IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 293 OF 2019

HAMIMU YUNUSU..APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the Decision of the Court of the Resident Magistrate of Shinyanga at Shinyanga)

(Mwaiseje, SRM Ext. Jur.)

dated the 13th day of May, 2019
in
Extended Jurisdiction Criminal Appeal No. 55 of 2019

JUDGMENT OF THE COURT

31st October & 4th November, 2022

KEREFU, J.A.:

In the District Court of Kahama, the appellant, Hamimu Yunusu was charged with two counts. The first count was on 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. 2022] (the Penal Code). The second count was on the offence of spreading HIV intentionally contrary to section 47 of HIV and AIDS Prevention and Control Act, No. 28 of 2008. On the first count, it was alleged that on diverse dates and time between April, 2015 and

February, 2018 at Mhongolo area within Kahama District in Shinyanga Region, the appellant had carnal knowledge of a girl aged fourteen (14) years old. On the second count, it was alleged that, on the same dates and place, the appellant intentionally transmitted HIV to the said girl.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. In proving the charge, the prosecution relied on the evidence of seven witnesses and two documentary evidence, the PF3 (exhibits P1) and the appellant's cautioned statement (exhibit P2). The victim, who testified as PW1 (name withheld) gave an account of how it all started. She testified that, the appellant was her fiancé since 2014 when she was eleven (11) years old and a student of Standard IV at Mhongolo Primary School. Her first encounter with the appellant was in April, 2014 when she was going to fetch water at about 16:00 hours with her bicycle. On the way, and while fixing the bicycle's chain, the appellant appeared with his motorcycle and told her that 'today is your day.' She said that, the appellant parked his motorcycle, grabbed her to a nearby unfinished house (*pagale*), covered her mouth with his hand, laid her down, undressed her, unzipped his trouser and raped her. Then, he warned her not to reveal the ordeal to anyone lest he would kill

her. She stated further that, after the incident, the appellant went away and she proceeded to fetch water. Upon getting home, she did not reveal the ordeal to anyone as the appellant's warning continued to ring in her mind.

PW1 went on to state that, after two days, while enroute to fetch water, the appellant followed her and took her to the same *pagale* and raped her again. She said that, from that date, it became a routine habit as they continued to have sexual intercourse regularly at the appellant's home when his wife was away. In all those occasions, the appellant used to give her TZS 1,000.00. She testified that, the said awful practice went un-noticed until February, 2018 when her father, Joseph Magire (PW4) was notified about the matter by their neighbour one Nyakilinga Kakwaya (PW3) after he became suspicious with her regular visits to the appellant's home.

In their testimonies, PW3 and PW4 supported the narration by PW1. PW4 added that, to ascertain the said information, he asked Milembe Joseph (PW5), the PW1's young sister (11 years old) who confirmed that her sister used to go to the appellant's home regularly. PW4 testified further that, he then decided to ask PW1 on the matter, who told him

that the appellant used to rape her. In her testimony, Anastazia Samweli (PW6), the PW1's step mother, supported the narration by PW4 and added that she also inquired from PW1 who told her that she was, on several times, raped by the appellant.

Following that revelation, PW4 reported the matter to the police and the appellant was arrested. Upon obtaining the PF3, PW1 and the appellant were taken to Kahama Government Hospital for medical examination which was conducted by Dr. Allan Isaya Masanja (PW2) who found that PW1 was raped as her hymen was not intact and she had long experience of having sexual intercourse. PW2 also found that PW1 and the appellant were both HIV positive. PW2 recorded his findings in two Police Forms No. 3 (the P.F.3) which were collectively admitted in evidence as exhibit P1.

WP. No. 3210 D/CPL Gumba (PW7) the investigation officer testified that, she was involved in the investigation of the incident, interviewed the appellant and recorded his statement. In the said statement (exhibit P2), the appellant denied to have committed the offence.

In his defence, the appellant denied any involvement in the commission of the two offences he was charged with. He contended that,

the case was framed up by PW3 due to the existing land dispute between them over a plot of land which he once sold to him and later a public road was set to pass over it. He stated further that, PW3 claimed for payment of compensation which the appellant did not pay. That, the said conflict was reported to the ten-cell leader. To support his assertion, the appellant summoned his wife, Farida William (DW2) who confirmed that there was a conflict between PW3 and her husband which emanated from a sale of a parcel of land. DW2 added that, the sale agreement, in respect of that transaction, was witnessed by PW6.

After a full trial, the trial court accepted the version of the prosecution's case and specifically placed much reliance on the direct evidence by PW1, the victim and best witness, whose evidence was found to have been corroborated by the evidence of PW2 and PW3. Thus, the appellant was found guilty, convicted on both counts and sentenced to serve thirty (30) years imprisonment term for the first count and four (4) years imprisonment for the second count.

Aggrieved, the appellant appealed to the High Court of Tanzania at Shinyanga District Registry. However, and by an order dated 3rd April,

2019, the High Court transferred that appeal to the Court of the Resident Magistrate of Shinyanga in terms of section 45(2) of the Magistrates' Courts Act [CAP 11 R.E. 2019] to be heard by Mwaiseje, Senior Resident Magistrate with Extended Jurisdiction who in turn dismissed the appeal.

Undaunted and still protesting his innocence, the appellant has approached this Court on a second appeal. In the memorandum of appeal, the appellant raised six grounds which can conveniently be paraphrased as follows: **first**, that, the prosecution did not prove its case to the required standard; **second**, that, there was no evidence tendered from the primary school where the victim was studying; **third**, the evidence adduced by prosecution witnesses was weak and unreliable; **fourth**, the first appellate court did not consider the evidence adduced by the defence side; **fifth**, the case was cooked to injure the appellant's reputation in the society; and **sixth,** the age of the victim was not sufficiently proved.

At the hearing of the appeal, the appellant appeared in person without legal representation whereas Ms. Mercy Ngowi, who was being assisted by Mses. Caroline Mushi and Rose Kimaro, all learned State Attorneys represented the respondent Republic.

When invited to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the learned State Attorney respond first but he reserved his right to rejoin, if the need to do so would arise.

In response, Ms. Ngowi from the outset, declared the respondent's stance of opposing the appeal. Nonetheless, before starting to respond to the grounds of appeal, she referred us to the second and fifth grounds and contended that the same are new as they were not part of the grounds canvassed and determined by the first appellate court. It was her argument that, since the said grounds were not deliberated and decided upon by the first appellate court, they were improperly before the Court as it lacked the requisite jurisdiction to entertain them. She thus urged us not to consider them. To support her proposition, she cited the case of **William Ntumbi v. Republic,** Criminal Appeal No. 320 of 2019 (unreported).

In addressing the Court on the first and third grounds, although, she conceded that the evidence of PW1 was recorded contrary to the mandatory provisions of section 127(2) of the Evidence Act, [Cap. 6 R. E. 2002, now R.E. 2022] (the Evidence Act) as PW1, a child of tender age did not promise to tell the truth and not lies, she argued that, in view of

our decision in **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported), the said omission was curable under section 127 (6) of the same Act.

In addition, and relying on the principle established by this Court in proving sexual offences, Ms. Ngowi argued that, the evidence of PW1 was the best evidence which could be used by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth.

Nevertheless, the learned State Attorney readily conceded that the evidence of PW5, who was also a child of tender age, was recorded contrary to the mandatory provisions of section 127 (2) of the Evidence Act, as that witness did not as well promise to tell the truth and not lies. She thus urged us to expunge the said evidence from the record. She was however quick to remark that, even if the said evidence is discounted from the record, it would not affect the strength of the prosecution's case because, the evidence of PW1 was corroborated by the evidence of PW2, PW3 and PW4. She therefore insisted that the prosecution case was proved to the required standard.

Responding to the fourth ground on the appellant's complaint that the first appellate court did not consider the evidence adduce by the defence side, Ms. Ngowi referred us to pages 45 and 65 of the record of appeal and argued that the appellant's defence was adequately considered by both lower courts. She thus urged us to find the fourth ground with no merit.

As regards the complaint on the age of the victim, Ms. Ngowi referred us to pages 11 and 19 of the record of appeal and contended that the said complaint is unfounded as the age of the victim was properly established by the evidence of PW1 herself which was corroborated by PW4.

At the conclusion of her address to us, we asked her to comment on the validity or otherwise of exhibit P2 and she responded that the said exhibit was unprocedurally admitted in evidence as its contents were not read out after its admission. She thus urged us to expunge it from the record, which we hereby do. She however stressed that, even if the said exhibit is expunged, the prosecution case will not be affected. She thus rested her case by urging us to find the appellant's appeal unmerited and dismiss it in its entirety.

However, and upon further reflection, Ms. Ngowi argued that, if the Court will find that the evidence of PW1 was unprocedurally received by the trial court, it should find it appropriate to order for a retrial because the omission was done by the trial court and the same should not be attributed to the victim.

In a brief rejoinder, the appellant did not have much to say. He insisted that the case against him was framed up by PW3 due to the grudges which existed between them as a result of the land dispute. He thus urged us to consider his grounds of appeal, allow the appeal and set him at liberty.

Having carefully considered the grounds of appeal, the submissions made by the parties and after having examined the record before us, we should now be in a position to confront the grounds of appeal. We are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence in

view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149, **Salum Mhando v. Republic,** [1993] TLR 170 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387.

At first, we are enjoined to determine Ms. Ngowi's submission that the second and fifth grounds of appeal as enumerated above are new complaints and should not be considered by this Court as they were not raised and determined in the first appeal. Indeed, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined at the first appeal. This position has been reaffirmed by the Court in numerous decisions - see, for instance, the cases of **Abdul Athuman v. Republic** [2004] TLR 151 and **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (unreported). In that regard, this Court will not entertain the said grounds of appeal for lack of jurisdiction as per the dictates of the provisions of sections 4 (1) and 6 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] which specifically empowers this Court to deal with appeals from the High Court and subordinate courts with extended jurisdiction.

On the remaining grounds, we wish to begin our consideration of the appeal by addressing the first ground of appeal concerning the evidence of PW1 as argued by Ms. Ngowi. Our starting point in respect of this ground will be section 198 (1) of the Criminal Procedure Act [CAP 20 R.E. 2022] which requires every witness in a criminal case, subject to the provisions of any other written law, to give evidence upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. The said provision states thus:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

One of the exceptions to this provision relates to witnesses of tender age whose procedure is provided under 127 (2) of the Evidence Act as amended vide the Written Laws (Miscellaneous Amendment) (No.2 of 2016) Act No. 4 of 2016 which came into force on 8th July, 2016. The said section provides for a procedure of taking the evidence of a child of a tender age and it states that: -

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving*

evidence, promise to tell the truth to the court and not to tell lies."

The above provision has been consistently construed by the Court to mean that, giving a promise to tell the truth and not to tell lies is a condition precedent for admissibility of the evidence of a child of tender age which is given without oath or affirmation. In the case of **Geoffrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported) we lucidly expressed the import of the above section and we stated that: -

> *"To our understanding, the ...provision as amended provides for two conditions.* ***One,*** *it allows the child of tender age to give evidence without oath or affirmation.* ***Two,*** *before giving evidence, such child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

In the instant appeal, it is undisputable fact that at the time of giving her evidence, PW1 was a child aged fourteen (14) years and thus a child of tender age - see section 127 (4) of the Evidence Act. It is also undisputable fact, and as correctly conceded by Ms. Ngowi that, although, the evidence of PW1 was received without oath or affirmation on 26th March, 2018 after the amendment of section 127 (2) of the Evidence Act,

the trial court did not comply with the mandatory provisions of that section. However, Ms. Ngowi referred us to our previous decision in **Wambura Kiginga** (supra) and urged us to find that the said omission is curable under section 127 (6) of the same Act. With profound respect, we are unable to agree with her on this aspect. For clarity, section 127 (6) of the Evidence Act provides that:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

In the case of **Nguza Vikings @ Babu Seya & 4 Others v. Republic,** Criminal Appeal No. 56 of 2005 (unreported) which was apparently not brought to our attention in **Wambura's** case, subsection (6) was narrowly construed so as not to override the conditions under

subsection (2). It was taken to mean that, subject to the conditions therein, evidence of a child witness can be used to sustain conviction without corroboration if it is the only independent evidence available and which upon scrutiny, is found to be nothing but the truth. Specifically, in **Nguza Vikings** (supra), the Court stated that:

> *"But at this juncture, we entirely agree with Mr. Marando that the provisions of section 127 (7) do not override the provisions of section 127 (2). All that the section does is to allow the court, in sexual offences, to assess the credibility of a child witness who is the only independent witness or a victim of a crime, and convict without corroboration, if the court is satisfied that the child witness told nothing but the truth."*

Then, the Court stated further that:

> *"From the wording of the section, before the court relies on the evidence of the independent child witness to enter conviction, it must be satisfied that the child witness told nothing but the truth. This means that, there must first be compliance with section 127 (2) before involving section 127 (7) of the evidence Act."*

It is therefore clear that, in **Nguza's** case, the provision was construed so as to avoid conflict between subsection (7), now subsection

(6) and subsection (2) of section 127. Now, since in that decision we did not exclude the applicability of section 127 (2) of the Evidence Act, we still find that the trial court in the instant case erred to receive the evidence of PW1 in violation of mandatory provision of the law. We find solace, in this view, from our recent decisions in **Emmanuel Masanja v. Republic,** Criminal Appeal No. 394 of 2020 and **Ramson Peter Ondile v. Republic,** Criminal Appeal No. 84 of 2021 (both unreported). In both cases, having considered the effect of the omission to cause a child of tender age to promise to tell the truth and not lies before testifying in court, we discounted their evidence from the record.

Likewise, in the case at hand, it is our settled view that, since the evidence of PW1 was received in contravention of section 127 (2) of the Act, it has no evidential value and we hereby discount it from the record. In the same spirit, and as correctly argued by Ms. Ngowi, even the evidence of PW5, which was also received in contravention of section 127 (2) of the same Act deserves to be discounted from the record, as we hereby do.

Having discounted the evidence of PW1, the best evidence in sexual offences, we find that the remaining evidence of PW2, PW3, PW4 and PW6 is insufficient to prove that the appellant had committed the offences he was charged with. For instance, the evidence of PW3 was only based on suspicions arising from the bad habit of PW1 of visiting the appellant's home regularly. The evidence of PW4 and PW6 was wholly hearsay thus incapable of incriminating the appellant with the offences charged. Furthermore, the evidence of PW2, the doctor, was only to establish that PW1's vagina was penetrated and that she was infected with HIV but not to the effect that it was the appellant who had unlawful carnal knowledge of her - see the case of **Parasidi Michael Makulla v. Republic,** Criminal Appeal No. 27 of 2008 (unreported).

In the circumstances, we are satisfied that there is no evidence on record which could have been safely relied upon by the trial court and the first appellate court to convict the appellant. It is our further view that had the first appellate court considered the issues discussed above, it would have come to the inevitable finding that it was not safe to sustain the appellant's conviction. Since the above finding disposes of the appeal,

we, accordingly, see no compelling reasons to consider the remaining grounds of appeal.

Consequently, we find merit in the appeal and allow it. Accordingly, we quash the appellant's conviction and substitute it with an acquittal resulting in setting aside the sentences imposed on the appellant. We order that the appellant be released from custody forthwith unless he is otherwise lawfully held.

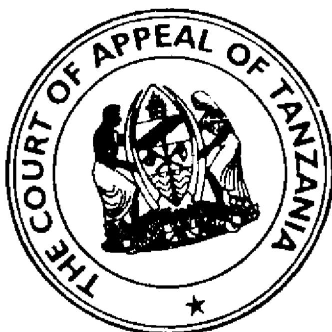
DATED at **SHINYANGA** this 4th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 4th day of November, 2022 in the presence for the Appellant in person and Ms. Verediana Mlenza, learned Senior State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL