IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 81 OF 2020

(Originating from Criminal Case No. 199 of 2018 from Ilala District Court)

JOAS OTIENO ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

Date of Last Order: 19/04/2021
Date of Ruling: 04/05/2021

J U D G M E N T

MGONYA, J.

The Appellant **JOAS OTIENO** being dissatisfied with the Judgment and order passed the District Court of Samora at Ilala by Hon. C. Kyoja, RM delivered on 18th July, 2019 do hereby appeal against the whole of the said decision to this Honorable Court on following grounds:

1. ***That, your Honorable Judge the learned Magistrate grossly erred in holding to entire prosecution evidence procured un-procedural where there was a serious none compliance with mandatory provision of section 210 (3) of the Criminal Procedure Act Cap. 20***

[R.E. 2002] after receivership which was a fatal irregularity;

2. *That, the trial Magistrate grossly erred in holding PW1 evidence procured un-procedural where she did not promise Court to speak nothing but the truth;*
3. *That, the learned trial Magisterial erred in holding to PF3 exhibit P2 tendered by PW6 and admitted un-procedural where its content was not read over before Court;*
4. *That, the trial Magistrate erred in convicting the Appellant where the prosecution evidence does not correlate with the provision of the penal code under which he was charged;*
5. *That, the learned trial Magistrate erred in holding that the Appellant was convicted as charged where the victims age was not proved by either Birth Certificate or Medical Chit; and*
6. *That, the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the Appellant beyond reasonable doubt as charged.*

Whereof; The Appellant prays that this court allow this appeal, quash the conviction and set aside the sentence of the trial Court.

At the date of hearing of this appeal, the hearing was conducted by way of video conferencing due to the Covid 19 Pandemic and the conditions set thereto. Appellant herein, was representing himself, while the Respondent the Republic, was represented by the learned State Attorney Imelda Mushi.

In the cause of hearing, the Appellant requested the court to adopt his grounds of Appeal advanced earlier before the court for determination.

Responding to the grounds of Appeal, Ms. Mushi, the learned State Attorney, informed the court that Republic supports the Appeal through one ground which concerns the *voire dire* to the victim at the trial court. In this regard the learned State Attorney referred the court to page 13 of the proceedings where it was stated that the trial Magistrate seems to conduct *voire dire* without asking the victim if she knows what the oath is or to let her promises to tell the truth. The omission which Ms. Mushi termed as contrary **to section 127 (2) of Criminal Procedure Act Cap. 20 [R.E. 2002];** whereas after amendment it waived the *voire dire* test and wanted the victim/witness to promise to tell the truth before she / he testify.

In the event therefore, it is the State Attorney's concern that the victim gave her testimony without promising that she is going to tell the truth. In support of this concern, the court was referred to the case of ***MASUDI MGOSI VS. Republic Criminal Case No. 195/2018*** **Court of Appeal at Dar es Salaam at pages. 8 and 9** of that case.

It is from the said anomaly, the learned State Attorney prayed the victim's testimony (PW1) be expunged from the records. Further, it was the learned State Attorney concern that, since the rest of testimonies do not support the offence, as the rest of witnesses were not eye witnesses, their testimonies have no weight, then Ms. Mushi therefore prayed the appeal be allowed from the above narrated reason.

Before I proceed with determination of this appeal, I wish to state the brief history of the original case up to this stage. From the record and especially from the charge sheet, the Appellant herein **JOAS OTIENO** was charged with the offence of Rape **contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code Cap. 16 (R. E. 2002).** Particulars of the offence read that:

> *On the 12th day of March, 2018 at Kichagani Mongolandege area within Ilala District in Dar es Salaam Region, the Appellant herein did have carnal*

knowledge of one ***Aisha Amani*** *a* ***girl of seven (7) years.***"

Upon hearing of the said case at the trial Court, the total of six prosecution witnesses and one defence witness testified before the court. Further, PF3 was admitted as Exhibit from the Prosecution's side witness **PW6 the Doctor** who is said to have conducted examination to the victim. As this is not a trial court, I don't intend to evaluate the said witnesses evidence before the trial court and it suffices to say that, it is after the trial court's Magistrate being satisfied to the adduced evidence, accordingly he decided to convict and sentence the Appellant, hence this Appeal.

As this is the Appellate Court, I have also gone through the said evidence at the trial Court from both sides. It is time now to determine the grounds of Appeal before the Court.

As I have rightly heard the learned State Attorney, the Appellant's appeal is suggested to be allowed due to the annomally alleged to take place during the trial especially at the *voire dire* stage or rather before the victim's testimony. There is a also a case that has been cited in support of the fact that the victim before testifying did not promise to tell the truth as the law requires where the testimony of the victim is suggested to be expunged. I don't have any conflict with the law. However, I am

in conflict with the users of the laws. As much I am respectful to the Highest Court of the Land decisions and precedents, it was and still difficult to believe that, if the learned Magistrate has carelessly decided not to abide with the laws, then despite of all the evidence and actions that the victim has suffered from the Appellant, this will be the end of it and still say that this is JUSTICE by allowing the Appellant to walk free out of the Magistrate's fault. It has to be taken into account that when the victim was taken to court, especially at her little age being raped, what the victim and her parents expects is **JUSTIC**E to be done and not getting into a legal lab to see whether the procedure was properly observed to or not. And if not, everything comes to an end as if nothing had happened to her.

While I am still wondering, I took time to refer to the victim's testimony on the proceedings at the trial court. The quotation before the proceeding demonstrate what happened. I quote:

> "***COURT***
>
> *The prosecution case opened*
>
> ***PW1: AISHA AMAN 7, KINYEREZI SUKUMA, STUDENT MUSLIM.***
>
> ***COURT***
>
> *The witnesses of tender age, I am hereby conduct a* ***voirechire*** *V/s 127 (1) of the TEA.*

Sgd. Hon. C. A. Kiyoja, RM
07/08/2018

Q. What is your name?

A: Aisha Amani

Q. What is your father's name?

A: Amani

Q. Whata is your mother's name?

A: Kiza

Q. Where do you stay?

A: Kichangani Kinyerezi

Q. Where do you study?

A: I am studying at Baba Msangi School – Nursery School.

Q. Do you know to state trust?

A: Yes, but I am not know how to elaborate.

COURT

The Court satisfied that the witness answers the question given to her. Therefore she will testify without an oath"

From the above, I have to state that, **1st**, it is not everything that it is said by the witness is written in the proceedings. It is

unfortunate that the victim's demeanor is rarely recorded. However, the phrase by the trial Magistrate that:

> ***"The court is satisfied that the witness answers the question given to her. Therefore she will testify without an oath."***

The word **"SATISFIED"** by Honorable Magistrate who is presiding the trial has to be taken with the great respect and cautiously.

When the victim said, **"Yes, but I don't know how to elaborate"** after she was asked if she knows to state the truth, this connotes that the victim knows to tell the truth and of course, by the word **"YES"** it is more than on promise to a child of **Seven years** and to tell the truth when she will be asked some questions; and obvious that she will elaborate some issues after being led by the Attorney. This is the is only way to get the victim's testimony regardless of her young age. On my view, the said anomaly which wanted the victim to state simplicity that she is going to tell the truth, the same was said though indirectly, that's why the trial Magistrate **was satisfied** and proceeded to make the victim testify without taking oath.

From the above explanation, I differ with the learned State Attorney's view that by the victim's absence of promising to tell the truth, the entire victim's testimony has to be expunged. It is

unfortunate that if we continue with the plain simple interpretation of these law as the way it is, there is a likelihood that the laws will be used, but **we won't be able to procure JUSTICE due to observing the rules of procedure.** It is my concern that we have now to change and focus on **substantial Justice rather than upholding procedural rules** which will actually and for sure defeat the people's justice.

My concern on observing **Substantive Justice versus Procedural Rule,** I would like to refer to the case of ***MBEYA RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA MWAKYOMA, Court of Appeal of Tanzania at Mbeya, Civil Appeal No. 101 of 1998, (9.8.2001) (Ramadhani, Lubuva and Lugakingira JJA) [2003] TLR CA,*** where the Justices of Appeal had this to say:

> *"It does not appear to us that the omission to cite the provision under which it was brought was fatal. We say so because a notice of preliminary objection which, of course, falls under Rule 100, is not an application. it is simply a notice and is given just before hearing of the appeal begins.*
>
> *Rule 100 is* ***procedural rather than substantive. It does not confer any right upon litigants nor does it bestow any power on the Court, it merely regulates the***

conduct of the business or the Court. *Omission to cite a procedural rule does not bring into question the jurisdiction of the Court to hear and determine the matter before it* ***and is therefore not fatal."***

I am also mindful of the provisions of the **Constitution of the United Republic of Tanzania (1977)** particularly **Article 107 A (2) (e)** which calls upon the courts to dispense justice without being tied up with technicalities provisions which may abstract dispensation of justice. The principle which is found in a number of cases already determined by our Honorable courts.

From the foregoing, and as the said "un-procedural act" are is not fatal, I am inclined to declare that the said legal anomaly at the trial court under the given circumstances, **is not fatal and did not occasion any injustice to neither party.**

I wonder as to how the Magistrate's wrong in following the law of procedure which does not go to the root of the matter can easily defeat the victim's right. Why should the victim suffer for the wrong she didn't commit? Where does the victim's right lie?

This case made me think wide that, in these circumstances, there is a possibility that in case the Magistrate wants to assist the Accused, though not at the trial court level, he can easily assist him by doing a deliberate mistake in order to create the

surroundings that could favor the accused at the appellate level, like the one we are having.

To understand my concern one has to read the victim's testimony to appreciate what she suffered against a simple suggestion of expansion of her entire testimony for the said **'fault'** done by the trial Magistrate.

From what I have narrated above, by all standards, **the 2nd ground of Appeal is hereby dismissed as it is meritless.**

In determining the **5th ground** of Appeal on the victim's age and the **6th ground** of Appeal that that Prosecution did not prove its case against the Appellant beyond reasonable doubt as charged, and the I have the following.

As I was going through the victim's testimony, it came across my eyes the following statement which emerged in the victim's examination in chief and in the cross-examination as herein below:

Pg. 15 "You penetrated your penis into me in my vigina. I saw you for the first time. You raped me in my vagina and anus."

Pg. 14 "When the accused raped me some blood and feace came out".

It is from this testimony that it came to the knowledge of the court that the victim was actually **raped** and **defiled.** However, since the offence of defilement was not placed in the Charge Sheet neither seen in the doctor's report (PF3), I an respectful to only what was before the trial Court and in this Appeal.

In principle, **Penetration** is an essential ingredient of the offence of rape / defilement as laid out in **Section 130 (4) (a) of the Penal Code** which states:

> ***"(4) For the purposes of proving the offence of rape:***
>
> ***(1) Penetration, however slight is sufficient to constitute the sexual intercourse necessary to the offence"***

In the case of ***MATHAYO NGALYA @ SHABANI V. REPUBLIC, Criminal Appeal No. 170 of 2006 (Unreported)*** it was stated that:

> ***"For the offence of rape it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is***

the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence."

From the above law and precedent, as law requires, **the victim has successfully testified** before the court that there was penetration of the Appellant's organ into the victim as recognized by the law. However, it is necessary for the victim's testimony to be corroborated with other relevant testimonies and evidence such as the medical report (PF3) etc.

In law, the victim's evidence in rape/defilement cases is the **best evidence** since it comes from the victim herself/himself. This principle was stated in the chain of cases, among them being the case of ***GODI KASENEGALA V. REPUBLIC - Criminal Appeal No. 10 0f 2008 (Unreported)*** where 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 collaborative evidence."

According to the victim's evidence at the trial court, I am satisfied that the Appellant offended the victim as stated above. However, to collaborate the victim's testimony, is the **PW3** at

page 21 of the proceedings and **PW5 at page 34** of the trial court proceedings, where they both said to have witnessed blood and fieces from the victim on bed after she had been raped by the Appellant. What else is needed to believe that the victim was really raped?

I had also an ample time of going through the trial court's proceedings. As regards to the **victims' age,** my eyes came across the testimony of **PW6 Magreth Ibobo, Doctor of Amana Hospital** stating that she is the one who examined the victim on the date she was brought before her. Apart from her testimony, she also tendered **PF3** in court. It is from the said PF3, the doctor stated clearly the victim's age to be **seven years**. Further, it is in record that when **PW4, the victim's father** was testifying before the court, he was able to state the victim's age is **seven years**. This can be found in **page 24** of the trial court's proceedings.

As in law, the age of the victim can be proved by the parent and the doctor, this court is satisfied that the victim's age has been accordingly and legally proved to be **seven years.**

Further, from the above, this court is satisfied that indeed that **Prosecution at the trial court proved their case beyond reasonable doubt.** In the sense that the Prosecution

evidence at the trial court was heavier than that of the Appellant to command conviction and sentence of the accused, the Appellant's conviction was fairly met. In the case of ***HEMED SAIDI VS. MOHAMED MBILU (1984) TLR 113 HC*** the court held that:

> ***"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".***

From the above, **the 5th and 6th grounds of appeal fails as they are baseless.**

On the 3rd **ground of Appeal** that the **PF3** was not read loud in court, I take the stand that, even if the same was not read loudly, the omission is not fatal as the same was not objected by the Appellant during the trial. Secondly, as I have already said when determining the 2nd ground of appeal above, I prefer substantial justice over the procedural rule. I cannot imagine once again the Magistrate's fault of not reading the PF3 loudly, can cause expunsion of the entire PF3 which carries **a serious investigation report** be denied. This too is to cause injustice on the part of the victim who is powerless in perfecting court's procedures towards justice.

It is from the above explanation, **the 3rd ground follows the rest as it is meritless.**

To conclude my determination, I have to state that the Appeal is accordingly **DISMISSED and the trial court's decision is accordingly upheld as the evidence adduced by the Prosecution at the trial Court was watertight.**

Further, it is in the record that the accused after being found guilty in the trial Court was convicted and sentenced to **30 years imprisonment and ordered to pay the victim compensation of Tshs. 10,000,000/=.** This Court is aware of the sentence passed by the trial Court. It is from here that this Appellate Court revisited the laws on the punishment on rape. The punishment on the offence of rape of **a child under the age of ten years** as per the provisions of section 131 (3) of he pf the Penal Code, Cap. 16 [R. E. 2019] states:

> ***"131. - (3) Subject the provisions of subsection (2), a person who commits an offence of rape of a girl under the age of ten years shall on conviction be sentenced to life imprisonment."***

Subject to the provision above, this Court is **hereby set aside the sentence of 30 years imprisonment and a compensation order of 10,000/= Tshs. and substitute the**

same with the SENTENCE OF LIFE IMPRISONMENT to the Appellant as provided for by the law under the provisions of **section 131 (3) of the Penal Code (Supra).**

In the event therefore and from the above stated reasons this appeal **is hereby dismissed in its entirety.**

It is so ordered.

Right of Appeal Explained.

L. E. MGONYA
JUDGE
04/05/2021

Court: Judgment delivered in chamber in the presence of Appellant (through virtual Court), Ms. Imelda Mushi, State Attorney for the Respondent and Ms. Salma RMA this 4th day of May, 2021.

L. E. MGONYA
JUDGE
04/05/2021