IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 463 OF 2018

AL-JABIR JUMA MWAKYOMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated the 21st day of August, 2018
in
Criminal Appeal No. 26 of 2018

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JUDGMENT OF THE COURT

21st & 27th September, 2021

KENTE, J.A.:

In the Resident Magistrate's Court at Mbeya, the appellant Al-Jabir Juma Mwakyoma, was charged, on the first count, with grave sexual abuse c/s 138C (1) and (2) (b) of the Penal Code, Cap 16 R.E 2002 (now R.E 2019). It was alleged that, on the 19th August, 2017 at Simike area within the City and Region of Mbeya, for purposes of sexual gratification and using his genitals and fingers, the appellant touched the private parts and surroundings of the genetalia of a girl aged 11 whose identity we shall hereinafter conceal and simply refer to as PW1. In the second count which charged the appellant with unnatural offence c/s 154 (1) of the Penal Code,

it was particularised that, at the same time and place, the appellant had the carnal knowledge of PW1 against the order of nature. The appellant having denied the charge, the prosecution was then called up on to prove its case.

The charge against the appellant culminating into his conviction and sentence was premised on the following facts as can be gleaned from the testimonies of the prosecution witnesses. At the time which is material with the occurrence of the charged offence, the appellant and the victim (PW1) who testified as the first prosecution witness before the trial court, were neighbours living within the same locality of Simike area in Mbeya City. Whereas PW1 was living together with her grandmother, the appellant being a family man, was living with his wife and son. The appellant's house was apparently just behind the house in which PW1 lived with her grandmother. It is was alleged that, between July and August, 2017 the appellant used to call PW1 through the window of his house and give her some money. After giving her money for the first two times, on the third time, the appellant would thereafter call PW1, take out his manhood and rub it against her private parts after having ordered her to remove her underwear. The appellant is said to have done so for about five days. However, as sure as

time does, it caught up with him on the sixth day when the appellant took PW1 to an unfinished house and did to her what had then become the norm.

It is then when PW1's friend one Christina Joseph (PW2) who was then collecting firewood in the neighbourhood happened to hear the sound of someone whom, at first, she thought was stealing avocados. Being young and relatively short, PW2 slowly elevated herself on top of the nearby wall to find out what was happening. To her surprise and shock, she saw her friend PW1 who was together with the appellant stripping of her clothes. In a hurry, PW1 took home the firewood and thereafter she returned to see what the appellant and PW1 were really doing. According to PW2, she found PW1 bending while touching the wall whereas the appellant whom PW2 referred to as "Babu Mwakyoma" was clinging on PW1's backside. Having accomplished whatever they were doing, the appellant is said to have given PW1 Tzs 500.00 after which he left. From there PW2 quickly went to tell one Mama Stella what she had witnessed and as the female neighbours passed the information regarding the said incident from one to another, Selina Mkala (PW3) who is also PW1's grandmother finally got the wind about the abuse of her granddaughter. At a later stage one Mama Stella and Mama Hadija decided to formerly tell PW3 who also reported the incident to the police at Meta where the appellant was subsequently booked for the offence

of grave sexual abuse. That was after PW1 was examined and found to have no signs of sexual penetration nor any sexually transmitted disease. The appellant was thereafter formerly arraigned in court where he was charged with and subsequently convicted of the aforesaid offence of grave sexual abuse.

In his protestation of innocence, without making reference to the 19th August, 2017, the appellant told the trial court that he was arrested at his home on 20th August, 2017 at about 10:00am and whisked to the police station where he was retained for eighteen days without making any statement to the police. He denied to have committed the offence with which he stood charged. He challenged the evidence of PW1 who told the court that he used to abuse her and give her some money which, the appellant said, was however, not tendered in court as exhibit. He also complained that there was no exhibit of a medical report and that the doctor who examined PW1 was not called to testify in support of the prosecution case. While admitting to have known PW1 for quite a long time, the appellant further challenged her for not reporting to their neighbours nor her grandmother the abuse incidents which were allegedly committed on several occasions.

However the trial court did not find any merit in the appellant's defence evidence and arguments. Instead, it was convinced that the charge against him on the first count, was proven beyond reasonable doubt. He was accordingly convicted and sentenced to twenty years of imprisonment and ordered to compensate the victim to the tune of Tzs 1,000,000.00. As for the second count, the appellant was found not guilty and consequently discharged. His appeal to the High Court to challenge conviction and sentence in respect of the first count was dismissed in its entirety, hence, his final resort to this Court by way of this last appeal.

Before us in this appeal, the appellant has raised the following grounds of dissatisfaction against the decision of the first appellate court:

1. That, the learned Judge of the High Court erred in fact and in law to dismiss the appeal basing on the evidence of PW1 and PW2 whose evidence was recorded without conducting a *voire dire* test.

2. That, the learned Judge erred in law and in fact in dismissing the appeal by believing the evidence of PW2 who allegedly witnessed the sexual abuse incident but did not raise any alarm.

3. That the learned Judge of the first appellate court erred in law and in fact by believing that PW1 was eleven years old without production of her birth certificate to prove her age.

4. That the learned Judge erred in law and in fact to dismiss the appeal basing on the hearsay evidence of PW3.

5. That the learned Judge of the first appellate court erred in law and in fact by dismissing the appeal relying on the evidence of PW1 who failed to report the incident to her grandmother and never tendered the money allegedly given to her by the appellant as an exhibit.

6. That the learned judge erred in law and in fact to dismiss the appeal relying on the contradictory evidence of PW4.

7. That there was no local leader from the locality where the offence was committed who appeared in court to testify in support of the prosecution case.

8. That the learned Judge erred in law and in fact in dismissing the appeal without taking into account that the prosecution had failed to prove the charge to the required standard; and

9. That the appellant's defence was not considered.

In this appeal, the appellant had no legal representation, he appeared in person. On the other hand, the respondent /Republic was represented by Mr. Deusdedit Rwegila, learned Senior State Attorney.

From the totality of the grounds of appeal raised, Mr. Rwegila was of the view and we entirely agree with him that, the second, fourth and seventh grounds of appeal were new, the same not having been raised

before the first appellate court. Accordingly, pursuant to section 6(7) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019, the learned Senior State Attorney indicated, correctly so in our view that, in the circumstances, he would not canvass them in his submissions in opposition to the appeal. For his part, the appellant, on being invited to expound on the grounds of appeal, he adopted them and thereafter he prayed to be allowed to hear the learned Senior State Attorney's reply submission, after which, if he thought it necessary, he would make a rejoinder submission thereto.

Submitting in opposition to the first ground of appeal, Mr. Rwegila maintained that, the same has no merit as the evidence of PW1 and PW2 who were witnesses of tender age was recorded by the trial Magistrate in compliance with the requirements of the law. The learned Senior State Attorney rejected the appellant's complaint that a *voire dire* test was not conducted on the two witnesses urging that, the said test is no longer a pre-condition for taking the evidence of a child witness in a criminal trial. He referred us to s. 127(2) of the Tanzania Evidence Act Cap 6 R.E. 2019, (the Evidence Act) and to our recent decision in **Mathias Joromini v. Republic,** Criminal Appeal No. 551 of 2020 (unreported).

Turning to the complaint in the third ground of appeal which challenges the decision of the first appellate court for relying on the evidence of PW1

without taking into account that her birth certificate was not tendered in court to prove her age, Mr. Rwegila submitted that, the age of PW1, the victim of the charged offence, was not at issue, the same having been listed on the memorandum of the matters which were not in dispute between the parties during the preliminary hearing. In the alternative, assuming that a preliminary hearing is not part of the trial, the learned Senior State Attorney submitted that the age of the victim was proved by the evidence of her mother PW3 who told the trial court that at the material time, PW1 was aged 11 years. Upon the above reasons, Mr. Rwegila prayed for dismissal of the third ground of appeal as it appears to be unsubstantiated.

As stated earlier, under the fifth ground of appeal, the appellant is challenging the learned Judge of the first appellate court for dismissing the appeal while relying on the evidence of PW1 who however, did not report the incident to her grandmother. Reacting to this complaint, Mr. Rwegila was of the view that, indeed PW1 did not report what had befallen her to her grandmother but she had a reason to explain away the said omission. The victim did not report because the appellant had threatened her that if she did, he would kill her, the learned Senior State Attorney urged. It is for that reason that Mr. Rwegila invited us to dismiss the fifth ground of appeal for lack of merit.

As to the complaint in the sixth ground of appeal that the charged offence was not established by the evidence of a medical expert, who in addition to his expert oral evidence, should have tendered a medical examination report confirming that indeed the complainant was sexually abused, the learned Senior State Attorney submitted in counter that, the offence of grave sexual abuse of which the appellant was convicted, did not require proof by an expert and therefore, it was not necessary for a medical examination report to be tendered in evidence.

Moving forward to the eighth ground of appeal which critises the learned Judge of the first appellate court for dismissing the appeal before her notwithstanding that the appellant's guilt was not proved to the required evidential threshold, Mr. Rwegila strongly countered this complaint by maintaining that, as opposed to his complaints, the appellant's guilt was proven beyond doubt. The learned State Attorney had in mind the evidence of PW1 and PW2 who were the eye witnesses to the sexual abuse incident and whose evidence of visual identification was relied upon by the trial court to support conviction and subsequently by the first appellate court in dismissing the appeal.

The essence of Mr. Rwegila's submission was that, the evidence of PW1 coming straight from the horse's mouth, was, by itself sufficient enough

to ground conviction and that the evidence of PW2 who witnessed the sexual abuse incident was brought in just to give credence but not to corroborate the evidence of PW1. Put in other words, the learned Senior State Attorney was of the settled view that, even in the absence of PW2, the evidence of PW1 would still be sufficient to support a conviction.

Finally is the complaint by the appellant under the ninth ground of appeal where he is criticising both the trial Magistrate and the learned Judge of the first appellate court for allegedly not considering his defence evidence. In a brief reply, Mr. Rwegila submitted that the complaint by the appellant is not founded both in law and in fact as, in reality, his defence version was canvassed mainly by the trial court and upon appeal, it was touched on by the first appellate court. The cumulative effect of the learned Senior State Attorney's submission was that, the appeal before us was devoid of merit. In the circumstances, Mr. Rwegila implored us to dismiss it in its entirety.

For his part, the appellant had nothing substantial to say in rejoinder. He only lamented that, the two courts below did not do justice to him and that he was convicted of an offence which was not proven.

It is evident from the complaint raised by the appellant in the first ground of appeal that, central to the determination of the question as to whether or not the evidence of PW1 and PW2 was taken in accordance with

the requirements of the law, is section 127(2) of the Evidence Act which provides that:

> *"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."*

It is trite to observe at this juncture that, as opposed to the view seemingly held by the appellant, the current position of the law does not make it a mandatory requirement for the trial Judge or Magistrate to conduct a *voire dire* test on a witness of tender age who appears in court to give evidence. As this Court observed in its earlier decision in **Godfrey Wilson V. Republic,** Criminal Appeal No. 168 of 2018 (unreported):

> *"... the above cited provision as amended, provides for two conditions.* ***One,*** *it allows the child of tender age to give evidence without oath or affirmation.* ***Two****, before giving evidence, such a child is mandatorily required to promise to tell the truth to the court and not to tell lies."*

(See also **Msiba Leonard Mchele Kumwaga v. Republic**, Criminal Appeal No. 550 of 2015 (unreported).

Commenting on a situation like the one obtaining in the present case where both PW1 and PW2 were children of tender age, the Court made the

following observations in **Issa Salum Nambaluka V. Republic,** Criminal Appeal No. 272 of 2018 (unreported):

> *"From the plain meaning of the provision of subsection (2) of s. 127 of the Evidence Act which has been reproduced above, a child of tender age may give evidence after taking oath or making affirmation or without oath or affirmation. This is because the section is couched in permissive terms as regards the manner in which a child witness may give evidence.* ***In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies.*** *Section 127 of the Evidence Act is however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not."*

And in an attempt to fill the lacuna in the law, the Court went on observing in **Salum Nambaluka** (supra), thus:

> *"... where a witness is a child of tender age, a trial court should at the foremost, ask few pertinent questions so as to determine whether or not the child witness understands the nature of oath..... If such child does not understand the nature of oath, he or she should before giving evidence, be required to promise to tell the truth and not to tell lies."*

In the instant case, apparently being mindful and cognizant of the current position of the law s. 127(2) of the Evidence Act, the learned trial Magistrate dutifully caused both PW1 and PW2 at pages 11 and 13 respectively of the record of appeal, to promise to tell the truth and not to tell lies before they proceeded to testify. For these reasons, we are convinced that the appellant has no objective justification to fault the learned Judge of the first appellate court for endorsing what the trial Magistrate did. We accordingly dismiss the first ground of appeal.

The second ground of appeal is relatively brief to dispose of. To recapitulate, the appellant is complaining thereunder that the age of PW1 was not ascertained as her birth certificate was not tendered in evidence. The thrust of the appellant's argument here is that, given the nature of the offence of which he was convicted, it was incumbent upon the prosecution side to prove the age of the victim beyond reasonable doubt. In the absence of such proof, the appellant appears to impliedly put forward, for sure, the prosecution case was destined for failure.

With due respect, we do not subscribe to the position taken by the appellant. For, we do not think that, at law, a birth certificate is the only proof of an individual's age. If it were, in a country like ours where the documentation of births and other vital personal statistics and information is

a recent development among populations, the age of many would have been left to conjencture. It is for this reason that in **George Claud Kasanda v. Republic**, Criminal Appeal No. 376 of 2017 (unreported), the Court quoted with approval what was stated in **Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported) that, in sexual offences, proof of age may be given by the victim, relative, parent, medical practitioner or, where available, by the production of a birth certificate. The Court went on to say that, there may be cases where, on the authority of section 122 of the Evidence Act, the court may infer the existence of any fact including the age of the victim.

It follows therefore that, a birth certificate is but one of various means of proving the victim's age in a sexual related offence. The law does not make it the only means.

In the instant case, in line with what was held in **Isaya Renatus** (supra), the age of PW1 was attested to by (PW3) her grandmother as being eleven years old and, what was more, it was not contested by the appellant. For this reason, we see it as an afterthought for the appellant to raise that complaint at this late hour. Based on the above premise, the second ground of appeal is dismissed for being unmerited.

We shall now quickly move on to the fifth ground of appeal in which the appellant is critical of PW1 for not reporting the sexual abuse incident to her grandmother. Submitting on this ground, Mr. Rwegila maintained that PW1 did not report the incident to her grandmother because the appellant had threatened her. The learned Senior State Attorney referred us to page 12 of the record of appeal regarding the nature of the appellant's threats to PW1. He therefore urged for the dismissal of the appellant's complaints on the grounds that they are unfounded.

We accept Mr. Rwegila's argument without demur. The reason why PW1 did not report the sexual abuse incident to her grandmother is reflected on page 12 of the record of appeal. When she was cross-examined by the appellant on that aspect, PW1 was firm and clear thus:-

> *"I did not tell my grandmother of your giving me money. You gave me money four (4) times. You showed me a knife and threatened to kill me and her."*

It is unfortunate that until now, it has not dawned on the appellant that, as a matter of fact, it was in compliance with his own order that PW1 could not disclose the incident to her grandmother. With due respect therefore, the appellant cannot be heard to turn around today and criticize PW1 for not violating his own order. What PW1 did was what the appellant

had directed her, that is absolute and unquestioning obedience of his order, pure and simple. That said, we find the appellant's complaint to have no basis and we proceed to dismiss it.

Next are the complaints in the sixth and eighth grounds of appeal where the appellant is respectively challenging the decision of the first appellate court claiming that the charged offence was not established by way of medical examination and that his guilt was not proven to the required standard. As for these grounds, Mr. Rwegila countered that, the offence of grave sexual abuse did not require proof by a medical doctor and therefore it was not necessary for a medical examination report to be tendered in evidence. Moreover, the learned Senior State Attorney maintained that, the case against the appellant was proven beyond doubt given the evidence of Pw1 and PW2 who were respectively the victim and eyewitness to the charged offence. Notably, the line of argument taken by Mr. Rwegila is similar to what was held by the learned Judge of the first appellate court.

For our part, we have no reason whatsoever to differ with the findings of the first appellate Judge. Given the nature of the offence of which the appellant was convicted, we agree with Mr. Rwegila that, indeed, it was not necessary for the prosecution to prove it by tendering a medical examination report or the evidence of a medical personnel. And above all, it will not be

correct to say, as the appellant seems to suggest that, a sexual offence cannot be proven in the absence of medical examination evidence to that effect. It is on that account that the court held in **Selemani Makumba v. Republic,** [2006] TLR 379 that, the best evidence of rape is the evidence of the victim. The above holding is in line with section 127(6) of the Evidence Act which provides that:

> *"Notwithstanding the preceding provisions of this section, where in a criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merit, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."*

In the present case, having found that the two eyewitnesses were credible, the two courts below believed their evidence. In our respectful view, based on the above cited provision of the law, the two lower courts were perfectly entitled to believe in the truthfulness of the two witnesses' evidence.

As it will be noted, apart from the evidence PW1, PW2 testified that on the material day, she saw the appellant undressing PW1 and having intercourse with her "against the order of nature". According to PW2, the said incident took place at the unfinished building "kwa bibi Diana". That takes us to the evidence of PW1 herself who told the trial court that, for the 6th time, the appellant took her to an unfinished building where she stripped off her clothes and the appellant inserted his manhood into her "back".

From the above evidence which was not materially controverted by the appellant, it is clear that, on the material day, he went on to abuse PW1 as alleged by the prosecution/respondent side in this case. In these circumstances, we are inclined to agree with the learned Judge of the first appellate court that indeed, the appellant's guilt was demonstrated beyond reasonable doubt.

Moving forward, we also agree with the learned first appellate Judge and the learned Senior State Attorney that, as opposed to the appellant's complaint's in the ninth ground of appeal, his defence version was considered by the trial and the first appellate court (at pages 33 and 56 respectively) of the record of appeal. Needless to say, in view of the damning evidence which was led by the prosecution witnesses in this case,

the appellant's weak defence version would not introduce any doubt in the prosecution case.

We are therefore satisfied on the whole that, the appellant's conviction and sentence by the trial court which was upheld by the first appellate court was sound. In the circumstances, the appeal is found to have no merit and it is hereby dismissed in its entirety.

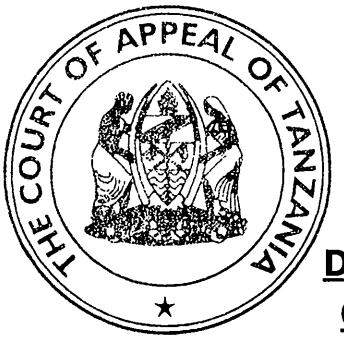
DATED at **MBEYA** this 25th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 27th day of September, 2021 in the presence of the appellant in person and Ms. Annarose Kasambala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
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