

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 147 OF 2022

(Arising from Criminal Case No.110 of 2022 at District Court of Babati at Manyara)

PASCHAL DANIEL.....APPELLANT

Vs

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order : 25-4-2023

Date of judgment:31-5-2023

B.K.PHILLIP,J

The appellant herein was arraigned at District Court of Babati at Babati on the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code (Cap 16, R.E 2019). The trial Court found him guilty and sentenced him to the life sentence imprisonment .

Aggrieved by the aforesaid conviction and sentence, he lodged this appeal to challenge the same. The grounds of appeal are reproduced verbatim hereunder.

- (i) *That the trial magistrate erred in law and fact in holding that the appellant had a case to answer without giving the fit ruling which constitute decision and the reasons for the*

decision and consequently went on convicting and sentencing the appellant on an offence charged with.

- (ii) That, the trial magistrate erred in law and in fact in holding that the appellant is guilty of an offence charged and consequently went on convicting and sentencing the appellant on an offence charged with by relying on the evidence of PW1 and PW2 who as per the record of the proceedings is not clearly shown how the viore dire test was conducted, though it seen in question posed and the answers thereto and not "report of doing" as clearly seen in the proceedings.*
- (iii) That, the trial magistrate erred in law and fact in holding that the appellant is guilty of an offence charged with and consequently went on convicting and sentencing the appellant on an offence charged with by relying on the exhibit PE1 which is most likely to have been involuntarily given or obtained because the appellant was arrested on 3/7/2022 and reminded in the illegal custody of the village office till 4/7/2022 when he was handed over to the police station of Dareda, an ordeal itself is a torture because it is not known which care and health and social environment he was kept on, as he clearly stated in his defence to have been beaten as from his time of arrest. The point was not contested by the prosecution.*

At the trial court the prosecution's case was as follows; that on 3rd July 2022 about 16:00pm at Mandi Village within Babati District in Manyara

Region the appellant did have sexual intercourse with a girl aged five (5) years old in a bush/farm. In this judgment she will be referred as "the victim" or "PW1" for the purposes of concealing her identity. To prove the charge against the appellant the prosecution paraded a total of six witnesses namely; the victim (PW1), Geson Leonard (PW2), Basili Sule (PW3), Leonard Dionice (PW4), WP9630 D/CPL Christian (PW5) and Dr. Rose Mosses Shayo (PW6). They also tendered two exhibits, accused caution statement (PE1) and PF3 (PE2).

PW1's testimony was to the effect that he was five years old, a student of standard one at Mandi Primary school. On the fateful day she was asked by her father to buy banana together with his brother. On the way they meet one male person who was wearing trousers and T-shirt. That male person gave her brother Gerson Tshs.1000/=. He grabbed her hand and took her to a farm where there were maize plants. He undressed her trousers then undressed his trouser up to the knees and had sexual intercourse with her. She further testified that when the appellant was having sexual intercourse with her, she was down and appellant was on top of her. She cried. While she was crying, one person came that is when the appellant stood up. That person arrested the appellant. She put on her clothes and went back home. His father took him to hospital.

On the other side, PW2 who is PW1's brother testified that he is a standard one pupil at Mandi Primary school. On the fateful day their (PW1 and PW2) father gave them TShs .500/= for buying banan for their young brother. On their way they met one male person wearing trousers and T- shirt. He talked to him and he took the Tshs. 500/=

from his hand and gave him Tshs. 1000/=. Then he took PW1 to a nearby farm with maize stalk. He remained on the way and within short time came one watchman. When he saw that watchman, he started crying. The watchman asked him what was the matter. While he was talking with him he heard his sister crying. The watchman followed her sister and started chasing the person who took his sister. They run to the eastern direction to one baba Reggy who took them back home.

PW3 testimony was to the effect that on the fateful day he was on duty as a watchman. At 16:00pm he found PW2 standing at a foot path. PW2 told him that his younger sister was taken in the farm by a male person, and while he was still talking with PW2, PW1 emerged from that farm crying. He saw the appellant putting on his trousers and started running away. He chased him and arrested him, and called the Village Executive Officer (VEO) who told him to send the appellant to the office. He was told that appellant was from Bashnet. On the fateful day the appellant wore a black trousers (Jens) and T-shirt with different colors.

PW4 was the victim's father. He testified that the victim was born on 20th January 2017. That on the fateful day he gave the Victim and his brother Tshs.500/= for buying bananas for their young brother. At about 17:00pm the appellant was arrested by Bazili who informed him that his child was raped. He accompanied Basil to their village office. Then, he took the victim to dispensary at Dabil. In the following day the Victim was taken to Dareda Hospital for further medical checkup.

PW5 was a police officer. His testimony was as follows; that on 4th July 2022 he was on duty at Dareda. At 12:00pm he received the appellant who was alleged to have raped a little girl. He was directed by OSC to take his statement. Before recording his caution statement, he introduced himself and told the appellant his rights. The appellant told him he was ready to give his statement in the absence of any witness/relative. He started recording his statement from 12:50 to 13:40pm. After reading the statement to him they both signed the same.

Prosecution rested their case by the testimony of PW6, a Doctor at Dareda Hospital. Her testimony was to the effect that on 4th July 2022 he attended one little girl who was brought to the hospital by her father. He was informed that the girl was raped. She examined her and found bruises at her labia and minora. There was also mucus discharging from her vulvar. She inspected the victim's private part and took sample of the discharging liquid which had blood. The sample was taken to laboratory. The result came out that there were pus cells and epithelial cells. Her hymen was broken and she complained of pain at pelvic area.

The appellant's defence was as follows; that on 3rd July 2022 he was on the way to Gitingi. He was with other two persons at motorcycle. They left him at Mandi Village because he was not feeling good. The other two were going at Gitingi. He got his lunch at certain local hotel. Then while on the way he got epilepsy. He fell down along the road. A group of people gathered there. While he was on the way he found two children near the valley. They asked him for money for buying sweets. He gave them Tshs.1000/= and he took from them Tshs.500/=. At that

place there was a farm with maize. He further testified that he decided to go to that farm to look for tooth brush from one of tree in that valley. He told them that he will come back to them but they stated to crying and one person came and find them crying. He decided to run away from that place. That person chased and arrested . He took him to the children's parent .The victim's father beat him with sticks.He was prevented from beating him by the people who were there at that time.He was taken to Mandi Village office and in the following day he was taken to Dareda Police station, then to Babati Police Station on the same day.

Back to the appeal at hand, the appellant appeared in person unrepresented whereas learned state attorney Yunis Makala appeared for the respondent.

The appellant opted to started on the 2nd ground of appeal. His submission was to the effect the trial court erred to rely on the testimony of PW1 and PW2 which were taken in contravention of section 127 (2) the Evidence Act. It was appellant's contention that the trial court was supposed to examine the victim on whether or not he knew the meaning of oath.He contended that the procedure for taking evidence of a child of a tender age was not adhered to, the testimony of PW1 has to be disregarded. To bolster his argument, he cited the case of **John Mkarango James vs Republic, Criminal Appeal No.498 of 2020** (unreported).

With regard to the 3rd ground of appeal he submitted that trial court erred to rely on exhibit P1 which was taken in contravention of section 50 of the Criminal Procedure Act ("CPA") because as per testimony of

PW4's the victim was raped on 3rd July 2022 and the appellant's caution statement was recorded on 4th July 2022, thus pursuant to section 50 of the CPA the caution statement was illegally recorded. That the caution statement was supposed to be recorded within 4 hours. He prayed the caution statement to be disregarded.

With regard to the 1st ground appeal he submitted that the trial Magistrate did not take into consideration his defence and did not state the reason for disregarding it. He further contended that the trial court did not give reasons for finding him with a case to answer.

In rebuttal, on the 1st ground Ms. Makala submitted that this is new ground. It is different from the 1st ground of appeal stated in the Memorandum of appeal. She contended that the appellant has submitted on a non-existing ground of appeal. She further contended that appellant's defence was taken into consideration. She referred this Court to page 7 of the trial court's judgment where the trial Magistrate held that the appellant's defence was very shallow and also said that the appellant did not cross examine the witnesses on the crucial issue/fact in respect of the offence.

With regard to the 2nd ground of appeal, Ms. Makala submitted that at page 5 of the typed proceedings it is indicated that the trial court asked the victim if she can state the truth and the victim replied that she was there to say the truth only. She also referred this court to page 7 of the typed proceedings where PW2 was asked by trial court if he was ready to say the truth and replied that she was ready to say the truth. Under these circumstances it was Ms. Makala's opinion that there was no contravention of section 127 (2) of the Evidence Act. To cement his

argument, he cited the case of **Wambura Kigingira Vs Republic, Criminal Appeal No.301 of 2018** (unreported) in which the Court of Appeal interpreted the provisions of section 127 (2) of the Evidence Act.

With regard to the 3rd ground of appeal Ms. Makala submitted that at page 10 of the trial court proceedings it shows that when exhibit PE1 was being tendered in court the appellant did not object and did not raise before the trial court the concern he is raising in this appeal. So the concern raised by the appellant is just an afterthought, contended Ms. Makala. She added that it is not only exhibit PE1 which was used to convict appellant. The Prosecution adduced heavy evidence to prove the offence against the appellant. There were evidences of PW6, the doctor, PW1 and PW2. She insisted that this appeal has no merits and prayed that it should be dismissed.

Appellant did not make any rejoinder. Having analyzed the rival arguments made by the parties herein, let me embark on the determination of the grounds of appeal. I will start dealing with with 2nd and 3rd grounds conjointly. The trial Magistrate recorded that he examined both PW1 (the Victim) and PW2 before giving their testimony and both promised to say the truth. (See page 5 trial court's proceedings). However, the record is silence on the questions put forward to PW1 and PW2, thus the record does not show if the PW1 and PW2 were examined on whether they knew the nature and meaning of oath. Fairly, I can say that the requirement of section 127 (2) of Evidence Act was not complied with to the letter. Now, the question the trial court's failure to comply with the requirements

provided in section 127 (2) of Evidence Act lead to removal of PW1's testimony from the court's record?.

Upon going through the court's records I am convinced that PW1 and PW2 spoke the truth. Their testimonies are corroborated with the testimony of PW3 and PW4. On the strength of the decision of the Court of Appeal in the case of **Wambura Kigingira Vs Republic , Criminal Appeal No.301 of 2018** (unreported) in which it held that the testimony of a child of tender age can be relied upon despite the non compliance with the requirements in section 127 (2) of the Evidence Act to the letter provided that there are clear assessment of the Victim's credibility on the record and the court must record the reasons that notwithstanding non compliance with section 127 (2) , a person of tender age still told the truth.I am of settled view that there is no any plausible reason to expunge the testimonies of PW1 and PW2 from the court's record.

Coming to the 3rd ground of appeal, the trial Court's records reveal that the offence was committed on 3rd July 2022, but according to PW5's testimony the appellant was taken to the Police Station on 4th July 2022 at 12:00pm and he start to take his caution statement at 12:50pm up to 13:40pm. Thus, exhibit PE1 was recorded 50 minutes after reporting at the Police Station which quite in line with the law thus, the appellant's contention that Exhibit PE1 was not recorded within four hours upon being taken to the Police Station is baseless. As correctly submitted by the learned state attorney the appellant did not cross examine PW5 on the time he spent at Police Station before Exhibit PE1 was recorded nor did he object to the admission of exhibit PE1 in evidence. The position

of the law is that as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the court to disbelieve what the witness. In the case of **Nyerere Nyague Vs Republic, Criminal Appeal No.67 of 2010**, (unreported), the court of Appeal had this to say on raising objections on admission of documentary evidence in an appellate stage;

"But what is more, during his defence, the appellant himself introduced that he gave a cautioned statement to the police. When the prosecutor sought to produce it, the appellant did not object to its production; and so it was admitted as Exhibit P2. He is now seeking to challenge its admissibility in this Court. It was never raised with the first appellate court. Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal....."

Thus, it is the finding of this court that Exhibit PE1 (the appellant's caution statement) in which he admitted that he raped the victim was properly recorded and admitted in evidence. The trial Magistrate cannot be faulted on relying on the same in his judgment. However, as correctly submitted by learned state attorney, the trial Magistrate did not base his conviction solely on exhibit PE1. Even if exhibit PE1 is expunged from the records, still there was strong evidence to convict appellant of the offence he charged with. For instance, the testimony of PW3 who apprehended the appellant after chasing him when he was trying to escape upon being found raping the Victim is very strong evidence

which proved beyond reasonable doubts that the appellant raped the Victim. Thus, this grounds also lacks merit and hereby dismissed.

Coming to the 1st ground of appeal, I am inclined to agree with the learned state Attorney that instead of submitted on the 1st ground of appeal stated in the memorandum of appeal the appellant submitting on non-existing ground, thus I will not consider the appellant's submission in respect of the 1st ground of appeal because they are irrelevant. It is a trite law that parties are bound by their pleadings. A party to a case is not supposed to submit on something which he/she did not plead. The reason behind is preventing one party from taking the other party by surprise.

However, by passing I wish to point out that the trial Court's judgment shows that the appellant's defence was considered.

With regard to the 1st ground of appeal, the same lacks merit since the trial court explained in his ruling that the appellant had a case to answer upon evaluation of the prosecution evidence. The ruling for case to answer is quite in order. The appellant has not told this court which provision of the law was not complied with or how was he prejudiced with that ruling. After all with the evidence adduced by the prosecution witnesses indeed the appellant had a case to answer.

In fine this appeal has no merit and it is dismissed in its entirety.

Dated this 31st day of May 2023



B.K.PHILLIP

JUDGE