IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 291 OF 2017

Original Criminal Case No. 130 Of 2016

BANGA BAYO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

14/5/2018 & 26/7/2018

JUDGMENT

I.P.KITUSI,J

Banga Bayo was sentenced to 30 years upon being convicted for Rape Contrary to Section 130(1) (2) (&) and 131(1 of the Penal Code, by the District Court of Morogoro. It was alleged before that court that on 4th October 2016, at Mikongeni area at Mzumbe Ward in Morogoro District Bango Bayo, hereafter the appellant, had carnal knowledge of Felista Donat, a girl aged 9 years.

The prosecution led evidence to prove that the appellant is a neighbor of Helena Simon (PW1)who has seven children including the alleged victim Felista Donat (Pw2). Pw2 testified that on 4th

October 2016 while playing with her friends Anji and Fatuma (Pw4) a the compound of the appellant's house, the appellant called her in the house and she obliged and went in.

In the house which had no occupant other than himself the appellant undressed Pw2 and had sex with her. According to Pw2, the appellant had sex with her on several other occasions at his house and sometimes in an un finished house.

On 5 October 2016 when Pw1 was bathing Pw2 she detected that the girl's private parts were swollen and enlarged. She also detected whitish discharges. Pw1 interrogated Pw2 as to who had raped her where upon she named the appellant.

Pw1 reported the matter at Mzumbe Police station where a Pf3 was issued for Pw2's medical examination which was conducted by one Ananius Cosmas Mgoa (Pw5) a Medical Doctor. Pw5's observations from the tests he carried out on the girl on 5 October 2016 were that she had not only been carnally known but she had been used to it. This he concluded from Pw2's calm behavior when he inserted fingers in the girl's vagina, which distinguished her from other victims of her age.

Fatuma Doto (Pw4) supported the account of Pw2 on the rape incident at the appellant's premises as well as at the unfinished house where she referred to as " *kwa Mtali*". She revealed that the appellant had also been ravishing her but she never took up the matter with law enforcement organs. Pw4's testimony was that in both

occasions involving Pw2 she could see what took place by peeping through the window.

In defence the appellant denied committing the alleged rape on 4th October 2016 as alleged and raised an alibi which one Michael Waida (DW2) and Tisora Lohi (DW3) testified in support of. According to the appellant and DW2, on 4/10/2016 they left home at 6.00 am to their farms at an area known as Lupanio, about 9 Kilometres away from Morogoro. The appellant stated that when he returned home in the evening he heard rumours that he was being accused of raping Pw2. He turned himself up to the police to inquire if there was such a report and he was informed that there was indeed such a report, so he was restrained and put in custody.

On 5/10/2016 the appellant was admitted to police bail on condition that he keeps on reporting at the police station, which he did for three days before he was charged in court. In cross examinations the appellant stated that he knew Pw2 as his neighbour's daughter with whom he had no previous conflict.

The learned trial Principal Resident Magistrate considered at length the issue whether the girl had been carnally known or not and finally concluded that she had in fact been carnally known, citing section130(4) (a) of the Penal Code which providers that penetration however slight is sufficient to prove rape.

On the evidence as a whole especially that of the victim and that of Pw5, and in view of the fact that the defence did not wish to

contradict this aspect, the trial court was entitled to conclude as it did.

The determinant issue however, is whether it is the appellant who had carnal knowledge of Pw2, an issue that the learned Principal Resident Magistrate also considered. Taking the view that evidence of rape has to come from the victim, the learned trial Magistrate accepted the testimony of Pw2 and rejected the defence of alibi raised by the appellant. It concluded that it was the appellant who had raped the girl, and consequently convicted him as charged.

The appeal seeks to impuign that decision by raising seven grounds which I shall summarize as thus;

1. The case was not proved beyond reasonable doubt.
2. That the evidence of Pw1 the victim's mother was hearsay.
3. That the court erred in relying on the evidence of Pw1 and Pw2 without warning itself of the danger of so doing.
4. That section 50 of the Criminal Procedure Act was not observed in interrogating the appellant.
5. That the trial court erred in relying on sworn testimonies of Pw2 and Pw4 who testified after erroneous Voir dire examinations.
6. That the age of the victim was not proved.
7. That the court erred in not considering the defence of alibi.

At the hearing of this appeal the appellant was represented by Mr. Daudi Mukirya, learned advocate, while Ms Rachael Magambo

learned State Attorney represented the Republic. Mr Mukirya abandoned the 4th ground of appeal and argued grounds 1 and 5 together.

Under grounds 1 and 5 Mr Mukirya's point was that the requirement for Voir dire examination has been done away with vide the written Laws (Miscellaneous Amendments) Act No. 4 of 2016 which came in force on 8th July 2016. He also cited the case of **Philipo Emmanuel V. Republic** Criminal Appeal No. 499 of 2015, CAT at Mbeya (unreported) to support his position. The learned counsel moved the court to expunge the testimonies of Pw2 and Pw4.

As regards the second ground of appeal Mr Mukurya submitted that the trial court erred in heavily relying on the evidence of Pw1 whose testimony was hearsay. Turning to the 3rd ground of appeal the learned counsel submitted that the Pf3 was not read over at the time of tendering.

On ground No. 6 it was submitted that there was a contradiction as to the victim's age because Pw1's version that she was 9 years was contradicted by Pw2 who said she was ten years. it was submitted further that a birth certificate would have resolved that contradiction. He cited the case of **Mathayo Kingu Vs Republic,** Criminal Appeal No. 589 of 2015, CAT at Dodoma (unreported).

As regards the 7th ground the learned counsel had initially submitted that the defence of alibi was not considered but when his attention was drawn to the judgment at page 10 he changed and submitted that the court did not accord weight to the defence. He cited

the case of **Jonas Bulai V. Republic** Criminal Appeal No. 49 of 2006, CAT at Dar es Salaam (unreported).

In response Ms Magambo supported the conviction and submitted that although the requirement of Voir dire examination has been removed, in the case of **Philipo Emmanuel** (supra) the Court of Appeal held that the Court has to satisfy itself that the witness was going to tell the truth. She submitted that Pw2 and Pw4 knew the meaning of telling the truth.

Regarding the evidence of Pw1 she submitted that its relevance was only in discovering that Pw2 had been raped, but even if the evidence is expunged it would not affect the case.The learned State Attorney submitted that admissibility of the PF3 was not objected to.

Turning to the ground of age of the victim, Ms Magambo submitted that Pw1 would be the best witness and there was no need of a birth certificate. She submitted that not in every case is the age of the victim important, she citing the case of **Tumaini Matayombo V. Republic** Criminal Appeal No. 127 of 2012, CAT at Mwanza (unreported)

Lastly the learned State Attorney submitted that the defence case, including that of alibi was considered but finally rejected by the trial magistrate.

Those are the arguments for and against this appeal and I commend the learned State Attorney and the learned advocate for providing me with enough material with which to resolve the matter.

I will, in the course of determining this appeal, not lose sight of the fact that the issue as to whether or not Pw2 was raped is beyond dispute on the basis of the testimony of Pw5, the medical officer who examined her. The law is also clear and settled that rape may be proved without a Pf3.

I will therefore treat as inconsequential the argument that the PF3 was admitted without reading out its contents.

Next for my consideration is the age of the victim. With respect I do not go along with Ms Magambo on her submission that the age of the victim is not always important. The case of **Tumaini Mtayomba** (supra) has been applied out context because the Court of Appeal did not suggest anywhere that in statutory rape age may sometimes be immaterial.

However in this case the contradiction between Pw1 and Pw2 as to the latter's age was neither here nor there because they both stated that the victim was below the age of majority. In any event it is my duty to re- evaluate the evidence, this being a first appeal. [See the case of **Kasema Sindano @ Mashuyi V. Republic,** Criminal Appeal No. 214 of 2006, CAT (unreported)]

In my assessment of the testimonies of Pw1 and Pw2 as regards the latter's age I feel the following observation made by the Court of Appeal very relevant;.

" We shall remain alive to the fact that not every discrepancy or inconsistency in a witness's evidence is fatal to the case. Minor discrepancies on details or due lapses of memory on account of passage of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."

[**Bokilimana Odasi @ Bimelifasi Vs. Republic , Criminal Appeal No. 269 of 2012 (unreported)]**

My conclusion in the aspect of the age of the victim in this case is that the discrepancies in Pw1 and Pw2 was minor and did not go the root of the matter as either way the victim was below the age of 18 years.

Next is the question of Voir dire after the amendment to section 127 of the Evidence Act vide the Written Laws (Miscellaneous Amendment) Act No.4. of 2016. Under the new sub section (2) of section 127 of the Evidence Act, all that a witness of tender age needs to do is promise that she shall tell the truth.

In another case, when I was faced with a situation like this, I took the view that the law as it stands now does not provide a guidance as to how the witness of tender age may be made to make the promise to tell the truth. I thought and still do think that it must be during a preliminary examination of the prospective witness by the

court, whatever name may be given to that examination. In Black's Law Dictionary 9th Edition at page 1710;

> *" 2 A preliminary examination to test the competence of a witness or evidence"*

is known as ***Voir dire.***

So my view is that it is for the court to determine whether during such preliminary examination of the prospective witness he/she makes a promise to tell the truth and not lies.

Taking the same approach I pose the question whether Pw2 and Pw4 made promises to tell the truth as opposed to lies. As regards Pw2 the magistrate concluded;

" Court:-

The child is intelligent enough and

she understands the meaning of an oath.

She is sworn and states;-"

Did this amount to concluding that Pw2 had promised to tell the truth in terms of sub section (2) of section 127 of the Evidence Act? I am afraid it did not. Similarly with Pw4 where the court's findings was;-

> *" The child knows the meaning of an oath and can distinguish between right and wrong....."*

It is finally my conclusion, and I respectfully agree with Mr. Mukirya, that Pw2 and Pw4 were wrongly cleared to testify as they did not comply with section 127(2) of the Evidence Act. With the evidence of Pw2 and Pw4 expunged, the case loses the two important legs on which it stood, which makes it unnecessary for me to consider whether or not the defence case was given the weight it deserved

The appeal is allowed because the prosecution failed to prove its case beyond reasonable doubt as to who raped the victim. The conviction is quashed and the sentence imposed on the appellant is set aside. The appellant, unless otherwise lawfully held, should be released forthwith.

I.P.KITUSI

JUDGE

26.7/2018

Date: 26/7/2018

Coram: Hon. Tiganga, DR

Appellant: Present in person

Respondent: Ms Racheal Magambo State Attorney.

Cc: Banza

Order - Judgment delivered in open chambers in the presence of the parties as to per coram.

J.C.TIGANGA
DR
26/7/2018

Right of Appeal Explained and guaranteed.

J.C.TIGANGA
DR
26/07/2018