IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 109 OF 2018

WILSON MUSA @JUMANNE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Opiyo, J.)

dated the 13th day of February, 2018
in
Criminal Appeal No. 23 of 2017

.....

JUDGEMENT OF THE COURT

9th & 15th February 2022.

KAIRO, JA.:

In the District Court of Mbulu at Mbulu, the appellant; Wilson Musa @ Jumanne 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 by the prosecution that on 20th day of March, 2016 at night hours at Haydon Village within Mbulu District in Manyara Region, the appellant had carnal knowledge of a girl child aged 6 years. We shall refer

to the girl as the victim or PW1 to conceal her identity. Upon conviction, the appellant was sentenced to serve thirty (30) years in jail and suffer twelve (12) strokes of the cane. His appeal to the High Court was unsuccessful and now is before the Court challenging both conviction and sentence.

At the trial the prosecution had adduced evidence to the effect that the appellant is a step father of the victim as he had married the victim's mother; one Rehema Ally who testified as PW2. The trio were living together. On 19th March 2016, PW2 went to visit her parents at Basutu and left behind the victim and the appellant.

On the material day, during night hours, the appellant took the victim to his bed, undressed her and applied some vaseline on the victim's private parts. He then inserted his penis into her vagina and raped her. According to the victim, she felt so much pain and shouted for help. However, the appellant threatened to beat her. He also warned her not to tell anybody about the incident, including her mother.

When PW2 returned back home on 25th March, 2010, she noticed that PW1 was walking abnormally. Upon examining the victim's private parts, she found pus discharging from her vagina. When asked as to what transpired, she narrated the ordeal to her and mentioned the appellant to be the one who had raped her. PW2 took the victim to the police where a

PF3 was issued so that the victim can be taken to the hospital. On the following day, PW2 took the victim to Haydom Hospital where she was examined by Dr. Yuda Munyaw who testified as PW3. According to PW3, the victim's vagina had bruises and was discharging a bad smelling mucus. Due to her condition, the victim was hospitalized for three days for treatment. PW3 then filled the PF3 which was admitted as exhibit P1 after being tendered by PW1.

In his defence, the appellant denied to have committed the offence. He alleged that the accusations were fabricated by PW2 so that they can separate.

After a full trial, the learned trial Magistrate was satisfied that PW1 was a witness of truth despite giving an unsworn evidence. He further found that her evidence was corroborated by the testimonies of PW2 and PW3 thus, convicted and sentenced the appellant as above stated. The appellant was not satisfied and his appeal to the High Court at Arusha was to no avail. Still determined to protest his innocence, the appellant preferred this appeal on the following grounds: -

1. *That, both the trial court and the first appellate court erred in law for failing to rule out that the charge against the appellant was defective.*

2. *That, the judgment of the first appellate court was based on a null judgment of the trial court for failing to cite any provision of law when convicting the appellant.*
3. *That, the evidence of PW1 was taken in contravention of section 127(2) of the Evidence Act, Cap 6 R.E. 2002 (the Evidence Act).*
4. *That, the first appellate Judge erred in law and in fact to hold that the prosecution has proved the case beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person unrepresented while the respondent Republic enjoyed the services of Misses. Eunice Makalla and Blandina Msawa, both learned State Attorneys. The appellant chose to begin and we invited him to proceed.

According to his submission in support of the grounds of appeal, the appellant's complaint mainly revolves on the 3rd and 4th grounds of appeal and declined to submit on the remaining 1st and 2nd grounds which we treated as abandoned and we shall not determine them.

Submitting for the 3rd ground of appeal, the appellant complains that the evidence of PW1 was taken in contravention of the dictates of section 127(2) of the Evidence Act. In elaboration, the appellant has contended that, PW1 did not promise to tell the truth and as such, her evidence was

wrongly acted upon to ground the conviction. He thus, urges the Court to expunge the evidence from the record.

As for the 4th ground of appeal, the appellant faults the first appellate court for failing to rule out that the prosecution did not prove the case beyond reasonable doubt. Expounding on this ground, the appellant's complaint was twofold: **first**; that the PF3 which was admitted as exhibit P1 was not read over after it was admitted by the trial court as legally required. He therefore prayed the Court to expunge it from the record. **Second**; that the right to call the doctor who examined the victim was not explained to him during the trial. On this, he argued that the provision of section 240 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 [now 2019] (the CPA) was not complied with and in a way, he was prejudiced. The appellant referred us to the case of **Jafason Samwel vs. Republic**, H.C Criminal Appeal No. 99 of 2002 AR (unreported) to substantiate his argument. He urged the Court to follow the stance taken in the cited case and expunge the testimony of PW3. In conclusion, he prayed the Court to find his grounds merited, allow the appeal and set him free.

The Court probed for the appellant's comments on the propriety of the sentence of 30 years imprisonment imposed on him *vis a vis* the offence he was convicted of. The appellant told the Court that he was aware that the

legal sentence is life imprisonment, but preferred to leave the issue to the wisdom of the Court.

In reply, Ms. Makalla informed the Court that the respondent supports the conviction but not the sentence meted on the appellant.

Reacting to the appellant's complaint that PW1 did not promise to speak the truth, Ms. Makalla submitted that the trial court made a fact finding on PW1 by asking her questions and that through her responses, the learned trial magistrate was satisfied that she possessed sufficient intelligence and understood the duty of speaking the truth. She went on submitting that, the learned trial court magistrate was however of the opinion that PW1 did not know the meaning of oath and she thus allowed her to give an unsworn evidence. Ms. Makalla referred us to pages 7-8 of the record of appeal to verify her argument. She also submitted that the stance of the law is to the effect that unsworn evidence needs corroboration. As for PW1's evidence, Ms. Makalla submitted that, the same was corroborated by PW2; her mother who upon noting that she was walking abnormally, she examined her and found pus discharging from her private parts. Upon quizzing the victim as to what had happened, she mentioned the appellant to be the one who raped her. Ms. Makalla also went on to submit that another evidence which corroborated PW1's evidence was that of the Doctor; (PW3) who examined

her and found bruises on her private parts together with mucus fluid having a bad smell discharging from her vagina. She therefore concluded that, the appellant's argument in the 3rd ground is baseless and prayed the Court to dismiss it.

As a reply to the 4th ground, Ms. Makalla began with the appellant's complaint that, the trial Court did not read over exhibit P1 after admitting it in court. Ms. Makalla un-hesitantly conceded to the short fall and joined hands with the appellant to have it expunged from the record as a remedy. She however contended that despite expunging it, the victim categorically testified how the offence was committed and named the appellant to be the one who raped her. She went on to argue that, it is now a settled law that the best evidence in sexual offence cases comes from the victim. She sought reliance on the case of **Selemani Makumba vs. Republic** [2006] T.L.R. 379 to back up her arguments. She also added that the said victim's evidence was corroborated by PW2 and PW3 as she earlier submitted. She concluded that the 4th ground of appeal is again without merit and prayed the Court to dismiss it.

Regarding the propriety of the sentence meted on the appellant, Ms. Makalla was firm that, the sentence of 30 years imprisonment was not

proper. She argued that such a conviction attracts a sentence of life imprisonment. She thus prayed the Court to substitute it with a proper one.

We have heard the rival arguments of the parties and gone through the record of appeal. Beginning with the 3rd ground, the issue in controversy is whether or not the evidence of PW1 was taken in contravention of section 127(2) of the Evidence Act. The appellant's complaint in this regard is to the effect that, PW1 did not promise to tell the truth when the *voire dire* test was conducted on her.

It is imperative to point out that when the victim was testifying on 6th June, 2016, the amendments to section 127 of the evidence Act were not yet in force. The said amendments were done vide the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 and came into effect on 7th August, 2016, which means the provision applicable when the victim was testifying was section 127 of the Evidence Act before the amendments.

It was not disputed that PW1 was 9 (nine) years old, thus a child of a tender age as per section 127 (5) of the Evidence Act applicable by then and thus, section 127 (2) of the Evidence Act was to be complied with before the trial court could receive her evidence. The section states:-

> *"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].*

In terms of the cited provision, what the trial court was required to ascertain from PW1 was if she understood the meaning of oath and the duty of speaking the truth and **not** getting the promise to speak the truth from her. We thus find the appellant's complaint misconceived. The begging question therefore is whether PW1 in this case understood the duty to speak the truth. For easy reference, we let the relevant excerpt speak for itself:-

"PROSECUTION CASE OPEN

PW1, Queen Juma, (Swahili in tribe), 6 years, Christian. Before given her evidence let her answer some questions:

I am not going to school. I live at Haydom town. My father and mother were peasants. All we live in a renting house. The owner of that house is one Gado. I do not attend church. I have two sisters. I am the youngest one. Only my mother is the person who attending in church. Others don't attend.

SGD: V. J. Kimario RM
6/6/2016

COURT:

This is a girl of six (6) years old. She had a knowledge of giving good explanation. She may give a rational answer to the question as above. She knows what she was asked. She had not attained the age of knowing about God. ***She knows the duty of speaking truth****. She shall give her evidence without Oath. [Emphasis added].*

SGD: V. J. Kimario RM
6/6/2016"

Applying the quoted provision to the quoted excerpt above, we hold without hesitation that section 127(2) of the Evidence Act was complied with. Regarding the case of **Jafason Samwel** (supra) cited by the appellant, suffices to state that the position stated therein which we subscribe to, does not support his arguments. We thus find that the 3rd ground of appeal without merit and accordingly dismiss it.

In the 4th ground of appeal, the appellant contends that, the case was not proved beyond reasonable doubt against him by the prosecution. As earlier stated, his complaint has two limbs: The first limb is to the effect that he was not addressed on the right to have the doctor who examined the victim summoned to testify, but there is no iota of truth as the Doctor

who examined PW1 was summoned to the trial court and testified as PW3. The record further shows that the appellant cross examined him (page 11 of the record of appeal) thus, he was not prejudiced in any way. We find his complaint baseless and dismiss it.

As for the second limb of his complaint, we agree with both the appellant and Ms. Makalla on the pointed-out infraction that exhibit P1 (PF3) was not read over in court after it was admitted.

The law is settled that wherever it is intended to introduce any document in evidence, it must first be cleared for admission and then read it out in court. Failure to do so is a fatal irregularity as it denies an accused person an opportunity to understand the nature and substance of its contents in order to make an informed defence. See: **Joseph Maganga and Another vs The Republic,** Criminal Appeal No. 536 of 2015 (unreported). The remedy as correctly stated by Ms. Makalla is to have it expunged. There is a plethora of authorities to that effect including; **Said s/o Salim vs. The Republic,** Criminal Appeal No. 449 of 2016, **Issa Hassan Uki vs. The Republic**, Criminal Appeal No. 129 of 2017, **Hassan Said Twalib vs. The Republic**, Criminal Appeal No. 95 of 2019, **Osward Charles vs. Republic**, Criminal Appeal No. 223 of 2017 (all unreported) to

mention but a few. We accordingly proceed to expunge exhibit P1 from the record for the pointed-out shortfall.

Having expunged exhibit P1, the issue before us is whether the case was proved beyond reasonable doubt. It is a well-established and settled principle that the best evidence in sexual offences like the one at hand, comes from the victim as she is the one to express what transpired and the sufferings she went through during the incident. The principle was established in the celebrated case of **Selemani Makumba vs. Republic** (supra) cited to us by Ms. Makalla and further restated in various cases including **Hans Mkumbo vs. Republic,** Criminal Appeal No. 124 of 2007 and **Rashid Abdallah Mtungwa** vs. Republic, Criminal Appeal No.91 of 2011 (both unreported) among many more.

In the instant case, PW1 firmly explained the ordeal she underwent on the fateful day. She testified how the appellant took her to his bed and undressed her, applied some vaseline on her private parts and he then inserted his penis into his vagina. PW1 further testified how painful the ordeal was which made her shout for help but was threatened to be beaten by the appellant. She was further warned not to tell anybody, even her own mother. However, she disclosed the incident to PW2 on her arrival after being noted to have been walking abnormally. PW1 also mentioned the

appellant to be the person who had raped her. Basing on her testimony, PW1 was very specific and firm as to what transpired and who raped her as rightly found by both lower courts.

We are mindful that PW1 gave unsworn statement which legally needs corroboration before the trial court could rely on it to mount conviction. We are in agreement with Ms. Makalla that PW1's evidence was aptly corroborated by PW2 who examined her private parts and found pus discharging and mentioned the appellant to be the perpetrator.

Another corroborative evidence is that of PW3; the Doctor who examined the victim and found bruises on her vagina and some fluid which had a bad smell. We are thus of firm view that the prosecution has managed to prove beyond reasonable doubt that PW1 was raped and it was the appellant who raped her. The 4th ground of appeal flops as well and we accordingly dismiss.

Pertaining to the sentence imposed on the appellant, we agree with Ms. Makalla that the imposed sentence of 30 years imprisonment for an offence of rape committed to a girl below the age of 10 years was illegal. Unfortunately, this went unnoticed in the High Court. We are of the view that the Court being the final one, has a duty to ensure the proper application of the law. On the basis of the foregoing and having sustained the

conviction, we invoke our revisional powers bestowed on us under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and quash the illegal sentence of 30 years imprisonment imposed on the appellant. We instead, substitute it with the mandatory sentence of life imprisonment in accordance with the provision of section 131 (3) of the Penal Code.

In the end, we find this appeal without merit and dismiss it.

DATED at **ARUSHA** this 15th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 15th day of February, 2022 in the presence of the appellant in person and Ms. Blandina Msawa learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL