IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY
AT ARUSHA

CRIMINAL APPEAL NO. 92 OF 2021

(Originating from the Resident Magistrates Court of Arusha, Criminal Case No. 5 of 2018)

FRANK MICHAEL ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

JUDGMENT

Date of last Order: 30th September, 2022

Date of Judgment: 7th October, 2022

MALATA, J.

The genesis of this appeal is that, on diverse dates of December, 2017 at kwa Morombo area, within the City, District and Region of Arusha, **Frank Michael**, the Appellant herein, was alleged to have unlawful carnal knowledge of the victim D.M, (name withheld for child's protection), a girl of 12 years old. The Appellant was also alleged to have abducted the victim from her parents.

The evidence of the prosecution leading to Appellant's conviction and sentence can briefly be summarized as follows: The victim (PW1), a standard III pupil at Olorien Primary School, was living with her parents at Mwanama. According to Mkamilifu Zephania (PW6) the victim's mother, the victim was missing at her house from August, 2017. PW6 made efforts to search her whereabouts but in vain. She reported to the Police Station and published her disappearance in a radio station. In December, 2017, they found the victim at Mt. Meru Hospital after she was taken there by good Samaritans.

PW1 testified that, the Appellant who used to lure her with sweet items like soda, pipi and chewing gums, took her to his mother's house in Rombo Kilimanjaro where she assisted some house chores and later on, she was taken back to Arusha. They lived in the Appellant's room at kwa Morombo as couple for almost three months. For the entire period they stayed together, the victim was locked inside without being allowed to get outside in order to conceal her presence in the Appellant's house. They had regular sexual intercourse. Whenever they had sex, the Appellant administered her with pregnant contraceptive pills.

On 27th December, 2017 Mary George Nyange (PW2), the Appellant's co-occupant saw the victim through a window of the Appellant's room. Noting the victim's childhood, she reported the matter to the ten-cell leader Veronica William Sumayi (PW3). PW3 together with neighbours gathered at the Appellant's room at 20:00hrs finding the door of the room closed. They inquired the Appellant to open the door. After forcefully entering the room, they found the victim hiding under the bed complying with the Appellant's instructions to hide.

They inspected the victim's vagina who had no underwear, and realized that there were sperms. PW3 called the street chairman, who arrested the Appellant. The Appellant was taken to the Central Police Station. After being given PF3, the victim was taken to Mt. Meru Hospital where she was admitted for six days. WP 5722 D/C Getrude (PW5), recorded the confession statement of the Appellant who admitted to have committed the offences on the pretext that the victim threatened to commit suicide if she wouldn't be sexually gratified. Despite objection from the Appellant, the confession statement was admitted as exhibit P2.

On 3rd January, 2018, Mathew Festo (PW4), a doctor at Mt. Meru Hospital, examined the victim. According to his examination, the victim tested HIV positive and was infected with STDs. The examination further revealed that the victim had casual sexual intercourse because she was not a virgin. Although there were no sperms and bruises, penetration manifested. The reason that sperms and bruises were not seen is due to the fact that the rape incident took place five days before the victim was taken to the hospital. He filled in the PF3 which was admitted as exhibit P1.

In his sworn defence, the Appellant (DW1), denied involvement in the commission of the offences. He testified that on 27th December, 2017 he was taken to police station where he stayed for 14 days before he was brought in the trial court to face the charges levelled against him. His defence was that the case was framed up against him by those he referred as business competitors.

The Appellant was arraigned at the Resident Magistrates' Court of Arusha (the trial court), where he was charged with two counts, namely: Rape contrary to section 130 (1), (2) (e) and 131 (1) and abduction contrary to sections 134 and 35 of the Penal Code, Cap. 16 [R.E 2002], (hereinafter Cap.

16). After full trial, the trial court was satisfied that the offences against the Appellant were proved to the hilt. The Appellant was convicted of the two offences and sentenced accordingly. The Appellant was sentenced to serve thirty (30) years imprisonment for the first count and seven (7) years for the second count. The sentence was ordered to run concurrently.

The Appellant was aggrieved by both conviction and sentence meted on him. He has preferred this appeal on the following grounds:

a) *The learned trial Magistrate erred in law and fact by not complying with the mandatory provision of section 127 (2) of the Evidence Act Cap. 6 as amended;*
b) *The learned trial Magistrate erred in law and fact for failure evaluate the evidence on record as result arrived at unfair and partial decision;*
c) *The learned trial Magistrate did not follow the procedure as exhibits were not read over and explained in court as required by the law;*
d) *The learned trial Magistrate erred in law and fact for failure to conduct an inquiry in respect of the Cautioned Statement before admitting the said statement as exhibit P2;*

e) *The learned trial Magistrate erred in law and fact for failure to consider and evaluate the Appellant's defence; and*

f) *The learned trial Magistrate erred in law for failure to decide that, the case was not proven beyond reasonable doubt.*

Basing on the aforesaid grounds of appeal, the Appellant prayed that the appeal be allowed by quashing the conviction and setting aside the sentence, leading to his acquittal.

At the hearing of the appeal, the Appellant appeared in Court in person unrepresented and fended for himself, whereas the Respondent Republic, was represented by Ms Akisa Mhando, learned Senior State Attorney. The appeal was heard *viva voce*.

The Appellant argued the grounds of appeal *seriatim.* Submitting in support of the first ground, the Appellant contended that the evidence of the victim (PW1), who was a child of tender age was recorded in contravention of section 127 (2) of the Evidence Act, Cap. 6 [R.E 2019] (hereinafter TEA). He maintained that the victim who was 13 years of age ought to be asked questions so as to confirm whether she knew the nature of oath, and whether she promised to tell the truth and not lies. He referred this Court to

the decision of the Court of Appeal in the case of **John Mkorongo James vs Republic,** Criminal Appeal No. 498 of 2020 (unreported). According to the Appellant, the trial magistrate did not comply with the law, rendering the evidence of PW1 to have no evidential value.

Submitting on the second ground of appeal, the Appellant asserted that there was no evaluation of the evidence by the trial court before finding the Appellant guilty of the offence insisting that the conviction was based on weak evidence.

Regarding the third and fourth grounds of appeal, the Appellant faulted admission of exhibits P1, (the PF3) and P2, (the confession statement) on two folds: In the first place, after being admitted in evidence, the contents of exhibits P1 and P2 were not read to the parties, in contravention of the law. He was of the view that failure to read the contents denied him right to cross examine on those exhibits. Second, during admission of exhibit P2, the Appellant raised objection that the statement was not freely and voluntarily given. Surprisingly, the trial Magistrate did not conduct trial within a trial. She admitted the statement as exhibit P2 contrary to the dictates of the law, argued the Appellant.

On the fifth and sixth grounds of appeal, the Appellant faulted the trial magistrate for failure to consider the Appellant's evidence before arriving to verdict. The conviction based on one side evidence, submitted the Appellant. It was the Appellant's further submission that conviction could not ensue basing on the contradictions prevalent in the prosecution evidence. He urged the Court to allow the appeal by quashing the conviction and setting aside the sentence.

On her part, Ms. Mhando opposed the appeal though admitted some of the irregularities pointed out by the Appellant. In response to the first ground, she admitted that although the victim was 13 years old, she testified on oath, in terms of section 127(2) of TEA. She referred to section 127(6) which allows the Court to receive the evidence of a child of tender age after being satisfied that the credibility of the evidence of the child is not doubted. It was her further submission that in the trial court decision, there was no doubt in PW1's credibility hence her evidence was properly taken. To bolster her argument on credibility of a child of tender age, she referred this Court to the case of **Shabani Rulabisa vs Republic,** Criminal Appeal No. 88 of 2018 (unreported).

The learned State Attorney, combined grounds two and five, and argued them jointly. She admitted that the trial court did not consider the Appellant's evidence before finding him guilty, referring to pages 3-6 of the judgement. However, she was of the view that, the shortfall did not occasion injustice to the Appellant. She invited the Court to exercise its power under section 366 of the CPA and either vary the decision or alter the judgment. She also relied on section 388 of the CPA stating that the omission is curable, alternatively, she invited this Court to order retrial.

The Respondent, combined third and fourth grounds of appeal and argued them together. She conceded that it is true that exhibits P1 and P2 were admitted but not read in court. On the way forward, she was of the view that exhibits P1 and P2 be expunged from Court record insisting that the remaining oral evidence by the prosecution can still prove the charges beyond reasonable doubt. This Court was referred to the case of **Mwaluko Kanyusi & 4 Others vs Republic,** Consolidated Criminal Appeals No. 110 of 2019 and 553 of 2020 (unreported), where the Court of Appeal was settled that oral evidence can prove the case in the absence of documentary evidence. As to failure to conduct trial within a trial, the learned State Attorney stated that the same is fatal under section 27 (1) (2) and (3) of

TEA, adding that the same renders the confession statement to have no evidential value.

Regarding the sixth ground of appeal on failure by the prosecution to prove case, it was her submission that the case was proven beyond reasonable doubt. She confidently submitted that first, there was penetration as proved by PW1 and PW4. This is credible evidence to warrant conviction. She referred this Court to the decision of the Court of Appeal in the case of **Jacob Manyani vs Republic,** Criminal Appeal No. 558 of 2016 (unreported), where the Court held that in sexual offences the best evidence is that of the victim. She further, contended that the accused was properly identified by PW1.

In response to the offence of abduction, the learned State Attorney submitted that it was proven beyond sane of doubt through the evidence of PW1 and PW2, she thus prayed for dismissal of the appeal and confirmation of the trial court's decision.

In rejoinder submission, the Appellant had nothing useful to add, he left the matter to the Court to decide his fate.

I have placed deserving weight on the grounds of appeal and the submissions by the Appellant and the learned Senior State Attorney. I have also revisited the trial court record. For reasons to be apparent in due course, I will determine the 1st, 2nd and 3rd grounds of appeal.

In the first ground of appeal, the Appellant faults the trial court for taking the evidence of PW1 who was a child of tender age without observing mandatory requirement of section 127(2) of TEA. On her part, the learned State Attorney sought refuge to section 127(6) of TEA, stating that since credibility of PW1 was not at issue, her evidence was properly taken.

There is no doubt that PW1 at the material time was a child of tender age. A "child of tender age" is defined under subsection 4 of section 127 of TEA. 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)

I entirely agree with Ms Mhando that in the current legal regime, the law is not strict on conducting *voire dire* test while taking evidence of a child of tender age. *Voire dire* test was no longer made mandatory procedure after

July, 2016 when Act No. 4 of 2016 which amended section 127 of the Evidence Act became operational. After the amendment, the only requirement was that before testifying, a witness who is a child of tender age has to promise to tell the truth and not lies. The procedure before taking the evidence of a child of tender age was incorporated in the TEA. Section 127(2) of that Act 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."*

The procedure was simplified by the Court of Appeal in the case of **Issa Salum Nambaluka vs Republic**, Criminal Appeal No. 272 of 2018, while referring to its previous decision in **Geoffrey Wilson vs Republic**, Criminal Appeal No. 168 of 2018 (both unreported), the Court made the following guidelines:

> *"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."

Resorting to the appeal under consideration, before taking the evidence of PW1 who while giving her particulars stated that she was 13 years old, the trial Magistrate did not comply with the above procedure. Nothing on record shows that PW1 was asked anything to ascertain whether she knew the nature of oath or whether she promised to tell the truth and not lies. The record shows that PW1 gave sworn evidence. Without ascertaining whether PW1 knew the nature of oath, or whether she promised to tell the truth and not lies, it was grave irregularity to take the sworn evidence of PW1.

It was expected that after the trial Magistrate was satisfied that PW1 possessed sufficient intelligence to testify and that she understood the duty of speaking the truth, it is only at this point her sworn evidence would be taken. Since the evidence of PW1 was taken in contravention of the law, her evidence was not properly admitted in terms of section127(2) of TEA. In so far as her evidence was improperly admitted it has no evidential value. Since the evidence of PW1 is the crucial evidence in grounding conviction against

the Appellant, having discarded her evidence, nothing remains to prove the charge against the Appellant.

The case of **Geoffrey Wilson vs Republic** (supra), is instructive in this aspect. The Court made the following observation:

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No 4 of 2016. Hence, the same has no evidential value. Since the crucial evidence of PW1 is invalid, there is no evidence remaining to be corroborated by the evidence of PW2, PW3 and PW4 in view of sustaining the conviction."*

From the above position of the law, and having discarded the evidence of PW1 whose evidence is crucial in sexual offences cases, there is nothing to be corroborated by PW2, PW3, PW4, PW5 and PW6. Their evidence is hearsay of what they heard from PW1. The first ground of appeal is meritorious, I therefore upheld it.

I now turn to the third ground of appeal which faults the trial court for failure to read the contents of exhibits P1 and P2 to the parties after their admission. Ms Mhando conceded to this assertion, agreeing that exhibits P1 and P2 be expunged from Court record.

The rationale behind reading contents of documentary exhibits after being admitted in evidence is to enable the parties to understand what is contained therein. The rationale was propounded in by the Court of Appeal in **Nkolozi Sawa and Another vs Republic**, Criminal Appeal No. 574 of 2016 (unreported) where the following was stated:

> *"In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits."*

As the trial court record shows, after admitting exhibits P1 and P2, their contents were not read so that the Appellant would know what is contained

therein. That would assist the Appellant also to cross examine on those exhibits. Since the said exhibits were admitted contrary to procedure, the PF3 (exhibit P1) and the confession statement of the Appellant (exhibit P2), are hereby expunged from Court record. Having expunged the two exhibits, the trial court decision cannot be left to stand because the same was to a great extent based on exhibit P2. The third ground of appeal is also worthy.

The fourth ground of appeal needs not to detain me much. It is a well settled principle of law that once the accused person objects tendering and admission of confession statement in evidence, the court must stop everything and conduct trial within a trial in order to ascertain whether the statement was freely and voluntarily given. There is a plethora of authorities to that effect. For example, in **Daniel Matiku vs Republic** Criminal Appeal No. 450 of 2016, the Court of Appeal while quoting with authority its previous decision in **Twaha Ally and 5 Others vs Republic**, Criminal Appeal No. 78 of 2004 (both unreported) demonstrated:

> *"... if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the*

alleged confession. Such inquiry should be conducted before the confession is admitted in evidence..."

See also: **Ali Salehe Msutu vs Republic** [1980] TLR 1 and **Shihobe Seni and Another vs Republic** [1992] TLR 330.

Failure to conduct trial within a trial constitutes fatal irregularity. This renders the confession statement which was admitted contrary to the above procedure baseless. Since the same has already been expunged from Court record, it wouldn't form the basis of the trial court decision basing on the above pointed out anomaly.

Having discarded the evidence of PW1, there is nothing that could have been relied upon by the prosecution to warrant the Appellant's conviction. This being sexual offence, the best evidence is that of the victim. See: **Selemani Makumba vs Republic** [2006] TLR 379. That, in tandem with the fact that exbibits P1 and P2 are expunged from Court record, nothing remains to sustain the Appellant's conviction. Since the first, third and fourth grounds of appeal sufficiently disposes the appeal, I find no compelling reasons to dwell on the rest of the grounds which are basically centred on the analysis of evidence.

Considering what I have deliberated above, it is the finding of this Court that the two offences were not proved by the prosecution beyond all reasonable doubts. Therefore, the Appellant's conviction was improperly anchored, so as the sentence meted on him.

Consequently, the appeal has merits. It is allowed in its entirety. The Appellant's conviction is quashed and the sentence set aside. He should be released from prison forthwith unless he is otherwise lawfully held.

Order accordingly,

DATED at **ARUSHA** this 7th, October, 2022.

G. P. Malata
JUDGE
7th, October, 2022