IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA SUB REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 57 OF 2022

(Original Criminal Case No. 82 of 2021 of the District Court of Mufindi at Mafinga before Hon. E. Uphoro, RM)

BONY SANGA ..... **APPELLANT**

VERSUS

REPUBLIC ..... **RESPONDENT**

JUDGMENT

26th May & 11th August, 2023

I.C MUGETA, J:

The victim in this case is a girl of nine years. Allegedly, she was raped by the appellant on 16/9/2021. The appellant was arrested in *"flagrante delicto"* by Makweta Kihongo (PW2) and Raha Lunyungu (PW4). The clinical officer, (PW5) examined the victim on the same date. She found the hymen perforated and whitish discharge in the little girl's vagina. In his defence, the appellant claimed the case is a frame up by Makweta Kihonga (PW2) who had refused to pay him his wages. PW2 is the appellant's neighbour. Upon being convicted and given the mandatory life imprisonment sentence, he has appealed to this court on nine grounds of appeal.

He appeared in court unrepresented while Daniel Lyatuu, learned State Attorney appeared for the Republic and he opposed the appeal. The learned State Attorney submitted first as the appellant so requested. He argued the 3rd and 9th grounds jointly. The same applies to the 4th and 5th grounds, the 6th and 7th grounds while the 1st, 2nd, 8th and 10th grounds were grouped together. The appellant made a brief rejoinder.

I shall deal with those complaints jointly or independently as I shall consider convenient and expedient to avoid making this decision unnecessarily long. This option is based on the fact that several grounds of appeal are similar in their nature of complaints. I shall start with the 6th and 8th grounds of appeal.

In the 6th and 8th grounds, the complaints are that the PF3 was filled in by unqualified person, that section 240(1)(2) and (3) of the Criminal Procedure Act [Cap. 20 R.E 2019] were not complied with and that the clinical officer failed to state the methods she used to examine the victim.

The PF3 was filed in by PW5 who is a clinical officer. The appellant made no relevant submission to support those complaints. He just said that the clinical officer failed to explain how he reached his conclusion. Was it by method of weighing scale or other methods? The learned State Attorney argued citing **Charles Boda V. R**, Criminal Appeal No. 46/2016, Court of

Appeal – Dar es Salaam (unreported), and I agree, that a clinical officer is competent to fill in the F3. The clinical officer said she examined the victim's vaginal and made the findings she recorded in the PF3. In my view that evidence does not need further description on the methods used. Which method was used is not a fact in issue. On compliance with section 240, the complaint is misconceived because the clinical officer, indeed, testified in court. The complaints in the 6th and 8th grounds of appeal have no merits.

The 1st and 2nd grounds are interrelated. They concern the age of the victim and the manner of recording her evidence. The complaints are that age of the victim was not proved by his father and no birth certificate was tendered. Further, that section 127(2) of the Evidence Act [Cap. 6 R.E 2019] was violated. At the hearing of the case, the appellant made no submissions to those issues. On his part, the learned State Attorney said the witness promised to tell the truth as recorded at page 9 of the proceedings, therefore, her evidence is properly on record. On the age, he said the victim (PW1) and her father said she was aged 9 years which is sufficient proof.

Before the victim testified, this is what is on record per page 9 of the typed proceedings:-

*"**Court:** After the court discover the age of the victim to be of tender age, this court has interrogated and interview the witness (victim) in under (sic) to ascertain on to whether she know the duty of telling the truth, and she replied.*

***VICTIM** (witness), I promise to tell the truth".*

According to section 127(2) of the Evidence Act a child of tender age who does not take oath must promise to tell the truth before giving the evidence. The challenge the trial courts face is how to lead the witness to making such a promise. In **Godfrey Wilson V. R.**, Criminal Appeal No. 168 of 2018, Court of Appeal – Bukoba (unreported), it was directed that the process would involve putting simple questions to the witness. It is expected that such questions and answers would appear on record. In this case the trial magistrate acknowledged conducting the interview with the witness. However, the questions and answers are not on the record. This is an irregularity. The issue for my determination is whether it vitiates the evidence of the victim.

In my view it does not. The law requires the witness to promise to tell the truth and, indeed, the promise was made before she testified. The manner of arriving to that promise has no standard process even though it is advisable that it be by question and answer session which would be

reflected on record. Reflecting the question answer session is important because it helps the appellate court to assess the fairness of the conclusion reached by the trial court. But what matters most is the promise from the witness which, in this case, appears on record. The evidence of PW1 (the victim), therefore, was not vitiated by the irregularity. The omission to record the question answer session did not prejudice the appellant nor occasioned a failure of justice. It is saved by section 388 of the CPA.

Regarding the age of the victim, indeed, no birth certificate was tendered in court. However, the victim testified that she is nine (9) years old. This was also said by her father (PW3) in his testimony. Such evidence sufficiently proved her age as there is no evidence to the contrary. The 1st and 2nd grounds of appeal have no merits.

In ground 3, 4 and 7, the appellant challenges the credibility of PW2 and PW4 who found him in *"flagrante delicto"* for failure to engage the hamlet leader. He also complains that the evidence of PW1 contradicts that of PW2 and PW3 as PW1 did not testify that PW2 and PW3 found the appellant naked. In his rejoinder he challenged the evidence of PW4 that he found the appellant and PW1 naked in the same room. He submitted that if this was true he ought to have yelled so that the appellant could be arrested in the act.

With respect to the appellant, PW3 who is the father of the victim did not testify to have found him and the victim naked. PW3 testified that he received information by phone from PW2. Therefore, the relevant evidence on his being found naked is that of PW2 and PW4.

Regarding the contradictions, the complaint is that while PW2 and PW4 said they found the victim and the appellant naked, PW1 never gave evidence to that effect. Indeed, PW1 (the victim) did not specifically state that PW2 and PW4 found them in the act and this does not amount to a contradiction. To support my conclusion, I, hereunder, reproduce their relevant testimonies.

PW1 said:

> *"When I was inside, I heard people outside knocking the door, accuse did open the door, however those people broke the door and entered inside. After they entered, they arrested Boni Sanga, and tied his both hands by ropes and proceeded to village government* office".

On his part PW2, at page 10 of the proceeding testified:-

> *"I get (sic) to the house of accused. I knocked the door, however the door was not opened, I decided to use force and broke the door and entered. I entered inside, and found Boni Sanga and Irene (victim) naked,*

i.e. 'clothesless', I get (sic) outside and locked the door, so accused could not run away".

In the same vein, PW4 at page 13 of the typed proceedings had this to say:-

"... tarehe 16/9/2021 ... nilipofika nyumbani nilimkuta Bony (mshitakiwa) akifanya tendo la ndoa na mtoto aitwaye Irene Mponzi baada ya kuona hivyo nilienda kwa Makweta ambaye ni jirani nikawaeleza ...".

The last quotation is in Kiswahili language because the learned magistrate recorded the evidence in both English and Kiswahili.

I see no contradiction in the foregoing evidence. PW1 said he was taken into the room and was carnally known by the appellant. PW4 who shared the house with the appellant found the appellant carnally knowing the victim. He reported to PW2 who accompanied him and the appellant was arrested in the act. Indeed, he did not yell but he summoned PW2 and they arrested the appellant and finally, the appellant was arrested at the scene of crime.

On credibility, the complaint is that PW4 and PW2 failed to yell to cause other neighbours to come to the scene of crime and arrest him. This complaint shall be addressed together with the complaint in the 9th ground of appeal that PW4 is a liar. The appellant was, indeed, arrested at the scene of crime by PW2 and PW4. If PW2 and PW4 were capable of

arresting the appellant, it was unnecessary to yell for help. They took him to the village leaders. It does not matter that the hamlet leader was not involved. On that account the hamlet chairman could not be summoned to give evidence in court because his evidence would be hearsay. I see nothing on record upon which PW4 can validly be adjudged as a liar. He is familiar with the house where the offence was committed and testified on how he lifted the nail that locked the door to enter and found the appellant in the act. The nature of the house is not described but if the nail could be unlocked from outside, then it is a typical village hut. A house for charcoal maker per the evidence of PW4 when asked questions for clarification by the court. On my part, I find PW2 and PW4 credible witnesses with no interest to serve. PW2 is the appellant's neighbor and the appellant and PW4 shared the rented house. There is no evidence of grudge between them. The complaints in the 3rd, 4th and 7th grounds have no merits.

The complaint in the 5th ground is that important witness, namely the police officer who issued the PF3 was not summoned to testify. The learned State Attorney submitted that the witness was unnecessary. I agree with him. There is no dispute that the PF3 was issued. This document (exhibit 1) was issued on the very incident date which means the incident was reported immediately.

Further, this complaint can be extended to village leaders who also did not testify. This is because PW3 in his evidence said the appellant confessed before the village leaders. However, the evidence of PW3 that at the village office the appellant confessed was not acted upon by the trial court. As a witness with interest to serve his evidence would have required corroboration if it was acted upon, hence, a need to be confirmed by the village leaders to whom the confession was made. Otherwise, the evidence of the said witnesses in all other aspects than confirming the confession would have been hearsay. Hearsay, evidence of witness that has not been brought in court cannot be used to draw adverse inference against the prosecution. (See the case of **Francis Eliud @ Mnyamwezi v. Republic**, Criminal Appeal No. 82/2021, High Court – Dar es Salaam (unreported) at page 10. The complaint in the 5th ground has no merits.

The complaint in the 10th ground of appeal is that the defence case was not considered. The defence advanced by the appellant, as I have said, is that the father of the victim is trying to frame up the appellant in order to rob him his wage for work they jointly performed.

At page 8 of the judgment, the trial magistrate considered this defence. Having found it to be untrue, he disregarded it. Therefore, it is not true that it was not considered. Was the trial magistrate right?

Mgeta

While the appellant is entitled to credence, I find his story highly improbable. The father of the victim was in the farm when the incident occurred. Therefore, he could not have incited the victim to go into the appellant's room per the appellant's claim. The appellant was arrested by PW2 and PW4 upon information from PW4 to PW2 that he was carnally knowing the victim. PW2 is the appellant's neighbor while PW4 is his co-tenant. There is no evidence on record that the duo conspired to arrest him on PW3's instigation. The appellant said he has a bad blood with PW2 for withhold the appellant's wage after they instructed a dam for PW3. However, when PW2 testified in court, the appellant never questioned him about the wages. Failure to question witnesses while in the witness box makes a defence on the same fact an afterthought. (See **Nyerere Nyegue v. Republic**, Criminal Appeal No. 67 of 2010, Court of Appeal – Arusha (unreported).

In my view, like the trial magistrate, PW1, PW2 and PW4 are credible witnesses. PW1 testified that the appellant penetrated his penis into her immature vagina. PW4 saw him ravishing the victim and informed PW2 and finally the appellant was arrested with the victim in his room being naked. On examining the victim, the clinical officer (PW5) found the hymen perforated. This evidence corroborates the victim. However, I disregard the

clinical officer's evidence in court that the vagina was bruised and had semen because that observation is not in the PF3 (exhibit P1). She could not have remembered these facts while in court if she forgot to put them in the PF3 as part of her findings. The complaint in the 10th ground of appeal has no merits.

In the event, I hold that the offence was proved to the hilt. The appellant was rightly convicted and sentenced. The appeal is, hereby, dismissed.

I.C. MUGETA

JUDGE

11/8/2023

Court: Judgment delivered in chambers in the presence of the appellant in person and Sauli Makori, learned State Attorney for the respondent.

Sgd. I.C. MUGETA

JUDGE

11/8/2023