IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 37 OF 2020

HOSEA GEOFREY MKAMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mkapa, J.)

dated the 4th day of December, 2019

in

Criminal Appeal No. 59 of 2017

.....

JUDGMENT OF THE COURT

25th August & 1st September, 2023

MASOUD, J.A.:

The appellant was charged with, convicted of the offence of rape contrary to section 130(1)(2)(e)(c) and 131(1) of the Penal Code, [Cap. 16 R.E 2002 now R.E 2022], and was sentenced to imprisonment for 30 years by the District Court of Same in Kilimanjaro Region way back in 12th April, 2017. The victim was then a standard five pupil. The allegation by the prosecution was that the appellant did, on 30th August, 2016 at about night time at Mhezi village within Same District in Kilimanjaro Region, have carnal knowledge with the victim who was then aged 16.

The prosecution case was at the trial built on the evidence of the victim (PW1) and five other witnesses. The five other witnesses were Amina

Ramadhani (PW2), the victim's aunt; Judica Msuya (PW3), a medical doctor; and WP3343 DC Zena (PW4), and E 5141 Abubakar (PW5), police officers. In addition to the testimony of such witnesses, the prosecution also relied on medical report (Exhibit P1), and the appellant's caution statement (Exhibit P2). On the other hand, the appellant had himself as the only witness in his defence.

The gist of the prosecution evidence was that the victim (PW1) was on 30th August, 2016 at night time raped by the appellant in a room of a house where she lived with her grandmother at Mhezi Village within Same District. In her testimony, she described how the act was carried out by the appellant. Her grandmother was at a *pombe* shop when she was raped. The victim was alone at home. She informed her grandmother when she came back from the pombe shop very late that fateful night, although the appellant had threatened to kill her if she told anyone about the incident.

When the victim's aunt (PW2) was informed by her uncle on 3rd September, 2016 about the victim being sexually abused by the appellant, she reported the matter to the Ward Executive Officer and as a result the appellant was arrested, the victim taken to hospital and examined. PW3 examined the victim on 5th September, 2016 and prepared a medical report (Exhibit P1). PW3 found that the victim's private part had no bruises and no signs of being raped, although the victim appeared experienced in having

sexual intercourse. PW4 and PW5 described how she interrogated the victim and the appellant respectively about the incident and how the appellant confessed to have raped the victim and his cautioned statement recorded (Exhibit P2).

In his defence evidence, the appellant denied committing the offence. He contended that he lived at Mwembe village, Same District, and the village authority was not involved in his arrest. His two witnesses, namely, Upendo Abdallah (DW2) and Zaina Geofrey Hassani (DW3), apart from being aware of the charge the appellant faced, they had nothing useful as a defence.

The trial district court was, on the basis of the above evidence, satisfied that the prosecution proved its case beyond reasonable doubt. It was for such reason that the appellant was convicted and sentenced to thirty (30) years imprisonment.

Aggrieved by the trial district court's decision, the appellant preferred an appeal to the High Court which was heard but not determined in his favour. Nonetheless, the cautioned statement (Exhibit P2) was expunged by the High Court for reason of being admitted without complying with the relevant procedure as to tendering and admission of exhibits.

As the appellant was dissatisfied by the decision of the first appellate court, he saw it fit to lodge the instant appeal to this Court. In his both

original memorandum of appeal, and supplementary memorandum of appeal, the appellant raised eight (8) and three (3) grounds of appeal respectively.

In all, we were contented that the grounds of complaint reflected in all memoranda could best be mentioned as, **one**, the charge and evidence were at variance; **two**, there was no evidence of penetration led by the prosecution; **three**, the evidence of the victim who was a girl of tender age was taken in contravention of section 127(2) of the Evidence Act, [Cap. 6 R.E 2002 now R.E 2022]; **four**, the contents of PF.3 admitted as Exhibit P1 was admitted without being read over before the court; **five**, the victim withheld the information of being raped for so long which affected her credibility; **sixth**, the charge was not proved beyond any reasonable doubt; **seventh**, the appellant was wrongly convicted of statutory rape whilst the victim's age was not proved; **eighth**, the trial court offended section 192(3) of the Criminal Procedure Act, [Cap. 20 R.E 2002 now R.E 2022] (CPA); and **nineth**, the trial district tribunal's proceedings offended section 210(1)(b) of the CPA.

When the appeal was called on for hearing, the appellant appeared in person and unrepresented, while the respondent Republic was represented by Ms. Cecilia Mkonongo, learned Principal State Attorney, who was assisted by Mr. Peter Utafu and Mr. Philbert Mashurano, both learned State

Attorneys. Both parties were ready for hearing. The appellant rose and informed us that he adopts his grounds of appeal and reserves his right to rejoin the submissions by the respondent.

Ms. Mkonongo, instantly, informed us that the respondent Republic was supporting the appeal. And further that, the respective submission would be made by Mr. Philbert Mashurano, learned State Attorney.

Accordingly, Mr. Mashurano submitted that in view of the thrust of the grounds of appeal raised, they boil down to the issue whether the prosecution proved her case beyond reasonable doubt. And that his submission would show that the prosecution did not discharge the burden. In doing so, Mr. Mashurano, covered a wide range of issues in respect of which he wanted us to find that the conviction was not properly grounded.

One of such aspects of Mr Mashurano's submission was on the evidence of PW1. He was of the view that the evidence was not taken in accordance with the requirements of section 127(2) of the Evidence Act, [Cap. 6 R.E 2019 now R.E 2022]. She said that the victim was aged 14 as is apparent at page 9 of the record of appeal. Accordingly, as she was 14 years old, her evidence ought to have been taken either under oath if she knew the meaning of oath or without oath provided, she promised to tell the truth and not to tell any lies. He argued that section 127(2) was not complied with because while the victim said that she did not understand

the meaning of oath, the trial court took her testimony under oath contrary to the requirement of the law.

Thus, since the victim did not understand the meaning of oath, the trial court ought to have taken her testimony without oath but after promising to tell the truth and not to tell any lies. The learned State Attorney invited us to expunge the evidence adduced by the victim on that reason.

We were further told that once the evidence of the victim is expunged, the remaining evidence would not be sufficient to ground the conviction. With this submission, we were referred to the evidence of PW2 which was merely a hearsay as the witness's uncle who told her about the incident of sexual harassment was not called to testify as a witness.

The remaining evidence is from PW3, PW4 and PW5, which is the evidence of the medical doctor (PW3) who examined the victim, and police officers who interrogated the victim and the appellant. The same would not be sufficient to support the conviction in the absence of the evidence of PW1. We were reminded that the cautioned statement had already been expunged from the record by the second appellate court for being received irregularly.

The other aspect related to the problems that pertained to the charge sheet. Whereas the charge sheet mentioned Mhezi village within

Same District as the place where the offence was committed, PW1 told the trial court that she lived with her grandmother at Dagheseto Mwembe Village where the offence was committed in her grandmother's house.

As it was alleged that the offence was committed at Mhezi Village within Same District, it was submitted that the variance between the charge and the evidence of the victim (PW1) as to the place where the offence was committed was incurably fatal as it meant that there was no evidence led by the prosecution to support the charge laid against the appellant.

In rejoinder, the appellant had nothing useful to say. He just concurred with the submission made by Mr. Mashurano and prayed to be set free.

Having heard the appellant and the respondent, we are set now to determine the appeal by considering the grounds of appeal raised and the arguments made by the respondent which as alluded to boiled down to the issue whether the prosecution proved her case beyond reasonable doubt. As we did so, we recalled that this is a second appeal in which we are, as a matter of rule of practice, enjoined not to interfere with the concurrent findings of facts by the two courts below, unless we are satisfied that there is misapprehension of the evidence, or where there were mis-directions or non-directions on the evidence, or where there had been a miscarriage of justice or violation of some principle of law or practice. (See for instance,

Emmanuel Mwaluko Kanyusi and 4 Others v. R, Criminal Appeal No. 110 of 2019 and 553 of 2020; **Noel Gurth aka Bainth and Another v. R**, Criminal Appeal No. 339 of 2013 (all unreported), and **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149).

In the light of the above principle, we scrutinized the manner in which the evidence of PW1 was taken by the trial court as we reflected on the requirements of section 127(2) of the Evidence Act and the contents of page 9 of the record of appeal. We paid attention to the questions that the trial court put to the victim in a bid to ascertain whether she knew and understood the meaning of an oath. We saw how the trial court, in the end, concluded that the victim knew the meaning of an oath and therefore she would give evidence under oath. The relevant part of the record reads thus:

> ***"XD by the court***
>
> - *My name is XXXX*
> - *I am in class V*
> - *I am at Daghaseto primary School*
> - *I am a Christian by religion*
> - *I do not know the meaning of an oath.*
> - *I know if you tell untruth is bad to God*
>
> ***Court:*** *The court is satisfied that the witness knows the meaning of an oath. Therefore, she will give evidence on oath".*

We considered the approach taken by the trial court in the light of a number of our previous decision that dealt with more or less similar issue. (See for instance, **Issa Salum Nambaluka v. R**, Criminal Appeal No. 195 of 2018, **Godfrey Wilson v. R**, Criminal Appeal No. 168 of 2018, **Ally Ngozi v. R**, Criminal Appeal No. 216 of 2018, **Menald Wenela v. DPP**, Criminal Appeal No.336 of 2018, **Emmanuel Masanja v. R**, Criminal Appeal No. 394 of 2020; **Ramson Peter Ondile v. R**, Criminal Appeal No. 84 of 2021, **Shomari Mohamed Mkwama v. R**, Criminal Appeal No. 606 of 2021, **Mathayo Laurence William Mollel v. R**, Criminal Appeal No. 53 of 2020- all unreported). We underlined different circumstances under which the provision of section 127(2) has been subjected to as we compared with the circumstances pertaining to this case.

It is settled that the plain meaning of the provisions of section 127(2) of the Evidence Act is to the effect that a child of tender age may give evidence on oath or affirmation or without oath or affirmation. However, where such a child is to give evidence without oath or affirmation, she must make a promise to tell the truth and not to tell any lies.

In the case at hand, when the victim was tested by the trial court to ascertain whether she knew and understands the meaning of an oath, she was emphatic that she neither knew nor understand the meaning of an oath. Contrary to the requirement of the provisions of section 127(2) of the

Evidence Act, which required such victim to give her evidence without oath or affirmation after promising to tell the truth to the court and not to tell any lies because she neither knew nor understood the meaning of an oath, the trial court purportedly took her evidence on oath. Accordingly, we agree with the learned State Attorney that the provisions of section 127(2) of the Evidence Act were flouted by the trial court. For such reason therefore, we find that the evidence of the victim (PW1) was wrongly admitted. We accordingly expunge it from the record.

The question that crops up at this juncture is whether the remaining evidence which is from PW2, PW3, PW4, PW5 and Exhibit P1 can sustain conviction in view of the fact that the cautioned statement was expunged by the first appellate court. The learned State Attorney was of the view that the remaining evidence does not suffice to ground the conviction in the absence of the evidence of PW1 and in the absence of the cautioned statement which have been expunged from the record. We shall consider this issue in line with items of complaint raised in the grounds of appeal adopted by the appellant and those which were covered by the learned State Attorney in his submission.

The learned State Attorney raised an issue of visual identification as the offence was committed at night. The argument was that the appellant did not testify as to how she ably identified the appellant as the wrong

doer. We think this issue should not detain us because it is a factual in its essence and was not raised in the trial court and in the first appellate court by the appellant.

There was an issue as to admissibility of Exhibit P2. It was complained about because it was not read out at the trial after it was admitted. Our perusal of the contents at page 14 of the record of appeal left us in no doubt that when PW3 was led to tender Exhibit P1 in evidence and having it admitted as such, it was not read out. We thus, pursuant to our previous decision in **Robinson Mwanjisi v. R** [2003] TLR 218 which we also applied in **Aneth Furaha and others v. R**, Criminal Appeal No. 161 of 2018 (unreported), and our decision in **Saganda Saganda Kasanzu v. R.** Criminal Appeal No. 53 of 2019 (unreported), we hereby expunge Exhibit P1 from the record for such reason. We are satisfied that this fault amount to violation of some principle of law or practice which is within our jurisdiction as the second appellate court to interfere despite the concurrent finding of the two courts below.

After expunging the evidence of PW1, and Exhibit P1 from the record mindful that Exhibit P2 had already been expunged by the first appellate court, it means that there would be only oral testimony of PW3 which has to be considered along with the evidence of other witnesses, namely, PW2, PW4 and PW5 as to the correctness or otherwise of the conviction. See,

Huang Qin & Xu Fujie v. R., Criminal Appeal No. 173 of 2018 (unreported); and **Saganda Saganda Kasanzu v. R.** (supra). We showed at the beginning the nature of the evidence received from each of the prosecution witnesses. In so far as PW2, PW4 and PW5 are concerned, their evidence is about what they were told about the incident which in the circumstances cannot support the conviction in the absence of the evidence of the victim. The same applies to the testimony of the medical doctor (PW3) which does not in any way link the appellant to the offence. Part of his testimony on the results of her examination reads as follow at page 14 of the record of appeal:

> *I attended one [.....] on 5/9/2016..... I examined her vagina. I examined her as to HIV. I observed and found no bruises. There were no signs of being raped. She was not impregnated. No signs of being raped but seems to have experience of having sexual intercourse".*

Clearly, the above testimony raises doubts as to who exactly raped the victim on the fateful night, as there is no evidence from the prosecution connecting the appellant to the offence. Thus, as already stated, the evidence cannot support the conviction.

Accordingly, the prosecution case was not proved beyond reasonable doubt. We need not therefore endeavour on the other grounds or points raised as what we have deliberated upon suffices to dispose of the appeal.

Finally, we allow the appeal, quash the conviction, and set aside the sentence. We order the appellant's immediate release, if he is not being held for another lawful cause.

DATED at **MOSHI** this 1st day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 1st day of September, 2023 in the presence of the Appellant who appeared in person and Mr. Innocent Exavery Ng'assi, learned State Attorneys for the respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL