IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 280 OF 2018

MASANYIWA MASOLWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Shinyanga District Registry at Shinyanga)

(Kibella J.)

dated the 10th day of August, 2018

in

(DC) Criminal Appeal No. 171 of 2016

.....

JUDGMENT OF THE COURT

4th & 21st July, 2022

GALEBA, J.A.:

On 12th March 2012, Masanyiwa Masolwa, the appellant in this appeal was arraigned before the District Court of Kahama in Criminal Case No. 108 of 2012 in which he was charged with sexual offences based on two counts. The first was rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code); and the second was abduction of a girl under sixteen years of age, contrary to section 134 of the Penal Code.

The victim of the two offences was a young girl of 13 years, whose identity, we will conceal by referring to her as PW1 or just, the victim.

According to the prosecution, on 28th February, 2012 while the victim's parents were out for daily work, the appellant went to the victim's home at Misayu village in Kahama District, found her there and deceived the child by advancing her TZS. 5,000.00, allegedly for buying clothes. Thereafter, he took the victim to his home in a distant village of Burega located in Ushirombo within Bukombe District. At Burega, according to the prosecution, the appellant had sexual intercourse with the victim. Before the trial court, the appellant denied the allegations, but all the same, the court believed the prosecution and found him guilty on both counts and convicted him accordingly. In terms of sanction, the appellant was sentenced to thirty (30) years and three (3) years imprisonment for rape and abduction, respectively, which sentences however were ordered to run concurrently. He was aggrieved by that decision and appealed to the High Court, but the appeal was dismissed. In this second appeal, the appellant is challenging the dismissal of his first appeal at the High Court. The appeal is based on five grounds, which are as follows:

"1. *That, Honourable Justice of the High Court*

erred in law and fact in convicting the appellant without proving the issue of penetration as the key element of rape considering that the victim was attended at police station on 09.03.2012 and was examined by the doctor on 18.03.2012 as per PF 3.

2. *That, the Honorable Judge of the High Court erred in law and fact in convicting the appellant basing on cautioned statement obtained under coercion, intimidation and threats over the appellant as it was taken out of time.*

3. *That, the Honorable Judge of the High Court erred in law and fact by not observing the difference of names between Nyasanyirwa Masorwa in the cautioned statement and Masanyiwa Masolwa written in the charge sheet.*

4. *That, the Honorable Judge of the High Court erred in law and fact by convicting the appellant basing on the evidence of tender age.*

5. *That, the prosecution did not prove their case beyond reasonable doubt."*

At the hearing of this appeal on 4th July 2022, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Ms. Merce Ngowi and Ms. Wampumbulya Shani, both learned State Attorneys.

At the outset, the appellant prayed that we adopt his grounds of appeal and determine his appeal based on those grounds. He added that the learned State Attorneys may reply to his grounds so that he may rejoin if such need would arise. So, we permitted the learned State Attorneys to react to the grounds, because Ms. Shani had indicated to us that the respondent Republic was not supporting the appeal.

Ms. Shani started with grounds 1 and 5 which she informed us that those grounds were challenging the decision of the High Court for upholding the conviction of the appellant on the offence of rape while penetration was not proved and generally the case was not proved beyond reasonable doubt.

On those grounds, Ms. Shani submitted that the case was proved to the hilt and the important element of penetration necessary in rape cases was abundantly proved too. She contended that at page

6 of the record of appeal the victim elaborated how she was abducted from her home and taken to the appellant's village in the absence, and without permission of her parents. She added that the witness, explained also how the appellant was sleeping with her as if she was his wife. The learned State Attorney relied on the decision of this Court in the case of **Hassan Kamunyu v. R,** Criminal Appeal No. 277 of 2016 (unreported), to support her argument that, although the victim did not directly give the exact details of the actual sexual act on her body, but the description of what happened to her clearly demonstrated that indeed, the appellant raped the victim.

Ms. Shani submitted further that the evidence of PW1, was corroborated by that of his father, PW2 and even that of the appellant himself for two reasons. **One,** the appellant did not cross examine the victim on her account of what he did to her at his home in Burega, and on this aspect, she cited the case of **Issa Hassan Uki v. R,** Criminal Appeal No. 129 of 2017 (unreported), moving us to hold that failure of a party to cross examine a witness of the adverse party on a particular point, implies that the party omitting to cross examine accepts as true the unquestioned version of the witness from the other side of the case. **Two,** the learned State Attorney argued that

the appellant in his evidence, admitted to have given the victim TZS. 5,000.00 as his wife. The point that Ms. Shani was seeking to drive home was that the evidence of the victim was corroborated by that of her father, PW2 and of the appellant, DW1.

In the circumstances, she concluded that both penetration of the victim's genitals was proved as well as the whole case in general was proved beyond reasonable doubt.

Next for argument, was in respect of grounds 2 and 3 which Ms. Shani was in support of. She beseeched the Court to expunge the caution statement, exhibit P1 and the PF3, exhibit P2 from the record because, the documents were not received in evidence according to law. She however was quick to remark that despite the expungement of those documentary exhibits, the evidence which was adduced orally by the witnesses who tendered the documents was still intact.

The last ground in line was the 4th. In respect of that ground, Ms. Shani contended that under the law, at the time hearing of the case in the subordinate court was conducted in 2012, *voire dire* test was mandatory to be conducted. In this case she stated, that the test was conducted, but it was conducted irregularly, because questions

that were put to the witness were not recorded. Nonetheless, she was quick to observe that where *voire dire* is not carried out properly then the evidence that is recorded after the test, does not become completely worthless, but it must be corroborated in order to validate it. To buttress her argument, she referred us to the case of **Kazimili Samwel v. R**, Criminal Appeal No. 570 of 2016 (unreported). In this case, she concluded, the evidence of PW2 the victim's father and that of DW1, the appellant, corroborated the evidence of the victim, a child of tender age which had been unprocedurally taken.

In rejoinder, the appellant being a layman, had nothing useful to tell us worthy recording. So, he left the matter for the Court to determine his fate as he had intimated earlier on.

We will start with a caution in the form of an observation, so that we are not misunderstood as we proceed. The appeal before us is the second, the first was before the High Court and the latter is the appeal from which, the decision challenged before us, emanates. The well-known principle of law in this jurisdiction is that, on a second appeal, the Court will not readily disturb or interfere with the concurrent findings on the facts by the trial court and of the first

appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure which have occasioned a miscarriage of justice. This Court has maintained that position in many decisions including **Wankuru Mwita v. R,** Criminal Appeal No. 219 of 2012**, Raymond Mwinuka v. R**, Criminal Appeal No. 366 of 2017 (both unreported) **and Salum Mhando v. R, [1993] T.L.R. 170.** In other words, the caveat we indicate here is that we will not unduly interfere with the concurrent finding of fact of the two courts below, unless there are the above apparent irregularities on record.

In determining this appeal, we propose to start with the 4th ground of appeal. It was on acceptance of the evidence of PW1, the victim, who was at the time 13 years old. Legally, at the time, that is before 7th July 2016, a person of an apparent age of not more than 14 years, could only give evidence, after a *voire dire* test first has been conducted. In this case *voire dire* was carried out, and the exercise led to a finding by the trial court that the child understood the meaning and importance of telling the truth and the nature of oath such that

her evidence was taken on oath. At page 6 of the record of appeal, the court is recorded, thus:

> *"Court: With due respect I am conversant (sic) that the witness knows the difference between true and lies hence she will testify with oath she had then sworn (sic) and states thus:"*

Thus, the victim testified on oath after the trial court was satisfied that the witness understood the meaning of the oath. The question we need to answer is whether a *voire dire* test leading to establishing that a child witness understands the nature of oath and does testify after taking oath, still needs to meet other two *voire dire* traditional conditions, that is; to demonstrate that he or she possesses sufficient intelligent such that his or her evidence can be received, and whether he or she understands the duty to tell the truth.

First and foremost, let us make one point clear; before the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, was enacted, the provisions of section 127 (2) of the Evidence Act [Cap 6 R.E. 2002, now R.E. 2022] (the Evidence Act) under which evidence of witnesses of tender age was being taken provided as follows:

"(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 reception of his evidence, and understands the duty of speaking the truth."

In view of the above provision, we think, if the trial court made a finding that the child understood the meaning of oath and went ahead to make the child swear as the trial court did in the matter before us, we are of a settled view that conducting further inquiries as to the intelligibility of the child does not arise. It is not the first time that this Court is encountering the scenario. In the case of **Kilaga Daniel v. R,** Criminal Appeal No. 425 of 2017 (unreported), a child of 5 years had been raped. A *voire dire* test was held, but there was nothing on record to suggest that the child possessed sufficient intelligence. Nonetheless, the magistrate noted that the child understood; **one**, the nature of oath and; **two** she demonstrated knowledge of the duty to tell the truth. The child then took oath and

gave evidence. On appeal to this Court, we observed as follows on a complaint that sufficiency of her intelligence was not established:

> *"The provision, (of section 127 (2) of the Evidence Act), required the trial Judge or Magistrate to determine by a voire dire test whether a child witness of tender age understands the nature of oath and the duty of speaking the truth before such child's evidence could be taken on oath or affirmation. If not, the court then was required to determine if the child possessed sufficient intelligence to justify the reception of such child's evidence without oath or affirmation. In* ***Kimbute Otinlel v. Republic,*** *Criminal Appeal No. 300 of 2011 (unreported), the Full Bench of the Court underlined that once the "oath test" has been satisfied, it justifies the reception of evidence on oath or affirmation and that it obviates the need to conduct the "intelligibility test." This observation is at page 65 of the typed ruling of the Court."*

See also, **Nguza Vikings @ Babu Seya and Three Others v. R**, Criminal Appeal No. 56 of 2005, **Khamis Samuel v. R**, Criminal Appeal No. 320 of 2010 and **Soud Seif v. R**, Criminal Appeal No. 521 of 2016 (all unreported).

We think therefore that obviation or omitting to carry out the intelligibility test of the victim after establishing that the child understood the nature of oath, the trial magistrate offended no law, and the evidence, of PW1, having been taken under oath as indicated, there was no more duty on the part of the trial court to establish any other intellectual abilities of the child. In any event, if a person can swear and give evidence on oath, what more intelligence would one need. We think that is why this Court in the case of **Kilaga Daniel** (supra) held that once an "oath test" is passed, one did not need to take the "intelligibility test". Thus, the 4th ground of appeal has no merit and we hereby dismiss it.

We will now proceed to the 2nd and 3rd grounds. Ms. Shani had no contest with these grounds. She submitted that the same are grounded. She was of the view that the caution statement, exhibit P1 and the PF3, which was exhibit P2 be expunged because after clearing them for admission the same were not read over to the appellant.

Resolving grounds 2 and 3 will not take much of our time because it is an established principle in the law of evidence as applicable in this jurisdiction that generally once a document is

admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person, for him to appreciate its substance. That has been the position in many cases decided by this Court including, **Robinson Mwanjisi and Three Others v. R,** [2003] TLR 218, **Mwinyi Jamal Kitalamba @ Igonzi and Four Others v. R,** [2020] T.L.R. 508 and **Huang Qin and Xu Fujie v. R,** Criminal Appeal No. 173 of 2018 (unreported). For instance, in **Mwinyi Jamal Kitalamba** (supra) at page 509, this Court observed that:

> *"(iii) Failure to read the exhibit after being admitted, the omission is fatal as it contravenes the fair right of an accused person to know the content of the evidence tendered and admitted against him. It was wrong and prejudicial."*

In this case, the caution statement was tendered by F. 1666 Detective Sargent Peter, PW4 at page 9 of the record of appeal and the PF3 was tendered by WP D/C Devotha, PW5 at page 10 of the record of appeal. Both documents however, were not read in court after their receipt and admission in evidence. Based on the authority in the case of **Mwinyi Jamal Kitalamba** (supra) reliance on such documents is unlawful and their forming part of, and remaining on

records is utterly illegal. Consequently, we expunge the said documents from the record. It should be noted that expunging the caution statement sorts out the appellant's complaint in the 3rd ground of appeal on the error of names in the expunged exhibit and the charge sheet. In the same vein, we allow the 2nd and 3rd grounds of appeal.

Ms. Shani had indicated to us that expunging the above exhibits would not in any way shake the remaining evidence on record.

It is, indeed the position of this Court that where a document is expunged, it does automatically follow that the evidence of the witness who tendered it must as well collapse or diminish in evidential weight. It depends, if the substance of the document which has been expunged is largely the same in substance and content as the oral evidence that was adduced by the witness, expunging the document cannot affect the remaining evidence on record. It is however not necessarily the case, where the substance of the document expunged is completely different from that of the oral testimony which was recorded. In the case of **Huang Qin and Xu Fujie** (sura), a Trophy Valuation Certificate tendered at the trial as an exhibit was expunged because its contents were not read, but the Court held that the oral

evidence of the witnesses remained intact and valid because the substance of the expunged document had been captured from oral testimony. On our part, having gone through the evidence of PW4 and PW5 who tendered both exhibits P1 and P2 and guided by this Court's previous decisions in **Robinson Mwanjisi** (supra) and **Anania Clavery Betela v. R,** Criminal Appeal No. 355 of 2017 (unreported), we hold that the evidence of PW4 and PW5 is retained irrespective of the fact that exhibits P1 and P2 have been expunged from the record as the removal of the exhibits from the record has not in any way affected the recorded evidence of those witnesses. In any event, in the case of **Jafari Salum @ Kikoti v. R,** [2020] T.L.R. 406, this Court stated that:

> *"(ii) An accused person may be convicted of rape even without a PF3 (medical report) provided that there is other sufficient evidence to prove that the accused raped the victim – see: Bashiri John v. Republic, Criminal Appeal No. 486 of 2016 (unreported)."*

There is therefore nothing alarming or necessarily detrimental to the prosecutions case, in the aftermath of expunging the PF3, as we

have done above. It is different however, if there was no other credible evidence to establish the offence of rape.

Next for our attention and last in determination are grounds 1 and 5. A wider complaint in those two grounds was that the offence of rape was not proved beyond reasonable doubt; particularly penetration, a critical ingredient of the offence.

Admittedly, for the offence of rape of any kind to be established, the prosecution or who ever is seeking the trial court to believe his or her version of the facts on trial, must positively prove that a sexual organ of a male human being penetrated that of a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed; proof that the victim did not consent to the sexual act. See **Athanas Ngomai v. R,** Criminal Appeal No. 57 of 2018 (unreported) and **Selemani Makumba v. R,** [2006] T.L.R. 379.

In cases of rape of persons aged below 18 years, which is called statutory rape, a further condition on the part of the prosecution kicks in. Age must be proved. See **Alex Ndendya v. R,** Criminal Appeal No. 340 of 2017, **Winston Obeid v. R,** Criminal Appeal No. 23 of

2016, **Edson Simon Mwombeki v. R**, Criminal Appeal No. 94 of 2016 and **Alyoce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (all unreported). Nonetheless, the complaint of the appellant is not on the age of the victim, his complaint is that penetration was not proved and generally the offence of rape was not proved.

Going forward, we will examine the evidence and see whether the appellant's complaint has merit or it has none. To do so, we will start with the evidence of the victim PW1, because such evidence, the offence under scrutiny being sexual, is the best evidence, in term of our decision in **Selemani Makumba** (supra).

The relevant evidence of the victim, PW1 is contained at pages 6 to 7 of the record of appeal. This is what she testified:

> *"I recall on 28/2/2012 whilst any parent (sic) at shamba, the accused came and elope me. He gave me money Tshs. 5,000/= in order to buy clothes. After giving me that money, he sent me at his home and we slept together, he promised to marry me. He sent me at Bulega. At Bulega we lived as man and wife, we used to sleep together and he used to fuck me, so many times. Actually, it was very painful in the beginning. On 9/3/2012 it is when my*

father came at Bulega with other people of Bulega and the accused was arrested and sent to the police station....I certify before this court that the accused married me and occasionally sucked me."

After PW1 had testified as above, at page 7 of the record of appeal, when the appellant was asked to cross examine her, he had no questions. That means, he did not challenge the evidence of the victim on the offence of rape. It is trite law that as a matter of principle, as indicated earlier on, a party who fails to cross examine a witness from the adverse party on a certain matter, is deemed to have accepted that point not cross examined and will be estopped to ask the trial court to disbelieve what the witness said. See, **Paul Yusuf Nchia v. National Eexcutive Secretary, Chama Cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005, **George Maili Kemboge v. R,** Criminal Appeal No. 327 of 2013, **Damian Ruhere v. R,** Criminal Appeal No. 501 of 2007 and **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (all unreported), just to mention but a few. In other words, failure by the appellant to cross examine PW1 amounted to his admitting the fact that what she testified was indeed true.

Further, PW1's evidence was corroborated by the evidence of the appellant himself at page 12 of the record of appeal where he stated that:

> *"In the actual fact I didn't abduct the girl but she just found me at my home, I stayed with her and gave her light duties there at Iponyanholo. After a week, all of a sudden, I was arrested and brought here at Kahama.*
>
> ***DW1 (xxd by PP):*** *I was beaten by mwano and father of the daughter. I stayed since 28/2/2012 – 9/3/2012.* ***Really, I gave her Tshs. 5,000/= as my wife."***
>
> [Emphasis added]

The evidence of the appellant did not contradict that of the prosecution, in our view, it complemented it instead. He did not deny raping the girl, the time period mentioned by PW1 as having stayed with the appellant as his wife which is from 28th February 2012 to 9th March 2012 matches pretty well with the timing detailed by the appellant of having stayed with her. The issue of being given TZS. 5,000.00 by the appellant as his wife is common to both PW1 and the appellant. In our view, PW1's expression "*we lived as man and wife,*

we used to sleep together and he used to fuck me, so many times. Actually, it was very painful in the beginning..." demonstrates nothing else, except a full and complete unlawful act of sexual intercourse of the victim by the appellant. We indicated a while ago that as per the decision in **Selemani Makumba** (supra), evidence of the victim is the most reliable which in terms of section 127(6) of the Evidence Act, does not even need corroboration, although the evidence of PW1 in this case was sufficiently corroborated, as stated above by the appellant.

Further the evidence of PW1 was corroborated by that of PW2, her father, who went to Bulega in Ushirombo Bukombe and found the victim at the home of the appellant, the latter posing as husband and PW1 as his wife. At that point the appellant was arrested and PW1 told PW2 and other local leaders of Bulega that she had been given TZS. 5,000.00 by the appellant. This witness, PW2, like it was for PW1, was not cross examined by the appellant.

In view of the above, we are unable to reverse the concurrent decisions of the two lower courts, and it is our finding that indeed the prosecution proved not only penetration of the victim by the appellant,

but also the whole case of rape was proved to the hilt. Thus, the 1st and 5th grounds of appeal are hereby dismissed.

For the above reasons, except for grounds 2 and 3, this appeal is hereby entirely dismissed for want of merit.

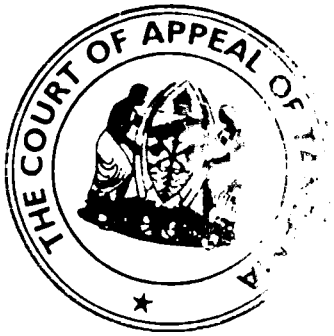
DATED at **SHINYANGA** this 21st day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of July, 2022 in the presence of Mr. Masanyiwa Masolwa, the Appellant in person and Ms. Caroline Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



W. S. NG'HUMBU
For: **DEPUTY REGISTRAR**
COURT OF APPEAL