IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 242 OF 2019

BETWEEN

JACKSON ANTHONY.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Madeha, J.)

dated the 20th day of June, 2019
in
Criminal Appeal No. 76 of 2018

.....

JUDGMENT OF THE COURT

22nd & 28th February 2023

GALEBA, J.A.:

Jackson Anthony, the appellant in this appeal was charged before the District Court of Sengerema in Criminal Case No. 94 of 2016 on a single count of rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002] [now R.E. 2022], (the Penal Code). The case of the prosecution was that, at 14.00 hours on 8th March 2016 at Soswa Island within Sengerema District in Mwanza Region, the appellant had carnal knowledge of a young girl aged twelve years. To conceal the identity of the victim, we will refer to her as K.P., the victim or PW2.

The evidence for both sides to this appeal, may be summarized as follows; On 8th March 2016, Festo Gervas (PW1), the victim's father came from a funeral in the neighbourhood but when he reached home, he found other children having lunch, but the victim was not there. Upon an inquiry, the children told him that the victim had gone to draw water from a nearby location. Although it was raining, PW1 decided to go to the water source. Although he found the buckets at that place, the girl was apparently missing. He decided to go to the appellant's place which was nearby. After knocking at the appellant's door, at first nothing was forthcoming, but eventually the door was opened and the victim came out, but the appellant returned to the room.

The victim told PW1 that the appellant called her from where she was fetching water and upon getting closer to him he pulled her towards his bed, undressed her and had carnal knowledge of her. PW1 called the village administration whose members arrested the appellant. The next day, the appellant and the victim were taken to Nyakalilo Police Station where he was detained. At that station, F. 316 CPL Silas gave PW1 and PW2 a PF3. The PF3 was then taken to Nyakalilo Health Centre where Fabian Thema, PW4 a medical doctor examined the victim and filled in the PF3. The document was tendered as exhibit P1.

The victim (PW2), testified that when she went to fetch water at the appellant's house, the latter pulled her inside his house, laid her on bed, undressed her underwear, put a piece of close to cover her mouth, separated her legs and raped her. She underwent that painful experience until when they heard a knock at the appellant's door that's when he let her go. Outside, she found her father and her sibling.

The appellant's evidence was that on 8th March 2016 at 10.00 hours, some people knocked at his door and informed him that he was under arrest following raping the victim but he denied. They took him to Nyakalilo Police Post and later to court where he was heard but convicted of the offence he never committed.

Upon consideration of the above evidence, the trial district court was fully convinced that indeed the appellant raped the victim. Upon that finding, the court convicted the appellant and sentenced him to thirty years imprisonment. The appellant was aggrieved by both conviction and sentence. To exercise his right of appeal, he filed Criminal Appeal No. 76 of 2018 to the High Court, but luck not being on his side, the appeal was dismissed on 20th January 2019 for want of merit.

This appeal is challenging the above decision of the first appellate court. It is premised on three grounds of appeal. However, for reasons to unfold as we proceed, we will first consider the third ground of appeal, which was to the effect that:-

> *"The trial and the first appellate court based a conviction of the appellant on the case which was not proved beyond reasonable doubt."*

At the hearing, the appellant appeared in person and the respondent Republic had the services of Ms. Gisela Alex Banturaki, learned Senior State Attorney, who was assisted by Ms. Ghati William Matayo, learned State Attorney. Upon requiring the appellant to argue his appeal, he prayed that his grounds be adopted by the Court and be considered as presented. He also preferred that the learned Senior State Attorney reply to his grounds, so that he could rejoin, would he wish to do so afterwards. Thus, we permitted the learned Senior State Attorney to respond to the appellant's grounds of appeal.

Although Ms. Banturaki argued all the three grounds of appeal, we will consider first her arguments in respect of the above quoted ground of appeal. In challenging it, she contended that the ground has no merit because, PW2 properly elaborated in her evidence how she was raped by the appellant during daytime. Relying on the cases of **Selemani**

Makumba v. R, [2006] T.L.R. 379 and **Karim Seif @ Slim v. R,** Criminal Appeal No. 161 of 2017 (unreported), she implored us to accept the evidence of PW2 as the best evidence because this is a rape case and in rape cases, the evidence of the victim is the most credible evidence to rely on. She added also that as PW1 found the appellant and the victim in the former's house, the evidence of the victim was well corroborated by that of PW1. She further submitted that relevant and of corroborative value was also the evidence of the medical doctor PW4 who examined the victim and found her to have been carnally known, for she had sperms in her private parts.

Before she was to conclude her submissions, the learned Senior State Attorney had a point to make on the credibility of the evidence of PW2, who was a child of tender age. Addressing the Court on the compliance with section 127 (2) of the Evidence Act [Cap 6 R.E. 2022], (the Evidence Act), she submitted that although what was carried out before PW2 could adduce her evidence was a *voire dire* examination, during the said examination, the victim promised to tell the truth, quite in observance of the above law. Thus, she argued, the evidence of PW2 was adduced procedurally and the same is a credible account of what the appellant did to her and what she went through on that day.

Thereafter, Ms. Bantuiaki concluded that the case of the prosecution was proved beyond reasonable doubt and implored us to dismiss the third ground of appeal for want of merit. The appellant being a layman, did not have anything useful in rejoinder, save for pleading with the Court to decide this appeal according to the dictates of justice.

We will start with the critical point argued by Ms. Banturaki in relation to *voire dire* test and a promise to tell the truth and not lies by PW2. Thus, the issue for our attention is whether the evidence of PW2, a child of tender age was received in compliance with section 127 (2) of the Evidence Act, as amended by section 26 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016. The latter Act which introduced a concept of promising to tell the truth and not lies, came into operation on 7th July 2016 while PW2 testified on 8th December 2016. It is therefore proposed that we start with the provisions of section 127 (2) of the Evidence Act, which provides that:-

> *"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."*

According to section 127 (4) of the Evidence Act, a child of tender age is a child whose apparent age is not more than fourteen years. In connection to that, the point we intend to investigate in ground three and the above framed issue, is whether PW2, being a child of tender age, promised to tell the truth and not lies, in line with the above quoted section 127 (2) of the Evidence Act, or she did not promise. That necessarily takes us to pages 9 to 10 of the record of appeal were the *voire dire* test was conducted. The record of the proceedings is as follows: -

> *"**Court:** After examination of PW2 it is discovered that PW2 is a child of tender age, therefore the voire dire test according to section 127 (3) is hereby conducted.*
>
> *M. O. Ndyekobora, RM*
>
> *08.12.2016.*
>
> ***VOIRE DIRE TEST***
>
> ***Qn:** What is your name?*
>
> ***Answer:** K.P.*
>
> ***Qn:** How old are you?*
>
> ***Answer:** 13 years.*
>
> ***Qn:** Which school are you studying and in which class?*
>
> ***Answer:** I am schooling at Soswa Primary School at standard IV.*
>
> *Qn: Where are you worshiping?*

Answer: *AIC.*

Qn: What do you prefer telling, lies or truth and why?

Answer: I want to tell the truth only because is what I like to speak.

Court: *Asking question (sic), I am satisfied that the victim is intelligent enough she can be able to testify."*

[Emphasis added].

Thereafter, the evidence of PW2 was duly taken. According to Ms. Banturaki, the bold response of PW2 above, is a clear promise to tell the truth and it satisfies the requirements of section 127 (2) of the Evidence Act. That too, was more or less the same reasoning of the first appellate Judge at page 48 of the record of appeal where she stated:-

"It appears the magistrate conducted the voire dire test, and PW2 in the course of replying to the questions promised to tell the truth, to my opinion PW2 promised to tell the truth, I have considered that the procedural mistake did not occasion any injustice, I see that this promise to tell the truth was recorded, I hereby quote as follows "PW2 I want to tell the truth only because is what I like to speak"."

To agree or disagree with the learned Senior State Attorney and the learned first appellate Judge, will wholly depend on; **first,** what was

the objective of the court to carry out the *voire dire* test, and; **two**, the conclusion drawn by the trial court at the very end of a *voire dire* examination.

Normally, and particularly before the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016, was passed in July 2016, objectives of carrying out a *voire dire* test were; **one**, to establish whether the witness of tender age understands the nature and meaning of oath; **two**, to test if he or she has sufficient intelligence to justify reception of his or her evidence and; **three**, is to test whether the witness understands the duty of telling the truth – see **Kimbute Otiniel v. R**, Criminal Appeal No. 300 of 2011 and **Joseph Damian @ Savel v. R**, Criminal Appeal No. 294 of 2018 (both unreported). So, clearly, a commitment to tell the truth is not one of the objectives of carrying out a *voire dire* test.

A critical review of the record of the trial court reveals that the objective of the court to carry out a *voire dire* test was not to find out whether PW1 would promise to tell the truth or not, the purpose for the examination was to test the intelligence of the child. That is deducible from the heading to the record of the test, where the trial court titled it "*VOIRE DIRE* TEST." To us, that is indicative of what the court wanted from the child. So, it cannot comfortably be said that the purpose of the

examination of the child before the trial court, was to have her commit herself to tell the truth.

In any event the question "*what do you prefer telling, lies or truth and why?*", is not equivalent to asking a question like: "*in these proceedings, do you promise to tell the truth and not lies?*" Whereas the former question begs for a routine experience of the witness, the latter question seeks to procure a definite commitment of the witness as to whether she undertakes to tell the truth and not lies in the ongoing session of the court. In this case the trial court asked the former question, which wanted the child to give her experience in life whether she preferred to tell the truth or lies and why. The question was noncommittal, it did not require the child to commit herself into a promise to tell either the truth or lies. That question was general and its answer was just as general. The point we want driven home is that the witness did not commit herself that at that session of the court she would tell the truth and not lies. That specific commitment of PW2 is not on record.

Another justification, why a search for commitment of PW2 to tell the truth and not lies was not the objective of the trial court, is the conclusion that the court made, subsequent to the responses of the witness. The court stated: "*I am satisfied that the victim is intelligent*

enough, she can be able to testify." In our view, this is what the trial magistrate was seeking to extract from the witness. The trial magistrate was not looking for a commitment to tell the truth and not lies. Had she been interested in the commitment; the record would have a conclusion of an effect similar to this: *"I am satisfied that the witness has promised the court that in her evidence she will tell the truth and not lies."* And had that been the case, we would not have entertained any difficulty in joining hands with Ms. Banturaki. But, going by the record, as we have tried to explain, we do not at all agree with the learned Senior State Attorney and the learned first appellate Judge, that PW2 promised to tell the truth as required by section 127 (2) of the Evidence Act.

Now, when a child of tender age adduces evidence without a clear promise to tell the truth and not lies, like PW2 in this case, his or her evidence is deemed to be invalid with no evidential value - see **Zuberi Mohamed @ Mkapa v. R,** Criminal Appeal No. 563 of 2020 (unreported). Thus, the evidence of PW2 is hereby declared invalid and therefore, unreliable for having been received in contravention of section 127 (2) of the Evidence Act.

Admittedly, legally a conviction may be achieved in absence of the direct evidence of the victim, like in murder cases where the victim dies or in rape where the victim is a child of extreme young age such that it

cannot give evidence or where one is suffering the disease of the mind, – see the case of **Haji Omary v. R,** Criminal Appeal No. 307 of 2009 (unreported). We are also well versed with the principle of the law of evidence that every witness is entitled to credence and must be believed and his testimony accepted, unless there are cogent reasons for not believing the witness as per the case of **Goodluck Kyando v. R** [2006] T.L.R. 363. According to **Mathias Bundala v. R**, Criminal Appeal No. 62 of 2004 and **Aloyce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (both unreported), good reason for not believing a witness includes where the witness gives improbable or implausible evidence or where the evidence of the witness materially contradicts the evidence of another or of other witnesses. In such circumstances, the principle in **Goodluck Kyando**, (supra) does not apply, the evidence cannot be accorded any credibility. We also know that it is unsafe to interfere with concurrent findings of two lower courts, as per this Court's decision in **Wankuru Mwita v. R**, Criminal Appeal No. 219 of 2012 (unreported), unless it can be shown that the courts below, among other flaws, failed to appreciate the nature and quality of the evidence that was tendered before the trial court.

Now back to the evidence remaining on record subsequent to invalidating that of PW2. The remaining evidence is that of PW1, the

victim's father, PW3 a police officer and PW4 the medical practitioner. The evidence of PW3, is of no assistance, because his testimony was that he gave PW1 and PW2 a PF3, which document as we will see was suffering from serious legal challenges. So, we eliminate the evidence of PW3 and remain with that of PW1 and PW4.

We indicated above that, one of the reasons of not believing a witness, is when his evidence is materially contradictory with the evidence of another witness or of other witnesses as per **Mathias Bundala** (supra). We shall therefore examine briefly the evidence of PW1 and PW4 and see whether they pass the test set in the case above stated. In particular, we will observe whether the evidence of the two witnesses is coherent and non-contradictory materially.

There are two areas; **first**, PW1 testified that after the offence was committed, he took the victim to Lugala Health Centre where the doctor at that Centre told him that the child had been raped. However, that is not consistent with the evidence of PW4 a medical doctor. PW4 stated at page 16 of the record of appeal that his work station was Nyakalilo Health Centre and that he is the one who examined PW2 and confirmed that she was raped and filled in a PF3 which he tendered in evidence as exhibit P1. Clearly, there is a contradiction between the positions of the two witnesses as to the place where PW2 was examined

and who examined her. Whereas PW1 stated to have taken her to Lugala Health Centre, PW4 stated that he examined her at Nyakalilo Health Center. We think this difference in the evidence of two witnesses testifying on the same thing is irreconcilable.

Second, the PF3 which was tendered by PW4 relates to a completely different victim called Neema Musa of eight years who was alleged to have been raped in Bunda on 12th June 2017 when the appellant was already in prison. The PF3 too, was tendered by the Public Prosecutor and was not even read after being tendered. On these shortfalls, we commend Ms. Banturaki to have prayed that the PF3 be expunged from the record, which order we hereby make.

We are of the firm position that the setbacks highlighted above, take away credibility of PW1 and PW4, such that no valid conviction can be based on their evidence. The contradiction that marred their evidence and the quality of the evidence that was adduced by PW4 including the PF3, is to say the least, poor. We cannot accord credence to such evidence and that gives us mandate to interfere with the findings of the two courts below, even though, concurrent. Briefly, we agree with the appellant that the case against him was not proved beyond reasonable doubt. Thus, the third ground of appeal is allowed.

Considering the manner, we have resolved the third ground, we find no point in dealing with the other two grounds of appeal. Finally in conclusion, this appeal is allowed and the appellant's finding of guilty by the trial court is hereby reversed and his conviction nullified. The judgments of the trial court and that of the first appellate court are both nullified and quashed. Further, the sentence of thirty years imprisonment is henceforth set aside. In the event, we hereby order that the appellant be released from prison and set to liberty unless, he is held there for other lawful cause.

It is so ordered.

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

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th February, 2023 in the presence of the Appellant in person via virtual link from Butimba prison at Mwanza and Ms. Ghati Mathayo, State Attorney for the Respondent/ Republic, via virtual link from Mwanza High Court is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL