IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 627 OF 2020

ASOBHISYE AMANGISYE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)

(Ndunguru, J.)

dated the 25th day of September, 2020

in

Criminal Session No. 129 of 2019

.....

JUDGMENT OF THE COURT

11th & 14th December, 2023.

KITUSI, J.A.:

The appellant was charged with statutory rape under section 130 (1) and (2) (e) of the Penal Code, the prosecution alleging that he ravished his paramour's daughter aged 8 years. He was convicted by the District Court of Kyela and sentenced to life imprisonment. The appellant's appeal to the High Court at Mbeya was dismissed for want of merit. This is the second appeal.

Apart from the victim's age which her mother (PW3) sought to prove, there are three key witnesses to what the prosecution alleges to have happened. The victim, PW1, stated that on the material day she was at home alone with the appellant whom she referred to as her step father. She testified that the appellant forced himself into her threatening to slaughter her if she resisted. The second witness is PW2, the victim's sister who said she arrived at the scene to find PW1 standing at the door step bleeding and crying. She went into the house and found the naked step father dressing up.

PW2 said she was confused by the fact that there was no neighbour to assist her arrest the appellant because everybody around the village had gone to a funeral and the appellant took advantage of this fact to escape. So, PW2 carried PW1 to a dispensary where, however, she was referred to police to obtain a PF3. It is not quite clear from PW2's testimony as to when she took PW1 back to the dispensary for medical examination after obtaining the PF3. However, PW4 a medical personnel and the third of the three witnesses, testified that he examined PW1 on 25/2/2019 and concluded that she had experienced vaginal penetration because her hymen had been perforated at that young age, and the vagina was swollen.

PW3 who identified the appellant as a man she was cohabiting with as her husband left us in no doubt that the victim was born on 25/12/2011 according to a clinical card tendered in exhibit, therefore she could not be older than 8 years.

When the appellant took the stand, he gave a long narrative of a matrimonial squabble which made his wife and children frame him up. He stated that before moving in with PW3, he was in a relationship with another woman but that relationship came to an end when he met her (PW3). The essence of the misunderstanding between him and PW3 according to the appellant, was that she suspected him of cheating on her with his former lover.

Earlier in his testimony, PW4 had stated that he tested PW1 for HIV but he found the results negative. The appellant took issue with this finding throughout these proceedings. He disclosed that he is a proven victim of HIV then wondered how come he did not infect PW1 through the sexual intercourse, if at all? He challenged the medical findings for having resulted from a delayed examination. He further contradicted PW2 by tendering in exhibit a statement she made to the police, containing a story different from the one she made in court, an argument he also raised at the High Court.

He sought the evidence of PW1, PW2 and PW3 to be discredited because they are all family members.

The two courts below found PW1 to be a truthful witness and that her testimony was corroborated by PW2, PW3 and PW4, the medical personnel. The appellant's first appeal was dismissed by the High Court. He is now challenging the decision of the High Court on a total of 10 grounds of appeal; four original grounds and six additional.

From the original memorandum of appeal, we are called upon to determine whether the prosecution proved the case beyond reasonable doubt in view of:

(i) the doubtful evidential value of PF3 resulting from the delayed medical examination.

(ii) three key witnesses being family members and;

(iii) failure to consider defence.

The supplementary memorandum of appeal includes three new issues which would, ordinarily, not qualify for our determination but we will address them because they raise legal points. These are:

(i) the memorandum of matters not in dispute extracted during the Preliminary Hearing (PH) were not read over to the appellant.

(ii) the complainant's statement was not supplied to the appellant.

(iii) the trial court did not inform the appellant of his right to legal representation.

The other three grounds in the supplementary memorandum of appeal raise the following complaints:

(iv) unresolved contradiction among the prosecution witnesses.

(v) the PF3 was not read.

(vi) lack of proof as to the date of the alleged rape, date of filing police report, date of submitting PW1 for medical examination.

At the hearing of the appeal, the appellant stood in person and briefly addressed the Court having implored us to consider his grounds of appeal. He specifically underlined two points, namely; the injustice caused to him by not disclosing to him his right to legal representation and; the contradictions on the dates.

Although it was Mr. Alex Mwita learned Senior State Attorney who argued in resistance of the appeal assisted by Mr. Salmin Zuberi, learned

State Attorney, Ms. Revina Tibilengwa, learned Principal State Attorney was the lead Attorney. Mr. Mwita conceded to ground 2 in the original memorandum of appeal and ground 5 in the supplementary memorandum of appeal raising issue with the evidential value of the PF3. As it is settled law that a documentary exhibit must be read out after admission, and it is conceded by Mr. Mwita that the contents of the PF3 in this case were not read out, we expunge it from the record as prayed by the learned Senior State Attorney and find merit in the two grounds of appeal.

Having dealt with the above two grounds, we wish now to consider the first three grounds that were raised in the supplementary memorandum of appeal, beginning with the alleged non - compliance with section 192 (3) of the CPA that requires the Court to read out the undisputed facts. Mr. Mwita submitted that the court complied with that legal requirement at page 5 of the record.

With respect, we agree that this ground of appeal is bound to be dismissed because it has no merit. This is because the appellant admitted nothing of substance and has not demonstrated that any of those admitted facts were subsequently relied upon in convicting him. In addition, the purpose of conducting a preliminary hearing is expediting trial and reducing

costs. See, **Mgonchori (Bonchori) Mwita Gesine v. Republic**, Criminal Appeal No. 410 of 2017 (unreported). It is not envisaged, in our view, that violation of the provisions of section 192 of the CPA would lead to nullification of the proceedings.

On the violation of section 9(3) and 10 (3) of the CPA, Mr. Mwita submitted that the appellant did not request to be supplied with the complainant's statement. We shall reserve determination of this ground for later because it seems the appellant obtained a statement which he sought to contradict PW2 with by tendering it as exhibit D1. We shall discuss this point in the course of resolving the issue whether the defence case was duly considered.

The other legal point arising from the supplementary memorandum of appeal is on the right to legal representation. The appellant submitted that the omission to inform him of that right was a serious violation. On the other hand, Mr. Mwita submitted that the offence with which the appellant had been charged is not among those that need legal representation as of right.

We are not certain if the appellant's complaint is denial of the knowledge that he had the right to legal representation or that no advocate was assigned to defend him. If the latter is the case as we think it is, we

agree with Mr. Mwita that legal representation though a constitutional and statutory right, is not automatic.

Section 310 of the CPA provides for the right to legal representation but the Court has qualified that right through case law. In **Samwel Kitau v. Republic**, Criminal Appeal No. 390 of 2015, cited in **Lucas Gisland v. Republic**, Criminal Appeal No. 89 of 2021 (both unreported) we stated about that right:

> *"... however, for other cases, legal assistance can be obtained upon request and only when the certifying authority considers that there is a need.* ***It is therefore not automatic****. There has been a number of situations where an accused person has been granted legal aid after putting in a special request. However, this position only applies to free legal aid, otherwise an accused person is at liberty to engage an advocate." [Emphasis added]*

In this case, the appellant did not request for legal representation which request would have required to be certified. Consequently, this ground fails and it is hereby dismissed.

We shall next consider the complaint about PW1, PW2 and PW3 being from the same family. Mr. Mwita submitted that what matters is the

credibility of the witnesses, and we agree with him. The record is clear at page 67 that the learned Judge re-evaluated the evidence and found PW1, PW2 and PW3 witnesses of truth. Besides, we have no reason for disturbing the concurrent findings of the two courts below, on the credibility of those witnesses. This ground has no merit and it is dismissed too.

The other complaint is that the witnesses for the prosecution were contradictory of one another. This complaint has been raised in grounds (iv) of the original memorandum of appeal and (vi) of the supplementary memorandum of appeal. Mr. Mwita conceded to two contradictions. He submitted that PW1 did not mention the date of the alleged rape but pointed out that it could have been caused by her tender age. He also submitted that PW2 who arrived at the house immediately after the alleged rape, mentioned the date as being 23/2/2019.

We uphold Mr. Mwita in his arguments. It would be unrealistic, in our view, to expect accuracy in the testimony of a vulnerable girl aged 8 years, especially on matters such as dates and time. Therefore, it would not have been fatal, but in this case the evidence of PW2 covered up.

The other contradiction is with regard to the date of submission for medical examination. Mr. Mwita submitted that, PW2 did not state when was

it when she took PW1 for medical examination after obtaining the PF3. He pointed out that PW4 conducted the examination on 25/2/2023. As correctly submitted by Mr. Mwita, although the PF3 has been expunged, PW4's oral evidence that when he examined PW1 on 25/2/2019 her hymen had been perforated, is key. We find this finding as supporting PW1, whose evidence in rape cases, is the best. In our view, the argument regarding delayed medical examination is irrelevant to the finding that PW1, aged only 8 years, had no hymen.

According to PW4, he detected some protrusions in PW1's vagina. The appellant was so keen to interrogate what might have caused such development. We are at a loss as to the relevancy of this argument and how it advances the appellant's contention that he did not rape PW1. We dismiss it because with or without offshoots, PW1 was found to have signs that vaginal penetration had taken place on her, which is a key ingredient in rape cases.

Last for our consideration is whether the defence case was considered. We shall tackle this ground with our special focus on two things. The first is the allegation that the police denied the appellant the complainant's statement, and the second is the medical myth why didn't the appellant

infect PW1 with HIV if at all he had sex with her. Mr. Mwita submitted that HIV status is not one of the ingredients of statutory rape and then he referred to the record to demonstrate how the defence case was considered.

In resolving the issue of complainant's statement we note that previously in **Elibariki Naftali Mchomvu v. Republic**, Criminal Appeal No. 332 of 2019 and **Daniel Kirati Mkonyali v. Republic**, Criminal Appeal No. 224 of 2019 (both unreported) after reproducing section 9 (3) of the CPA we considered the omission not fatal because there was no suggestion that the appellants had been prejudiced. We hold the same view in this case.

It would have been different had the appellant introduced exhibit D1 properly. As indicated earlier, the appellant sought to contradict PW2 by tendering a statement she allegedly made to the police. However, this statement was introduced into evidence when PW2 was not in the witness box to respond. We had occasion to express our concern on that procedure in the case of **Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017 (unreported) where we stated:

> *"We entirely agree that if the appellant wanted to cross-examine PW2 on the previous statement she made at police against her testimony at the trial, he would have done so when she testified in chief. If*

that was not possible, as it happened in this case, he would have requested the trial court to re summon PW2 who had already testified for cross examination. As that course of action was not taken, the statement of PW2 could not be properly tendered and admitted into evidence under section 154 of the Evidence Act during the defence case as it was done in this case."

However, what was in that statement, anyway, we ask? Despite the statement getting into the proceedings wrongly, the learned judge considered it in the course of re-evaluating the evidence and made the following remark at page 70 of the record:

"I had ample time to throw an eye on it. From the statement, what was reported to the police station was nothing else but the offence of rape and what PW2 testified in court is the offence of rape."

In view of the foregoing, the appellant's complaint about omission to supply him with the complainant's statement is procedurally wrong and materially misconceived because there was nothing to contradict PW2 about. Our conclusion is that the two courts below considered the defence case. We agree with Mr. Mwita that the fact that the court rejected the defence case does not mean it did not consider it. This last ground is dismissed.

Having dealt with and dismissed all grounds of appeal we are satisfied that the prosecution proved the case against the appellant to the required standard and he was rightly convicted and sentenced.

This appeal is entirely dismissed.

DATED at **MBEYA** this 14th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 14th day of December, 2023 in the presence of the Appellant in person and Mr. Augustino John Magessa learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL