IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

CRIMINAL APPEAL No. 37 OF 2020

(C/F Criminal Case No. 176 of 2018 District Court of Rombo at Rombo)

ABDUL AKWILINI MRAMBA ..... 1ST APPELLANT

ANANIA DOMINIC MASSAWE @ CHADOGI ..... 2ND APPELLANT

OTTO PETER MUSHI ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

21st December, 2020 & 12th March, 2021

JUDGMENT

MKAPA, J.

The appellants were arraigned before the District Court of Rombo at Rombo (the trial court) in Criminal Case No. 37 of 2020 on three counts of Rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code,** Cap 16, R.E. 2002 (Penal Code). It was alleged that on the unknown date and time in the month of May 2018, at Aleni Chini Village within Rombo district in Kilimanjaro region, the appellants had unlawful carnal known one "**AF**", the victim (true identity hidden) a girl aged 12.

At the trial court, the respondent called five witnesses named PW1, the teacher, PW2, **"AF"** the victim, PW3, medical doctor who also tendered PF3 which was admitted as Exhibit P1. Other witnesses were PW4, a Police Officer and PW5, a resident of Aleni. The defence paraded three witnesses, the 1st appellant as DW1, the 2nd appellant as DW2 and 3rd appellant as DW3.

The actual facts of the case is to the effect that while **"AF"** was in standard one or two the 3rd appellant alone used to rape her at different occasions. That she informed her grandmother who warned the 3rd appellant but he continued raping and sodomizing her at his house. Later, the 3rd appellant started to jointly rape and sodomize **"AF"** and her sister one **'HP'** and invited the 1st and 2nd appellants to rape and sodomize the two sisters in turn. It was not until June 2018 when the grandmother reported the ordeal to the school authorities.

"AF" and her sister "HP" narrated the ordeal to PW1 and mentioned a total of seven men (appellants inclusive) involved in sexually abusing them for more than four years. Later PW1 reported to police and appellants were arrested and brought before the court. Other suspects are still at large to date.

In their sworn defence, all appellants denied to have committed the offence alleging that that PW2 had mentioned them because

she happened to know them. In the end, the trial magistrate was satisfied that the prosecution had proved its case to the required standard, convicted and sentenced the appellant to serve thirty (30) years imprisonmet. Aggrieved, the appellant preferred this appeal on the following seven grounds;

1. That, the trial magistrate grossly erred in law and fact in recording the evidence of PW2 (the victim) a child of tender years without examining her as required by the Evidence Act.
2. That, the trial magistrate erred in law and fact in failing to adhere to the mandatory requirement of section 210 of the Criminal Procedure Act, Cap 20 R.E. 2002.
3. That the trial magistrate erred in fact and in law in not assessing and analysing the evidence of PW2 (the victim) which was uncorroborated by her sister who was not summoned to testify.
4. That, the trial magistrate erred in law and fact in holding that, the victim was speaking nothing but the truth despite the fact that for 3 years the grandmother withheld the information and she was never summoned to testify.
5. That, the trial magistrate erred in law and fact in believing the evidence of PW3 (the Doctor) who was inconsistent on whether he examined one or two girls.

6. That, the trial magistrate erred in law and fact in not being specific on where the other two offences expired since they were charged with three offences.
7. That, the trial magistrate erred in law and fact in not addressing the contradictions on whether the victim was 8 or 12 years as testified by PW3 the Doctor. Also the charge sheet stated rape as opposed to gang rape and unnatural offence testified by the victim.

At the hearing the appellants appeared in person fending for themselves while the respondent was represented by Ms. Lilian Kowero learned State Attorney.

Supporting the appeal, the appellants jointly submitted on 1st and 3rd ground the fact that the trial magistrate failed to comply with section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 as amended by Act No. 2 (Miscellaneous Amendments Act) of 2016 which requires the court to ascertain whether the victim understands the duty to tell the truth. That, the trial magistrate sworn PW2's without satisfying herself whether she was indeed capable of telling the truth. Furthermore, the trial magistrate believed PW2's testimony to be true while her sister was never summoned to appear in court to corroborate PW2's testimony which was tainted with contradictions.

On the 2nd ground, the appellants submitted that, the trial magistrate failed to adhere to the mandatory provisions of section 210 (3) of the CPA which requires the trial magistrate to read the recorded testimonies for the appellants to comment on.

The appellants went on submitting on the 4th ground that, there is unexplained delay by PW2 to report the sexual abuse to her grandmother, that such delay of over four (4) years does not attract the confidence of PW2 that she was actually raped. Further, during the trial, the respondent did not bother to summon PW1 as key witness.

Supporting the 5th and 7th grounds of appeal, the appellants submitted that, PW3, the doctor testified the fact that he had examined an 8 years girl as opposed to 12 years. However, the PF3 mentions an 8 years girl while the information on the other victim namely, PW2's sister is not disclosed also the PF3 which was admitted into evidence was never read aloud.

Lastly, on the 6th ground, the appellants argued that, they were charged with three offences but were all convicted on only one offence of rape. They finally prayed for this honourable court to re-evaluate the trial court's evidence with a view to quashing the sentence and conviction and thereafter set them free.

In reply, Ms. Kowero resisted the appeal and averred that, they support the conviction and sentence because the prosecution had proven its case beyond reasonable doubt. That, at page 7 of the trial court's typed proceedings, PW2 was sworn prior to giving her testimony which simply means that the trial magistrate satisfied herself that she was matured enough to understand that she was sworn to speak the truth. To support this argument, Ms. Kowero cited the case of **Ashura Haruna V Republic** CAT No. 74/2005 where the Court declared that when a child of tender age give his evidence on oath/affirmation, the phrase that he has promised to tell the truth and not lies is unnecessary because the purpose of oath or affirmation is a promise to tell the truth.

On the 2nd ground Ms. Kowero conceded the fact that, the trial court's proceedings does not state whether the trial magistrate adhered to section 210 (3) of CPA. However, such non-compliance does not amount to miscarriage of justice or prejudiced the appellants anyhow.

Regarding the 3rd, 4th and 6th grounds, Ms. Kowero conceded the fact that PW2 testified on being sodomized however, the appellants were charged on the offence of rape and the same was proved at the required standard. More so, the allegation that PW2 delayed in reporting the ordeal is a misconception as PW2 testified that she

did inform her grandmother timely but it was her grandmother's fault not to report the ordeal until when PW2 informed her teacher PW1 and later informed the police. Ms. Kowero recalled the fact that, the best evidence of rape offence comes from the victim herself as it was held in the landmark case of **Selemani Makumba V. Republic** 2006 TLR 379, therefore it was not fatal that PW2's testimony was not corroborated by her sister's.

Ms. Kowero went on arguing on the three offences that the appellants were charged with to the effect that, they were three offences of rape c/s 130 (1) (2) (e) and 131 (1) of the Penal Code. That while composing the judgment the trial magistrate convicted the appellants on the same offence.

Lastly, on the 5th and 7th grounds, the learned state attorney argued that, PW3, the doctor testified to have examined both PW2 and his sister and concluded that their private parts were widen as opposed to their age. Thus when PW3 testified the fact that he examined PW2, it was an error since the fact is, he examined two girls aged 8 and 12 years. Regarding PF3, Ms. Kowero conceded the fact that the same was not read out but in the event the same is expunged the evidence on record is strong enough to hold appellants conviction. Learned state attorney finally prayed for the court to uphold the trial court's conviction and sentence.

After going through trial court's records as well as parties' submissions, my view is, the submission of the parties raise one question for determination namely whether the case against the appellants has been proved at the required standard to ground conviction.

To begin with the 1st and 3rd grounds jointly, the appellant alleged that PW2's testimony was uncorroborated and not in accordance with **Section 127 (2) of the Evidence Act** as amended, which reads;

> *(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 court and not lies****. (emphasis mine)*

It is relevant to mention that the law is well settled in respect of receiving of testimony of a tender age to the effect that, the need for a trial magistrate to satisfy himself on the understanding of the child of tender age if s/he possess enough knowledge on the need to speak the truth is no longer a requirement. In the case of **Philipo Emmanuel V Republic**, Cr. Appeal No. 499 of 2015 (CAT at Mbeya) (unreported), the Court while making reference to the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 which amended section 127 (2) of the Evidence Act, held that:

> *"... [We] think it is instructive to interject a remark, by way of a postscript, that, of recent, this long standing requirement of a voire dire test was laid to rest upon the enactment of the Written Laws (Miscellaneous Amendments) Act, No. 2 of 2016 which was promulgated on 8th July 2016. Through this Act, the provisions of subsections (2) and (3) of section were deleted and substituted with the following: "(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 lies****." (Emphasis mine)*

Basing on the above Court of Appeal authority it is crystal clear the fact that *voire dire* test is no longer a requirement. At page 7 of the trial court's proceedings, the following is what had transpired in Court when PW2's was sworn;

> *"PW2,* ***AF****, 12 yrs, Christian, chagga, student-Allen Chiini, Swear and states as follows."*

It undisputed that PW2 gave a sworn testimony after the trial magistrate was satisfied that she understood the nature of oath and the duty to speak the truth. It would have been different If PW2 would have given an unsworn testimony without promising the court to tell the truth.

The appellants also challenged PW2's uncorroborated evidence from her sister. It is a settled principle on rape offences the fact that, the best evidence comes from the victim as was held in the decision in the case of **Selemani Makumba V. R** (*supra*). It is also a settled principle of the law in rape offence that, penetration is an essential ingredient in proving rape offence as was held in the case of **Ally Mkombozi V. R**. Criminal Appeal No. 227 of 2007. In the present case penetration has been proven through the victim's testimony as seen at page 7 and 8 of the typed proceedings that;

> *"... he took me on bed by force and started raping me, he entered my anus with his penis, the penis is like a stick, I saw it but is of meat, thereafter he entered my vagina with his penis I felt pain all over and cried I told him to leave me but he was forcing me. I saw blood and mkojo mzito una rangi nyeupe/njano, it took like 30 min, he left me ..."*

She went on narrating;

> *"Otto alituzoesha kufanya hivyo tukawa tunaenda tu I did afraid to say to anyone at school. If Otto is entering me the rest hold Happiness outside when he finished they brought **HP** and Otto did the same to her (he entered her) when I asked **HP** she said he entered his anus 'Mkundu' last time the three entered me was on June 18 at Otto's house"*

Undoubtedly, the above explanation has proven penetration which is the essential ingredient in the rape offence. Thus the two grounds are meritless and hence disallowed.

As to the 2nd ground of appeal, the appellants argued that, the trial magistrate did not read out witnesses' testimonies after they had testified contrary to **section 210 (3) of the CPA**. The section reads;

> *"(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"*

This provision requires compliance, failure of which amounts to procedural irregularity. However, I agree with the respondent that the appellants did not establish on how they were prejudiced for this court to invoke the provisions of section 388 of the CPA.

At this juncture I find it relevant to mention **section 388 (1) of Criminal Procedure Act**, which vests this Court with powers to correct such irregularity upon meeting the laid down criteria. For ease of reference the provision reads:

> *"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 failure of justice, the court may order a retrial or make such other order as it may consider just and equitable****"* [Emphasis Mine]

Subjecting the above position with the appeal at hand, as I mentioned earlier the appellants failed to establish how the omission did occasion miscarriage of justice. This ground lacks merit and is disallowed.

On the 4th ground, the appellants faulted, the trial magistrate for the delay in reporting the rape incident. In her own words PW2 at page 7 of the typed proceeding stated;

"I told my grandma what Otto did to me, Otto did that to me for a long time since when I was in STD I when I was 6 or 7 yrs I used to tell grandma always but she said she will warn him. She did but Otto continued."

From the foregoing it is sufficiently clear that PW2 reported the incident to her grandmother timely. Likewise PW1's testimony corroborated this fact. In **Yohanis Msigwa v. Republic** 1990 TLR 148 the court had this to say:-

"As provided under section 143 of the Evidence Act, no particular number of witnesses is required for the proof of any fact. What is important is the witnesses' opportunity to see what he/she claimed to have seen, and her credibility".

Basing on the above legal position even if PW2's grandmother was not summoned to testify, the testimony of PW2 and PW3 suffices to establish that PW2 communicated the ordeal to her grandmother at the earliest. This ground also crumbles.

Coming to the 5th and 7th grounds of appeal, the appellants faulted PW3's testimony being contradictory as to whether he did examine PW2 or his sister. The Respondent/Republic conceded to the fact that, PF3 which was tendered was not read aloud during trial. A perusal of Court records revealed that the PF3 which was admitted by the trial court as Exhibit P1 was not read aloud after its admission, I thus proceed to expunge the same from the record. Nonetheless, the testimony of PW2 is watertight to warrant appellants' conviction.

On the 6th ground, the appellants challenged the trial court's decision on the ground that the charge sheet mentions three charges while the appellants were convicted on a single charge.

It is well settled in criminal cases the fact that charge sheet is the backbone of the trial as the evidence adduced has to prove the offence charged thereon. In **Mussa Mwaikunda V R [2006] TLR 387** Court of Appeal observed *inter alia* that;

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

In the instant appeal the charge sheet states the offence of rape against the 1st appellant as 1st count, the 2nd count against the 2nd appellant and 3rd count against the 3rd appellant. The counts state that, the rape incidents happened in May, June and July 2018 in respect of 1st, 2nd and 3rd accused respectively but in actual fact it was a single offence with three counts, and later the trial magistrate convicted them on the said offence. Thus, all the appellants understood the charges against them and were able to mount their defence. This ground also crumbles.

In light of the above analysis, I find that the respondent has proved the case against the appellants beyond reasonable doubt as required by the law. In the circumstances, this appeal is dismissed and the trial court's decision is upheld.

It is so ordered.

Dated and delivered at Moshi this 12th day of March, 2021.

Right of Appeal explained

S.B. MKAPA
JUDGE
12/03/2021