IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 303 OF 2019

DENIS JOSEPH@SAA MOJA.......................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Arising from the decision of the District Court of Mkuranga at Mkuranga)

(Kinyage, Esq- RM)

Dated 10th July 2019

in

Criminal Appeal No. 121 of 2018

JUDGEMENT

27th November 2020 & 5th February 2021

AK. Rwizile, J

The appellant is appealing against conviction and sentence of 30 years imposed on him by the District Court of Mkuranga. It happened that in the year 2018, the appellant was arraigned on two counts of rape contrary to

section 130(1) and (2) (e) of the Penal Code as first count and was charged on the second count of committing an unnatural offence contrary to section 154(1)(a) of the Penal code. Upon conviction on both counts, the appellant was sentenced to a concurrent sentence of 30 years imprisonment. He was aggrieved by the decision. He has appealed to this court and so advanced six grounds of appeal.

i. That the learned trial magistrate erred in law in convicting the appellant by disregarding the variation of evidence and the charge on when the offence occurred
ii. That the learned trial magistrate erred both in law and fact in convicting the appellant on the first count based on the defective charge with none existent punishment section for the offence of rape
iii. That the learned trail magistrate grossly erred in embracing the evidence of Pw1 and Pw4 whose evidence did not comply with section 210(3) of the CPA, which is a fatal illegality.
iv. That the learned trial magistrate erred in acting on the defective charge with no sufficient particulars to enable him make his defence
v. That the learned trial magistrate erred in law and fact by convicting the appellant based inconsistent, weak, unreliable and uncorroborated evidence adduced by the prosecution witnesses.
vi. That the learned trial magistrate erred both in law and fact by convicting the appellant on the offence which was not proved beyond reasonable doubt.

The appellant appeared before this court via video-linkup form the prison he has been held and had no representation.

He asked this court to act on the memorandum of appeal. The respondent being represented by MS Masue learned State Attorney supported the conviction. She resisted this appeal by submitting together grounds 1,2 and 4. It was her submission that after having gone through the records there is no truth in the said grounds of appeal. She went on arguing that there are no defects in the charge, proceedings and judgement of the trial court, that cannot be cured under section 388 of the CPA. She asked this court to dismiss this appeal.

The learned Attorney argued the 3rd ground of appeal that there was compliance to section 210 of the CPA. She was clear that even if it is held that the evidence of Pw1 and Pw4 conflicted with section 210(3), still the remaining evidence taken singly, may found conviction under section 127(7) of Evidence Act. His view was that, the best evidence in a sexual offence is that of the victim as held in the case of **Seleman Matumba vs R** [2006] TLR 379. Here she was referring to the evidence of Pw2, the victim who the court believed was the witness of truth.

She also argued grounds 5 and 6 together. It was her view that Pw2 proved was penetrated her anus and vagina. According to her, Pw2 was vivid in penetration at page 11 and 12 of the typed proceeding. The learned Attorney asked this court to hold that evidence of Pw2 and Pw3 on crucial issues of penetration by a blunt object proved the charge beyond reasonable doubt. I was therefore asked to dismiss this appeal.

When given a chance to rejoin, the appellant was of the view that the trial court committed injustices. He said, he spent 8 days with the victim's father and ultimately found himself in jail. He asked, this appeal be allowed.

Tackling grounds of appeal will be done by taking the 1st, 2nd and 4th grounds of appeal together. In these grounds, the appellant complained that there is variance between the charge and evidence on when the offence occurred. According to the charge sheet, the appellant is alleged to have committed offences on the dates not known but in the month of June 2018. It is clearly shown in evidence that there is no witness who exactly knowns the day the offence was committed. Pw2, the victim was of the evidence that she was raped and sodomised twice in different occasions. On the first time she was from fetching water. While on the second, she was going to attend church service. The third attempt according to her, failed because the appellants wife interrupted as she was about to be pulled into the house. Therefore, it is true of the charge as well as evidence, that the date when the offence was committed is not known.

