IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 67 OF 2020

WILSON LEVIN BAYO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)
(Gwae, J.)
dated the 10th day of October, 2019
in
Criminal Appeal No. 11 of 2019

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JUDGMENT OF THE COURT

17th & 24th February, 2023

LEVIRA, J.A.:

The appellant, Wilson Levin Bayo was arraigned before the District Court of Monduli at Monduli (the trial court) facing rape charge contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002. Upon a full trial, he was convicted as charged and sentenced to thirty years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania, at Arusha (the first appellate court) vide Criminal Appeal No. 11 of 2019, subject of the present appeal.

Briefly, the background to this appeal can be traced from Sabasaba town within Monduli District in Arusha Region. It was alleged by the prosecution that on 17th December, 2017 while at that Sabasaba area, the appellant had sexual intercourse with a girl aged 13 years old, whom we shall refer to as the victim or PW5 to preserve her modesty. On the material date the victim went missing from home for sometimes. Upon tracing her whereabouts, E. J. M (PW1) was informed by undisclosed person that she was seen with the appellant at Mtaa wa Sabasaba at the salon where the appellant was working. PW1 made an inquiry to know from the victim as to where was she. The victim told him that she met the appellant at Soko la Jumapili and the appellant took her to his salon and later to his home where he had sexual intercourse with her. The disappearance of the victim from home was confirmed by J.J. (PW2), the victim's grandmother.

In her testimony, the victim (PW5) narrated on how the appellant undressed and covered her mouth before removing his clothes and started to rape her. The incident was reported to Monduli Police Station by PW1. The appellant was arrested and together with the victim were sent to the police. At the police, PC Kigeso issued the victim with a PF 3 (Exhibit PE2) and PW2 sent her to Monduli District Hospital where she

was attended by Dr. Yona Athumani Senzota (PW3). In his evidence, PW3 testified that having examined the victim's vagina, he found bruises suggesting being penetrated with a blunt object. He filled the PF3 which he tendered during trial. The appellant was interrogated by Police Officer No. D 6339 DC David (PW4) and his cautioned statement was admitted in evidence (Exhibit PE3). In the said statement, the appellant admitted to have committed the charged offence in almost similar narration as that of PW5. He was later sent before the trial court to face the charge which he denied in his defence. At the end of the trial, the trial magistrate was satisfied that the prosecution proved its case beyond reasonable doubt and thus it convicted and sentenced the appellant as intimated above.

Before us, the appellant has presented four grounds of appeal, three of them appear in the memorandum of appeal and one oral additional ground. We shall paraphrase them hereunder:

1. *That the prosecution did not prove the age of the victim.*
2. *That the first appellate court did not assess the credibility of prosecution witnesses.*
3. *That the first appellate court failed to evaluate the evidence of PW4 and Exhibit PE3, as a result it arrived at a wrong decision.*

4. *That PW5 was not sworn before testifying in terms of section 127 (2) of the Evidence Act, Cap. 6 R.E 2019 (the Evidence Act).*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent, the Republic was represented by Mr. Felix Kwetukia, learned Senior State Attorney assisted by Ms. Grace Madekinya, learned State Attorney. In determining the grounds of appeal, we shall follow the following order, 1, 4, 2 and 3.

The appellant's main complaint in the first ground of appeal is that the prosecution failed to prove the age of the victim. As a result, the charge against him was not proved to the required standard. In reply, Mr. Kwetukia opposed this claim as he stated that the age of the victim was proved. He referred us to pages 9 and 14 of the record of appeal where PW2 and PW5 respectively testified to the effect that the victim was 13 years old. According to him, this ground of appeal is baseless.

It is settled position that the age of the victim can be proved by the victim, a relative, a parent, a medical practitioner or by production of birth certificate - see for instance: **Issaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported). Bearing in mind the above position, the issue whether the age of the victim was proved should not task our mind. We have perused the record of appeal and we

agree with Mr. Kwetukia that the victim (PW5) at page 14 of the record of appeal and her grandmother (PW2) at page 9 of the record and Exhibit PE2 at page 25 of the record of appeal testified and indicated that the victim was 13 years old at the time of commission of the offence. For instance, at page 9 of the record of appeal, PW2 stated as follows:

> *"I know "B. K" she is my granddaughter, the daughter of "L.J", "B. K" is living with me at Sinoni since she was one-year-old.* ***She is now 13 years*** *old; she is in Standard IV at "M Primary School". [Emphasis added].*

The letters "B. K." referred to above are the initials of name of the victim. Therefore, contrary to the appellant's complaint, we find that the prosecution sufficiently proved that age of the victim was 13 years old when she was raped. This ground of appeal is unfounded.

We now move to consider the fourth ground of appeal where the appellant argued that PW5 was not sworn before testifying contrary to the requirements of section 127 (2) of the Evidence Act. In support of his argument, he cited the case of **John Mkorongo James v. Republic**, Criminal Appeal No. 498 of 2020 (unreported). Finally, he prayed for this appeal to be allowed.

Mr. Kwetukia replied in respect of the fourth ground of appeal to the effect that, following the amendment of section 127 of the Evidence Act through the Written Laws (Miscellaneous Amendment) (No. 2) Act No. 4 of 2016, *voire dire* is no longer a mandatory requirement under section 127 (2) of the Evidence Act. He went on to state that, a child of tender age is required to promise to speak the truth before giving evidence and this is what had happened to PW5. He went on to submit that the case cited by the appellant to support this ground of appeal is distinguishable. According to him, this ground of appeal is misconceived.

Section 127 (2) of the Evidence Act provides as follows:

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall,* ***before giving evidence, promise to tell the truth to the court*** *and not to tell any lies."* [Emphasis added].

In the light of the above provision, we agree with Mr. Kwetukia that since the victim was 13 years old at the time of giving her evidence, she was required by the law to promise to speak the truth. At page 14 of the record of appeal, the trial magistrate recorded as follows:

> *"PW5, B. K. 13 years, Sinoni, peasant, Christian,* ***promises to speak the truth*** *as follows:"*

[Emphasis added).

In the circumstances, we are satisfied that the promise to speak the truth made by the victim before testifying was sufficient. This ground of appeal is misconceived.

In the second ground of appeal the appellant challenged the first appellate court for failure to assess the credibility of the prosecution witnesses and make a finding therefrom. He highlighted some contradictions in prosecution evidence, which he said, were not properly assessed by the first appellate court, otherwise it could resolve them in his favour.

Before we embark in determining the identified variations by the appellant, we wish to note that, Mr. Kwetukia's response to the second ground of appeal was too general as he stated that, normally assessment of credibility of witnesses is done by the trial court, as it was done in this case. Apart from that, the first appellate court also evaluated the whole evidence as it can be seen at pages 61 to 65 of the record of appeal.

However, for the interest of justice we shall consider each of the identified contradictions while keeping in mind that this being a second appeal, we should not interfere the concurrent findings of the

lower courts unless necessary. It is a requirement of the law that whenever contradictions arise in evidence, the court has to resolve them by determining whether they are minor or they go to the root of the matter – see for instance: **Mohamed Said Matula v. Republic** [1995] T.L.R. 3; **Armand Guehi v. Republic,** Criminal Appeal No. 242 of 2010 and **Awadhi Abrahamani Waziri v. Republic,** Criminal Appeal No. 303 of 2014 (both unreported).

The first contradiction claimed about by the appellant was the variance of the evidence in relation to the date of incident. According to him, while PW1 testified that the incident occurred on 11th December, 2017, other witnesses (PW2, PW3, PW4 and PW5) and the charge sheet indicated that it was on 17th December, 2017. First and foremost, we agree that there was that variation as identified by the appellant. However, having considered circumstances of this case, we find that the said variation was minor. We say so because the victim (PW5) stated that she was raped on 17th December, 2017. Her evidence in respect of the date of incident was supported by her grandmother (PW2) who testified that she sent the victim to the police and later to the hospital on that date. Another witness who corroborated the victim's evidence was the police officer (PW4)

where the incident was reported and the doctor (PW3) who examined her and discovered that she had bruises in her vagina. The only difference between the evidence of PW1 and other prosecution witnesses is that instead of mentioning the 17th date, he said 11th. In our considered view, the difference might be caused by either slip of the tongue or the pen which did not go to the root of the matter as there was sufficient evidence on record to prove that the incident took place on 17th December, 2017.

The appellant also indicated that there was variation of evidence as regards the time of commission of the offence. While PW1 indicated that at 13:45 hours the victim was already at home, the doctor who examined her indicated in the PF3 (exhibit PE2) that he examined her at 13:07, meaning that, before she could return home as per the evidence of PW1. Likewise, the time mentioned by PW4 was between 14:00 to 15:00 hours when he saw people arriving at the police was different. He contended that the first appellate judge ought to have evaluated the evidence properly and make a finding that those witnesses were not truthful witnesses. In support of his argument, he cited the case of **Nelson Mang'ati v. Republic**, Criminal Appeal No. 346 of 2017 (unreported).

We agree with the appellant that indeed, there was such difference. However, the most important question to be considered is whether the difference goes to the root of the matter, which we say it did not. Suffices here to state that, the time between 10:00 hours when the victim left home to 14:00 hour when she was sent to the police, she was raped. Therefore, we find that the contradiction or rather difference was minor and under normal circumstances, it might be caused by lapse of time from the date of incident to when those witnesses were called to testify – see: **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 (unreported).

The appellant submitted further that the charge sheet was defective but the prosecution did not amend it as per the requirement of the law under section 234 (1) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA). According to him, while the charge sheet indicated that the incident took place at Sabasaba, PW1 said it took place at Soko la Jumapili. It is clear in the record of appeal that in his evidence, PW1 stated that when he interrogated the victim to know where was she, the victim said that she met the appellant at "Soko la Jumapili" at page 8 of the record of appeal. Also, on the same page PW1 testified to have been

informed that the victim was seen at Sabasaba. The extracted part of his evidence is as follows:

> *"I took the endeavors to trace her and I got the news that* ***she has seen at Mtaa wa Sabasaba*** *with an accused person." [Emphasis added]*

In the circumstances, we do not see any material difference between the charge sheet and the evidence of PW1. Having considered all the discrepancies complained about by the appellant, we find that they were minor and they did not go to the root of the matter.

Submitting on the third ground of appeal, the appellant stated that the first appellate court failed to evaluate the evidence of PW4 and Exhibit PE3 (the appellant's cautioned statement) as a result it arrived at a wrong verdict. His main claim was that the said statement was recorded by Corporal David and he was asked to sign it contrary to section 58 of the CPA. Therefore, he urged us to expunge the said statement from the record.

Responding on the third ground of appeal, Mr. Kwetukia submitted that at the time of recording the appellant's cautioned statement, there was compliance with section 58 of the CPA. This he said, is because the appellant wrote his statement himself and when it was tendered, he did

not object it. Besides, he said, in cross examination the appellant did not challenge the contents of the said statement. Citing the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), Mr. Kwetukia argued that failure by the respondent to cross examine the witness on the contents of that statement, amounted to admission of the truthfulness of the contents.

We agree with the learned Senior State Attorney that the appellant's cautioned statement was recorded by himself and he did not object it when it was tendered in court. But as it can be seen above, this ground of appeal is twofold. Apart from challenging the preparation of his cautioned statement, the appellant also raised an issue of improper evaluation of evidence. Ultimately, this ground leads us to determine whether the charge against the appellant was proved beyond reasonable doubt. It is common knowledge that courts are enjoined to evaluate evidence adduced by parties, failure of which, results to unfair trial. The appellant in the present case was charged with rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code.

When someone is charged under that provision what is required to be proved is the age of the victim and penetration. We have already discussed and concluded above that the age of the victim in the present

case at the time of commission of the offence was 13 years old as per the evidence of PW2, PW3 and PW5. Therefore, the age of the victim herein falls squarely under the provision of the law creating the offence with which the appellant was charged.

Another ingredient to be proved is penetration. In her evidence PW5 demonstrated the sequence of events which had occurred and eventually ended to her being penetrated by the appellant. For ease of reference, we hereby extract part of her evidence found at page 14 of the record of appeal:

> *"On 17/12/2017 I remember I met an accused while going to the shop. He asked me that I should follow him to his barber shop (salon). ... He took me to his room. I understood he wanted to have sex with me. I told him I do not want, he laid me down on his bed, he undressed my skirt, tight, underpants, he covered my mouth with the right hand and undressed, he also removed his, he then lied on me he started* ***raping me, he penetrated me****, it lasted for two minutes, he put a condom, after he finished, he asked me not to tell anybody, I then left the room." [Emphasis added]*

In his cautioned statement which was admitted without any objection from the appellant (PE3) and its contents were never challenged during cross examination, the appellant also indicated that

he penetrated the victim. The following is the extract from his statement:

> *" ... akaingia ndani kuhusu maswala ya kufanya mapenzi ..... alipanda kitandani akajifunika shuka na kuvua nguo zote na mimi nikavua za kwangu tukajifunika shuka moja nikamshika maziwa na uume wangu ukasimama* ***nikaushika na kuiingiza kwenye uke wa ....*** *nikaendelea kufanya mapenzi mpaka nikatoa mbegu za kiume ...." [Emphasis added].*

Therefore, the evidence of PW5 as far as penetration is concerned was corroborated by the contents of the appellant's cautioned statement and that of the Doctor who examined her and found some bruises in her vagina which suggested that she was penetrated. In the circumstances of this case, even if we had expunged the appellant's cautioned statement, which we do not, still the evidence of the victim proved the elements of the offence with which the appellant was charged.

We have as well considered the appellant's defence during trial. However, as courts below, we find nothing in it that could have shaken the prosecution evidence against him. He only denied to have committed the charged offence claiming that he had a conflict with Mama Evarist who was neither a party nor a witness in the case.

Having considered all the circumstances pertaining to this case and the entire evidence on record, we entertain no doubt that the prosecution proved beyond reasonable doubt that on 17th December, 2017 the appellant had sexual intercourse with the victim, a girl of 13 years old. Therefore, we find no merit in this appeal. We uphold the conviction and since the appellant's sentence is statutory, we confirm it. Consequently, we dismiss the appeal in its entirely.

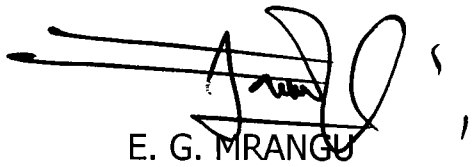
DATED at **ARUSHA** this 24th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of the appellant in person and Mr. Felix Kwetukia, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL