IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 02 OF 2022

(From the decision of the Resident Magistrates' Court for Mbeya at Mbeya in Criminal Case No. 31 of 2018)

GERSON GETENI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 07//02/2022
Date of Judgement: 28/02/2022

MONGELLA, J.

The appellant 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. At the hearing it was alleged that on 27th January 2018 at Mageuzi area within the district and region of Mbeya, he did have carnal knowledge of a girl aged 9 years (hereinafter referred to as PW2 or the victim). The RMs court for Mbeya, which tried the matter, was satisfied that the charge was proved beyond reasonable doubt. It thus convicted and sentenced the appellant to life imprisonment.

Dissatisfied with the decision, he filed the appeal at hand through legal assistance from Mr. Abinel Zephaniah, learned advocate. The appeal contains 5 grounds as follows:

1. *That the trial court erred in law and facts when it convicted and sentenced the appellant by relying on the victim's evidence without examining and satisfying itself as to the reliability and truthfulness of her evidence.*

2. *That the trial court erred in law and facts to convict and sentence the appellant on the offence of rape by relying on PF3 which was not tendered nor admitted in court.*

3. *That the trial court erred in law and facts to convict the appellant while the case was not proved beyond reasonable doubt as required under the law.*

4. *That the trial court erred in law and facts when it failed to draw adverse inference against the respondent for failure to call a key witness, hence reaching a wrong conclusion.*

5. *That the trial court erred in law and facts when it failed to consider and analyse the defense case thereby reaching a wrong conclusion.*

On the 1st ground, Mr. Zephaniah challenges the trial court's decision on the ground that it relied on the victim's evidence without examining and satisfying itself as to the reliability and truthfulness of her evidence. He

based his contention on **section 127 (2) of the Evidence Act, Cap 6 R.E. 2019**, which requires the court, before recording the evidence of a child, to satisfy itself as to whether the child understands the nature of oath and her ability to testify in court. He submitted that the court has to conduct first an intelligence test and whether she promises to tell the truth before the court and not lies, and the process has to be recorded in proceedings.

Referring to the trial court proceedings particularly at page 7, he contended that the trial court recorded that "PW2, a child of tender age has promised to tell the truth." He added that thereafter her testimony was recorded, but it is not indicated in the proceedings if the process of procuring the promise was followed as provided under the law. To buttress his point he referred the case of ***Godfrey Wilson vs. The Republic***, Criminal Appeal No. 168 of 2018 (CAT at Bukoba), and that of ***David Mwampashe vs. The Republic***, Criminal Appeal No. 56 of 2020.

With regard to the 2nd ground, Mr. Mwampashe challenged the reliance on the PF3 by the trial court. He contended that the said PF3 was never tendered nor admitted in court. He referred the Court to page 6 of the trial court judgment whereby he contended that while the trial court was addressing the question of penetration, it stated that the PF3 filed by a medical doctor shows that the child was penetrated. However, he said, no medical doctor testified or PF3 was tendered.

Arguing on the 3rd ground, he had a stance that the case was not proved beyond reasonable doubt as required under the law. Explaining on the

major element in rape cases, he contended that there must be available unshakable evidence on penetration. However, he said, since the evidence of PW2, the victim, was incorrectly recorded and the PF3 was not tendered in court, there remained no tangible evidence to prove the offence.

Expounding on the 4th ground, he challenged the prosecution evidence for failure to call a key witness. Referring to the prosecution evidence, he said that the prosecution witnesses mention a child named Eliza claiming that she was with the victim in the case at hand and was raped together with her. That the said Eliza and the victim went to PW1 and PW3 to report the incident. In the premises, he was of the view that the said Eliza was a key witness and it is surprising that she was not brought to testify. He concluded that it is the position of the law that failure to call a key witness empowers the court to draw an adverse inference in favour of the accused person.

On the 5th ground, Mr. Zephaniah faulted the trial court decision for failure of the trial court to consider and analyse the defence case. He argued that it is the requirement of the law that judgment should base on objective evaluation of evidence from both sides. He contended that in the matter at hand, the trial court never at all touched the defence case. He referred to the case of ***Baruan Hassan vs. The Republic***, Criminal Appeal No. 580 of 2017 (CAT at Mwanza, unreported) and prayed for the appeal to be allowed and the life imprisonment sentence be set aside.

The respondent was represented by Mr. Saraji Ibolu, learned Principal State Attorney, who opposed the appeal. He argued first on the 1st, 2nd, 4th, and 5th grounds and then finished with the 3rd ground. With regard to the 1st ground, whereby the appellant challenges the process of procuring the promise to tell the truth from the child victim, Mr. Ibolu first conceded to be aware of the Court of Appeal decisions on the process to be followed.

However, on the other hand, he argued that the provisions of **section 127 (2) of the Evidence Act** require the court to record whether the child has promised to tell the truth to the court. In the premises, he was convinced that the trial magistrate correctly recorded the promise of the child witness to tell the truth. He added that in his research while preparing to argue the appeal, he went further to consider the intention of the Parliament under Hansard of 24th June 2016 at page 97, last paragraph, which is to the effect that the court has to satisfy itself that the child has promised to tell the truth. He was of the view that the same intention led to the amendment of the provision in the Evidence Act.

Replying to the 2nd ground, he conceded to Mr. Zephaniah's argument, but contended that a PF3 is not the sole proof of rape. He referred to page 7 of proceedings saying that the victim is seen to have stated clearly that the appellant raped her. He was of the view that the victim was a credible witness. Referring to the case of ***Said Majaliwa vs. The Republic***, Criminal Appeal No. 02 of 2020 (CAT at Kigoma, unreported), he argued that the best evidence comes from the victim herself.

On the 4th ground whereby the appellant claims that the prosecution failed to present a key witness, he argued that the witness mentioned by the appellant, that is, one Eliza, was not a material witness as claimed by the appellant. He added that the victim testified that the said Eliza had gone inside when the appellant called her therefore she did not witness anything.

With regard to the 5th ground, Mr. Ibolu conceded that the appellant's argument was not considered. However, he briefly argued that the omission does not vitiate the whole trial court decision because this being the first appellate court, it has powers to re-evaluate and consider the appellant's evidence under **section 373 of the Criminal Procedure Act, Cap 20 R.E. 2019**.

Lastly on the 3rd ground, Mr. Ibolu, in consideration of the whole prosecution case, had a stance that the victim's evidence was corroborated by the rest of the prosecution witnesses. He said that the victim explained at the earliest stage what happened to her and PW1, PW3 and PW4 testified that the appellant confessed in their presence and prayed for forgiveness. He added that the appellant never cross examined these witnesses on the alleged fact regarding his confession. Referring to the case of ***George Mail Kemboge vs. Republic***, Criminal Appeal No. 327 of 2013 (CAT at Mwanza, unreported), he argued that failure to cross examine on an important fact entails acceptance. He prayed for the appeal to be dismissed.

In rejoinder, Mr. Zephaniah maintained his argument that the law provides the procedure for procuring the evidence from a child witness. He challenged Mr. Ibolu's contention that the law does not state the procedure to be followed arguing that the Court of Appeal settled the process to be followed in its decisions.

With regard to the PF3, he was of the view that Mr. Ibolu had misconceived their argument, which was to the effect that the trial court relied on the PF3 and victim's evidence in proof of rape, but the same was not tendered.

On the 4th ground he maintained his argument that Eliza was a key witness as the victim in the case at hand claimed that the two were together when the incident happened. He as well insisted that in the absence of the victim's evidence and the PF3, the case remains unproved beyond reasonable doubt.

I have considered the arguments by both counsels and thoroughly read the trial court record. I shall start with the complaint regarding the recording of the testimony of PW2, a child witness. In fact, both counsels are in consensus that the procedure settled by the Court of Appeal in various cases in procuring the promise to tell the truth before recording the evidence was not adhered to. Mr. Ibolu however, argued that the provisions of **section 127 (2) of the Evidence Act** does not state any procedure. He further argued that the intention of the Parliament as stated under page 97 of last paragraph of the 24th June 2016 Hansard was only to obtain the child's promise.

With all due respect, I do not agree with Mr. Ibolu's line of argument. In our legal system, the court is charged with the duty to interpret the laws enacted by the Parliament. Our system is also that of common law whereby case law is one of major sources of law. In that respect, the rules of precedent have it that, once a higher court in the court hierarchy settles a legal position, the subordinate courts to it are bound to follow the position unless where the same is distinguishable considering the circumstances of the case. In the matter at hand, the Court of Appeal which is the highest in the hierarchy, while interpreting the provisions of ***section 127 (2) of the Evidence Act*** which were introduced vide ***Miscellaneous Amendment Act, No. 2 of 2016, under section 26***, has settled in its various decisions the procedure of procuring the promise to tell the truth from the child witness before recording his/her testimony. In ***Godfrey Wilson vs. The Republic***, Criminal Appeal No. 168 of 2018 (CAT at Bukoba, unreported) the Court stated:

> *"The trial magistrate ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 27 (2) as amended imperatively requires a child of a tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is a condition precedent before reception of the evidence of a child of a tender age. The question, however, would be on how to reach at that stage. 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:*
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> 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.*

Thereafter, upon making the promise, ***such promise must be recorded before the evidence is taken*** *(emphasis added)."*

See also: ***Mwalimu Jumanne vs. The Republic***, Criminal Appeal No. 18 of 2019 (CAT at DSM, unreported); ***Selemani Bakari Makota @ Mpale vs. The Republic***, Criminal Appeal No. 269 of 2018; ***Issa Salum Nambaluka vs. The Republic***, Criminal Appeal No. 272 of 2018; and ***Medson Manga vs. The Republic***, Criminal Appeal No. 259 of 2019 (all unreported). Mr. Ibolu did not argue on whether the settled position is distinguishable on the circumstances in the case at hand. It is my advice to him that if he wishes to challenge the position settled by the Court of Appeal as stated above, he should invoke relevant procedures as required under stare decisis rules. As matters stand at this point, the testimony of PW2 lacks evidential value and is hereby expunged from the record.

With regard to the issue on reliance on PF3 advanced on the 2nd ground, I agree with Mr. Zephaniah that the trial court wrongly relied on the PF3 which was not tendered in evidence. Its finding based on the said PF3 is therefore expunged.

On the 4th ground, the appellant asserts that a key witness, that is, one Eliza, was not called. Non-calling of a particular witness can only be fatal if the said witness is material to the case. See: ***Aziz Abdalah v. Republic*** [1991] TLR 71; and ***Hemed Said v. Mohamed Mbilu*** [1983] TLR 113.). I have gone through the testimony of the victim and found that she never testified that Eliza witnessed the rape. She said she was with Eliza, but Eliza had gone inside her house when the appellant carried her to an unfinished house to rape her.

Considering the testimony, I find the said Eliza not a material witness to the case to the extent of making the court draw an adverse inference against the prosecution for not presenting her. In addition, the law does not compel a particular number of witnesses to be called to prove a certain fact. See: **Section 143 of the Tanzania Evidence Act, Cap 6 R.E. 2019**. What matters is the credibility of the witnesses presented by the prosecution. See also: ***Daffa Mbwana Kedi v. The Republic***, Criminal Appeal No. 65 of 2017 (CAT at Tanga, unreported); ***Hassan Juma Kanenyera v. Republic*** [1992] TLR 100; ***Yohanis Msigwa v. Republic*** [1990] TLR 148; and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017.

The 3rd and 5th grounds shall be dealt with collectively. After expunging the testimony of PW2 and the finding of the trial court based on an untendered PF3, what remains is for this Court to consider whether the remaining evidence on record suffices to hold the conviction against the appellant. I shall therefore re-evaluate and re-consider the evidence for both sides.

In his defence, the appellant denied to have committed the offence. He challenged the witnesses' testimony on the ground that the victim stated to have been raped on 17th January 2018 and not 27th. He said that the witnesses did not state anything before the trial court and none witnessed the incident. He also stated that the 5th prosecution witness was couched by the 1st and 3rd witnesses.

With regard to the discrepancy on the date of the incident, I agree with the appellant that while the charge stated the date to be 27th January

2018, the witnesses stated the date to be 17th January 2018. However, the discrepancy in dates is now considered a minor error with no effect of vitiating the charge. See: ***Emmanel Sang'uda @ Sulukuka and Another v. Republic***, Criminal Appeal No. 422 B of 2013 (unreported); ***Goodluck Kyando v. Republic*** [2006] TLR 363 and ***Mathias Bundala v. Republic***, Criminal Appeal No. 62 of 2004 (unreported).

The appellant claims that the charge was not proved beyond reasonable doubt. This assertion was also argued by his counsel on the ground that if the testimony of PW2 and the finding basing on the PF3 are expunged, there remains no evidence on record to prove the offence. After going through the record however, I agree with Mr. Ibolu that there still remains evidence to hold the conviction as the appellant confessed before PW1, PW3, and PW4 to have committed the offence to the victim. PW1, PW3, and PW4 testified that they confronted the appellant after receiving information of the incident and the appellant confessed and pleaded for mercy.

As argued by Mr. Ibolu, the appellant never cross-examined these witnesses on these incriminating allegations. Even during his defence, the appellant never denied to have confessed before PW1, PW3 and PW4. The law is trite to the effect that failure to cross examine on a particular fact entails acceptance on the fact alleged. See: ***Martin Misara v. Republic***, Criminal Appeal No. 428 of 2016 (CAT at Mbeya, unreported); ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013

(unreported) and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017. Even at this appeal stage the appellant has not challenged the testimony of PW1, PW3, and PW4 regarding his confession before them.

The law does not necessitate that confession be made before a police officer only. Therefore confession made before other witnesses, in this matter before PW1, PW3, and PW4, can suffice to hold a conviction against the appellant. See: ***Juma Ibrahim vs. Republic***, Criminal Appeal No. 110 of 1989; and ***D.P.P. vs. Nuru Mohamed Gulamrasal*** (1988) TLR 82. The law is also settled to the effect that there is no better evidence in criminal offences than the accused person's own confession. See: ***Jacob Asegelile Kakune v. DPP***, Criminal Appeal No. 178 of 2017 (CAT, unreported); ***Ibrahimu Ibrahimu Dawa v. The Republic***, Criminal Appeal No. 260 of 2016; and ***Mohamed Haruna Mtupeni & Another v. Republic***, Criminal Appeal No. 259 of 2007.

Considering the above observation I find the case was proved to the required standard. The appeal is therefore dismissed. The conviction and sentence by the appellate court, though on a different observation, are hereby upheld.

Dated at Mbeya on this 28th day of February 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in chambers on this 28th day of February 2022 in the presence of the appellant and his advocate, Mr. Abinel Zephaniah and Ms. Sara Anesius, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE