THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL NO. 99 OF 2020.

(Original Criminal Case No. 252 of 2019, in the Court of Resident Magistrate of Mbeya, at Mbeya).

PETER MLELWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

17/02 & 17/05/2021.

UTAMWA, J.

In this first appeal, the appellant, PETER MLELWA challenged the judgement (impugned judgement) of the Court of Resident Magistrate of Mbeya, at Mbeya (the trial court) in Criminal Case No. 252 of 2019. Before the trial court, the appellant stood charged with two counts. In the first count he was charged with offence of rape contrary to section 130 (1), (2) (a) and 131 (1) of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019), henceforth the Penal Code. In the second count, the appellant was charged with the offence of impregnating a school girl contrary to section 60A(3) of

the Education Act, Cap. 353 R.E 2002 as amended by section 22(3) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016.

In the particulars of the offence regarding the first count, it was alleged that, on unknown date of April, 2019, at Nsalaga area within the City and Region of Mbeya, the appellant did have carnal knowledge of one HJ (being a branded name for protecting her dignity), a girl of 16 years. She will hereinafter be called the complainant in this judgement. As to the second count, the allegations in the particulars of the offence were that, in the same period and place mentioned in the first count, the appellant did impregnate the same complainant, who was a standard four pupil at Nsalaga Primary School (henceforth the school).

When the charge was read to the appellant before the trial court, he pleaded not guilty to both counts, hence a full trial. Five prosecution witnesses testified and the appellant made a sworn defence and invited another defence witness to support him. At the end of the day, the trial court, through the impugned judgment, found the appellant guilty. It then convicted and sentenced him to serve in prison for 30 years regarding each count. The sentences were ordered to run concurrently. He was further ordered to compensate the victim the sum of Tanzanian shillings (Tshs.) 500, 000/= immediately after completing the custodial sentence.

Aggrieved by the impugned judgment, the appellant preferred this appeal through Mr. Isaya Mwanri, his learned counsel. His petition of appeal was based on six grounds of appeal. However, the same can be smoothly condensed to only three as shown below:

1. That, the trial court erred in law and fact in convicting and sentencing the appellant regarding both counts though the prosecution had not adduced sufficient evidence to prove the charge beyond reasonable doubts.
2. That, the trial court erred in law and in facts in failing to properly evaluate the prosecution evidence, hence the erroneous conviction against the appellant.
3. The trial court erred in law in failing to draw an adverse inference against the prosecution case for its ungrounded failure to call key witnesses to give evidence.

The rest of the grounds of appeal amounted to complaints aimed at supporting the above listed first ground of appeal. In such complaints the appellant lamented in the petition of appeal that, the trial court erroneously relied upon the evidence of the complainant whose credibility was questionable since there was sufficient prosecution evidence showing that she was suffering from mental disorder. He added that, it was improper for the trial court to base the conviction on circumstantial evidence which had inconsistencies and was uncorroborated. Again, the victim could not be raped in April, 2019 and give birth prematurely in December, 2019 being the period of only eight months of pregnancy.

It was also the lamentation by the appellant in the petition of appeal that, it was imperfect for the trial court to believe the prosecution case without production of any DNA evidence in verifying that the complainant's child was really fathered by the appellant. The trial court also mistakenly convicted the appellant on hearsay.

Owing to the above listed grounds of appeal, the appellant urged this court to quash the conviction, set aside the sentence and set him free.

The respondent objected the appeal. The same was argued by way of written submissions. The appellant's submissions in chief were signed by his counsel, Mr. Isaya Mwanri as mentioned earlier. The respondent's submissions were drawn and filed by Mr. Baraka Mgaya, learned State Attorney.

In deciding this appeal, I will firstly consider the parties' arguments regarding the first ground of appeal and if need will arise, I will also test the rest of the grounds. This plan is based on my assessment that, in case the first ground of appeal will be upheld, it will afford the disposal of the entire appeal without even considering the rest of the grounds of appeal.

Now, under the same first ground of appeal, I will firstly discuss the arguments by the parties in relation to the state of mind of the complainant. I will also discuss the other arguments if need will arise.

In his submissions in chief regarding the state of mind of the complainant as the only alleged eye witness of the offence of rape, the learned counsel for the appellant contended that, in sexual offences, like rape which is one of offence under consideration, the best evidence comes from the victim of the crime. He cited a decision of the Court of Appeal of Tanzania (the CAT) in the case of **Martin Misara v. Republic, Criminal Appeal No. 428 of 2016, CAT, at Mbeya** (unreported) to support his contention. In the matter at hand, the PW. 4 (the complainant) was the only alleged eye witness of rape. The other four prosecution witnesses

testified according to her story that it was the appellant who had raped her and caused her pregnancy.

The learned counsel for the appellant further contended that, despite the fact that the complainant was the only alleged eye witness of the rape, there was sufficient evidence from other prosecution witnesses that she was born with mental disorder (*Mtindio wa ubongo* in kiswahili). This fact was supported by PW. 1 (Grace Samwel), the Medical Officer who examined the complainant and felt her PF.3, the PW.3 (Joyce Julius Lwanji) the mother of the complainant and PW. 5 (Fidiki Vedasto Mtavangu), the Head Teacher of the complainant's school.

It was also the contention by the learned counsel for the appellant that, though there was such sufficient evidence regarding the mental illness of the complainant, the trial court did not make any finding on her credibility or reliability as a witness. The trial court thus, acted against the guidance by the CAT in the case of **Fadhili Makanga v. Republic, Criminal Appeal No. 458 of 2017, CAT of Tanzania, at Mbeya** (unreported). In that precedent, he contended, the CAT held that, the trial court had erred in not addressing the issue of mental status of the victim of rape who testified when there was prior evidence that she was mentally retarded. The course was important for purposes of ascertaining her competency and reliability in line with section 127(6) of the Evidence Act, Cap. 6 R.E. 2019 and for ensuring the fairness of the trial against the appellant. The omission thus, left doubts on the competency of the victim to testify against the offence charged.

To give further support to the above contention, the learned counsel for the appellant cited a decision of this court (Masaju, J.) in the case of **Sebastian Mazengo v. Republic, DC Criminal Appeal No. 121 of 2019, High Court of Tanzania, at Dodoma** (unreported). He further concluded that, for the omission by the trial court mentioned above, the evidence of the complainant was fatally defective and it was wrong for the trial court to rely upon it to convict the appellant, hence lack of fairness in the trial.

In his replying submissions, the learned State Attorney for the respondent essentially conceded to all the arguments made by the appellant's counsel. He however, prayed for this court to order for a retrial against the appellant since there was ample evidence save for the irregularities in receiving the evidence of the complainant.

The appellant's counsel did not wish to file any rejoinder submissions. He in fact, declared in court on 17th February, 2021 that, they did not wish to file it, hence this judgment.

I have considered the arguments advanced by the appellant's counsel and the supporting reply by the learned State Attorney for the respondent. In fact, I agree with them that, apart from the complainant, all the other four prosecution witnesses (PW. 1, 2, 3 and 5) did not testify that they saw the appellant raping or having sexual intercourse with the complainant. They only testified to the effect that, according to the complainant's information, it was the appellant who was responsible with the rape and the pregnancy. It was thus, only the complainant who direct evidence

before the trial court that it was the appellant who was responsible for the rape and the pregnancy under discussion.

Again, I agree with the parties that, the trial court convicted the appellant of both offences mainly on the complainant's evidence. It did not however, make any finding as to her competence and reliability. This was irrespective of the fact that, PW. 1 (the medical doctor), her PF. 3 and PW. 3 (the mother of the complainant) had given evidence that the complainant was born with mental problems. They did so before the complainant herself testified as PW. 4.

The law on witnesses of unsound mind is clear in our land. It alerts courts on the competency of such category of witnesses. Section 127(1) and (5) of the Evidence Act, Cap. 6 R. E. 2019 are the pertinent statutory provisions. They are couched thus, and I quote them for a readymade reference:

> **"127:**
> **(1): Every person shall be competent to testify** unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, **disease (whether of body or mind)** or any other similar cause.
>
> **(5): A person of unsound mind shall, unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them**, be competent to testify." (Bold emphasis is mine).

In my settled opinion, what one gathers from the above quoted provisions, is that, the law sets a general rule that, all persons are competent witnesses and can testify unconditionally. However, there are exceptions to the general rule. A group of persons can testify only if they

meet some conditions. Persons suffering from deceases of mind (i.e. of unsound mind) fall under this exception. A witness of this nature can testify only if the trial court considers him/her as capable of understanding the questions put to him/her or of giving rational answers to those questions and/or he/she is not prevented by his/her condition from understanding the questions and giving rational answers to them.

