IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KWARIKO, J.A., KEREFU, J.A., And MAIGE, J.A.)
CRIMINAL APPEAL NO. 125 OF 2020
OMARY SALUM@ MJUSI.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
[Appeal from the Decision of the Court of Resident Magistrate of Kibaha at Kibaha]
(Sarwatt, SRM Ext. Jur.)
dated 3rd day of March, 2020
in
Extended Jurisdiction Criminal Appeal No. 25 of 2019
.....

JUDGMENT OF THE COURT

19th & 27th September, 2022

KWARIKO, J.A.:

Omary Salum @ Mjusi, the appellant was arraigned before the Court of Resident Magistrate of Kibaha at Kibaha charged with two counts. The first count was on the offence of rape contrary to sections 130 (1) (2) (e) and 131 (3) and the second count, which was on the alternative was the offence of grave sexual abuse contrary to section 138 C (1) (a) and (2) (b) both of the Penal Code [CAP 16 R.E. 2002, now R.E. 2022]. It was alleged by the prosecution that on 14th January, 2019 at Mlandizi Center area within Kibaha District in Coast Region, the appellant did have carnal knowledge of one 'LA' (name withheld to disguise her identity), a girl aged seven years. The appellant denied the

charge but at the end of the trial, he was convicted of the offence of rape and sentenced to life imprisonment.

Upon being aggrieved by that decision, the appellant appealed to the High Court of Tanzania at Dar es Salaam District Registry. However, by its order dated 29th August, 2015, the High Court transferred the appeal to the Court of Resident Magistrate of Kibaha in terms of section 45 (2) of the Magistrates' Courts Act [CAP 11 R.E. 2022] to be heard and determined by Sarwatt, Senior Resident Magistrate with Extended Jurisdiction who dismissed the appeal.

Still discontented, the appellant has preferred this second appeal upon the following paraphrased nine grounds of complaint:

1. That, section 127 (2) of the Evidence Act was not complied with when the trial court received the evidence of PW2.
2. That, there was contradiction between the evidence of PW1 and PW4 concerning their inspection of PW2.
3. That, the courts below erred to believe the evidence of PW1 and PW2 which was not supported by PW4 regarding the presence of the appellant in PW2's bedroom.
4. That, PW5 did not establish his medical qualifications and the PF3 was improperly admitted in evidence.

5. That, the defence evidence was not considered by the lower courts.
6. That, the case was poorly investigated and the failure to tender the alleged appellant's cautioned statement weakened PW3's evidence.
7. That, section 234 (2) of the Criminal Procedure Act was not complied with upon substitution of the charge.
8. That, the prosecution evidence was contradictory, improbable, insufficient and unreliable to ground conviction.
9. That, the prosecution case was not proved beyond reasonable doubt against the appellant.

At this point, we wish to narrate the relevant factual background of the case leading to this appeal as follows. 'JE' (PW1), the victim's mother stayed at Mlandizi area with her husband and their six children including the victim, 'LA' who used to share a bedroom with her brother one Omary. On 14th January, 2019 at 04:00 hours, PW1 went to check on the victim's bedroom but found the door open and the light was switched off. Upon turning on the light, she was surprised to find the appellant therein half naked and the victim was sitting on bed near the wall with her underpants in hand. When he was asked as to why he was there, the appellant told her that he went to assist the victim who

raised an alarm for help. However, the victim (PW2) denied that narration and explained what had happened. That, she had gone out for a call of nature and found Omary playing cards near her room. On her way back, she found the light switched off and the appellant was in the room. PW2 stated that, the appellant undressed her, applied jelly into her vagina and raped her. She stated further that, she felt pain but could not raise alarm as she was confused.

Thereafter, PW1 called her co-tenant one Maria Emmanuel (PW4) and together they inspected PW2. On this, while PW1 said there was mucus, fluid and petroleum jelly in the victim's vagina, PW4 testified that, it was only swollen. The incident was reported at Mlandizi Police Station following which No. WP 10667 DC Diana (PW3) was assigned to investigate the case. Further, PW2 was taken to Mlandizi Dispensary where Dr. Francis Mbogo (PW5) examined her and according to him, the victim had bruises and sperms, and had no hymen signifying that she had sexual intercourse about four hours earlier. PW5's findings were posted in the PF3 which was admitted in evidence as exhibit P1.

The appellant who was the only witness in defence, did not admit the charge. He complained that the case was framed by PW1 who owed

him money and did not want to pay him and had promised to report him to the police.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whilst Mses. Rehema Mgimba and Fidesta Uisso, learned State Attorneys teamed up to represent the respondent Republic.

Upon being invited to argue the appeal, the appellant adopted the grounds of appeal and written arguments which he had filed earlier in terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009. He did not have further oral explanation to make paving way for the learned State Attorney to respond.

It was Ms. Mgimba who argued the appeal on behalf of the respondent, Republic who did not support the appeal. We have considered her arguments but for the reasons to be apparent soon, we have found no pressing need to reproduce them herein.

We propose to begin with the seventh ground which raise a pure point of law. In this ground both parties were at one that the trial court contravened the provisions of section 234 (1) and (2) of the Criminal Procedure Act (the CPA) which provides thus:

"(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such

witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."

This provision requires that the accused be called upon to plead to the substituted charge and be informed of his right to require a recalling of the witnesses who had testified either to give evidence afresh or for further cross-examination. The prosecution may also be allowed to recall and examine the said witnesses with reference to any alteration or addition to the charge.

Now, according to the record of appeal, on 7th May, 2019, the prosecution was granted leave to substitute the charge. However, neither was the charge read over and explained to the appellant nor was he informed of his right to require the five prosecution witnesses who had already testified before substitution, be recalled to give evidence

afresh or for cross-examination. It is important to note that the substituted charge had added another count of rape while the former charge had a only a single count of grave sexual abuse. It goes without saying that, the five witnesses had testified only in respect of the offence of grave sexual abuse. Thus, it was imperative for the court to inform the appellant his right provided under the cited provision of the law for him to choose whether or not to exercise it.

Often, the Court has pronounced that failure to comply with the provisions of section 234 (1) and (2) of the CPA, renders the proceedings a nullity. One of such pronouncements is in the case of **Tluway Akonnay v. R** [1987] T.L.R. 92 and **Omary Juma Lwambo v. R,** Criminal Appeal No. 59 of 2019 (unreported). For instance, in the latter case the Court referred to its previous decisions in relation to non-compliance with the said provision of the law and stated thus:

> *"The above being the effect of a failure by a trial court to comply with s. 234 (1) and (2) of the CPA after substitution or alteration of a charge, we similarly find that, in this case, the omission rendered the proceedings which followed after the date of substitution of the charge, a nullity."*

Likewise, in the instant case failure by the trial court to comply with the provisions of section 234 (1) and (2) of the CPA renders the

proceedings subsequent to the substitution of the charge on 7th May, 2019 a nullity and so as the proceedings of the High Court which arose from null proceedings.

Under normal course of events, the Court having nullified the proceedings of the two courts below, would have ordered a retrial of the appellants from the stage at which the charge was substituted. However, a retrial would only be ordered if it is in the interests of justice to do so. In the celebrated case of **Fatehali Manji v. R** [1966] EA 341 it was held thus:

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

The learned State Attorney urged us to order a retrial of the appellant from the stage the charge was substituted. However, having perused the record of appeal, we find it inappropriate to take such a move as we have found that the prosecution evidence is discrepant for

the following reasons: The trial court did not comply with the provisions of section 127 (2) of the Evidence Act [CAP 6 R.E. 2022] (the Evidence Act), when it concluded that PW2, a child of tender age would testify without oath, although it did not test her on whether she understood the nature of an oath. Many times, this Court has stated that the import of section 127 (2) of the Evidence Act requires a simple process to test the competence of a child witness of a tender age to know whether he/she understands the meaning and nature of an oath before it is concluded that his/her evidence can be taken on oath or on promise to the court to tell the truth and not to tell lies. See **Godfrey Wilson v. R,** Criminal Appeal No. 168 of 2018, **Salum Nambaluka v. R,** Criminal Appeal No. 272 of 2018 and **John Mkorongo James v. R,** Criminal Appeal No. 498 of 2020 (all unreported).

In all the cited cases, failure to comply with section 127 (2) of the Evidence Act, rendered the evidence of the witness of tender age with no evidential value thus deserving to be discounted from the record. We are of the same view that the evidence of PW2 which was taken contrary to the law lacks evidential value and we hereby discount it from the record. Having discounted the evidence of the victim from the record, the question to determine is whether there is any other remaining evidence strong enough to sustain the appellant's conviction.

One, the evidence of the victim's mother PW1 is equally not sufficient to establish the offences charged. This is because, she did not say he found the appellant committing any of the alleged offences but only that he was found half naked and the victim was sitting on bed near the wall. **Two,** PW1 and PW4 differed on their evidence regarding the state of the victim's private parts when they allegedly inspected her. While PW1 said they found mucus, fluids and petroleum jelly, PW4 only said the vagina was swollen. This contradiction creates doubt in the prosecution case.

Three, if at all the appellant was a suspected offender, it has troubled our mind when PW1 stated that he ceremoniously escorted her and the victim to the police station and hospital without any force being deployed to arrest him. Otherwise, it was not explained when and how the appellant was arrested because PW3 said she found him already in the police cell. **Four,** the evidence by the medical doctor could only establish sexual assault but not the identity of the perpetrator. **Lastly,** the act by the prosecution to prefer the offence of rape together with that of grave sexual abuse indicates the uncertainty encountered by the prosecution in their evidence against the appellant. It goes without saying that if rape was completed one cannot talk of grave sexual abuse.

For these shortcomings, we are of the considered opinion that the order of retrial will not be in the best interest of the appellant and the case as a whole echoing the holding in **Fatehali Manji v. R** (supra).

In the event, we find the appeal meritorious and is hereby allowed. We proceed to order the appellant's immediate release from custody unless he is otherwise held for other lawful order.

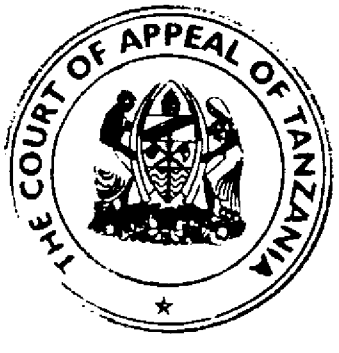
DATED at **DAR ES SALAAM** this 26th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 27th day of September, 2022 in the presence of the appellant in person linked-Via Video from Ukonga Prison and Mkunde Mshanga, learned Principal State Attorney linked-Via Video from Kibaha for the respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL