IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 458 OF 2018

ONESMO LAURENT @ SALIKOKI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Moshi)

(Fikirini, J.)

Dated the 16th day of October, 2018
in
DC. Criminal Appeal No. 27 of 2018

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JUDGMENT OF THE COURT

27th & 30th September, 2022

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania sitting at Moshi (Fikirini, J., as she then was) affirming the decision of the District Court of Moshi at Moshi by which it convicted Onesmo Laurent alias Salikoki, the appellant herein, of rape and unnatural offence and sentenced him to two concurrent custodial terms of thirty years. In essence, the appeal challenges the convictions on procedural and evidential grounds.

The accusation at the trial, on the first count, was that on 2nd December, 2016 at Mkalama area within the District of Moshi in Kilimanjaro

Region, the appellant had carnal knowledge of a woman aged 86 years without her consent. To protect the alleged victim's privacy, we have withheld her name and, therefore, we shall hereafter refer to her as the "complainant." On the second count, it was alleged that at the time and place mentioned above, the appellant had carnal knowledge of the complainant against the order of nature.

The prosecution case rested on the testimonies of five witnesses augmented by a medical report on the complainant. Overall, the prosecution case tended to show that the complainant, who testified as PW1, was on 2nd December, 2016 around 13:00 hours working in her vegetable garden. As she was about to call it a day, the appellant surfaced so abruptly and accosted her. While covering her mouth to quieten her, he removed her underclothing and inserted his male member into her vagina despite her frantic screams for help. After he was through with vaginal intercourse, he sodomised her. Moments later, Suwamba Nassa (PW2) arrived at the scene in response to her screams. According to him, he found the appellant and the complainant naked at the scene amid sexual intercourse with the latter still shouting for help. On spotting PW2, the appellant turned tail but PW2 pursued him and was later joined in the chase

by one Boniface Parament (PW3). They finally subdued and arrested the appellant not far from the scene.

The matter was subsequently reported to the local leadership and a formal complaint lodged at the TPC Police Station. The complainant was examined in the very evening at the Mawenzi Regional Referral Hospital, Moshi by Gladstone Paul Mushi (PW5), a Principal Clinical Officer, who documented his findings in his medical report (PF3 – Exhibit P1). Briefly, he stated that he observed some bruises and abrasions on the labia majora of the complainant's vagina as well as on her anus. He also detected loosening of the anal orifice and sphincter muscles. It was his conclusion that both the vagina and anal orifice were penetrated by a blunt object.

The appellant denied the charge against him. He claimed that in the afternoon on the material day two persons wielding sticks raided his home and apprehended him for what was later disclosed to him to be an allegation that he had raped an elderly woman. He swore that the allegation was false and attributed his travails to grudges arising from his wrangling with a certain John Mushi over ownership of a piece of farmland.

Acting on PW1's evidence, the trial court (Hon. A.H. Mwilapwa – SRM) found it established that the complainant was, indeed, raped and

sodomised. It also held that the said fact was corroborated by the medical evidence adduced by PW5 and reinforced by Exhibit P1. As to who the perpetrator of the crimes was, the court gave full credence to the testimonies of the complainant, PW2 and PW3 pointing an accusing finger at the appellant. As stated earlier, on the first appeal, the High Court upheld both conviction and sentence, hence the present appeal.

The appellant raised seven grounds of appeal through his original memorandum of appeal and supplementary memorandum of appeal, whose thrust is the following complaints: **one**, that the charge sheet was incurably defective. **Two**, that the trial was a nullity for non-compliance with section 186 (3) of the Criminal Procedure Act ("the CPA). **Finally**, that the prosecution case was not proved beyond reasonable doubt because it was founded on contradictory evidence, unreliable Exhibit P1 and the wrong shifting of the burden of proof to the appellant.

We heard the appeal on 27th September, 2022. Before us, the appellant, who was self-represented, basically urged us to allow his appeal based upon the written submissions he lodged to amplify his grounds of appeal. On the other hand, Ms. Mary Lucas, learned Senior State Attorney,

assisted by Ms. Nitike Emmanuel, learned State Attorney, represented the respondent, determinedly opposed the appeal.

We begin with the alleged defect in the charge. It was the appellant's contention, based on our recent unreported decision in **Godfrey Simon & Another v. Republic**, Criminal Appeal No. 296 of 2018, that the charge on the first count was fatally deficient in the statement of the offence in that it was predicated on sections 130 (1), (2) (a) and 131 of the Penal Code without specifically citing the punishment provision. We understood him to mean that the said count omitted citing sub-section (1) of section 131 of the Penal Code, which enacts the general punishment of thirty years' imprisonment as the minimum penalty for rape, the maximum being life imprisonment.

Replying, Ms. Lucas conceded the point but argued that the omission was not fatal because the particulars of the offence fully informed the appellant of the offence of rape he stood charged with. She urged us to hold the defect curable under section 388 of the CPA. In support of her argument, she referred us to **Barikiel Akoo Batana v. Republic**, Criminal Appeal No. 396B of 2017 (unreported) for the proposition that a defect in

a charge that is not prejudicial to the accused will most invariably be curable.

We respectfully agree with Ms. Lucas that the defect complained of is of no moment. In our recent decision in **Abdul Mohamed Namwanga @ Madodo v. Republic**, Criminal Appeal No. 257 of 2020 (unreported), where we dealt with a similar complaint, we concluded, after a review of various decisions on the applicable statutory provisions, that:

> *"... it is our view that the citation of wrong penalty provision in the statement of offence in the instant case was not a violation of any express provision of the governing law, that is the CPA, but a necessity born out of laudable practice and caselaw. Even if it were so, it would still be curable under section 388 of the CPA as we are unpersuaded that the appellant in the instant case was prejudiced or embarrassed in preparing and mounting his defence. Nor is it discernible that a failure of justice was occasioned because the punishment which was ultimately imposed on him was levied in terms of the law as the mandatory penalty."*

In the aforesaid decision, we cited our previous decisions in which we held that such an omission was inconsequential and curable: **Burton**

Mwipabilege v. Republic, Criminal Appeal No. 200 of 2009; **Jafari Salum @ Kikoti v. Republic**, Criminal Appeal No. 370 of 2017; **Paul Juma Daniel v. Republic**, Criminal Appeal No. 200 of 2017; and **Juma Hassan v. Republic**, Criminal Appeal No. 458 of 2019 (all unreported). In **Burton Mwipabilege** (*supra*), for instance, we held that:

> *"... this is curable under section 388 of the CPA, because the irregularity has not, in our view, occasioned a failure of justice."*

Likewise, in **Jafari Salum @ Kikoti** (*supra*), while following the position in **Burton Mwipabilege** (*supra*), we extracted from the decision of the erstwhile Court of Appeal for Eastern Africa in **R v. Ngidipe Bin Kapirama & Others** (1939) 6 EACA 118 and applied the following holding:

> *"An illegality in the form of a charge or information may be cured as long as the accused persons are not prejudiced or embarrassed in their defence or there has not otherwise been a failure of justice."*

We would therefore reiterate that the omission complained of is not a violation of any express provision of the CPA. If anything, it is a derogation from laudable practice and caselaw encouraging or indorsing the citation of applicable penalty provision in the statement of the offence. Even if the omission were a contravention of the CPA, it would still be

curable under section 388 of the CPA as we are unpersuaded that the appellant was prejudiced or embarrassed in preparing and mounting his defence. The first ground of appeal fails.

We turn to the protest that the trial proceedings contravened section 186 (3) of the CPA, which provides as follows:

> *"**186**.-(3) Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the court in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal or medical professions."*

The above provision essentially imposes the peremptory requirement that the evidence of all persons in all trials involving sexual offences be received by the court in camera. It also prohibits the publication of such proceedings in the media.

Ms. Lucas acknowledged that the trial proceedings contravened the said requirement because they were not conducted in private, without the public. However, she put in a rider that the violation complained of did not vitiate the proceedings mainly because the appellant was not thereby prejudice. We respectfully agree.

In **Leonard Salim Kimweri v. Republic**, Criminal Appeal No. 453 of 2015 (unreported), we stated that the section 186 (3) requirement is intended to protect the victim of any sexual offence and not the accused person and that non-compliance by a trial magistrate with that requirement would invariably occasion no miscarriage of justice to the appellant. The same stance was taken in **Godlove Azael @ Mbise v. Republic**, Criminal Appeal No. 312 of 2007; **Saning'o Meshuki Mollel v. Republic**, Criminal Appeal No. 3 of 2009; **Faraja Leserian v. Republic**, Criminal Appeal No. 203 of 2012; and **Msiba Leonard Mchere Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015 (all unreported). See also **Goodluck Kyando v. Republic** [2006] T.L.R. 363 on trial of a juvenile in open court in violation of a similar requirement under section 3 (5) of the now repealed Children and Young Persons Act, as amended by Act No. 4 of 1998.

In the instant case, we cannot help but ask ourselves the same question we asked in **Godlove Azael** (*supra*):

> *"In what way was the appellant prejudiced under section 186 (3) of the CPA? Even at the late stage when he made his defence as DW1, he did not protest that since he was charged with sexual offence, his evidence should be received in camera."*

At no point in the trial did the appellant protest over the non-compliance. More importantly, it does not seem that he took the witness stand discontentedly. In the premises, we are satisfied that he has failed to demonstrate that the infringement complained of had any deleterious effect to the trial proceedings. Accordingly, we hold, as we must, that the second ground of appeal is unmerited and dismiss it.

Finally, we deal with the general contention that the prosecution case was not proven beyond reasonable doubt on the grounds that one, it was based on contradictory evidence; two, that Exhibit P1 was unreliable; and three, that the burden of proof was wrongly shifted to the appellant.

The appellant contended in his written submissions that the prosecution case was materially contradictory. Elaborating, he argued that

PW2's evidence that he found the culprit on top of the complainant was inconsistent with the complainant's testimony that at that point the ravisher had her body bent forward as he had inserted his male member into her anus. He also posited that while PW1 stated that the appellant was a stranger, PW2 claimed to be familiar with the appellant. Nonetheless, the appellant did not expound on his attack on the integrity and reliability of Exhibit P1 and the alleged shifting of the burden of proof.

On her part, Ms. Lucas refuted the appellant's complaints. She posited that the complainant's account on how sexual acts were committed to her was coherent and consistent; that it established that the appellant not only had vaginal sex with her without consent but also sodomised her before PW2 came to her rescue at the scene. Citing **Selemani Makumba v. Republic** [2006] TLR 379; and **Shabani Haruna @ Dr. Mwagilo v. Republic**, Criminal Appeal No. 396B of 2017 (unreported), she supported the view taken by both courts below that the complainant's account was the best evidence and that it was rightly acted upon. She also submitted that the testimonies of PW2 and PW3 corroborated the complainant's version and that the alleged inconsistencies were rather trifling. Rounding off her submissions, she argued the medical evidence, adduced by PW5

and unveiled by PF3 (Exhibit P1), was consistent with the complainant's evidence that she was raped and sodomised.

Rejoining, the appellant reiterated what he stated in his written submissions as well as his prayer for a favourable verdict.

Inasmuch as this is a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act to deal with matters of law only and that we can intervene in matters of fact only in limited circumstances – see the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; and **D.R. Pandya v. R.** [1957] E.A. 336.

Furthermore, we are cognizant that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the complainant is very crucial and must be examined and judged cautiously. Indeed, in this context, we held, for instance, in **Selemani Makumba** (*supra*), that the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important matter for consideration. If the evidence of the complainant is credible, convincing and consistent with human nature as well as the

ordinary course of things, it can be acted upon singly as the basis of conviction – see section 127 (6) of the Evidence Act.

We have considered the complaint at hand and examined the record of appeal in the light of the contending submissions. At the outset, it should be stated that the gravamen of the offence of rape constituting the first count was that the appellant had sexual intercourse with the complainant without her consent. Thus, the prosecution had to establish that there was penetration into the complainant's vagina, that the sexual intercourse was without the complainant's consent, and that the perpetrator of the sexual act was the appellant. As regards the second count, the prosecution had to establish that there was penetration into the complainant's anus and that the perpetrator of that bestial act was the appellant.

We have reviewed the testimonies of PW1, PW2, PW3 and PW5 as well as Exhibit P1 in the light of the concurrent findings of the courts below. In the beginning, we are satisfied that on the evidence on record it was proven that the complainant was raped and sodomised on the material day. Her evidence on that aspect was not controverted by the appellant in cross-examination. PW5's findings, as documented in his medical report (Exhibit P1) that the complainant sustained injuries on the labia majora and anus

due to forceful penetration by a blunt object, were consistent with her evidence that she was raped and sodomised. The attack on the integrity and reliability of Exhibit P1 is clearly beside the point.

As to who the perpetrator of the crimes was, the courts below gave full credence to PW1's testimony naming the appellant as the rapist and sodomite. In our view, PW1 narrated about her painful ordeal at the hands of the appellant, so coherently, explicitly and reliably. The fact that the incident occurred in the afternoon around 13:00 hours implies that the identity of the assailant was a non-issue.

We are also in agreement with the learned Senior State Attorney that the complainant's testimony on the identity of the perpetrator of the crimes was supported by PW2, who, on arriving at the scene in response to the cry for help, found the appellant and the complainant naked amid sexual intercourse with the latter still yelling for help. On this evidence, whatever was happening at the scene was not a consensual sexual act. The fact that the appellant was subdued and apprehended by PW2 and PW3 not far from the scene of the crime after a hot pursuit reassures that he was the perpetrator of the crimes.

We recall that the appellant bewailed that the prosecution case was dented by contradictions. We reject the claim and endorse the submission by Ms. Lucas that the alleged deviations are trivial. They do not deflect from the main story that the appellant was found at the scene *inflagrante delicto* and that he was arrested after a hot pursuit. The inconsistencies are likely, in our view, to have arisen due to lapse of memory as the testimonies were given a year after the fateful event. As we held in **Masanja Mazambi v. Republic** [1991] T.L.R. 200, such minor inconsistencies or variations are, if anything, a healthy and reassuring sign that the witnesses had not rehearsed the evidence before testifying.

As hinted earlier, the appellant interposed the defence of general denial. This line of defence is generally weak as it is self-serving. The courts below rightly rejected it upon due consideration. Equally, nothing of substance was found in his claim that the charges arose from grudges with John Mushi over a land dispute. Furthermore, the claim that the courts below shifted the onus of proof to him is a lost cause.

Consequently, we find the third ground of appeal unjustified as we are satisfied that the two offences were proven beyond reasonable doubt upon soundly evaluated evidence.

In the final analysis, we hold that the appeal is without any substance. It stands dismissed in its entirety.

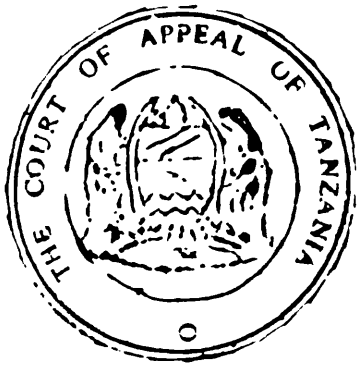
DATED at **MOSHI** this 29th day of September, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2022 in the presence for the Appellant in person and Mr. Innocent Njau, learned Principal 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