IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A, And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 240 OF 2019

JOSEPH KANANKIRA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Maghimbi, J.)

dated the 31st day of August, 2019

in

Criminal Appeal No. 19 of 2017

.....

JUDGMENT OF THE COURT

21st September & 27th October, 2022.

FIKIRINI, J.A.:

This is a second appeal by the appellant, Joseph Kanankira, initially charged and convicted of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, before the District Court of Arusha/Arumeru District at Arusha. The particulars of the offence were that, on 26th December, 2010, at about 18:00 hours at Malula village, the appellant did rape a sixteen (16) year old girl, whom, for the sake of disguising her identity, shall be referred to as PW5 or the victim. The appellant was sentenced to thirty (30) years

imprisonment. Displeased with the decision, he unsuccessfully appealed to the High Court.

At this juncture, we find it appropriate to recapitulate what led to the appellant's conviction. In proving its case, the prosecution had a total of eight (8) witnesses, namely: Ndelekwa Akiro Nnko (PW1) - a deputy village Chairman, Ester Ombeni (PW2) - the victim's mother, Akundael Afrael Nassary (PW3) - a ten cell leader, Kanankira Ombeni (PW4) - victim's brother, the victim (PW5), Margaret Ombeni Nassary (PW6) - PW2's grandchild, Genes Nairobi Kimario (PW7) and Maria Joseph Massawe (PW8). The evidence from these witnesses revealed that on 26th December, 2010, at about 16:00 hours, PW2 sent PW5 to charge her phone at a place about one hour walk to and fro. PW2 waited for PW5's return until around 21:00 hours. Worried about her daughter's late coming back, PW2 and PW6 set out to go and look for her. In the search, PW6 came across PW5 on a farm roadside crying, with the appellant by her side holding a knife and a cell phone.

On their way home, PW5 told PW6 that the appellant raped her. Narrating the ordeal, she stated that on her way home from charging the phone when about to get home, the appellant who had been following her

walked past her and asked her to surrender her phone, which she declined. He then drew out his knife, stabbed her in the hand, and tackled her, and when she fell, the appellant carried her to a nearby maize farm, where he undressed her and raped her.

PW5 recounted the ordeal to PW4 that the appellant, Joseph Kanankira, had raped and taken her phone. PW1, PW2, and PW3 were all informed of the incident. The matter was reported to the Usa River Police Station where PW8 - Inspector of Police, issued PW5 with Police Form Number 3 (PF3). At Tengeru hospital, PW5 was attended by PW7 – a doctor. In examining the victim, PW7 noticed that her vagina was destroyed and fluids mixed with sperm oozed out concluding she was raped. He then filled the PF3, which was tendered and admitted in evidence as exhibit P1. Aside from issuing PW5 with PF3, PW8 recorded PW2, PW5, and other witnesses' statements. Before the court, PW8 tendered a knife allegedly to be used by the appellant to injure PW5.

In his defence, the appellant who testified as DW1, though admitted meeting PW5, who happened to be his cousin drinking beer in the company of Darsness Yona and Sialo Jackson, denied raping her. He stated leaving the place at 18:20 hours, but was later arrested at the church while he

went out to attend to a call of nature. Apart from his testimony, he called two (2) witnesses: DW2 - Kanankira Melan, his father, and DW3 - Warvaeli Moses Nnko. Their evidence was that PW5 did not know who raped her among the three men: the appellant, one Sialo Jackson, and another male person whose name was not mentioned.

The trial court disbelieved his defence and consequently convicted and sentenced him accordingly. His appeal to the first appellate court was unsuccessful.

As intimated earlier, this is a second appeal consisting of six (6) grounds from the memorandum of appeal lodged on 26th July, 2019 and two (2) in the supplementary memorandum of appeal lodged on 19th September, 2022. The grounds of appeal may be paraphrased as follows: **one**, that the charge sheet was defective; **two**, the first appellate court ignored contradictions and inconsistencies in the prosecution case; **three,** there was a variance between the charge sheet and the evidence on record; **four,** that the PF3 - exhibit P1 was wrongly admitted; **five,** the trial court judgment lacked essential elements of a proper judgment, and the defence case was not considered; and **six**, that the prosecution failed to prove its case beyond reasonable doubt. And from the supplementary memorandum,

the grounds were **one;** PW5's evidence, which was relied on in grounding conviction was not coherent, hence not reliable in terms of section 127 (6) of Tanzania Evidence Act and **two,** that PW6 and PW7's evidence relied on by the court was hearsay and unreliable to warrant the appellant's conviction and sentence.

At the hearing, the appellant was unrepresented. The respondent Republic enjoyed the services of Ms. Akisa Mhando, learned Senior State Attorney, assisted by Ms. Eunice Makala and Mr. Tony Kilomo, both learned State Attorneys.

Getting the ball rolling, the appellant expounded on his grounds. In respect of the first ground of appeal the appellant contended that the charge sheet did not cite the sentencing provision; instead of reflecting section 131 (1), it only indicated section 131 of the Penal Code. He contended that this prejudiced him in preparing his defence on the one hand, while on the other, he could not know the gravity of the sentence. Bolstering his submission, the appellant referred us to the case of **Godfrey Simon & Another v. R,** Criminal Appeal No. 296 of 2018 (unreported) for the proposition that sentence must be specified in the charge sheet to

enable an accused person to understand the nature of the charged offence and the requisite punishment was underscored.

On the third ground, the appellant challenged the variance between the charge sheet and the evidence in respect of the time of the commission of the offence and age of the victim. On the time aspect, the appellant contended that the charge sheet stated the offence to have been committed at about 18:00 hours which was also the evidence of both PW2 and PW5 on pages 14 and 29; however, PW6 had 12:30 hours as the time when the offence was committed as shown on page 32 of the record of appeal.

The same was the case with PW5's age. PW2 and PW5 shared the account that in 2012 the victim was sixteen (16) years and not as indicated in the charge sheet. On the other hand, PW4's statement that the victim was seventeen (17) years old in 2012 was incorrect and contrary to what PW2 and PW5 vouched. According to the appellant, all these marred the prosecution side of the case, who are entrusted with the duty of preparing a charge sheet as pointed out in the case of **Mohamed Kaningo v. R** [1980] T. L. R. 279.

The fourth ground was on the wrong processing of exhibit P1. As reflected on page 35 of the record of appeal, after the PF3 was tendered and admitted, it was not read out aloud in court. The omission denied the appellant knowing the contents of the document. Exhibit P1 was thus liable to be expunged. To support his argument, he relied on the case of **Robinson Mwanjisi and Three Others v. R** [2003] T. L. R. 218.

The appellant's complaint on the fifth ground was that the essential elements of a proper judgment were lacking and the defence case was not considered. The appellant contended that, failure by the trial magistrate to consider the defence case was contrary to Article 13 (6) (a) of the Constitution of the United Republic 1977 as amended from time to time.

The sixth and second grounds which were argued together had a common complaint that the case was not proved beyond reasonable doubt. The appellant prefaced his submission by citing the case of **Alphonce Mapunda & Another v. R** [2006] T. L. R. 395 and proceeded to point out several contradictions, which according to him were: ***first,*** in relation to the year the offence was committed. According to PW5, on page 26 of the record of appeal, the offence was committed on 26th December, 2010 while on page 30, PW6, stated the offence to have been committed on 26th

December, 2012. ***Second,*** on the dates in the PF3. PW7 stated to have filled the PF3 on 27th December, 2012, whereas the PF3 was filled on 27th December, 2010. ***Third,*** on the fact that PW5 was injured with a knife. On pages 24 and 28 of the record of appeal, both PW4 and PW5 claimed the appellant to have injured PW5 with a knife on her right hand, but PW7 did not say so on page 37 of the record of appeal meaning that PW5 was lying, argued the appellant. ***Fourth,*** PW2 and PW5 on pages 18 and 28 indicated that PW5 was admitted for a day at Meru hospital, while PW7 in his testimony on pages 34 to 35 of the record of appeal did not say anything related to that. The appellant stressed that the contradictions weakened the prosecution case with the effect that there was a failure to prove the case against him.

Canvassing the two supplementary grounds, the appellant focused on the credibility of PW5, in ground one. He contended that PW5 was not a credible witness even though the victim's evidence in cases of this nature is highly relied on. Fortifying his point, the appellant cited to us the case of **Abiola Mohamed @ Simba v. R,** Criminal Appeal No. 291 of 2017 (unreported). Drawing out examples, he took us through pages 28-29 of the record of appeal, where PW5 testified that the appellant tackled her,

and she fell down and lost consciousness and that when she regained consciousness, she found the appellant standing playing with her phone. This account differed from the response when she was asked the same question during cross-examination where her response was that when she regained consciousness, she found the appellant still raping her and not playing with the phone.

PW5 also stated to have lost her phone but at the same time told PW2 that her phone was taken. On another account, PW5 told the court that after charging her phone, she left for home in the company of Happy, while at another point, she stated that she was not in the company of Happy on her way home. Besides, PW5 and PW6's accounts contradicted each other. Summing up, the appellant contended that the contradictions and inconsistencies went to the root of the case.

When discussing ground two of the supplementary grounds of appeal, the appellant criticized the evidence of PW6 and PW7 as hearsay and thus the trial court wrongly relied on it in grounding his conviction. The challenged PW7's account was that the incident occurred on 27th December, 2010. However, on page 34 of the record of appeal, the PF3 was filled on

27th December, 2012, without any explanation on the difference in the dates. Also, while PW5 claimed to have been injured with a knife, PW7 did not say anything about that claim.

In the light of his submission, the appellant urged us to allow the appeal, quash the conviction, set aside the sentence and release him from prison.

Responding, Ms. Mhando resisted the appeal on behalf of the respondent Republic. Instead, she supported the conviction and sentence meted out.

Submitting on ground one on the defective charge, the learned Senior State Attorney admitted that there was an omission by not citing sub-section (1) of section 131 of the Penal Code. However, she was quick to urge us to find the omission not fatal as it has been remedied by the particulars of the offence, which clearly stated the nature of the offence the appellant was charged with and to whom the act was committed. In addition, she contended that the evidence brought was to prove the offence the appellant was charged with. The appellant, therefore, knew the nature of the offence and its seriousness. Thus, she argued that the omission was

curable under section 388 (1) of the Criminal Procedure Act. Supporting her submission, the learned Senior State Attorney referred us to the case of **Halfani Ndubashe v. R,** Criminal Appeal No. 493 of 2017 (unreported).

The learned Senior State Attorney further admitted that the sub-section providing for the sentence to be imposed upon conviction was not reflected in the charge sheet. Nevertheless, knowing the seriousness of the offence and the fact that an advocate was representing the appellant, she did not find any prejudice occasioned against the appellant.

On ground four that the PF3 was wrongly admitted, the learned Senior State Attorney conceded the omission and invited us to expunge exhibit P1 admitted on page 35 of the record of appeal, citing the case of **Robinson Mwanjisi & Three Others** (supra). However, she argued that after expunging exhibit P1, the oral evidence of PW7 that the hymen was broken and semen was found on PW5's vagina, was sufficient to hold together the prosecution case.

Ground five that the defence was not considered, was met with learned Senior State Attorney's concession that neither the trial court nor the first appellate court considered it. She thus invited us to step into the

shoes of the first appellate court and re-evaluate the defence case. Reinforcing her argument, she cited the case of **Athumani Musa v. R,** Criminal Appeal No. 4 of 2020 (unreported) in which the discussion about stepping into the shoes of the first appellate court was underscored.

Ground six was on whether the prosecution proved its case beyond reasonable doubt. The learned Senior State Attorney laid down the ingredients of the offence required to be proved to be (i) penetration (ii) the victim's age and (iii) who was the culprit. In her view, all the ingredients were proven. She took us to pages 27 -29 of the record of appeal and PW5's evidence on how the appellant raped her is supported by that of PW7 as reflected on pages 34-35, that PW5's vagina was destroyed and semen found.

Additionally, PW6, in her testimony on pages 30-32 stated to have found PW5 with the appellant. The appellant was playing with a phone, and PW5 named the appellant to PW6 as the one who raped her. The act of PW5 naming her assailant at the earliest opportunity constituted assurance of her reliability, emphasized the learned Senior State Attorney. Hand in hand with that, she contended that it was for the Court to assess the

coherence of the evidence that PW5 adduced. Buttressing her position, she cited the case of **Halfani Ndubashe** (supra).

The learned Senior State Attorney maintained that, PW5 was a reliable witness and that the highlighted contradictions featured above were minor which did not go to the root of the case. She exhibited the same stance on the raised concern on different dates. She contended that the date on the charge sheet that the offence was committed on 26th December, 2010 was the correct one and not 26th December, 2012, as reflected on page 13 of the record of appeal. Furthering her submission, she argued that it was impossible for the offence to have been committed after the commencement of the hearing as seen on page 3 of the record of appeal as the appellant was arraigned on 4th January, 2011.

As for the victim's age, she led us to PW2's evidence found on pages 17-19, where her response when cross-examined by the defence counsel, stated that PW5 was born in 1995. Winding up her submission, the learned Senior State Attorney beseeched us to dismiss the appeal and uphold the trial court conviction and sentence.

In his brief rejoinder, aside from stressing that PW5 was not credible, the appellant prayed for his appeal to be allowed.

We have considered the grounds of appeal and the arguments from both sides. We shall begin with the substantive memorandum of appeal.

On ground one, regarding the defective charge, we wish to restate that this is not the first time issue of similar nature has been raised and dealt with. There are many decisions to that effect amongst others; **Jamali Ally @Salum v. R,** Criminal Appeal No. 52 of 2017, **Jafari Salum @ Kikoti v. R,** Criminal Appeal No. 370 of 2017, **Halfani Ndubashe** and **Godfrey Simon** (supra), (all unreported) which have elaborately dealt with the issue.

We agree that the punishment section was not cited in the charge sheet. The learned Senior State Attorney readily admitted the omission. She was, nonetheless, quick to add that the omission was not fatal as it did not prejudice the appellant since the particulars of the offence clearly stated the offence faced by the appellant and the evidence adduced in that regard. The appellant, therefore, knew the nature of the offence and its

seriousness. To the contrary, the appellant stated that failure to know the sentence prejudiced him as he failed to appropriately mount his defence.

The issue for us to grapple with is whether the omission of not citing subsection (1) of section 131 of the Penal Code was a fatal irregularity. The Court in **Jafari Salum @ Kikoti** (supra) concluded thus:

> *"... we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA."*

In **Abdul Mohamed Namwanga @ Madodo v. R,** Criminal Appeal No. 257 of 2020 (unreported) the Court stated that inserting a punishment section in a charge sheet is not a legal requirement and thus its omission does not render the charge defective, more so when the particulars are clear enough to inform him of the nature of the offence. In this case, the appellant knew the nature of the offence; rape of a girl below the age of 18 years punishable by 30 year's imprisonment. Apparently, that is the correct sentence to an accused person committing rape even to an adult woman. There is no suggestion that the appellant did so with consent. Accordingly, we find no merit in this ground and dismiss it.

Turning to the second ground on contradictions and inconsistencies in the prosecution case, again this is not an uncharted area, as we have sailed through the posed challenge before. In the case of **Dickson Elia Nshambwa Shapwata & Another v. R,** Criminal Appeal No. 92 of 2007 (unreported), the Court underscored the importance of evaluating contradictions and discrepancies and deciding whether they are minor or material going to the very root of the case.

In the appeal before us, we note that PW5 gave a contradictory account at some point. For example, in examination in chief, she testified that the appellant tackled her and she fell down and lost consciousness. When she regained consciousness, she saw the appellant playing with her phone. However, she gave a different account during her cross-examination stating that the appellant was still raping her when she woke up. To us, this contradiction is minor and did not go to the root of the case. We have analyzed the evidence in totality and concluded that PW5 was consistent that she was raped and the appellant was the person who raped her.

The remaining contradiction is that exhibited by PW1 and PW8 that the incident occurred in 2012, different from what is stated in the charge sheet and other prosecution witnesses. We find the differing account

immaterial, bearing in mind that PW5's evidence by itself was sufficient to prove the case against the prosecution that she was raped on 26th December, 2010. After all, PW5's evidence was supported by that of PW2 and PW6.

Our discussion covers the supplementary ground on PW5's credibility and contradictory versions between PW5 and PW6. We will only address two aspects.

Although the appellant claims that PW6's and PW7's versions of the stories were hearsay, we take a different view because each witness accounted for what he saw or experienced. For example, PW7 attended PW5 when she was taken to hospital and upon examining her, he concluded that she had been raped. The contention as to why he did not reveal to have as well treated PW5's injury sustained from the knife stab, is, in our view, immaterial as it does not negate the fact that PW5 was taken to the hospital for examination following her complaint that she was raped. The injury on the hand was secondary which could not have changed that central story on the rape incident.

Furthermore, PW6's narrative was also, in our view, without any infractions. This is because her evidence was that, she met PW5 right after she was raped and by then, the victim was still with the appellant. We do not find anything material affecting this account.

The complaint in the third ground relates to variance between the charge and the evidence regarding the time when the offence was committed and the victim's age. Admittedly, this complaint is not entirely without any substance.

Ordinarily, under section 234 (1) of the CPA, the trial court is empowered to make an order to alter the charge at any trial stage once it appears that the charge is defective, either in substance or in form. However, under section 234 (2) of the CPA, the amendment is not a must if the variance between the charge and the evidence is in respect of the time when the offence was committed. In the present situation, the victim of the offence established when the offence was committed which is consistent with the time indicated in the charge sheet. Variance on the issue of time caused by other witnesses is immaterial to the prosecution case and we disregard it.

Likewise, in the case of age, PW2 and PW5 gave the same account on PW5's age in 2012. This was different from the age stated in 2010 when the charge was filed. PW4's version was that PW5 was seventeen (17) in 2012, in contrast with PW2 and PW5, but from the evidence, PW5's age could not have been eighteen (18) or above, considering that she was born in 1995 as shown on page 29 of the record of appeal.

At any rate, there is no suggestion that the variance occasioned any injustice to the appellant. We say so, firstly particularly because at the trial the appellant had the services of an advocate. Secondly, the appellant had room to cross-examine the prosecution witnesses be it himself or through his advocate and thirdly, he could have raised the concern, if any, during his defence case. In the case of **John Madata v. R,** Criminal Appeal No. 453 of 2017 (unreported) which cited with approval the High Court decision in the case of **Mohamed Katindi v. R** [1986] T. L. R. 134, it was held:

> *"It is the obligation of the defence counsel, both in duty to his client and as officer of the court, to indicate in cross-examination the theme of his client's defence so as to give the prosecution an opportunity to deal with that theme."*

See also: **Hatibu Gandhi v. R** [1996] T. L. R. 12 and **Halid Maulid & Another v. R,** Criminal Appeal No. 342 of 2020 (unreported). This ground is devoid of merit and we dismiss it.

The fourth ground on improper admission of exhibit P1 (PF3) will not detain us for long. It is correct that exhibit P1, after its admission, the contents were not read aloud in court hence contravening the law on the admission of documentary evidence articulated in **Robinson Mwanjisi & Three Others** (supra). Guided by that decision we accordingly expunge exhibit P1 from the record.

Nonetheless, as submitted by Ms. Mhando, the remaining oral evidence is sufficient to back up the prosecution case after expunging exhibit P1. Aside from PW5's account of what occurred to her, there is evidence from PW7 on page 35 of the record of appeal which vividly describes PW5's condition after the rape. This ground is unmerited and we likewise dismiss it.

The issue that the defence evidence was not considered featured as a fifth ground. Whereas the trial court ruled out the appellant's defence that he did not commit the offence, the first appellate court did not re-evaluate

the defence evidence in the course of composing judgment. Failure by the High Court to perform its duty necessitates this Court's intervention by stepping into its shoes by re-evaluating the whole evidence. In the case of **Deemay Daati & 2 Others v. R,** Criminal Appeal No. 80 of 1994 (unreported), the Court cited the case of **Peters v. Sunday Post Ltd.** (1958) E.A. 424 and **Salum Mhando v. R** [1993] T. L. R. 170, both echoing the principle that if the first appellate court has abdicated its duty of re-evaluating evidence, this Court can step into the shoes and do so. We shall do likewise in this appeal.

We have critically re-evaluated and analyzed the appellant's defence, at the trial but we have found it too weak to raise any reasonable doubt, to warrant intefereing with the trial counrt's findings on the appellant's guilt. Despite the incriminating evidence from the prosecution witnesses, the appellant's advocate did not cross-examine them on the issues implicating him. Like in **Nyerere Nyague v. R,** Criminal Appeal No. 67 of 2010 (unreported) it led the Court to conclude that failure to cross-examine them on material aspects amounted to accepting the facts testified on connoting that the appellant admitted what was said by the prosecution witnesses. This ground is unmeritorious and is dismissed.

The last ground is on whether the prosecution proved its case to the hilt. We agree with the learned Senior State Attorney that the prosecution case was proved beyond reasonable doubt. In cases of this nature, the prosecution was required to prove three (3) things: (i) penetration (ii) age of the victim and (iii) that it is the appellant who committed the offence. PW5 proved penetration in this case as can be seen from her evidence found on pages 27 -29 of the record of appeal supported by PW7's version at page 34-35 of the record of appeal.

The age of the victim was abundantly proved by PW2 as seen on pages 17-19 that PW5 was sixteen (16) years old when the offence was committed having been born in 1995.

On who committed the offence, again there is ample evidence that it was the appellant. Aside from PW5's evidence which did not require any corroboration, on pages 30-32 of the record of appeal, there was the evidence of PW6 who found the victim together with the appellant. More so, PW5 named the appellant to PW6 as the person who raped her. PW5's naming of the appellant at the earliest opportunity added credence to her credibility. Besides, we had an opportunity of visiting the original record to

verify the dates pointed out by the appellant as contradictory. We found all dates were correctly recorded; the differences noted in the typed proceedings were mere typo errors. This ground also fails and is dismissed.

In conclusion, we find no merit in this appeal and dismiss it in its entirety.

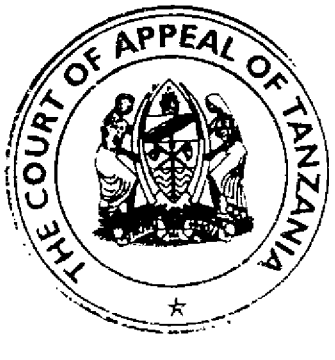
DATED at **DAR ES SALAAM** this 26th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 27th day of October, 2022 in the presence of the Appellant in person and Mr. Charles Kagirwa, State Attorney for the Respondent/Republic, both appeared through Video Link from Arusha is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL