IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 2 OF 2020

(Originating from Criminal Case No. 225 of 2018 in the District Court of Morogoro at Morogoro (Msacky RM)

MUSSA BAKARI.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MASABO, J.:-

The appellant Mussa Bakari was on 19th August 2019 found guilty and convicted of the offence of rape contrary to section 130(1) (2) and section 131(1) of the Penal Code [Cap 16 R.E 2002] by the district court of Morogoro. He was sentenced to 30 years imprisonment. Aggrieved, he lodged this appeal against the conviction and sentence. He has marshaled 14 grounds in support of his appeal. The grounds can be summarized as follows: the charge sheet was defective for not categorizing the specific paragraph; the age of the victim was not ascertained as there were contradictions on her actual age; section 9(3) of the Criminal Procedure Act [Cap 20 R.E 2019] was not complied with; PW1's testimony was contradictory; there was no proof of penetration; PW2's testimony (the victim) that she had sex with the appellant did not support the offence; PF3 was wrongly admitted as it was tendered by prosecutor also it was not read to him; section 231 of the

Criminal Procedure Act was not complied with; and lastly section 127(2) of the Evidence Act [Cap 6 R.E 2019] was not complied with.

During the hearing, the Appellant who defended himself, did not have much to submit. He just expressed his confidence that this court will do justice, quash his conviction and set aside the sentence. On her side, Ms. Christine Joas, learned State Attorney who appeared for the Republic supported the conviction and sentence and proceeded to submit that the ground that the charge sheet was defective is with no merit as the charge sheet was in order having clearly stated all the relevant provisions. She also submitted that there was no contradictions in the testimony rendered by the prosecution witnesses and that, the victim who testified as PW1 clearly established that she had a love affair with the Appellant and the same was corroborated by the testimony of PW1, PW3, PW4 and PW5.

The learned State Attorney further argued that the appellant had an opportunity to controvert the testimonies of the prosecution witness through cross examination but he failed to do so which implies that their assertion against him was true. Regarding proof of penetration, Ms. Joas submitted that the same was proved through the testimony of PW2 as corroborated by the testimony of the doctor who examined her. With respect to the PF3 Ms. Joas did not dispute the assertion but she submitted that, even in the absence of this piece of evidence there was enough evidence to convict the Appellant and this includes the testimony of the victim which is the best evidence. On the compliance with section 127(2) of the Evidence Act, Ms.

Joas submitted that, even in the absence of *voire dire*, the testimony is admissible and if corroborated as in the instant case, it is sufficient to convict.

I have carefully considered the grounds of appeal, court records and the submission made by the learned state Attorney. There are three major procedural irregularities complained of by the appellant. The first is irregularity in the admission of PF3. I need not labor on this irregularity as it has been conceded by the Respondent Republic.

Regarding the second irregularity, section 231(1) of the Criminal Procedure Act, states that:

> 231(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right–
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> (a) to give evidence whether or not on oath or affirmation, on his own behalf; and
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> (b) to call witness in his defence,
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> and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and

shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those right."

The application of this provision and the consequences thereto has been a common subject. There are many authorities on this principle. They include the decisions of the Court of Appeal in **Richard Malima & 4 Others v R**, Criminal Appeal No 183 of 2010, Court of Appeal of Tanzania at Mwanza (unreported) and in ***Ndamashule Ndoshi V.R,*** Criminal Appeal No. 120 of 2005. In position has consistently been that the provision imposes a mandatory requirement in the court. In **Richard Malima v R** (supra), while interrogating the trial's courts failure to comply with the requirement above the Court of Appeal stated that:

"the appellants who are laypersons and unrepresented were not made aware of their rights pursuant to section 231 of the CPA. In the circumstances of this case, we think, the omission stated herein above occasioned a miscarriage of justice, since the appellants were not represented by an advocate and were not made aware of their rights. We think so because the appellants could have opted for any option among those stated therein if they were made aware of their rights. The problem is, they had no legal representation and worst enough

the trial court failed to comply with the requirements under section 231 of the CPA."

In conclusion, it held that:

"For that irregularity of non-compliance with section 231, we are of the view that all the proceedings appearing after the closure of the prosecution's case were null and void and vitiates all those proceedings, thereafter."

The record in the instant case reveal that contrary to the appelants complaint, the provision above was fully complied with. The Appellant was informed of his rights and in page 25 of the proceedings, he made his choices whereby he told the court that: "I will defend myself on oath; I will not call any witness." His complaint is therefore with no merit.

The third irregularity complained of is non-compliance with section 127(2) of the Evidence Act [cap 6 R.E. 2019]. It is a settled principle of law that for a person to be allowed to testify it must first be proved that he/she is capable of understanding the questions put to him/her and giving rational answers thereto. The age of the witness (tender age, extreme old age) and his mental wellbeing are used as determinants. When the witness is of tender age (of the age not more than 14 years (Section 127(5)), the law articulated in section 127(2) requires that his/her evidence should only be taken after

she/he has promised to tell the truth to the court and not to tell lies. It states that;

> (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 lies."

Interpreting the import of this section, the Court of Appeal in **Godfrey Wilson v R** Criminal Appeal No. 168 of 2018 held that,

> "section 127(2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/ she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age."

The Court had this to say regarding the consequences of failure to comply with the above provision:

> "In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence, the same has no evidential value. Since the crucial evidence of PWl is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction."

In the instant case the victim who testifies as PW2 was 14 years hence she required to be subjected to a *voire dire* test before her testimony could be admitted. To the contrary, page 12 of the proceedings reveals quite clearly that the requirement under section 127(2) was not complied with. As per the principle above stated, since her testimony was procedurally procured, it had no evidential value. Thus, there was to be corroborated by the testimonies of of PW1, PW3 and PW4 and PW5 more so because the testimonies of these witnesses were largely hearsay.

In conclusion, the cumulative effect of the failure to conduct *voire dire* examination before receiving the evidence of the complainant, and the shortcomings on the PF3, is that there was no evidence to warrant the conviction.

Accordingly, 1 allow the appeal and quash the convictions and set aside the sentence imposed. The appellant is to be forthwith released from custody unless otherwise lawfully held.

Dated at Dar es Salaam this 17th day of June 2020.

J.L. MASABO

JUDGE