IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: NDIKA, J.A, WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 259 OF 2019

MEDSON s/o MANGA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Declsion of the High Court of Tanzania at Iringa)

(Matogolo, J.)

Dated the 16th day of July, 2019
in
DC. Criminal Appeal No. 59 of 2018

.....

JUDGMENT OF THE COURT

23rd April, & 3rd May, 2021.

SEHEL, J.A.:

This is a second appeal by the appellant who was convicted of the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code, Cap. 16 R.E 2002 (now R.E 2019) and accordingly sentenced to serve a jail term of twenty (20) years. He was also ordered to pay the victim compensation of TZS. 100,000.00.

Briefly, in the morning hours of 11th day of April, 2017, a seven-year-old girl who for the purpose of hiding her identity we shall refer to as PW3 was left outside by her mother (PW1) to play with her friends,

Wile and Denis and her brother whom we shall also, for the purpose of hiding his identity, refer to him as PW2. The mother (PW1) went to buy morning snacks for that day. Whilst playing, the appellant appeared and requested PW3 to escort him to the water-well to fetch water. PW3 agreed. He took her to the well. Upon reaching there, the appellant undressed her panties and inserted his fingers in her vagina. PW3 felt pain. She raised an alarm which was responded to by PW2. Upon arrival, PW2 saw the appellant dressing PW3 her underwear. PW2 asked PW3 as what happened to her, she told him that the appellant had inserted his fingers to her private parts. After a while the mother returned. The children upon seeing her all rushed to her and told her what had befallen PW3. The mother reported the incident to the village chairman and the appellant was arrested.

In his defence, the appellant denied the allegation. He alleged that the mother of the victim framed the charges against him because she did not want to pay him his wages for the work he had done.

After hearing the case for both sides, the trial court was satisfied that the prosecution proved the offence against the appellant beyond reasonable doubt. He was therefore convicted and sentenced as

indicated earlier. His appeal to the High court (the first appellate court) was unsuccessful hence the present appeal.

In his memorandum of appeal, the appellant advanced six grounds, which are: -

1. *That, the Judge of the High Court erred in law to uphold the conviction when the trial court failed to sit in coram with the social welfare officer which is mandatorily required because PW2 & PW3 (the victim) were children of tender age.*
2. *That, the High Court erred to uphold the evidence of PW2 & PW3 whose unsworn testimonies were not corroborated by a person who swore to speak the truth.*
3. *That, the Judge of the High Court erred in law and in fact in failing to consider the defence of the appellant that he went to demand to be paid his salary and not otherwise.*
4. *That, the Judge of the High Court erred in law to dismiss the appellant's appeal without considering that there was no eye-witness on the allegation that an appellant inserted a finger to the victim's private parts.*
5. *That, the Judge of the High Court erred in law to dismiss the appellant's appeal without considering that the trial court*

failed to follow the procedure of mitigation has to be thereto, otherwise it was just mentioned as MITIGATION which was not fairly to meet the justice.

6. *That, the prosecution side failed to prove the case against the appellant beyond reasonable doubt.*

When the appeal was called for hearing, the appellant appeared in person through a video link from Iringa prison whereas Ms. Blandina Manyanda, learned State Attorney, appeared for the respondent Republic and she was assisted by Ms. Veneranda Masai, learned State Attorney.

After the Court had reminded the appellant on his grounds of appeal and requested him to make his submissions on the grounds, he opted for the learned State Attorney to make a reply on his grounds while reserving his right to re-join, if need be.

In response, Ms. Manyanda prefaced her submission by supporting the conviction and sentence meted out against the appellant. She then responded to each and every ground of appeal seriatim.

For the first ground of appeal where the appellant complained of the absence of a social welfare officer during his trial, the learned State

Attorney argued that it is not a requirement of the law for the trial court to conduct trial with the presence of the social welfare officer when a child is a witness or victim. She added that under sections 97 and 99 (1) (d) of the Law of the Child Act, Cap. 13 of the R. E 2019 (the Child Act) the presence of social welfare is required where the accused person is a child, that is, a child in conflict with the law. To augment her submission, she referred us to this Court's decision in **Alex Ndendya v. The Republic**, Criminal Appeal No. 207 of 2018 (unreported).

Regarding the second ground that deals with the unsworn evidence of PW2 and PW3, the learned State Attorney strongly submitted that the evidence of PW2 and PW3 was properly relied upon because the trial court complied with the provision of section 127 (1) of the Evidence Act, Cap. 6 R.E 2002 (now R.E 2019) (the Evidence Act) that requires a child to promise to tell the truth to the trial court. She said both PW2 and PW3 were children of 10 and 5 years, respectively. She pointed out that the record of appeal at pages 12 and 13 shows that before the evidence of PW2 and PW3 was received, they promised to the trial court to tell the truth. She therefore requested the Court to dismiss this ground as it lacks merit.

Regarding the complaint that the trial court failed to consider his defence that he went to ask for his wages from the victim's mother, Ms. Manyanda contended that the claim was an afterthought because the victim's mother was paraded as a witness but the appellant did not cross-examine her on the issue of debt in order to shake her evidence as it can be discerned from the record of appeal at pages 11 to 12. She further submitted that the appellant raised the issue of debt for first time when giving his defence evidence. To fortify her submission, she referred us to our decision in the case of **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 (unreported).

With respect to the proof of insertion of fingers in the victim's private parts, the learned State Attorney argued that the ground lacks merit because the victim herself testified before the trial court on how the appellant lured her to the water-well, undressed her underwear and inserted his fingers into her vagina for his sexual gratification. The learned State Attorney fortified her submission by relying on our decision in the case of **Joseph Leko v. The Republic**, Criminal Appeal No. 124 of 2013 (unreported) where we cited our previous decision, the case of **Selemani Makumba v. Th Republic** [2006] T.L.R 379 to state that the true evidence of rape comes from the victim. Ms. Manyanda

further submitted that the evidence of PW3 was corroborated with that of PW2 who saw the appellant dressing PW3 her underwear.

Ms. Manyanda also attacked the appellant's complaint that the procedure of mitigation was not complied with. She contended that the appellant misdirected himself on mitigation procedure. She argued that the record of appeal is patently clear that after the appellant's conviction, the trial court invited the prosecution to state the record of the convict. After, the prosecution informed the trial court that they had no previous record, the trial court invited the appellant to address it on mitigating circumstances. The appellant pleaded that he did not commit the act. Hence, the trial court after considering both the aggravating and mitigating factors, sentenced the appellant.

Lastly, Ms. Manyanda responded to the ground that the prosecution failed to prove the offence against the appellant. The learned State Attorney firmly submitted that the three prosecution witnesses, PW1, PW2 and PW3 proved the offence against the appellant and that the appellant's defence did not shake the prosecution case. She therefore urged us not to disturb the conviction and sentence and to proceed to dismiss the appeal.

The appellant briefly re-joined by insisting that all of his grounds of appeal have merit. He ultimately urged the Court to allow the appeal and release him from prison custody.

We have duly considered the grounds of appeal and the submission of the parties. In disposing the appeal, we shall be mindful of the position of the law that the Court rarely interferes with the concurrent findings of fact by the courts below unless it found that there were mis-directions, non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice (see: - **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Musa Mwaikunda v. The Republic** [2006] TLR 387).

Starting with the first ground of appeal where the appellant complained about the absence of a social welfare officer during his trial, the law as it stands, and well submitted by the learned State Attorney, does not require the presence of the social welfare officer in the trial where the child is a victim or witness. The social welfare officer is mandatorily required, in terms of section 99 (1) (d) of the Child Act, to be present in the proceedings conducted in the Juvenile Courts

established under section 97 (1) of the same Act. We held so in the case of **Alex Ndendya v. The Republic** (supra) that: -

> *".... a social welfare officer is required in proceedings in the Juvenile Courts established under section 97 (1) of the Law of the Child Act. The provisions of section 99 (1) (d) of the same Act mandatorily require a social welfare officer to be present during the proceedings in the Juvenile Courts. The presence of the social welfare officer does not envisage situations when the child is a witness; it envisages situations when the child is in conflict with the law; that is, when the child is an accused person."*

In the present appeal, given the fact that the appellant was not a child and the proceedings were not in the Juvenile Court, there was no need of having the social welfare officer in the conduct of his trial. Accordingly, this ground of appeal lacks merit and we proceed to dismiss it.

On the second ground of appeal, the appellant complained about the trial court relying on the unsworn evidence of PW2 and PW3. We note that this complaint was raised before the first appellate court. The first appellate judge found, and we entirely agree with him that the law permits a child of tender age to give evidence without taking an oath or

affirmation but before the reception of such evidence, the child must promise to the tell the truth to the court and not to tell lies. This is the import of section 127 (2) of the Evidence Act which 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 any lies."*

We succinctly explained the import and the proper procedure to be adopted by the trial court when faced with a child witness of tender age in **Issa Salum Nambaluka v. The Republic**, Criminal Appeal No. 272 of 2018 (unreported). We said: -

> *"From the plain meaning of the provisions of sub-section (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 of the Evidence Act is however, silent on the method of*

determining whether such child may be required to give evidence on oath or affirmation or not.
It is for this reason that in the case of ***Geoffrey Wilson v. Republic****, Criminal Appeal No. 168 of 2018 (unreported), we 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."*

In the present appeal, the record of appeal shows that both PW2 and PW3, at pages 12 and 13 respectively, promised to the trial court to tell the truth and nothing but the truth. After the said promise, they were allowed to take a witness box and the trial court received their evidence without oath or affirmation in compliance with 127 (2) of the Evidence Act.

More so, in terms of section 127 (6) of the Evidence Act, the unsworn evidence of a child can be acted upon without corroboration if

the trial court upon recording the reasons in the proceedings and after assessing the credibility of the evidence of the child of tender years is satisfied that such child was telling nothing but the truth. This ground of appeal therefore lacks merit and we dismiss it.

With respect to the third ground of appeal, the learned State Attorney rightly submitted that the appellant's defence that the case was framed against him by the mother of the victim as she owed him some wages, is an afterthought. It should be noted that the mother of the victim testified before the trial as prosecution witness number one, PW1 but the appellant did not attempt to shake her credibility on this critical issue through cross-examination. Failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence and will be estopped from asking the trial court to disbelieve what the witness said (see this Court's decision in **Nyerere Nyague v. The Republic** (supra) and **Cyprian Athanas Kibogoyo v. The Republic,** Criminal Appeal No. 88 of 1992 (unreported)). The third ground of appeal therefore fails.

The fourth ground of appeal that there is no proof of insertion of fingers to prove the offence also lacks merit. The evidence on record does not support his claim. There is cogent evidence coming from the

victim, herself and this is found at page 13 of the record of appeal when she told the trial court that after the appellant had taken her to the water-well, he undressed her underwear, inserted his fingers into her vagina, she felt pain and therefore cried for help. The alarm she raised was responded to by PW2 who found the appellant dressing PW3 her underwear.

We further note that the trial court went into a great length to analyse the evidence of PW3 and found that it was not shaken by the appellant's defence. The first appellate court also re-evaluated the entire evidence on record and at the end it concurred with the findings of the trial court that there was ample evidence connecting the appellant with the offence. In sum, the two courts below found the evidence of PW2 and PW3 to be credible and reliable thus believed their story. On our part, we find no reason to alter the concurrent findings of the two courts below. Consequently, the fourth ground of appeal lacks merit and it is hereby dismissed.

The same goes for the fifth ground of appeal on the appellant's contention that the trial court did not follow the procedure of mitigation. This is contrary to what is contained in the record of appeal. It is evident from the proceedings of the trial court that after the trial magistrate

convicted the appellant and before imposing sentence, he invited the learned State Attorney to present information concerning previous records of the convict, that is, history, number and severity of any prior criminal convictions. The learned State Attorney reported that they did not to have any record concerning the appellant thus requested the trial magistrate to sentence the appellant in accordance with the law. Following that information, the trial magistrate invited the appellant to say anything in order to mitigate as to what had been proposed by the learned State Attorney. The appellant pleaded that he did not do the act. Having heard the aggravating and mitigating factors, the trial magistrate sentenced him to a prison term of twenty (20) years and he was also ordered to pay the victim a compensation of TZS. 100,000.00. We therefore agree with the learned State Attorney that the procedure of mitigation was fully complied with by the trial magistrate. Consequently, we dismiss the fifth ground of appeal.

With regard to the last ground, we are firm that the prosecution proved the case to the required standard; that is, beyond reasonable doubt. The fact that the appellant inserted fingers into PW3's vagina for his sexual gratification without PW3's consent was sufficiently proved by the victim herself, that is, PW3. We reiterate that the true evidence of

rape comes from the victim (see: - **Selemani Makumba v. Th Republic** (supra). Besides, her evidence was corroborated by PW2 who found the appellant dressing the victim after the act. In that regard, like the two lower courts, we find that the prosecution proved its case beyond reasonable doubt against the appellant.

In the end, we find the appeal lacks merit and we do hereby dismiss it.

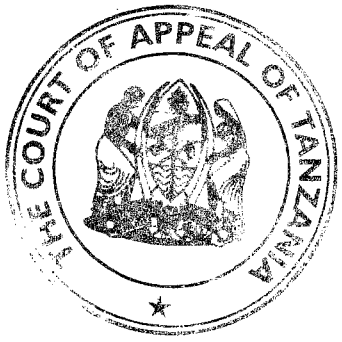
DATED at **IRINGA** this 3rd day of May, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2021 in the presence of the Appellant linked via video conference at Iringa Prison and Ms. Blandina Manyanda, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL