IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 160 OF 2021

MASANJA DOTTO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Court of a Resident Magistrate of Shinyanga (Extended Jurisdiction) at Shinyanga)

(Swallo, PRM, Ext. Juris.)

dated the 2nd day December, 2020

in

Criminal Appeal No. 84 of 2020

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JUDGMENT OF THE COURT

4th & 12th December, 2023

GALEBA, J.A.:

The appellant in this appeal, Masanja Dotto, was arraigned before the District Court of Bariadi (the trial court) in Criminal Case No. 53 of 2013. He was charged for rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code. Consequent to his trial, he was convicted and sentenced to thirty years imprisonment. He was aggrieved and appealed to the High Court, where by the powers conferred upon it by section 45 (2) of the Magistrate's Courts Act, that court directed that the appeal be transferred and be heard at the Court of a Resident Magistrate of Shinyanga. The instrument of transfer named Swallo PRM, with Extended

Jurisdiction (the first appellate court), as the magistrate to hear and determine the appeal. The appeal was accordingly heard, but the same was dismissed and the findings of the trial court were upheld, hence this second appeal.

The facts that led to the appellant's apprehension and prosecution were that; on 29th March, 2013, a standard six girl aged 13 years, whose name we will conceal, and refer to her as PW1 or the victim, was sent by Mariam Samson (PW2), her grandmother to buy rice and beans at a shop in the neighbourhood, but the girl did not come back. The next day, on 30th March, 2013 around 16:00 hours, PW2 and Chanila Nkali (PW3) the victim's grandfather, got information that there was a young girl in a guest house which was yet to be operational in the same village. Upon getting to the scene of crime, PW2, PW3 and Dadu Kishona (PW4) found the appellant and the victim in one of the rooms in the guest house. According to the prosecution, the appellant raped the victim in that guest house during the time of their stay from the previous day to 30th March, 2013, the day of his arrest.

Naturally, the appellant denied the charge such that the prosecution called five witnesses including the above four, to prove the case. At the end of the trial, as indicated above, the trial court was

convinced that the appellant raped the victim; so much so that it convicted him of the offence and sentenced him as shown above.

Following the dismissal of his first appeal, the appellant approached this Court with 6 grounds of appeal, which can be paraphrased in the following complaints corresponding to the said grounds of appeal; **first**, that the two courts below erred in considering the evidence of the victim as credible while the same was not corroborated, as the owner of the guest house was not called as a witness by the prosecution; **two**, that the evidence of PW2, PW3 and PW4 was hearsay, because none of them saw the appellant raping PW1; **three**, that *voire dire* examination of PW1, was invalid because, the witness failed even to state her age. **Four**, that the age of the victim was not proved; **five**, that the order convicting the appellant was irregular, and; **six**, that the appellant's defence was not considered.

At the hearing of this appeal, the appellant appeared in person, whereas Ms. Suzan Masule, learned State Attorney appeared for the respondent Republic. When we required the appellant to elaborate his grounds of appeal, he opted to adopt them and requested that Ms. Masule reply to them first, such that if any need would arise, he would rejoin.

The learned State Attorney started off with the third ground of appeal, challenging the *voire dire* test of the victim who was 13 years at the time of the trial in 2013. She contended that the test was properly conducted and at the end of the exercise the trial court concluded at page 8 of the record of appeal, that the witness possessed sufficient intelligence to tell the truth. She submitted that the third ground of appeal is barren of merits and implored us to dismiss it.

In law, *voire dire*, is a legal process or test to assist a trial court to satisfy itself of two points; **first**, is to gauge whether a witness understands the nature of oath or affirmation and appreciates its consequences. If he does, the court always administers oath or affirmation and receives evidence from the witness normally. In case the witness does not understand the nature of oath or affirmation, the court cannot receive the evidence of such a witness, but at that point, the **second** objective of the test kicks in; to carry on an oral examination aimed at assessing whether the witness possesses sufficient intelligence, such that he can be permitted to give evidence in a court case. See this Court's decision in **Mohamed Sainyeye v. R**, Criminal Appeal No. 57 of 2010; and **Mwilali Mussa v. R,** Criminal Appeal No. 18 of 2017 (both unreported). In the latter case for instance, on the objective of the *voire dire* test, this Court stated as follows: -

"The purpose of a voire dire test under section 127 (2) of the Evidence Act, is to ascertain whether or not a chlld of tender age is competent to testify. It is also intended to ascertain whether a child of tender age understands the nature of oath or if he does not, whether or not he knows the duty of telling the truth".

Thus, in the ground of appeal under consideration, we will determine whether, the trial court carried out the test in compliance with the law. At page 7 of the record of appeal, responding to the questions put to her by the trial court during the test, PW1 responded: -

"I am in standard six at Nkololo "A" Primary School, the headteacher is called teacher Makeja. We do study Mathematics, Geography, English, Kiswahili, Science etc. My mother is Malongo, my father Samwel Chaniia. I am Roman Catholic; we do also study religion in school. If you come late in school the teacher on duty punishes you. If you lie in school or if you insult your fellow, the teacher beats us for the reason, the same is not good for us. If you commit sin you won't see the Heaven of God. If you don't commit sin you will see Heaven of God after you die. I am and I know how to tell the truth. I know the difference between wrong and truth".

After considering the above reaction of the witness to its questions, the trial court concluded at page 8 of the record of appeal as follows: -

> *"The child (PW1) though of tender years, I have found, she understands the nature of oath and possesses sufficient intelligence to justify reception of her evidence as she also understands the duty of speaking the truth".*

From that point on, the trial magistrate permitted the public prosecutor who examined the victim normally, till she was done with her evidence.

In this case, we must agree that the witness was not examined as to her appreciation of the nature of oath or affirmation and its consequences. However, her intelligence was properly assessed, and the trial court made a finding that the witness possessed sufficient intelligence to the extent of having her evidence received. In this case we agree that the intelligibility and coherence of the answers that were given by the witness, demonstrated possession of sufficient intelligence to give evidence. Thus, we agree with the learned State Attorney that, the *voire dire* test conducted enabled the court to assess the sufficiency of the victim's intelligence, hence the validity of the test. Based on the above discussion, we find no merit in the third ground of appeal, so we dismiss it.

The complaint in the first and second grounds of appeal was that the prosecution failed to call the owner of the guest house as a witness in order to corroborate the evidence of the victim and also that, the evidence of PW2, PW3 and PW4 was completely hearsay as none of them saw the appellant raping the victim. In reply to that complaint, Ms. Masule submitted that, under section 143 of the Evidence Act, the prosecution is not required to call a specified number of witnesses, meaning that there was no legal requirement compelling the prosecution to call the owner of the guest house. As for the evidence of PW2, PW3 and PW4, the learned State Attorney submitted that, whilst it is true that those witnesses' evidence on the act of rape was hearsay, she was quick to add, that as the witnesses found the appellant at the scene of crime with the victim, who stated that he had raped her, such evidence was of corroborative value to that of the victim.

To resolve the first and second grounds, we will have to answer the issue whether with the evidence of PW1, PW2, PW3 and PW4, still the evidence of the owner of the guest house was necessary, to prove the offence charged. We will then proceed to the evidence of those witnesses in brief, starting with that of PW1, who was the victim of the offence. Her evidence in this regard is contained at page 8 of the record of appeal, which is as follows: -

"...on 29/3/2013, at about 16:00 hours, I was ordered to go at the shop to buy rice and beans. On the way one Masanja Dotto we met, he told me let us go, he held my hand, he brought me to the guest house which is not yet opened. When we arrived there, he told me to remove his clothes, that's trousers and shirt. He had put on pants, I removed it. He then removed out my skirt, skin tight, under pant and my blouse. The accused then released the penis, put on condom, then he pressed it into my vagina two times. From 16:00 hours, we slept there. Up to morning he did insert his penis into my vagina five times. The accused's penis was circumcised. His penis is short. His body is black. He even gave me, before the event, the clothes called body tight, two pieces of soap and body clare. We stayed in that scene of crime from 29/3/2013 up to 30/3/2013 at about 16:00 hours. We were arrested by the gathered people who were looking for me...."

In corroborating the above evidence, PW2, the grandmother of the victim testified thus, at page 9 to 10 of the record of appeal: -

"On 29/3/2013 I ordered PW1 to go to the shop to buy rice and beans, she never came back, she slept there until next day when we arrested her with the accused in the guest house which is not

yet opened...Before the event I saw two pieces of soap and body tight clothes".

PW3, at page 10 of the record of appeal, stated: -

"On 29/3/2013 the said PW1 was sent to buy beans and rice at the shop but she never came back until 30/3/2013. We got information that in the guest house which is not working there was one lady. I went there, I found many people gathered. I saw Masanja Dotto who is the accused. He was with the said PW1. They were inside the guest house which has not yet started to operate. They were arrested and taken to the office of WEO. One Dadu Kishona and Bila Nhale were present too".

The evidence of PW4, Dadu Kishona is materially the same as that of PW2 and PW3, just quoted above.

According to the case of **Seleman Makumba v. R** [2006] T.L.R. 379, the general position is that in sexual offence cases, the best evidence is that of the victim of the sexual abuse. In this case, the victim described in details how she was held by the hand and led to the guest house by the appellant, who told her to undress him, which she did and how in reciprocity, the appellant also undressed PW1 in preparation for the day long sexual activity. The witness described the size of the appellant's manhood and how it physically looked like. She stated that the

appellant had five rounds of sexual intercourse in the course of the 24 hours they stayed together from 16:00 hours on 29th March, 2013 to the next day on 30th March, 2013 around the same time.

In our view, the evidence of the victim as fully corroborated by that of PW2, PW3 and PW4 who found the appellant at the guest house in the company of PW1, was sufficient to discharge the standard of proof required of the prosecution by section 3 (2) (a) of the Evidence Act, which is to prove the case beyond reasonable doubt. Indeed, we agree that any more evidence in addition to the above, including that of the owner of the guest house, would not have been necessary, for the available evidence was sufficient, to found a conviction of the appellant. In the circumstances, the first and second grounds of appeal have no merit and we dismiss them.

The complaint in the fourth ground of appeal was that the age of PW1 was not proved. In reply to this point, Ms. Masule submitted that the age complained of was proved by PW2 and PW3 at page 10 of the record of appeal where they stated that the victim, at the time of the offence, was 13 years old. Resolving this ground of appeal is pretty simple, it is to revisit the evidence of PW2 and PW3 who were the victim's grandparents living with her.

At page 10 of the record of appeal line 14, PW2 stated that; *"PW1 is aged 13 years old* and PW3 at the same page line 20, stated; *"PW1 is aged 13 years. She is in standard six."* In law, evidence as to age of the victim may be adduced by a victim, a parent, a relative, a medical doctor and, where available, by production of an official document evidencing the victim's date of birth. In addition, on the authority of section 122 of the Evidence Act, there may be other circumstances where a trial court may infer the age of the victim. See this Court's decision in **Isaya Renatus v. R,** Criminal Appeal No. 542 of 2015 and; **George Claud Kasanda v. R**, Criminal Appeal No. 376 of 2017, (both unreported). We are therefore satisfied that the evidence of PW2 and PW3 as to the age of PW1, discharged the prosecution of the burden of proving the age of the victim that at the time of the commission of the offence, she was 13 years old. If the appellant had an alternative version as to the victim's age, he would have either given evidence on it, or he would have at least, cross examined the above witnesses on that aspect. In the absence of any attempt to provide an alternative position as to the age of the victim by the appellant, we find no substance in his complaint. In the circumstances, the fourth ground of appeal has no merit and we dismiss it.

The appellant's complaint in the fifth ground of appeal, is that his conviction was improper. In response to that complaint Ms. Masule submitted that, it is true that at the time of conviction, the trial court did not mention the section under which the appellant was convicted, but she was quick to add, that the omission is curable under section 388 of the Criminal Procedure Act (the CPA), because the failure, did not in any way, prejudice the appellant, she argued.

In law, consequent to hearing and closure of the prosecution and the defence cases, the trial court must either convict, discharge or acquit the accused person. That is the requirement of section 235 (1) of the CPA which provides that: -

> *"235-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code".*

In this ground of appeal, there are no issues as to acquittal or discharge. The issue for discussion here is whether the appellant was properly convicted. In seeking to answer the issue, we have thoroughly scrutinized the impugned judgment particularly at page 26 of the record of appeal, where the challenged conviction is recorded. At that page,

after having found that the prosecution proved the case, the trial court stated: -

> *"I have considered the evidence of PW5 as well as that of DW1. That be as it may, I find that the accused committed the offence of rape c/s 130 (1) (2) and 131 (1) of the Penal Code Cap 16 R.E. 2002. Consequently, the accused Masanja s/o Dotto is hereby convicted forthwith".*

In the above quoted part of the judgment, the court found the appellant guilty and mentioned the sections that he had offended. Section 130 (1) and (2) of the Penal Code, creates the offence of rape, and section 131 (1) of the same Code, provides for the punishment for the said offence. The court having mentioned the sections of the law breached, consequent to which it convicted the appellant, we find nothing offensive in doing so. The court properly complied with the provisions of section 235 (1) of the CPA. Therefore, we do not agree with both the appellant and Ms. Masule that there is any irregularity in the conviction of the appellant as recorded at page 27 of the record of appeal. Thus, we find no substance in the fifth ground of appeal.

Lastly, is the sixth ground of appeal. The complaint in that ground, which was not disputed by Ms. Masule, was that the appellant's defence was neither considered by the trial court nor by the first appellate court.

The learned State Attorney, despite admitting that the defence was not considered by both courts, stated that the omission is not fatal, as the remedy is for this Court to consider the defence, and see whether the same created reasonable doubt on the prosecution case. Her position was that, the defence of the appellant was too weak to shake the prosecution case. First, we agree that indeed, both courts below did not consider or analyse the defence evidence.

In law, where both the trial court and the first appellate court do not analyse or consider any evidence, the second appellate court may consider the evidence, evaluate it and where necessary come up with its own conclusion. In **Hassan Mzee Mfaume v. R** [1981] T.L.R. 167, this Court stated: -

> *"(iii) Where the first appellate court fails to re-evaluate the evidence and to consider material issues involved,* ***on a subsequent appeal, the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court".***

See also this Court's decision in **Nyakwama Ondare Okware v. R**, Criminal Appeal No. 507 of 2019 (unreported). According to the above position, we can either remit the matter to the first appellate court for consideration of the defence evidence, or we may consider it on our own

and make a decision on whether it is consequential to his conviction or not. In that respect, we have decided to take matters in our own hands and reevaluate the evidence of the appellant and come up with our findings of fact. That remark takes us to page 23 of the record of appeal, where the evidence of the appellant is recorded. He stated:-

> *"On 2/4/2013, I was arrested while building a house. It was at 11:00 hours in the morning. I was taken to Nkololo office. I was put in lock up to the next date and then taken to Bariadi Police Station, they said that I did abduct a school girl. I never abducted a school girl.... I was arrested by gathered people. I know them by their face, they told me that I was found with a school girl. I don't know the guest they said, I do not know if I was at the room. I was with the mason who were not arrested, the victim was not present at the VEO's office, Ntemi Nyanda, I know him by face".*

According to the evidence of the appellant, his defence was that he was arrested for an offence he did not commit. He states that he was arrested by many people who had gathered. This point was also made by all the prosecution witnesses. They all stated that the appellant was arrested after many people gathered at the guest house. However, the appellant alleges to have been arrested by many people while building a house on allegations of abduction of a girl he does not know. The

narrative of the appellant is evasive and not answering the allegations of rape. The appellant's evidence, cannot be taken to have shaken the prosecution case, or created any doubt against it because, there is no conceivable way that a crowd of people could have conspired to arrest the appellant just for nothing. The appellant's defence is therefore, not believable. Thus, we hold that even if the two lower courts would have considered the defence evidence, the outcome of the trial and of the appeal, would have been substantially the same. In the circumstances, the sixth ground of appeal has no merit, we accordingly dismiss it.

As we draw closer to the very end of this judgment, we wish to make one observation. It must be remembered that, in rejoinder to all that was argued by Ms. Masule in reply to the appellant's grounds of appeal, the latter made only one point. He submitted that no medical doctor was called to confirm that the victim was indeed raped. In that respect, we wish to state that, it is not mandatory that for proof of rape, there must be, on all occasions, the evidence of a medical expert. As already elaborated above, the best evidence in sexual offences is that of the victim, see the case of **Selemani Makumba** (supra). It is therefore our holding that the offence of rape may legally be proved, like in this case where, a medical practitioner is not called to give evidence.

Finally, as all the grounds of appeal have been dismissed for want of merit, the consequence is that the appeal also has no substance, and we accordingly dismiss it.

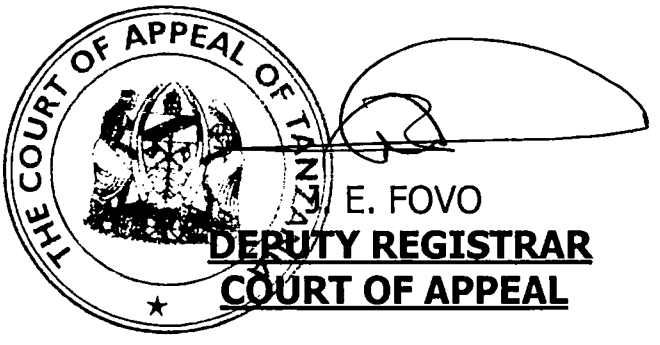
DATED at **SHINYANGA**, this 11th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgement delivered this 12th day of December, 2023 in the presence of the Appellant in person, Mr. Louis Boniface Mbwambo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL