IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., BWANA, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 442 OF 2007

HAMISI ANGOLA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 30th day of October, 2007
in
Criminal Appeal No. 34 of 2007

JUDGMENT OF THE COURT

13 & 15 OCTOBER, 2010

BWANA, J.A.:

Hamisi Angola, the appellant herein, was charged with and convicted of the offence of rape contrary to sections 130 and 131 of the Penal Code as amended by sections 5 and 6 of the Sexual Offences (Special Provisions) Act No. 4 of 1998 (the SOSPA). The trial court, the District Court of Newala at Newala, sentenced him to a term of thirty (30) years

imprisonment. Aggrieved, the appellant appealed to the High Court. However, that first appellate court, the High Court of Tanzania at Mtwara, confirmed the conviction, but set aside that otherwise illegal sentence. In its stead, the appellant was sentenced to life imprisonment, in view of the provisions of section 131(3) of the Penal Code as amended by the SOSPA. The girl alleged to have been raped was five (5) years old.

Dissatisfied by that decision of the first appellate court, the appellant has now come before us for a "second bite". In his Memorandum of Appeal, the appellant raised several matters which, when concretised, may be categorized into the following areas:-

- Procedural irregularities during his trial.
- Demeanour and credibility of PW1 and PW2.
- Contradictions in the prosecution evidence.

Before considering the three matters listed above, it is proper to give a summary of the facts of the case. It was the prosecution case that on the 22nd February, 2005 at about 16.00hrs. at Nambudi Village within Newala

District, the appellant did rape Rukia Saidi, a girl aged five years. Three witnesses testified in support of the prosecution case. These were Rukia Saidi herself, PW1, her mother, Salima Saidi, PW2, and Abdallah Naleja, PW3, the Nambudi Village Executive Officer. The appellant on his part, gave a sworn defence statement.

On the fateful day and time, while PW1 was walking along the road at Nambudi Village, the appellant got hold of her and took her to his house. He then stripped off her clothes, undressed himself and raped her. After that barbaric act, the appellant let her go. PW1 went home crying. Her mother, PW2 was alerted . Upon being told what had befallen the girl, PW2 examined PW1's private parts. She saw traces of sperms mixed with blood.

The victim, PW1, told both PW2 and PW3 that it was the appellant who had raped her. He was subsequently arrested and charged with the offence of rape. His victim, PW1, was taken to the police where she was issued with a PF3 and then taken to Newala hospital for medical examination and treatment.

During the trial, the PF3 was tendered as an exhibit which supported the prosecution case that indeed PW1 was raped. We will revert to that shortly.

As stated hereinabove, the appellant's grounds of appeal before this Court centre on procedural irregularities; credibility and demeanour of PW1 and PW2; and contradictions in the prosecution evidence.

Before us the appellant fended for himself while the respondent Republic was represented by Mr. Ismail Manjoti, learned State Attorney.

For reasons of convenience, we consider first the issue of credibility and demeanour of PW1 and PW2. The sole argument advanced by the appellant is that their evidence should not be considered, because they are mother and daughter hence, they had an interest in the case. This kind of argument need not detain us longer. There is no law which forbids relatives from testifying in court for the same cause. This point has been canvassed by this Court earlier. Even before then, the erstwhile East

African Court of Appeal did state (See **R v Lulakombe Mikwalo and Kibege** (1936) EACA 43 at 44):

> *"There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship to an accused person."*

In a decision of this Court, in the case of **Paulo Tarayi v Republic,** Crim. Appeal No. 216 of 1994 (unreported), it was stated thus:-

> *"we wish also to say ... that* ***it is not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of a non-relative corroborating their story****. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind,* ***the evidence of each of them must be considered on merit, as should also the totality of the***

story told by them. *The veracity of the story must be considered and gauged judiciously, just like in the evidence of non-relatives. It may be necessary, in given circumstances, for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve,* ***but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relative..."*** [Emphasis added].

(See also the decision of this Court in **Deo Bazili Olomi and Hamisi James Mallya v Republic** (Criminal Appeal NO. 245 of 2007) (unreported).

We are equally alive to and minded of the long established practice that a second appellate court should be hesitant to disturb concurrent findings of fact made by lower courts unless it is glaringly seen to be erroneous or there are misdirections or non directions (see **DPP v Jafari Mfaume Kawawa** (1981) TRL 149; 153). Therefore when it comes to

the assessment of the demeanour of a witness, the trial court is the best suited to assess him/her. All the above considered, it is apparent that the appellant's claim over this issue is not supported by evidence on record. Rather, it seems to have been plucked from his mind. He has, therefore, not convinced us to hold likewise.

Several procedural irregularities have been raised by the appellant. Two such obvious ones touch on the tendering of the PF3 and how the "voire dire" was conducted. As to the former, it is evident and Mr. Manjoti did concede that the requirements under section 240(3) of the Criminal Procedure Act (the CPA) were not complied with hence denying the appellant his right to examine the maker of the document. It is our firm view that failure to do so was a fatal omission whose consequence is to have the said document expunged from the record. We do order so. (See also **Prosper Mnjoera Kisa v Republic**, Crim. App. No. 73 of 2003; **Metson Mtulinga v Repulic**, Crim. App. No. 426 of 2006; **Shabani Ally v Republic**, Crim. App. No. 50 of 2001; **Issa Hamisi Likamalila v Republic**, Crim. App. No. 125 of 2005 (all unreported).

This Court had an occasion to remark in a recent case of **Dismas Kabaya Milanzi v Republic**, Crim. App. No. 218 of 2005 (unreported) to the effect that section 240(3) of the CPA has been placed to safeguard the rights of accused persons.

The other procedural irregularity apparent on the face of the record is the way the "voire dire" was conducted and or recorded. The victim, PW1, as stated herein, was five years old when she was raped. Before taking her evidence, therefore, the trial magistrate was under obligation to conduct a properly recorded "voire dire," pursuant to the provisions of section 127(2) of the Tanzania Evidence Act (the TEA). The main objectives of conducting a "voire dire" are threefold. **First,** to establish whether such a child of tender years is possessed of sufficient intelligence to testify. **Second,** to establish whether the child understands the duty to tell the truth. **Third,** to establish whether the child knows the meaning of oath. According to the record in the instant case, it is apparent that the trial magistrate conducted a kind of "voire dire" examination and came to the conclusion that PW1 had the first two elements but lacked the third one. She therefore gave unsworn evidence which in essence, required

corroboration. We may state here in passing that "voire dire" must be clearly conducted and/or recorded. The way it was done in the instant case was not, with due respect, to the required standard.

The foregoing notwithstanding, a "voire dire" was conducted and unsworn evidence given. Therefore, it needed corroboration. That was not in deficiency. The evidence of PW2 corroborated what PW1 said. The two courts "a quo" believed it. We have no reason to fault those findings. We are as well aware of the provisions of section 127(7) of the TEA which in essence provide that a conviction for rape can be founded even on the uncorroborated evidence of a child of tender years where the court is satisfied that she is telling the truth. The first appellate court confirmed that finding. We are therefore hesitant to differ in the absence of evidence to the contrary.

The last main ground of appeal, again, does not need to detain us further. It is on the issue of contradictions in the prosecution case. With unfeigned respect, we have failed to see or identify such contradictions which are fatal to the prosecution case. It is now settled that not every

contradiction will make the prosecution case flop. In a recent decision of the Court, it was held thus (see **Saidi Ally Ismail vs Republic,** Crim. Appeal No. 241 of 2008 (unreported):

> *"...it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop.* ***It is only where the gist of the evidence is contradictory then the prosecution case wiii be dismantled ..."*** [Emphasis added).

We see no such contradictions in the present case. Each witness may testify in a different style and dependant on how he/she is led by the prosecutor. Therefore so long as the evidence of different witnesses does not differ or contradict in material particulars, then a trial court may ignore such minor discrepancies. That is what happened in this case. The discrepancies, if any, were not fatal. Therefore, this ground of appeal as well, has no basis on which to stand. It fails.

The sentence of life imprisonment imposed by the first appellate court is the statutory one. The appellant has to serve it.

In the upshot, this appeal is dismissed in its entirety.

DATED at MTWARA, this 14th day of October, 2010.

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL