IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 31 OF 2023
(Originating from the District Court of Arumeru, Criminal Case No. 40 of 2022)

CLEMENT PASKAL @MAWE ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th July & 18th August 2023

Masara, J

The Appellant was arraigned at the District Court of Arumeru ("the trial court") on charges of Rape, contrary to section 130(1) & (2)(e) and 131(1)(a) and Unnatural Offence, contrary to section 154(1)(a) & (2), both of the Penal Code Cap. 16 [R.E 2019]. He was convicted on both counts and sentenced to serve thirty years imprisonment in each count. The sentences were ordered to ran concurrently.

It was the Prosecution's version of events that CI (PW2), a minor, who is also the victim, was living with her grandmother, Neema Said Msangi (PW3). PW2 accounted that the Appellant had a habit of defiling her on a number of occasions. That the last ordeal happened at the time she was home alone whereby the Appellant entered into their house and stated to defile her by inserting 'his thing' into her vagina and anus. The Appellant

threatened that in case she disclosed the ordeal to her grandmother, he would kill her. The action of the Appellant caused her to bleed but she decided to wash her underwear. That on another day, the Appellant touched the victim's stomach in the presence of her grandmother (PW3).

According to PW3, the Appellant was her neighbour who used to visit her house regularly. On the fateful day, the Appellant was seating on a coach next to the victim, pretending to teach her tuition. While PW3 was taking cooking utensils, she saw the Appellant laying behind the victim. She asked him why he did that whereby the Appellant responded that he had headache. Later, she interrogated the victim who at first refused to disclose but after some threats about taking her to the police, she unveiled that the Appellant raped and sodomised her on the coach a day she was at home alone. PW3 inspected the victim and found out that the vagina was wider than normal. She also informed the victim's mother.

Witness Ahmed (PW1), the victim's mother who lived in Dar es Salaam, accounted that she was called by PW3 on 28/04/2022. PW3 informed her that the victim was raped on a coach by the Appellant. PW1 travelled to Arusha. She interrogated the victim about the ordeal. The victim informed her that the Appellant raped and sodomised her after opening his zip. PW2 also informed PW1 that after being raped and sodomised, she bled

and decided to wash her underpants. PW1 inspected the victim and noted that her vagina and anus had wider openings. She took the victim to the police station for further actions. On 05/05/2022 at 11:00hrs, Dr Elibariki Samson Kaguo (PW4), interrogated and examined the victim. In his report, PW4 stated that the victim was penetrated by a blunt object in both the anus and vagina. He filled in the PF3 which was admitted as exhibit P1. According to PW4, the hymen was partial and the vagina was red and pain. He also noted bruises which were healing in the victim's anus.

In his sworn defence, the Appellant denied involvement in the commission of the offences. He insisted that the issue of rape was cooked up as he did not rape the victim. He was arrested on 28/04/2022 while he was in a barber shop shaving. He was taken to the police station and later on he was arraigned in court.

After hearing both the prosecution and defence evidence, the trial magistrate was convinced that the charges against the Appellant were proved to the hilt. The Appellant was convicted and sentenced as above stated. Unamused by both conviction and sentence, the Appellant has preferred this Appeal on the following grounds of appeal, reproduced *verbatim*:

a) *That, the trial court erred in law and facts by convicting and sentencing the appellant in contravention of section 160B of the Penal Code;*
b) *That, the plea on charge of the appellant contravened requirements of section 231(1) of the CPA;*
c) *That, the trial court erred in law and in fact by convicting and sentencing the appellant while there were apparent procedural mistakes committed by the trial court by contravening mandatory requirement of Section 192(2)(3) of the CPA;*
d) *That the learned trial magistrate erred in fact and law in holding that the case against the Appellant was proved beyond reasonable doubt;*
e) *That, the voire dire test to PW2, a victim of crime having been conducted contrary to the law; the trial court erred in law when relied on evidence of such PW2;*
f) *That, there was variance between the charge and evidence adduced rendered the charge to be defective;*
g) *That the trial court erred in law and facts when did not even think why prosecution side did not get support from the police officer (investigator) as the matter alleged that it was reported to police;*
h) *That, the trial court erred in law and fact when convicted and sentenced the appellant based on contradicting testimonies made by PW2 (the victim) in court when adducing evidence, hence, PW2 was not credible;*
i) *That, the trial court did not accord due weight to appellant defence; and*

j) *That, the learned Trial magistrate erred in law and fact when it relied on an incredible Prosecution account, which was improbable, implausible, and full of discrepancies, inconsistencies, and contradictions, affecting their credibility the core.*

At the hearing of the appeal, the Appellant appeared in Court in person unrepresented and fended for himself. The Respondent was represented by Ms Tusaje Samwel, learned State Attorney. Hearing of the appeal proceeded *viva voce*.

Submitting in support of the 1st ground of appeal, the Appellant asserted that the sentence against him was excessive contrary to section 160B of the Penal Code, considering that he is a minor. He accounted that the record supports the fact that at the time he was convicted and sentenced he was under the age of 18 years. According to the Appellant, the trial magistrate should have given him a lesser punishment. To support his contention, he relied on the decisions in **Zuberi Mohamed @Mkapa vs Republic, Criminal Appeal No. 563 of 2020** and **Paul Juma Daniel vs Republic, Criminal Appeal No. 200 of 2020** (both unreported).

On the 2nd ground of appeal, the Appellant contended that the trial court erred in allowing him to respond to the charge contrary to section 231(1) of the Criminal Procedure Act, Cap. 20 [R.E 2022] (hereinafter "the CPA"). He accounted that he ought to have been reminded of the charge before

entering his defence. His stance was backed up by the case of **Emmanuel Richard @Hambi vs Republic, Criminal Appeal No. 369 of 2018** (unreported). In furtherance of his submission, the Appellant fortified that during the preliminary hearing the court erred in holding that he admitted the offence, and still went ahead to conclude that he did not admit the offence.

Elaborating the 3rd ground of appeal, the Appellant amplified that the requirements of a preliminary hearing were not fulfilled, contrary to section 192(2) and (3) of the CPA. He made reference to the case of **John Charles vs Republic, Criminal Appeal No. 554 of 2017** (unreported).

Regarding the 4th ground, the Appellant fortified that the prosecution evidence was full of contradictions, hence it could not be relied on to ground conviction.

Amplifying the 5th ground of appeal, the Appellant averred that section 127(2) of the Evidence Act was not complied with. He maintained that before the reception of the evidence of the victim (PW2) who is a child of tender age, the trial court ought to have assessed whether she knew the nature and meaning of oath and the danger of telling lies. According to the Appellant, the promise must come from the child's own words and not from the court. To buttress his position, he relied on the decisions in **John**

Mkorongo James vs Republic, Criminal Appeal No. 498 of 2020 and **Hamimu Yunusu vs Republic, Criminal Appeal No. 293 of 2019** (both unreported).

Regarding the 6th ground which was to the effect that there was variances between the charge and the evidence adduced, the Appellant prayed that the ground be allowed as is, reliance being the case of **Mohamed Kamingo vs Republic [1980] TLR 279**.

Submitting on the 7th ground, the Appellant accounted that the prosecution evidence was not supported by any police witness such as the investigator. That without evidence from the police, there looms doubt on the prosecution evidence. He maintained that failure to summon a police witness is indicative that the case was fabricated against him. He relied on the case of **Hemed Said vs Mohamed Mbilu [1986] TLR 15**. On totality of his submissions, the Appellant urged the Court to allow the appeal and set him free.

On her part, in rebuttal, the learned State Attorney fronted the grounds of appeal randomly. In support of the 2nd ground, she averred that section 231 of the CPA does not mandatorily require that a charge be read afresh after a *prima facie* case is established against the accused. She maintained that the trial magistrate properly directed himself by addressing the

Appellant charges against him and how he would like to defend himself. That he was also informed properly on the right to call witnesses. In her view, there was no violation of law as the Appellant argued.

Resisting the 3rd ground of appeal, the learned State Attorney amplified that the inscription that the Appellant admitted the charges was a mere slip of the pen, that is why the trial magistrate entered a plea of not guilty. Ms Tusaje added that a preliminary hearing is intended to assist the Court to sort out disputed matters. The absence of the same does not vitiate the proceedings, she added. In her view, the case of **John Charles** (supra) relied on by the Appellant, is distinguishable as it relates to a plea of guilty.

Confronting the 5th ground of appeal, Ms Tusaje conceded that prior to the reception of PW2's evidence there were no preliminary questions recorded. But that, as the trial magistrate recorded that the child witness promised to tell the truth and not lies, the evidence was taken in compliance of the law.

On the 7th ground, it was the learned State Attorney's submission that it is the duty of the prosecution to decide who to call in order to build its case. She insisted that the 4 witnesses who testified for the prosecution managed to establish its case warranting the Appellant's conviction.

Further, she insisted that the number of witnesses is immaterial as what is taken into account is the relevance of the evidence adduced. Buttressing her contention, the learned State Attorney relied on section 143 of Evidence Act and the case of **Halfan Ndubashe vs Republic, Criminal Appeal No. 493 of 2017** (unreported).

Reacting on the 9th ground, the learned State Attorney accounted that the trial magistrate considered the evidence of both the prosecution as well as the defence, referring to pages 4 and 5 of the typed judgment. Alternatively, she invited this Court to re-evaluate the evidence and come up with its own findings on the evidence.

Submitting on the 4th, 6th, 8th and 10th grounds of appeal simultaneously, Ms Tusaje propounded that there are no contradictions in the evidence of PW2 and PW3 as the Appellant alleged. She insisted that the evidence of the prosecution was clear that the Appellant used to visit PW3's home. He also used to teach PW2 tuition. Further, it was PW4 who identified the PF3 and tendered the same as exhibit. Further, that the age of the victim was proved through her mother, PW1. Counsel added that PW2 testified clearly in court that she was raped and sodomised. That, since she was a minor, she could not testify as an adult. To bolster her argument, the learned State Attorney referred to the case of **Hassan Kamunyu vs**

Republic, Criminal Appeal No. 277 of 2016 (unreported), which explains about children's accounts of offence events. Again, that the evidence of PW2 was corroborated by PW3 and the expert evidence of PW4. The learned State Attorney was of the firm view that the charges against the Appellant were proved beyond reasonable doubts. She relied on the well-founded principle that true evidence in sexual offences is that of the victim. Her stance was backed up by section 127(6) of the Evidence Act and the reported case of **Seleman Makumba vs Republic [2006] TLR 379**.

In the 1st ground of appeal, the learned State Attorney conceded that the sentence imposed on the Appellant was excessive, despite the fact that at the time of committing the offence he was 18 years old. The contention that the Appellant was below 18 years, was highly disputed by the learned State Attorney because he did not raise it until the time of mitigation. That, in the preliminary hearing, the Appellant admitted his particulars, including his age that he was 18 years old. Owing to the fact that the Appellant was the first offender and giving due regard to his age of 18 years, section 231(2)(a) of Cap. 16 ought to have been invoked, and appropriate sentence would be corporal punishment, she maintained. In

conclusion, Ms Tusaje prayed that the appeal be dismissed with regard to conviction but be allowed in respect to the sentence imposed.

I have dispassionately considered the grounds of appeal as presented, the trial court records as well as the submissions by both the Appellant and the learned State Attorney. I will determine the appeal based on the grounds of appeal, albeit not sequentially.

Beginning with the 1st ground of appeal, I entirely agree with the Appellant and the learned State Attorney that the sentence imposed on the Appellant was illegal owing to the age of the Appellant at the time he is said to have committed the offence. Section 160B of the Penal Code, Cap. 16 (R.E. 2022) provides as follows:

> *"For promotion and protection of the right of the child, nothing in Chapter XV of this Code shall prevent the court from exercising-*
> *(a) reversionary powers to satisfy that, cruel sentences are not imposed to* ***persons of or below*** *the age of eighteen years; or*
> *(b) discretionary powers in imposing sentences to persons of or below the age of eighteen years."* (Emphasis added)

The record of the trial court shows that the Appellant, even at the time of appearing in court, was 18 years old. It was therefore inappropriate for the trial magistrate to sentence him to a custodial sentence of 30 years. The 1st ground of appeal is therefore sustained.

Regarding the 2nd ground of appeal, it was the Appellant's contention that he was not reminded of the charges against him before entering his defence. On her part, the learned State Attorney refuted the contention stating that there is no law which mandatorily requires a charge to be read to the accused person prior to putting up the defence. To address this issue, it is trite to reproduce Section 231 of the CPA which governs matters to be taken into account after a prima facie case has been established against an accused person, before entering his defence. The section provides:

> *"(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the court shall again explain the substance of the charge to the accused person and inform him of his right-*
> *(a) to give evidence whether or not on oath or affirmation, on his own behalf; and*
> *(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."*

From the above provision, it is apparent that the mandatory requirements of the law were complied with by the trial court. What is to be complied by the court is embodied in part (a) and (b) of subsection 1 above. That is, the trial magistrate must inform the accused person of his rights to give evidence either on oath or affirmation or without oath or affirmation. The trial magistrate must also inform the accused person the consequences of giving evidence without oath or affirmation. In addition, the trial magistrate is duty bound to inform the accused person the right to call witnesses and tender exhibits, if any. Finally, the trial magistrate must record every response put up by the accused person. The underlying mandatory requirements of the law were restated in the case of **Maduhu Sayi @Nigho vs the Republic, Criminal Appeal No. 560 of 2016** (unreported), where it was observed:

> *"In the case at hand, as submitted by Mr. Katuga, the record does not show the manner in which the appellant elected to give his evidence and whether or not he intended to call witnesses.* ***The trial magistrate was enjoined to record the appellant's answer on how he intended to exercise such rights after having been informed of the same and after the substance of the charge has been explained to him.*** *In the circumstances, the omission prejudiced the appellant."* (Emphasis added)

The contention by the Appellant that the charge ought to have read to him prior to giving his evidence is, thus, a misconstruction of the law. In the case at hand, there is no doubt that the mandatory requirements of section 231 of the CPA were complied with. As reflected in the proceedings of 07/09/2022 (page 18 of the typed proceedings), the trial magistrate explained the substance of the charge to the Appellant. He further gave him his right to enter his defence either on oath/affirmation or otherwise. The Appellant was also informed of his right to call witnesses. That can easily be gleaned in the responses put forth by the Appellant. The Appellant is recorded to have said: *"I will defend myself under oath and I will bring herein court witnesses."*

As submitted by the learned State Attorney, there is no law requiring that after a *prima facie* case has been established against the accused person, the charge sheet must be read over to the accused. The 2nd ground of appeal therefore fails.

The next ground for consideration is ground 5. According to the Appellant, the evidence of PW2 was received in contravention of section 127(2) of the Evidence Act. The learned State Attorney admitted that there were no questions put up to PW2 to test whether she knew the nature of oath or she promised to tell the truth and not lies. For easy of reference, section

127(2) of the said Act provides: *"A child of tender age may give evidence without taking an oath or making an affirmation* ***but shall before giving evidence, promise to tell the truth to the court and not to tell lies.*** "(Emphasis added)

The procedure of receiving evidence of a child of tender age was restated in *extenso* in the case of **Geoffrey Wilson vs Republic, Criminal Appeal No. 168 of 2018** (unreported). In that case the Court stated that where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness. If such child does not understand the nature of oath, he or she should, before giving evidence, be required to promise to tell the truth and not to tell lies.

It is trite to note that a child of tender age may either give evidence on oath or affirmation or without oath or affirmation. However, where the child does not understand the nature of oath or affirmation, that child witness must make a promise to the court that he or she will tell the truth and not lies. That is the import of section 127(2). To be in a better position

to resolve whether the evidence of PW2 was received in compliance with the law, it is instructive to reproduce what transpired in the trial court prior to receiving PW2's evidence. It thus goes:

> *"PROSECUTION CASE CONTINUES:*
> *PW2 Is Caren Idrisa, 6 Resident of Maji ya Chai, a pupil of standard I, Christian,* ***promised to tell the truth as follows:"*** (Emphasis added)

From the above quotes, it is apparent that the trial magistrate did not test the witness whether she knew the nature and meaning of oath or not, so that she could either give sworn evidence or otherwise. He simply jumped to the second option, presupposing that PW2 did not know the nature and meaning of oath, therefore she promised to tell the truth and not lies. That was a fatal infraction. The cited case of **John Mkorongo James vs Republic** (supra) was elaborate in this aspect. It was *inter alia* observed:

> *"The import of section 127(2) of the Evidence Act requires a process, albeit a simple one,* ***to test the competence of a child witness of tender age and know whether he/she understands the meaning and nature of an oath, to be conducted first, before it is concluded that his/her evidence can be taken on the promise to the court tell the truth and not to tell lies.*** *It is so because it cannot be taken for granted that every child of tender age who comes before the court as a witness is competent to testify, or that he/she does not understand the meaning and nature of an oath and therefore that he should testify on the promise to the court tell*

the truth and not tell lies. It is common ground that there are children of tender age who very well understand the meaning and nature of an oath thus require to be sworn and not just promise to the court tell the truth and not tell lies before they testify." (Emphasis added)

In the case at hand, the infraction of the law is manifest. The trial magistrate received PW2's evidence on the pretext that she promised to tell the truth and not lies. However, the promise by PW2 is not reflected in the court's record. Ordinarily, such promise cannot be assumed to have been made by the witness if it is not reflected in the proceedings. This position was restated in the case of **Yusuph Molo vs Republic, Criminal Appeal No. 343 of 2017** (unreported) where it was reaffirmed:

*"**It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case** ... if there was no such undertaking, obviously the provisions of section 127(2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value."* (Emphasis added)

Similarly, in the cited case of **John Mkorongo James vs Republic** (supra), the Court of Appeal stressed that the promise to the court to tell the truth and not lies must come from the child witness in person. It must

be a direct speech given by the child witness. In the appeal under consideration, the promise was made in indirect speech; that is, by the trial magistrate. It is also imperative to note that PW2 only promised to tell the truth. There is no record that she promised not to tell lies. Observing on a similar infraction the Court of Appeal in the referred case of **John Mkorongo James vs Republic** (supra) succinctly observed:

> *"We have also observed that besides the omission or failure by the trial court to have first examined PW1 to test his competence and know if he understood the meaning and nature of an oath before jumping to the conclusion that PW1 would give unsworn evidence on the promise to the court to tell the truth,* ***PW1's promise was incomplete and it was in form of an indirect or reported speech instead of a direct speech.*** *It was incomplete because while section 127(2) of the Evidence Act, require that the promise should be in telling the truth and not telling any lies, what PW1 is said to have promised is only to tell the truth.* ***He did not promise not to tell any lies. It is recommended that the promise to the court under section 127 (2) of the Evidence Act should be in direct speech and complete.***" (Emphasis added)

Bearing in mind the above position of the law, I am inclined to agree with the Appellant that section 127(2) of the Evidence Act was violated. Reception of the evidence of PW2 was an abrogation of the law. The resultant effect is to render the evidence of PW2 deplete of evidentiary

value, worth to be discarded. That evidence is accordingly discarded. That said, it is my considered decision that the 5th ground of appeal is merited.

Having discarded the evidence of PW2, the question is whether the remaining evidence is sufficient to sustain the Appellant's conviction. The evidence from PW1 and PW3 emanate from what they were told by PW2, which is basically hearsay evidence because none of them witnessed the incidences. Similarly, the evidence of PW4 and exhibit P1, is only to the effect that PW2 was penetrated by a blunt object in her vagina and anus. That evidence did not point out to the Appellant as the person responsible for defiling PW2. Therefore, in the absence of PW2's evidence, which is the best evidence in sexual offences cases as this one, the Appellant's conviction lacks legs to stand on.

The conclusion made with regard to the 5th ground of appeal sufficiently disposes the appeal before me. I hold so considering that there is no other piece of evidence that may sustain the Appellant's conviction in the absence of the evidence of the victim. That being the case, I see no compelling grounds to delve into the other grounds of appeal as they die naturally. In addition, the conclusion made on the 1st ground of appeal would have led to the immediate release of the Appellant notwithstanding the strength of the other pieces of evidence.

Consequently, I find the appeal merited. It is accordingly allowed in its entirety. The conviction on the two counts is hereby quashed and the sentence imposed upon the Appellant by the trial court is set aside. It is ordered and directed that the Appellant be released from prison with immediate effect, unless he is held there for some other lawful cause.

Y.B. Masara

JUDGE

18th August 2023