IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 68 OF 2019

(Originating from the District Court of Kiteto at Kibaya, Criminal Case No. 163 of 2018)

MSAFIRI HALILI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

27th July & 6th August, 2021

Masara, J.

Msafiri Halili, the Appellant herein, stood charged of the offence of Rape contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code Cap 16 [R.E 2002] in the District Court of Kiteto (the trial Court. He was convicted and sentenced the to serve thirty years imprisonment. The Appellant was aggrieved by both the conviction and the sentence imposed on him. He has preferred this appeal on the following grounds, verbatim:

a) *That, the trial Magistrate erred in law and fact when he failed to scrutinize the evidence as regards to the identification of the appellant;*
b) *That, the trial Magistrate convicted the appellant notwithstanding contradictory and inconsistence evidence on the part of the prosecution;*
c) *That, the trial Magistrate erred in law and in fact by not complying with Mandatory provision of section 127(2) of the Evidence Act, Cap 6 [R.E 2002];*
d) *That, the trial Magistrate erred in law and in fact for failure to scrutinize and evaluate the evidence tendered before him consequently holding the appellant herein criminally liable; and*
e) *That, the trial Magistrate erred in law and fact by failure to evaluate the evidence by defence side which raised reasonable doubt and thus arrived at unfair decision toward the appellant.*

The factual background leading to the Appellant's conviction and sentence resulting into this appeal can be summarised as follows: The Appellant and PW1 (the victim) are relatives. The victim is the daughter of the Appellant's brother. Both the Appellant and the victim live with the Appellant's parents who are also

the victim's grandparents. According to the Prosecution evidence (PW1), on 6/10/2018 the victim's grandparents travelled to go and attend a burial ceremony in Kondoa. They left behind the Appellant, the victim and other siblings in the house. The Prosecution went on to state that on 19/10/2018 at about 2200hrs, while PW1 sleeping in her room, the Appellant entered therein on the guise of fetching water for bathing. After taking the water, he locked the door from inside and forcefully undressed the victim and started to rape her. In the same room, PW1 was sleeping with some other children. In the process of being raped by the Appellant, the victim screamed making the other children to wake up and start crying. Noting that the children were awake, the Appellant took his water and left. The next morning the victim informed her uncle Nazaria (the accused's brother) what had happened. That when the said Nazaria asked the Appellant he admitted. The victim did not report to police or go to hospital until on 23/10/2018 after her grandparents came back.

The victim was examined by PW2 on 24/10/2018. The PF3 report showed that there were no bruises in the victim's private parts but her hymen had been raptured. PW3 testified to the effect that on the fateful day, he was asleep in a different room when he heard the screaming from PW1 who was asking for help. PW3 went out whereby he saw PW1 who told him that there was someone in the house. At that moment the Appellant came out of the room with water in a gallon. The next morning PW1 revealed to him that she was raped by the Appellant and that was the third time. After five days the victim went to report to the Police Station.

In his testimony in Court, the Appellant who had two witnesses denied to have raped the victim. He testified that the victim had a habit of delaying from school and she used to go out during the nights, therefore he punished her. He went on to state that on 19/10/2018 he went to fetch water after the victim delayed

to come back from school. When the Appellant returned from fetching water, ıbdi that she was being seduced by the Appellant but she ellant was asked but he denied the allegations. Three days ant had chastised the victim due to her habits of going home t night. On 19/10/2018 at around 11pm, when the Appellant heard dogs barking followed by voices of people walking ellant opened the door noticed that it was PW1. In the next morning he asked her where she had been in the previous night, she admitted that she had been out and apologized. The Appellant punished by canning her two sticks, thereafter she went to school. The Appellant was asked by PW's father but he denied seducing her. They were told to wait until when the grandparents would be back, but on 23/10/2018 the Appellant was arrested. At the Police, PW1 told the Police that she was beaten but not raped. The Appellant was interrogated but he denied raping he victim. When cross examined, the Appellant stated that he had grudges with PW1.

DW2 (Nazaria) testified that on 18/10/2018 he met PW1 who told him that she was beaten by the Appellant. The next day, DW2 went there inquiring from the Appellant the reason he was beating PW1. DW1 admitted to have beaten PW1 because she arrived home late at about 21:00hrs. The Appellant further told DW2 that the victim has the habit of going out during the nights. DW2 travelled and when he returned back, he found the accused person already arrested. DW2 further testified that on 19/10/2018 he was at home but he did not know what happened. DW3, the victim's grandmother and the Appellant's mother testified that she heard that on 19/10/2018 while she was at Kondoa the victim was beaten by the Appellant for going home late.

At the hearing, the Appellant who was not represented combined all the grounds of appeal and submitted generally challenging the decision of the trial Court. The Appellant faulted the trial Court's decision contending that the Prosecution evidence did not prove the case against him beyond reasonable doubts. To support his contention the Appellant referred to the decision in the case of ***Andrea Francis Vs. Republic***, Criminal Appeal No. 173 of 2014 (unreported).

On her part, Ms. Tusaje Samweli, learned State Attorney who appeared on behalf of the Republic, supported the conviction by the trial Court stating that the Prosecution proved the case beyond reasonable doubts. She averred that the evidence of PW1 and PW2 support the fact that PW1 was raped by the Appellant. According to Ms Tusaje, the Appellant did not cross examine the victim about her age. She prayed for the dismissal of the appeal.

When given an opportunity to re-join, the Appellant insisted that he did not commit the offence, he just chastised the victim and she framed the case against him. He prayed that the appeal be allowed.

Despite the fact that the Appellant did not submit on all the grounds of appeal as had been outlined, I nevertheless took all of them into consideration. The main point of contention in this appeal is whether the evidence against the Appellant proved the offence of rape beyond reasonable doubts.

The first ground of appeal revolves around the identification of the Appellant by the victim. In my view, the issue of identification has no bearing in this case. The Appellant and the victim are relatives and lived in the same house. There cannot be any issue relating to mistaken identity. It has been held times and that the ability of the victim/witness to name the accused person at the earliest

opportunity suffices to conclude that the accused was properly identified. The case of ***Marwa Wangiti Mwita and Another Vs. Republic*** [2002] TLR 39 is instructive in this respect. The Court of Appeal stated:

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"*

Thus, the complaint that the Appellant was not properly identified by the victim is misplaced. No wonder the Appellant did not pursue it in his submissions in Court.

The next complaint is the fact that the trial Magistrate convicted the Appellant relying on the evidence of PW1 without observing the mandatory provisions of section 127(2) of the Tanzania Evidence Act, Cap. 6 [R.E 2002]. The learned State Attorney said nothing about this complaint. Subsection 2 of section 127 provides:

> *"(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 to tell any lies."*

In assessing whether the victim in the instant appeal falls in the category of who a "child of tender age" above provided, the answer is found under subsection 4 of section 127 of the Evidence Act, Cap. 6 [R.E 2019]. That subsection provides:

> *"(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means* ***a child whose apparent age is not more than fourteen years."*** (Emphasis supplied)

The age of the victim was not ascertained as required by law. While the charge sheet shows that the victim was 14 years old, the PF3 recorded her age as 15 and likewise the trial Magistrate wrote 15 years when she was taking her evidence. Incidentally, the victim testified 5 days after the alleged rape. One

would have expected oral or documentary evidence to prove that she was 15 years at the time she testified. In the absence of such evidence, one would take (for argument's sake) the charge sheet to be the actual age of the victim. On the premise, the victim was a child of tender age within the meaning of the above subsection. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 above is, however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation. As to the procedure to be followed, the Court of Appeal has given detailed directives on how that should be undertaken. In the case of ***Issa Salum Nambaluka Vs. Republic***, Criminal Appeal No. 272 of 2018, while making reference to its previous decision in ***Geoffrey Wilson Vs. Republic***, Criminal Appeal No. 168 of 2018 (both unreported), the Court of Appeal observed the following:

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions/ which may not be exhaustive depending on the circumstances of the case as follows:*
> *1. The age of the child.*
> *2. The religion which the child professes and whether he/she understands the nature of oath.*
> *3. Whether or not the child promises to tell the truth and not to tell lies."*

In the above cited case, the Court of Appeal also referred to its earlier decision in the case of ***Hamisi Issa Vs. Republic***, Criminal Appeal No. 274 of 2018 (unreported), where the Court approved the procedure which the trial Court followed before the witness of tender age gave her evidence in accordance with section 127(2) of the Evidence Act. In that case, the trial Magistrate started by asking the child witness whether or not she understood the nature of oath. Having replied to the question in the negative, the child's evidence was taken upon her promise that she would tell the truth and upon her undertaking that she would not tell lies.

In the appeal under consideration, the record shows that on 25/10/2018 while testifying, PW1 gave her evidence on affirmation. The record does not reflect that she understood the nature of oath. As stated above, under the current position of the law, if a child witness does not understand the nature of oath, she or he can still give evidence without taking oath or making an affirmation, but must promise to tell the truth and not to tell lies. In the circumstances therefore, Appellant's ground that the procedure used to take PW1's evidence contravened the provisions of section 127 (2) of the Evidence Act succeeds. This applies also to the evidence of PW3 who is recorded to have been 14 years of age but whose evidence was taken in contravention of the law.

For the above reasons, the evidence of PW1 and PW3 which were received contrary to the provisions of section 127(2) of the Evidence Act, Cap. 6 [R.E 2019], are hereby expunged from the record. Since the Appellant's conviction was solely based on the evidence of PW1 and PW3, and since in sexual offences the best evidence comes from the victim, there is no gainsaying that the effect of expunging the evidence of PW1 renders the Prosecution case impotent.

I need not also traverse the effect of not ascertaining the age of the victim of statutory rape under Section 130(1) (2) (e) of the Penal Code. The decision of the Court of Appeal in ***Andrea Francis Vs. R*** (supra) referred by the Appellant made the following decision:

> *"In this case, the particulars of offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 14/2/2006 the Principal District Magistrate, before putting her on oath, also indicated that she was 16 years.* ***With respect, it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation of by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age.*** *It follows that the evidence in a trial must disclose the person's age."* (Emphasis added)

Likewise in the case of ***Projestus Zacharia Vs. The Republic***, Criminal Appeal No. 162 of 2019 (unreported), the Court of Appeal held:

> *"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal ..... This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim.*** *"*(emphasis added)

The pointed anomalies suffice to dispose of this appeal. The trial Magistrate casually dealt with the case before him. Further, the evidence relied upon to convict the Appellant was received contrary to law.

In the event, the appeal is hereby allowed in its entirety. The Appellant's conviction is quashed and the sentence set aside. I hereby order the Appellant's immediate release from prison unless he is otherwise lawfully held.

Order accordingly.

Y. B. Masara
JUDGE
6th August, 2021.