IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 379 OF 2017

(an appeal from the judgment of Ilala District Court delivered by Hon. Haule RM on 12th October, 2015 in Criminal Case No. 120 of 2014)

YOHANA SAID @ BWIRE ..... APPELLANT

VERSUS

THE REPUBLC ..... RESPONDENT

JUDGMENT

6th and 29th June, 2018

BANZI, J.:

In the District Court of Ilala at Samora Avenue, the appellant was charged with two counts, one; rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap.16 R.E. 2002] and two; unnatural offence contrary to section 154(1)(a) of the Penal Code [Cap.16 R.E. 2002]. Upon closure of the prosecution case, the appellant was acquitted on the second count of unnatural offence after being found with no case to answer. At the end of the trial, he was convicted with the offence of rape and sentenced to life imprisonment. Aggrieved with both conviction and sentence, the appellant preferred this appeal.

The appellant filed a Petition of Appeal with six grounds and later he added seven grounds which essentially focused on the following areas; **one** that, his conviction was wrongly based on contradictory and inadmissible evidence of prosecution witnesses; **two** that, his defence was not considered; **three** that, exhibit P1 (PF3s) was wrongly tendered; **four** that, non-compliance of sections 231 and 210(3) of the Criminal Procedure Act; **five** that, *voire dire* was not conducted before receiving the evidence of PW1 and **six** that, failure to conduct trial in camera.

The factual background of the case leading to the conviction of the appellant runs as follows. On an unspecified date in April, 2014 the victim one Zulfa Salum (PW1), a standard III pupil while on her way from school, she was called by the appellant who offered her his umbrella as it was raining. PW1 accepted the offer because the appellant was not a stranger to her as she used to see him selling charcoal across the road near the school of her friend namely Mariam. The appellant walked along with PW1 and took her to an unfinished building. PW1 further testified that, upon entering inside, he asked her to undress her underpants and then, he laid her down, unzipped his trouser and inserted his penis into her vagina. He then inserted

it into her anus. Despite feeling pain, she couldn't shout because he threatened to kill her.

After quenching his desire, the appellant ordered PW1 to wear her underpants and go home. He also took his way. The appellant repeated his ravished act on two unspecified dates whereby on the third time, PW1 felt pain all over her body and she couldn't walk properly. Her mother Aziza Abdallah (PW2) noticed how she was walking in difficulty and she asked her but PW1 lied that her leg was hurting. Later PW2 informed her husband and on 4th April, 2014 she took her to nearby dispensary. Upon being examined PW1 was found sexually assaulted and was referred to Amana hospital where the findings were the same. They reported the matter to the police and they made a trap and arrested the appellant.

In his defence, the appellant denied to have committed the offence. He told the trial court that on 10th April, 2014 he went to run his errands whereby upon reaching CCM building, he saw PW1 and mama Mariam (his former landlord) across the road and one policeman at the bar. Then he was arrested and sent to Chanika Police Station. The appellant contended that, this is a made up case by Mama Mariam who had quarreled with his wife.

At the hearing of this appeal, the appellant appeared in person and fended for himself, whereas the respondent Republic had the service of Mr. Bryson Ngidos, the learned State Attorney.

The appellant, being a layperson did not have much to submit but merely prayed to the court to adopt the grounds of appeal as part of his submission and be set free.

On the other hand, Mr. Ngidos firmly resisted the appeal. He began his submission on failure to consider the appellant's defence. According to him this ground lacks merit. He referred to page 10 and 13 of the judgment where the trial Magistrate considered defence evidence before reaching his decision.

Turning to the complaint that the appellant's conviction was based on contradictory evidence of PW1, Mr. Ngidos submitted that, the appellant failed to show how PW1's testimony is contradictory. He further submitted that, at page 12 to 14 of the proceedings, it shows how PW1 was taken to hospital, how she mentioned the person who raped her and how the appellant was arrested; hence her evidence was cogent and not contradictory at all.

In respect of insufficient and inadmissible of evidence of PW2, PW3, PW4, PW5 and PW6, the submission of the learned State Attorney was that, each prosecution witness had a role to prove what he/she knew about the incident. PW2 explained how she become aware on what befallen PW1. On the other hand, PW3 testified on how she investigated the alleged offence whereby among other things, she testified on how PW1 took her to the locus in quo and how they arrested the appellant. Likewise, PW4 testified on how he participated in trapping the appellant until they arrested him, while PW5 and PW6 stated on how they attended and examined PW1. He argued that the evidence of these witnesses was sufficient and admissible.

Coming to the complaint of non-compliance with section 231 of the CPA, Mr. Ngidos submitted that, page 52 of the proceedings clearly shows section 231 of the CPA was complied with. However, he contended that, had it been any non-compliance, the appellant would not have been prejudiced as at that juncture he was fully aware of the charge against him and the record shows he defended himself very well.

Submitting on the issue of non-compliance of section 210(3) of the CPA, Mr. Ngidos invited the court to revisit page 21, 25, 30, 41 and 47 where

it shows how the trial court complied with the said section, hence the appellant's complaint has no basis at all.

In regards to the issue of admissibility of PF3s Mr. Ngidos submitted that, there was non-compliance of section 240(3) of the CPA as the appellant was not given his right to require the person who made the report to be summoned. However, he contended that, in the instant case the omission was not fatal as both makers of the PF3s admitted earlier through PW2 were called to testify and the appellant had opportunity to cross-examined them, hence the was not prejudiced in any way. To support his argument, he referred the case of **Michael Magige @ Wang'anyi v Republic** [2002] TLR 94. Mr. Ngidos ended his submission by prayer to dismiss this appeal for lack of merit.

On rejoinder, the appellant submitted that, his conviction was based on contradictory evidence. He argued that, PW1 contradicted herself on who raped her whereby at first she mentioned a boy Lukumai and later she named Abuu. Also there was contradiction on PF3 as compared to the testimony of doctor at Amana (PW5) and nurse at Dispensary (PW6). The PF3 was dated 08/04 2014 whereas PW5 said he examined the victim on 10/04/2014 while PW6 said she examined her on 4th April, 2014. The

appellant further argued that, PW5 and PW6 both found her with bruises in her genital areas but how is it possible while the victim took long time before she went to hospital? The appellant also insisted that, this case was fabricated by mama Mariam who is the friend of PW2. He therefore prayed his appeal to be allowed as the prosecution failed to prove the case beyond reasonable doubt.

As stated earlier, the appellant raised thirteen grounds but the same are focused on six main complaints. On the first complaint the appellant contended that, his conviction was wrongly based on contradictory and inadmissible evidence of prosecution witnesses. His complaints are of two folds; one the contradiction of PW1's evidence and two; the contradiction on the date appeared on PF3 against the testimony of PW5. The appellant in his rejoinder complained that PW1 gave contradictory evidence concerning her assailant. At first she mentioned Lukumai then Abbu. His second complaint was the PF3 was dated 08/04/2014 whereas PW5 claimed to attend the victim on 10/04/2014 and PW6 mentioned 04/04/2014.

I will begin with the contradictions on the dates as appeared on both PF3s against the testimonies of PW5 and PW6 and alongside I will deal with the complaint concerning admissibility of exhibit P1. The second PF3 shows

it was issued to the victim on 08/04/2014 and the same was filled by PW5 on 10/04/2014. PW5 in his evidence stated the same thing that he attended the victim on 10/04/2014 while it is shown the PF3 was issued to her on 08/04/2014 depending on the date the victim reported to the police. In my considered view this is very normal depending on circumstances of each case as the date of examination can be different from the date of issuance of PF3.

In respect of the first PF3, it shows that the victim was attended on 04/04/2014 while the PF3 was issued six days later on 10/04/2014. According to the evidence of PW2 they took PW1 to Nguvukazi Dispensary before they went to report the matter to the police. After all, the said PF3 was filled by the nurse (PW6) who is not a medical practitioner. In my considered view it ought to be rejected on the first place.

Despite the contradictions appeared on PF3, it is evidently from the record that the same were wrongly tendered by the Public Prosecutor instead of PW2 who was testifying. In addition, the court did not inform the appellant over his right to require the person who made it to be summoned for cross examination as required by section 240(3) of the CPA. The result of such non- compliance is to expunge PF3 from the record as it was directed in the case of **Abilahi Mshamu Mnali v Republic**, Criminal Appeal No. 98 of

2010 CAT (unreported). Though both makers were called to testify yet still the trial court failed to comply with section 240(3) of the Criminal Procedure Act leave alone the same were tendered by incompetent person as a result exhibit P1 is hereby expunged from the record.

In respect of other complaint concerning contradiction the appellant contended that, PW1 contradicted herself when she first mentioned a boy by the name of Lukumai as the one who sexually assaulted her and later mentioned Abbu. The evidence on record shows that, PW1 when she was asked by PW2 on what befallen her she claimed to be hurt on her leg. Also, at first she mentioned Lukumai and later after being threatened by her mother, she revealed that it was Abbu. However, looking on the testimony of PW1 at page 11 to 12 of the typed proceedings, and page 13 to 14 when she was cross examined by the appellant, PW1 was very consistent when explaining why she didn't reveal the truth as well as mentioning Lukumai. Her reason was very clear that she was afraid as the appellant threatened to kill her if she reveals the truth. In respect of mentioning appellant as Abbu, she also stated that, she knew the appellant as Abbu as he introduced himself with that name. Therefore, the contended contradictions were very minor and had reasons hence not detrimental to the case.

Apart from that, as correctly submitted by the learned State Attorney that in the present case, the evidence of all witnesses was admissible as each prosecution witness had a role to prove what he/she knew about the incident.

After all, it is a settled principle that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. This principle was set in the case of **Selemani Makumba v Republic** [2006] TLR 379. In the case at hand the evidence of PW1 clearly proved it was the appellant who raped her. She knew the appellant as she used to see him selling charcoal across the road the fact which the appellant himself stated in his defence that he used to sell charcoal at Tandika, Chanika and Gongolamboto. She also testified that, it was the appellant who raped her several times. Though she didn't mention the date but taking into consideration of her tender age the issues of dates can be easily forgotten. In my considered view, PW1 evidence was worthy to be believed. Therefore, this ground lacks merit.

Regarding the second complaint, I inclined to agree with the learned State Attorney that, this ground lacks merit. Traversing the judgment of the

trial court on the last two paragraphs of page 13 the trial Magistrate though not in detailed but she considered the defence evidence before she reached her decision.

However, the defence evidence was mainly on two areas, firstly he explained how he was arrested on 10/04/2018 and secondly the complaint that this case was concocted by mama Mariam (the friend of PW2). According the evidence of the appellant, mama Mariam was her landlady and during their stay at her house, she quarreled with his wife. He contended that since mama Mariam and PW2 were friends, she used the latter's daughter to frame up the case against him. But looking it as a whole the appellant contention over his case being concocted is far from the truth. Firstly, during the testimony of PW2 the appellant did not cross examine her over her friendship with mama Mariam and if this case was concocted by her. This issue just arose during the defence which in my considered view is as good as an afterthought. Secondly, though it is not the duty of the appellant to prove anything, but at least he could have called his wife to support his assertion on the issue of quarrel between her and the so called mama Mariam. Therefore, in my considered view, the defence evidence did

not raise doubt on the prosecution case. In that regard this ground fails for lack of merit.

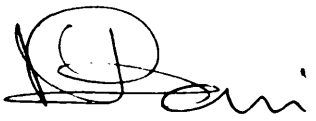
Turning to fourth complaint concerning non-compliance of sections 231 and 210(3) of the CPA, as correctly submitted by the learned State Attorney that, the requirements of these provision were fully complied with as shown at page 15, 21, 25, 30, 41, 47 and 52 of the typed proceedings. Hence, this complaint has no legal basis.

Another complaint raised by the appellant is that the *voire dire* was not conducted before receiving the evidence of PW1. The proceedings at the trial court shows that, before the testimony of PW1 was taken, the trial Magistrate conducted a long *voire dire* comprising both test; oaths as well as intelligibility and truth test and came up with the conclusion that PW1 knows the meaning of affirmation and recorded her evidence on oath. In that regard it is clear that the voire dire was properly conducted and I find no reason to fault it. Therefore, the ground concerning this complaint has no merit.

I now turn to the last complaint that the trial was not conducted in camera. It is the requirement of section 186(3) of the CPA that the evidence

of all persons in all trials involving sexual offences shall be received by the court in camera. In the present case the proceedings do not show the trial was conducted in camera. Failure to conduct trial in camera is a procedural irregularity and it becomes fatal if it occasioned failure of justice to the appellant. In the instant case it is not shown that the appellant was prejudiced upon such non-compliance. Hence this irregularity is curable under section 388(1) of the CPA. Refer the case of **Goodluck Kyando v Republic** [2006] TLR 363. Therefore, this complaint also lacks merit.

In the upshot, I am satisfied that the appellant was properly convicted and sentenced. This appeal is devoid of merit and is hereby dismissed in its entirety.



I.K. BANZI
JUDGE
29/06/2018

Delivered this 29th day of June, 2018 in the presence of Bryson Ngidos (State Attorney) for the respondent and the appellant in person.

I.K. BANZI
JUDGE
29/06/2018

Right of appeal explained.

I.K. BANZI
JUDGE
29/06/2018