IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 72 OF 2019

(Appeal from the Judgment of the District Court of Bukombe at Bukombe (Selemani, RM) Dated 13th of April, 2018 in Criminal Case No. 256 of 2017

COSMAS S/O HERMAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of the last order: 25.03.2020

Date of Judgment: 15.04.2020

JUDGMENT

M.K. ISMAIL, J

The appellant was arraigned in court and convicted of the offence of rape, contrary to ***sections 130 (1) (2) (e)*** and ***131 (1)*** of the Penal Code, Cap. 16 R.E. 2002. In consequence of the conviction, he was sentenced to imprisonment for a term of thirty (30) years.

Brief facts of the matter are to the effect that, at around 05.25 hours on 19th April, 2017, at Msasa village in Bukombe District, within Geita region, the appellant called ABC (in pseudonym), the victim then aged 13 years of age, and enticed her into his room where he unlawfully had carnal knowledge of her. After he finished, he promised the victim a hand out amounting to TZS. 2,000/= which he never gave out. The victim's abrupt and long absence from home on that fateful day drew a panic and suspicion from her father who decided to carry out a search that successfully located her. On interrogation, she revealed that she had just come from the appellant's house where she had been raped. This news enraged the victim's father (PW2). He reported the matter to the village chairman and the latter apprehended the appellant and took him to the police station. It was alleged that the appellant confessed to the alleged offence. The victim was given a PF3 that enabled her to undergo a medical examination which revealed that the victim had been raped.

The appellant was arraigned in court where he was convicted and sentenced. The decision was not to the appellant's

liking, hence the decision to prefer this appeal, carrying seven grounds of appeal. These are: ***One***, that the trial court erred in law and fact by convicting the appellant while the prosecution had not proved the case beyond reasonable doubt; t***wo***, that evidence of the victim, a child of tender age, was taken without conducting a *voire dire* test; t***hree***, that the principle of *res gestae* was not considered by the trial court when the prosecution adduced its testimony; ***four***, that no evidence was adduced to prove that the victim was a student of Msaki Primary School; ***five***, that the trial court erred in law and fact for admitting evidence on a confession knowing that the same was involuntarily procured; ***six***, that the trial court erred in law and fact by making a decision which was influenced by malice; and ***seven***, that oral evidence given by PW1 to the effect that the appellant was circumcised was wrong.

When the matter was called for hearing, the appellant prosecuted the appeal on his own, whereas Ms. Gisela Alex, learned State Attorney, represented the respondent. Cognizant of the fact that the appellant is a lay person who enjoyed no legal

representation, I guided that the counsel for the respondent should have the first opportunity to submit on the grounds of appeal ahead of the appellant. This guidance was acceded to by the parties.

Ms. Alex began setting the ball rolling by expressing her unreserved endorsement of the conviction and sentence passed by the trial court. She urged the Court to uphold the trial court's decision.

She began her submission by tackling ***ground two*** of the appeal in which the appellant decried what he contends to be failure by the trial court to conduct a *voire dire test*. Ms. Alex contended that *voire dire test* was conducted on 26th October, 2017. She was quick to submit, however, that the test was conducted while the requirement had been dispensed with, following the amendment of ***section 127*** (2) of the Evidence Act, Cap. 6 [R.E. 2002], vide Act. No. 4 of 2016. Ms. Alex submitted further that this position is supported by the Court of Appeal's decision in ***Selemani Moses Sotel @ White v. Republic***, CAT-Criminal Appeal No.385 of 2018 (unreported). She held the view that, since the test

confirmed that the witness knew that she had a duty not to tell lies, it should be taken that the purpose for which the amendment to the law was made has been met through the *voire dire test,* and that the Court should expunge the procedure and let the testimony stand, because the witness promised to tell the truth and no lies. She bolstered her argument by submitting that the anomaly was of trifling effect and has not occasioned any miscarriage of justice to the parties. She urged the Court to dismiss this ground of appeal.

With respect to ***ground one*** of the appeal, Ms. Alex held the view that the prosecution had already proved its case beyond reasonable doubt. She singled out the testimony of PW1 which she contended that it laid bare everything about what the appellant did. She cited the case of ***Shija Misalaba v. Republic***, CAT-Criminal Appeal No. 206 of 2011 (unreported); and ***Selemani Makumba v. Republic***, CAT-Criminal Appeal No. 94 of 1999 (unreported). The learned counsel further argued that the testimony of PW1 was corroborated by ***exhibit P1*** (PF3) which established that the victim had been raped. The counsel conceded that exhibit P1 was not read. She quickly discounted that error and submitted that, since

the appellant did not raise an objection in respect thereof or cross-examined on that aspect, he was contented with it and it cannot be the basis for faulting the trial court's decision.

As regards ***ground three***, the learned attorney chose not to submit on this. She simply rubbished and termed it utterly baseless.

In respect of ***ground four***, Ms. Alex admitted that there is no evidence that PW1 was a student. She submitted, however, that the charge falls under ***section 130 (1) (2) (e)*** of the Penal Code which is about statutory rape involving a victim whose age is under 18 years of age. She was of the firm contention that the requirement under this provision is to prove age and whether the intercourse was consented to, and not whether the victim was in school. In this connection, the learned counsel contended that the victim stated that she was 13 years of age, meaning that the rape incident committed against the victim was, on account of age, a statutory rape. She held the view that this ground is gibberish.

Submitting on ***ground five***, the respondent's counsel contended that in none of the proceedings was the confessional

statement admitted or used as part of the evidence. She held the view that this ground too is devoid of any merit. Equally dismissed is ***ground six*** in respect of which Ms. Alex held the view that it is not supported by anything. On the contrary, she argued, the trial court based its decision on the evidence tendered during trial.

Finally on ***ground seven***, Ms. Alex argued that proof of the case did not require taking the path of establishing if the appellant was circumcised or not. She urged the Court to hold that this ground of appeal is barren and be dismissed.

On the whole, Ms. Alex held the view that the appeal is not meritorious. She reiterated her plea that the same be dismissed in its entirety.

The appellant was expectedly terse in his submission. Maintaining that he is innocent, he prayed that his appeal be allowed, as there was no evidence to prove that the victim was a class four pupil at Msaki Primary School or at all. Furthermore, the appellant reiterated his rallying call that the trial court strayed into

error when it bought the victim's testimony that he is circumcised while in fact he was not.

Punching further holes in the victim's testimony, the appellant queried as to how she would move to his house while he allegedly resisted the appellant's previous advances on the ground that she was a student. He denied that he, at any point prior to his arraignment in court, confessed to the offence. He contended that he maintained his innocence throughout, even before he was arraigned in court. He urged the Court to allow his appeal and order his release from prison.

After being treated to these rival submissions, my task is to consider the merits or other wise of the appeal, and the grand question is whether the appeal presents any credible and compelling case for departing from the view taken by the trial court. Disposal of the appeal will take the same pattern as that adopted by the counsel for the respondent.

The contention in ***ground one*** revolves around whether a *voire dire* test was conducted and the impact that it would have to the

proceedings. While the appellant contends that this process was spurned by the trial court, leading to an injustice on the appellant's part, the respondent takes the view that this procedure was followed. The respondent's further contention is that, though *voire dire* was carried out, the legal requirement did not demand that the same be carried out. I agree with Ms. Alex that subsequent to amendment of ***section 127*** of the Evidence Act (supra) through ***section 26*** of the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016, the requirement of *voire dire,* as hitherto enshrined under ***section 127 (2) and (3)*** of the Evidence Act (supra), has been dispensed with. The new dispensation provides as follows:

> *"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 tell lies."***

This means that the witness of tender age's role is, hence forth, only limited to giving a promise of telling the truth and no lies.

This position has been underscored by the Court of Appeal in several of its decisions, including the ***Selemani Moses Sotel @ White***

(supra). In ***Msiba Leonard Mchere Kumwaga v. Republic***, CAT-Criminal Appeal No. 550 of 2015 (unreported). It was held:

> *"... Before dealing with the matters before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act).* ***Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies.***"

It follows, therefore, that non-compliance with this defunct position does not constitute an irregularity as contended by the appellant or at all.

While this is the position in the new set up, the question is, was this new requirement fulfilled in this case? The quest for answer to this question took me to page 8 of the trial typed proceedings in which PW1's testimony is recorded. Noting that the victim was of a tender age of 13 years, the trial magistrate conducted a *voire dire* test on her. The relevant portion of the proceedings reads as follows:

> *"Date: 26/10/2017*
>
> *Coram: V.M. Selemani [RM]*
>
> *PP: A/Insp. Neema*

Accused: Present

B/C: Kisanga

Pros: *For hg. I have three witnesses I pray to proceed.*

Court: *Prosecution case opens.*

Voire dire.

PW1 Asia Jafati is (sic) I am a student of Msasa standard four I don't know the meaning of oath. I know the duty of telling the truth lying is a sin before god.

That's all."

From this excerpt, the obvious conclusion is that the trial magistrate preferred an abolished and inapplicable process to the new requirement brought about by the amendment of the law which was in force at the time of conducting the proceedings. Now, can this be considered to be a fundamental flaw? If so, what does it portend?

As stated earlier on, under the new procedure, the victim, PW1, was simply required to make a promise to tell the truth and not to tell lies. While this is a lesser burden than the abolished requirement of conducting the test which would gauge possession of intelligence of the child, both of these processes are intended to

ensure that evidence of the child of tender age is free from any possible misrepresentation of the factual account. They are both a guard against permeation of lies in the testimony. Matters would be different if the witness had not undergone the test under the abolished requirement or made the promise under the new dispensation. In either of the cases, the net effect would be to render the evidence inadmissible and, therefore, liable to having it expunged. The fact that the intended objective was met through this 'invalid' procedure brings an honest feeling to me that the process in the *voire dire* test equates to promising to tell the truth under the new dispensation. Thus, while the procedure may be irregular, the intended objective was achieved. My finding is fortified by the fact that while the amendment did away with *voire dire* test, the new position did not provide a guidance on how one would get to promise to tell truth and not lies. The Background to the amendment or the introduced amending provision would provide the ***"how"***. This explains why the Court of Appeal came up with possible questions which would be relevant to pose to the witness before a conclusion is drawn that a promise has been extracted

from the witness (see: ***Godfrey Wilson v. Republic***, Criminal Appeal No. 168 of 2018 (unreported)).That is not the case here and, in my view, this spares the testimony of PW1 from any blemishes. Accordingly, I join hands with the respondent and hold that this ground of appeal is barren of fruits. I reject it out of hand.

Reverting to ***ground one*** of the appeal, the appellant's contention, which is fervently opposed by the respondent is that the prosecution did not prove its case beyond reasonable doubt. The counsel for the respondent has relied on the testimony of PW1, the victim, to vindicate the trial magistrate's decision to convict the appellant of the offence of rape. Her contention is that in rape cases, the evidence of a victim of the incident is the best evidence. I fully subscribe to this reasoning, and this and the Court of Appeal have held so in a multitude of decisions some of which are the ***Shija Misalaba*** and ***Selemani Makumba***, cited by the counsel for the respondent.

The position in ***Shija Misalaba*** was adopted from several previous decisions of the Court of Appeal. In ***Bakari Hamisi v.***

Republic, CAT-Criminal Appeal No. 172 of 2005 (unreported) the superior Court held:

> *".... Conviction may be founded on the evidence of the victim of rape if the Court believes for the reasons to be recorded that the victim witness is telling nothing but the truth."*

A similar position was propounded in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported) in which it was stated:

> *"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

See also: ***Kalebi Elisamehet v. The D.P.P.,*** CAT-Criminal Appeal No. 315 of 2009(unreported); ***Selemani Makunge v Republic***, CAT-Criminal Appeal No. 94 of 1999 (unreported); *and* ***Ramadhani Samo v Republic***, CAT-Criminal Appeal No. 17 of 2008 (unreported).

A thorough evaluation of the evidence of PW1, as corroborated by the testimony of PW2, PW3 and PW5, left no shred of doubt in the mind of the trial magistrate and in my mind now, that it is the appellant, and none else, who perpetrated the rape

incident against the victim. I find nothing faulty in this reasoning and conclusion. In evaluating the prosecution evidence, one thing crops in my mind. This is in respect of the treatment of ***exhibit P1***, the PF3 which was tendered and admitted through PW5. Proceedings in respect thereof feature at page 18 of the typed proceedings at which the said exhibit was tendered and admitted as evidence. As conceded by the counsel for the respondent, this piece of evidence was not read by PW5 who tendered it in court. The question that follows is: with this undisputed fact, what do we make of the omission by the trial court? Ms. Alex's contention is that nothing untoward can be said of this anomaly because the appellant neither objected to that nor did he cross-examine when he was given a chance to do so. I find this contention failing to resonate with me. The legal position, as it currently obtains, is to the effect that such failure constitutes a horrendous omission whose consequence is colossal.

In ***Sprian Justine Tarimo v Republic***, CAT-Criminal Appeal No. 226 of 2007 (unreported), the Court of Appeal held as follows:

> *"Another fatal flaw is that the contents of Exhibit P1 were not even read out to the appellant. So the appellant was convicted on the basis of evidence he was not made aware of although he was always in court throughout his trial. In our settled view, these two serious omissions which, unfortunately, escaped the attention of the learned first appellate judge,* ***wholly vitiated the evidential value of the PF 3. We shall accordingly discount it in our judgment.***

In the end, the superior Court expunged the testimony. I find myself profoundly compelled to follow the path taken in the cited case. I order expunging of ***exhibit P1*** from the evidence adduced in court. Obliteration of this testimony does not take away the fact that PW5 gave a substance of what she observed when she examined PW1, and this testimony has meticulously corroborated the evidence of PW1 and to a great effect. Such testimony has tightly knitted the prosecution's evidence and, in my view, the totality of this testimony has sufficiently proved the appellant's culpability. Consequently, I hold that this ground is hollow and I dismiss it.

The appellant's third ground of appeal faults the trial court for not considering the *Res Gestae Rule* when the prosecution

adduced its evidence. This ground of appeal was not canvassed by the parties in their submissions. This act of avoidance left Court with no material on which to base its decision.

It is worth of a note, that the *Res Gestae* principle derives its root from a Latin Word which means ***"things done"***. This is the rule of law of evidence and is an exception to hearsay rule of evidence which is to the effect that hearsay evidence is not admissible. It is a spontaneous declaration made by a person immediately after an event and before the mind has opportunity to conjure a false story. In our legal system, this principle was brought to light through an English case of ***Teper v. Reginam*** [1952] 2 All ER 447, 449; [1952] AC 480. Lord Normand had the following observation:

> *"Nevertheless the rule (Hearsay) admits of certain carefully safe-guarded and limited exceptions, one of which is that words may be proved when they form part of res gestae ... It appears to rest ultimately on two propositions - that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and disassociation of the words from the action would impede the discovery of truth."*

In the subsequent decision of ***Ratten v. Queen*** [1971] 3 All ER 801, the Privy Council which dealt with admissibility of the statement of a telephone operator who received a call from the deceased minutes before she was allegedly murdered by her husband, characterized the statement as original evidence of 'verbal facts', as opposed to hearsay evidence, as the object of admitting the statement was not to establish the truth of the statement made, but merely to establish the fact that it was made.

See also: ***R. v. Premji Kurji***, (1940) 7 EACA 58; ***Makindi v. R*** [1961] EA 327; and ***Oriental Fire and General Assurance Ltd v. Govenda and Others*** [1969] EA 116.

This principle is covered in the Evidence Act (ss. 4-15). Thus, while the principle is known and well entrenched in our legal system, the gravamen of the appellant's complaint is not clear and nothing convinces me that the trial court was supposed, in the circumstances of this case, to take cognizance of this principle and it failed. Nothing has been stated either, that failure to consider that principle occasioned an injustice on the part of the appellant. In

view thereof, I choose to shrug off this contention and dismiss this ground of appeal.

The next battleground in this appeal is in respect of ***ground four*** of the appeal. In this ground, the complaint is that no evidence was led in the trial court to prove that the victim was a student at Msasa Primary School. This contention has been slammed by the counsel for the respondent and I associate myself with her contention. Looking at the charge sheet which was laid at the appellant's door, we gather that the allegation leveled is having an unlawful carnal knowledge of the victim, a girl of 13 years. That the victim was a student at Msasa or any other school was not a bone of contention in the trial proceedings. Neither is it a requirement in proving an offence of rape. Since this was not a disputed fact or an ingredient of the offence with which the appellant was charged, proof of that fact was a needless requirement. I find this ground hogwash and I am not persuaded to allow it.

Equally gibberish are ***grounds five*** and ***six*** of appeal in which the appellant's complaint is that the prosecution relied on an

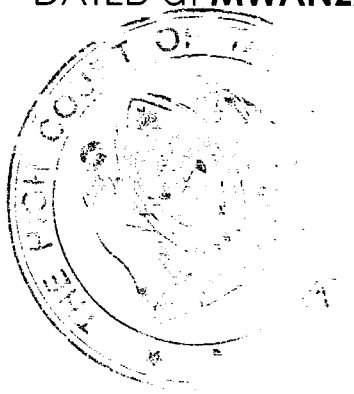
involuntarily procured confession, and that the decision was arrived at with malice. No semblance of a submission has been given to give credence to this reckless contention. Nowhere in the proceedings or impugned judgment has the appellant's confession been cited or used as the basis for the decision. Infact, none was adduced during the trial. I see no reason to detain myself on allegations which are unsupportable. I dismiss these grounds as well.

Finally, the appellant decried the trial court's acceptance of the testimony of PW1 that the appellant is circumcised while in fact he is not. This contention took me to the impugned judgment. At page 2 of the judgment, the trial magistrate recorded the testimony of PW1 in which she testified that the accused entered her without using a condom and that his manhood was circumcised. This testimony did not feature anywhere in the analysis of evidence and eventual deliberation that culminated in the decision which convicted the appellant. It is highly disingenuous to contend that this fact swayed the decision of the trial court. I find this ground baseless and deserving nothing except an outright dismissal.

In the upshot, I dismiss the appeal and uphold the conviction and the sentence.

It is ordered accordingly.

DATED at **MWANZA** this 15th day of April, 2020.



M.K. ISMAIL

JUDGE

Date: 15/04/2020

Coram: Hon. J. M. Karayemaha, DR

Appellant: Present

Respondent: Ms. Gisela Alex, State Attorney

B/C: Leonard

Ms.Gisela:

Your Honour, this matter is coming for judgment. I am ready to receive it.

Appellant:

I am ready for judgment.

Court:

1. Delivered under my hand and Seal of the Court this 15th April, 2020 in the presence of both parties.
2. Right of Appeal fully explained.

J. M. Karayemaha
DEPUTY REGISTRAR

At Mwanza

15th April, 2020