It has been submitted by the respondent that there is no such variance between the charge and the evidence. The point to be discussed here should be, if indeed the offences were committed and there is no date specified, how does that affect the trial. In my view, the defect of the charge may come by in two ways, defects that are incurable and those which can be cured. The incurable defect is that kind of defect as to affect the substance of the charge necessary for the accused to be unable to prepare his defence. But other defects may be taken as curable.

In the case at hand, the victim, is a girl of 10 years. Based on her age, she is not expected to be exact on the date the incidence happened. What is important is for her evidence to disclose the essential elements that constitute the offence charged. I therefore agree with the finding that no incurable defect in the charge. The appellant did not, neither the evidence itself that showed the said variation. Section 388 of the CPA as submitted, by the learned State Attorney cures the mischief. It categorically states thus;

> *388.-(1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable*.

Based on the strength of the evidence and the provision of the law. I hereby find the 1st, 2nd and 4th grounds of appeal are without merit. Determination of grounds, 1, 2 and 4 takes me to grounds 3.

In this, the appellant complains about the evidence of Pw1 and Pw4 being taken in total disregard of section 210(3) of the CPA. The law is clear and it does not need efforts to agree with the appellant. The section not complied with states thus;

210.-(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner-

(2)…………

(3) The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence

It is categorical that the evidence by Pw1 and Pw4 did not comply with the law. It is so because there is no indication in the proceeding showing the witnesses were given the option stated by the law. If that was done, then the learned trial magistrate did not record compliance of the section. Unlike evidence of other witnesses, the trial learned Magistrate noted compliance of section 210(3). It has been the case in the subordinate courts, where this provision applies, to show in record that at least the same has been complied with. This has the bearing in ensuring a fair trial. The witness cannot at the end of the day or whoever is aggrieved by evidence of a particular witness to complain that it was not taken properly. There no dispute from the respondent about it. I therefore hold that since the appellant has complained about it and there is truth in the same that it was not read to the witnesses, I will disregard the same, even if I do not see if the same prejudiced the appellant. I therefore see merit in the 3rd ground of appeal.

The remaining two grounds of appeal, I think should be dealt with together. The appellant has complained about the inconsistences and unreliability of the evidence that was not corroborated and that did not prove the charge beyond reasonable doubt. The appellant as I have shown before did not offer any tangible clue on the allegation. On party of the respondent, Masue's view was that evidence of Pw2 and Pw3 was straight forward on crucial issues. She stated that penetration was on both, the vagina and anus.

In my considering of evidence, it has been shown that Pw2 was abused twice by the appellant. Her evidence was believed by the trial court. I, have securitized the same with health eyes. It is important to note, corroborative evidence may come from the witnesses other than the victim or may come from the defence. The prosecution in this case paraded five witnesses. The evidence of Pw1 and Pw4 has been disregarded for none compliance of the law. The respondent submitted that the rest of the evidence especially that of Pw2 has to be as much as it was believed by the trial court, found conviction under section 127(7) of Evidence Act. Pw2 was of the evidence that she was raped twice and sodomized ones. She gave a detailed evidence on how these sad events happened. She was recorded by the trial court to have cried when narrating the ordeal. She has been consistent in material issues.

Pw3 and Pw5 were in support of some important facts about her story. Pw3 for instance testified and tendered a PF-3. It was admitted as P1 but not read in court. But Pw3 consistently referred to the content of the same and the way he examined her. It was the view of Pw3 that she had been with a raptured hymen and her anus enlarged beyond normal compared to her age.

This suggest and indeed so, that Pw2 was raped and sodomized. Pw3 and Pw5 also gave evidence connecting the incident with her evidence. This clearly shows, Pw2 had been consistent and credible as the trial court believed.

The respondent submitted that evidence of the victim under section 127(7) of the evidence Act may stand alone to found conviction. I agree with the same assertion. But still in this case, there is evidence that corroborates Pw2. Consistence in evidence has something to do with credibility. That is and perhaps I have to hold that Pw2 was consistent and credible. Her evidence was supported by that of Pw3 and Pw5. I therefore find no merit in both 5th and 6th grounds of appeal. In its entirety, this appeal has no merit. It is dismissed.

A.K. Rwizile

JUDGE
05.02.2021

Signed by: A.K.RWIZILE