IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 409 OF 2020

GODFREY MWANDEMWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Utamwa, J.)

dated the 14th day of August, 2020
in
Criminal Appeal No. 107 of 2019

.....

JUDGMENT OF THE COURT

15th & 22nd February, 2023.

KITUSI, J.A.:

The appellant's first appeal to the High Court to challenge the District Court's decision convicting him with rape under section 130 (1) (2) (e) and 131(3) of the Penal Code as well as sentencing him to life imprisonment, was unsuccessful. This second appeal moves us to quash the High Court judgment confirming the District Court's decision, quash the conviction and set aside the sentence.

The essence of the charge and proceedings from which this appeal arises, is told by the victim of the alleged rape who testified as PW1 and one

Raphael Tanganyika (PW2) who claims to have been passing by the scene of the alleged rape and saw it happening.

PW1, a girl aged 8 years according to her mother (PW3) said she was proceeding home from school, on the day she met her fate. Somebody unknown to her grabbed her from behind and carried the girl to a nearby unfinished building where he had sex with her, causing severe pains and her crying all along. Somebody who might have heard the cries came to her rescue and the alleged rapist cleared out of the scene.

PW2's account connects with that of PW1. He said he was passing by an unfinished building when he heard a female voice crying "Mama nakufa" meaning "Mother, I am dying". He went into the building through an uncovered window and saw the appellant on top of the girl (PW1) in sexual intercourse.

On seeing PW2, the appellant took to his heels, with PW2 giving chase immediately behind, until he apprehended him. Some curious onlookers wondered what was the matter, and PW2 informed them that the man he had apprehended was a rapist. PW2 turned over the appellant to the hamlet Chairman and went back to the unfinished building to fetch the victim. He found PW1 in the care of a concerned woman.

PW2 insisted that he caught the appellant with pants down and that when fleeing, his male organ stuck out because he had not had time to dress up properly before. Apart from testifying on PW1's age, PW3 stated that PW1 was bleeding from her private parts and her hymen had been perforated. She reported the incident to the police before proceeding to the hospital for medical examination.

In defence the appellant came up with a totally different story. He said he was walking past two schools, when a group of scholars knocked him down causing items he was carrying to fall down. In the course of the fracas, PW2 materialized, apprehended him and went on to beat him up accusing him of raping a girl. The appellant testified that he was surprised by all that, because he did not rape any girl as alleged by those who formed the angry mob. He further stated that it would not have been possible for him aged 28 to have carnal knowledge of the little victim aged 8 years. He challenged the investigators for not conducting an identification parade despite him demanding it. He admitted being apprehended while running, but questioned why was he not subjected to medical examination and get specimen of his sperms tested.

The trial court accepted PW1's account as true and that it was supported by PW2, on the basis of which a conviction was entered.

At the High Court on first appeal the learned Judge took the view that the learned trial Magistrate did not comply with the relevant provisions of the law requiring competence of a witness of tender age to be tested before recording it. For that reason, the learned Judge expunged PW1's evidence. However, he proceeded to find PW2's evidence sufficient to ground a conviction because, he pointed out, he saw the appellant in the middle of the act. The High Court dismissed the appeal.

This appeal raises a number of grounds for our consideration. **One,** that age was not proved because no documentary evidence was tendered to substantiate it. **Two**, that the prosecution did not call material witnesses such as the leaders of that locality. **Three,** that the PF3 which was tendered as Exhibit PE2 should be expunged from the record because it was tendered by PW4 who was not the author. **Four,** that the charge was not proved beyond reasonable doubt. **Five,** that the two courts below did not consider the defence. The appellant also raised a supplementary memorandum of appeal consisting of six grounds most of which are twins of those raised in

the substantive memorandum of appeal, except the first two which raise procedural issues.

The appellant prosecuted the appeal in person. Mr. Edgar Luoga learned Principal State Attorney represented the respondent Republic assisted by Mr. Davice Msanga, learned State Attorney. The appellant did not address us on the grounds of appeal but asked us to consider and weigh them to allow his appeal.

We shall quickly deal with the first two grounds in the supplementary memorandum of appeal which, incidentally, were not canvassed in the submissions. We are not surprised that Mr. Luoga did not consider them worth his time. The first ground that complains that the trial court erred in recording the appellant's defence without reading the charge over to him is misconceived because that is not a legal requirement. The second ground complaining that section 210(3) of the Criminal Procedure Act (CPA) was not complied with, is equally based on a misconception, because our perusal of the record has satisfied us that the trial court observed that provision of the law. That provision requires the trial court to read over to a witness the substance of his or her testimony. However, we have stated in a number of decisions, that the proper person to complain about violation of section

210(3) of the CPA would be the witness alleging that the record does not bear out what he narrated, not the appellant who was in court and heard the testimonies. [See **Shaban Haruna @ Dr. Mwagilo v. Republic**, Criminal Appeal No. 396 of 2017 (unreported)].

Thus, the first and second grounds of appeal raised in the supplementary memorandum of appeal have no merit and are dismissed. We turn to the substantive memorandum of appeal.

The first ground of appeal raising the issue of age is similar to the fifth ground of appeal in the supplementary memorandum of appeal. Mr. Luoga submitted that PW3 being the mother of PW1 was competent to prove her daughter's age without any documentary evidence. We have no hesitation accepting Mr. Luoga's submissions because that is the settled position, stated in many of our decisions such as **Kidai Magambe v. Republic**, Criminal Appeal No. 228 of 2021 (unreported). Consequently, this ground of appeal is dismissed.

The second ground of appeal in the substantive memorandum of appeal raises the issue of failure to call material witnesses, a similar complaint as that raised in the third ground in the supplementary memorandum of appeal. Specifically, the appellant wonders why the local

government leaders were not lined up as witnesses. Submitting on this ground, Mr. Luoga referred us to section 143 of the Evidence Act which provides that proof of a fact in a case shall not require a particular number of witnesses. He pointed out that PW2 whom the High Court found reliable was enough to sustain the conviction.

With respect, we agree with Mr. Luoga again that it was unnecessary to call leaders of the local government when they did not witness the alleged rape. We similarly dismiss this ground for want of merit, because the witnesses the appellant has in mind would not have added any value to the prosecution case. The appellant has not suggested that the witnesses would have testified against the prosecution's case, to justify us making an adverse inference.

The third ground of appeal like the fourth in the supplementary memorandum of appeal, fault the two courts below for acting on the PF3 which was not tendered by the medical doctor who prepared it. Mr. Luoga submitted that PW4 who tendered the PF3 was the custodian of that document. He submitted in addition that the court explained to the appellant about his right to have the medical doctor summoned for cross-examinations

in terms of section 240(3) of the CPA but he elected not to exercise that right.

First of all, it is true that apart from the author of a document, the person who has custody of it may tender it in court. [See **Hamis Said Adam v. Republic,** Criminal Appeal No. 529 of 2016 (unreported)] where it was held that a person who at some point has had custody of an exhibit is competent to tender it in court.

Secondly, the appellant cannot eat his cake and have it, because having elected not to have the doctor summoned for cross examination, he cannot be heard complaining that it was an error not to call him. In a similar situation, the court dismissed a similar complaint in **Westone Haule v. Republic,** Criminal Appeal No. 504 of 2017 (unreported). In this case the High Court dealt with this complaint and rightly dismissed it.

Next, we consider the fifth ground of appeal alleging that the two courts below did not consider the defence case. Mr. Luoga referred us to pages in the judgment of the trial court showing the court's discussion of the account that was given by the appellant. We understand that failure to consider the defence case may be fatal to the decision finally arrived at by the court. In this case however the record does not support the appellant's

contention because as submitted by Mr. Luoga, the defence case was considered. As we said in the case of **Hosea Emu Mwangama v. Republic**, Criminal Appeal No. 217 of 2020 (unreported), when the defence version of the matter is not accepted by the court as it happened in this case, that does not amount to failure by the court to consider it. We dismiss this ground.

The fourth and last ground of appeal is that the prosecution did not prove the case beyond reasonable doubt. Settled law is that the victim of sexual offence tends to offer the best evidence and in this case the conviction should have hinged on the evidence of PW1. However, PW1's testimony was expunged by the High Court because reception of her evidence was in violation of section 127(2) of the Evidence Act. As there is no cross appeal by the respondent Republic on that finding, that part of the decision is not subject of our discussion and we shall not make reference to PW1's testimony.

If this ground of appeal is considered together with the sixth ground of appeal in the supplementary memorandum of appeal, the appellant maintained that when PW1's evidence is discounted, the remaining witnesses cannot prove the case against him. Mr. Luoga submitted that even

after expunging the evidence of PW1 the prosecution had another arrow to its bow, in the form of PW2. He submitted that PW2 caught the appellant red handed and successfully gave chase.

In determining this ground, we take note that in dealing with the testimony of PW2, the High Court attached a lot of weight in it because, it was satisfied that, "he found the appellant *in flagrante delicto* on top of the victim". The learned Judge took the view that PW2 deserves credence. Our view of the matter is that PW3 proved the age of the victim but also her evidence supports the PF3 that PW1's hymen had been perforated shortly before she checked her daughter's private parts. But the star witness in our view, is PW2 who saw the appellant right in the middle of the sexual intercourse with PW1. We have no basis, and none has been suggested by the appellant, for doubting PW2's word him being a stranger who was just passing by. We thus endorse the finding of the High Court and dismiss the fourth and last ground of appeal.

Before us, the appellant also submitted that he is too old and too big for an 8 - year – old to handle, suggesting that the story is a wild imagination and untrue. With respect, the law, Section 131(3) of the Penal Code, envisages rape victims of under the age of 10 years like PW1, so the

appellant cannot just wish it away. For that reason, we dismiss this argument. We hold as did the two courts below that the case against the appellant was proved beyond reasonable doubt and he was rightly convicted and sentenced.

The appeal is dismissed in its entirety.

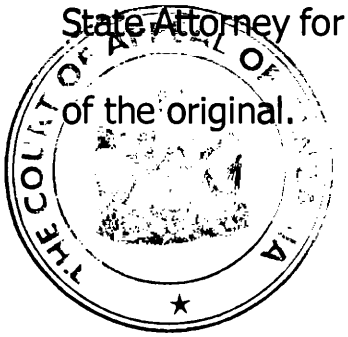
DATED at **MBEYA** this 22nd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2023 in the presence of the Appellant in person and Ms. Mwajabu Tengeneza, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL