IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 19 OF 2021

(C/F DC Criminal Case No. 99 of 2005 in the District Court of Same at Same)

JUMA HUSSEIN.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 17th June, 2022

Date of Judgment: 19th July, 2022

JUDGMENT

MWENEMPAZI, J.

The appellant, Juma Hussein was charged in the District Court of Same at Same with an offence of rape contrary to section 130(1) (2) (e) and 131 (2) (a) of the Penal Code, Cap 16 R.E 2002. He was convicted and sentenced to life imprisonment in accordance to the provision of section 131 (3) of the Penal Code. Aggrieved with the conviction and sentence imposed, the appellant preferred an appeal to this court advancing nine (9) grounds reproduced as follows;

1. That the learned trial magistrate erred in both law and fact in convicting and sentencing the appellant despite the charge being not proved beyond any reasonable doubt and to the required standard by the law.

2. That the learned trial magistrate grossly erred both in law and fact when he convicted and sentenced the appellant based on fatally and incurably defective charge sheet.

3. That the learned trial magistrate grossly erred in both law and in fact when he failed to conduct a proper *voire dire* examination to (PW2 – the victim) to ascertain whether she possess sufficient intelligence to justify the reception of her evidence, whether she knows the duty of speaking the truth and whether she understands the nature of an oath. Hence the PW2'S evidence was received contrary to section 127 (2) of the Tanzania evidence Act (T.E.A) cap R.E 2002.

4. That the learned trial magistrate grossly erred in law and in fact in convicting and sentencing the appellant but failed to warn himself on the danger of relying on the unsworn evidence of the victim of the alleged offence (PW 2).

5. That the learned trial magistrate grossly erred in law and in fact when he convicted and sentenced the appellant based on Exhibit P1 (PF3) but failed to note that the same was received contrary to laid legal procedures pertaining to the admission of Exhibits as the appellant was never asked if he has any objection pertaining the admission of the same.

6. That the learned trial magistrate grossly erred in law and fact when she relied on the Exhibit P1 (PF3) as corroborative evidence in convicting and sentencing the appellant but failed to note that the same was never read aloud before the court after being admitted as Exhibit. Hence the contents of the Exhibit P.1 remained unknown to the appellants.

7. That the trial magistrate erred in law and fact when he convicted and sentenced the appellant based on an irregular proceeding which flouted the mandatory provision of section 186(3) of the Criminal Procedure Act (CPA) Cap 20 R.E 2002. In that the appellant failed to cross examine the alleged victim (PW2) on some facts because of the presence of other people before the court.

8. That the learned trial magistrate grossly erred in both law and in fact when he relied on weak, tenuous, contradictory, incredible and wholly unreliable evidence from prosecution witnesses a basis of convicting and sentencing the appellant.

9. That the learned trial magistrate grossly erred in both law and fact when he failed to take into account and give a due consideration the defence evidence given by the appellant.

The hearing of appeal was done orally. The appellant appeared in person and unrepresented while Ms. Mary Lucas learned State Attorney appeared for the respondent.

In his brief submission in support of the appeal the appellant stated that he was arrested without any examination to verify that he was involved in the commission of the offence. That the wrong he did was to claim his salary. He said that the day he was taken to prison he also met another person who was also convicted because he demanded payment of salary.

The appellant further stated that he did not receive a fair trial because he was not allowed to question anything. He prayed to be assisted because according to him he was suffering for the offence he did not know. That was all for the applicant.

Responding to the appellant's submission Ms. Lucas submitted that they are supporting the conviction and sentence of the appellant because the prosecution did prove the case beyond reasonable doubt. In response to the grounds of appeal Ms. Lucas summarized the grounds and argued them in two groups. Ground 1-8 were argued together and the 9th ground alone.

Beginning with the 9th ground of appeal Ms. Lucas submitted that according to section 194(4) the defence of alibi must be preceded by a notice which must be given before the case is heard. She argued that since that was not done then the defence had no merit.

Regarding grounds 1- 8 Ms. Lucas submitted that the accused was charged with the offence of rape and that the charge was proper as the child was below 10 years and the provision was proper. She further submitted that the accused had also been charged under Section 131 a provision which pronounces the penalty. She contended therefore that the appellant had not been prejudiced anyhow.

Submitting further Ms. Lucas stated that the trial court convicted the appellant after considering the evidence of the victim and that she possessed sufficient intelligence. It was her submission that the court satisfied itself after asking her questions and then allowed her to testify. She argued that the victim's testimony was thus truthful.

Furthering her submission Ms. Lucas stated that the evidence of PW1, PW3 and PW4 all testified to have gone to the crime scene and found blood drops inside the room and a bed sheet which had already been washed. She also submitted that even the accused when examined he asked for forgiveness and when the victim was testifying the appellant never cross examined her. It was Ms. Lucas's submission that failure to cross examine the victim gave them inference that he accepted. She argued that the best evidence was that of the victim and that the court was right to convict the appellant. Concluding her submission, she stated that it was without any doubt that the accused was the one who raped the victim. She therefore prayed for the appeal to be dismissed.

Before I proceed to determine the merits or otherwise of this appeal, I will give a brief narration of facts that lead into this appeal.

The prosecution alleged that on 2/5/2005 at around 4:30 pm at Hedaru village in Same district Kilimanjaro region, the appellant did unlawfully have sexual intercourse with a girl child aged 9 years. To prove the charge, the prosecution summoned six (6) witnesses: The victim of the offence testified as PW2. She told the court how the incident happened and how she informed her mother who was PW1. She also explained how she was taken

to the police where she also identified the appellant after he was arrested and brought there at the police post. Her evidence was supported by the evidence from other prosecution witnesses that is PW1 her mother. PW3 the police officer in charge of the Hedaru Police post, PW4 another police officer who accompanied PW3 and PW1 to arrest the appellant. PW5 was a person who lived together with PW1, so he testified on how he was informed by the PW1 of the incident that had happened and that he was the one who calmed PW1 and advised her to report the matter to the police station while he remained behind and decided to talk to the appellant until the police arrived and arrested him. Finally, was the testimony from PW6 who was a medical doctor. He told the court about how he received the victim PW2 while accompanied with her mother PW1 and a police officer on that fateful day. PW6 explained how he examined the victim and found that she was bleeding and also had bruises on her vagina. The doctor also said that the victim's hymen had been raptured which he said may have been caused by a blunt object. During his testimony PW6 also tendered a report which had been prepared by him after examining the victim. A report which the trial court received in evidence as an exhibit P1. This was the prosecution evidence.

Based on all this evidence on record the trial court found that the prosecution had established their case and so the appellant was allowed to give his defence. The appellant's defence was to the effect that on the date of the ordeal, he left at Hedaru village early in the morning at around 6:00am and went to a farm. He testified further that he returned from the farm in the evening at around 6:30 pm whereby few minutes later at round

7:00pm he was arrested and taken to police station. He said that while at the police station he was informed that he was being accused of raping a girl so he was thereafter taken back to his room where the police checked his bed and they saw a red colour on the bed and said it was blood but he told them that it was Kiwi shoe polish and not blood. This was all for the defence.

I have thoroughly gone through the entire evidence on record and examined the same in relation to the grounds of appeal raised by the appellant. In the course of determining the appeal I have grouped the grounds of appeal into two, **first** is the grounds that challenged the procedure and **second** is the ground that faulted the substance of evidence.

The issue of procedural irregularity has been the major complaint of the appellant as it is seen in most of his grounds of appeal including ground 2, 3, 5, 6 and 7. Faulting the trial court's procedure the appellant argued that he was convicted based on a defective charge. While expounding his ground during the hearing of the appeal the appellant never explained this ground by pointing to any specific irregularity on the charge sheet or show anything that proves that he was unfairly tried due to a certain defect on the charge sheet. I however examined the record in respect to this ground but was also not able to find any defect on the charge sheet. For that reason, this ground lacks merit and it is dismissed forthwith.

Another procedural defect pointed out by the appellant was the one on the third ground of appeal where he faulted the trial magistrate for failure to

conduct *voire dire* examination to PW2 who was the victim of the alleged offence. He contended that the trial magistrate did not comply with the provision of the law under section 127(2) of the *Tanzania Evidence Act*, Cap 6 R.E 2002. I will quote this provision of the law as it states hereunder;

> *"(2) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation,* ***if in the opinion of the court which opinion shall be recorded in the proceedings****, he is possessed of sufficient intelligence to justify the reception of his ~ evidence, and understands the duty of speaking the truth." (Emphasis added)*

Now going back to present case, the record is clear before receiving the testimony of PW2 the trial magistrate asked her a number of questions which she responded as follows;

> *"I pray in Bethlehem church. I pray on Saturdays. We are in Same. We are told that there is God. If I tell lies God will see me to be bad."*

After asking those questions, the trial magistrate went on stating that from the response he got he was satisfied that the child possessed the necessary intelligence to justify reception of her evidence.

Therefore, based on what is on the record as shown above it is clear that the trial magistrate conducted the *voire dire* examination as required by the

law by asking PW2 a number of questions before he allowed her to testify. It is based on the procedure that the evidence was taken not on oath. In the circumstance I find that the complaint by the appellant that PW2's evidence was received contrary to the provision of the law to be unjustifiable. Thus, the 3rd and the 4th grounds lack merit and they are accordingly dismissed.

Next is the 5th and 6th grounds of appeal where the appellant challenged the reception of exhibit P1 which was a PF3 containing medical examination report. The appellant argued that the report was neither read aloud after being tendered as an exhibit nor was he asked if he had any objection. I have checked the record with respect to this complaint and noted that it is true that the appellant was not asked if he had any objection before the evidence was received as an exhibit and also the document was never read aloud even after it was received for the appellant to know its contents. This was irregular because failure to do so is fatal renders such evidence to be expunged from record. However, this does not affect the testimony of PW6 the doctor who conducted medical examination on the victim. As it was held in the case of **Bashiru Salum Sudi vs R Criminal Appeal No 379 of 2018** (unreported) the Court of Appeal stated that, "*Failure to read out an admitted document is fatal and such evidence is expunged from the records* ***but the content of expunged document can be saved by oral evidence***". *(Emphasis added).*

Therefore, Since PF3 was never read aloud after being tendered and since it is fatal as per the case of **Bashiru Salum Sudi vs R(supra)**, I therefore expunge it from the record.

Now that the PF3 has been expunged from record the question remains as to whether the prosecution case can stand without it. In **Salu Sosoma V R, Criminal Appeal No.4 of 2006 CAT-Mwanza** (Unreported) the Court of Appeal, had this to say;

> *"...likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence points to the fact that it was committed."*

Based on the above authority, despite the fact that PF3 has been expunged from the records, yet the content of such PF3 was elaborated by PW6 who testified that he examined the victim's vagina and noted that she had bleeding bruises and her hymen raptured. This evidence does prove that the victim was penetrated. Now, in the case of statutory rape like the present one the only element that needs to be established is penetration. So, the case of prosecution can still stand without such PF3.

The seventh ground of appeal also was related to a procedural irregularity where the appellant faulted the trial court for not complying with the provision of section 186 (3) of the CPA which require the court in all trials involving sexual offences to be conducted in camera. He argued that he was unbale to cross – examine the victim on some aspects because of the presence of other people before the court. I wish to quote the words of section 186(3) hereunder:

> *"Notwithstanding the provisions of any other law, the evidence of all persons in all trials involving sexual offences shall be received by the*

court in camera, and the evidence and the witnesses involved in these proceedings shall not be published by or in any newspaper or other media, but this subsection shall not prohibit the printing or publishing of any such matter in a bona fide series of law reports or in a newspaper or periodical of a technical character bona fide intended for circulation among members of the legal of medical professions."

Looking at the proceedings of the trial courts the record is silent as to whether the trial was held in camera as per the requirement of the law under the cited section above. Since there is no evidence that proves this provision was complied with it means there was noncompliance. The issue here is whether the noncompliance of the law in the circumstance of this case was fatal to the proceedings as to cause injustice to the appellant.

Examining the above provision of the law and the way it has been construed, I was led to believe that the provision seeks to protect the victims of the sexual offences. This is why the provision further prohibits the publication of evidence and the witnesses involved. It is my considered view therefore that the provision was not meant to protect the accused but the victim of the alleged offence. The accused is only protected by the law under the presumption of innocence which is a constitutional right provided in the Constitution of the United Republic of Tanzania of 1977 as amended from time to time under Article 13(6) which requires for every accused person to be presumed innocent until the contrary is proved. Therefore, at all time when the appellant was being tried in court, he was presumed innocent and that is why he was allowed to cross examine the witnesses and also give his defense at the end of trial. I thus find the argument that

he was unable to cross examine the victim because of presence of people not at all justifiable given the fact that he was able to cross-examine other witnesses.

Be it as it may, fatality of any irregularity depends upon whether or not it occasioned miscarriage of justice to the aggrieved party otherwise it is curable. Such omission as in this case is curable under **Section 388 (1)** of the **Criminal Procedure Act** (supra) which provides that no finding, sentence or order made by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of error, omission or irregularity in proceeding unless such error has in fact occasioned a failure of justice. This ground has no merit because it did not in my view occasion failure of justice to the appellant as he was given a right to cross examine PW2 but for the reasons best known to himself he did not ask any question.

Having looked at the procedural aspect of the appeal, I will now proceed to determine the evidential aspect. This has been covered under the eighth ground of appeal where the appellant complained that he was convicted based on weak, contradictory, incredible and unreliable evidence from prosecution. When submitting in support of his appeal the appellant did not expound on this ground therefore the ground is too general as he did not show which specific evidence, he was referring which means he attacked all the prosecution evidence.

In my thorough examination of the trial court proceedings, I did not come across any evidence which was contradictory. Looking at the entire

prosecution evidence I had no reason to fault it as I found all the prosecution witnesses to be credible and therefore their evidence was admissible to prove the charged offence. The victim (PW2), gave a clear explanation on what happened to her on the date of the incident. Also, the fact that PW2 was able to identify the accused by name and face even before the court the evidence which was not controverted by him it connected the appellant directly with the offence charged. PW2's evidence was also supported by the rest of the prosecution witnesses' evidence. There is coherence in prosecution evidence which makes the entire prosecution evidence water tight and thus believable.

In reaching his decision, the trial magistrate raised two issues for determination one is whether the victim was raped and two is who was the person responsible. When determining the first issue the trial court observed that he was convinced that the victim was raped based on the victim's testimony which was also corroborated by other prosecution witnesses' evidence (PW1, PW3, PW4 and PW5). These witnesses testified to effect that they saw the victim bleeding from her vagina. Also, important was the evidence of PW6, the doctor who examined the victim and proved that she was penetrated as he found her vagina to have bleeding bruises and her hymen raptured. The trial magistrate was of the view that there was proof of penetration and for the reason he was satisfied that the victim had been raped. Regarding the second issue as to who was the rapist the trial court observed that the appellant was the rapist because he was identified by the victim who knew him before the incident and the fact that

the appellant was leaving in the neighbourhood made the trial court convinced that the victim knew the appellant.

Considering such analysis made by the trial court and based on all the evidence on record I have no reason to fault its judgment. I also find that the prosecution did prove the charge against the appellant on the required standard of law. Having held so I find no reason to discuss the nineth ground of appeal because as submitted by the respondent and as rightly held by the trial court, the appellant's defence of alibi was not considered since the procedure pertaining to its reception was not followed.

In light of the above, I therefore dismiss the appellant's appeal and uphold the trial courts decision on conviction and sentence of the appellant. It is so ordered.

Dated and delivered at Moshi this 19th day of July, 2022.

T. MWENEMPAZI

JUDGE

Judgement delivered in court this 19th July, 2022 in the presence of the appellant and Ms. Mary Lucas, learned state Attorney.

T. MWENEMPAZI

JUDGE