IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 262 OF 2020

EMANUEL PAULO @ AMASI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Moshi at Moshi)

(Kingwele, S.R.M- Ext- Juris)

dated the 21st day of April, 2020
in
Criminal Appeal No. 11 of 2019

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JUDGMENT OF THE COURT

22nd & 26th September, 2023

MAIGE, J.A.:

The appellant was aggrieved by the decision of the Resident Magistrate Court of Moshi presided over by a Senior Resident Magistrate with extended jurisdiction (the first appellate court) which upheld his conviction of the offence of rape contrary to section 130(1) (e) and (2) and 131 of the Penal Code and unnatural offence contrary to section 154(1) (a) of the same Act as well as the sentence of 30 years

imprisonment for each of the offences imposed on him. In this appeal, he is questioning the correctness of the said decision on ten (10) grounds in the initial memorandum of appeal and one (1) ground in the supplementary memorandum of appeal. The grounds, in our reading, can conveniently be reduced into the following six complaints: **First**, the appellant was convicted based on a defective charge; **Second**, the appellant was convicted without the specific provisions creating the offence and punishment being cited in the judgment contrary to sections 312 (2) of the Penal Code; **Third**, the appellant was contrary to section 235(1) of the CPA, sentenced without being convicted: **Fourth**, the appellant rejoinder submissions was erroneously disregarded; **Fifth**, the appellant was convicted based on the evidence of PW5 which was received without observing the mandatory requirement under section 127(2) of the Evidence Act; and **Sixth**, the case against the appellant was not proved beyond reasonable doubt.

In the conduct of this appeal, the appellant appeared in person without representation whereas the respondent Republic was represented by Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney. When called upon to argue

his appeal, the appellant submitted only in respect of the fifth complaint. As of the rest of the complaints, the appellant fully adopted the grounds in the memorandum of appeal and invited us to allow the appeal. Ms. Tibilengwa made a detailed submission in rebuttal responding to each of the complaints. We have duly considered the rival submissions and we shall determine the merit or otherwise of the appeal. However, before doing so, we find it pertinent to narrate albeit briefly the material facts underpinning the background of this appeal.

The victim who shall otherwise be referred to as "PW5" was on the material date herein mentioned, a girl of 13 years old. She was a standard seven student at Mdawi Primary School. She was living at Mdawi area in Old Moshi within the municipality of Moshi with her father Harrison Mramu and mother Happiness Mramu (PW1). On the material date, she met with the appellant when she was going to pick mango fruits. As she was closer to him, the appellant touched her stomach. Suddenly, she lost consciousness and upon recovering, she found herself in the residential house of the appellant. At there, the appellant forcibly raped and sodomised her. When she tried to raise an alarm, the appellant touched her mouth with a piece of cloth. Again, she lost consciousness. It was her

testimony that, when she woke up in the morning, she found herself near a river. She said, as she was struggling to go back home, she met with someone who informed her that she was being tracked by her parents. When she met with her parents, she narrated to them what happened.

Michael Absaloom Msaki (PW2) testified that on the material date in the morning while he was at his shop, he was approached by the father of the victim who told him that he was looking for his missing daughter. Subsequently, and after the father of the victim had departed, PW2 saw the victim walking near his shop. He informed her parents there about who came and collected the victim.

PW1 testified that as she was at work on the material date, she was informed about the missing of the victim by her house girl. On return home in the evening, she did not find the victim. On the next day in the morning, she reported the incident to the head teacher of her school. Afterwards, she received a call from PW2 informing her that, the victim had been found. She went to the shop of PW2 and found the victim there. She took her to the village executive officer. The latter interrogated the victim who disclosed that she had been at the residence of the appellant where she was raped and sodomised. The matter was reported to the police and

the victim was taken to hospital for checkup. PW4, Christian Andrew Mkemi, medically examined the victim and discovered that she had been penetrated in both her private parts.

In his defence, the appellant denied the charge. He totally denied the proposition that he had been with the victim on the material date. His evidence was supported by Jonathan Jackson (DW2), who was at the material date the tenant of PW1.

The trial court was persuaded by the evidence of the victim as substantiated by that of PW1, PW2 and PW3. It, therefore, convicted the appellant and sentenced him as afore stated. The Resident Magistrate Court presided over by a Senior Resident Magistrate with extended jurisdiction on appeal, confirmed that the appellant was rightly convicted and sentenced and hence dismissed the appeal. This is another step to challenge the conviction and sentence in question.

We start our address of the appeal with the first complaint as to whether the charge sheet was fatally defective for want of citation of the provisions creating the offences and punishment. In her submissions, Ms. Tibilengwa, learned Principal State Attorney (the counsel), while admitting as a fact that the relevant provisions prescribing the punishments for each

of the offence were not cited in the charge sheet as the law requires, she submitted however that, in as much as the appellant was not prejudiced, the omission was curable under section 388(1) of the CPA.

We understand it to be the law under section 388(1) of the CPA that, for a conviction or sentence to be reversed for the reason of irregularities in the proceedings or judgment, the same must have occasioned failure of justice. In determining whether the omission occasioned failure of justice, the test is, in view of the authority in **Abubakar Msafiri v. R**, Criminal Appeal No. 378 of 2017 (unreported), whether the omission has prevented the accused from appreciating the nature and seriousness of the offence he is facing. Therefore, in the case of **Jamali Ally @ Salum v. R**, Criminal Appeal No. 52 of 2017 where there was a failure to cite the appropriate provisions creating the offence, having noted that the charge sheet and evidence fully disclosed the particulars of the offence as to enable the appellant appreciate the nature and seriousness of the offence, the Court held that the omission was curable under section 388(1) of the CPA. In particular, the Court stated as follows:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the*

seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."

The same position was replicated in the case of **Peter Kabi @ Another v. R**, Criminal Appeal No. 5 of 2020 (unreported), where it was clearly stated that the omission: *"is no longer an incurable anomaly in the wake of the case of **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported) where it was held that failure to cite the punishment provision in a rape case was curable under section 388 of the CPA."*

In this case, the particulars of the offence in the charge sheet plainly disclosed that the appellant was facing a charge of rape and unnatural offence against a girl of 13 years named therein. The time, place and manner of the commission of the offence were clearly stated. Equally so, the provisions creating the offences. The omission was only on citation of the penal provision in relation to the unnatural offence and subsection of the penal provision, in relation to rape. In the circumstances, the

appellant cannot say that he was prevented from comprehending the nature and seriousness of the offences he was being charged. With respect, the first appellate court was quite right in holding that, the defect was curable under section 388(1) of the CPA. In that regard, the first complaint is dismissed.

This now takes us to the second complaint which pertains to omission to cite the specific provisions under which the appellant was sentenced as per section 312(2) of the CPA. The counsel conceded to the omission. However, as it was for the first complaint, she contended that the defect was curable as the appellant was not prevented from knowing the nature of the accusation and the penalty involved. Since we have already held in relation to the first complaint that, the omission notwithstanding, the appellant was able to appreciate the nature and seriousness of the charges, we hold that it was curable under section 388(1) of the CPA. We had more or less a similar position in **Abubakar Msafir v. R**, Criminal Appeal No. 378 of 2017 and **Gabriel Lucas v. R**, Criminal Appeal No. 557 of 2017 (both unreported) where, like here, the non-citation was in the judgment. Consequently, we dismiss the second complaint.

Next is the third complaint to the effect that the sentence was violative of the provision of section 235(1) of the CPA in that the appellant was sentenced without being convicted. Though conceding that there was a non-observance of the respective requirement, it was the counsel's submission that, the irregularity could be ignored under section 388(1) of the CPA without causing failure of justice. On our part, we have read the judgment of the trial court and more particularly what is at page 52 of the record of appeal and satisfied that the trial magistrate while he made a finding that the appellant was guilty of the offence, he omitted to convict him.

In **Mabula Makoye and Another v. R**, Criminal Appeal No. 277 of 2017 (unreported) a similar issue arose. The Court, having reviewed a number of conflicting pronouncements made during the pre-overriding objective period, took the view that the omission is now curable under section 3A of the Appellate Jurisdiction Act read together with section 388(1) of the CPA. In particular, it stated as follows:

> "*With the coming into force of the provisions of section 31A of the AJA which gave prominence to the overriding objective introduced into the AJA following its amendment by Written Laws (Miscellaneous*

Amendments) (No.3) Act, 2018-Act No. 8 of 2018 to determine the matters on their merit, we think, the course taken by the first appellate court to treat the omission as curable under section 388 of the CPA, was quite in order and appropriate in the circumstances."

Like in above case, we hold that, the approach taken by the first appellate court in treating the omission curable under section 388(1) of the CPA was in order. For that reason, we dismiss the third complaint.

We pass to the fourth complaint as to failure of the first appellate court to consider the appellant's rejoinder submissions. On this, the counsel submitted that, the first appellate court rightly disregarded the purported rejoinder because it was filed without leave of the court and after the appellant had expressly waived his right to file the same. Addressing the issue, the first appellate court observed at page 120 of the record as follows:

"On 19/03/2020 the appellant failed to come to collect or the respondent failed to serve him the reply submissions. However, since all the copies were in the court, the appellant was served in the court and asked if he wished to file rejoinder to be given extension of time. He opted to waive that right and asked for a date

of judgment. Surprisingly, when I was composing this judgment, come across a rejoinder containing among others, an objection and complaint that the respondent's submissions was filed out of time. Apparently, the said rejoinder is a misconception and filed without permission of this court. The same will not be regarded in writing this judgment."

We noted from page 114 of the record that, on 9th day of April, 2020, when the learned state attorney prayed for the date of judgment, the appellant remarked, "I am not yet served the reply". The record shows that he was served in court on the same day. The appellant was asked if he would wish to file rejoinder submissions, and said, "I pray for a judgment". That being the case and indeed it is, we find the complaint an afterthought and we dismiss it.

We proceed with the fourth complaint as to whether or not the evidence of PW5 was received in compliance of the requirements under section 127(2) of the Evidence Act. The contention in the respective complaint is that, despite PW5 being a child of tender age, she testified without promising to the tell the truth and not lies as section 127(2) of the Evidence Act requires. The counsel submitted that contrary to the appellant's assertion, PW5 gave her evidence on oath. To her, that was

in order because the provision just referred gives option to a child of tender age to testify with or without oath. Much as she may be correct, it is our understanding that, the option in the respective provision is not without control mechanisms. It cannot, therefore, be opted arbitrarily as that may obviously lead to failure of justice.

The general principle of law in criminal proceedings is that, for a witness to testify, he has to be competent so to do and must have taken oath or affirmation. This is in accordance with section 198(1) of the Criminal Procedure Act (the CPA), read together with section 127(1) of the Evidence Ac. Section 127(2) of the Evidence Act which allows a child of tender age to testify without oath or affirmation, we have said from time to time, provides for an exception to such said general rule. For instance, in **Mwami Ngura v. R**, Criminal Appeal No. 63 of 2014 (unreported), we observed:

> *"..as a general rule, every witness who is competent to testify, must do so under oath or affirmation, unless she falls under exceptions provided in a written law. As demonstrated above one such exceptions is section 127(2) of the Evidence Act..."*

Section 127(5) of the Evidence Act in effect, defines tender age as the age between one year and fourteen years. Not all children of such age can rationally answer questions put to them and understand the nature of oath or affirmation. In understanding such reality, the provision under discussion allows a child of tender age to testify without oath or affirmation conditional upon giving a promise to tell the truth. This, we agree with the counsel, does not mean that a child of such age cannot testify on oath or affirmation. He or she can do so if the trial court satisfies itself that, the respective child cannot only answer the questions put to him but understand the meaning of testifying under oath or affirmation as well. How does the trial magistrate came to a conclusion that the respective child is capable of testifying on oath or affirmation, it is settled, must be reflected in the proceedings. Otherwise, such evidence can be treated as unsworn evidence and thus subjected to the conditions under section 127(2) of the Evidence Act.

In this case, the record is conspicuously silent as to how the trial magistrate reached to such a finding before taking the evidence of PW5 on oath as he did. In the circumstances, we treat the evidence of PW5 as unsworn evidence. The obvious issue that follows, is whether the

requirement under section 127(2) of the Evidence was observed. As we said above, the requirement is said to have been observed, if the witness is caused to tell the truth and the promise recorded. In **Ally Ngozi v. R.**, Criminal Appeal No. 216 of 2018 (unreported), where just as in this case, a child of tender age gave testimony on affirmation without the trial court satisfying itself on her competence. The Court, while acknowledging that the conditions for such a child to testify on affirmation was not met, it treated the undertaking to tell the truth which is ordinarily an element of an oath or affirmation as promise to tell the truth under section 127(2) and held as follows:

> *" In this regard, in terms of section 198(1) of the CPA, section 6 of the Oaths and Statutory Declaration Act and Oaths and Affirmation Rules GNs 127 and 132 of 1967, wherever a child of tender age is examined upon oath or affirmation, that witness undertakes to speak nothing but the truth which amount to a promise to speak the truth and not to tell lies as envisaged under section 127(2) of the Evidence Act. Thus, in the case at hand, since the victim , a child of tender age of 13 years was examined on affirmation, she promised to speak the truth and not to tell lies and her account has evidential value."*

Guided by the above authority, therefore, we have no hesitation to hold, as we hereby do that, since PW5 undertook, as she was being examined under the purported affirmation that, she would tell the truth and nothing but the truth, that by itself amounted to a promise to tell the truth and not lies within the meaning of section 127 of the Evidence Act. The ground is thus without merit and is hereby dismissed.

We shall wind up our discussion with the last complaint that the case was not proved beyond reasonable doubt. The appellant's complaint in the memorandum of appeal is that, the prosecution evidence was incredible, contradictory, incoherent and with a lot of gaps. In addition, it is alleged that, the appellant's defence was not correctly assessed and evaluated.

In her submissions, the counsel contended that the evidence of the victim (PW5), which is the best evidence in law, was credible and established the essential elements of the two offences beyond reasonable doubt. She submitted that, her ability to disclose the name of the culprit after the incident, consistence in her evidence and failure of the appellant to cross examine her and other prosecution witnesses in material respects,

rendered her evidence more credible and probable. Contradictions if any, she submitted, were not material as to affect credibility of her evidence.

In essence, the conviction of the appellant was based on the evidence of the victim (PW5). The two courts below viewed such evidence as credible and the best evidence in proof of the offences in question. The courts placed heavy reliance on the provision of section 12(6) of the Evidence Act. That appears to be the correct interpretation of the respective provision and the Court has, since the case of **Selemani Makumba v. R.** [2006] T.L.R. 379 consistently maintained as such. However, we wish to insist right away that, for such evidence to be believed as the best evidence, the trial court is obliged to warn itself, upon assessment of credibility of such evidence that, the witness in question is telling nothing but the truth. We said so in, among others, the case of **Imani Charles Chimango v. R.,** Criminal Appeal No. 382 of 2016 (unreported).

The question which we must resolve, therefore, is whether the evidence of PW5 upon which the appellant was convicted was credible. The test involved in arriving to such a destination we said in the case of **Mathias Bundala v. R**, Criminal Appeal No. 382 of 2016 (unreported), is

"whether his or her testimony is probable or improbable when judged by the common experience of mankind." On top of that, the evidence in question has to be appraised in line with other evidence, including that of the accused and more importantly, in accordance with the surrounding circumstances. To cement this, the following statement in **Shabani Daudi v. R**, Criminal Appeal No. 28 of 2000 (unreported) may be pertinent:

> *"The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused."*

According to the particulars of the offence in the charge sheet, the incident took place on 11th April, 2017. The appellant met with the appellant at or around 5 pm as she was going to collect some mango fruits. She said that she fainted when the appellant touched her stomach and when she gained consciousness, she found herself in the house of the appellant where she faced the sexual abuses in question. At the first appellate court, the appellant doubted the probity of the appellant carrying the victim from the mango tree to his home while unconscious without

anyone noticing. The opinion of the first appellate court at page 129 of the record was as follows:

> *"If the appellant wanted this court and the court below to cast doubt of the distance of the alleged mango tree to his home he would have cross examined PW5 or PW1"*

With respect, the first appellate court was not right, for in criminal cases, the burden to prove the case beyond reasonable doubt is on the prosecution and not the accused. In this case, the evidence shows and the first appellate court noted at page 126 of the record that, the appellant and the victim were neighbours. The incident having happened soon after the appellant had met with the victim sometime around 5 pm, it raises doubt, how possible could the appellant carry a girl of 13 years old while unconscious without the neighbours, including the victim's family, noticing.

The victim's evidence also indicates that, she fainted after the commission of the offence. It was after the appellant had touched her on her mouth with a piece of cloth. The fact that the victim was unconscious when she was being taken to the appellant's house and when she was leaving the same, inevitably leaves the question whether the appellant

could carry her from the mango tree to his home and from home to the river without being seen, with no one to answer. Perhaps, only logic and common sense can answer. Similarly so, for the question of how probable could it be that in each of the incidents of the victim's loss of consciousness, there was an act of touching by the appellant. Coupled with that is the evidence of PW3, the police officer who investigated into the crime, which appears at page 21 of the record. He testified that, when he was taking the statement of the victim, she told him that, "on the following date, he took her to unknown place by using bajaji". Could she, if at all it is true that she was taken by the appellant from his residence to the river unconsciously, possibly know that she was carried by a bajajii. Yet, her factual narration to PW3 contrary to what the victim said in court, indicates that she was taken on the material date forcibly while conscious.

There is yet another element which raises doubt in the evidence of PW5 and which was raised in the first appeal. In her testimony in chief the victim, explaining how she left from the river in the morning and eventually met with her parents, stated as follows:

> " *There was no body I was wearing my clothes, I looked for our house I met someone I know, she show me the way and told me that my mother was looking for me".*

In the course of cross examination, she was asked whether that person who assisted her was a lady or male and she said, *"the one who helped me is a woman."* In her evidence, PW1 testified that it was PW2 who informed her that the victim had been found and was at his shop. Testifying on this, PW2 said at page 19 of the record:-

> *"I saw the girl who was walking at the East of my business place, she told me that she was going to Mbare area, I asked the name of the father she told me that her father is Harrison Mramu. I told her that her father was looking for him so she was to wait for me to call them".*

Was the person who met with PW5 after being abandoned in a river and eventually linked her with her parents, PW2 or someone else, is a question which leaves much to be desired. **One**, while the evidence of PW5 suggests that such person was known to her, the evidence of PW2 shows that he was not familiar with the victim. **Two**, while the person mentioned by the victim was a lady, PW2 is irrefutably a male. **Three**, while the person mentioned by the victim met with her as she was searching for her home, the evidence of PW2 indicates that the victim was not going to her residence but Mbare area. Therefore, in the absence of

evidential clarification, these questions inevitably raise reasonable doubts in the prosecution case. It raises much doubt as how possible would PW5 forget to mention PW2 in her testimony despite the materiality of his evidence in linking between her evidence and that of PW1 as to how she was found after the incident. A similar question arises as to the silence of PW5 in her evidence to name the village executive officer while according to the testimony of PW1, he was the first one to interrogate the victim.

Last in this aspect is the evidence of PW1 and PW5 as considered in line with the evidence of DW2. The evidence of PW1 suggests that she got informed by her house girl of the missing of the victim as she was at work. Though she does not mention what time it was, her evidence suggests that she remained in office until at 6:00 pm when she retired from work. As we said above, the evidence of PW5 suggests that she went to the mango tree where she met with the appellant around 5:00 pm. In the circumstances, it is highly questionable what made the said house girl to report the alleged missing of the victim to PW1 while the interval between her departure and the report was shorter than an hour. That would raise a doubt if the following evidence of DW2 at page 38 of the record of appeal was not true.

"It was last year April 11th I was a tenant of the victim's mother around 6 pm her daughter left the house, her aunt asked her where she was going, she didn't answer, she left and I asked her aunt why she left her leave without asking her where she was going, she said if she doesn't want to answer her, let her go. Around 9 p.m. her mother came and said her daughter was not seen, she asked us to held her looking for her. I was with my wife and other people we went to look for her but we didn't see her, her mother said that she was married that she could be at accused's house, she went to sleep, we men didn't go to sleep, we were looking at the accused's house to see if she was there around 11 p.m. we decided to go there to accused's wife house .... We asked her if she was there she said that she was not there. We decided to watch that house to see if the victim would come out. We stayed there until morning but we didn't see her. In the morning victim's mother received a phone call that the victim was found, she took her to WEO, Bodaboda went to the accused's house while he was brushing his teeth. "

The trial court though narrated the evidence of DW2 at page 48 of the record, did not say anything as to the relevance of the same in rebutting or otherwise the prosecution case. We note that, the first

appellate court at page 131 of the record doubted such evidence because in cross examination, DW2 said, "it was his wife who stayed with PW1 for a long time than him." The said statement, in our reading, does not render DW2's evidence contradictory or rather improbable. It was merely a comparative statement as to who, between DW2 and his wife, happened to stay with PW1 much longer.

The evidence of DW2, on the face of it, suggests that, him and other male persons were until the morning, somewhere around the house of the appellant observing if the victim would come out therefrom. That was after PW1 had suspected that she could have been there. His evidence suggests that he, together with other persons, went to the residence of the appellant and found his wife who told them that the victim was not there. The evidence, would, in our view, raise a doubt that, perhaps PW5 was somewhere else and not at the residence of the appellant. Besides, it would raise a reasonable doubt if the appellant was not accused of committing the offence on a mere suspicion by the victim's mother.

In our view, the doubts discussed herein above when looked at in line with the defence evidence and the circumstances of the case, would obviously raise a reasonable doubt on the credibility of the evidence of

PW5. Such doubt would have been resolved for the benefit of the appellant. On that account, therefore, the appeal succeeds and it is hereby allowed. We quash the conviction, set aside the sentence and order his immediate release from prison unless held therein for some other lawful cause.

DATED at **MOSHI** this 25th 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 26th day of September, 2023 in the presence of the appellant in person and Ms. Revina Tibilengwa, learned Principal State Attorney assisted by Ms. Eliainenyi Njiro, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL