IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 37 OF 2023

(Originating from the Resident Magistrate Court of Arusha at Arusha in Criminal Case No. 270 of 2020)

BILALI JUMA RAMADHAN.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

01/08/2023 & 30/10/2023

GWAE, J

In the Resident Magistrate Court of Arusha at Arusha, ("the trial court"), the appellant, Bilal Juma Ramadhan stood charged with the offence of attempted rape contrary to section 132 (2) of the Penal Code, Cap 16, R.E. 2019 (the Penal Code). The particulars of the offence as per the charge sheet were that on 19th day of September 2020 at Kisongo Area within the city, District and Region of Arusha, the appellant did attempt to rape one "DS" a girl of seven (7) years old, the act which contravenes the law. The name "DS" is for the purpose of only hiding the victim's identity.

The appellant blatantly denied the charge against him. Therefore, in its endeavours to prove, the prosecution mounted three witnesses namely; the victim's mother who appeared during trial and testified as PW1, the victim (PW2) and one Caroline Samwel Anthony, the victim's sister who testified as PW3. The appellant defended his case as DW1 together with one Mbarouk Ayubu as DW2.

According to PW3 on 9/09/2020 when she was coming from her mother's work place, she noticed that the victim was missing as she left her playing with other children. As PW3 went to look for the victim, she was informed by one Joyce that, she saw the appellant holding the victim's hand and they went inside the room of mama Mwanaidi. She went to the said house, opened the door and then called the name of the victim where upon inquiry as to whereabouts of the victim, the appellant replied that the victim was not there.

However, PW3 then saw the shoes of the victim and asked the appellant why the victim's shoes were there, the appellant kept quiet. At the residence of mama Mwanaid. PW3 was in a company of a person called Mama Babuu, they then broke opened the door where the appellant was. Upon entering the room, they saw the victim lying on the bed and her clothes were down to her knees. Mama BBabuu took the victim and

went with her at home, PW3 also called her mother (PW1) through the phone of Mama Babuu and narrated the scenario to her, where upon receiving such news, PW1 came back home and upon her arrival at her residential home she went to directly confront the appellant. A fracas happened.

The evidence of PW2 was to the effect that, on the material date as she was going back home, the appellant gave her money (Tshs. 1,000), held her hand and took her to the house of Mwanaidi. He then took her shoes and put them behind the door and laid her on the bed. He then undressed her and as the appellant was about to put his penis into her vagina, her sister, PW3 and Mama Babuu came and asked the appellant if she was inside the room but he told them that she was not there. Her sister then saw her shoes and thereafter they opened the door and found her lying on bed. Mama Babuu then dressed her and took her back home and that her sister called her mother and narrated the story where upon she came back home.

In defending his case, the appellant disputed to have committed the offence and argued that the neighbours and the victim's mother fabricated this case against him because his sister and the victim's mother had a

dispute. He also stated that in his street people dislike him and that is why the case was plotted against him.

DW2's testimony was to the effect that, on the material date he arrived at the scene of crime and found the victim's mother beating the appellant claiming that he raped her child, the victim. On cross-examination by the public prosecutor, DW2 stated that the appellant is his in-law and that there is no dispute between his wife and the victim's mother.

After a full trial, the trial court found that the case against the appellant to have been proved beyond reasonable doubt. The appellant was consequently convicted and sentenced to the terms of thirty-(30) years' imprisonment.

Dissatisfied with both the judgment and sentence by the trial court, the appellant filed this appeal containing seven grounds of appeal namely;

1. That, the trial Court erred in law and in fact in convicting and sentencing the appellant on a seriously defective charge, for omission to indicate the essential ingredients in the offence of attempted rape.
2. That, the trial court erred in law and in fact by failure to observe the requirement of section 312 (2) of C.P.A Cap 20 [R.E 2019].

3. That, the trial Court erred in law and in fact in convicting and sentencing the appellant on the basis of oral evidence of PW1, PW2 and PW3 whose evidence were not credible and reliable.
4. That, the trial court erred in law and in fact in convicting the appellant for the offence of attempted rape, while the evidence of PW1, PW2 and PW3 was full of contradictions and inconsistencies.
5. That, the trial court erred in law and in fact by shifting the burden of proof on the appellant when she held that, the appellant herein did not explain how the conflict between him and his sister involved him in this case.
6. That, the trial court erred in law and fact in convicting the appellant without observing that the prosecution failed to summon material witnesses i.e the said Joyce who saw the appellant holding the hands of PW2 (victim).
7. That, the case against the appellant was not proved beyond reasonable doubt and as required by the law.

At the hearing of the appeal, the appellant appeared in person unrepresented whilst Mr. Godfrey Nugu, the learned represented the respondent.

Submitting in support of the grounds of appeal the appellant argued them generally stating that, he is challenging the charge sheet on the ground that it did not establish necessary ingredients/particulars of the

offence. Furthermore, it was his submission that the prosecution failed to summon/call vital witnesses Mama Babuu and one Joyce, who alleged to have seen him holding the victim's hands.

The appellant also complained that section 312 of the CPA was not complied on the ground that no provision of the law was cited in the judgment. The impugned judgment also did not indicate the provision of law in which the judgment was composed. Hence, the conviction and sentence thereof are illegal.

Similarly, the appellant faulted the evidence of the victim stating that, the testimony of the victim is not reliable since there was no compliance of section 127 (2) of TEA save a promise to tell the truth and not lies. He added that the trial court ought to have made an inquiry as to the victim's knowledge. In view of the above reasons, it was his prayer that his appeal be allowed.

Responding to the appellant's submission Mr. Nugu supported both the conviction and sentence. He argued as herein. In the first ground of appeal, the learned state attorney stated that this ground is baseless because appellant herein was informed of the particulars of the offence (attempted rape).

Responding on grounds number 7 and 8, Mr. Nugu submitted that the same are unfounded on the reason that the prosecution proved its case beyond reasonable doubt and that, the proof was never shifted to the appellant. He went further to state that even the decision of the trial court did not base on the weakness of the appellant's defence but on the strength of the prosecution.

As to the 2nd ground of appeal, the learned state attorney admitted that the alleged provision of the law was not cited by the trial court but the same omission is curable under section 388 of the CPA.

Replying to the complaint on alleged failure to call one Mama Babuu and one Joyce, it is the submission of the respondent's counsel that the complaint is misplaced. He cemented his submission by section 143 of the Tanzania Edition Act, Cap 6, Revised Edition, 2019 (TEA) provides that what matters in proving a case is not a number of witnesses but credibility and quality of the evidence. According to Mr. Nugu since PW3 was the one who went to the scene of crime and one who found the accused with the victim inside the house, therefore, there was no legal requirement of calling others witnesses who would testify the same evidence like that of PW3.

With regard to the compliance of section 127 (2) of the TEA, it was the submission of the counsel that the said section was complied with, since the victim did promise to tell the truth and not lies. Thus, the appellant's complaint in this regard is meaningless (see page 12 of the typed proceedings).

On the complaint that there was a failure to call the doctor and investigator, Mr. Nugu stated that this ground lacks merit on the reason that the nature of the offence did not require a proof of penetration. Similarly, the offence was investigated that is why the accused was charged and brought to the court. He thus prayed the appeal be dismissed.

The foregoing was what was argued for and against the appeal and the general issue for determination is whether the appeal is meritorious or not.

In doing so, I shall start with *the first ground* of appeal where the appellant challenges the correctness of the charge against him. According to him the charge preferred against him was defective as it did not indicate the essential ingredients of the offence of attempted rape. At the outset, it should be restated that it is settled that a charge being an important

aspect of the trial should always enable the accused to understand the nature and seriousness of the case against him.

It is therefore important that in every charge, the law applicable and the section of the law against which the offence is said to have been committed must be mentioned and stated clearly. The charge must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged with. This position was recently stressed by the Court of Appeal of Tanzania in the case of **Joseph Paul @ Miwela vs. Republic,** Criminal Appeal No. 379 of 2016 (Reported Tanzlii). In the instant case, the charge sheet that was laid before the trial court against the appellant contained the statement and particulars of offence in the following form:

> ***STATEMENT OF OFFENCE:*** *ATTEMPT TO RAPE CONTRARY TO SECTION 132 (1) OF THE PENAL CODE.*
>
> ***PARTICULAS OF OFFENCE:*** *That* ***Bilal s/o Juma @ Ramadhani,*** *on the 19th day of September, 2020 at Kisongo area, within the City and Region of Arusha, did attempt to rape one "DS" a girl of seven (7) years old, the act, which contravenes the law.*

It is clear from the above quoted part of the charge that, the charge against the appellant is defective for not only including subsection 2 (b)

of the Penal Code but also for the insufficient particulars of the offence. The appropriate charge against the appellant ought to have been laid under section 132 (1) (2) (b) of the Penal Code. Further to that, since the offence of attempted rape is statutorily defined then the particulars of the offence ought to have disclosed the ingredients of the offence that is *intent to procure prohibited sexual intercourse* and the aspect of the victim having been *influenced.*

That being observed by the court as to the complained defect, next question for consideration is, whether the defect renders the charge fatally defective and not curable in the eye of the law. In determining whether a charge is fatally defective or otherwise the test is whether from the statement of the offence and the particulars of the offence an accused person is able to fully understand the nature and seriousness of the offence with which he stands charged with or not. This legal position was firmly held by the Court of Appeal of Tanzania in **Abubakari Msafiri vs. The Republic,** Criminal Appeal No. 378 of 2017 (Unreported) with approval of its decision in **Jamali Ally vs. Republic,** Criminal Appeal No. 52 of 2017 (unrep*orted) where it was stated that;*

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness*

of the offence facing him and eliminated all possible prejudice. Hence, we are prepared to conclude that the irregularities over non-citations and citation of inapplicable provisions in the statement of the offence are curable under section 388 (1) CPA."

In the instant case, the victim, PW2 testified that on the material date while on her way back home the appellant gave her money (one thousand). The appellant held her hand leading to the house of mwanaidi, and while there, the appellant undressed her clothes up to the knees and as he was about to put his penis into her vagina. PW3 and one Mama BBabuu came in the residential house of Mwananaid. On the other hand, when the appellant entered his defence, he stated that on the material date he was at the house of his sister, which in this case is the scene of crime. However, he denied to be found with the victim of the offence, he further disputed to have committed the offence and stated that it is fabricated case as the people in his street dislike him.

From the above, it is therefore my increasing view that the appellant was well informed of the charge and he appreciated the nature and seriousness of the offence he was charged with. Therefore, the defects in the charge did not prejudice the appellant and the same are curable under section 388 (1) of the Criminal Procedure Act Cap 20 R.E 2019. That said, this ground of appeal fails.

On the second ground of appeal the appellant challenges the failure of the trial court to observe the requirement of section 312 (2) of CPA. I find this ground devoid of merit. This section requires that in the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, an accused is convicted and the punishment to which he is sentenced. In the matter at hand, the trial magistrate having found that the charge against the appellant was proved beyond reasonable doubt proceeded to find him guilty as charged and convict him forthwith. For easy of reference the paragraph is reproduced hereunder;

> *"That said and for reasons stated herein, I find the charge against the accused being proved beyond reasonable doubt. I hereby find the accused person guilty as charged and proceed to convict him forthwith."*

From the above quoted part of the judgment, it is clear that the trial Magistrate when convicting the appellant did not cite the section of the offence, which the accused was convicted with. Nevertheless, I find this irregularity curable under the provision of section 388 (1) of the CPA on the reason that, the omission by the trial court did not occasion failure of justice to the appellant and the appellant has not demonstrated during hearing of this appeal as to how the omission prejudiced him. The Court

of Appeal when faced the similar complaint in E**mmanuel s/o Phabian vs Republic**, Criminal Appeal No. 259 of 2017(unreported), had these to say;

> *"In his judgment the learned Resident Magistrate convicted the appellant as charged meaning that he was convicted of the offence of rape under section 130 (2) and 131 of the Penal Code which the trial magistrate specified at the beginning of the judgment. Thus the fact that the offence and section of the law were not restated did not amount to non-compliance with s. 312 (2) of the CPA. See for instance, the case of* ***Hassan Said Twalib v. Republic,*** *Criminal Appeal No. 95 of 2019 (unreported). As found above, although there was omission to the paragraphs (a) of s.130 (20 of the Penal Code, that did not vitiate the conviction."*

In our instant matter, the learned Senior Resident Magistrate at the beginning of her judgment she rightly stated the offence with which the appellant stood charged, section of the law, Penal Code. However, in her conclusion she stated that the accused is found guilty as charged. I am of view as that of the Court of Appeal in its recently decisions cited above, that failure to restate the offence and provisions of the law as required under section 312 (2) of the CPA does not render the judgment fatally

defective as long as the same was stated in the judgment. Therefore, this ground also fails.

I shall now revert to determine ground number 6 and grounds number 3,4,5 and 7 as argued jointly.

On ground number six, the appellant alleges that the prosecution failed to call material witness to prove their case i.e Joyce who is said to have seen the appellant while holding the victim's hand and the one who furnished such information to PW3. Also, one Mama Babuu who is said to have gone to the house of Mama Mwanaid and while in company of PW3 saw the victim lying on the bed while her clothes were down her knees. The position of the law is as complained by the appellant that, failure to call material or vital witness an adverse inference may be drawn against the prosecution evidence unless reason for such omission is given. In **Hemedi Saidi vs. Mohamedi Mbilu** (1984) TLR 113, it was stated among other thing that:

> "*In measuring the weight of evidence it is not the number of witnesses that counts most but the quality of the evidence. Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they*

would have given evidence contrary to the party's interests."

Presently, it is clear from the records that, the evidence of the said Joyce and one Mama Babuu would not be different from that of PW3. I am holding so, since the said Joyce furnished the information, which assisted PW3 to procure the victim, PW1 in the house owned by Mama Mwanaid. Similarly, what mama Babuu saw is what was as well seen by PW3. Hence, though, the evidence of Joyce and Mama Babuu was necessary yet the same has been substituted by that of PW3. Having found nature of the PW3's evidence and corroborative evidence adduced by the victim in respect of who found her in the Mwanaid's residence, the sixth ground of appellant's appeal is therefore dismissed.

Regarding the *complaint on the non-compliance with section 127 (2) of CPA*, this court has noted that the appellant although he did not raise it in his grounds of appeal save during his oral submission when he complained that section 127 (2) of the TEA was not complied with. Section 127 (2) of the 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 tell lies."

There are a number of decisions of the Court of Appeal of Tanzania that have deliberated what, the provision of the law entails and its significance. Such cases include case of **Godfrey Wilson vs. Republic,** Criminal Appeal No. 168 of 2018, **Hamisi Issa vs. Republic,** Criminal Appeal No. 274 of 2018 and **Issa Salum Nambaluka vs. Republic,** Criminal Appeal No. 272 of 2018. In all these cases the Court of Appeal of Tanzania stated that section 127 (2) of the Act requires that, where the evidence of a child of tender age is taken without oath, the intended witness must promise the court to tell the truth and not to tell lies. In our case, it is patently clear that the victim promised to tell truth and not lies. Hence, in conformity with what transpired at the trial court prior to the recording of the testimony of PW2 as depicted at page 12 of the typed proceedings and it reads as follows;

> **"Court:** *The witness is a child of tender age, this court is obliged to ask the witness to promise to tell the truth and never lie as per section 127 (2) of the TEA CAP 6 R.E 2019.*
> ***PW2:*** *I promise I will tell the truth and I will not lie.*
>
> ***Signed: H.G Mhenga, RM***
> ***27/07/2021***

Court: *Since the witness promised to tell the truth and never lie, her evidence will be received without oath.*

Signed: H.G Mhenga, RM
27/07/2021"

From the above-reproduced excerpt, the trial court did not make any inquiry as to whether PW2 understood the meaning of taking an oath or affirmation. However, the victim of tender age did promise to tell the court the truth and not to tell lies, thus as required by the law. **Salehe Ramadhani Othman vs. Republic**, Criminal Appeal No. 532 of 2019 (unreported) where the testimony of a victim of tender age (PW1) was recorded on oath but after promised to tell the truth and not lies, the court's dealt with appellant's complaint regarding non-compliance with section 127 (1) (2) of CPA and stated inter alia;

"We have however noted that in addition to his promise of telling the truth and not lies, PW1 gave his evidence on affirmation, although the record does not reflect that he understood the nature of oath. We wish to emphasize that the amendment to section 127 (2) of the Evidence Act did not dispense with or do away with the duty of the trial court, before receiving the evidence of a child of a tender age, to ascertain whether the said child possess sufficient intelligence and understand the duty to speak the truth. See the provisions of sub-section (1) to section 127 of the Evidence Act. However, since in this case, we

are satisfied that the learned trial Magistrate complied with the requirement of section 127 (2) of the Evidence Act and PW1 promised to tell the truth and not lies, his evidence has evidential value and cannot be discounted from the record as submitted by the appellant. We are settled in our mind that the evidence of PW1 could stand-alone and capable of mounting a conviction on the appellant.

Also in **Geoffrey Wilson vs. Republic;** Criminal Appeal No. 168 of 2018 (unreported) where the Court of Appeal of lucidly expressed the import of section 127 (2) of the Act to mean;

*"To our understanding.....provision as amended provides for two conditions. **One,** it allows the child of tender age to give evidence without oath or affirmation. **Two,** before giving evidence, such child is mandatory required to promise to tell the truth to the court and not to tell lies."*

Basing on the above judicial jurisprudence, I find the appellant's complaint on the requirement provided under section 127 (2) of the CPA lacks merits.

Finally, on the 7th ground of appeal, there are pieces of evidence adduced by PW1 which constitutes a hearsay evidence. However, there is direct evidence adduced by the victim, PW2 whose testimony is credibly

corroborated by the PW3 who found the appellant in the room as well the victim being half-naked and lying on the bed. The evidence of the victim and an eyewitness is consistent and clear. Their pieces of evidence is also corroborated by that of the appellant himself who did not dispute to be found at the scene of crime as he clearly testified that on the material date he was at his sister's place which is near the victim's home. More so, the testimony of DW2 corroborates that of PW1 pertaining what actually transpired after the incidence. The question that I pause is that, if initially, the appellant was accused of an offence of rape as testified by DW2, it follows therefore, it was a earliest suspension on the part of the victim's relatives before medical examination and clear explanation from the victim.

In the upshot, it is my considered view that the prosecution case was proved beyond reasonable doubt, and that this appeal has been lodged without substance. It is accordingly dismissed in its entirety.

It is so ordered.

DATED and **DELIVERED** at **ARUSHA t**his 30th October 2023

MOHAMED R. GWAE
JUDGE

Court: Right of appeal to the Court of Appeal explained

MOHAMED R. GWAE
JUDGE