IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

MUSOMA

CRIMINAL APPEAL 83 OF 2020

(Originating from Criminal Case No 87 of 2019 of the District Court of Musoma at Musoma)

JOSHUA S/O MALIMA MALIMA.....APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

30th November & 7th December, 2020

Kahyoza, J

The Republic alleged that **Joshua S/O Malima Malima,** (the appellant) did unlawfully have sexual intercourse with **YY** (not real name). **YY** also referred to as the victim was 15 years old girl. The appellant denied the charge. The trial court convicted the appellant and sentenced him to serve sentence of thirty years' custodial sentence.

Aggrieved with both conviction and sentence, the appellant petitioned to this Court with six grounds of appeal. The appellant's grounds of appeal raised the following issues-

1. Did the prosecution prove the age of the victim?
2. Was the trial court justified to rely on the evidence of the clinical officer (PW3) and the examination report as conclusive evidence to convict the appellant?
3. Was there corroboration?

4. Was the trial court justified to convict the appellant without the prosecution calling the arresting officer and the police who issued a PF. 3 to the victim?
5. Was the appellant wrongly convicted for the prosecution's failure to tender evidence that the victim was a student?
6. Did the trial court err to hold that the prosecution proved the case against the appellant?

A brief background is that: The police arraigned **Joshua S/O Malima Malima,** the appellant, before the District Court of Musoma at Musoma with the offence of rape contrary to section 130 (1) and (2) (e) and section 131 of the Penal Code, [Cap 16 R.E. 2019] (the **Penal Code**). It was alleged that the appellant on 9th day of July 2019 at Buira village within the District of Musoma in Mara Region, had carnal knowledge of a girl **YY** or the victim who was 15 years old.

The appellant pleaded not guilty to the charge. The prosecution lined up three witnesses namely **YY**, the victim (**PW1**), **Pw2 Mengi Juma,** the victim's father and **PW3** Willy Dishon, the doctor. The prosecution's case was that on the 8th July, 2019 **Pw2 Mengi Juma** came from his daily chores at 11.00 pm and found the victim absent. He searched the victim in all rooms and the following morning he inquired from his neighbors if they had seen her. Later that day, he got in formation that the victim was in the appellant's room. He arrested the victim and the appellant and took them to police station.

The victim admitted that she spent a night at the appellant's home. She deposed that he was the one who removed her hymen. **PW3** Willy Dishon examined the victim and found that the victim had no hymen and that she had been involved in sexual activities several times. **PW3** Willy Dishon remarked in the PF.3, exhibit "no hymen (**old perforation).**"

Both, the victim, **Pw1** and the victim's father, **Pw2 Mengi Juma** deposed that the victim was born on the 27th February,2004. Thus, she was 15 years old at the time of the alleged offence.

The appellant denied to rape the victim. However, during cross-examination the appellant deposed that he had carnal knowledge with the victim only once and she was not virgin. She had previously made love with other men.

It is against the above back ground, I consider the evidence of both sides.

Did the prosecution prove the age of the victim?

The appellant complained that the prosecution did not tender the victim's birth certificate to establish her age. He did not expound this ground of appeal.

Mr. Peter Ilole, the respondent's state attorney replied that there was enough evidence to establish the victim's age. He submitted that the victim and her father described the victim's birth date.

It is settled that the **evidence of a parent is better than that of a medical Doctor as regards the parent's evidence on the child's age.** See the decision of the Court of Appeal in **Edson Simon**

Mwombeki v. Republic, Criminal Appeal No. 94 of 2016 (unreported) where the Court quoted the observation in its previous unreported decision in **Edward Joseph v. Republic**, Criminal Appeal No. 19 of 2009. The victim's father proved the age of the victim that she was 15years old, born on the 25th February, 2004. I find that the victim's age was proved.

In addition, the record shows that the victim's age was not an issue during trial. The appellant did not cross-examine the victim or victim's father regarding the victim's age. In **Ismail Ally V. Republic**, Criminal Appeal No. 212 of 2016 (unreported) the Court of Appeal considered a complaint as to the victim's age raised by the appellant convicted of rape during his appeal and observed-

> *"the complainant's age was not raised during trial. It is also glaringly clear that the appellant did not cross examine PW1, PW2 and PW3 on that paint. Therefore, raising it at the level of appeal is an afterthought - See the cases of* ***Edward Joseph v. Republic****, Criminal Appeal No. 272 of 2009,* ***Damian Ruhele v. Republic****, Criminal Appeal No. 501 of 2007,* ***Nyerere Nyegue v. Republic****, Criminal Appeal No. 67 of 2010, and* ***George Maili Kemboge v. Republic****, Criminal Appeal No. 327 of 2013, CAT (all unreported)".*

I find no merit in the first ground of appeal. I dismiss it.

Was the trial court justified to rely on the evidence of the clinical officer (PW3) and the examination report as conclusive evidence to convict the appellant?

The appellant complained that the trial court erred to rely on the

evidence of the clinical officer (PW3) and the examination report as conclusive evidence to convict him.

The state attorney opposed the ground of appeal on the ground that the medical doctor gave evidence and tendered Exh. P. 1 explaining what he observed.

It is true that **Pw3 Willy Dishon** deposed that he examined the victim and found that she had no hymen. **PW3** Willy Dishon did not find that the victim was raped. He established that she had no hymen, a situation he described, as **old perforation**. I examined at the Ex. P.1 and found that the trial did not admit it properly. After Exh. P. 1 was cleared for admission; the trial court failed to read or to call upon **PW3** Willy Dishon to read its content to the appellant.

It is now settled that failure to read out the exhibit after admission in court constituted a fatal irregularity. See the Court of Appeal decision in **Manje Yohana & Another v. R** Criminal Appeal No. 147/ 2016. In that case, the trial court admitted the valuation of report without the same being read over to the accused. The CAT held that-

> *"Given the plethora of authorities failure to read out the exhibit after admission in court constituted a fatal irregularity. It should be expunged."*

It is fatally defective for the trial court after admitting Ex.P.1 to fail to read it to the appellant. I expunge it.

The remaining evidence is that of the doctor. The doctor explained how he examined and the victim and what he found out. I find that doctor's evidence was that the victim was not a virgin. He did

not state that she was raped. It is not true that the court convicted the appellant basing on the evidence of the doctor only. There was other evidence. The doctor's evidence could not prove that the victim was raped by the appellant. I find no merit in the appellant's second ground of appeal.

Was there corroboration?

The appellant stated in the third ground of appeal that the trial court reached a wrong decision on relying on the uncorroborated evidence.

The state attorney replied that the victim's evidence was corroborate by the evidence of the victim's father and the doctor's evidence.

It settled that in sexual offences the best evidence comes from the victim. The position was stated in the case of **Selemani Mkumba v. R**. [2006] T.L.R. 23. In the case at hand, the victim was more or less an accomplice. **Pw2 Mengi Juma** found her daughter missing from home at 11:00 pm. He managed to trace her on the following day and arrested both the victim and the appellant. He took them to police station. I passionately considered the evidence of the prosecution's principal witnesses who are the vitim and her father, **Pw2 Mengi Juma.** I start with the victim's evidence. I wish to state at the outset that the evidence of the victim was to be treated with care. **PW3** Willy Dishon deposed that that the victim had no hymen (old perforation). **PW3** Willy Dishon meant there was no traces that the victim was recently penetrated or that she was her hymen was removed recently

before he examined her. The victim's evidence was that the appellant raped her and removed her hymen, causing her pains and bleeding. The victim's evidence and that of **PW3** Willy Dishon contradicted each other.

Pw2 Mengi Juma deposed that the victim was found in the appellant's room. He added that he arrested the appellant in the presence of the village executive officer. It is astonishing, why did the prosecution not call the village executive office to testify. I am alive of the position of the law that in terms of section 143 of the **Evidence Act**, [Cap 6 R.E. 2019], there is no specific number of witnesses required to prove any fact. The number of witnesses does not matter but the quality or credibility of the witness. See **Yohanes Msigwa v R** (1990) TLR 148. What is important is the quality of the evidence and not the numerical value. However, in the case at hand the village executive officer was an important witness to be summoned. In the absence of the evidence of village executive officer and given the nature of the evidence **PW3** Willy Dishon that the victim *had been involved in making love for long time*, the appellant's defence that he was framed up cannot be overruled.

There is no doubt that the appellant had had sex with the appellant at one time but there is no evidence that he had sex with her on the alleged date. The appellant admitted during cross-examination that he had once made love with the victim and that she was not virgin. The victim told the court that the appellant removed her virginity and that it was painful experience. Had that been the case, **PW3** Willy

Dishon would have noticed the victim was penetrated as result, her hymen raptured. It was not the case. **PW3** Willy Dishon observed that the victim had experience. I am not saying that a girl who had sexual activities cannot be raped no not all am saying the contradiction raises doubt if the victim and her father told the truth. There a great chance that the case was fabricated.

I find reasonable doubt in mind why did the prosecution and call any other person in addition to the victim and the victim's father.

I find reason doubt whether the victim was raped on the material date. I am alive of the fact that since the victim is a girl below 18 years. In such cases, the offence of rape is established by proving penetration and the age of the victim. It is immaterial if the victim consented or not. Section 130 (1) and 2(e) stipulates that-

> *130.-(1) It is an offence for a male person to rape a girl or a woman.*
> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(a) .....;*
> *(b) .....;*
> *(c) .....;*
> *(d) .....;*
> *(e)* ***with or without her consent when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

On one hand the evidence of the doctor proved that the victim was long penetrated. On the other hand, the victim's evidence was that the appellant raped her causing her hymen to rapture. She added that

she bled in pain. Amid such contradictory evidence, I find reasonable doubt and resolve it in favour of the appellant.

The state attorney desisted to reply to the fourth, fifth and six grounds of appeal and submitted that the trial court did not comply with section 231 of the **Criminal Procedure Act**, [Cap. 20 R.E. 2019] (the CPA).

The appellant did not comment on this issue.

I examined the record. Indeed, I cannot tell whether or not the trial magistrate did comply with mandatory provisions o f s. 231 (1) of the CPA. I resolve the doubt in favour of the appellant, that the trial court did not comply with the dictates of section 231 (1) of the CPA. It is trite law that failure to comply with the mandatory provisions o f s. 231 (1) of the CPA vitiates subsequent proceedings. See **Maneno Mussa v. Republic** www.tanzlii.org [2018] TZCA 242 where the Court of Appeal *observed that-*

> *"non-compliance with s. 231* ***(1) of the CPA which safeguards the rights an accused person to a fair trial, is a fatal omission."***

In the upshot, I find the proceedings a nullity and quash the proceedings and set aside the sentence. That done, the task is whether I should order a retrial. In **Fatehali Manji v R** [1966] EA341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

> *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its*

evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

Given the nature of the evidence on record and the fact that there are discrepancies in the prosecution's case, to order retrial would be to give the prosecution a chance to rectify the errors or fill in the gaps I have identified in its evidence. It is settled that retrial should not be ordered to give a chance to the prosecution to rectify the errors. I will not order retrial.

After quashing the proceedings and setting aside the sentence, I order the appellant's immediate release from the prison unless held there for any other lawful cause.

It is ordered accordingly.

J. R. Kahyoza
JUDGE
7/12/2020

Court: Judgment delivered in the presence of the appellant and Mr. Temba S/A via video link. B/C Catherine Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza, J.
7/12/2020