IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 379 OF 2021

AKWINO MTAVANGU @ BABA JANET.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogoro, J.)

dated the 11th day of June 2012
in
DC Criminal Appeal No. 08 of 2021
.....

JUDGMENT OF THE COURT

13th & 22nd March, 2024

LILA, J.A.:

Akwino Mtavangu @ Baba Janet/Baba Joseph, the appellant herein, is still languishing in prison serving a statutory life imprisonment. Initially, he was charged and convicted by the Resident Magistrates' Court of Iringa sitting at Iringa (henceforth the trial court) in Criminal Case No. 5 of 2018 of the offence of rape contrary to sections 130(1) (2) (e) and 131 (1) of the Penal Code. He was accordingly sentenced to serve thirty (30) years imprisonment. His first appeal to the High Court was unsuccessful, ending up with the sentence being enhanced to life imprisonment. He is still aggrieved and is before the Court to challenge that decision.

Before the trial court, the allegation was that; on the 19/12/2018 at Kigamboni area within Mufindi District and the Region of Iringa, the appellant had carnal knowledge of a girl aged six years, the allegation he strongly refuted. To avoid any further stigmatization, we shall refer to the said girl as the victim or PW2.

The appellant's conviction was basically founded on PW2's own testimony as corroborated by that of the doctor who medically examined her one Zena Mjumba (PW4). Briefly, PW2 went missing on the fateful date at noon after school hours until at about 16:00 hours something which raised concern to her father one Bruno Mgala (PW1) when he went home. He called the teacher who informed him that all the children were allowed to go home since 12:00 hrs. PW1 decided to report the matter to the Village Chairman and later to the police station. Search for the girl on that day which involved PW1 and Stulida Kalinga (PW3), a ten-cell leader, bore no fruits and it was until the next day at about 05:00 hours in the morning when she was found in an unfinished house (a "*pagare*"). According to PW1, when she was asked as to where she spend the night, PW2 said, while on her way from school, she was called and taken on a motorcycle by the appellant (Baba Janet) and said "*alinifanya vibaya*" literally meaning "*he did something bad to her*" in a *pagare* which is

almost 15 paces from his house to which he took her. According to PW3, the victim kept quiet. PW1 reported the matter to the police station where a PF3 was issued and the victim was taken to hospital where she was medically examined by PW4 coming up with a finding that her private part had bad smell, It was reddish and had bruises showing that something was inserted, blood oozed from it for some time but the virginity was intact. He reduced the findings in a PF3 which was admitted as exhibit P1. Alfred Mwakalebela (PW5), also a doctor, examined the appellant and confirmed that he was potent. We defer to a later stage to recite the narration by PW2 in details it being very crucial in the determination of this appeal, but suffice it to state at this stage that she said she was taken by the appellant when proceeding home from school and was raped.

The appellant's sworn defence constituted mostly of *alibi* that on the material time he was busy with his shop business with his wife until on 21/12/2018 at 10:00 hrs when he was approached at his shop by PW1 who was in the company of a certain kid who, at first denied knowing him before, but upon being forced, she claimed to know the appellant and they left only to find himself later on being arrested by police at 20:00 hrs when he was closing his shop.

Satisfied that the prosecution had proved the charge, the trial court convicted the appellant. As demonstrated above, it was moved to such finding by the evidence of the victim and having warned itself in terms of section 127(7) of the Evidence Act (the EA), it found her credible and her evidence was sufficient to ground a conviction. Applying his mind to the principle that in sexual offences the best evidence comes from the victim as propounded in the case of **Seleman Makumba Vs Republic** [2006] TLR 379, the learned trial magistrate found that the victim was raped by the appellant, convicted him and sentenced him to thirty (30) years imprisonment and to pay the victim TZS 2,000,000.00 as compensation.

Six (6) complaints characterised the appellant's appeal to the High Court and they centred on the validity of PW2's evidence which was recorded after a *voire dire* test hence not recorded consistent with the provisions of section 127(1) and (2) of the EA, the trial court wrongly relied on a contradictory evidence by PW4 that the victim was raped while her virginity was not perforated, the evidence by PW2 and PW4 were mere words, the case was fabricated against him and the sentence imposed was improper. Neither of them could find merit and the appeal was dismissed in its entirety. Considering the fact that the victim was six (6) years old, in terms of section 131(3) of the Penal Code, the appellant's

complaint on the legality of the thirty (30) years custodial sentence imposed by the trial court backfired resulting in it being enhanced to life imprisonment.

Determined to assail the High Court decision before the Court, six (6) grounds are preferred by the appellant. They may be paraphrased thus: -

1. *That, the Hon Judge erred in law and fact to grant the prayer by the State Attorney to consolidate Criminal Appeal No. 6 of 2019 and 12 of 2021 to consolidate the two appeals without affording him an opportunity to comment.*
2. *That, the Honourable Court misdirected itself to rely on the prosecution evidence by PW2 in respect of whom voire dire test was wrongly conducted to hold that PW2 promised to say the truth.*
3. *That, the judge of the High Court misdirected himself when he declared that it is true PW2 was raped while PW4 testified that her virginity was still intact.*
4. *That, the Judge erred in law and fact to dismiss the appellant's appeal after considering the respondent's grounds of appeal only who did not prove the case beyond reasonable doubt without considering his grounds of appeal."*

At the hearing of the appeal before the Court, the appellant appeared in person without legal representation. Ms. Radhia Njovu, learned State Attorney, represented the respond Republic. She resisted the appeal.

Exercising his right to begin to address the Court, the appellant prayed his appeal be allowed based on his grounds of appeal and he left it to the respondent to first respond to the complaints he raised.

On her part, Ms. Njovu was quick to put her stance plain that the appeal was without merit and should be dismissed. She responded to all the complaints seriatim and consolidated grounds 3 and 5 (now ground 3) of appeal in which the appellant questioned how could rape be committed and yet virginity remain intact. In simple terms the appellant was putting to question the credibility of the evidence by both PW2 and PW4. We find this to be a pertinent issue to be determined first before we address other complaints if need arises. In the due course we shall also determine the second limb of the complaint in ground four (4) raising the issue whether the charge was proved beyond doubt.

Submitting on this complaint, the learned State Attorney said there was sufficient evidence establishing that PW2 was raped and the appellant was her ravisher. She took us through the testimony by PW2 in which she

gave a detailed account of the incident that she was taken by the appellant to a *pagare* and raped, that she named the appellant as the rapist. That her age being six (6) years was proved by her father (PW1) and the doctor (PW4) in exhibit P1. As to whether there was poof of penetration, Ms. Njovu initially stood by her guns that these statements by PW2 as proof of being penetrated, that the appellant "*took me to the pagare*", "*he told me to lay down*", "*did something bad to me*", "*he inserted his penis..*", "*I felt pain*" and "*I never made noises*". It was also the learned State Attorney's view that PW2's evidence was corroborated by PW4's testimony in court and her findings in the PF3 (exhibit P1). Apart from arguing that both courts below found PW2 credible, while referring to section 131(4)(a) of the Penal Code that penetration however slight is sufficient to prove rape, she was certain that by PW2 stating that she felt pains and PW4's findings, penetration was proved. However, when she was prompted by the Court whether the testimony by PW4 is elaborative enough on the issue of penetration, she retreated and said such evidence does not show insertion of whatever degree but bruises on the private part which could justify the appellant be charged for committing another offence of grave sexual abuse in terms of section 138C(2)(b) of the Penal Code. She consequently urged the Court to substitute that offence in lieu of rape.

On this aspect, the appellant strongly disputed that it could not be possible for him, an experienced adult person with a wife and children to spend the alleged time without succeeding to penetrate PW2 and hence perforate the hymen. To him, this was proof that the case was a concocted one against him.

In our view, much as we agree and subscribe to the well settled principle that the best evidence in sexual offences comes from the prosecutrix (See **Selemani Makumba v. Republic** (supra), that a delay by a witness to name at the earliest possible opportunity the person he knows to have committed an offence casts doubt (see **Swalehe Kalonga @ Sale v. Republic**, Criminal Appeal No. 16 of 2001 cited in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (both unreported), that expert opinion deserves respect but is not binding (see persuasive High Court decision in **Said Mwamwindi v. R** [1972] HCD n. 212) and that a medical evidence is merely an aid to the court (see persuasive High Court decision in **R. v. Ramson** [1972] HCD n. 35), but, to have a fair resolve of the issue, the evidence by PW2 and PW4 should properly be examined so as determine if they are able to sustain the conviction. And this reminds us of our recent pronouncement on the need to subject the

victim's evidence to credibility test in **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) that: -

> *"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for courts to be satisfied that what they state contain nothing but the truth."*

Having seriously examined the record, we have no difficult to agree with the learned State Attorney that PW2 and PW4 stated in court as she argued but, looking at the judgments of both courts, it is plain their evidence was taken and acted on wholesome. They were believed to have told nothing but the truth. Much as we acknowledge that it was a matter for the trial magistrate to assess their credibility by demeanour as such duty is exclusively the monopoly of the presiding magistrate who has an opportunity to observe the witness at the dock testifying (see **Yasin Ramadhani Chang'a v. Republic** [1999] T.L.R. 489), yet, in resolving as to whether the witness is trustworthy and telling the truth, the demeanour of the witness must be consistent with his evidence in court.

This enables an appellate court to also assess the credibility of a witness by looking at the coherence and consistence of that evidence. In the event of any shortfall, then the credibility of the witness becomes questionable as the Court held in **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2001 (unreported) that: -

> *" The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

In the light of the above legal principles, it behoves the Court to examine the testimonies of PW2 and PW4 and also a part of PW1 so as to satisfy ourselves whether they are credible to ground a conviction. To attain that purpose, we find it apt to recite portions of their narrations at the trial court for our ease of reference.

Starting with PW2, when narrating how the offence was committed, she said: -

> ***"Xd by State Attorney:***
>
> *I live with my mother and father. My younger sister is Betina. I know a person called Baba Jose. He is baba Janet, he is here in court.*

Baba Janet, does (sic) something bad to me, he inserted his penis at his home. I used to home at his shop, he was together with his wife at the shop. He took me at the new house, I don't know the house. He took me in the "Pikipiki" he took me to his home. He then took to a "pagare", unfinished house. He then left me there I then decided to sleep on the bricks. In the morning I went home. I was afraid to go home. At home I waited for my father, I told him that, in the "pagare" I told him that I was taken there by Baba Janet. I used to go to Janet's house. I was alone when he took me.

We went to hospital. I know the shop of Baba Janet, we went together with father. There we saw Mama Janet, he was not there. That is all.

Xxd by Mwela & Mwakabungu:

He took me on his Pikipiki, he took me once. At home there was no body, he took to the room. I go to school alone, and when I come back, I was alone. I went to the Janet's house two times, Janet is my friend. I used to go to the shop regularly. I met the accused there. There is one bed. I felt pain. He told me to lie down. I never see the "kidudu" before. He took me to the "Pagare". At home there are neighbours but they didn't see us. I never made noises. I was afraid. On the way we never met people. I had a sweater. He laid me on the bricks. I could is for from the "Pagare". When I went, home my mother and father was not there. My father came later.

I was asleep at the "Pagare" till morning. My mother never did anything. She inspected my private part. We went to Baba Janet the next day.

Xxd by court:

I was asleep in the pagare. I left school at 12:00. There we stayed from 12:00 – 13:00. ***He took me to the pagare at noon. There we stayed from 13:00 to 18:00.*** *We closed the doors. The Pikipiki was inside. He gave me "andazi" I never see anybody.*

Re-examination:

There at the bed there were clothes, he undressed me. It was evening when he left the "Pagare". I had no watch my mother then inspected me. ***I never saw the blood."***

PW4, explaining his findings upon examining PW2, said: -

"Recall on 21/12/2018 I was at the outpatient, Department. I received a kid brought by her parent for examination. Her name was Beatrice of 6 years. As a doctor, I took the description form. ***Her parent said that she was raped.*** *I then took her to theater for examination. I examined her private part, she had bad smell, she had also bruises. I then took her to a special department for HIV and other sexual disease.* ***She had bruises; this show that there is something inserted in her private part****. I then filled the PF3. I can recognize it for handwriting, signature and the stamp. This is the PF3, I pray to tender it as exhibit.*

Mr. Mwakabungu, advocate:

No objection.

Court: *Admitted P1 and explained in court.*

That is all

Xxd by Mwakabungu, advocate for the accused:

She had bad smell this may be caused by several diseases or failure to wash the private part properly. ***She had bruises this shows that blood oozed for sometimes. They told me she was raped after three days. They were asked to come to me as assistant medical officer. The story guided me to conclude that she was raped. That means there was penetration but she was virgin.***

Re-examination:

There was blood and reddish also bruises on the vagina.*"*

Her father (PW1) had this to say: -

*"**Xxd by the Court:***

I went to see the pagare, there is no any distance from my home to the "pagare" it is almost 15 paces.

The kid was missing since 12:30 she was found at 11:00 she was sober, I never inspected her private part. She was 6 years. She had dust.

Re-examination:

She told me that she was at the accused home at night*, he took her to the "pagare'. That is all."*

Comprehensively considered, from the testimony of PW2 one cannot ascertain as to where exactly the offence was committed. At first,

she said she was taken by the appellant on a motorcycle to his home as she was proceeding home alone on the fateful date at 12:00 noon and was ravished but later, when examined by the court, she said she was taken to a *pagare* where they stayed from 13:00 hrs to 18:00 hrs. Secondly, on her own words she said she was left by the appellant at the *pagare* at 18:00 hrs, but her father (PW1) said that she told him that she spent the night at the appellant's home. Furthermore, going by her story that the appellant left her (the victim) at the *pagare* at 18:00 hrs, then there is no satisfactory explanation as to why the victim failed to go back home which was only 15 paces from the *pagare* as stated by her father (PW1). Worse still, the search team including PW3 was first to meet the victim but when they inquired her as to what had befallen her, she remained silent. That, was the appropriate opportunity to explain the whole ordeal and name the appellant as the perpetrator of the rape for, it is trite law that the ability of a witness to name a suspect at the earliest opportunity tends to render assurance to the witnesses' credibility. [See **Jackson Thomas v. Republic**, Criminal Appeal No. 299 of 2013 (unreported)]. PW'2 failure explain the ordeal and name the appellant as the perpetrator casts doubt on her truthfulness and we cannot, but agree with the appellant's defence evidence that his being later named by the victim to her said father (PW1) was a result of her being pressed to do so

by her father (PW1). Given these concerns which reveal incoherence on the victim's own evidence on the one part and the inconsistences between her evidence and that of other witnesses, a reasonable person properly directing his mind to the case would not share the view with both courts below and the learned State Attorney that PW2 was a truthful witness. The probity of the evidence of the victim was questionable and could, therefore, not sustain a conviction for rape against the appellant.

There is yet the issue of PW4's evidence corroborating that of PW2 that she was raped. On this aspect, we respectively disagree with the learned State Attorney. In the first place and as was rightly conceded by the learned State Attorney, PW4's testimony in court fell far short of establishing penetration. If any, it established an attempt to penetrate which exercise failed leaving bruises on the private parts. And, we would add here that not every time a victim of sexual offence complains of suffering pains will amount to sufficient proof of penetration as the learned State Attorney wished us to accept. In peculiar circumstances like the instant one where hymen was not perforated, pains, bruises and blood on the vagina part would suggest inability to penetrate and would utmost amount to sexual abuse. That is not all. PW4's testimony in court was to the effect that there was penetration which contradicted her own remark

in exhibit P1 where she stated that the bruises were seen on the vaginal walls and not in the vagina. This is what she remarked in exhibit P1: -

> *"The child found to have bruises at the labia.....at the vaginal walls evidencing penetration,"*

It is incomprehensible that bruises outside the vagina would be evidence of rape. Section 131(4) of the Penal Code envisages a situation where the male organ (the penis) finds its way into the female organ (the vagina) not outside the vagina. To succeed in proving penetration there must be satisfactory evidence that the male organ entered, however slight, into the vagina and not otherwise. Such evidence is wanting in this case. It was therefore unsafe to treat such expert opinion as corroborative of PW2's evidence and convict the appellant of the offence of rape.

Lastly, it appears from the evidence by PW4 that she walked under and was influenced by two extraneous matters to arrive at the conclusion that PW2 was penetrated. On the one hand, is her finding that blood oozed from the victim's private part which assertion was disproved by, first, PW3 who was first to see PW2 who said he did not suspect anything when he saw her and, second, by PW2 herself who said she did not see blood. On the second hand, she (PW4) appeared to have been influenced by what she was told by PW2's parent when she was taken to her for medical examination that she was raped. She is recorded to have said "*As*

a doctor, I took the description from her parent that she was raped' and *"They told me she was raped after three days. They were asked to come to me as assistant medical officer. The story guided me to conclude that she was raped. That means there was penetration but she was virgin."* We do not think that such details were necessary to PW4 before examining PW2. All that was necessary for PW4 was to examine PW2 and establish if she was penetrated and if so, the nature of the object used, whether it was sharp or blunt object. She also had the duty to tell the extent of injury, if any, sustained. If the problem lies with the Police Form No. 3 (PF3), then it should be mended so as not to give such clue hence allow medical practitioners examine victims with free minds. With all due respect to PW4, based on the explained deficiencies, we hasten to hold with no flicker of doubt that her testimony and findings in exhibit P1 lacked professionalism rendering his medical report and her evidence in court of no evidential value. He was of no assistance to the court and we accordingly discount his evidence.

It being trite law, in terms of section 130 (4) (a) of the Penal Code, that in proving rape, evidence establishing penetration is necessary and, as demonstrated above, such evidence is missing in this case, hence the

charge was not proved to the required standard. The appellant's conviction cannot therefore stand.

Without grappling any further, we are satisfied that the above lone grounds have disposed of the appeal.

All said, we allow the appeal, quash the conviction and set aside the sentence imposed by the trial court and later enhanced by the first appellate court on appeal. The appellant to be released from prison forthwith unless held for another cause.

DATED at **IRINGA** this 21st day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of the Appellant in person and Ms. Magreth Mahundi, Senior State Attorney assisted by Ms. Radhia Njovu and Ms. Sophia Manjoni both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL