IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 85 OF 2021

SIXMUND ANGELUS MASOUD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate Dar es Salaam at Kisutu)

(Ngimilanga, SRM (Ext.J.)

dated the 24th day of December, 2020

in

Criminal Appeal No. 34 of 2020

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JUDGMENT OF THE COURT

13th February & 5th September, 2023

KOROSSO, J.A.:

This is a second appeal. The appellant, Sixmund Angelus Masoud was arraigned in the District Court of Kigamboni at Kigamboni charged with the offence of Grave Sexual Abuse contrary to section 138(1)(a) and (2)(b) of the Penal Code, Cap 16 (the Penal Code). It was alleged that, the appellant on 10/7/2019 at Kisiwani area, within Kigamboni District, within Dar es Salaam Region, for sexual gratification, did touch and put his penis onto the vagina of a girl aged five who we shall henceforth refer to as PW2 or "the victim" (to disguise her name). The appellant pleaded

not guilty to the charge. Thereafter, the trial ensued where the prosecution side presented three witnesses to prove the charge while the defence side, had the appellant as its sole witness.

To understand the context giving rise to the appeal before us, the background, as gathered from the evidence of prosecution witnesses, is important. Kidawa Ally Kambangwa (PW1), the victim's mother revealed that on 10/7/2019 at 20.00 hours, while inside her house, she heard from outside someone calling the victim (PW2), who was playing outside. When she queried, the voice of a male person responded and introduced himself as Matata (the appellant). The appellant left with the victim, and at 21.00 hours PW1 became concerned on the whereabout of the victim and she then proceeded to the appellant's house to search for her. At the appellant's house, she knocked the door, and out came the appellant with the victim and PW1 left for home with the victim. After some time, the victim informed PW1 that while at the appellant's house, the appellant had taken off her underpants and put his penis in her vagina and threatened her not to tell anyone of the incident. In the morning, PW1 went to the appellant's house and questioned him on what had transpired between himself and the victim. According to PW1, though the appellant had at first, procrastinated, he later admitted to having done to the victim what the victim had told PW1, saying the devil possessed him to do the

evil act on the victim. Thereafter, PW1 reported the incident to the ten-cell leader, PW3 who questioned the appellant and the victim. The victim repeated her story on what the appellant had done to her while the appellant confessed to the allegations as stated by the victim. PW1 upon being directed by PW3, went and reported the incident at the Police station and the appellant was arrested and later arraigned in the District Court of Kigamboni on charges stated above. With the PF3 obtained from the police station, PW1 took the victim to Kigamboni Health Centre for a medical examination. The appellant's defence on the other hand was a complete denial of the charges against him alleging that they were concocted after PW1 failed to pay him back a loan of Tshs. 100,000/= which he had given her on 5/5/2019.

After hearing both sides of the case in the trial that ensued, the appellant was convicted as charged and sentenced to twenty years imprisonment and ordered to pay compensation of Tshs. 200,000/= to the victim for injuries suffered from the alleged incident. The appellant was aggrieved, and his appeal to the first appellate court in the Resident Magistrate's Court of Dar es Salaam at Kisutu before Ngimilanga, PRM (Extended Jurisdiction) was unsuccessful hence the current appeal.

In this appeal, the appellant has raised six grounds of appeal faulting them trial and first appellate courts essentially, on the following complaints: **one**, reliance on the evidence of PW2 received in contravention of section 127(2) of Tanzania Evidence Act (Evidence Act). **Two,** non-compliance with section 240(3) of the Criminal Procedure Act (the CPA). **Three**, reliance on discredited and untenable evidence of PW1, PW2 and PW3. **Four**, failure to summon vital witnesses. **Five**, failure to consider defence evidence and **six**, conviction on weak evidence to prove the charge against the appellant to the required standard. In addition, the appellant raised two grounds of appeal in his written statement of arguments, that is to say; **one**, that the lower courts failed to consider that the prosecution did not establish his apprehension/arrest after the alleged incident and **two**, that both lower courts wrongly relied on the evidence of PW1 and PW2 in the conviction of the appellant.

On the day the appeal came for hearing, the appellant appeared in person, self-represented. Ms. Hellen Moshi learned Senior State Attorney appeared for the respondent Republic, assisted by Ms. Gladness Senya, learned State Attorney.

The appellant commenced his submission by adopting the grounds of appeal and his written statement of arguments which he implored us

to consider. Regarding ground one, the main complaint is that the evidence of PW2 was improperly admitted in contravention of section 127(2) of the Evidence Act there being no *voire dire* examination conducted to ascertain whether PW2 understood the nature of an oath and the duty of telling the truth in court and not lies and that the court failed to make any finding on this. The appellant argued that such omission is fatal and thus urged the Court to expunge the evidence of PW2 from the record and cited the case of **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 (unreported), to cement his argument. Apart from this, he challenged the credibility of the evidence of PW2 for the reason that there was no background given on what happened prior to the alleged incident, such as whether she was undressed by the appellant.

Ms. Moshi, in resisting the appeal, made her submissions commencing with the complaint on non-compliance of section 127(2) of the Evidence Act. She contended that in the instant appeal, the record of appeal shows that the provision was fully complied with because it does not provide for questioning of the victim, rather it requires the child witness to promise to tell the truth and not to tell lies. She thus urged us to find the ground lacks merit.

Having heard the submissions from both sides on complaint number one, there is no dispute that PW2 was, in terms of section 127 (2) of the Evidence Act, a child of tender age whose evidence could be recorded without taking an oath or making an affirmation. Section 127(2) of the Evidence Act stipulates:

> *"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".*

This Court has on several decisions discussed the import of the above provision. In **Godfrey Wilson v. Republic**, Criminal Appeal No. 168 of 2018 (unreported), we observed:

> *"The trial magistrate ought to have required PW1 to promise whether or not she would teil the truth and not lies. We say so because, section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of tender age..."*

(See also, **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 195 of 2018 (unreported))

In the instant case, the record of appeal shows that PW2 did not give evidence on oath or affirmation but promised to tell the truth and the court made a finding to that effect. However, the court neither asked any preliminary questions to the victim nor seek an undertaking from PW2 not to tell lies, which is one of the complaints by the appellant. The issue we ask ourselves is whether such omission renders the evidence of PW2 worthless.

We are alive to the restated position from our decisions in the cases of **Godfrey Wilson** (supra) and **John Mkorongo James** (supra) that, to reach the point of a child witness promising to tell the truth and not to tell lies requires a prior process of putting simple questions to the child witness depending on the circumstances of each case. Not without derogating from the same, we are, however, of the firm view that the process is not for every case where evidence is not given on oath having regard to our recent decision in **Mathayo Laurence William Mollel v. Republic**, Criminal Appeal No. 53 of 2020 (unreported). The Court held that:

> "*We respectfully think that if a child of tender age is not to testify on oath or affirmation, a preliminary test on whether he knew and understands the meaning of oath may be dispensed with... We understand the legislature*

> *used the words "promise to tell the truth to the court and not to tell lies". We think tautology is evident in the phrase, for, in our view,* ***"to tell the truth" simply means "not to tell lies". So, a person who promises to tell the truth is in effect promising not to tell lies.*** *The tautology in the subsection is, in our opinion, a drafting inadvertency".* [Emphasis added].

Applying that reasoning to the present case, PW2 is recorded to have stated: "*I promise to tell nothing but the truth*" which led the trial court to remark: "*She has promised to tell the truth".* To us, as argued by the learned Senior State Attorney, that means that, PW2 promised to tell the truth and not lies. Therefore, section 127 (2) of the Evidence Act was complied with. We find under the circumstances the case cited by the appellant, **John Mkorongo James** (supra) is distinguishable in that, apart from the different circumstances between the two cases, the trial court in that case concluded that the victim had sufficient intelligence without having tested the victim on such a finding. The other aspect is that, in the instant case, even if the evidence of PW2 was to be expunged, the evidence of PW1 and PW3 and the oral confessions of the appellant are sufficient to prove the offence charged. Thus, the first complaint falls.

Clarifying on the second point of grievance on non-compliance with section 240(3) of the CPA, the appellant argued that the prosecution case was weak and not sufficient to prove the charge against him especially since there was no medical report to prove the alleged offence nor was the officer who issued the PF3 called to testify. Responding to this complaint, Ms. Moshi conceded that the record of appeal reveals that, there was neither a medical-personnel who testified with regard to the medical examination of the victim nor was there any medical report tendered in evidence. However, she argued that since there was no such medical report, informing the appellant of his right to call a medical-personnel for cross-examination did not arise and, thus the complaint is misconceived.

Having gone through the record of appeal, clearly, there was no medical examination report tendered and therefore section 240(3) of CPA could not come into play. In consequence, we agree with the learned Senior State Attorney that this ground is misconceived, and it therefore fails.

In amplifying complaint number three and additional ground two, the appellant contended that the case was poorly investigated and prosecuted. According to him, taking his earlier submission that the

evidence of PW2 was worthless, it thus rendered the evidence of PW1 and PW3 as mere words or hearsay evidence. Therefore, according to the appellant, having discredited the evidence of PW1, PW2 and PW3 as unreliable and in the absence of his cautioned statement which was recorded in contravention of sections 57 and 59 of the CPA, the prosecution case was rendered wanting to prove the charges against him and to warrant his conviction. In response, the learned Senior State Attorney reiterated her stand with which we agree on the credibility of the evidence of PW2 and argued that, since there was no such statement tendered and admitted into evidence, therefore compliance with sections 57 and 58 of the CPA is not an issue in the instant appeal. This complaint lacks merit and we dismiss it.

The other aspect of the complaint, relates to the credibility of the evidence of PW1 and PW3. The appellant contended that it is not worthy of belief for being hearsay. Our perusal of the record shows that both the trial and first appellate court found the evidence of PW1 and PW2 to be credible. Considering that, the trial court found the evidence of PW1 and PW3 to corroborate the evidence of PW2 it is also important to remember the well-settled law that the best evidence in sexual offences is derived from the victim as held in the case of **Selemani Makumba v. Republic**

[2006] T.L.R. 379. PW2 stated in her testimony found on page 10 of the record of appeal thus:

> *"I live with bibi mama Tatu. I live with my father and mother. I play with Jane and Neema. I know Matata. He raped me kwa juu. He bought me juice. He told me not to report to my mother. He put dudu wake here (showing her private parts). He removed his dudu from there (showing accuseds private parts). He put his dudu here (showing her private parts) I felt pain"*

Having been satisfied that her evidence was properly received in terms of section 127(2) of the Evidence Act, we are constrained to sustain the concurrent findings of the two courts below on the credibility of PW2 which proved the offence charged against the appellant. The evidence of PW1 on finding the appellant with PW2 at his house corroborates the fact that the appellant was with PW2 in his house alone between 20.00 hours and 21.00 hours on the fateful day.

We have also considered the oral evidence of PW1 and PW3 relating to the alleged oral confession by the appellant. The appellant, when questioned by the prosecution side conceded to have confessed before PW3 to having committed the offence charged, but qualified this stating that his confession was prompted by fear of being killed by the mob of

people who had surrounded him after his arrest. We agree with the findings of the first appellate court that the evidence by the prosecution witnesses regarding the oral confession was credible and reliable in the light of the evidence of PW3 who firmly testified that the appellant confessed before him and thus the appellant's explanation was an afterthought. We have also considered the well-established position that an oral confession made by a suspect, before or in the presence of reliable witnesses, be it a civilian or not, may be sufficient by itself to convict the suspect. In **Mohamed Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (unreported), the Court held that such oral confession validity would be subject to the suspect having been a free agent when he said the words that implicated him. (See **Posolo Wilson @Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported)). The evidence of PW1 and PW3 showed that the appellant was a free agent when he confessed, having also stated that it was under the influence of the devil. We thus find this complaint to be unmerited and dismiss it.

Amplifying on complaint number five, the appellant contended that his defence was not properly considered by both lower courts. Replying, the learned Senior State Attorney argued that the trial court did consider the defence evidence as evident on pages 34 and 35 for the trial court and page 67 for the first appellate court and proceeded to reject it after

finding that it was wanting. She thus prayed for the dismissal of the complaints.

Having perused the record of appeal, we are of the view that the complaint is unfounded. The record shows that the conviction against the appellant was entered upon the trial court's scrutiny and evaluation of evidence of both sides as can be seen at page 34 of the record, where the trial court rejected the appellant's defence after finding that the evidence of PW1 and PW2 was watertight and proved the offence. She also found the appellant's complaint discrediting his oral confession to be an afterthought. The first appellate court at page 63 and 67 of the record of appeal considered the appellant's assertion that the offence charged was proved and held that, having considered the defence evidence, it found it to be weak and rejected it for not raising any doubts in the prosecution evidence. We are thus of the view that the complaint is unmerited and dismiss it.

In relation to the prosecution's side failure to call vital witnesses and to prove the charge against the appellant to the standard required, and reliance on contradictory and unreliable evidence of PW1 and PW2. The thrust of the complaint in grounds four and six and the additional ground number one, is that the case was not proved to the standard required by

the appellant. The appellant challenged the absence of vital witnesses such as the doctor who examined PW2, the Police officer who issued the PF3 and those who arrested him.

In her reply, Ms. Moshi contended that there is no particular number of witnesses required to prove a case citing section 143 of the Evidence Act. According to her, what is important is whether the witnesses who testified adduced credible evidence relative to the matter to be proved. She cited the case of **Mwita Kigumbe Mwita and Another v. Republic**, Criminal Appeal No. 63 of 2015 (unreported), where it was held that what was important for courts to consider is quality and not the quantity of the evidence. She further argued that PW2's evidence was sufficient for the appellant to understand the context of the charge against him. With reference to failure to call a material witness to prove the appellant's arrest, Ms. Moshi contended that the witnesses who testified were sufficient to prove the case against the appellant and it was proved beyond reasonable doubt. She implored us to find the complaints unmerited, liable to be dismissed.

The fact that the burden of proof in criminal cases lies upon the prosecution needs no discussion. It is thus the duty of the prosecution side to call any number of witnesses required to prove its case. We agree

with the learned Senior State Attorney that proving a fact is not dependent on the number of witnesses called as provided under section 143 of the Evidence Act, since even a single witness can prove any fact and that what courts consider is quality and not the quantity of evidence (See, **Mwita Kigumbe Mwita and Another v. Republic** (supra) and **Halfan Ndubashe v. Republic**, Criminal Appeal No. 493 of 2017 (unreported).

In this case, the appellant has failed to show us how the witnesses he alleged were vital to the case and not called to testify were more material than those who testified and how their absence dented the case for prosecution. As there was no PF3 or cautioned statement tendered in evidence the relevance of a doctor and the police who issued the PF3 did not arise. We find the complaint baseless and we dismiss it.

In considering the complaint that the charge was not proved beyond reasonable doubt, it is important to understand that the appellant faced a charge of grave sexual abuse contrary to section 138(1)(a) and (2)(b) of Penal Code. We have already held that PW2 was a credible witness and her evidence was rightly relied upon by the two lower courts to convict the appellant. A scrutiny of the evidence shows that PW2's testimony on the circumstances surrounding the incident was essentially not disputed by the appellant since his testimony intending to show that the incident

was fabricated upon PW1's failure to honour a loan he had advanced to her, a month or so prior to the incident. PW3 who was alleged by the appellant to have witnessed the loan transaction was never cross examined on that fact by the appellant. In fact, at page 15 of the record of appeal, the appellant had nothing to ask PW3 when given an opportunity to ask question him, nor did he cross-examine PW1 on the alleged loan. When asked why he did not cross examine her on the alleged loan, his response was that the case was not a civil action. It is well established that failure to cross examine a witness on an important matter implies acceptance of the truth in the witness's evidence. (see, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010, **Bakari Abdallah Masudi v. Republic**, Criminal Appeal No. 126 of 2017 and **Karim Seif @ Islam v. Republic**, Criminal Appeal No. 161 of 2017 (all unreported)). It is plain in this case, that the appellant did not have any evidence to contradict or raise doubts on the evidence of prosecution witnesses with regard to the offence charged. The appellant did not deny he was found with the victim he only alleged that it was a planned scenario by PW1 for him to be with the victim then.

We also agree with the findings of the two lower courts that the evidence of PW1 and PW3 corroborated that of PW2 on important aspects of the offence charged. As already stated above, even PW2's evidence

alone was sufficient to prove the charges in terms of section 227(6) of the Evidence Act. Therefore, complaints number four, six and additional ground one are unmerited and are hereby dismissed.

In the final analysis, the appeal has no merit. We dismiss it accordingly.

DATED at **DAR ES SALAAM** this 11th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 5th day of September, 2023 in the presence of the Appellant in person linked - via Video Conference from Ukonga Prison and Ms. Agness Mtunguja, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL