IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 45 OF 2020

JOHN NGONDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Arusha at Arusha)

(Hon. Temu – SRM Ext. Juris)

dated the 27th day of September, 2019
in
Criminal Appeal No. 86 of 2019

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JUDGMENT OF THE COURT

6th & 15th February, 2023

NDIKA, J.A.:

The appellant, John Ngonda, was convicted by the District Court of Kiteto at Kibaya of raping his eight-year-old stepdaughter. He was consequently sentenced to thirty years' imprisonment. His first appeal against the conviction and sentence brought him more anguish as the Resident Magistrate's Court of Arusha (Hon. Temu – SRM with Extended Jurisdiction) not only dismissed it but also enhanced the sentence to life imprisonment in accordance with section 131 (3) of the Penal Code, Cap. 16

R.E. 2022. This is his second and final appeal against the conviction and sentence.

At the trial, the prosecution relied on the evidence adduced by five witnesses as well as two documentary exhibits to establish the allegation that on 23rd November, 2017 at about 22:00 hours at Kiperesa village within Kiteto District in Manyara Region, the appellant had carnal knowledge of his eight-year-old stepdaughter. We will refer to the girl anonymously as "the complainant" or simply by her trial codename of "PW1".

The prosecution case tended to show that PW1 was a primary school pupil. At the material time, she was living in the same ménage at Chekanao village with the appellant and her mother (PW2) along with her two younger sisters. PW1 testified that after eating supper on 23rd November, 2017 around 22:00 hours, the appellant took her along with her two younger relatives to a nearby house, about one hundred paces away, to retire to bed for the night. As the two relatives fell asleep almost straightaway, the appellant took her to another adjoining house. He forced her into the house as he threatened to slaughter her if she resisted. There and then, he pulled up her skirt, removed her underwear, unzipped his trousers, and proceeded to have sexual intercourse with her. As she was screaming due to deep pain,

her mother (PW2) appeared at the scene whereupon the appellant released her, turned tail, and attempted to flee the scene. The incident was immediately reported to the local functionaries who referred the matter to Chekanao Police Post before a formal complaint was finally lodged at Kibaya Police Station. On the following day, PW1 was examined at Kiteto District Hospital after she had been attended at a dispensary in Kiperesa village.

PW2's account pertinently tallied with that of the complainant. She recalled that she stayed behind at the main home in the night as the appellant took the children to sleep in a nearby house. Since the appellant had taken too much time without coming back, she walked to one of the nearby houses only to find him having sexual intercourse with PW1 who was crying in agony. The appellant attempted to flee the scene, but he was subdued and apprehended by several neighbours who attended the scene in response to PW2's screams for help. The appellant was subsequently locked up at Chekanao Police Post and was transferred to Kiteto Police Station where he was booked for rape.

Mariam Mpina (PW3) was one of the neighbours who responded to PW2's distress call. She recalled having found PW2 and the appellant confronting each other at the scene and later learnt of the allegation of rape.

She said she later inspected the complainant's private parts, which she found wet with what appeared to be semen. Dr. Ramadhan Abdallah Maingu (PW5) examined the complainant at Kibaya District Hospital and noted the presence of lacerative lesions in her private parts indicative of the vaginal orifice having been penetrated by a blunt object. His medical examination report – PF3 was admitted as Exhibit P2.

F.5190 Detective Corporal Albano (PW4), a police investigator, testified on various aspects of the investigations into the appellant's alleged offending. He tendered in evidence a sketch map of the scene of the incident (Exhibit P1), which he drew on 17th December, 2017 after attending the scene.

In his sworn defence, the appellant denied the accusation against him. However, he admitted the tale about him taking the complainant, along with her two younger relatives, to sleep in a nearby house in the material night but with a slight variation that PW2 did not remain at the main home; she also came along. After reaching the house, he said, PW2 left momentarily but came back a few moments later whereupon she screamed out of the blue that the appellant had raped the complainant. He charged that PW2's

claim was a false alarm; it was a ruse for her to wrestle his property from him as she attempted to do previously.

The learned trial magistrate (Hon. H.M. Hudi – RM) took the view that the case hinged on two issues: one, whether the complainant was raped; and two, if she was indeed raped, whether the appellant was the perpetrator of the crime.

On the first issue, the learned magistrate believed and acted on the complainant's evidence as corroborated by the medical evidence that she was, indeed, raped. As regards the second issue, the learned magistrate found, acting on the testimonies of PW1, PW2, and PW3, that the appellant was the culprit. He rejected the appellant's defence that PW2 had grudges against him, saying that the accusation against him was not raised by PW2, but PW1 who did not begrudge him. Accordingly, he convicted him of the charged offence and sentenced him as stated at the beginning. As stated earlier, the appellant's first appeal went unrewarded, hence this appeal.

The appellant initially challenged the first appellate court's decision on six grounds: **one**, that the charge was defective; **two**, that complainant's age was not proved; **three**, that the complainant's evidence was received

contrary to section 127 (2) of the Evidence Act, Cap. 6 R.E. 2022 ("the Evidence Act"); **four**, the medical examination report (Exhibit P2) was wrongly tendered in evidence by the Public Prosecutor; **five**, the defence was not duly considered; and, **six**, the offence was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant, who was self-represented, sought leave of the Court to raise two additional grounds of appeal: **one**, that Exhibits P1 and P2 were not read out at the trial; and **two**, that the courts below erred in law and in fact in not finding that PW3's claim that she heard the alarm from PW2 and responded to it was unbelievable because her home, as is shown on the sketch map (Exhibit P1), was far from PW2's house. As the respondent, who appeared through Mses. Eunice Otto Makala and Penina Ngotea, learned State Attorneys, had no objection, we granted the appellant the leave prayed for.

We find it convenient to deal, at first, with the additional grounds of appeal, beginning with the appellant's contention that Exhibits P1 and P2 were not read out following their admission into evidence.

Admittedly, it is settled that after a document is cleared for admission and then admitted in evidence, its contents must be read out to apprise the accused of its nature and substance. Failure to do so may vitiate the fairness of the trial rendering the document worthless – see, for instance, **Robinson Mwanjisi & 3 Others v. Republic** [2002] T.L.R. 218.

However, in the instant case the claim that the two exhibits were not read out, as correctly argued by Ms. Makala, flies in the face of the record. It is evident at pages 14 and 17 of the record of appeal that the two exhibits were, respectively, read out after being received in evidence without any objection from the appellant. We are, therefore, fully satisfied that our guidance in **Robinson Mwanjisi** (*supra*) on the handling of documentary exhibits was complied with. The first additional ground lacks merit.

Turning to the second additional ground of appeal, we must first deal with Ms. Makala's argument that the ground at hand constituted a new factual grievance, which was not raised before the first appellate court and that it cannot be entertained on a second appeal. She was unwavering that the Court is precluded from entertaining any new ground raising a factual contention, not a pure question of law. Not surprisingly, the appellant did not attempt to negate the learned State Attorney's submission.

It is firmly established that in terms of its jurisdiction set forth under section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 RE 2022, this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court or the Resident Magistrate's Court with extended jurisdiction sitting on first appeal – **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016; **Hassan Bundala v. Republic**, Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016; **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017; and **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 (all unreported).

Looking at the complaint in the second additional ground, we agree with the learned State Attorney that it raises no more than an attack on the calibration of the testimonies of the prosecution witnesses (notably PW2 and PW3) by the courts below without suggesting that the said evidence was misapprehended. This is a pure matter of fact. Since the said argument was not raised on the first appeal for consideration and determination, it cannot

be raised on a second appeal, which must be on pure points of law. In the premises, we abstain from entertaining it.

Reverting to the complaints cited in the substantive memorandum of appeal, we propose to deal with grounds one, three and four separately and round off with grounds two, five and six collectively.

Although it is apparent from the memorandum of appeal that the thrust of the first ground is an issue with the legality and propriety of the charge on record, the appellant changed tack at the hearing and contended, in his argument, that the allegation in the charge that the offence was committed at Kiperesa village conflicted with the evidence by the prosecution witnesses who mentioned the appellant's home in Chekanao village as the scene of the crime. Citing **Godfrey Simon & Another v. Republic**, Criminal Appeal No. 296 of 2018; and **Noel Gurth @ Bainth & Another v. Republic**, Criminal Appeal No. 339 of 2013 (both unreported), the appellant urged us to find the alleged variance fatal to the prosecution case.

Although Ms. Makala conceded to the existence of the alleged variance, she submitted, quite correctly in our view, that it was trifling and hence curable under section 388 of the Criminal Procedure Act, Cap. 20 RE 2022.

Indeed, while PW1, PW2 and PW3 testified that the offence was committed in one of the houses within the compound in Chekanao village the appellant lived with his extended family, the appellant himself acknowledged that he was at that place at the material time with PW1, PW2 and the other two young relatives. The inconsistency between the charge and the evidence on that aspect is clearly inconsequential not only because the appellant did not deny being at the scene at Chekanao but also because both PW1 and PW2 alluded to Kiperesa as the place where PW1 was initially attended to at a dispensary before she was finally referred to Kiteto District Hospital. All said, the variance complained of does not deflect from the cogency of the prosecution case as to the location of the scene of the incident.

The third ground of appeal that the complainant's evidence was received contrary to section 127 (2) of the Evidence Act, as amended, is based on two contentions: one, that her evidence was received without the trial court having asked her any preliminary questions to determine her understanding of the nature and meaning of oath; and two, that it was not clear on the record whether the evidence was given and received on oath or without oath. Relying on **John Mkorongo James v. Republic**, Criminal

Appeal No. 498 of 2020 (unreported), the appellant urged us to find that the testimony was improperly received and proceed to discount it.

Conversely, Ms. Makala claimed that the procedure under section 127 (2) of the Evidence Act was complied with to the letter and that PW1 was properly moved to promise to the truth before she gave her testimony.

Section 127 (2) of the Evidence Act is unavoidably the focus of our attention. It provides as follows:

> *"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 any lies."*

The construction of the above provision has been a subject of discussion by the Court in numerous decisions, one of which is **Issa Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018 (unreported). In that decision, we stated that the said provision permits a child of tender age, that is, a child whose apparent age is not more than fourteen years, to give evidence on oath or affirmation or to testify without oath or affirmation but upon promising to tell the truth, not lies. Most crucially, we held thus:

> *"It is for this reason that in the case of* ***Godfrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018 (unreported), we stated that, where a witness is a child of tender age, a trial court should at the foremost,* ***ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness****. If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies."* [Emphasis added]

It is common ground in the instant case that the complainant, who stated to be eight years old at the time she took the witness stand, was in the eyes of the law a child witness of tender years and, therefore, her evidence had to be given in compliance with the dictates of section 127 (2) of the Evidence Act. Although it is shown at page 8 of the record of appeal that the trial magistrate did not ask any preliminary questions to determine if the witness understood the nature of oath for her to qualify to give evidence on oath, it is evident that he recorded her to have said, *"I promise*

that I will speak the truth" before he allowed her to testify. Certainly, the trial court could not let her testify on oath since it had not established whether she understood what an oath entailed. Nonetheless, so long as the trial magistrate extracted the child witness' promise to speak the truth in compliance with the law, he rightly allowed her to give evidence on the strength of such promise. The appellant's twofold complaint on this aspect is plainly unfounded. We dismiss it.

We are enjoined by the fourth ground of appeal to interrogate the question whether the medical examination report (Exhibit P2) was wrongly tendered in evidence by the Public Prosecutor and if so, whether such irregularity rendered the document worthless. Urging us to answer the two questions in the affirmative, the appellant relied upon a decision of the High Court (Rutakangwa, J., as he then was) in **Republic v. Kerstin Cameron** [2003] T.L.R. 87.

On her part, Ms. Makala initially acknowledged the anomaly, saying that the record of appeal evidently showed at page 17 that it was the Public Prosecutor who asked the trial court, during PW5's evidence in chief, to admit the medical examination report. Nevertheless, citing **Ramadhan Idd**

Mchafu v. Republic, Criminal Appeal No. 328 of 2019 (unreported), she submitted that the said irregularity was remediable.

We have examined the record of appeal at pages 16 and 17. As rightly argued by the appellant and Ms. Makala, it is evident that after PW5 (the medical witness) had been shown and identified the medical examination report which he said he had filled out to document his findings following his examination of the complainant, the Public Prosecutor interposed and prayed for the report to be admitted as an exhibit. This approach was clearly irregular because by practice it is the witness himself that should have prayed for the admission of the exhibit. Dealing with a similar infraction in **Ramadhan Idd Mchafu** (*supra*), we followed our earlier decision in **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 (unreported) where we treated the anomaly trifling as it was not prejudicial to the accused. We reasoned that although it was the prosecutor who interjected the invitation to the court to receive the exhibits, it was most significant that such invitation was made during the respective witnesses' evidence in chief after they had seen and identified the exhibits, that after the exhibits were admitted their contents were read out and explained, and that the defence had the opportunity to cross-examine the witnesses on the exhibits.

As hinted earlier, the prosecutor in the instant case merely invited the trial court to admit the medical report after the medic had seen and identified it as the document that he made after examining PW1 at the hospital. It is also evident at page 17 of the record of appeal that the contents of the report were read out and explained and that the appellant cross-examined the doctor on his findings as unveiled in the report. Given the circumstances, we find the complaint unjustified. It falls by the wayside.

Finally, we round off with grounds two, five and six collectively. Their thrust is the overarching question whether the charged offence was proven on the evidence on record beyond all reasonable doubt.

Ahead of determining the above general question, we wish to remark that due to the inherent nature of the offence of rape or any other sexual offence usually involving two persons only when it is committed, the testimony of the complainant is mostly crucial and must be examined and judged cautiously. Indeed, as we held, for instance, in **Selemani Makumba v. Republic** [2006] T.L.R. 379, the best proof of rape (or any other sexual offence) must come from the complainant. Consequently, the complainant's credibility becomes the most important consideration such that if his or her evidence is believable, persuasive, and consistent with human nature as well

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

The gravamen of the offence of statutory rape the appellant faced, as predicated on section 130 (1) and (2) (e) of the Penal Code, is a male person having sexual intercourse with a girl, with or without her consent, if she is under eighteen years of age, unless she is his wife aged fifteen years or above and is not separated from him.

To begin with, since the appellant faced the offence of statutory rape as already stated, proof of the complainant's age was a crucial ingredient. Before us, the appellant contested the complainant's alleged age, saying that it was not proven in the evidence. Ms. Makala disagreed, submitting that the complainant stated her age as being eight years before giving her testimony. She said in terms of our decision in **Wilson Elisa @ Kiungai v. Republic**, Criminal Appeal No. 449 of 2018 (unreported), PW1's statement on her age was sufficient.

We have read **Wilson Elisa** (*supra*) and noted that the Court observed therein, citing **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 and **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337B of 2020

(both unreported), that generally evidence as to the proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. The Court, however, went on holding that:

> *"... like any other fact, age may be deduced from other evidence and circumstances availed to the court which is permissive under section 122 of the Evidence Act, [see **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported)]."*

In this case, it is evident that the complainant presented herself to the trial court as an eight-year-old child, a fact that the appellant neither challenged in cross-examination of the child nor disputed in his defence testimony. More importantly, the medical report (Exhibit P2), found at pages 23 and 24 of the record of appeal, confirms that the complainant was eight years old at the time she was examined by PW5 at the hospital. On this basis, we uphold the concurrent finding by the courts below that the complainant was aged eight years at the material time.

Turning to the issue whether the appellant had sexual intercourse with the eight-year-old complainant, we should, at first, underline that almost all the facts of the case are undisputed. The appellant admitted being at the

scene of the crime at the material time with several family members including the complainant but denied having had sex with her. On our part, we have carefully examined the evidence of the complainant and found it to be unblemished, spontaneous, and consistent. Her detailed account of what happened during the fateful night after the appellant had taken her into one of the houses one hundred paces from the main house is so logical, forceful, and undaunted. She positively testified that the appellant threatened to kill her should she offer any resistance and then proceeded to undress her and have sex with her. The appellant did not suggest that she had any motive or reason to lie against him. Most importantly, both courts below believed her testimony, which was the best evidence as explained earlier. Certainly, in terms of section 127 (6) of the Evidence Act her evidence did not require any corroboration, to sustain conviction against the appellant.

We also note that the complainant's convicting testimony was supported by her mother (PW2) who found the appellant at the scene in the middle of committing the repulsive sexual act on the helpless little girl. His unsuccessful attempt to flee the scene at that point is not conduct of an innocent man.

Further corroboration came from PW3 who rushed to the scene in response to PW2's alarm, only to find PW2 and the appellant there pushing and shoving. Upon inspecting the complainant's private parts, she found them wet with what looked like semen. That aspect of her evidence tallies with what the medic (PW5) unveiled in his medical examination report (Exhibit P2). That he found lacerative lesions in the complainant's private parts indicative of her vaginal orifice having been penetrated by a blunt object. These findings are consistent with the complainant's claim that she was sexually abused by the appellant.

As stated earlier, the appellant in his defence blamed his travails on the grudges he had with his wife, PW2, whom he claimed to have fabricated the charge to wrestle ownership of certain undisclosed property from him. As rightly argued by Ms. Makala, this defence was duly considered but rejected by the courts below. Indeed, it is on record that he did not cross-examine the complainant or PW2 on that aspect, meaning that his defence was not just a sham but an afterthought. His self-serving defence of general denial would naturally disintegrate when weighed against the prosecution case. The courts below rightly rejected it.

Altogether, we are satisfied that the charge against the appellant was established beyond all reasonable doubt. The three grounds of appeal under consideration inevitably fail.

In the final analysis, we find the appeal unmerited and proceed to dismiss it in its entirety.

DATED at **ARUSHA** this 14th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 15th day of February, 2023 in the presence of the appellant in person and Mr. Timotheo Mmari, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL