IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 403 OF 2020

MICHAEL CHAULA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Utamwa, J.)

Dated 2nd day of June, 2020
in
Criminal Appeal No. 81 of 2019

JUDGMENT OF THE COURT

10th & 22nd February, 2023

LILA, J.A.:

The appellant, Michael Chaula, was tried before the District Court of Kyela and was convicted of the offence of rape contrary to sections 130 (l), (2) (e) and 131 (1) of the Penal Code. Consequently, he was sentenced to serve thirty (30) years imprisonment. His appeal to the High Court was dismissed hence the present appeal.

The charge was that on the 15th day of September 2018 at about 13.00 hrs at Ipinda Village within Kyela District in Mbeya Region, the appellant wilfully and unlawfully did have carnal knowledge of a Standard IV girl who was then aged 12 years. The girl, who shall be

referred to as the victim or PW1 so as to disguise her identity, was schooling at Kafundo Primary School. The appellant denied the charge and the prosecution paraded four (4) witnesses and tendered two documentary exhibits to prove the charge. The appellant fended for himself.

If anything, the facts giving rise to this appeal present a somehow peculiar scenario whereby a person was accused of raping his lover's daughter. There was no dispute at the trial that the appellant was a man friend of the victim's mother hence were known to each other because he frequently visited the victim's mother. According to the victim, the appellant visited their home on 15/9/2018 at 1:01 pm and asked her to accompany him to a place called Matema so as to collect banana and fish. Believing that was the mission, the victim agreed and left with the appellant to Matema. Unfortunately, until 06:00pm, there was no fish. It being already evening time, the appellant seized the opportunity to lure the victim to wait till the following day so that she could go back home and he took her to his residence at 19:00 hrs. Thereafter, the appellant demanded to have sex with the victim but she declined. He then forcefully undressed her clothes and inserted his whole penis into the victim's vagina. The victim's shout for help did not attract the attention of anyone. She was released the next day and she left for home where

she reported the matter to her mother and the latter reported the matter at the police station. A PF3 was issued and the victim was taken to Ipinda Hospital where she was medically examined by Dr. Henry Wambue (PW3), the Medical Officer In- charge. He found the victim's hymen perforated following being penetrated by a blunt object. The victim's mother's statement was recorded on 17/9/2018 in the morning by a policeman J1633 DC Thadeo Christian (PW4) under section 34B (2) (c) of the Evidence Act, (the EA) and section 10 (3) B of the Criminal Procedure Act. Unfortunately, the victim's mother could not survive to testify in court and her statement was tendered in court by PW4 as exhibit B. WP 11469 Sara Christian (PW2) investigated the case in the course of which she went with the victim to Ilulu Matema where she was shown the appellant's house and she arrested him. She stated that, upon inquiry, the appellant admitted knowing the victim and said she was his ex-lover's child.

Defending himself under oath, the appellant admitted the victim visiting his place on 1/9/2018 while he was away as he returned at 6.30 pm. He blatantly denied raping the victim claiming that, at night time, the victim slept with his sister ("dada"). He challenged the prosecution case as to why while the offence was committed on 16/9/2018 it took too long until 23/9/2018 to be reported. As for being penetrated, he

wondered how PW1 (victim) aged only twelve (12) years could withstand the pains of being penetrated. He also attacked the testimony by PW2 who arrested him on 25/9/2018 as being hearsay and that of PW3 for failure to name who penetrated the victim. As for PW4 whom the matter was reported on 17/9/2018, he challenged his testimony for failure to take action until 23/9/2018. In conclusion, he complained that he was falsely implicated in the case.

Nonetheless, the appellant's defence did not find price in the minds of the learned trial magistrate. He framed two issues he found crucial in the case to guide him in its determination. These were;

1. Whether there is proof of age in respect of the victim.
2. Whether PW1 was raped and whether the evidence points at the accused as the person who ravished her.

The learned trial magistrate was satisfied that age of the victim was stated in the witness statement of her late mother (exhibit "B") and as the appellant did not cross-examine on that fact, he was taken to have had no qualm with it. Addressing the second issue, the learned trial magistrate relied on the principle that best evidence in sexual offences comes from the victim and was convinced that the ordeal as explained

by the victim quite sufficiently established that she was penetrated by the appellant a fact which was said to have been strengthened by the appellant's admission that the victim visited his home. The learned trial magistrate could not be moved an inch to agree with the appellant that the victim, on the fateful date, slept with his sister who also cooked food for her. After all, the learned trial magistrate queried why such sister was not summoned by the appellant to prove that contention and PW2's evidence was not challenged about the existence of his sister. In all, he was of a finding that the appellant took the victim from her mother's home, went with her to Matema and deliberately delayed her so that she could spend a night with him and finally seized the opportunity to rape her. He found her evidence to have been corroborated by PW3 amongst other witnesses. In view of this, he convicted the appellant as was charged followed by the statutory thirty years imprisonment.

Five grounds were raised by the appellant in the High Court to challenge the trial court's decision. They comprised; **one**, his conviction was grounded on the PF3 (exhibit A) which was received in contravention of section 240 (3) of the Criminal Procedure Act, (the CPA), **two**; the victim's mother's statement was relied on while she was not cross-examined, **three**; the trial court believed that the victim's mother died without a death certificate being produced to prove so,

four; the appellant's defence evidence was totally ignored by the learned trial magistrate, and **five;** the charge was not proved against the appellant beyond reasonable doubt.

In the determination of the appeal, the learned judge (Hon Utamwa), condensed those five grounds into two grounds: that is:

> *"1. That, the trial court erred in law and fact in convicting and sentencing the appellant, though the prosecution had not proved the charge beyond reasonable doubt.*
>
> *2. That, the trial court erred in law in not considering the appellant's defence in deciding the case."*

Both grounds were answered negatively. The learned judge had it that the victim's evidence was impeccable and she was credible and being the victim, her evidence was the best evidence and capable of grounding a conviction. Although he agreed that there was no proof of death of the victim's mother, he held that the omission was not fatal and did not offend the appellant's fair trial and the deceased mother's statement served the purpose of proving the victim's age that she was twelve (12) years old. The contention that there was unexplained delay in taking steps after the incident was reported was discounted by the learned judge stating that steps were taken timeously as the offence

was committed on 15/9/2018, the next day the victim went home and reported the matter to her mother who reported the matter to the police and her statement (exhibit B) was recorded on 17/9/2018 by PW4 and then the appellant was arrested and charged on 3/10/2018.

In respect of the claim that the appellant's defence was ignored, the learned judge referred to pages 3, 5 and 9 of the record and was convinced that the appellant's evidence was considered. He dismissed the complaint. In the end, the appeal was dismissed in its entirety.

Before us, the appellant who appeared in person has advanced four (4) grounds of appeal aimed at faulting the findings of the learned judge. However, before the hearing could commence in earnest, he abandoned ground four (4) of appeal and remained with only three grounds. Although they could be comprehended with difficulty, the grounds may conveniently be paraphrased thus:-

1. That, there was variance between the charge and evidence in respect of crime scene and time the offence was committed.

2. That, the court below wrongly convicted the appellant when they relied on statement of a dead person to prove age of the victim and which was tendered by a person who could not be cross-examined.

3. The first appellate court did not consider ground 3 to 5 of the appellant's petition of appeal something which occasioned injustice.

In this appeal the appellant was not represented hence he fended for himself. Mr. Baraka Mgaya, learned State Attorney, appeared for the respondent Republic and he resisted the appeal.

When accorded the right to amplify his grounds of appeal, the appellant was of the view that the grounds of appeal presented, in sufficient details, his grievances against the findings of the High Court hence he saw no compelling reasons to elaborate them. He left it for the Court to consider them and determine the appeal.

Mr. Mgaya opted to begin his submission with ground three of appeal. He submitted that the complaint contradicts the true picture of the matter. He pointed out that ground 3 which was about proof of death of victim's mother was discussed at pages 64 and 65 of the record of appeal, ground 4 in which the appellant complained that his defence was not considered, was considered at pages 62 and 63 of the record while ground 5 on the charge not being proved beyond doubt was considered at pages 63 to 66 and all were found unmerited and were dismissed. In actual fact, as correctly submitted by Mr. Mgaya, as opposed to the appellant's complaint, the record of appeal speaks it loud

and clear that the complained grounds of appeal were dutifully considered and determined by the learned judge on first appeal at the pages pointed out and findings made. Since the complaint is not on the merits but rather that it was not considered and determined, we therefore find the complaint baseless and we dismiss it.

The appellant's complaint in ground two (2) is in respect of proof of the victim's age by using a statement of a deceased victim's mother's witness statement (exhibit B) which was tendered in court by PW4. Initially, the learned State Attorney showed adamancy that it was properly admitted in court as evidence under section 34B (2) (d) of the Evidence Act (the EA) and acted on as proof of age as, in it, the deceased stated that the victim was raped when she was 12 year old and that the same was not objected to by the appellant. But, at the height of his submission, the Court put it to him whether the conditions under that section were conjunctively complied with. He recalled that in view of the Court's finding in **Vincent Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 (unreported) there was no full compliance of the conditions set out under section 34B (2) (a) to (f) of the EA and to be specific, subsection (e) which required the trial court to ascertain if there was or there was no notice of objection to the reception of the deceased witness statement raised by the appellant within ten days from the date

he was served with the copy of the statement which was served to the prosecution which proposed to tender that statement before it was received as evidence. By the record being silent, Mr. Mgaya admitted that the statement was wrongly admitted as evidence. We agree with him. The proposition by the learned State Attorney and the exposition of the law in the cited case present the true and correct exposition of the law. The Court has consistently insisted that the statement of a witness can be admitted in court as evidence provided the conditions stipulated under section 34B (2) of the Evidence Act are cumulatively satisfied. [See **Twaha Ali & Five Others vs Republic**, Criminal Appeal No. 78 of 2004 (unreported)]. Similarly, in the case of **Juma Ismail & Another v. Republic,** Criminal Appeal No. 501 of 2015 (unreported); the Court reiterated that:

> *"In order for the court to admit a statement of a witness who cannot appear and testify after a reasonable step have been taken to secure his attendance, all conditions contained in S. 34 B of TEA must be cumulatively complied with."*

The record clearly shows that the appellant was served with the copy of the victim's deceased mother's statement in accordance with section 34B (2) (d) of the EA. But, in terms of section 34B (2) (e) of the EA, the trial court was enjoined to ascertain from the appellant and the

prosecution if there was any notice of objection respectively, lodged by the appellant and served to the prosecution before admission of exhibit B. That was omitted. Being one the conditions to be complied with, its non-compliance constituted a serious flaw. The record has to reflect that compliance. Uncertainty, in the circumstances, surrounded the admissibility of exhibit B hence it was unsafe to act on it to ground a conviction. It should, as we hereby do, be expunged from the record.

It is notable that the expungement of exhibit B did not displace the learned State Attorney's position that even in its absence, the victim's age still stood proved. He was emphatic that the victim (PW1) as a witness was forthcoming at page 9 of the record that she was twelve (12) years old. While referring to the Court's decision in **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported), he submitted that proof of age may be given by the victim herself. Accordingly, he discounted the complaint as being unmerited liable to be dismissed. With respect, we agree with Mr. Mgaya that the victim's age still stood proved. And we proceed to hold that while it was true that exhibit B could not be able to prove the victim's age, yet her age still stood proved by herself when she testified on 4/12/2018 as reflected on page 9 of the record. This complaint technically fails and we dismiss it.

Besides the above complaints which were mostly points of law, the appellant's complaint in ground one (1) touches on a factual issue. His contention is that the charge was not proved simply because there was variance between the charge and evidence in respect of the place and time of the occurrence of the rape incident. To this, the learned State Attorney was not hesitant to concede to the anomaly in respect of time. That whereas the charge indicated that rape was committed at 13:00hrs, evidence by the victim (PW1) showed it was committed at 19:00hrs. However, he was quick to argue that the variance in time did not prejudice the appellant and, in law, cannot render the charge not proved. Although he was unable to cite any law or authority, he is right. The provisions of section 234 (3) of the CPA are clear on that stance and the Court lucidly expounded that stance in the recent decision of **Osward Mokiwa @ Sudi vs Republic**, Criminal Appeal No. 190 of 2014 (unreported) that human recollection is not infallible and is affected by time lapse. The truth is that there is discrepancy but the fact remains that the victim explained what transpired from the time the appellant arrived at their residence at 01:01pm (13:01hrs) and took her to Matema to 19:00pm when she was raped. So, what seems to be a discrepancy is simply a slip of the pen of those who drew the charge which could not prejudice the appellant as it was a continuous story by

the victim on how she was raped on that particular date. And, the victim, after telling a series of incidents, was clear and specific in her testimony that she was raped at 19:00pm. Therefore, once the testimony of the victim is read as a whole the discrepancy becomes a misnomer which will not be able to displace the strong evidence by the victim on the incidence. The Court has occasionally considered and given guidance on how to resolve complaints related to time and date of the incident a subject of a charge and insisted on the need to read the evidence as whole. In **Pascal Aplonal vs. Republic**, Criminal Appeal No. 403 of 2016 (unreported), the charge did not indicate the time or date of the incident and, instead, stated a period of time rape was committed to be between June and October in 2013 and the appellant on an appeal to the Court, complained of the deficiency. The Court observed that:

> *"The month of June 2013 as recounted by the victim squarely falls between June and October 2013 being the period during which the appellant raped the victim as stated in the charge sheet. In this regard, since the prosecution paraded supportive evidence to that effect, the absence of the specific date as to the occurrence of the rape did not materially impeach the strong*

victim's account as to when she was raped by the appellant..."

In the present case, the discrepancy is of just a few hours which we find to be minor and did not prejudice the appellant who heard the victim testify without assailing her testimony on that point by way of cross-examination.

Another complaint by the appellant in that ground is about the crime scene. While the charge refers it to be at Ipinda Village, evidence on record by PW1 and PW2 tells that it was at Matema Village. We think, the complaint misses legs to stand on. PW3 made clear that the victim was taken to Ipinda Hospital for medical examination after the ordeal. It therefore seems clear to us that Matema Village and Ipinda are, geographically, located in the same area. The discrepancy is trivial and therefore inconsequential. We dismiss the complaint.

Finally, on our own objective examination of the evidence on record, we are of the firm view that the appellant's conviction was well founded. The victim gave a detailed account of the ordeal and reported the matter to her mother. The victim was familiar to the appellant with whom her mother related. The victim was believed by both courts below and, given the consistence and coherence of her testimony, we have no

reason to raise an eyebrow on her credibility. Further to that, PW3's testimony established the victim being penetrated by a blunt object. To advance the prosecution case the appellant, in his sworn defence, admitted the victim sleeping in the same house with him on the fateful day.

We, ultimately, find no merit in this appeal and we dismiss it.

DATED at **MBEYA** this 22nd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2023 in the presence of the Appellant in person and Ms. Mwajabu Tengeneza, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL