IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE, J.A., KIHWELO, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 260 OF 2021

FELICK KILIPASI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Decision of the High Court of Tanzania, at Iringa

(Matogolo, J.)

dated the 14th day of April, 2021

in

DC Criminal Appeal No. 50 of 2020

JUDGMENT OF THE COURT

5th & 13th December, 2023

MKUYE, J.A.:

Before the District Court of Mufindi District at Mafinga, the appellant Felick Kilipasi was arraigned for committing unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap 16 R.E. 2002, now R.E 2022]. Upon a full trial, he was convicted and sentenced to thirty years imprisonment. Aggrieved with the outcome of the trial court, he unsuccessfully appealed to the High Court of Tanzania at Iringa in which his appeal was dismissed for want of merit. Still undaunted, the appellant has now appealed to this Court.

Before embarking on the appeal on merit, we find it appropriate to narrate, albeit, a brief background culminating to this appeal. It goes thus:

On 19/4/2018, the victim L s/o K (name withheld to conceal his identity) (PW2) had taken his fathers' livestock for grazing in the bush. While still grazing the herd of cattle, at about 6.00 p.m., he was approached by the appellant who required him to choose either of the two options; to receive 20 strokes of the cane or to get sodomized. The victim reluctantly chose to receive the strokes. Even when the appellant increased the number of strokes to 100 and then 200, still the victim chose the strokes instead of being sodomized. Then, the appellant forcefully removed the victim's trouser and undressed himself, felled him on the ground and started having carnal knowledge against his order of nature.

This incident made the victim to get back home late which was rather unusual as was explained by PW3 (the victim's father). He, therefore, followed the victim and met him on the way. Upon inquiring about his lateness, PW2 disclosed to him that he was late because the appellant sodomized him. PW3 reported the matter to the village authority and then went to Mafinga Police Station where they were issued with a PF3, and later to Mafinga Government Hospital for medical examination. Dr. Victor Peter

Msahiri (PW4), examined the victim and observed bruises and blood clotting on his anus which was also loose. The appellant was arrested and charged as alluded earlier on.

In his defence, the appellant denied to commit an unnatural offence and challenged the evidence of PW1 and PW3 for being hearsay evidence.

As hinted earlier on, on conviction the appellant was sentenced to thirty years imprisonment.

The appellant has lodged a memorandum of appeal comprising four grounds which can be paraphrased to read as follows:

1. *That, the appellant's conviction was based on improper evidence of the victim in which voire dire examination was conducted "off record".*
2. *That, the appellant was not positively identified.*
3. *That, there was a failure to consider that the appellant did not record any cautioned statement.*
4. *That, the appellant's arrest was improper suggesting that the case was fabricated.*

At the hearing of the appeal, the appellant appeared in person without any representation, whereas the respondent Republic was represented by Messrs. Yahaya Misango and Burton Mayage, learned State Attorneys.

When availed an opportunity to elaborate his grounds of appeal, the appellant prayed to adopt his memorandum of appeal and opted to let the learned State Attorney respond first while reserving his right to rejoin later, if need would arise.

For the respondent, it was Mr. Mayage who took the floor. He prefaced his submission by declaring that they were opposing the appeal. In the first place he contended that, although the appellant fronted four grounds of appeal, grounds 3 and 4 were new grounds as they were not raised and dealt with by the first appellate court (High Court). In such a situation he argued that, this Court has no jurisdiction to entertain them as it cannot be in a position to know if they were rightly or wrongly determined. While referring us to the case of **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (unreported), he urged the Court to refrain from entertaining them.

On his side, the appellant, had nothing to contribute and understandably so being a lay person.

Having revisited the record of appeal, especially at pages 38 to 39 thereof where there is a petition of appeal which was lodged before the High Court, we are in agreement with the learned State Attorney that the two grounds were not among the grounds which were raised. In other words, the issue of considering or not considering the cautioned statement of the accused that was not taken; or reliance on improper arrest of the appellant were not among the grounds to which the High Court was invited to deliberate on them. In the case of **Godfrey Wilson** (supra), we were confronted with an akin scenario and we stated as follows:

> *"... we think that those grounds being new grounds for having not been raised and decided by the first appellate court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate court went wrong or right. Hence, we refrain ourselves from considering them."*

Even in this case, guided by the above cited authority, grounds Nos. 3 and 4 being new, we find that we are not in a position to entertain them for lack of jurisdiction. Hence, we are constrained to refrain from entertaining them.

Regarding the first ground of appeal that the appellant's conviction was based on improper evidence of the victim as the *voire dire* was conducted "off record", it was Mr. Mayage's argument that PW2's evidence was taken in accordance with section 127 (2) of the Evidence Act [Cap 6 R.E. 2002, now R.E. 2022]. This is because, he contended, the victim gave evidence on oath after the court was satisfied that he understood the duty of speaking the truth. It was argued further that, even if the trial magistrate said he examined the witness "off record", it cannot invalidate the witnesses' evidence since he testified on oath. He added that, although section 127 (2) of the Evidence Act was not complied with to the letter, it can be salvaged by section 127 (6) of the same Act which states as follows:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied*

that the child of tender years, or the victim of the sexual offence is telling nothing but the truth."

To fortify his argument, he also referred us to the case of **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported).

In this regard, the learned State Attorney urged the Court to find that this ground is devoid of merit and dismiss it.

With regard to the 2nd ground of appeal on reliance on the evidence of improper identification of the appellant, Mr. Mayage countered it contending that he was properly identified. In elaboration, he submitted that, the offence was committed during the day at 6.00 p.m., they took ample time in conversing when he gave him a choice of whether to be given strokes or be sodomized while he was driving the cattle back home, the appellant was busy sending them further inside the forest. He added that, the victim knew the appellant even before the incident, the fact that was confirmed by the appellant himself in his defence. He contented further that, the victim mentioned the appellant to his father (PW3) as his assailant at the earliest opportune time. In this regard, he argued that this ground also lacked merit and has to be dismissed.

In the end, the learned State Attorney implored the Court to find that the appeal is not merited and dismiss it in its entirety.

The appellant had nothing to respond to the submissions by the learned State Attorney.

We have examined the grounds of appeal, record of appeal and the arguments by the learned State Attorney and we think, we are now in a position to determine it.

With regard to the first ground concerning improper *voire dire* examination, we wish to declare at the outset that *voire dire* is no longer a requirement of the law through the amendment of section 127 (2) of the Evidence Act vide the Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016). In terms of section 127 (2) as amended, the witness of a tender age is only required before giving evidence to promise to tell the truth to the court and not lies. In this case, the record of appeal at page 12 bears out that, the trial magistrate while conducting the purported *voire dire* on PW2 who was a child of tender age, recorded that the examination was conducted "off record". It is not clear what the trial magistrate meant but that is the basis of the appellants' complaint.

We asked ourselves as to what the trial magistrate might have meant by the statement that the examination was done "off record." In our view, applying a literal interpretation to that term, it would imply that whatever transpired in the examination was not recorded to form part of the record or proceedings. If that is the case, what can be said of what was recorded. The answer is, in our view, not farfetched. It is found in the case of **Halfani Sudi v. Abieza Chichifi** (1998) T.L.R. 557 where the Court stated that:

> *"A court record is a serious document; it should not be lightly impeached; there is always a presumption that a court record accurately represents what happened. "[See also,* ***Otto Kalist Shirima v. Republic*** *Criminal Appeal No. 234 of 2008 (unreported)."*

This position was reiterated in the case of **Ex-D. 8656 Cpl Senga s/o Idd Nyembo and 7 Others v. Republic,** Criminal Appeal No. 16 of 2018 (unreported), where the Court observed that the record of a trial court reflects what transpired and cannot be substituted or supplemented by submissions from the bar to the contrary.

Going by the above cited authorities, therefore, it means that whatever is recorded in this record is exactly what happened or transpired at the

hearing. And, this being the case, we can safely say that the alleged *voire dire* examination was never conducted since whatever took place and was not recorded does not form part of the record apart from a reporting that it was conducted.

In any case, there is no doubt that the manner the trial magistrate tried to comply with section 127 (2) of the Evidence Act was irregular. This is so because as was stated in the case of **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020 (unreported), it is recommended that the promise to the court in terms of section 127 (2) of the Evidence Act should be in direct speech which is to be reflected in the record. Thus, according to what transpired in this matter, it cannot be said that PW2 promised to tell the truth as was envisaged by section 127(2) of the Evidence Act with the effect that even the evidence would lack evidential value.

However, we are mindful of our decision in the case of **Ally Ngozi v. Republic,** Criminal Appeal No. 216 of 2018 (unreported), in which the circumstances of the case were almost similar to the case at hand. The Court stated that, the fact that the child had given evidence on oath (like in this case) that amounted to compliance with the provisions of section 127 (2) of the Evidence Act. In that case, the child of tender age had not made any

promise to tell the truth as required by section 127(2) of the Evidence Act. However, the Court observed that since the child had taken oath which carries in it a promise to speak the truth, then the child had promised to tell the truth and not lies. Hence, her evidence was held to have evidential value.

In this case, the record bears out at page 12 that, PW2 gave evidence on oath. In this regard, we take that through the oath which he took before testifying carried a promise to tell the court the truth and not to tell lies, and therefore his evidence had evidential value.

Yet, we are alive to the decision in the case of **Wambura Kiginga** (supra) which was cited by the learned State Attorney, in which the provisions of section 127 (6) of the Evidence Act were discussed. In that case, the Court took a stance that the phrase "*Notwithstanding the preceding provisions of this section*" used in that provision, meant that, a conviction could base on only subsection (6) of section 127 of the Evidence Act even if other subsections in that section including subsection (6) is not complied with. In particular, the Court stated as follows:

> *"Based on that understanding, we were satisfied that, it is not impossible to convict a culprit of a sexual offence, where section 127(2) of the Evidence Act is not complied with, provided that some*

conditions must be observed to the letter. The conditions are: ***first,*** *that there must be clear assessment of the victim's credibility on record and;* ***second,*** *the court must record reasons that notwithstanding non-compliance with section 127(2), a person of tender age still told the truth".*

In the end, based on the above observation, the Court refrained from expunging the evidence of the victim (PW1), a child of tender age.

Even in this case, being guided by the above authority, we think, the circumstances are in all fours with the above case. Much as the so called *voire dire* test was mistakenly conducted being not a requirement of the law, in the sense that section 127(2) of the Evidence Act was not complied with, still section 127(6) of the same Act can salvage the situation since PW2 gave evidence on oath and was assessed to be a credible witness who could tell nothing but the truth. In this regard, we find that the witnesses' evidence was properly taken and he told the truth to the court and, thus, this ground lacks merit and we hereby dismiss it.

In relation to the complaint that the appellant was not positively identified, we think, this issue should not detain us much. The parameters relating to identification were well articulated in the case of **Chacha Jeremiah Murimi and 3 Others v. Republic,** Criminal Appeal No. 557 of

2015 (unreported), in which when discussing the issue of identification, the Court observed among other things that:

> *"Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely water light, and that every possibility of a mistaken identify has been eliminated. To guard against that possibility the court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the witness under observation? At what distance? What was the source and intensity of light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the descriptions of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it (see* ***Waziri Amani v. Republic*** *(1980) TLR 250;*

Raymond Francis v. Republic *(1994) TLR 100,* ***Augustino Mihayo v. Republic*** *(1993) TLR 117 and* ***Shamir John v. Republic,*** *Criminal Appeal No. 166 of 2004 (unreported)."*

In this case, PW1 clearly testified that the incident took place at around 6.00 p.m. He told the court that the appellant was known to him prior to the incident as both resided in the same village. Much as it may be argued that even in the broad day light there may be incidences of mistaken identity, we think, in this matter, the victim was firm that he identified him to the extent that the chances of mistaken identity do no arise. This fact was also admitted by the appellant during cross-examination that the victim knew him before the incident. We also take note that PW2 narrated the incident to PW3 mentioning the appellant to be his assailant at the earliest possible time when the two met on the way. This was an assurance of unmistaken identity as was stated in the famous case of **Marwa Wangiti Mwita and Another v. Republic,** [2002] TLR 39, where the Court stated that:

"The ability of a witness to name the suspect at the earlier opportunity is an important assurance of his reliability, in the same way an unexplained delay or complete failure to do so should put a prudent court to enquiry."

Guided by the parameters stated above, we are satisfied that the appellant was properly identified as there were no chances of mistaken identity. In this regard, this ground also fails.

Ultimately, in view of what we have endeavored to discuss above, we hold that this appeal is devoid of merit and we dismiss it in its entirety.

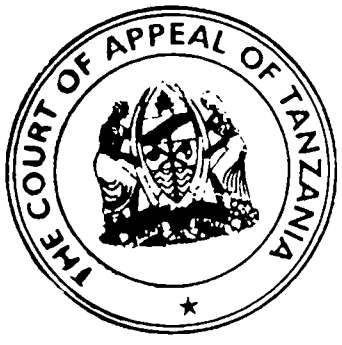
DATED at **IRINGA** this 12th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of the Appellant in person and Mr. Burton Mayage and Simon Masinga both learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL