IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 12 OF 2017

(Original Criminal Case No. 59 of 2016 of the District Court of Manyoni at Manyoni)

JEREMIA YOHANA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20/4 & 15/6/2017

KWARIKO, J.

Before the District Court of Manyoni appellant herein stood charged with the offence of Rape contrary to section 130 (1) & (2) (e) and 131 (1) of the Penal Code Cap. 16 Vol. 1 of the Laws R.E. 2009 (sic). The appellant was accused to have unlawful carnal knowledge of HILDA D/O JONAS aged three (3) years on 27/2/2016 at about 14.00 hours at Lusilile Village within Manyoni District in Singida Region. Appellant denied the charge hence the prosecution brought a total of four witnesses to prove the same.

The evidence by the prosecution reveal the following. On the material date and time while PW1 JONAS BENEDICT and PW2 OLENI

JAPHET father and mother respectively to the complainant PW3 were at home when PW3 returned sweating heavily. PW1 decided to wash her but found blood in her thighs and had no underpant, whereas blood came out from the vagina and PW3 cried saying she was being hurt. Upon inquiry as to who had hurt her she led the way and upon reaching a neighbouring house she stopped and cried more. They took her to dispensary but were asked to go to the District Hospital through Police Station where PF3 was issued. It was PW2 and another woman who sent PW3 to hospital.

At the hospital PW3 was examined by Dr. WIRON ELLY SAWAKI PW4 where he said he found clotted blood in the vagina and bruises outside the vagina. PW4 penetrated his finger in the vagina which entered for about 2cm where the child felt pains. PW4 concluded that the girl had been raped. The PF3 was filled tendered and admitted in court as exhibit P1.

The evidence by the prosecution reveals according to PW2 that upon discovery of blood in PW3's vagina by PW1 and upon inquiry the girl did not say anything but PW1 & PW2 also said that the girl mentioned the appellant at the hospital as the one who raped her.

On her part the girl PW3 testified after *voire dire* examination where it was found that she had sufficient intelligence to give evidence but did not know meaning of an oath. She was thus not sworn. PW3 said in evidence that she did not know all people in the court room except the appellant herein whom she said lived near their home. That, she was afraid of the appellant as he injured her vagina. That, she felt pain and

blood came from her vagina. Upon cross-examination by the appellant PW3 said he injured her with his '*dudu*' which was in his trouser.

In his defence appellant denied the allegation and said at the material time he was at neighbour's wedding ceremony and was given a goat to take to one Steven but since he had no Kraal they took it to Kanyangwa's and return to inform Steven of the same. That, he went to Henry's and stayed up to 18.00 hours before he went to Mama Killy's and returned home at 20:00 hours. Upon cross-examination appellant said PW2 had once assaulted his mother.

Appellant's alibi was supported by MANENO WILLIAM AYA, DW2 and DAUDI CHABAISI, DW3 who said they were together in the ceremony and did the errands together as accounted by the appellant. These two wondered as to how the appellant could have committed the offence as they were together as stated.

At the end of the trial it was found that PW3 was raped and identified appellant in court as the rapist. Appellant was convicted and sentenced to life imprisonment.

Upon being aggrieved by decision of the trial court appellant filed this appeal predicated it into seven grounds of appeal which raise the following five important grounds of complaints:

1. *That, this case was fabricated against appellant due to family conflicts.*

2. *That, no independent witnesses testified against appellant but family members only.*

3. *That, there was delay in appellant's arrest from 27/2/2016 the date of incident to 2/3/2016 when appellant was arrested while he was all long in the village.*

4. *That, PW3's evidence was weak, uncorroborated and only couched by her parents.*

5. *That, evidence of appellant's witnesses DW2 & DW3 was not considered.*

During hearing of the appeal at first the appellant only adopted his grounds of appeal and left to the State Attorney to respond.

On the other hand Mr. Sarara learned State Attorney for the respondent Republic opposed this appeal and submitted as follows;

As regards to the first ground of appeal he submitted that appellant did not give reasons as to why he said that the case against him was a fabrication due to family conflict.

That the evidence on record is straight by PW1, PW2, PW3 and PW4 which proved the case hence there could be no possibility that the case was a frame-up.

In the second ground of appeal Mr. Sarara argued that section 127 (1) of the Evidence Act [CAP 6 R.E. 2002] does not prohibit family members from giving evidence on matters they have knowledge of. That, however in this case there is PW4 who is not a family member and the people from the village did not witness the incident.

Thirdly, it was Mr. Sarara's contention that truly the appellant was arrested five days later after the incident but it was due to the fact that PW1 & PW2 were taking care of the complainant and the appellant was mentioned while in hospital. And the appellant did not deny that he was in the village at the material time but only that he was at a Mission area.

In the fourth ground of appeal it was argued for the respondent that the trial court was satisfied that PW3 knew the duty of telling the truth but did not understand the oath. That, the court noted that PW3 was afraid of the appellant hence knew that he was her assailant. Mr. Sarara referred the court to section 127 (7) of the Evidence Act (supra) where only the victim's evidence is sufficient to convict in the absence of any corroboration. However, he said that in this case other witnesses corroborated PW3's evidence.

As regards the fifth ground of appeal Mr. Sarara learned State Attorney was of the view that as the appellant relied to the defence of alibi but did not comply with the law under section 194 (4) of the Criminal Procedure Act [CAP 20 R.E. 2002] as he did not give notice of the same

before the prosecution closed its case and sub-section (6) thereof could not rescure him as the trial court had considered the alibi.

In conclusion Mr. Sarara contended that PW1, PW2 & PW3 showed that rape was committed by the appellant and PW4 supported the same. That, PW3's demenour towards appellant as noted by the trial court was inconsistent with appellant's innocence. Also, the appellant's defence was very short as he only said he was not at the scene and he scantly cross-examined PW3.

In his rejoinder submission appellant argued that he was at a party at the material time and no any neighbour or village leader was involved during his arrest and no any police came to testify. That, he was not medically examined.

Following submissions for and against the appeal this court's germane issue to decide is whether the appeal has merit and to do that the grounds of appeal will be chronologically decided as follows;

In the first ground of appeal this court agrees with the respondent that appellant did not prove that he had quarrels with PW3's family. Appellant did not explain the said quarrel when he gave his evidence in chief but only when he was cross-examined that is when he said PW2 had assaulted his mother. Also, appellant did not cross-examine PW1 or PW2 on the alleged quarrel and frame-up of the case against him. Thus, though the appellant did not prove that he had any quarrel with PW3's family thus framed-up the case against him, the issue whether he committed this

offence will be decided in the coming grounds of appeal. This first ground of appeal fails.

In the second ground of appeal this court first is in agreement with the learned State Attorney that the law under section 127 (1) of the Evidence Act does not forbid family members from testifying on a certain issue. However, in the case at hand there ought to be independent witnesses such as neighobours, local area leaders and the police to explain how and when the incident was reported after its occurrence.

There ought to be witness(s) to tell the court to whom PW3 mentioned the appellant as her assailant while in hospital. This is so as PW1 & PW2 only said the appellant was mentioned by PW3 while at hospital. Police also ought to testify on when report was sent to them of this incident and how and when appellant was arrested and what he said to them after arrest. Therefore, police investigator ought to testify in this respect and especially as regards appellant's involvement in the crime, if any..

Mr. Sarara was of the contention that PW4 was not family member but this witness did not testify in relation to appellant's involvement in the crime but in relation to his examination of PW3 as regards sexual assault. In this case not even the woman who was said to have accompanied PW2 to go to hospital was called to testify. The second ground of appeal thus has merit.

This court is in further agreement with the appellant in relation to the third ground of appeal that delay in his arrest adversely impacted on the prosecution case. Mr. Sarara conceded that appellant was arrested five days later after the alleged incident but said this was due to the fact that PW1 & PW2 were caring PW3 at the hospital. However, PW1 had said it was his wife PW2 and another woman who took the complainant to hospital and definitely as PW3 was a girl in the normal course of things it is the mother who was engaged with her and not the father. That way PW1 would have taken care of the case promptly.

This court finds that had the police came to testify they would have said why there was delay to arrest the appellant and whether he was not in the village during the period after the incident. Therefore, this delay to arrest the appellant brings doubt as to whether PW3 mentioned him as her assailant (see also **JUMA SHABAN @ JUMA VR**, Criminal Appeal No. 168 of 2004, Court of Appeal of Tanzania at Tabora (unreported)). This ground of appeal succeeds.

The appellant's complaint in relation to the fourth ground of appeal is that PW3's evidence was weak, uncorroborated and only couched by her parents. Mr. Sarara learned State Attorney forcefully submitted that the trial court believed PW3's evidence and was impressed by her demenour in court when she saw the appellant.

On its part this court will start with the way the trial court conducted the *voire dire* test which was still required at the material time before it was removed by Act No. 4 of 2016. By that amendment now a witness of

tender age need to ensure the court that they will tell the truth and not lies in their testimony. The amendment was in July, 2016 through the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016.

Now, in March, 2016 when PW3 testified since she was reported to be four (4) years old the court ought to conduct sufficient *voire dire* test as required by then section 127 (2) of the Evidence Act (supra) and record the same. In this case the record reads;

"PW3: -Hilda Jonas, 4 yrs, Muha, Christian, resident of Lusilile.

VOIRE DIRE TEST

1. *That I am Hilda Jonas, I am Christian we use to go to the church.*
2. *I am going to school every day, we learn how to count and read a e i o u.*

Court: *After conducting a voire dire test I am satisfied that the witness Hilda Jonas a child of tender age (4yrs) has got enough intelligency (sic) to testify before this court though does not know the meaning of an oath according to her age but is competent to testify under section 127 (1) of the TEA, though without oath."*

Then PW3 gave her evidence. This court is settled in mind that that is what the law envisaged to be *voire dire* test. The law under section 127 (2) of the Evidence Act provided thus;

> *Where in any criminal cause or matter a child of tender age called as a witness does not, in the*

opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation, if in the opinion of the court, which opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.

If that is what the law says this court finds that the test was so shallow for anyone to deduce that PW3 had sufficient intelligence to testify. Firstly, the trial court did not show what were the questions put forward that received two recorded answers from PW3. And even if the questions were shown tallying with the answers the same could not be sufficient to prove that PW3 had sufficient intelligence given her age at the material time of three (3) years mentioned in the charge and four (4) years indicated when she testified. Therefore, the *voire dire* examination was not complete and hence PW3's evidence is to be retained in the record only to be scrutinized in the same way as the rest. (see also **KIMBUTE OTINIEL VR**, Criminal Appeal No. 300 of 2011 Full Bench of the Court of Appeal of Tanzania at Dar es Salaam (unreported)).

Hence, when PW3's evidence is looked together with the rest (i.e PW1, PW2 and PW4) this court finds that PW3 was sexually assaulted. However, the question that follows is who assaulted PW3 sexually? On this issue the only evidence is by PW3.

The evidence shows that PW3 mentioned the appellant as her assailant while at hospital but PW2 said soon after they discovered the assault and upon inquiry PW3 did not say anything. If that is the case then how later PW3 was able to mention the appellant while she could not do so immediately after the incident. There is no evidence as to when PW3 mentioned the appellant and to whom.

Also, PW3 did not say in her evidence at what place the appellant assaulted her and where she was going or doing when she was waylaid by appellant.

Further, PW3 said appellant injured her with his 'dudu' which was in his trouser but that was not explained further to get clear picture what was meant by 'dudu' that was in appellant's trouser.

And since only the name JEREMIA was being mentioned there ought to be proved that in the relevant locality there was only appellant who was known by that name as PW3 was of very tender age to be sufficiently versed with matters or people surrounding her. That is why this court finds that identification parade was necessary for PW3 to pick out a person who had assaulted her. And the demenour by PW3 as reported by the trial court could be expected to a child of three or four years. This court has been wondering if PW3 was not accompanied by her parents when she testified to say that she only knew the appellant in the entire court room. Also, the alleged identification of the appellant by PW3 in court had no any probative value as the identification ought to be done at police station given very tender age of PW3.

At this juncture this court is settled that PW3's evidence was doubtful hence it ought to be corroborated by independent evidence as to the identity of her assailant. There is no such evidence. This ground of appeal succeeds.

The last ground of appeal relates to appellant's defence evidence by DW2 and DW3. Truly, the trial court did not sufficiently consider defence evidence. It only said appellant tried to escape liability by saying that he was not at the scene but at a ceremony.

This court agrees with Mr. Sarara that appellant did not comply with the law under section 194 (4) of the Criminal Procedure Act (supra) when he relied on a defence of alibi. However, despite of the omission but the trial court should have exercised its judicial discretion and considered the defence of alibi as required under section 194 (6) of the Criminal Procedure Act (supra). This was also said in the case of **MWITA s/o MHERE & IBRAHIM s/o MHERE VR [2005] T.L.R 107**.

Now, had the trial court considered appellant's defence of alibi in connection with the prosecution case it would have found that the same raised doubt onto the prosecution case as to his involvement in the crime.

For the foregoing, this court is settled in mind that the prosecution case was not proved beyond reasonable doubt against the appellant hence this appeal has merit and it is hereby allowed, conviction quashed and sentence set aside.

It is thus ordered that appellant be set at liberty unless he is held further for other Lawful cause.

Order accordingly.

M.A. KWARIKO

JUDGE

15/6/2017

Judgment delivered in court today in the presence of the Appellants and Ms. Nsana learned State Attorney for the Respondent Republic. Mr. Nyembe Court Clerk present.

M.A. KWARIKO

JUDGE

15/6/2017

Court: Right of Appeal Explained.

M.A. KWARIKO

JUDGE

15/6/2017