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

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 01 OF 2022

(Arising from the decision in Criminal Case No. 245 of 2020 of the District Court of Temeke, at Temeke by Hon. Y.J KINGWALA -SRM) dated 09th day of September 2021, in Criminal Case No. 245 of 2020)

RAJABU s/o SALUMU @ ROJA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th February, 2022 & 28th February, 2022

ISMAIL, J;

The instant appeal arises from the decision of the District Court of Temeke at Temeke, before which the appellant was arraigned and convicted of the offence of rape, contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019.

The allegation, as gathered from the charge sheet, is that on diverse unknown dates in April, 2020, at Tandika Nyambwela area, within Temeke District in Dar es Salaam Region, the appellant had an unlawful carnal

knowledge of SR (in pseudonym), a IV class student and a 9-year old girl. Facts further reveal, that, on the material day, SR, who featured in trial proceedings as PW2, was sat at her father's shop, having a meal. The appellant went to the shop and grabbed her bowel of rice and ran with it. PW2 ran after him but she stumbled and fell down. The appellant raised her up as he teased PW2, telling her that he loves Chagga people. As he said that, he dragged PW2 to his room, but she managed to escape that day. The appellant did not relent. On another day, he found PW2 at her father's shop, from which he called, seduced and led her to the toilet where he allegedly undressed himself and PW2, before he inserted his penis into PW2's vagina. This persisted for four more times on different dates. In each of the encounters, the appellant allegedly warned the victim (PW2) against disclosing the incident to anyone, as doing that would cause the appellant to continue raping her.

After some days, the victim told her mother that her anus was itching. She asked her mother to check her up which she did. As she did that, she realized that PW2's vaginal wall had enlarged like that of an adult, suggesting that she had been penetrated. On enquiry, PW2, told it all, and named the appellant as the culprit who inflicted the injury and pain

that she carried for all this long. The victim's mother, PW1, informed the PW5 of what happened and they both resolved to report the matter to the Ward Executive Office (WEO). The latter ordered the appellant's arrest and subsequent conveyance to a police station. At the station, the victim was issued with Police Form No. 3 (PF3), Exhibit P2, for medical examination. The medical examination found that the victim had been penetrated by a blunt object, suggesting that she had been raped. Conclusion of investigation, carried out by PW4, culminated in the arraignment of the appellant in court. Five prosecution witnesses testified in court against the defence's two witnesses.

In his sworn defence, the appellant did not have much to say, rather than denying the allegations and recounting how he found himself under restraint. The appellant's other witness, DW2, testified on how the appellant repeatedly denied the allegations levelled against him and how he was conveyed to the police station.

At the conclusion of the trial proceedings, the trial magistrate was convinced that the appellant's guilt was established. He went ahead and convicted the appellant of rape, and sentenced him to serve life imprisonment. This decision did not amuse the appellant, hence his

decision to prefer the instant appeal. The petition of appeal has seven grounds of appeal, while four more grounds were introduced through an additional petition of appeal. Because of their striking similarity with other grounds, these grounds were argued alongside the main grounds.

These grounds of appeal are fused and paraphrased as follows:

1. *That the learned trial magistrate erred in law and fact by convicting the appellant while relying on the evidence of PW2 (the victim) who was the only witness whose evidence stood uncorroborated.*

2. *That the trial magistrate erred in law in convicting the appellant in reliance on the discredited evidence of PW2 (the victim) as it was not consistent, for failure to mention the specific dates on which the offence was committed, and that it contradicted the evidence of PW5 in respect of the date on which she was sent to the hospital.*

3. *That the prosecution case was not proved beyond reasonable doubt as the evidence was not sufficient to justify the conviction.*

4. *That the trial magistrate erred in law to rely on the evidence of PW3 (the doctor) which was not credible for want of qualification and explanation on the causes of bruises.*

5. *That the trial magistrate grossly erred in law by convicting the appellant relying on the evidence of PW2, the victim which was taken in contravention of section 127 (2) of the Evidence Act as amended by Act No 4 of 2016 as there is no evidence on record to show that PW2 promised not to tell lies in court.*

6. *That the evidence by PW1, PW3, PW4 and PW5 were unreliable and incredible which could not corroborate PW2's story against the appellant.*

7. *That the learned trial magistrate erred in law by convicting the appellant relying on the evidence of PW3 (Emmanuel Shija) who was not listed as a witness at the Preliminary hearing rendering his testimony and Exh. P2 (PF3) he tendered a nullity.*

When the matter came up for hearing, the appellant fended for himself, unrepresented, as the respondent enjoyed the services of Ms. Jackline Werema, learned State Attorney. Besides submitting on additional grounds of appeal, the appellant urged the Court to admit his oral representations in support of the appeal. In his written submission, the appellant opted to abandon grounds 1, 2, 4, 6, 9, 10 and 11, while grounds 5, 7 and 8 were not submitted on as the appellant thought they were self-explanatory. He, then, chose to argued grounds 1, 2, 3 and 4 of the additional grounds together with ground 3 of the main petition of appeal.

In respect of the said grounds, the appellant argued that, in the decision of ***Godfrey Wilson v. Republic***, Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal of Tanzania established a requirement of conducting a process that will enable a trial court to assess the ability of the child witness of tender age to promise to tell the truth and no lies. Where admitting that such process was carried out in this case, the conclusion which was drawn by the trial court was that the child did not know the meaning of oath but promised to speak the truth. He submitted that PW2 did not promise to tell the truth as required of him under section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019. He took the view that PW2's testimony was improperly and irregularly taken, rendering it fatally incompetent. He bolstered his argument by citing the case of ***Yusuph Molo v. Republic***, CAT-Criminal Appeal No. 343 of 2017 (unreported), in which it was held as follows:

> *"It is mandatory that such promise must be reflected in the record of the trial court. If such a promise is not reflected in the record, then it is a big blow in the prosecution case .... if there was no such undertaking, obviously the provisions of section 127 (2) of the Evidence Act (as amended) were flouted. This procedural irregularity in our view, occasioned a miscarriage of justice. It is fatal and*

incurable irregularity. The effect is to render the evidence of PW1 with no evidentiary value, it is as if she never testified to the rape allegation against her."

The applicant took the view that the testimony of PW2 is, for the reasons stated above, worthless and liable to expunging it from the record. If the urge to expunge it is acceded to, the appellant submitted, the rest of the testimony, as testified by PW1, PW3, PW4 and PW5 is a hearsay account that cannot establish the offence of rape. He added that, after all, PW2's testimony required corroboration which was not there.

Turning on to penetration, the appellant submitted that the same could be proved by medical examination. He argued that, in this case, such testimony was adduced by PW3, but the same had three flaws. The first is the introduction of a witness (PW3) who was not in list of witnesses lined up for testimony, and without issuance of a reasonable notice. On this, he cited the case of ***Kimbu Chagu & Another v. Republic***, CAT-Criminal Appeal No. 106 of 2002 (unreported). In his view, such anomaly rendered PW3's testimonyand Exhibit P2 a nullity. Secondly, the appellant argued that the death of Dr. Lwiza, in whose position PW3 stood, was not proved, making the latter's testimony lacking in evidential value. The appellant

further argued that the testimony of PW2 and Exhibit P2 stood alone and failed to support the offence.

He concluded that, since his conviction was based on the evidence of PW2 which is liable to expunging, the residual evidence is insufficient to sustain the conviction. Overall, he prayed that the appeal be allowed and he set to liberty.

Ms. Werema was strongly opposed to the appeal, and held the view that the appellant's conviction was quite unblemished. With respect to ground one, she argued that the provision used to charge the appellant is section 131 (1) of the Cap 16, in respect of which she saw nothing wrong.

Regarding grounds 2 and 3 of the additional grounds, learned attorney's view is that the testimony of PW2 conformed of section 127 (2) of Cap. 6, and that the questions posed to PW2 were intended to test her ability before she promised to tell the truth and no lies. She submitted that what happened was consistent with the guidance given in ***Godfrey Wilson v. Republic*** (supra). Ms. Werema further argued that PW2's testimony was perfect and did not require any corroboration.

On ground 3, Ms. Werema's take is that the legal position is that the testimony of the victim of rape need not be corroborated, and that this was

underscored in the case of ***Selemani Makumba v. Republic*** [2006] TLR 379. She found no merit in this ground.

With respect to ground 4, the respondent's view is that threats given by the appellant instilled fear in the victim, as disclosing the pain she endured would subject her to more pain, because the appellant threatened that he would continue raping her.

In response to ground 5, learned counsel took the view that, given the victim's age and passage of time, it would not be easy to remember every detail. In any case, she contended, such failure does not go to the root of the case. She took the view that this ground is lame.

With respect to ground 6, the respondent's contention is that the length of time in filling out the PF3 does not affect the case. Learned counsel contended that, in any case, PF 3 does not serve as a proof of involvement or otherwise of the appellant.

Regarding ground 8, the argument is that testimony of the medical doctor is found at page 25 where it is stated that the victim lost her hymen, meaning that she was penetrated. The respondent felt that that was enough to prove rape.

With regards to ground 9, Ms. Werema submitted that the appellant's defence was factored in and considered. She submitted further that, consistent with the holding in ***Kaimu Said v. Republic***, CAT-Criminal Appeal No. 391 0f 2019 (unreported), the Court can step in and evaluate the defence testimony.

Ground 10 was also dismissed as baseless on the ground that the PW2 testified that she was raped by the appellant on four occasions, and that it is the victim who identified the appellant. The respondent argued that the appellant did not cross-examine on this contention.

With respect to ground 11 and ground 3 of the additional grounds, the respondent submitted that Preliminary Hearing is intended to expedite proceedings and establish contentious and non-contentious matters. It was argued that failure to conduct a proper preliminary hearing is not fatal. The respondent took the view that this ground is hollow.

On grounds 7 and 2 of the additional grounds, Ms. Werema's take was that, while it is true that the testimony of listed witnesses was hearsay, that of the victim is what settled the matter. On that basis, the appellant's contention is baseless.

Submitting on ground 4 of the additional grounds, Ms. Werema argued that in rape cases, the crucial evidence, if the victim is the age below 18 years, is penetration. She argued that, in this case penetration was proved. He further contended that age of the victim was not an issue as it was proved by her mother, and as was held in ***Isaya Renatus v. Republic***, CAT-Criminal Appeal No. 542 of 2015 (unreported).

The respondent urged the court to hold that the case against the appellant was proved and that the appeal should be dismissed.

The appellant did not have anything to submit in rejoinder.

The usual question that follows the parties' rival submissions is whether the appeal that is before me is meritorious.

I will start the disposal by looking at ground 7 of the appeal. This ground queries legality of deviating from the preliminary hearing and introducing evidence which was not lined up during the preliminary hearing. This touches on the testimony of PW3 who also tendered Exhibit P2.

It is true that at the preliminary hearing, held pursuant to section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2019, PW3 was not listed as a witness for the prosecution. He, however, featured in the trial proceedings

and testified. As Ms. Werema argued, this was an uncalled for deviation from the procedure, and it is in bad taste. But with all its flaws, can it be said that this was a fatal indulgence that can affect the proceedings? In my considered view, the answer to this question is in the negative, and a couple of the court decisions support my view. In ***Kalist Clemence @ Kanyaga v. Republic,*** CAT-Criminal Appeal No. 19 of 2003 (unreported), it was held:

> *"**Section 192** of the Criminal Procedure Act, Cap. 20 Revised Edition 2002 appears under Part (c) of **"Trial Generally."** That Part has a heading – **"Accelerated Trial and Disposal of Cases."** The obvious inference is that **Section 192** is intended to achieve the speeding up of criminal trials. Under that Section, one of the ways of speeding up a trial is that as soon an accused person pleads not guilty to a charge the trial court should hold a hearing termed **"preliminary hearing"** during which matters which are undisputed will be identified so that evidence to prove such matters will not unnecessary be called. That will mean that witnesses will not be summoned to prove that which is not disputed. That which is accepted as undisputed is taken by the trial court as proved."*

The foregoing position was cemented in two subsequent decisions of the superior Court. These are ***Peter Paul v. Republic***, CAT-Criminal Appeal No. 238 of 2008; and ***Fungile Mazuri v. Republic***, CAT-Criminal Appeal No. 147 of 2012 (both unreported). In the latter it was held as follows:

> *We have always restated that the intention of the legislature in enacting section 192 of the CPA on holding of preliminary hearing was to accelerate and speed up trials in criminal cases (see- CRIMINAL APPEAL NO. 109 OF 2002,* ***1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (CAT at Arusha) (unreported)****. We have further restated that criminal proceedings can be said to have been vitiated by the omission of the trial court to hold preliminary hearing only when upon perusal of the record it is shown that the appellant's trial was either delayed or caused extra costs or prejudiced the appellants: (see-****1. JOSEPH MUNENE, 2. ALLY HASSANI VS. THE REPUBLIC (supra)****. Mr. Karumuna is with due respect correct, there is nothing on the record to show the appellant suffered any delay or extra costs or any other prejudice on the appellant because of the failure to conduct the preliminary hearing."*

It is my considered view that worthiness of the testimony of PW3 and Exhibit P2 was not affected by the prosecution's failure to list PW3 as one of the prosecution's witnesses. I consider this ground hollow and I dismiss it.

The appellant's gravamen of complaint in grounds 1, 4, 5 and 6 is that PW2, a child of tender age gave an incomplete promise as she did not promise not to lies. She only promised to tell the truth and, in the appellant's view, this was offensive of the provisions of section 127 (2) of Cap. 6. For ease of reference, I feel apt to cite the relevant provision. It states:

> *"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 lies."*** [Emphasis added]

The proceedings are clear on this. It is simply that PW2's undertaking did not extend to giving a promise of not telling lies, and this is where the appellant's disgruntlement resides. The question is, is this a fatal omission? This Court grappled with the same question, when it was contended that the witness gave an incomplete promise. This was in the case of ***Roja***

Ndaga v. Republic, HC-Criminal Appeal No. 62 of 2021 (unreported). Holding the omission fatal, the Court (Chaba, J.) held as follows:

> *"As the record stands,* ***no doubt that PW1 promised to tell the truth only and never promised not to tell any lies to the court.*** *When our Apex Court was confronted with a similar situation in the case of* ***Godfrey Wilson vs. Republic (Supra),*** *the Court held inter alia that:*
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> *"The trial court ought to have required PW1 to promise whether or not she would tell the truth and not lies. We say so because, section 127 (2) as amended imperatively requires a child of tender age to give a promise of telling the truth and not telling lies before he/she testifies in court. This is the condition precedent before reception of the evidence of a child of tender age. The question, however would be on how to reach at that stage. We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions, which may not be exhaustive depending on the circumstances of the case, as follows;*
>
> *1. The age of the child;*
>
> *2. The religion which the child professes and whether he/she understands the nature of oath;*

3. Whether or not the child promises to tell the truth and not to tell lies. Thereafter, upon making the promise, such promise must be recorded before the evidence is taken."

Back to the manner in which the victim's testimony was received, ***I find that failure by the trial court to comply with the mandatory provisions of the law under section 127 (2) of the TEA was fatal as the promise given by the victim was incomplete."***
[Emphasis is supplied]

The trial court proceedings reveal, at page 17 that, prior to adduction of her testimony, PW2 was put to test questions and provided answers on the basis of which the trial court went ahead and admitted her testimony. The relevant part of the said proceedings are as provided hereunder:

"PW2-I am called ....., I'm Christian, I 'm standard 4, I'm studying Kigunga Primary School.
I don't know the meaning of the oath
The one who speaks lies is a sin
I will speak the truth to my evidence
I promise to speak the truth.

Court: The child does not know the meaning of Oath so she will testify without taking an oath the child promises to speak the truth in her evidence."

Deducing from this excerpt, I gather that the promise to speak the truth embodied an implicit undertaking of not telling lies. The words ***"The one who speaks lies is a sin (sic). I will speak the truth to (sic) my evidence;*** and ***I promise to speak the truth"*** were, in my unflustered view, a promise to tell truth, and nothing but the truth. It was, in other words, a promise to shun lies and never to do that in the course of adducing her evidence. This was a full compliance with the requirement of the law under section 127 (2) of Cap. 6 and as stressed in ***Godfrey Wilson v. Republic*** (supra).

Noticeably, my position in this case is a deviation from what my brother Chaba, J held in the ***Roja Ndaga*** (supra). The reason for such deviation does not reside in the fact that I am not bound by the decision of this Court. Rather, it is based on what the Court of Appeal held in the case of ***Arcopar (O.M) S.A. v. Hubert Marwa & Family Investments Ltd & 3 Others***, CAT-Civil Application No. 294 of 2013 (unreported). In this case, the upper Bench referred to the Article by Paul M. Perell on Stare

decisis and Techniques of reasoning and argument, (1987) 2.23 Legal research Update II; and the cases of ***Young v. Bristol Aeroplane Company Limited*** [1944] 1 KB 718; and ***Dodhia v. National Grindlays Bank Ltd & Another*** [1970]. In the end, the superior Court held that a court can decline to follow the path taken by a court of record if doing so would result in the occurrence of any or all of the following circumstances:

i. *"In Criminal cases, following the precedent case would result in an improper conviction;*
ii. ***It does not stand for the legal preposition for which it has been cited*** *or;*
iii. *It articulates the legal preposition for which it has been cited, the preposition was obiter dicta or, the ratio decidendi is too wide or obscure or;*
iv. *The precedent case has been effectively overruled by a new statute or given per incurium; or*
v. *The case has a built in public policy factor or based on the customs, habit and needs of the people prevailing at the time, and the public policy or the customs, habits and needs of the people have since changed;*
vi. *The ratio decidendi of the precedent case is in conflict with fundamental principle of law;*
vii. *There are conflicting decisions of equal weight that stand for the opposite preposition."* [Emphasis is added]

In my view, the basis for my deviation is item (ii) of the cited excerpt, and I find that the manner in which the testimony of PW2 was procured is perfectly in order. In view thereof, these grounds of appeal are barren and I dismiss it.

Grounds 2 and 5 of the appeal need not detain us. They are simply of no significance, taking into consideration that inability to remember exact dates of the occurrence of the offence does not mean that the alleged incident did not occur. Given the victim's age, it was not expected that she would remember the exact dates on which the incidents occurred. This takes into account, as well, the fact that PW2 testified almost a year after the last of the incidents allegedly occurred. I dismiss these grounds of appeal.

The argument by the appellant in ground 3 is that the testimony adduced by the prosecution did not prove the offence. In my considered view, this contention is hollow. As stated earlier on, in cases of rape in respect of which consent is not a requirement, the key ingredient necessary for proving a charge is penetration. This is in terms of section 130 (4) (a) of Cap. 16 which provides as follows:

"For the purposes of proving the offence of rape-

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."

PW2 has testified on how the appellant got her to succumb to threats unleashed to her and how on all the four occasions he entered his penis into the victim's vagina, and how she felt during after the act. PW3 and exhibit P2 were an icing on a cake. They corroborated what the PW2, the victim, saw and went through. PW2's testimony, even without any other piece of evidence to cap it up, was enough to found a conviction, in line with the legal position as enshrined in section 127 (6) of Cap 6, whose substance is as quoted hereunder:

"Notwithstanding the preceding provisions of this section, where in 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 of as the case may be the victim of sexual offence on its own merits, notwithstanding that such The Evidence Act [CAP. 6 R.E. 2019] 54 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."

This trite position has been restated time and again, the most recent subscription being that of the Court of Appeal of Tanzania in ***Majaliwa Ihemo v. Republic***, CAT-Criminal Appeal No. 197 of 2020 (unreported), wherein it was held:

> *"In sexual related trials, the best evidence is that of the victim as per our decision in **Selemani Makumba vs. R**, [2006] T.L.R. 379. We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point..."*

Looking at the prosecution testimony on which the conviction was based, my view is that the same was credible, reliable, unblemished and sufficient enough to prove the charges with which the appellant was charged.

From the totality of the foregoing, I hold the view that this appeal is barren or fruits and I dismiss it. I uphold the trial court's conviction and sentence.

It is so ordered.

Rights of the parties have been duly explained.

DATED at **DAR ES SALAAM** this 28th day of February, 2022

M.K. ISMAIL

JUDGE