IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MWANGESI, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 454 OF 2016

SHABANI NG'OMBE @ KENYEKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mwanza)

(Matupa, J.)

dated 23rd day of September, 2016
in
Criminal Appeal No. 176 of 2015
.....

JUDGMENT OF THE COURT

25th November, & 3rd December, 2019.

MWANDAMBO, J.A.:

Shabani Ng'ombe @ Kenyeka, the appellant herein, has preferred this second appeal protesting against conviction on the charge of rape by the District Court of Tarime upheld by the High Court sitting at Mwanza in Criminal Appeal No. 176 of 2015. It was alleged by the prosecution that on 8th May 2016, the appellant had canal knowledge of a girl aged 14 years of age contrary to section 130(2) (e) and 131 of the Penal Code, Cap 16 R.E

2002. We shall be referring to the name of the victim of the offence interchangeably as **DJ,** the victim or PW1 as the case may be to hide her true identity.

The facts giving rise to the appeal are not complicated. They go as follows: on 8th March 2015, three school girls from Busegwe primary school, namely; Elizabeth D/o Wasaga, Maria D/o Peter and **DJ** left the school in the afternoon in search of animal manure. Their mission landed them into a shamba which appeared to belong to the appellant where they found the manure scattered. Unsuspectingly, the trio started collecting manure in the absence of the owner. Before they could complete the task, the appellant appeared. He arrested the girls threatening to take them to Busegwe Hamlet chairman. In the process, the trio pleaded with the appellant for forgiveness. The appellant pardoned Elizabeth D/o Wasaga, and Maria D/o Peter in turn but refused to do alike with DJ. The two girls, including Elizabeth Wasaga, who had already been pardoned, were allowed to depart to school leaving behind DJ under the appellant's arrest. Despite DJ pleading with the appellant for forgiveness, he was resolute to have her taken to the Hamlet Chairman to account for her unforgivable sin, namely;

stealing manure from his shamba. Thereafter, the appellant and the victim proceeded to the said hamlet Chairman through a foot path in a bush before. Somewhere on the way, they met John Ng'ombe who happened to be the elder brother of the appellant. As DJ was carrying "the stolen manure", John Ng'ombe demanded explanation why the appellant was with the school girl to which the appellant did not conceal the fact that the girl was a culprit of theft of manure from his farm for which he was determined to take her to a hamlet chairman. It is common ground too that John Ng'ombe who testified as DW2 before the trial court asked the appellant to forgive the victim and let her free to which he appeared to yield and both, the appellant and the victim, departed.

All the same, luck was not on the victim's side for, later on, the appellant seized the opportunity to force sexual intercourse from the victim somewhere in a bush. The appellant is claimed to have done so regardless of the victim pleading with him that she was her close relative. Determined to quench his thirst, the appellant undressed himself as well as the victim and had carnal knowledge with her with the associated pains. According to her, she could not cry for help because the appellant covered her mouth

with his hands as he was committing the awful act. After satisfying his urge, he set her free with a warning to desist from disclosing the incident to anybody or else, she should expect the worst.

As it was already too late to go back to school, the victim went straight to her parents' home where she found her mother to whom she narrated the ordeal before calling her father and later on Bernadetha Gayo, the school teacher who testified as PW5.

Subsequently, a report was made to a Village Executive Officer (VEO) who issued DJ's father, Joshua Mruta (PW2) and the victim a letter which they took to a police station where a PF3 was issued. Later on, they proceeded to Butiama hospital for medical examination where they were attended by Makumbusho Mazigo, a clinical officer (PW4). The findings of the medical examination revealed bruises on the upper part of the victim's vagina and presence of sperms, perforated hymen and enlarged vagina resulting from entry of a blunt object therein. Subsequently, the appellant was arrested and arraigned before the trial court on a charge of rape to which he pleaded not guilty.

To prove its case, the prosecution paraded five prosecution witnesses and tendered one exhibit, namely; the PF3 admitted in evidence as exhibit P1. In defence, the appellant gave sworn evidence and called John Ng'ombe as his witness. At the end of it all, the trial court found the charge proved against the appellant to the hilt. It convicted him and handed a mandatory sentence of thirty years' imprisonment.

The appellant's appeal against conviction and sentence before the High Court was barren of fruits. That Court (Matupa, J.) dismissed the appellant's appeal upon being satisfied that the prosecution had proved the case against the appellant on the required standard in criminal cases. It is worth noting at this stage that one of the appellant's complaint before the first appellate court was that the trial court received and relied on the unsworn evidence of the victim of the offence (PW1) without conducting a *voire dire* test contrary to the dictates of section 127(2) of the Evidence Act. Cap. 6 R.E. 2002 (the Act). The nitty-gritty of the complaint is a subject of our discussion at a later stage but what is obvious and worthy mentioning at this stage is that the first appellate court held the view and correctly so, that despite the omission to conduct a *voire dire* test, PW1's

evidence was received as unsworn testimony which required corroboration. The learned first appellate judge found sufficient evidence from Elizabeth Wasaga (PW3), PW4 and DW2 corroborating PW1's unsworn testimony. In the end, the first appellate court dismissed the appeal.

Dissatisfied, the appellant has preferred the instant appeal premised on nine (9) grounds of appeal. Essentially, the appellant faults the two courts below for not holding that the charge against him was not proved beyond reasonable doubt to warrant conviction. The appellant faults the first appellate court on the following grounds with their inherent grammatical errors:

1. ***THAT,*** *charged offence prepared against the appellant was not proved beyond reasonable doubt and to the yardstick of law requirement.*
2. ***THAT,*** *PW1 being a tender age, prior to her evidence was not attested Under Mandatory Principal of "Voire dire" and her testimony which need corroboration couldn't been corroborated by PW3 who was also a tender age unsworn, as the first appellate did on his judgment (at P7 line 20 to proceedings).*
3. ***THAT,*** *PW4 being a clinical officer his evidence and medical examination result tendered in court were baseless and invalid as in*

law of Dentist Act he was/is Un-Authorised to make any examination to that case of rape in question.

4. ***THAT**, notwithstanding afro ground an exhibit P1 (PF3) was irregular tendered in Court by Public Prosecutor, however to the connection of PW4 supra reason its trite law that an Illegal act at the beginning would never render the thing legitimate at final.*

5. ***THAT,** the was no any Adverse inference drawn by the first appellate court following the trial court not worn itself on the danger of relying on unsworn and Un corroborated evidence of PW1's Incredibility to convict the innocent appellant who apprehend them/her stealing at his shamba.*

6. ***THAT,** nothing could resist appellant to commit crime at the first instance before met with a vigilant one John Mang'ombe on the way to hamlet leader, if he could had any malice afterthought to commit.*

7. ***THAT,** PW2 and PW5 couldn't corroborate PW1's evidence due to crime, since were persons called informed from a far distance and acted upon as an hearsay, Instead of one Loise d/o Joshua purported receiving a first report of, never testify on effect with no reason awarded.*

8. ***THAT,** the appellant was Victim of the case not Investigated with no Investigator who could even visit at the alleged "in flagrante delicto". Although no any arresting personally testify as to when and in what connect led to appellant's arrest.*

9. ***THAT,*** *appellant's defence was holding water, thus would be given the benefit of doubt erupted from prosecution's case and declare him innocent.*

At the hearing of the appeal, the appellant appeared in person fending for himself. Mr. Victor Karumuna, Senior State Attorney joining forces with Ms Gisela Alex, State Attorney appeared for the respondent Republic resisting the appeal.

Being a lay person, the appellant did not have anything in addition to his grounds of appeal. He urged us to consider them and opted to let the Senior State Attorney submit first before he could be heard in rejoinder if such need arose. Mr. Karumuna commenced his address by drawing our attention to the fact that some of the grounds in the memorandum of appeal were new, for they were not raised before and determined by the High Court neither do they relate to issues of law. The learned Senior State Attorney singled out the 5th, 7th 8th and 9th grounds of appeal as new grounds which he refrained from discussing and urged us to decline considering them. We readily agreed with Mr. Karumuna having regard to the provisions of section 6(7) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 (the AJA) as well as rule 72 (2) of the Tanzania Court of Appeal

Rules 2009 (the Rules). Section 6(7) of the AJA mandates us to hear appeals from the High Court or court of Resident Magistrate with extended jurisdiction on matters canvassed before them and determined by such courts. Indeed, more often than not, this Court has pronounced itself on that aspect in a number of cases. Very recently, the Court, sitting at Mwanza, had occasion to reiterate its stance on the issue in **Thomas s/o Peter @ Chacha Marwa vs. The Republic,** Criminal Appeal No. 553 of 2015 (unreported) citing previous decisions in **Galus Kitaya vs. The Republic**, Criminal Appeal No. 196 of 2015 and **Godfrey Wilson vs. The Republic,** Criminal Appeal No. 16 of 2018 (both unreported).

See also; **John Nkwabi @ Kakunguru vs. The Republic**, Criminal Appeal No. 443 'A' of 2019 and **Mustapha Khamis vs. The Republic,** Criminal Appeal No. 70 of 2016 (both unreported). In the circumstances, being satisfied that the 5th, 7th, 8th and 9th grounds were not decided by the High Court, we shall not consider them in this appeal. That means, the appeal will be determined on the 1st, 2nd, 3rd, 4th and 6th grounds argued by Mr. Karumuna. However, ground one touches on the general complaint that the appellant's conviction by the trial court sustained by the first

appellate court was premised on proof which was below the standard of proof in criminal cases. Mr. Karumuna did not address that ground specifically understandably so because the determination of it is dependent on the other grounds for our consideration.

Submitting on ground two, the learned Senior State Attorney was quick to concede that there was an omission to conduct a *voir dire* test before the trial court. That notwithstanding, Mr. Karumuna argued that the evidence of PW1, the victim of the sexual offence, was received as an unsworn testimony which required corroboration before acting on it. It was the learned Senior State Attorney's submission that nonetheless, the High Court addressed that aspect and came to a firm view that PW1's evidence was sufficiently corroborated by PW3 and PW4. In support of his submission, Mr. Karumuna sought reliance from our previous decision in **Deemay Daati And Two Others vs. the Republic** [2005] T.L.R. 132 for the proposition that omission to conduct a *voir dire* test of a child of tender age is not fatal, for such evidence is relegated to unsworn testimony which requires corroboration which came from PW3 and PW4.

In the course of his submission in this ground, Mr. Karumuna found it inevitable to address us the appellant's complaint in ground four faulting the lower courts for relying on a PF3 (Exhibit P1) which was allegedly wrongly tendered by a prosecutor rather than the witness, that is, PW1. Mr. Karumuna's reaction to this complaint was that despite the inept manner in which the trial magistrate recorded the proceedings, the record of appeal (at page 11 and 12) shows that Exhibit P1 was tendered by PW1 and so the complaint in ground four lacks basis.

As to ground three, Mr. Karumuna argued that the complaint that PW4 was an unqualified person to conduct medical examination on PW1 was without any basis. Seeking refuge from our previous decision in **Charles Bode vs. The Republic**, Criminal Appeal No. 46 of 2016 (unreported), counsel submitted that PW4, a clinical officer was a qualified medical personnel who was competent to conduct the medical examination as he did. He thus invited us to dismiss this ground as well.

Finally in ground six, the learned Senior State Attorney submitted that the evidence shows that DW2 met the appellant in the company of PW1 before committing the rape and not after as claimed by the appellant.

He implored us to dismiss this ground as well. On the whole, Mr. Karumuna urged us to find no merit in all grounds and dismiss the appeal.

The appellant had nothing to address the Court except on ground six on which he beseeched us to believe that he met DW2 after the incident complained of thereby negating the prosecution's version that it was before. Otherwise, the appellant left his fate in our hands.

Having heard oral submissions from the learned Senior State Attorney on the grounds he argued before us, it is plain that the crux of the appeal revolves around ground two. For easy reference, the appellant complains that it was an error by the first appellate court to have held as it did that PW1's unsworn evidence could have been corroborated by PW3 who was also a child of tender age in the absence of *voir dire* examination. Put it differently, it is the appellant's complaint that the testimony of PW3 which was similarly relegated to unsworn testimony was incapable of corroborating another unsworn testimony by PW1. In its judgment, the first appellate court stated:-

> *"In the present case the trial court did not bother to look for corroboration. This being the first appellate*

court, it is bound therefore to step into the shoes of the trial court and see if there was corroboration. We have shown above that the circumstances of the case is corroborative of the fact that the appellant raped the appellant (sic victim). The appellant was last seen by Maria Wasaga (PW3) in the company of the appellant. The appellant has not denied the fact." (at page 11 of the judgment page 55 of the record)

Despite the fact that there was no specific complaint before the High Court on PW3's competence, Elizabeth Wasaga (PW3) whose evidence was found to be corroborative of PW1 was of the age of 15 years on the date she testified before the trial court. Section 127 (5) of the Act [now section 127 (4) as amended by Act No. 4 of 2016] defines a child of tender age as a child whose apparent age is not more than 14 years. Apparently, there was no dispute as to PW3's apparent age and so, her evidence did not require any *voir dire* examination as claimed by the appellant to be acted upon. PW3 gave her evidence on oath and so the question of her evidence being incapable of corroborating PW1's testimony does not arise. In our view, the first appellate court properly directed its mind to the law and

came to a correct decision holding as it did that PW1's evidence was sufficiently corroborated by PW3 as well as PW4 and DW2. We thus agree with Mr. Karumuna that ground two is baseless and we dismiss it.

On the alleged irregularity in tendering the PF3, we, yet again go along with Mr. Karumuna. Our examination of the record at page 12 thereof, shows that the prosecutor led PW1 to ask the trial court to have the PF3 admitted in evidence and thereafter, the trial court admitted the same as Exhibit P1 without any objection from the appellant. We find no merit in this complaint and dismiss it. At any rate, even if we were to agree with the appellant that Exhibit P1 was irregularly tendered and admitted, we would only discard it from the record. However, that will leave intact the oral testimony of PW4, the author of the PF3 guided by our previous decision in **The Director of Public Prosecutions vs. Erasto Kibwana and 2 Others**, Criminal Appeal No. 576 of 2016 relied upon subsequently in **Thomas Robert Shayo vs. The Republic**, Criminal Appeal No. 409 of 2016 (both unreported). We held in **Erasto Kibwana** (*supra*) that medical reports are not substantive evidence rather the oral testimony of the

authors. The uncontroverted evidence of PW4 who examined PW1 runs thus:-

> *"I medically find (sic! found) that there were bruises on the upper part of her vagina, also witnessed sperms, her vagina was enlarged compared to her age. I asked her to go for laboratory purposes I fill (sic! filled) the PF3 on what I observed hymen missing vagina open, blunt object meet sexual (sic!) by penis."[at page 16].*

PW4's oral testimony went unchallenged. In our view, PW4's testimony was so unveiling even in the absence of the PF3. Like the other complaints, the complaint in ground four falls away.

As to the appellant's criticism regarding PW4's competence the subject of the appellant's complaint in ground three, we also find no basis in that challenge guided by our previous decision in **Charles Bode** (*supra)* referred to us by the learned Senior State Attorney. We are satisfied that PW4 was a qualified medical personnel competent to conduct medical examination on PW1 revealing findings of rape posted in exhibit P1. PW4's testimony as well as Exhibit P1 constituted another evidence corroborating

PW1's unsworn testimony and so we find no merit in the appellant's complaints. We shall now turn our attention to ground six.

The appellant would have us endorse his argument that it could not have been possible for him to commit the offence after DW2's intervention and had PW1 and the appellant depart consistent with his evidence at page 24 of the record. John s/o Ng'ombe (DW2) is on record that he met PW1 carrying manure in the company of the appellant who told him that PW1 was arrested stealing manure from his shamba. At DW2's intervention, both PW1 and the appellant departed. Like the first appellate court, by "both departed", we think they (PW1 and the appellant) did so towards the same direction before the appellant turned against PW1 and ravished her in a bush. Otherwise, we are unable to comprehend the argument because had it been true that DW2 met PW1 and the appellant after the incident, that would run contra to PW1's evidence that the appellant let her depart to school after the incidence. Indeed, in defeats logic that the appellant could have allowed himself to be in the company of his prey carrying manure after the awful act.

Be it as it may, worth for what it is, such a claim is, in our opinion a fanciful possibility with no bearing on the prosecution's case. We are fortified in this view by a statement of Lord Denning in **Miller vs. Minister of Pension** [1974] 2 All ER 372. Drawing inspiration, in **Chadrankant Joshubhai Patel vs. Republic,** Criminal Appeal No. 13 of 1998 (unreported) the Court stated:

> *"As this court said in **Magendo Paul and Another v. R** [1993] TLR 2, 9, quoting Lord Denning's view in **Miller v. Minister of Pensions** [1947] 2 All E.R. 372, also quoted by the learned trial judge in the instant case, remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences."*

See also; **Chiganga Mapesa vs. The Republic**, Criminal Appeal No. 252 of 2007, (unreported), **John Nkwabi @ Kakunguru** (*supra*) and **Sophia Kingazi vs. The Republic**, Criminal Appeal No. 273 of 2019 (unreported).

We would likewise hold that yes it may have been possible that DW2 met the appellant and PW1 after the 'alleged incident' but the evidence against the appellant was too strong to be deflected by such a fanciful and remote possibility. All said and done, ground six fails.

Before we pen off, we find it opportune to make our observation on one aspect regarding the reception of evidence of children of tender age. At the time when PW1 gave her evidence, section 127 of the Act had already been amended vide Written Laws (Miscellaneous Amendments) Act No. 4 of 2016. Relevant to this appeal was the abolition of the requirement to conduct *voir dire* tests to witnesses of tender age under section 127 (2) of the Act and the introduction of promise to tell the truth and not lies by such witnesses. It is apparent that the High Court determined the appeal on the basis of the law prior to amendment to section 127 (2) of the Act such that it made reference to omission to conduct a *voir dire* test which was no longer a requirement. Be it as it may in so far as the PW1 gave an unsworn testimony, such omission had no bearing to the outcome of the appeal.

In the upshot, having dismissed all grounds of appeal, the appeal is found to be wanting in merit and we dismiss it.

Order accordingly.

DATED at **MWANZA** this 2nd day of December, 2019.

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered on this 3rd day of December, 2019 in the presence of the appellant in person and Ms. Gisela Alex, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL