IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 269 of 2018

SELEMANI BAKARI MAKOTA @ MPALE ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J)

dated the 11th day of July 2018
in
Criminal Appeal No. 1 of 2017

JUDGMENT OF THE COURT

1st & 6th November, 2019

MWANDAMBO, J.A.:

Selemani Bakari Matola @ Mpale, the appellant, was aggrieved by the judgment of the High Court sitting at Mtwara dismissing his appeal from the judgment of the District Court of Ruangwa at Ruangwa. That court tried, convicted and sentenced him on the charge of rape contrary to section 130 (2) (e) and 131 of the Penal Code, Cap 16 [R.E. 2002]. He has appealed to this Court to protest his innocence believing as he does, that the two courts below were wrong in making concurrent findings concerning his conviction.

The appellant's arraignment and his eventual conviction and sentence meted out to him have a genesis from an event alleged to have occurred on 7th August, 2016 at Mchangani Village within Ruangwa District, Lindi Region. Mwanahawa D/o Rashidi Kalungudu (PW3) happened to be hibernating under a tree close to the house of Semeni Bakari (PW4). PW3 had two female children of tender age staying with her in that "home". The first was, according to the charge sheet, aged 8 years and this was the subject of the first and second counts in the charge sheet. For the purpose of concealing her identity, we shall be referring to her as 'SMN' or the victim interchangeably. The other one was Nasiri Mfaleli (PW6) whose age is not disclosed but she was, at the material time a primary school pupil.

On 7th August, 2016, PW3 appears to have stepped out to her home for unspecified reason and upon her return in the night, she found a person having sexual intercourse with SMN. The culprit who PW3 claimed to have been a regular at her home happened to be the appellant also her lover, with whom she had slept between June and August, 2016. Upon asking him why he was committing such an act with her daughter, the appellant chased PW3 and that she tried to enlist help from the neighbours but in vain for, after she had returned,

the culprit had already taken to his heels. Early in the morning on the following day, PW4 whose house was very close to the tree under which PW3 had converted as her shelter, saw SMN sleeping. PW4 asked PW3 about SMN's condition but the latter did not disclose that her daughter had been raped the previous night until later in the evening. At that time PW4 took upon herself and examined SMN.

After examining SMN, PW4 found some mucus from her private parts. PW4 suspected the mucus to be a result of rape and thereafter she took her to a police station where a PF3 was obtained for medical examination. Dr. Nicodemus Elias Nicholaus (PW1), a medical doctor at Ruangwa District Hospital examined PW5 with laboratory tests revealing that her vagina had fluid which suggested that she had been penetrated. Based on the information that it was the appellant who had raped SMN, the police arrested him and preferred a charge predicated on three counts namely: rape of SMN contrary to sections 130 (2) (e) and 131, unnatural offence of SMN contrary to section 154 (1) (a) (2) and carnal knowledge of Mwanahawa d/o Rashidi Kalungundu without her consent contrary to section 130 (2) (c) and 131 all the Penal Code. It is not entirely clear why the prosecution preferred the second and third counts against the appellant as the

record is quite scanty in that respect. Be it as it may, the appellant pleaded not guilty to the charge on all counts. To prove the case, the prosecution paraded six (6) witnesses including SMN who testified as PW5 followed by her sister, Nasiri Mfaleli (PW6). The two last witnesses were children of tender age. Reception of their evidence was subject to compliance with section 127 (2) of the Evidence Act, Cap. 6 [R.E. 2002] as amended by The Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016 (henceforth the Evidence Act). According to the record (at page 10 and 11) the trial court received evidence from PW5 and PW6 upon compliance with section 127 (2) of the said Act.

Having been found with a prima facie case to answer, the appellant offered his evidence on affirmation supported by two other witnesses. At the end of the hearing, the trial court found the prosecution's case to have proved the charge on the first count, which is, rape of SMN beyond reasonable doubt and entered a conviction thereon followed by a sentence of life imprisonment. The trial court found no satisfactory evidence to convict the appellant on the second and third count and acquitted him.

The appellant's first attempt to protest his innocence by an appeal to the High Court at Mtwara did not succeed. The first appellate court concurred with the trial court despite the respondent declining to support the conviction. Like the trial court, the first appellate court took the view that there was sufficient and direct evidence from PW3, PW5 and PW6 supported by PW1 and the PF3 (exhibit P1). In the end, it dismissed the appellant's appeal which triggered the institution of the instant appeal predicated on three grounds in the original memorandum of appeal and four grounds in the supplementary memorandum filed on 24th October, 2019.

Essentially, the appellant faults the two courts below for convicting him without regard to the fact that; one, the reception of the evidence of PW5 did not comply with section 127 (2) of the Evidence Act, two PW3 was not a competent witness due to her mental illness and; three PW5 was not a credible witness whose evidence could have been believed under section 127 (7) of the Evidence Act. The supplementary memorandum raises the following grounds:-

1. That the appellate court erred in law and fact by its failure to observe the violation of section 193 (3) of the Criminal Procedure Act, Cap. [R.E. 2002].
2. The trial court erred in law and fact in composing judgment without entering conviction.
3. That the trial court erred in law and fact by relying on the evidence of PW5 and PW6 without observing the requirement of section 127 of the Evidence Act, Cap. 6, R.E. 2002, as amended.
4. That the case was not proved beyond reasonable doubt as required by law as the age of PW5 was not all proved and the judge relied on assumption rather than evidence.

At the hearing of the appeal we heard Mr. Abdulrahman Msham, learned Senior State Attorney assisted by Mr. Emmanuel John, learned State Attorney who entered appearance for the respondent/Republic supporting the appeal. That was after the appellant who entered appearance, unrepresented, urging the Court to consider his ground of appeal in both the original and supplementary memoranda of appeal and deferring his argument pending submissions from the State Attorneys.

Mr. Msham's stance in supporting the appeal was predicated on grounds 1, 2 and 3 in the original memorandum of appeal as well as ground 3 in the supplementary memorandum which he promised to argue together. Perhaps it may not be entirely irrelevant to note in

passing that the respondent took a similar stance before the first appellate court albeit for a different reason against the conviction, the subject of this appeal.

The learned Senior State Attorney began his address with the validity of the evidence by PW5 and PW6 in the light of section 127 (2) of the Evidence Act. Essentially, Mr. Msham pointed out that according to the trial court's record, PW5 and PW6 were children of tender age at the time of occurrence of the incident and giving their evidence at a time when section 127 of the Evidence Act had already been amended vide Written Laws (Miscellaneous Amendments) Act. No. 4 of 2016. That section permits children of tender age to give evidence without taking oath or affirmation provided that they promise to tell the truth and not to tell lies before giving evidence. It was the learned senior state attorney's submission that contrary to the dictates of section 127 (2) of the Evidence Act as amended, PW5 and PW6 gave their evidence without promising the trial court to tell the truth and not to tell lies as it should have been the case. Relying on the case of **Godfrey Wilson vs. Republic**, Criminal Appeal No. 168 of 2018 (unreported) Mr. Mshamu impressed upon us that non-compliance with section 127 (2) of the Evidence Act was fatal for it

rendered invalid the evidence of PW5 and PW6 and thus incapable of supporting the charge. On that account, the learned Senior State Attorney urged us to discard the evidence of PW5 and PW6 for being invalid and once that evidence is discarded, there will be no other credible evidence to support the charge. This is so, the learned Senior State Attorney argued, the best evidence in sexual offences must come from the victim and since the evidence of the victim was invalid, there can be no more best evidence in support of the charge. Submitting further, Mr. Msham argued that PW6 who is recorded to have been at the same place with PW5 and witnessed the appellant raping SMN was equally invalid and incapable of corroborating PW5's evidence. As for PW3's evidence, Mr. Msham pointed out that, it was not free from difficulties as well. This witness was found to have mental problems and so there was no assurance of her credibility with the net effect that such evidence be acted upon with great care and corroborated by another evidence which is wanting. According to the learned Senior State Attorney, PW3's evidence could not have been corroborated by the PF3 tendered by a prosecutor as an exhibit instead of PW1 contrary to the Court's decisions in several cases including; **Aloyce Maridadi vs. Republic**, Criminal Appeal No. 208 of 2016 (unreported). In that decision, an exhibit tendered by a

prosecutor was expunged for being wrongly admitted and since the position in this appeal is similar to what transpired **Aloyce Maridadi vs. R.** (supra), Mr. Msham urged us that exhibit P1 should face similar consequences.

Accordingly, the learned Senior State Attorney submitted that after expunging the PF3 the remaining evidence is too weak to support the charge. Having so submitted, he did not find it necessary to canvass other grounds as intimated earlier being convinced that his submissions on the ailments arising from the non-compliance with section 127(2) of the Evidence Act was sufficient to dispose the appeal. He thus invited the Court to allow the appeal on that sole ground.

By reason of the respondent's stance, the appellant found no difficult in urging the Court to allow the appeal.

We have keenly followed the submissions by the learned senior state Attorney and like him, we are also of the view that the determination of the appeal turns on the sole ground he argued before us.

As seen above, in convicting the appellant, the trial court relied on the evidence of PW1, the author of a PF3 (exhibit P1) which indicated that SMN had been penetrated by reference to the bruises found on her vagina. As to who was responsible for the rape, the trial court relied on two pieces of evidence. One, the evidence of PW3 who testified that she found the appellant having sexual intercourse with SMN on the material night upon her return from drawing water. Two, the trial court relied on the victim's testimonial account supported by PW6 who testified that they had identified the appellant as the person who had raped PW5.

The first appellate Court concurred with the trial court that PW5 was raped by the appellant on the strength satisfactory evidence from PW1, PW3, PW5 and PW6 supported by a PF3. Be it as it may, the crucial issue for our determination in this appeal is whether the concurrent findings of the two courts below are legally sound.

In answering that question, we shall have regard to the settled principle of law behind the Court's limited power in interfering with the concurrent findings of the courts below unless the same are based on misapprehension of the evidence or misdirection causing miscarriage of justice. See **Ezekiel Kakende vs. Republic**, Criminal

Appeal No. 492 of 2015 and **Mbaga Julius vs. Republic**, Criminal Appeal No. 131 of 2015 (both unreported). The appellant's main complaint conceded by Mr. Msham is predicated on non-compliance with section 127 (2) of the Evidence Act which stipulates.

> *"(2) 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 to tell any lies."*

Luckily, that provision has received our interpretation in several cases including; **Godfrey Wilson vs. Republic** (supra) cited by the learned Senior State Attorney in which the Court relied on its previous decision in the case of **Msiba Leonard Mchere Kumwaga vs. Republic**, Criminal Appeal No. 550 of 2015 (unreported) stressing the need for trial courts to ensure compliance with the mandatory requirement under section 127 (2) of the Evidence Act to the letter.

As rightly pointed out by the learned Senior State Attorney, it is evident from the proceedings of the trial court that despite the trial Magistrate indicating that section 127 (2) of the Evidence Act had been complied with before PW5 and PW6 gave their respective evidence, there is nothing to show that each made a promise to tell

the truth and not to tell lies. Such omission was, as rightly submitted by Mr. Msham, fatal to their respective evidence on the authority of **Godfrey Wilson vs. Republic** (supra) in which it was apply stated:

> *"In this case, since PW1 gave her evidence without making prior promise of telling the truth and not lies, there is no gainsaying that the required procedure was not complied with before taking the evidence of the victim. In the absence of promise from PW1 we think that her evidence was not properly admitted in terms of section 127 (2) of the Evidence Act as amended by Act No. 4 of 2016. Hence, the same has no evidential value."* (At page 14).

The Court took a similar stance in **Yusuph Molo vs. Republic, Criminal** Appeal No. 343 of 2017 (unreported) whereby it aptly held:

> *"It is mandatory that such a promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution's case.... if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It was a*

fatal and incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value. It is as if she never testified to the rape allegation against her (sic! the appellant). It was wrong for the evidence of PW 1 to form the basis of conviction." [At page 12]

As stated above, the position in the instant appeal is no better. The evidence of PW5, the victim of the offence as well as that of PW6 was taken in abject non-compliance with the mandatory requirement under section 127 (2) of the Evidence Act. Similar to the position the Court took in the cases just referred to above, PW5's and PW6's evidence had no evidential value. It as if the two girls of tender age had never testified on the charge for rape and so it could not have formed the basis of the appellant's conviction. The purported evidence is thus expunged from the record as prayed by Mr. Msham.

Having expunged the purported evidence by PW5 and PW6, will the remaining evidence suffice to form the basis of the appellant's conviction?

The learned Senior State Attorney readily conceded, that the remaining evidence was quite shaky. With respect, we are constrained to go along with him. The record shows that PW3, the mother of

PW5, who is recorded to have found the appellant having sexual intercourse with SMN on the material night had mental problem as found by PW2. That witness was a Medical Doctor stationed at Ruangwa District Hospital specialising in attending patients with mental illnesses. Mr. Msham had initially submitted that PW3 was, on that account not a competent witness but later on he changed his stance. He submitted that by reason of PW3's mental illness, her credibility could not have been assured to render her evidence acted upon on its own. We are inclined to agree with him.

Besides PW2's findings, it is doubtful if PW3 was normal as confirmed PW4. According to PW4, PW3 stayed under a tree close to her house. The record shows also that although on the material night her daughter had been raped, she took no action taking SMN to a hospital. She even concealed to PW4 about the nature of her daughter's sickness when she found her daughter sleeping until late in the evening when she told PW4 that SMN had been raped and asked for assistance resulting into taking the victim to the police and later on to the hospital. Earlier on, PW3 had told the trial court that upon finding the appellant raping her daughter, she asked the appellant why he was doing that to her daughter whereupon the latter chased

her which enabled her waking up neighbours for help only to find the culprit fled upon return.

From the foregoing it is hard to reconcile PW3's version with that of PW4. We say so because we find it difficult to explain why PW4 a person whose house was close to the tree under which PW3 had her home could not have been aware of what had befallen of SMN before PW3 ultimately disclose the incident in the evening after concealing it from PW4 earlier in the morning. Further, if indeed PW3 had wakened her neighbours on the material night, PW4 could not have asked PW3 about SMN's condition few hours later but worse still, she did not say anything in her testimony close to PW's version. In our view, we cannot hesitate anymore to withhold our agreement with Mr. Mshamu that PW3's credibility was questionable and so the trial court could not have acted on her evidence without corroboration.

After discrediting the evidence of the very witness who claimed to have witnessed the appellant having sexual intercourse with her daughter, there is no other evidence to corroborate it. That evidence remains with little evidential value and thus incapable of standing on its own to form the basis of the appellant's conviction. A similar issue

to the issue we are faced with in this appeal arose in **Mbushuu alias Dominic Mnyaroje And Another vs. Republic** [1995] TLR 97 wherein after the Court found the evidence of PW1 deficient, it restated that the principle underlying corroboration and stated that corroboration becomes necessary to support evidence of a witness who is credible and not to give validity or credence to evidence which is deficient or suspect or incredible. The Court quoted with approval an excerpt from a speech by Lord Hailsham in **DPP vs. Kilbourne** [1973] AC 729 at page 745 thus:

> *`If a witness's testimony fails of its own inanities the question of his needing or being capable of giving corroboration does not arise.'*

In the light of the foregoing, we agree with Mr. Msham that the evidence of PW3 was incapable of corroboration and so it could not have been acted by the lower courts in convicting the appellant.

For completeness sake, we propose to say something with regard to the PF3 admitted as exhibit P1. As correctly submitted by Mr. Msham the PF3 was wrongly admitted by a prosecutor instead of its author, PW1. That was contrary to the procedure laid down by this Court in its previous decisions including; **Aloyce Maridadi vs. Republic** (supra) which relied on **Frank Massawe vs. Republic**,

Criminal Appeal No. 302 of 2012 and **Thomas Ernest Msungu @ Nyoka Mkenya vs. Republic** Criminal Appeal No. 78 of 2012 (both unreported). The net effect of the erroneous tendering of the PF3 rendered it fatal and incapable of forming part of the court's record. The lower courts were thus wrong in acting on it come to the finding that PW5 was raped and hence the eventual conviction. The purported exhibit must be and is hereby expunged from the record.

The cumulative effect of the above is, as day falls night, there is no other evidence to prove not only that SMN was raped but also that it is the appellant who committed the alleged rape. Had the two courts below bothered to pay due regard to the dictates of the law relevant to the case and applied it as we have endeavoured to show, they could not have come to the findings that the prosecution had proved its case beyond reasonable doubt. On the contrary, they could have acquitted the appellant on the charge of rape of SMN.

For the above reasons, we have found ourselves constrained to interfere with the concurrent findings of the two courts below because we are satisfied that they were a result of misapprehension of the evidence which occasioned a miscarriages of justice. Such legally flawed findings cannot stand and are hereby quashed. Consequently,

we endorse the submissions by Mr. Msham that the appeal has merit on the sole ground he argued before which is sufficient to dispose of the appeal.

In the upshot, we allow the appeal and quash the conviction and sentence meted out to the appellant with an order for his immediate release from custody unless he is held therein for any other lawful purpose.

Order accordingly.

DATED at **MTWARA** this 5th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 6th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Abdulrahman Msham learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL