IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 244 OF 2020

MNG'AO YOHANA CHACHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Musoma)

(Galeba, J.)

dated the 15th day of May, 2020
in
Criminal Appeal No. 188 of 2019

.....

JUDGMENT OF THE COURT

7th & 10th June, 2022

NDIKA, J.A.:

The appellant, Mng'ao Yohana Chacha, was convicted by the District Court of Serengeti at Mugumu of rape and was sentenced to thirty years' imprisonment. Having vainly appealed against the conviction and sentence to the High Court of Tanzania at Musoma, he now appeals to this Court, yet again against the conviction and sentence.

Based upon the testimonies of six witnesses and two exhibits, the prosecution sought to establish the accusation that the appellant, on 22nd November, 2018 at about 15:00 hours at Kemgesi village within Serengeti

District in Mara Region, had carnal knowledge of a girl [name withheld] aged eleven years. We shall hereafter refer to the girl as "the victim" or "PW1", the codename by which she testified.

On the whole, the prosecution case presented the following narrative: on 22nd November, 2018 around 8:00 a.m., PW1, aged eleven years, was with her grandmother, Winfrida d/o Bhoke (PW2) and a younger sister at their farm in Kemgesi village planting sisal. At or about 11:00 a.m., PW2 and the younger sister went away to tend to certain stray cattle, leaving PW1 alone at the farm. Around 3:00 p.m., the appellant, who was a cowhand employed by a certain Mongita Moremi in the village, came to the farm. He offered to help PW1 with her sisal planting work on condition that she drives his herd of cattle that were grazing nearby. Not knowing what was on the cards, PW1 agreed to that arrangement and walked towards the cattle in a nearby bush. Shortly thereafter, the appellant followed her, got hold of her neck and covered her mouth to muffle her screams. He finally removed her underwear, inserted his male member into her vagina and had sexual intercourse with her. When he was through, he ran to where the cattle had moved and disappeared.

PW1 went back home around 4:00 a.m. She did not tell PW2 about her ordeal as she feared a reprisal. Later that night around 11:00 p.m.,

she informed PW2 of the matter as she could no longer bear the pain in her private parts. PW2 examined the victim's private parts and noted that her underwear (Exhibit P1) was stained with blood. Because it was rather late, it was decided that the matter would be pursued the following day.

In the following morning, PW2 informed her brother, Stanslaus Masau (PW4), of the matter and enlisted his help. PW4 led his sister and PW1 to the home of the appellant's employer, the said Mongite Moremi, who then called the appellant for questioning on the accusation against him. On being quizzed, the appellant admitted to having sexual intercourse with PW1 but claimed that the act was consensual because she agreed to it after he had given her TZS. 1,000.00 as an inducement. When queried why PW1's neck was swollen and lacerated, which was indicative that the sexual act was forceful, the appellant remained tightlipped. There and then, he was arrested and taken to the Kenyana Police Station where a formal complaint was made against him. Accordingly, the victim was issued with a request for medical examination (PF.3).

PW5 Hilary Said Ally, a Clinical Officer at Kemgesi Health Centre, attended the victim later the same day. His findings, which he posted in the medical examination report (Exhibit P2), were that the victim had multiple lacerations on the neck and cheeks and that her vagina also had

lacerations on the labia minora and labia majora. He added that there was a whitish thick discharge with foul smell from the vagina. The said findings, he concluded, were consistent with the victim having been sexually abused.

It is noteworthy that although the appellant passed up the chance to cross-examine all the prosecution witnesses, he still interposed the defence of general denial. He also alleged that the charge against him was a scheme arising from his mother's disagreement with PW2 over ownership of a certain piece of land. However, in cross-questioning, he admitted that he never had any grudges with PW4.

Acting on PW1's evidence which it accepted as credible, the trial court (Hon. I.E. Ngaile – RM) found it proved that the victim was, indeed, raped. It also held the said fact was corroborated by the medical evidence adduced by PW5 and supported by Exhibit P1. As to who the perpetrator of the crime was, the court gave full credence to the victim's testimony pointing an accusing finger at the appellant who she knew very well before the incident. As stated earlier, on the first appeal, the High Court of Tanzania sitting at Musoma (Galeba, J. as he then was) upheld both conviction and sentence, hence the present appeal.

This appeal was premised on six grounds of grievance as follows: **one**, that PW1's evidence was irregularly given and recorded. **Two**, that PW5's evidence and Exhibit P2 are unreliable. **Three**, that the evidence given by PW2, PW3 and PW4 was hearsay, hence it had little weight. **Four**, that the evidence given by PW2, PW3 and PW4 was inconsistent. **Five**, that the ingredients of the charged offence were not proved. **Finally**, that the case was not proved beyond reasonable doubt.

We heard the appeal on 7th June, 2022. Before us, the appellant, who was self-represented, basically urged us to allow his appeal and rested his case. On the other hand, Mr. Tawabu Yahya Issa, learned State Attorney, who teamed up with Mr. Nico Malekela, also learned State Attorney, to represent the respondent, resolutely opposed the appeal against conviction but supported it as against the impugned sentence.

We find it convenient to deal, at first, with the argument Mr. Issa made at the beginning of his address to the Court on the appeal. He contended that the third and fourth grounds were new grievances that were not raised before the first appellate court. Relying on the Court's decision in **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 (unreported), he argued that the Court is precluded from entertaining any new ground raising factual contentions, not pure

questions of law. The appellant, on his part, offered no rebuttal quite understandably as he appeared unapprised of the thrust of the learned State Attorney's submission.

Unquestionably, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal – **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016; **Hassan Bundala v. Republic**, Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016; and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported).

We are in agreement with the learned State Attorney that the two grounds raise no more than an attack on the calibration of the testimonies of the three witnesses by the courts below without suggesting that the said evidence was misapprehended. The said contentions were not raised on the first appeal to the High Court for consideration and determination. They cannot be raised on a second appeal, which must be on pure points of law. On that basis, we abstain from entertaining them.

On the first ground of appeal, the appellant essentially faulted the giving and recording of the testimony of the victim on oath without the learned trial magistrate having ascertained whether she understood the nature and meaning of oath in view of her tender age of twelve years at the time she took the witness box. We understood him that without such ascertainment, the evidence was recorded contrary to the letter and spirit of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 (hereafter "the Evidence Act") and, therefore, such evidence was worthless.

Conversely, Mr. Issa submitted that the impugned evidence was properly recorded because the aforesaid provision gives a child witness of tender years an option to give evidence on oath or affirmation or upon a promise to tell the truth and not lies if evidence is given without oath or affirmation. While acknowledging that in **Seleman Moses Sotel @ White v. Republic**, Criminal Appeal No. 385 of 2018 (unreported), the Court held that a testimony of a child witness of tender years could only be recorded on oath or affirmation if the witness is ascertained to have an understanding of the nature of oath or affirmation, the learned State Attorney referred us to a recent decision of the Court in **Wambura Kiginga v. Republic**, Criminal Appeal No. 301 of 2018 (unreported) for the proposition that non-compliance with section 127 (2) of the Evidence

Act is not necessarily fatal in view of the provisions of section 127 (6) of the same law. For clarity, we extract the relevant passage thus:

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127 (2) of the Evidence Act is not complied with, provided that some conditions must be observed to the letter. The conditions are: first, that there must be clear assessment of the victim's credibility on record and; second, the court must record reasons that notwithstanding non-compliance with section 127 (2), a person of tender age still told the truth."*

Mr. Issa posited further that, even if the victim's evidence was discounted, the appellant's conviction would still be firmly founded upon his own admission of having had sexual intercourse with PW1 as adduced by PW4.

We think that we need not belabour the issue at hand in view of the circumstances of this matter. We are in agreement with Mr. Issa that apart from the appellant's conviction being founded on the testimony of PW1, the said conviction remains sustainable upon his own admission, as adduced by PW4, that he had sexual intercourse with PW1 after he had given her TZS. 1,000.00 as an inducement as well as the undisputed

evidence that the victim was aged eleven years at the material time. It is significant that the appellant did not challenge PW4's evidence on the said admission, either by cross-examination or in his defence evidence. The circumstances suggest that he made the admission as a free agent, the statement being totally voluntary, hence incriminating – see **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul**, [1988] TLR 82; **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004; and **Posolo Wilson @ Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (both unreported). As it is in the evidence that the victim was eleven years old at the material time, it did not matter whether she consented to the sexual encounter or not. Obviously, the evidence is loud and clear that the sexual encounter was plainly not consensual. That is why, according to the medical evidence, the victim sustained multiple lacerations on her neck and cheeks, which must have resulted from the appellant having applied force by holding her around the neck so as to secure sexual intercourse. Accordingly, we dismiss the first ground of appeal.

The complaint in the second ground of appeal that PW5's evidence and Exhibit P2 are unreliable is equally beside the point. We entirely agree with the learned State Attorney that PW5, a qualified medical professional, gave a coherent and consistent account of his examination of the victim

and the findings he made, which he duly posted in Exhibit P2. Given that his testimony was not questioned by the appellant who actually declined to cross-examine him and also taking into account that Exhibit P2 was admitted without any objection, we take the view, as did the courts below, that the said evidence was credible and reliable.

In view of the foregoing discussion, grounds five and six, whose common thread is the criticism that the charged offence was not proven beyond reasonable doubt, poses no difficult. It is noteworthy that the offence the appellant's faced was laid under section 130 (1) and (2) (e) of the Penal Code, Cap. 16 R.E. 2002 (hereafter "the Penal Code"). Its essence is that a male person commits the offence of rape if he has sexual intercourse with a girl with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

As we indicated when dealing with the first ground of appeal that even if PW1's testimony were discounted, the appellant's own admission of having had sexual intercourse with the victim on the fateful day as per PW4's uncontroverted evidence coupled with the fact that the victim was a girl aged eleven years at the material time, sufficiently established the gravamen of the charged offence. Besides, the said evidence, so far as the

element of penetration is concerned, is confirmed by PW5's testimony and Exhibit P2 that the victim's vagina had lacerations on the labia minora and labia majora. These findings were undoubtedly consistent with the victim having been sexually abused. The fifth and sixth grounds fail.

The final issue concerns the legality and propriety of the sentence. As we stated earlier, the trial court, having convicted the appellant of the rape, sentenced him to thirty years' imprisonment. That sentence, which was presumably levied under section 131 (1) of the Penal Code, was upheld without question on the first appeal.

At the hearing of the appeal, we questioned, *suo motu*, whether that sentence was legal and proper as it is on record firmly unchallenged that the appellant was eighteen years at the time he committed the offence. The appellant did not address us on the issue but Mr. Issa, on his part, posited that in view of the appellant's age of eighteen years and that he was a first offender, he ought to have been sentenced to suffer corporal punishment in terms of subsection (2) of section 131. On that basis, he moved us to rectify the error, pursuant to our revisional powers, by setting aside the illegal sentence and substituting for it a proper sentence.

Section 131 of the Penal Code is the punishment provision for the offence of rape. It stipulates as follows:

> *"**131**.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.*
>
> *(2) Notwithstanding the provisions of any law, where the offence is committed by a **boy who is of the age of eighteen years or less, he shall**-*
>
> *(a) **if a first offender, be sentenced to corporal punishment only;***
> *(b) if a second time offender, be sentence to imprisonment for a term of twelve months with corporal punishment;*
> *(c) if a third time and recidivist offender, he shall be sentenced to life imprisonment pursuant to subsection (1)."* [Emphasis added]

It is clear that subsection (1) above stipulates that thirty years' imprisonment with corporal punishment, and with a fine is the minimum

penalty for rape as a general punishment. However, subsection (2) above expressly creates an exception from the said general punishment as it stipulates, so far as is relevant to the instant case, that the punishment for rape committed by a boy who is of the age of eighteen years or less being a first offender shall be corporal punishment only. The other punishments for boys are in accordance with paragraphs (b) and (c) of subsection (2), which are inapplicable in the instant case.

In view of the foregoing, given that the appellant was a boy of eighteen years' of age at the time he committed the offence and that he was a first offender, he ought to have been sentenced to suffer corporal punishment only. On that basis, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and proceed to set aside the illegal and improper sentence of thirty years' imprisonment imposed on the appellant. However, having taken into account that the appellant was convicted on 30th October, 2019 and that since then he has been serving the aforesaid illegal sentence, it is our considered view that the term of imprisonment he has served so far, spanning over thirty-two months, is far more than the corporal punishment he would have lawfully suffered. As we did in **Goodluck Kyando v. Republic** [2006] TLR 363 at 373 where we dealt with a comparable

setting, we order that in lieu of the aforesaid illegal punishment, we impose a sentence on the appellant that would result in his immediate release from prison unless otherwise lawfully held.

In the upshot, save for the aforesaid order on the sentence, the appeal stands dismissed.

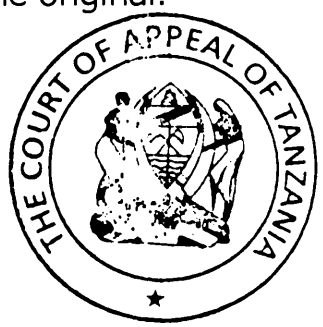
DATED at **MUSOMA** this 9th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 10th day of June, 2022 in the presence of the appellant in person and Mr. Tawabu Yahya Issa learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL