IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J. A., KENTE, J.A. And MASHAKA, J.A.:)

CRIMINAL APPEAL NO. 261 OF 2019

JUMA FAIDA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Ismail, J.)

dated the 24th day of July, 2019

in

Criminal Appeal No. 243 of 2019

JUDGMENT OF THE COURT

4th & 10th July, 2023

MUGASHA, J.A.:

Before the District Court of Bukombe sitting at Bukombe, the appellant Juma Faida was charged and convicted of the offence of rape contrary to sections 130 (1) & (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2019). The particulars of the offence are that on 05.03.2016 at about 13:00 hours at Lugunga village within Mbogwe District in Geita Region the appellant had carnal knowledge of a girl aged 12

years. In order to conceal the identity of the victim, she will be referred to as "the victim" or PW1. After a full trial, the appellant was sentenced to a jail term of thirty years. Aggrieved, he unsuccessfully appealed to the High Court at Mwanza was unsuccessful. Still protesting his innocence, he has come to this Court on a second appeal.

To appreciate what underlies the present appeal, a brief background is as follows: On 05/03/2016 at about 13:00hours, the victim met the appellant at Lugunga village. The appellant was riding a bicycle and the victim asked for a lift from the appellant which he obliged and carried her onto the bicycle. When they arrived near the victim's residence she alighted and proceeded home. However, it is alleged that, the appellant followed her and upon being asked to stop she declined and took to her heels. She was chased and grabbed by the appellant who threatened to kill her, dragged her to the bush and ravished her. Also, her money and the mobile phone were taken away by the appellant.

As the victim cried for assistance, shortly thereafter her grandmother Lucia Maliganya (PW2) happened to be passing by and upon asking the victim as to why she was crying, she claimed to

have been raped by an unknown man. According to PW2, as the appellant was standing nearby, she pleaded with him to return the victim's mobile phone and the money but the appellant declined and left the place. The victim went home crying and when her bother Kayungilo Magina (PW3) saw her, upon inquiring from her as to what was wrong, the victim stated that she was raped by a certain man who was known by the grandmother that is, PW2. This prompted the brother to trace PW2 who revealed that the culprit's name was Juma Faida. Thus, PW3 traced the appellant and found him at Msimbazi area drinking alcohol and had in his possession a mobile phone make Tecno which was on a table. According to PW3, the appellant disclosed that he had already utilised the money. Thus, PW3 took the mobile phone and informed the village chairman before whom it was alleged that the appellant had confessed to have raped the victim. On the 06/03/2016 the appellant was taken to Masumbwe police station whereby, according to WP 9897 DC Imelda (PW4), the appellant confessed to have raped the victim in the cautioned statement recorded on 07/03/2016 which was tendered and admitted as exhibit P1. Meanwhile, the victim was taken to Masumbwe Health Centre where the Clinical Officer Rehema Killo (PW5) examined her and found that she had sustained

several bruises on her outer parts and on the vaginal parts. She also had blood spots and traces of sperms.

On the other hand, the appellant denied the accusations levelled against him by the prosecution. He claimed to have been arrested on 05.03.2016 at Msimbazi area within Lugunga village while drinking alcohol and was taken to the hamlet chairperson. On the following day, he was taken to Masumbwe police station where he was detained and on the 07/03/2016 was interviewed by three police officers but he denied to have raped the victim.

At the conclusion of the trial, the District Court found the appellant's defence too weak to raise any reasonable doubt on the prosecution's case and hence as earlier stated, the appellant was convicted as charged and sentenced to a jail term of 30 years. His appeal before the High Court was not successful hence this second appeal on the following grounds:

1. *That, the first appellate court erred in law and fact to dismiss the appellant's appeal without taking into account that PW1 a child of tender age was given a chance to testify without VOIRE DIRE test as directed by the law.*

2. *That, the first appellate court erred in law and fact to uphold the appellant's conviction while PW1 was never asked by the trial court if she know the meaning of oath and the duty of telling the truth.*
3. *That, the first appellate court erred in law and fact in upholding the appellant's conviction while PW1 told her family that she was raped by an unknown person and that the appellant was arrested only on suspicious.*
4. *That, the first appellate court erred in law and fact in upholding the appellant's conviction while there was no first description reported from any leader or police officer relating to the crime.*
5. *That, the first appellate court erred in law and fact to uphold the appellant's conviction while the prosecution failed to conduct an identification parade.*
6. *That, the first appellate court erred in law and fact to uphold the appellant's conviction relying on the caution statement while the same was not read loudly.*
7. *That, the first appellate court erred in law and fact to convict the appellant while the prosecution failed to conduct DNA tests.*

8. *That, the first appellate court erred in law and fact to uphold the appellant's conviction while the mobile phone and money tsh. 4,000/=alleged to have been robbed from the victim were never tendered in Court.*
9. *That, to prove lies done by PW1 and PW2 before the trial Court, PW2 observed herself and saw PW1 crying but failed to raise an alarm for help.*

Basically, the appellant's main ground of grievance is two fold namely, **one,** that the trial was flawed with the procedural irregularities and that **two**, the evidence paraded by the prosecution did not prove the charge beyond reasonable doubt.

At the hearing the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Ms. Gisela Alex Banturaki, learned Senior State Attorney alongside Mr. Morice Hassan Mtoi, learned State Attorney.

The appellant adopted the grounds of appeal and opted to let the learned State Attorney to submit first reserving the right to rejoin if need arises. From the outset, Mr. Mtoi opposed the appeal and urged the Court to dismiss the appeal and sustain the conviction and the sentence. In respect of the first two grounds of appeal, he

conceded that ***voire dire*** was not conducted prior to taking the evidence of the victim because the trial court did not satisfy itself if the witness understood the meaning of oath and the duty of speaking the truth before giving her unsworn account. However, the learned State Attorney was quick to state that, despite the pointed out omission, yet, the evidence of the victim qualifies to be treated as unsworn account which required corroboration. To support his proposition, he cited to us the case of **KIMBUTE OTINIEL VS REPUBLIC**, Criminal Appeal No. 300 of 2011 (unreported).

Subsequently, it was Mr. Mtoi's submission that the unsworn account of the victim was corroborated by the evidence of PW2 who happened to be at the scene of crime shortly after the occurrence of the incident and was told by the victim about the rape and mentioned the appellant as the culprit who also took the victim's mobile phone and money. It was further contended that the occurrence of the rape incident is cemented by the evidence of Doctor who after examining the victim established that she had bruises, blood spots and sperms in the vagina. Thus, the learned State Attorney urged us to find the 1st and 2nd grounds of appeal not merited.

Regarding the 6th ground of appeal, the learned State Attorney conceded that, the cautioned statement of the appellant and the PF3 were not read out to the appellant after admission. In this regard, he urged us to expunge the two documentary exhibits P1 and P2 from the record which is in line of what we said in the case of **ROBINSON MWANJISI AND THREE OTHERS VS REPUBLIC** [2003] T.L.R 218

However, Mr. Mtoi argued that even if the PF3 is expunged, yet the Doctor's oral account which established that there was penetration on the victim's vagina, suffices to corroborate the victim's account on the occurrence of the rape. However, the learned State Attorney fell short of making any submission as to how the victim's account is corroborated by the evidence of PW2 and PW5 as none of them had witnessed the rape incident. Yet, he was of the view that since PW2 happened to be at the crime scene shortly after the incident and the victim told her about the rape incident, her evidence suffices to corroborate the victim's unsworn account to sustain the conviction of the appellant. With this submission, the learned State Attorney urged us to dismiss the

appeal on ground that the charge against the appellant was proved to the hilt.

In rejoinder, the appellant had nothing useful to add apart from urging the Court to set him at liberty after allowing the appeal.

Having considered the submissions, grounds of appeal and the record before us, the issues for determination are whether **one**, the trial was flawed with procedural irregularities which addresses the 1st and 2nd grounds of appeal; and **two**, whether the charge was proved beyond reasonable doubt as against the appellant which covers the remaining grounds of appeal.

We begin with the complaint on the procedural irregularity surrounding the admission of the cautioned statement of the appellant and the PF3. It is glaring at page 16 of the record of appeal that PW4 who recorded the appellant's cautioned statement tendered it in evidence as exhibit P1 without being objected to by the appellant. However, the cautioned statement was not read out following its admission. Similarly, at page 18 of the record of appeal after the PF3 was tendered and admitted in evidence as exhibit P2, it was not read out to the appellant. Apparently, the two documentary exhibits (P1 and P2) were acted upon to ground the

conviction of the appellant as reflected in the judgment of the trial court at pages 33 and 34 of the record of appeal. This was irregular as stated in numerous decisions of the Court including the case of **FESTO MGIMWA VS REPUBLIC,** Criminal Appeal No. 378 of 2016 (unreported), the Court emphasized that:

> *"On our part, firstly, we entirely agree that the contents of exhibit P1* ***were not made known to the appellant as it was not read over as required.*** *We, therefore, expunge the same from the record as prayed by Mr. Mwandalama. We wish however, to implore trial courts to always adhere to what the Court stated in* ***Robinson Mwanjisi and Three Others V. The Republic*** *[2003] TLR 218, on the importance of reading over the contents of the document once it is cleared and admitted in evidence".*

On account of the omission to read out the two documentary exhibits though present throughout the trial, the appellant was besides, being denied opportunity to understand the contents of the documents and if need be, invoke his right of cross-examination, he was convicted on the basis of the evidence he was unaware. This

occasioned a failure of justice and we accordingly expunge the appellant's cautioned statement and the PF3 from the record. However, we remain with the oral account of the Doctor because it is settled law that, oral account of a witness shall not fail the test of admission merely because the corresponding documentary account has been expunged. See: **ABAS KONDO GEDE VS REPUBLIC,** Criminal Appeal No. 472 of 2017 and **SIMON SHAURI AWAKI @ DAWI VS REPUBLIC,** Criminal Appeal No. 62 of 2020 (both unreported). In the premises, we find the 6th ground of appeal merited.

Next is the appellant's complaint on the failure to conduct ***voire dire*** before taking the evidence of PW3 which is the gist of the 1st and 2nd grounds of complaint. The appellant faults the first appellate court for dismissing his appeal without considering that the victim, a child of tender age testified without conducting ***voire dire*** as directed by the law. On this omission, it was argued that, the trial court did not satisfy itself if the victim knew the meaning of oath and the duty of telling the truth. Since the charged offence is alleged to have been committed on 5/3/2016, the law regulating the manner of taking evidence of a child witness was section 127 (2) of the

Evidence Act before the 2016 amendment which stipulated as follows:

> *"Where in any criminal cause or matter a child of tender age called as a witness does not in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. "*

The essence of conducting ***voire dire*** before taking the evidence of a child of tender age was for the purposes of enabling the court to satisfy itself that, if the child does not understand the nature of oath but is possessed of sufficient intelligence and understands the duty of speaking the truth, such evidence may be received though not upon oath or affirmation. Failure to conduct ***voire dire*** had consequences of rendering the evidence of a child witness defective and liable to be expunged. See: **OMARI KURWA VS REPUBLIC**, Criminal Appeal No.87 of 2007 (unreported).

However, it is settled law that the omission to conduct *voire dire* examination of a child of tender age, brought such evidence to the level of unsworn evidence of a child which requires corroboration. See: **KILENGENY ARAP KOLIL VS REPUBLIC** [1959] EA 92, **KISIRIRI MWITA S/O KISIRIRI VS REPUBLIC** [1981] TLR 218 and **DHAHIR ALLY VS REPUBLIC** [1989] TLR 27. Yet, in the case of **KIMBUTE OTINIEL VS REPUBLIC** (supra) where the Court among other things, in addressing section 127 (2) of the Evidence Act before the 2016 amendments, held:

> *"That section 127 (2) is not intended to allow the admission of uncorroborated evidence taken without complying with section 127 (2). Rather, as rightly found by the Court in Nguza Vikings @ Babu Seya, that subsection comes into play only if the evidence has been lawfully admitted under section 127 (2).* ***Where the Court does not conduct*** *a* ***voire dire then the evidence of a child witness must be corroborated for the purposes of determining whether he or she is telling nothing but the truth.*** *That section 127 (7) is not intended to serve as an alternative legal basis for admitting or acting upon evidence, which would otherwise not be admissible under section 127 (2)".*

In the light of stated position of the law as it was, in the matter under scrutiny, the evidence of the victim taken without conducting ***voire dire examination*** falls under the category of unsworn evidence which requires corroboration so as to establish the truth on the occurrence of the rape incident. In this regard, the question to be addressed is whether on the record before us, there is any other prosecution account to corroborate the evidence of the victim. Our answer is in the negative and we are fortified in that regard because:

One, PW2 who is alleged to have been at the scene of crime soon after occurrence of the incident, besides narrating what she was told by the victim about the rape incident which is indeed hearsay, she gave no evidence on having witnessed the alleged rape and this was conceded by the learned State Attorney; and **two,** a similar fate befalls the evidence of the victim's brother Kayungilo Magina (PW3) who besides being told by the victim about the rape incident he did not witness the occurrence of the rape and his evidence is purely hearsay. Thus, the hearsay evidence of PW2 and PW3 is of no evidential value to corroborate the unsworn evidence of the victim and as such, it must be discredited. Moreover, the doctor's account

besides, establishing penetration on the victim's vagina is of no assistance to the prosecution case to pin down the wrong doer and as such, the question as to who raped the victim remains unanswered.

Having discredited, the evidence of PW2 and PW3, the evidence that remains on the record implicating the appellant is the unsworn evidence of the victim. Thus, since the victim's account itself requires corroboration cannot act as corroborative evidence. See: **MKUBWA SAID OMAR VS S.M.Z** [1992] T.L.R 365, **SELEMANI MWITU VS REPUBLIC,** Criminal Appeal No. 90 of 2000, **DEEMAY DAATI AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 80 of 1994, **HERMAN HENJEWELE VS REPUBLIC,** Criminal Appeal No. 164 of 2005 (all unreported).

Thus, in the wake of uncorroborated victim's account, the charge against the appellant was not proved at the required standard as suggested by the learned State Attorney because there is no evidence to connect the appellant with the rape incident. Therefore, although we sympathize with the victim, our hands are tied by the law and as such, the appellant is entitled to the benefit of doubts surrounding the prosecution case.

In view of the aforesaid, the appeal is merited and allowed. We quash and set aside the conviction and the sentence and order the immediate release of the appellant unless he is held for another lawful cause.

DATED at **MWANZA** this 6th day of July, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 10th day of July, 2023 in the presence of Appellant in person and Ms. Martha Mwandenya, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL