IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A, And MAIGE, J.A.)

CRIMINAL APPEAL NO. 38 OF 2020

BAKARI JUMA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mkapa, J.)

dated the 12th day of December, 2019

in

DC. Criminal Appeal No. 20 of 2020

.....

JUDGMENT OF THE COURT

19th & 22nd September, 2023

MWANDAMBO, J.A.:

The District Court of Mwanga convicted the appellant Bakari Juma of the offence of statutory rape and sentenced him to 30 years imprisonment. The appellant's conviction and sentence resulted from a trial in which the prosecution preferred a charge of rape of a girl of tender Age of 8 years (name withheld) in which the prosecution alleged that on unknown date in the year 2015 at a place called Kambi ya Simba village in Mwanga District, Kilimanjaro Region, the appellant had carnal knowledge of the victim

contrary to section 130(1) and (2) (e) of the Penal Code. The appellant pleaded not guilty. That notwithstanding, the trial court found the appellant guilty as charged followed by conviction and sentence. His appeal before the High Court (Mkapa, J) sitting at Moshi was dismissed which has culminated in the appeal before the Court.

The tale behind the appellant's arraignment before the trial court is somewhat tricky. The victim (PW2), who was eight years on the date of the incident and Editha Sikinde (PW4) were allegedly sent by their grandmother (Bibi Wao) to a room which the appellant resided to look for a child. However, Bibi Wao did not testify before the trial court. Needless to say, the tale goes further that, it is PW2 who entered the room leaving behind PW4. As she entered the room, she found the child asleep so was the appellant. Instantly, the appellant allegedly woke up, pulled PW2's hand, undressed her underpants while covering the victim's mouth with his hand and inserted his manhood into her vagina. The appellant allegedly threatened the victim against telling anybody about the ordeal or else she risked her eyes being extracted and turn her blind. It would appear the victim was too scared of being made blind such that she desisted from disclosing the ordeal to anybody for as a long as one year. According to

her, she gained courage when she was in standard I breaking the sad news to her teacher; Nuru Athumani (PW2) at Jipe Primary School. She is said to have done so after a visit at the school by people from an organization conducting a seminar sensitizing pupils on child abuse awareness.

Following interrogation with the said people, PW2 is said to have disclosed the ordeal claiming that it was the appellant who did the awful act to her. Subsequently, the appellant was arrested and charged with statutory rape facing a trial involving five prosecution witnesses including the victim (PW2) and Dr. Luiza Malisa (PW5) who examined the victim. The appellant was the sole witness from the defence side. It is significant that, as PW2 and PW4 were tender age witnesses, their evidence was receivable with or without oath or affirmation provided that in the latter case, they were required to promise to tell the truth and not lies in terms of section 127 (2) of the Evidence Act (the Act). While PW4 gave her evidence upon affirmation, PW2 did so without oath but she is recorded to possess sufficient intelligence and understood the duty of speaking the truth. At the close of the trial, the learned Resident Magistrate was satisfied

that the prosecution had proved its case on the offence charged beyond reasonable doubt followed by conviction and sentence.

As alluded to earlier on, the appellant's appeal before the High Court (Mkapa, J.) sitting at Moshi did not find its day for it was dismissed for lack of merit. He is now before the Court faulting the High Court for sustaining conviction and sentence on six complaints upon a memorandum of appeal and one ground in the supplementary memorandum of appeal.

The appellant appeared in person to prosecute his appeal, unrepresented at the hearing of the appeal. Earlier on, he had lodged in Court a written statement of his arguments in support of the appeal in terms of rule 74(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). He stood by the ground of appeal and the statement which was, nonetheless, restricted to the supplementary ground faulting his conviction grounded upon a defective charge which omitted to cite a penal section in the charge sheet. Other than that, he had nothing to say in support off the grounds of appeal except urging the Court to allow his appeal.

Ms. Revina Tibilengwa, learned Principal State Attorney who teamed up with Ms. Eliainenyi Njiro, learned Senior State Attorney conceded the

omission but urged that the same was curable under section 388 of the Criminal Procedure Act (the CPA) in line with the decision of the Court in **Jamali Ally v. Republic,** Criminal Appeal No. 52 of 2017 [2019] TZCA 32 (28 February 2019) TanzLii and **Erick Maswi & Another v. Republic** (Criminal Appeal No. 179 of 2020) [2022] TZCA 339 (14 June 2022) TanzLii.

Having examined the charge sheet, we are constrained to endorse the submission by Ms. Tibilengwa that, since the particulars of the offence informed the appellant of the nature of the offence and the age of the victim in sufficient details, the omission to cite a penal section was inconsequential consistent with the holding in the cases cited to us. Indeed, we would go further and state that despite Ms. Tibilengwa's concession, as the Court stated in **Abdul Mohamed Namwanga @ Madodo** (Criminal Appeal No. 257 of 2020) [2022] TZCA 123 TanzLii, while it is desirable, citing a penal section in a charge sheet is not a statutory requirement under the CPA. Accordingly, the sole ground in the supplementary memorandum of appeal is dismissed which takes us to a discussion on the grounds in the memorandum of appeal.

Initially, Ms. Tibilengwa was resolute resisting the appeal arguing that the trial court rightly entered conviction sustained by the first appellate court. In the course of hearing, the learned Principal State Attorney threw in her towel conceding to the complaint in ground one in the memorandum of appeal which turned out to be sufficient to dispose of the appeal.

The appellant's complaint in ground one was that the evidence of PW2 (the victim) relied upon in grounding the impugned conviction was received in contravention of section 127 (2) of the Act. Ms. Tibilengwa urged that although the record shows (at page 7) that, PW2 promised to tell the truth and gave her evidence without oath or affirmation, there is nothing in the record indicating that PW2 made such a promise before her evidence was received. Under the circumstances, counsel argued that, what appears to be PW2's evidence is a worthless statement incapable of proving penetration by the appellant; an essential ingredient in the offence charged.

We respectfully agree with her considering that it is trite law that the best evidence in sexual offences must came from the victim - See:

Selemani Makumba v. Republic [2006] T.L.R. 379. As rightly submitted by the learned Principal State Attorney, the remaining evidence, particularly by PW4 and PW5, is incapable of proving that the loss of virginity from the victim's vagina as found by PW5 was a result of penetration by the appellant. Besides, PW4's evidence was purely hearsay which was inadmissible without corroborative evidence. The prosecution led no such evidence during the trial.

At any rate, considering the lapse of one year between the alleged incident and PW2's examination by PW5 revealing loss of virginity, it could not have been conclusively proved that such loss was a result of penetration by the appellant had PW2's evidence remained intact. In our view, the delay in reporting the incident for as long as one year had a serious dent on her credibility. Had the two courts below directed their mind properly to this aspect and given its consideration, they could not have concurred in their finding that the prosecution proved its case against the appellant. In the upshot, we are constrained to set aside such a finding as we hereby do being satisfied that it was a result of non-direction and misapprehension of the evidence on record which occasioned injustice to the appellant.

In the event, we allow the appeal, quash conviction and set aside the sentence and order that the appellant shall be released from custody forthwith unless lawfully held therein for another cause.

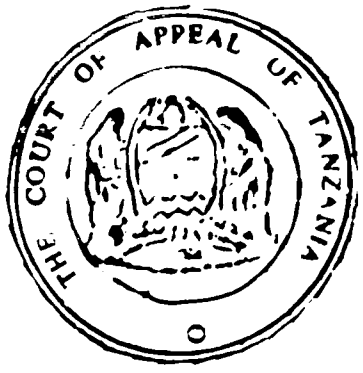
DATED at **MOSHI** this 21st day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of September, 2023 in the presence of the appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL