IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 237 OF 2016

(Originating from Criminal Case No. 83 of 2014, In the District Court of Kilombero, at Ifakara Before Hon. N.R. BIGIRWA, RM)

AYOUB HAJI @NYUNGI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

26th August, & 14th Sept, 2021

CHABA, J.

On 19th day of March, 2014, a girl aged 8-year-old namely RKM or the victim (her real name is withheld in terms of section 33 (1) of the Law of Child Act, No. 21 of 2009, now [Cap. 13 R.E. 2019], is alleged to have been succoured from attempted rape. Upon investigation, the appellant, one Ayoub Haji @ Nyungu @ Mbunge was spotted to be the man behind the evil act. Such facts led the prosecution to prepare a charge under section 132 (1) of the Penal Code [Cap. 16 R.E. 2002] now (Revised Edition, 2019) and initiated criminal trial at the District Court of Kilombero, at Ifakara (the District Court). In a bid to prove the charge, a total number of four (4) prosecution witnesses were paraded and testified. On the other hand, the appellant fended for himself and he had no witness to call.

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At the end of the trial, on the 26th February, 2015, the appellant was found guilty of the offence he stood charged, convicted and sentenced to suffer thirty (30) years imprisonment.

It appears the appellant was disgruntled with the trial court decision, but alas he found himself in a web of delay for reasons better known by himself. He therefore, lodged an application before this Court seeking for leave to appeal out of time, which was accordingly granted by this Court on the 10th August, 2016. Thus, he filed his Notice of Appeal although it was supposed to be a Notice of Intention to Appeal to initiate his appeal. However, this ailment is curable taking into account that the overriding objectives principle is now in place. Similarly, he filed his petition of appeal containing five (5) grounds of appeal, but paraphrased as hereunder shown:

1. That, the learned trial magistrate grossly erred in law and fact for failure to consider that PW3 and PW2 were witnesses of tender age where their testimonies had to be received in line with the principle of *"voire dire test"* before entering conviction against the appellant.

2. That, the learned trial magistrate erred in law and fact to convict the appellant without considering the appellant's defence, hence judgment of the court failed to meet the standards set by law.

3. That, the learned trial magistrate grossly erred in law and fact when composed a judgment which lacked factual and legal points for determination and finally convicted him without complying with the mandatory procedures.

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4. That, the charge laid against the appellant was not proved beyond reasonable doubt and no corroboration testimony was advanced from an independent witness in particular persons who were watching football at the ground pitch called Taifa something which vitiated the prosecution testimonies.

On 20th July, 2017, the appellant prayed to file additional grounds of appeal comprising of eight (8) grounds. But for reasons that will be shortly apparent, I find it not necessary to re-produce them in here. Relying on all these grounds of appeal, the appellant prayed for this court to allow his appeal, quash conviction and set aside the sentence.

During hearing, the appellant fended for himself, while the respondent was represented by Ms. Florida Wenceslaus, learned State Attorney.

When the appellant was invited to argue his appeal, he prayed to adopt his thirteen (13) grounds of appeal and asked this court to find him not guilty.

On her part, Ms. Florida, learned State Attorney was quick to oppose the appeal. She grouped the grounds of appeal by juxtaposing the first five grounds of appeal as indicated in the petition of appeal with the said eight additional grounds of appeal. Arguing in respect of the 1st ground which concerns with non-adherence with the principle of *voire dire test*. She submitted that at pages 4, 5 and 6 of the trial court proceedings illustrates clearly that the trial court complied with the law, hence this ground lacks merit.

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As to the 2nd ground filed as an additional ground of appeal, which seeks to challenge the proof of the age of the victim, the learned State Attorney accentuated that the age was proved by the birth certificate which was tendered as an exhibit at trial. She added that even if the said birth certificate would have not been tendered, yet there is oral evidence from the victim and her mother proving her age.

Regarding to the 3rd ground herein featured as an additional ground, the learned State Attorney had the view that the same has no merit. She stated that non-summoning of the victim's head teacher or any teacher from the school in which the victim was schooling, such an act did not in any way deteriorate the prosecution's case because the appellant/accused was charged with the offence of attempted rape and not the offence of rape. She added that, the complaint would have been meaningful and having valid ground if the charge levelled against the appellant/accused could have been termed as impregnating a school girl (the victim). This argument was also maintained against the complaint that a doctor was not called to establish the charge.

On the 4th, 5th and 7th grounds of appeal featured herein as additional grounds of appeal, Ms. Florida argued that the law does not require a specific number of witnesses to prove the case. Thus, the complaint or allegation levelled against the prosecution side for failure to summon material witnesses, are devoid of merits because the witnesses whom were not summoned had nothing useful to build the prosecution case.

Further, in respect of the 6th ground contained in the additional grounds of appeal, the appellant complained that the prosecution failed

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to tender the victim's underwear to prove the allegation. On this point, Ms. Florida underlined that failure to tender the said underwear, did not affect the prosecution case and had nothing to do with proving the offence of attempted rape.

As regards to 8th ground featured in additional grounds of appeal, the learned State Attorney contended that the same has no merit. She argued that the appellant spent only four (4) months in police custody and later on was brought before the trial court facing the offence he stood charged. In her view, such a delay did not affect the prosecution case taking into account that the offence was bailable.

With regards to the complaint that the trial magistrate convicted the appellant without considering his defence, the learned State Attorney averred that the trial court did actually consider the evidence adduced by the appellant in his defence at trial as shown at page 2 of the typed judgment. She added that at trial, the appellant neither raised any doubt nor cross-examined the prosecution witnesses.

As to the 1st ground of appeal contained in the additional grounds of appeal, the learned state attorney, submitted while relying under section 127 (7) of Tanzania Evidence Act [Cap. 6 R. E. 2019] that Tanzania Evidence Act [Cap. 6 R. E. 2019] (the Evidence Act) the victim in sexual offences is sufficient to ground conviction of the culprit.

On failure to comply with the provisions of section 210 (3) of the Criminal Procedure Act [Cap. 20 R.E 2019] (the CPA), the learned State Attorney had the view that, the same is not fatal as did not prejudice the appellant, and thus curable under section 388 of the CPA. Further, the

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overriding objectives principle may also be positively applied to cure such omissions.

When the learned State Attorney was probed by this court to comment on the failure by the trial court to make reference on the provisions of the law in which the accused was convicted, she highlighted that since the appellant knew the offence and the law he stood charged, then the trial court decision cannot be faulted. She cited the case of **Mabula Makoye & Another v. Republic**, Criminal Appeal No. 227 of 2017, CAT – Shinyanga (Unreported), in which the said omission was said to be curable in terms of section 3A of the Written Laws (Miscellaneous Amendment Act) Act No. 3 of 2018.

I have impassively considered the submissions of both sides and accorded weight they deserve. In disposing this appeal, I find it apposite to start with the first ground featured in additional ground of appeal which relates to unprocedural conduct of *voire dire test*. By definition, *voire dire* test is the procedure to ascertain whether a child of tender age is competent to testify. (See: **Mohamed Sainyeye v. Republic**, Criminal Appeal No. 57 of 2010: CAT – Arusha (Unreported). Until 2016 this procedure was used to test whether the child of tender age is competent to testify on oath or affirmation or not on oath or affirmation. However, in the year 2016 vide **the Written laws (Miscellaneous Amendments) Act, 2016 (Act No. 4) of 2016**, this procedure was laid to rest. As a result, section 127 (2) of the **Tanzania Evidence Act [Cap. 6 R.E. 2019]** was introduced a new provision following amendment of the law. What is required now is that, where the court is satisfied that the child of tender age does not understand the nature of

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an oath, her or his evidence will only be received not on oath after she or he promises to speak only the truth as it was expounded in the case of **Godfrey Wilson v. Republic**, Criminal Appeal No.168 of 2018; CAT Bukoba – Registry; citing with approval the case of **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No. 550 of 2015 (All unreported).

Before the 2016 amendments, section 127 (2) of TEA, required the principle of *voire dire* test to be complied to the latter. As to how the said procedure had to be conducted, the case of **Mohamed Sainyeye** (supra) is relevant. At page 9 – 10 the judgment, the Court of Appeal of Tanzania narrated the relevant procedures to be adhered to as hereunder shown:

PROCEDURE TO FIND OUT WHETHER A CHILD OF TENDER AGE IS COMPETENT TO TESTIFY

A. <u>ON OATH</u>

1. The Magistrate or Judge questions the child to ascertain.

(a) The age of the child.
(b) The religious belief of the child.
(c) Whether the child understands the nature of oath and its obligations, based upon his religious beliefs.

2. Magistrate makes a definite finding on these points on the case record, including an indication of the question asked and answers received.
3. If the court is satisfied from the investigation that the child understands the nature and obligations of an oath, the child may then be sworn or affirmed and allowed to give evidence on oath.
4. If the court is not satisfied that the child of tender age understands the nature and obligations of an oath, he will not allow the child to be sworn or affirmed and will note this on the case record:

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B. <u>UNSWORN</u>

1. If the court finds that the child does not understand the nature of an oath, it must before allowing the child to give evidence determine through questioning the child **two things**:

(a) That the child is possessed of sufficient intelligence to justify the reception of the evidence, **AND**

(b) That the child understands the duty of speaking the truth. Again, the findings of each point must be recorded on the record.

C. IN CASE THE CHILD IS INCAPABLE TO MEET THE ABOVE TWO POINTS (A & B)

Court should indicate on the record and the child should not give evidence.

Having scanned the records of appeal, I observed that PW2 and PW3 testified in the year 2014, and both of them, were children of tender age, hence the above quoted procedure was relevant at the material time. Upon keenly considering the records of appeal, I came to the conclusion that the trial court flouted the mandatory procedure. For ease of reference, I will quote what the trial magistrate recorded when it received such testimonies, to simplify my destination;

PW2: RKM, 8 years;
COURT: PW2 being a child of tender age below 14 years let a voire dire test be conducted.

<u>VOIRE DIRE TEST:</u>
QN. – What is your name ?
Ans. My name is RKM.
Qn. Where do you reside ?
Ans. I reside at Ifakara.
Qn. Are you studying ?
Ans. Yes.

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Qn: At which School ?

Ans: Ifakara Primary School.

QN: Do you go to the mosque for worshiping ?

Ans: No.

Qn. Is it good to tell lies ?

Ans. No, it is not.

Qn. Is it good to tell the truth?

Ans. – Yes, it is.

Court: I am satisfied that PW2 possess sufficient intelligence and she understands the duty of speaking the truth as per s. 127 (2) Cap. 6 R.E. 2002.

Order – PW.2 adduced her evidence under oath or affirmation.

The similar procedure was adopted to PW3 a girl aged seven (7) years. As gleaned from the trial court record and upon considered the position of the law as alluded to earlier on, the question which arises here is whether or not the *voire dire test* was properly conducted. The answer is no. Just like what happened in **Mohamed Sainyeye's** case (supra), the trial magistrate did not take trouble to inquire on whether the child understood the nature of an oath. The same procedure was adopted by the trial court when it conducted *voire dire* test to PW3. The questions so devised did not tend to inquire as to whether the children (PW2 & PW3) understood the nature of an oath.

The record further reveals that the decision reached by the trial magistrate to conclude that PW2 and PW3 did possess sufficient intelligence and understood the duty of speaking the truth, was not backed up by the whole exercise of conducting *voire dire* test. Suffice to state that the magistrate did not comply with the principle of law.

Subject to the court's findings on other grounds and the holistic determination of the appeal, the principles expounded in **Kimbute**

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Otiniel vs. Republic, Criminal Appeal No. 300 of 2011, CAT – Dar es Salaam (Unreported), would be followed to deal with the above error. Considering the nature of the flaw on this ground the same will not render the evidence be discounted. But other rules of evidence shall apply to it accordingly.

On the 2nd ground, herein featured as the 2nd ground of appeal in the appellant's petition, the appellant is faulting the trial court that it failed to consider the defence case as a whole, thus the decision fall short of the required statutory standards. On this facet, Ms. Florida simply submitted that the trial court did consider the defence evidence. She referred this court to page 2 of the trial court judgment to fortify her standpoint.

In answering the above complaint, it is settled law that in writing a judgment, a court has to consider the evidence in support of one party in a case and not completely to ignore the evidence for the other party, however worthless it may be. Failure to consider the defence evidence, it constitutes a fatal error. (See: **Baruani Hassan v. Republic**, Criminal Appeal No. 580 of 2017: CAT – Mwanza (Unreported). Further, non-consideration of the defence evidence before arriving at the decision amounts to a breach of one of the rules of natural justice, which is the right to be heard. (See: **Fikiri Katunge vs. Republic**, Criminal Appeal No. 552 of 2016: CAT – Tabora (Unreported).

At page 2 of the typed judgment, the trial magistrate having summarized the evidence of both parties, proceeded to raise at least two issues for determination. On the first issue; the learned trial magistrate had the following to say:

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"As to first issue the fact that there is evidence showing that accused did these acts of undressing PW.2 one RKM, that accused unzipped his trouser, took out his penis and while accused was about to insert his penis into the victim's vagina the voice of PW.4 interrupted. These accused's acts altogether to this court are the evil intention of the accused to rape which fall short to attempt rape.

From the above quoted passage of the trial court judgment, it is clear that there is nowhere the learned trial magistrate, considered the evidence adduced by the appellant (defence evidence). In my opinion, the learned trial magistrate was supposed to deal with the evidence of both sides and come up with a conclusion why he chose to believe the evidence of the victim and discarded the defence evidence. Similarly, the trial magistrate did the same when dealt with the second issue that he raised. In the final analysis, I am satisfied that on this aspect, the trial magistrate did not consider the defence evidence as asserted by the appellant. Having answered in affirmative, this ground of appeal would have been sufficient to dispose this appeal. However, I find it beneficial to deal with the question of the validity of the judgment.

It was Ms. Florida's contention that the judgment of a trial court met the statutory standards, whereas the appellant saw it in the opposite. On this point, it is important to revert to the provision of the law under section 312 of the CPA which articulates the ingredients of a valid judgment. The provision reads:

"312 (1) - Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the

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decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."

From the wording of the above provisions of the law, it is pertinent to have in mind that in order to have a valid judgment, the court must properly evaluate the evidence on record. As to what amounts to evaluation of evidence, my brother, Nangela, J., in **Edmund Msangi v. The Guardian Limited**, Labour Revision No. 838 of 2019: High Court of Tanzania (Labour Division) at Dar es Salaam (Unreported), defined the term to mean:

"...a process by which the Court either confirms, with its inner conviction, the existence or non-existence of facts suggested by the evidence laid before it or declares that, under legal rules applicable to evidence, an alleged fact is to be taken as proven. That process entails consideration of various issues such as reliability of the evidence tendered, weight, demeanour of witness and their credibility as well as the degree by which the evidence is corroborated or undetermined by other evidence."

Back to the instant appeal, having scrutinized the record at trial, I am convinced that the trial court magistrate failed to appreciate and gauge the evidence adduced before him. His two paragraphs showing that he determined the raised issues and finally arrived to his conclusion, shows that he completely went astray and failed to meet the standards enshrined under section 312 of the CPA. I say so because, looking at the judgment of a trial court, there is nowhere it has been shown within the said two paragraphs, the reasons advanced by the trial court magistrate explaining why he chose to believe the evidence of the victim over and above that of the appellant. See: the cases of **Barnaba Changalo v. DPP**; Criminal Appeal No. 165 of 2018: CAT – Mbeya (unreported),

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Hamisi Rajabu Dibagula v. Republic, Criminal Appeal No. 53 of 2001: CAT – Dar es Salaam (unreported), the Court cited its earliest decision of **Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Said Msabaha,** Civil Appeal No. 24 of 1999 (unreported).

Consequently, the appellant's conviction is quashed and the sentence is set aside. Considering the circumstance of the case which prompted to this decision and the nature of the evidence available, this court finds no other remedy that will do justice to the parties than this which I now order; the appellant, one **AYOUB HAJI @NYUNGI** should immediately be released from custody unless held therein lawfully for any other purpose.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of September, 2021.

M. J. CHABA
JUDGE
14/09/2021

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