IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MZIRAY, J.A. And WAMBALI,J.A.)

CRIMINAL APPEAL NO 52 OF 2017

JAMALI ALLY @ SALUM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mzuna, J.)

dated the 25th day of September, 2015

in

Criminal Appeal No. 45 of 2014

JUDGMENT OF THE COURT

26th & 28th February, 2019

JUMA, C.J.:

The Appellant JAMALI ALLY @ SALUM was arraigned before the District Court of Lindi at Lindi, tried and found guilty of the offence of rape of his 12-year-old niece who we shall refer to in her initials, **"BHD"**. The Statement of the Offence showed this to be contrary to **Section 130 and 131 (1) (e)** of the Penal Code Cap 16 [R.E. 2002].

The appellant denied the offence, prompting the prosecution to call three witnesses who were, the victim of the alleged rape (PW1), the

appellant's nephew, Jafari Hamisi Bakari (PW2) and Ahmani Said Hashomu (PW3) who was a nurse midwife at Nyangamara health centre. The appellant was the sole witness in his defence.

PW1 recalled how the event unfolded that day of 05/08/2013. It all began when the appellant's wife informed PW1 that the appellant wanted to see her, which she complied. The appellant asked her to follow him right to his farm to uproot cassava tubers for food *"futari"*. But events turned to the worse when, after uprooting the tubers, the appellant, while wielding a knife and a machete, ordered her to undress, which she refused. He forcefully peeled off her clothes, laid her down to the ground. After unzipping his trousers he proceeded to insert her penis into both her anus and vagina. After completing his sexual gratification, he gave her some local herbs supposedly to take back home to cure her baby sibling's habit of crying endlessly at night. The appellant warned her not to tell anyone.

The following day, when she decided to disclose to his brother (PW2) what had happened to her in the bush.

PW1 also disclosed about another day when the appellant invited her to his house, where they had sexual intercourse. This other day, the

appellant also gave her local herbs (medicine), this time to protect her from bewitchment.

The incident of 05/08/2013 was reported to the police station and a Police Form No. 3 (exhibit P1) was issued to enable her to seek treatment. At Nyangamara Health Centre PW3 examined PW1, and saw bruises and slippery fluid at her private parts. PW3 formed an opinion the bruises were caused by a blunt object, possibly a penis.

When put to his defence, the appellant stoutly denied the offence. He recalled how, when he was asked about the rape in the presence of his in-laws, he had denied. He wondered why when PW1 was asked about the rape in his presence and others, she had said nothing. The appellant believed that PW1 had merely made up the incident of rape in order to punish him for forcing her to regularly attend school.

The learned trial magistrate, E. PHILLY—RM convicted the appellant for the rape of PW1, and sentenced him to serve thirty (30) years in prison.

Aggrieved by the outcome of his trial, the appellant appealed to the High Court at Mtwara, which dismissed it.

Still aggrieved, the appellant has come to this Court with a total of nine (9) grounds of appeal which may be summarised into the following heads of complaints:

1). He was convicted on the basis of prosecution evidence which failed to indicate points for determination, decision thereon and the reasons for the decision.

2). Prosecution failed to carry out DNA tests to prove beyond reasonable doubt that it was the appellant who committed the offence.

3). The appellant should not have been convicted on the strength of evidence of PW1 and PW2 who were members of same family.

4). Failure to consider the significance of the passage of time, separating when the offence which was committed on 05/08/2013, and the medical examination of the victim the following day on 06/08/2013. Secondly, the two courts below did not consider the possibility that the bruises found on victim's private parts could have resulted from another blunt object other than the penis.

5). The two courts below erred in law for relying on the evidence of PW1 despite the irregularity of the trial that was not conducted in camera as the law requires.

6). The appellant was convicted because of the weaknesses of his defence.

7). Failure to consider the appellant's defence.

8). Failure to bring the victim's mother to testify as a witness.

9). Failure to consider the reasonable doubt arising from the evidence of the victim regarding the two separate incidents of rape.

At the hearing of the appeal, the respondent was represented by two learned Counsel, Mr. Abdurrahman Mohamed, Senior State Attorney and Mr. Yahya Gumbo, State Attorney. The appellant appeared in person and brought a supplementary memorandum of appeal. He urged us to consider these additional grounds of appeal together with the grounds in the memorandum of appeal which he filed earlier on 11/01/2017.

The supplementary memorandum of appeal contained five grounds, which he expounded with submissions reproduce as follows. In the **first** ground the appellant complained that the charge sheet is incurably defective for failure to cite in the statement of offence, the appropriate

sub-section of section 130 of the Penal Code. He expounded this ground by contending that the failure by the prosecution, to cite appropriate subsection to section 130 of the Penal Code, prevented him from proper understanding the nature and seriousness of the offence. It also prevented him from entering his defence. On this complaint, he sought the support of the case of **MUSSA MWAIKUNDA V. R.,** CRIMINAL APPEAL NO. 174 OF 2006 (unreported).

In the **second** ground, the appellant complains that the charge sheet is incurably defective for citing section 131 (1) (e) which does not exist in the Penal Code. Similarly relying in the case of **MUSSA MWAIKUNDA V. R** (supra), the appellant submitted that since section 131 (1) (e) does not exist, he was prevented from knowing what offence he was being charged with, and which provision he contravened.

In the **third** count, he complained about procedural irregularity which he regarded as fundamental. This is where the medical prescription card **"exhibit P1"** was wrongly admitted in court by PW1 who did not in the first place prepare it. He submitted that this irregularity prevented the appellant from cross-examining or challenging exhibit P1. The **fourth**

ground complained over what the appellant describes as fundamental procedural irregularity. This is when the medical examination report, exhibit P2, was tendered by a person who did not prepare it. This, appellant complains, prevented the appellant from cross examining or challenging the exhibit P1. He further complained that exhibit P1 shows that the name of the maker is one "Athumani Hashim" while it was tendered by PW3 named "Ahmani Said Hashomu".

In his **fifth** ground the appellant complains that the two courts below erred for relying on the evidence of PW1 who was a child of tender age after a *voir dire* Examination which was in any case conducted unsatisfactorily.

Mr. Mohamed, Senior State Attorney opposed the appeal on behalf of the respondent. He combined, argued together grounds number 1 and 2 of the supplementary memorandum of appeal which faults the defective charge sheet. He admitted that the charge sheet is defective in the Statement of Offence which cites **"section 130 and 131 (1) (e)"** of the Penal Code. The victim subject of this offence was a 12 year old girl, he submitted, in that respect the statement of the offence should have cited

"section 130 (2) (e)". Further, the learned Counsel agreed with the appellant that **"section 131 (1) (e)"** which is cited in the charge sheet does not exist. He submitted that the only issue which this Court should determine from the conceded defects is whether the appellant was prejudiced.

The learned Counsel hastened to urge us to find that the appellant was not prejudiced because the particulars of the offence drew the appellant's to who the victim of the offence was, together with her age. That, the appellant was further not prejudiced because he knew what he was facing and he was not in any way distracted by the defective citations of the applicable provisions of the law in the statement of offence. In support of this line of argument, he referred us to a decision of the Court in **DEUS KAYOLA V. R.**, CRIMINAL APPEAL NO. 142 OF 2012 (unreported) where the appellant was charged for the rape of a twelve year-old girl and the statement of offence cited ***"sections 130 and 131 of the Penal Code"***. The Court made the following observation which the learned Counsel before us would like us to regard as illustrative:-

"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old."

The learned Counsel next submitted, on grounds 3 and 4 of the supplementary memorandum of appeal, wherein the appellant faulted the admission of the medical prescription card which was admitted as exhibit P1, and the medical examination report (PF3) which was tendered as exhibit P2. Responding to the complaint that the exhibit P1 was admitted by a wrong person hence denying the appellant a chance to cross examine or challenge this exhibit, the learned Counsel while conceding that indeed that the medical prescription card was tendered by the victim (PW1) but not a medical officer, referred us to page 15 of the record where the appellant himself opted not to cross examine the person who had prepared the report. In so far as the learned Counsel is concerned, section 240 (3)

of the Criminal Procedure Act, Cap. 20 [RE 2002] which gives the accused person the right to cross examine, was complied with.

We would like to pause for a moment and express our agreement with the learned Counsel that the appellant has no good cause to belatedly complain. The appellant was indeed asked whether he had any objection if PW1 tendered medical prescription card (exhibit P1). The appellant replied:

> *"No objection, I opt not to cross-examine the person who made the report."*

Turning to the complaint over the medical examination report (exhibit P2) the learned Counsel referred us to pages 21 and 22 of the record of appeal where **"Ahmani Said Hashomu"** (PW3) a Nurse Midwife tendered this report. He argued that there had been mixing up of names because the name of **"Athumani Hashimu"** who signed exhibit P2 as medical practitioner is the same person as PW3. He urged us to ignore what he described as typographical error. When we pressed him whether a Nurse Midwife is a medical practitioner within the requirements of medical

examination reports, he conceded that PW3 was not a medical practitioner. He urged us to expunge exhibit P2. We obliged and expunged this exhibit.

The learned Counsel urged us to dismiss the fifth ground of appeal in the supplementary memorandum which claimed that the evidence of PW1 was not properly admitted in evidence because the *voir dire* procedure was not properly followed to establish whether this witness of tender age understood the duty of speaking the truth and understood the nature of oath as the Evidence Act Cap 6 requires. He referred us to page 13 of the record of appeal where, after conducting the examination the learned trial Magistrate expressed his satisfaction over the capacity of PW1 to testify under oath:

> *"After voir dire test, it is the court's opinion that this witness understands the nature of oath and possesses sufficient intelligence to justify the reception of her evidence, [she] also understands the duty of speaking the truth. Hence her evidence will be adduced under oath."*

Reverting to the complaints in the memorandum of appeal which the appellant filed on 11/01/2017, the learned Counsel urged us to disregard grounds number 5, 6 and 7 which he submitted are new grounds. The

appellant did not raise these grounds in the High Court and were not considered by the first appellate court. He urged us to strike them out. He submitted further that jurisdiction of this Court is provided under section 4 (1) of the Appellate Jurisdiction Act, Cap. 141, which is to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. He referenced to us a decision of the Court in **BAKARI ABDALLAH MASUDI V. R.,** CRIMINAL APPEAL NO. 126 OF 2017 (unreported) this had restated that the Court cannot deal with grounds that were not discussed in the first appellate court. We agreed with the learned Counsel to disregard these grounds in our determination of this appeal.

The learned Counsel combined and argued together grounds number 2, 4 and 8. Through these grounds the appellant claims that the prosecution's case was not proved beyond reasonable doubt. According to the appellant, failure to conduct DNA to establish the appellant's participation, medical examination being conducted a day after the event, failure of one Mama Ajira to testify, and reliance on evidence of the victim

(PW1) all serve to confirm that the prosecution did not prove its case beyond reasonable doubt.

The learned Counsel rejected this line of the appellant's submissions. He gave the example of the evidence of PW1 which can stand alone to prove the appellant's guilt beyond reasonable doubt. He referred to a decision of the Court in **SELEMANI MAKUMBA V. R** [2006] TLR 379 to reinforce his submission that in sexual offences, the best evidence is that of the victim. He urged us to look at page 14 of the record of appeal where the victim (PW1) gave a detailed account on how she was lured to the bush, where she was threatened, forcefully raped and forced to endure much pain.

The victim's detailed account, he submitted, proved sexual penetration beyond reasonable doubt. He urged that proof by DNA is not a pre-condition, especially like in the instant case, where the evidence of the victim is overwhelming. He submitted further that neither the fact that the victim was examined by the medical personnel the following day, nor the failure to call one Mama Ajira to testify, takes away the weight of the evidence of the victim of rape.

On a similar note, the learned Counsel submitted that the ninth ground of complaint should be dismissed because, even if the date when the second incident of rape has not been ascertained, the evidence of the victim is sufficient to convict. Thus, he completed his submissions by urging us to dismiss the first ground in the original memorandum of appeal which claimed that prosecution did not prove its case beyond reasonable doubt.

The appellant had nothing to add to the written submissions he had mixed up with his grounds of appeal.

As stated by this Court in so many occasions, generally, a second appellate court should not disturb the concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice: see for example **HAMISI MOHAMED V. R.**, CRIMINAL APPEAL NO. 297 OF 2011 (unreported).

We have examined the record of appeal including the decisions of the trial and first appellate courts. We have also considered all the fourteen grounds of appeal which the appellant brought to support his second

appeal. We found no cause for us to interfere with concurrent finding of facts by the trial and the first appellate courts.

We think that in light of the submissions of the appellant and those of the learned Senior State Attorney, this appeal can be disposed of by our determination of two issues. The **first issue** relates to the failure by the prosecution, to cite **section 130 (1), (2) (e)** and **131 (2)** of the Penal Code. That is, whether this defect arising from wrong citation and citation of inapplicable provisions; prevented the appellant from understanding the nature and seriousness of the offence of rape and prevented him from entering his proper defence thereby occasioning him injustice.

After expunging the medical examination report (exhibit P2), the **second** arising issue for our determination is with regard to the probity of the evidence of the 12-year old victim of rape; whether it can sustain a conviction for rape against the appellant.

With regard to the first issue for our determination the learned Counsel for the respondent placed reliance in the decision of the Court in **DEUS KAYOLA V. R.** (supra), which he employed to urge us to find that the irregularities in the statement of the offence arising from wrong and

inapplicable citations are curable under section 388 of the CPA because the appellant was fully informed by the particulars of offence that he was charged with, that is, the offence of raping a girl of 12 years. On his part, the appellant referenced us the decision of the Court in **MUSSA MWAIKUNDA V. R** (supra) to argue that he was so prejudiced that he could not marshal a proper defence.

However, read closely, the decision of **MUSSA MWAIKUNDA V. R** which found that the charge against the appellant could not be cured under section 388 (1) of the CPA, is not of much help to the appellant's cause in the appeal before us. We say so because the particulars of the offence facing Mussa Mwaikunda had omitted essential ingredients of the offence of attempted rape. In addition, the complainant against Mwaikunda did not say in her evidence that Mussa Mwaikunda had threatened her, which was an essential element in that offence. The Court had stated the following on page 393:-

> *"Having said so, the issue is whether the charge facing the appellant was curable under section 388(1) of the Criminal Procedure Act, 1985. With respect, we do not think that it was curable. We say so for two main*

reasons. One, since threatening was ***not alleged in the particulars of offence*** *the effect was that an essential element of the offence of attempted rape missed in the case against the appellant. Two, at any rate, as already stated,* ***the complainant did not say anywhere in her evidence*** *that she was threatened by the appellant."* [Emphasis added].

In the instant appeal before us, the particulars of the offence were very clear and in our view, enabled the appellant to fully understand the nature and seriousness of the offence of rape he was being tried for. The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the village where the offence was committed, the nature of the offence, the name of the victim and her age:

> *"JAMALI S/O ALLY @ SALUM on 5th day of August, 2013 at Nahukahuka Village within the District and Region of Lindi, did had carnal knowledge of one (**PW1**) a girl of 12 years old."*

Similarly, in her evidence which the trial magistrate recorded on page 14 of the record, PW1 gave a detailed account on how the appellant raped her:

"...the accused wife came and told me that I was called by the accused person. After that I went to the accused person who asked me to escort him to his shamba to uproot cassava for 'futari' he carried on his bicycle into the bush by then he had knife and panga on his hand. Upon reaching the bush, he asked me to uproot the tree, I did so. He then asked me to put off my clothes, I refused. He then used force and removed my dressing 'gauni' and then laid me down. After that he unzipped his trousers and pulled out his penis and inserted into my anus and vagina. I received painful and cried but he asked me not to cry on the reason that the local medicine will not work."

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 prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA.

With regard to the second issue about probity of the evidence of 12-year old PW1, the Evidence Act Cap 6 regards her to be both a child of tender years and a victim of the sexual offence. The appellant has

questioned the propriety of the *voir dire* examination of PW1. But this ground need not detain us. We agree with the learned Counsel for the respondent that pages 12 and 13 of the record show how the *voir dire* examination was in our view properly conducted before the learned trial magistrate, before he concluded that PW1 not only understood the nature of oath, but had sufficient intelligence which enabled her to understand the duty to speak the truth.

The record of appeal shows that the trial and the first appellate courts made a concurrent finding of fact that the evidence of PW1 proved the offence of rape beyond reasonable doubt. The first appellate Judge went further, by referring to section 127 (7) of the Evidence Act to reiterate the position of the law that the evidence of the 12-year old PW1 did not require corroboration to sustain the conviction:

> *"Reading the provision of section 127 (7) of the Evidence Act, it provides that such evidence of a child of tender years may be received even without corroboration after assessing her credibility provided that it is recorded by the court that the court is satisfied that the child of tender or victim of sexual offence is "telling nothing but the truth". Reading the record, the trial Magistrate warned himself and saw no*

danger to convict (see page 9 and page 12 of the typed judgment).

The trial Magistrate after observing PW1's demeanour in her voir dire test and the examination in chief said that "I am satisfied that what she said was meaningful and was nothing but truth." I see not sufficient ground to find otherwise. He made a note as well that she recognized him as her uncle after a walk together to the shamba/forest."

For the foregoing reasons, we find no merit in this appeal and is hereby dismissed. It is so ordered.

DATED at **MTWARA** this 28th day of February, 2019.

I. H. JUMA
CHIEF JUSTICE

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL