is equally not in dispute that though the appellant's defence of alibi was not considered by the trial court, the first appellate court dealt with it adequately as required under section 194 (6) of the CPA. Moreover, we are aware of the defence of the appellant at the trial to

the effect that on the alleged date of the incident, that is, 17th January, 2014, he was remanded at Kawe Police Station. We are also alive to the settled position of law that it was not the duty of the appellant to prove the alleged defence and that his failure to do so does not relieve the prosecution of the duty to prove its case.

However, as we have demonstrated in our deliberation in the second and third grounds of appeal above, the evidence of PW1 and PW2 on the arrest and involvement of the appellant was sufficient for the first appellate court to come to the conclusion that the appellant's defence of alibi had no basis. Basically, the evidence of PW1 and PW2 left no doubt that the appellant was found at the scene of crime on 17th January, 2014. The complaint of the appellant on the finding and holding of the first appellate court on the defence of alibi has no basis. In the circumstances, we find no merit in the fourth ground of appeal. We accordingly dismiss it.

Next is the complaint of the appellant that the prosecution case was not proved to the required standard as it was poorly investigated for failure of the investigator to visit the scene of crime to ascertain the reliability of the testimonies of PW1 and PW2.

The learned Senior State Attorney countered the appellant's contention by submitting that the investigator was not duty bound to

visit the scene of crime as the evidence of PW1 and PW2 proved that he committed the offence. She added that PW1 and PW2 are reliable witnesses as found by the two courts below. In the end, she argued that in the circumstances of this case there was no need of the investigator to visit the scene of crime. In her view, there is no dispute that the appellant was arrested at the house of Mzee Msingi (the scene of crime) where he resided and he did not challenge that piece of evidence when PW1 and PW2 testified at the trial.

We have closely scrutinized the evidence in the record of appeal and we are satisfied that though PW4, the police investigator, did not visit the scene of crime, the evidence of PW1 and PW2 demonstrates clearly what transpired on the particular date and the involvement of the appellant in the commission of the offence. As we have intimated above, the evidence of PW1 and PW2 was not challenged by the appellant during cross-examination. It follows that in the light of the evidence in the record concerning the occurrence of rape against the victim and the involvement of the appellant in the commission of the offence, it cannot be safely concluded that the failure of the investigator to visit the scene of crime weakened the prosecution case. On the contrary, since the two witnesses were held to be credible and reliable, we have no hesitation to uphold the concurrent finding of facts by the two courts below that the

prosecution case was proved beyond reasonable doubt. In the result, we hold that the fifth ground of appeal is devoid of merit and dismiss it.

Lastly, the appellant's complaint in the sixth ground is that the first appellate judge wrongly enhanced the sentence of imprisonment from thirty years to life imprisonment in disregard of section 130 (2) (a) of the Penal Code while the victim's age was not ascertained.

Countering the appellant's argument, Ms. Chimpaye argued that the first appellate judge properly enhanced the sentence as the appellant was charged with raping a victim of below the age of ten years contrary to the provisions of sections 130 (2) (e) and 131 (1) and (3) of the Penal Code.

We have thoroughly perused the judgment of the first appellate court against the complaint of the appellant. There is no dispute that before enhancing the sentence the first appellate judge made reference and reviewed the provisions of the law in respect of the charge sheet which was placed at the door of the appellant. Basically, she was satisfied that the charge sheet indicated that at the time the offence was committed the victim was seven years old and therefore below ten years. She then found that the appellant was properly charged under section 130 (2) (e) of the Penal Code and that he was aware that he was accused of raping the child below ten years. In the circumstances,

she imposed the sentence of life imprisonment under section 131 (3) of the Penal Code.

On our part, we have no hesitation to state that in view of the record of appeal, there is no dispute that the charge sheet indicated that the victim was aged seven years in 2014. On the other hand, the evidence of PW1, the victim's mother, is that she was aged eight years as she was born on 14th October, 2006. We are settled that in the circumstances of this case, PW1 was better placed to testify on the age of the victim as her mother. Besides, PW2 also testified that she was aged eight years old. Be that as it may, we are of the considered opinion that despite the difference on the age of the victim between the charge sheet and the evidence of PW1, the crucial issue is that PW2 was below the age of ten years by the time she was raped. Thus, the appellant was properly charged under section 130 (2) (e) of the Penal Code. The appellant could not have been charged under section 130 (2) (a) as he would have wished. It was therefore wrong for the trial court to have sentenced him to thirty years imprisonment as he was not charged under section 130 (2) (a) of the Penal Code. In this regard, we hold that as the parties were given opportunity to be heard on the legality of the sentence that was imposed by the trial court, the first appellate court properly enhanced the sentence to life imprisonment as required under section 131 (3) of the Penal Code.

In the premises, we find the sixth ground of appeal meritless. We therefore dismiss the appellant's complaint in this ground.

In the end, save for what we have stated with regard to the second ground of appeal, we dismiss the appeal.

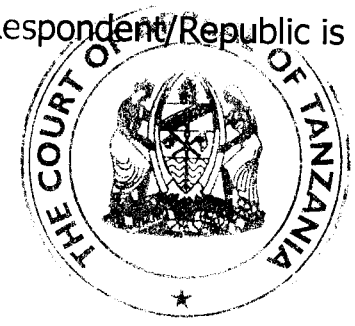
DATED at **DAR ES SALAAM** this 4th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of February, 2022 in the presence of appellant in person linked via video conference from Ukonga Prison and Ms. Jacquline Werema, 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