It follows thus, that, whenever a trial court is alerted through evidence that a witness is of unsound mind, it must follow the procedure guided by the CAT in the **Fadhili Makanga case** (supra). Failure of that, the evidence of that witness will have no value. The procedure envisaged in the **Fadhili Makanga case** is that, upon a trial court receiving evidence that a witness before it is of unsound mind, the court is enjoined to address the issue of the unsoundness of the witness's mind and make a finding on his/her competence and reliability.

A person of "unsound mind" referred to under the provisions of law quoted herein above is a person who is not mentally well; see the Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 1679. In my settled view, the complainant in the matter at hand fall squarely under this definition. This is because, the evidence discussed above described her as a person with mental problems or mental disorder.

I thus, agree with the parties that the entire evidence of the complainant, as a person of unsound mind (with mental problems or disorder) according to the evidence shown above, was improperly received by the trial court for the omission to follow the procedure envisaged in the **Fadhili Makanga case** (supra).

At this juncture, the issue is whether or not under the circumstances of the matter at hand it is proper for this court to order a retrial as prayed by the learned State Attorney for the respondent. In his submissions in support of his prayer, he cited the case of **Fatehali Manji v. Republic [1966] EA. 343.** In that case, he argued, it was observed that, 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; and that, each case must depend on its particular facts and its circumstances, and an order for retrial should only be made where the interests of justice require it.

As hinted earlier, the learned counsel for the appellant did not file any rejoinder submissions to counter the prayer made the respondent for the retrial. I have also considered the nature of the evidence on record and the law. In my view, the stance of the law on an order for retrial is in fact, as correctly highlighted by the learned State Attorney for the respondent. In fact, I am live of the fact that, the same stance of law was underscored by the CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported at page 8 of the typed version of the Judgment). In that precedent the CAT approved the holding in the **Fatehali Manji** case (supra).

According to the evidence on record, I agree with the learned State Attorney for the respondent that, there are some tangible pieces of evidence against the appellant who was known to the complainant save for the omission committed by the trial court in receiving her evidence. I

have also considered the serious nature of the two offences with which the appellant was charged. They fetch serious sentences of imprisonment as shown above. They thus, need a due attention of the trial court so that justice can be done to both sides.

Again, I have considered the fact that, the appellant has served only a small portion of his sentence mentioned above. He was convicted on 18th May, 2020. He has therefore, served in prison for only exactly a year. I therefore, find that, justice would demand for a retrial. The prayer made by the learned State Attorney is thus, merited.

Having made the findings above, I hold that, there is no pressing need to consider the rest of the arguments in relation to the first ground of appeal. Likewise, it is needless to consider the rest of the grounds of appeal. The reasons for this course is that, the findings I have made above are forceful enough to dispose of the entire appeal, otherwise I will be performing a superfluous or academic exercise which is not the core function of the adjudication process.

Owing to the above reasons, I make the following orders: I nullify and quash the proceedings of the trial court from when it began to receive the evidence of the PW. 1 to the date when it heard the last defence witnesses. I also set aside the impugned judgement and the sentences imposed by the trial court against the appellant in respect of both counts. Furthermore, I set aside the compensation order. It is further ordered that, the appellant shall be retried immediately before another magistrate. Currently he shall remain in custody as a remand prisoner pending his

retrial. For the sake of justice, it is directed that, the retrial shall take off within only 30 days from the date hereof. It is so ordered.

J. H. K. UTAMWA
JUDGE
17/05/2021.

Date; 17/05/2021.

CORAM; Hon. JHK. Utamwa, J.
Appellant; Ms. Kisa Mwakilasa, H/B for Mr. Baraka Mbwilo, advocate.
For Respondent; Ms. Bernadeta Thomas, State Attorney.
BC; Mr. Patrick Nundwe, RMA.

Court: judgment delivered in the presence of Ms. Kisa Mwakilasa, learned counsel holding briefs for Mr. Baraka Mbwilo, learned advocate for the appellant and Ms. Bernadeta Thomas, learned State Attorney for the Respondent, in court, this 17th May, 2021.

THE HIGH COURT OF TANZANIA

JHK. UTAMWA
JUDGE
17/05/2021.