IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 234 OF 2021

(Arising from the decision of the District Court of Mkuranga at Mkuranga by Hon. Kaswaga, RM) dated 13th day of May, 2020, in Criminal Case No. 26 of 2019)

MOHAMED MSHAMU NGUVUMALI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th & 30th May, 2022

ISMAIL, J;

Mohamed Mshamu Nguvumali, the appellant herein, was arraigned in Court facing the charge of rape, contrary to the provisions of section 130 (1), (2) (e) and section 131 (1) of the Penal Code, Cap. 16 R.E. 2019.

The allegation that constituted the charge is to the effect that at about 1600 hours on 25th January, 2019, the appellant, a resident of Vikindu village in Mkuranga District in Coast Region met UVW (in pseudonym), a seven-year girl and a neighbour. The latter (the victim) was coming from school along with her friend. Along the way, he she met the appellant whom she referred

to as Muddy. The appellant called her but the victim (PW2) took no heed. It is then that the appellant began running after her. On the way, the victim stumbled and fell down, an act which made life easy for the appellant. He grabbed her, covered her mouth with a head veil (hijab) and dragged her to an unfinished building near the valley. The appellant took off the victim's clothes and then penetrated his *"mdudu"* into the victim's private parts. After he was done, the appellant allegedly dressed and threatened to kill the victim if she ever disclosed this incident to a third party.

Reeling in serious pain, bleeding and discharging dirt from her *genetalia*, the victim struggled to get home. While crying, she informed her mother, PW1, who examined her private parts and found that they were swollen and had bruises. PW1 reported the matter to the police, the latter of whom issued a PF3 (Exhibit P1) and PW5, WP 8053. D/C Neema, was assigned to investigate the case. UVW was sent to hospital for medical examination, carried out by Dr. Seif Mussa Mkwinda (PW4). PW4's findings were that PW2 had bruises, had her hymen perforated, and that there were red blood cells indicating that she had been forcibly and sexually penetrated. A swoop succeeded in arresting the appellant and conveyed to a hamlet leader (village office), before he was subsequently handed over to the police.

In his sworn defence, the appellant (DW1), whose testimony was corroborated with that of a certain Mr. Mshamu Nguvumali (DW2), told the trial court that PW2 fabricated the case against him and pleaded a defence of *alibi,* contending that at the time of commission of the alleged incident he was on frolics of his own elsewhere.

On conclusion of the trial proceedings, the trial court convicted the appellant as charged, and sentenced him to serve life imprisonment. The trial court's decision was based on the evidence of the victim PW2 together with the corroborating evidence by other prosecution witnesses who satisfied the trial magistrate that the charge was proved on the required standard.

The appellant is bemused by the decision of the trial court, hence his decision to prefer the instant appeal that has eight (8) grounds of appeal, paraphrased as follows:

1. That, there was violation of the mandatory procedure enshrined under section 192 (3) of CPA when Preliminary Hearing was conducted.
2. That, the PF3 (Exhibit P1) was wrongly admitted as it was not tendered by a competent witness and that it was not read out to the appellant.
3. That, the evidence by PW2 a child of tender age was un-procedurally procured, contrary to section 127 (2) of the Tanzania Evidence Act, Cap 6 R.E. 2019 (the TEA).

4. That the age of the victim was not proved.
5. That there were shortcomings in the evidence of PW2 as it was not certain.
6. That the victim (PW2) did not mention the appellant at the earliest opportunity.
7. There were inconsistences of evidence on the prosecution evidence.
8. That, the prosecution's case was not proved beyond reasonable doubts.

When appeal came for hearing, the appellant fended for himself, while the respondent was represented by Ms. Laura Kimario, learned State Attorney. Hearing of the appeal was conducted by way of written submissions filed by the parties in accordance with the schedule of filing.

The contention by the appellant with respect to grounds one and two which were argued together is that the preliminary hearing was bungled by the magistrate by his failure to read the facts recording them (memorandum). This was an infraction of section 192 (3) of the Criminal Procedure Act, Cap 20 R.E. 2019. Besides that, treatment of Exhibit P1 (PF3) was inconsistent with the law as it was not read out after it had been admitted as evidence.

The argument by Ms. Kimario is that the preliminary hearing was conducted and pages 4 and 5 of the typed proceedings bear testimony. She added that disputed and undisputed facts were identified, and the appellant, prosecutor and magistrate appended their signatures on the proceedings. Ms. Kimario contended that the spirit of section 192 is to accelerate trials, and that proceedings would not be vitiated on account of the failure to conform to the requirements section 192.

I acknowledge that holding of a preliminary hearing after the accused has pleaded not guilty is a requirement under section 192 (1) of the CPA and Rule 2 of the Accelerated Trial and disposal of cases Rules, 1988, GN. No. 192 of 1988 ("the Accelerated Trial Rules"). The decisions in ***Leonard Joseph @ Nyanda vs. The Republic***, CAT-Criminal Appeal No. 186 of 2017 [Dated 12th March,2020], ***Republic vs. Petro Joctan @Isinika @Chinga,*** CAT-Criminal Appeal No. 293 of 2016; ***Republic vs. Francis Lijenga,*** CAT-Criminal Revision No. 3 of 2019 (both unreported); and ***Joseph Munene & Ally Hassani vs. Republic*** [2005] T.L.R 141, are a case in point.

Section 192 (3) of the CPA is coined in the following wording:

> *"(3) At the conclusion of a preliminary hearing held under this section,* ***the court shall prepare a memorandum of the matters agreed and the memorandum shall be***

> ***read over and explained to the accused in a language that he understands,*** *signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."* [Emphasis added]

Significance of conformity with this requirement has been emphasized in numerous decisions. In the case of ***MT. 7479 Sgt. Benamin Holela vs. Republic*** [1992] T.L.R 121 the upper Bench observed:

> *"Section 192 (3) of the Criminal Procedure Act, 1985 imposes a mandatory duty that the contents of the memorandum must be read over and explained to the accused.'"*

The contention which is contradicted by the respondent is that this essential step was skipped. While it is clearly evident that this requirement was given a wide berth by the respondent, my contention is that skipping of that step does not render the entirety of the trial proceedings obliterated, as the appellant contends. This takes into account the fact that, though the procedure is mightily important, its ultimate goal is to ensure that trial proceedings are expedited with a view to bringing cases to a speedy end. The consequence of the court's failure to comply with the law in this respect has been a subject of discussion in many a decision. Thus, in ***Republic vs. Francis Lijenga,*** CAT-Criminal Revision No. 3 of 2019 (unreported), the

Court of Appeal of Tanzania nullified the entire preliminary hearing proceedings and ordered conducting of fresh preliminary proceedings. In arriving at that conclusion, the upper Bench remarked as follows:

> *"…We need not recite the much referred statement of facts which were appended at page 60 of the record and, suffice it to remark that, from the forgoing excerpt, it is palpably clear that the deduced memorandum of undisputed facts was not read over and explained to the respondent ahead of appending his signature thereto……..all said, we entirely share the concurrent views taken by counsel from either side and ,accordingly, we invoke section 4(3) of AJA and nullify the entire preliminary hearing proceedings…"*

Exercise of this option is, however, conditioned on the court being satisfied that the accused person was prejudiced by the trial court's failure to conform to the requirements of the law. This was held in the case of ***Fungile Mazuri v. Republic***, CAT-Criminal Appeal No. 147 of 2012 (unreported), wherein the Court of Appeal of Tanzania guided on why preliminary hearings are conducted and consequences that come with non-compliance with the law. It was held:

> *We have always restated that the intention of the legislature in enacting section 192 of the CPA on holding of preliminary hearing was to accelerate and speed up trials in criminal cases (see- CRIMINAL APPEAL NO. 109 OF 2002,* ***1.***

> ***JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (CAT at Arusha) (unreported)****. We have further restated that criminal proceedings can be said to have been vitiated by the omission of the trial court to hold preliminary hearing only when upon perusal of the record it is shown that the appellant's trial was either delayed or caused extra costs or prejudiced the appellants: (see-**1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (supra)****. Mr. Karumuna is with due respect correct, there is nothing on the record to show the appellant suffered any delay or extra costs or any other prejudice on the appellant because of the failure to conduct the preliminary hearing."*

Nothing convinces me that the appellant was prejudiced by the trial court's failure to read out the memorandum of facts not in dispute and those that were disputed. My position is emboldened by the fact that the appellant enjoyed the services of an advocate during the trial proceedings. It is on the basis of the foregoing that this ground of appeal is considered hollow and it is hereby dismissed.

With respect to failure to read out Exhibit P1, I subscribe to the view of both counsel and accede to their unanimous call that the same be expunged for want of compliance with this mandatory requirement of the law. This ground is allowed to that extent.

Ground three of the appeal castigated the trial court's decision to rely on the testimony of PW2 which was allegedly taken without due regard to the requirements set under section 127 (2) of the CPA. Learned counsel for the applicant did not submit on this ground but the contention by the respondent's counsel is that PW2 promised to tell the truth and affirmed before she testified.

I have gone through the record of the trial proceedings and, as Ms. Kimario alluded to, PW2 made a promise of telling the truth and before she affirmed and went ahead and testified. In my considered view, this was perfectly in order and consistent with the legal position as it currently obtains. The most exquisite position on this was made by the Court of Appeal of Tanzania in ***Ally Ngozi v. Republic***, CAT-Criminal Appeal No. 216 of 2018 (unreported), in which it was held:

> *"In terms of section 127 (2) of the evidence Act, it is permissible only for a child of tender age to give unsworn account on condition of making a prior promise to tell nothing but the truth…. So, subject to the mandatory provisions of subsection (2) above, a child of tender age can be a competent and compellable witness in criminal proceedings. In this regard, in terms of section 198 (1) of the CPA, section 6 of the Oaths and Statutory Declaration Act, and the Oaths and Affirmation Rules GNs 127 and 132*

of 1967, whenever a child of tender age is examined upon oath or affirmation, that witness undertakes to speak nothing but the truth which amounts to a promise to speak the truth and not to tell lies as envisaged under section 127 (2) of the Evidence Act. Thus, in the case at hand, since the victim a child of tender age of 13 years was examined on affirmation, she had promised to speak the truth and not to tell lies and her account has evidential value."

The clear message discerned from the cited excerpt is that, besides complying with the provisions of section 27 (2) of the CPA, examination of a witness on oath or affirmation is also in compliance with the requirement enshrined in section 198 of the CPA, which provides as hereunder:

"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

The manner in which the oath or affirmation should be taken is as provided in the Oaths and Statutory Declarations Act, Cap. 34 R.E. 2019. In the instant case, the record reveals that after fielding a few questions, PW2, a child of tender age, opted to adduce her testimony on affirmation. This is one of the alternatives provided in section 127 (2), and I find nothing blemished in that respect. The testimony of PW2 was recorded in accordance

with the procedural requirements set out in sections 127 (2) of the Evidence Act and 198 of the CPA. In view thereof, this ground of appeal fails.

The appellant's gravamen of complaint in ground four resides in the alleged failure to ascertain age of the victim before convicting the appellant. The appellant holds the view that the victim's age was not proved. It has been stated, time and again that, in charges involving statutory rape, proof of age of the victim bears a great significance. This is because age of the victim constitutes a key ingredient that completes the offence. It, therefore, requires leading in evidence just like proof of any other allegation. This requirement is clearly embodied in the charging provision itself *i.e.* section 130 (2) (e) of Cap. 16. It provides as follows:

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under the circumstances falling under any of the following descriptions:*
>
> *(e) with or without her consent* ***when she is under eighteen years of age****, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."* [Emphasis is added]

Significant, as well, is the fact that proof of age of the victim helps the court in determining the punishment to be imposed on an accused person for, if age of the victim is 10 or less years, the sentence is life imprisonment,

while a thirty-year custodial sentence would be imposed if proven that the victim's age surpassed 10-year mark but below the age of 18 years of age. So important is age of the victim that failure to prove it constitutes the prosecution's failure to prove its case beyond reasonable doubt. This position was underscored in ***Andrea Francis v. Republic***, CAT-Criminal Appeal No. 173 of 2014 (Dom-unreported), wherein it was held:

> *"…. In the absence of evidence to the above effect it will be evident that the offence under section 130 (2) (e) (supra) was not proved beyond reasonable doubt."*

The upper Bench stated in the just cited decision that age of the victim can be proved in number of ways. It held:

> *"…. Under normal circumstances evidence relating to the victim's age would be expected to come from any or either of the following:- the victim, both of her parents or at least one of them, a guardian, a birth certificate."*

Reviewing the trial proceedings and, as Ms. Kimario submitted, age of PW2 (the victim) was proved by PW1, her parent, and this is evident at page 6 of the proceedings. Same age was stated by the victim at page 11 and, finally, by PW4, when the victim was presented to him for medical examination (see page 25 of the proceedings). From the totality of this testimony, I am satisfied that proof of the victim's age was sufficiently

adduced, and that the victim was aged 7 years when she testified in court. I find no merit in this ground of appeal and I dismiss it.

Grounds 5, 6 and 8 question the sufficiency of the evidence adduced in support of the prosecution's case. The appellant's totality of the complaints in these grounds is that the case for the prosecution was not proved to the hilt.

The law relating to criminal procedure is firmly settled. It places the burden of proving the accused's wrong doing on the shoulders of the prosecution. This is an enduring canon of criminal procedure that has stood the test of time. Thus, in ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

> "*The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence.*

The position in the cited case was fabulously articulated by the High Court of Kenya (Ojwang, J., as he then was) held as follows in ***Republic v. Cosmas Mwaniki Mwaura***, H.C. Criminal Case No. 11 of 2005 (as quoted in ***R v. Elizabeth Nduta Karanja & Another*** [2006] e KLR). The learned judge made the following persuasive finding:

> "*The basic principle applicable in criminal trial is that any doubts in the prosecution case, at the end of the trial, will*

lead to the acquittal of the accused. The corollary is that the prosecution case, before the accused is accorded a chance to respond, must be so definitely cogent as to bear compelling need for an answer. Without such prima facie justification, there is no legal basis for putting the accused through the trouble of having to defend himself. It is the responsibility of the court to determine, upon a careful assessment of the evidence, whether to conclude the proceedings by early judgment, or to proceed to the motions of hearing both sides before pronouncing judgment. The logical inference is that whereas the prosecution must be heard in a criminal case, the accused does not have to be heard. The accused can only be heard if the court determines that the weight of the evidence laid on the table is so implicative of the accused, that considerations of justice demand that he be accorded a chance to answer."

The question that calls for my determination is whether the prosecution discharged this duty. My hastened answer to this question is in the affirmative. Noting that penetration and age of the victim constitute the key ingredients at which the testimony was aimed, I take the view that all of the prosecution's witnesses discharged this obligation. PW2, the victim of the rape incident, gave a stellar account of the appellant's perpetration of the incident. Her testimony was corroborated by PW1 who inspected the victim and found that she had been molested. She was also present when

the victim named the appellant as her tormentor. Testimony of PW4 was also of additional value that cemented the prosecution's case. It confirmed that the victim had been penetrated.

Further to that, PW1 and PW2 proved that the victim was of the age of below 10 years of age. To be precise, the victim was aged 7 when she took the witness box to testify on the matter. Nothing could be more telling.

I am convinced that the testimony adduced sufficiently proved the appellant's culpability at the standard required in criminal cases. Consequently, I find the appellant's consternation in these grounds lacking in merit. I dismiss these grounds of appeal.

Ground seven points out to contradictions which are allegedly apparent in the testimony of PW1, PW2, PW3 and PW4. Areas of such contradictions have been pointed out. These are with respect to the scene of the crime; PW4's testimony that sperms can last for 72 hours in the victim's genital parts while in the case of PW2 none was found; and the contention that there was fabrication of the testimony adduced by PW3, PW4 and PW5.

While the alleged contradiction in the testimony of PW3, PW4 and PW5 is neither here nor there, it is true that there are contradictory versions on where exactly the alleged incident occurred. While there is a contention that the incident occurred in an unfinished house, others contend that it was

committed in a non-functioning bar building. With respect to PW4, nothing appears to contradict anything. While the contention that there were no sperms found was an observation that came from the examination carried out, the assertion that sperms can last for up to 72 hours was merely an expression of opinion in an ordinary course of the things.

With regards to the scene of the crime, assessment of the conclusion of these contradictions requires gauging if the same were material, fundamental and affecting the central story (See: ***Luziro s/o Sichone v. Republic***, CAT-Criminal Appeal No. 231 of 2010; ***Dickson Elia Nsamba Shapwata & Another v. Republic***, CAT-Criminal Appeal No. 92 of 2007; ***Bikolimana s/o Odasi @ Bimelifasi v. Republic***, CAT- Criminal No. 269 of 2012 (all unreported); and ***Mukami w/o Wankyo v. Republic*** [1990] TLR 46). Considering that the central story in the accusations against the appellant is his involvement in the rape incident, the question relating to description of the scene of the crime plays second fiddle to the actual perpetration of the alleged incident. I consider these contradiction trifling and immaterial. I dismiss this ground of appeal.

Consequently, I take the view that the entire appeal is lacking in merit. Accordingly, the same is dismissed.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

30/05/2022

DATED at **DAR ES SALAAM** this 30th day of May, 2022

M.K. ISMAIL,

JUDGE

30/05/2022