IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 189 OF 2019

(Appeal from the Judgment of the District Court of Sengerema at Sengerema (Kahimba, SRM) Dated 16th of July, 2019 in Criminal Case No. 87 of 2019)

ABDALLAH S/O HAMISI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT OF THE COURT

13th May, & 29th May, 2020

ISMAIL, J.

The District Court of Sengerema at Sengerema before which the appellant was arraigned, convicted him of a count of rape contrary to sections 130 (1) (e) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002. Consequently, the said court sentenced the appellant to life imprisonment. Feeling aggrieved by the conviction and sentence, the appellant preferred a nine-ground petition of appeal challenging the trial court's wisdom in convicting and sentencing him.

Before we dwell onto the substance of the matter, I choose to preface it with brief facts constituting the instant appeal. It was alleged that on 15th April, 2019, at about 18.00 hours, at Itabagumba village within Sengerema district, Mwanza region, the appellant raped XYZ (in synonym), a girl of ten years of age. The testimony of PW1, the victim, and a class 4 pupil, is to the effect that on the fateful day, the appellant who hails from Zilagula village, induced PW1 with a bun *"andazi"* and a soda, and grabbed her to Gaunya forest where he undressed her and himself and had a carnal knowledge of PW1. He then abandoned her and fled. PW1 was located by a woman who went for a call of nature, after which she conveyed the victim to a hamlet chair and later to a police station. The appellant was subsequently apprehended and conveyed to the police station where he was interrogated before he was arraigned in court. The medical examination (exhibit P1) established that her vagina had multiple trauma involving labia manora, perinea body and that her hymen had been perforated. It was further reported that PW1's vagina was discharging and smelling. They also found blood stains. The prosecution case had four witnesses against one for the appellant. The appellant denied any involvement in the incident that he was accused of. He contended that he

did not know the victim and that the charges against him had been fabricated.

At the end of the trial proceedings, the trial court was convinced that a case had been made out to warrant conviction and eventual sentence, both of which are the subject of this appeal. When the matter came up for a virtual hearing on 13th May, 2020, the appellant fended for himself, unrepresented, while the respondent was represented by Ms. Gisela Alex, learned State Attorney. At the hearing, the appellant prayed for and was granted leave to add two more grounds of appeal. The grounds of appeal, inclusive of the two additional grounds can be paraphrased as follows: ***One***, that the prosecution's case was not proved beyond reasonable doubt; ***two***, that prosecution relied on PW1's dock identification without any proper identification and that the person who was alleged to have found PW1 in the bush was not procured for testimony; ***three***, that there was no testimony on how the appellant was connected to the offence, and that there was no description by PW1 of how the appellant was identified; ***four***, that none of the prosecution witnesses testified that he saw the appellant fleeing from the scene of the crime and that his clothes were not tendered as an exhibit; ***five***, that no investigation was carried out in respect of the

allegation and that no sketch map of the scene of the crime was tendered in testimony; ***six***, that the PF3 (exh. PE1) did not connect the appellant with the offence charged; ***seven***, that the proceedings were heard by more than one magistrate and no reasons were assigned for the takeover or change of hands; ***eight***, a local leader of the area at which the crime was committed or any other independent witness was not called to testify; ***nine***, there was a variance and uncertainty on the scene of the crime between Itabagumba village and Zilagula and that the appellant ought to have been given the benefit of doubt of this uncertainty; ***ten***, that the trial court did not afford the appellant an opportunity to cross examine the victim, PW1, on her testimony; and ***finally***, that no evidence was tendered to prove age of the victim of the alleged rape incident.

Submitting on the appeal, the appellant prayed that the Court should consider his appeal and find that his conviction and sentence were flawed. He prayed in consequence, that the Court should set aside the sentence and conviction and acquit him of the charges.

Ms. Alex began by expressing her total support to the conviction and sentence imposed on the appellant. Submitting on ground one, she stated that the prosecution proved the case beyond reasonable doubt. She

referred to page 8 of the typed proceedings at which the victim testified on how the appellant took him to the bush where she abandoned her after he had raped her. The learned counsel submitted that PW3 testified that the victim was raped, a fact which was proved by a PF 3 (exh. P1) whose admission and contents were not opposed to by the appellant. Ms. Alex argued that it is an established principle that in rape cases, evidence of the victim is the most decisive, as was held in ***Shija Misalaba v. Republic***, CAT-Criminal Appeal No. 226 of 2011 (unreported). It was her contention that the case had been proved beyond reasonable doubt.

With respect to the second ground, Ms. Alex conceded that indeed no identification (ID) parade was conducted to identify the appellant. She was quick to point out, however, that the appellant was known to the victim, meaning that need did not arise for having the ID parade conducted. She found no need, either, of calling the woman who rescued the victim as that would add nothing to the prosecution's case. Ms. Alex conceded, however, that it is not clear, and that no evidence established with certainty that the victim was raped at 18.00 hours. She prayed that this ground be dismissed.

Addressing the Court on ground three, Ms. Alex contended that this ground is hollow because the trial court relied on the testimony of the victim to found a conviction, and it did not matter how and when the appellant was arrested. Equally dismissed, was ground four of the appeal, and the respondent's counsel argued that nobody else saw the appellant at the scene of the crime and that, that fact alone would not have the effect of diluting the prosecution's case.

On ground five of the appeal, Ms. Alex submitted that the ground is baseless because it is firmly in the prosecution's discretion and mandate to choose which testimony to rely on. In this case, the counsel contended, testimony of the victim was enough to prove the appellant's wrong doing.

With regards to ground six, the respondent's attorney threw the blemishes back to the appellant for his failure to seize the opportunity and cross examine the witness, if he wasn't happy with some aspects of her testimony. She referred the Court to the case of ***Deogratias Nicholaus v. Republic***, CAT-Criminal Case No. 211 of 2010 (unreported) in which it was held that failure to cross examine a witness is considered to be an admission of the fact testified on.

Submitting on ground seven, Ms. Alex submitted that this ground is weak since the testimony in the proceedings was recorded by a single magistrate and that at no time did the case change hands. With respect to ground eight, the respondent submitted laconically that the prosecution called all the witnesses it needed. The counsel added that the case hinged on the testimony of the victim which was enough to prove the allegation.

In respect of ground nine, the respondent's attorney submitted that PW1 testified to the effect that she was a resident of Itabagumba village and that the incident occurred in Gaunya forest. By her reckoning, the forest is within the same village of Itabagumba.

Submitting on the tenth ground Ms. Alex held the view that the appellant was given time to cross examine but he chose not to cross examine. He considered that this ground to be weak. Submitting on 11th ground, the learned counsel rebuffed the appellant's contention on the age of the victim, holding the view that the victim said that she was 10 years of age and that this was enough to prove age of the victim.

Reacting on whether the PF3 was read out, the learned counsel conceded that the same was not read out but PW3 explained the contents and the appellant was given an opportunity to cross examine the witness

but he spurned it. On whether it was proper to hold a *voire dire* test while the law had dispensed with that requirement with that requirement, Ms. Alex was in agreement with the Court that the law has since done away with the requirement of conducting a *voire dire* test, and that the trial court's indulgence was strayed. She contended, however, that the effect of this flawed indulgence is to have the testimony corroborated, and this has been done through exhibit P1 and testimony of PW3.

Consequently, the respondent's counsel prayed that the appeal be dismissed.

In rejoinder, the appellant reiterated his call of having his grounds of appeal considered and that he be set free.

For reasons that will be apparent shortly, I will confine my analysis to two questions which were raised by the Court *suo motu*. These relate to; firstly, the impact of conduct a *voire dire* test while the practice is no longer a requirement; and secondly the issue of the time and place at which the incident occurred. The latter relates, in some way, to the appellant's complaint in ground nine of the appeal.

In addressing the first limb of the points raised by the Court, my attention is drawn to page 8 of the typed proceedings, held on 9th July,

2019. This is the date on which PW1, the victim, testified. Noting that she was a child of tender age, the trial magistrate took her through the 'ritual' of the *voire dire* test in the following fashion:

> *"**PP:** Your honor the victim she (sic) is a child of tender years. Let us conduct a voire dire examination first.*
>
> *VOIRE DIRE EXAMINATION*
>
> *I reside at Itabagumba. I am Christian I normally go to church, I cannot tell lies. It is not good to tell lies. I know how to tell the truth.*
>
> *A. Kahimba, SRM*
>
> *09.07.2019*
>
> ***Court:** The victim through voire dire examinatia (sic) she does not know the nature of an oath but she does possess sufficient intelligence to tell the truth. The Court will continue to receive on sworn testimony."*

As the trial magistrate was busy conducting the test, the law on *voire test* had evolved into a new dispensation through an amendment to section 127 of the Evidence Act, Cap. 6 R.E. 2002, effected vide section 26 of the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2016. Through this amendment, the requirement of *voire dire,* as hitherto enshrined under section 127 (2) and (3) of the Evidence Act (supra), has been dispensed with. The new dispensation provides as follows:

"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 tell lies."***

It implies, therefore, that currently, a witness of tender age's role is, hence forth, only limited to giving a promise of telling the truth and no lies.

Underscoring this position is the Court of Appeal of Tanzania, through several of its decisions. In ***Msiba Leonard Mchere Kumwaga v. Republic***, CAT-Criminal Appeal No. 550 of 2015 (unreported), it was held:

"... Before dealing with the matters before us, we have deemed it crucial to point out that in 2016 section 127 (2) was amended vide Written Laws Miscellaneous Amendment Act No. 4 of 2016 (Amendment Act). ***Currently, a child of tender age may give evidence without taking oath or making affirmation provided he/she promises to tell the truth and not to tell lies."***

In view of the foregoing, it is clear that the trial magistrate indulged in a needless and futile exercise while at the same time abdicating his duties under the new dispensation. He did not let the child witness make a promise to tell the truth and not to tell lies. The question that follows is:

what is the net worth of the testimony received through the application of the moribund position of the law? Ms. Alex has conceded that reception of PW1's testimony followed the path of the repealed procedure. She was quick to point out, however, that the effect of this is to render the evidence requiring corroboration which it got through PW3 and exhibit P1. With respect, I do not subscribe to this position. Position of the law is that, though the procedure was faulty, the evidence is not invalid. This position takes inspiration from the decision of the superior Court in ***Bashiru Salum Sudi v. Republic***, CAT-Criminal Appeal No. 379 of 2018 (Mtwara-unreported). It was held:

> *"It is plain that her evidence received on affirmation after the trial court had conducted a voire dire test despite the fact that it is no lobger a requirement. However, we are settled in our mind that the fact that the trial court determined PW1's ability to give oath or affirmation on the basis of the practice obtaining under the repealed law, did not invalidate that evidence. This is because, as observed in* ***Godfrey Wilson v. R (supra)*** *and later in* ***Issa Salum Nambaluka v. R*** *(supra), the law is silent on the method of determining whether such child may be required to give evidence on oath or affirmation or not. In the absence of such a method, we do not think the method adopted by the trial court for*

purposes of ascertaining PW1's ability to give evidence on oath or affirmation was fatal to her evidence and thus prejudicial to the appellant."

A similar position was adopted by this Court in ***Cosmas Herman v. Republic***, HC-Criminal Appeal No. 72 of 2019 (Mwanza – unreported). In this case, evidence of a child of tender age who had undergone a voire dire test, which has since been abolished was found not to be invalid. The Court took the view that both, the abolished and the current procedure, are ultimately intended to *"to ensure that evidence of the child of tender age is free from any possible misrepresentation of the factual account. They are both a guard against permeation of lies in the testimony. Matters would be different if the witness had not undergone the test under the abolished requirement or made the promise under the new dispensation.* It is my considered view that, while the procedure may be irregular, the intended objective was achieved. Ultimately, I hold that the testimony of PW1 was, in all material respects, valid and regular.

Turning to the second issue, the question is whether the prosecution's evidence proved beyond reasonable doubt that the offence of rape with which the appellant stood charged was committed at a time and a place stated in the charge sheet. The charge sheet which was admitted

in court on 24th April, 2019, stated that the offence was committed at about 18:00 hours at Itabagumba village, in Sengerema district. This allegation is not proven, in any way, by the testimony of any of the prosecution witnesses. Testimony of PW1 is to the effect that the rape incident occurred at Gaunya forest and it is not stated if Gaunya forest is located in Itabagumba village where the victim hails, or in Zilagula village where the appellant allegedly resided up until the incident. More confusion arises when you glance through the testimony of PW2 who testified to the effect that the rape incident was committed at Zilagula, a different location from Itabagumba stated in the charge and, certainly different from Gaunya forest testified by PW1, the victim. Furthermore, 18:00 hours cited in the charge sheet, as the time the victim was raped, was derived from the evidence of PW2 who testified that the victim disappeared from about 18:00, not to be found until the following day when she was informed that the victim had been raped at Zilagula. Mere disappearance from PW2's sight from 18:00 hours cannot serve as proof that the rape incident occurred at exactly the same time PW1 disappeared from the sight of PW2. Nowhere in the testimony of PW1 or any of the prosecution witnesses has the issue of time been ascertained. These loose ends in the evidence of the

prosecution imply that the question of where and when the rape incident occurred has not been proved by any cogent evidence. It remains to be a mere allegation that is yet to be proven and the prosecution has not discharged this obligation. Where such failure arises, the conclusion is that burden of proof has not been discharged and the trial court had no justification of making a finding of guilty and convict the appellant. This reasoning draws an inspiration from the Court of Appeal's holding in ***Mathias Samwel v. Republic***, CAT-Criminal Appeal No. 271 of 2009 (Tabora-unreported). While acquitting the appellant, the honourable Justices of Appeal observed:

> *"We are of the opinion that when a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed by the accused by giving cogent evidence and proof to that effect. In the instant case, as demonstrated herein earlier, the prosecution has failed to prove beyond reasonable doubt that on such a date, time and place the appellant committed the offence of rape to PW2 as charged."*

The foregoing position borrowed a leaf from its previous decision in ***Anania Turian v Republic***, CAT-Criminal Appeal No. 195 of 2009 (unreported), in which it was held that conviction founded in the absence

of evidence, by the prosecution, to prove that the charge against the appellant was committed on the date specified in the charge sheet, is wrong and untenable.

Emboldened by the cited decisions, I hold that the case against the appellant was not proved beyond reasonable doubt as a consequence of which his conviction was not justified.

Consequently, I allow the appeal, quash the conviction and set aside the sentence against the appellant. I order that the appellant be released from custody and be set free, forthwith, unless he is held or detained for any other lawful cause.

DATED at **MWANZA** this 29th day of May, 2020.

M.K. ISMAIL

JUDGE

Date: 29/05/2020

Coram: Hon. M. K. Ismail, J

Appellant:

Respondent: Absent

B/C: Leonard

Court:

Judgment delivered in chamber, in the absence of the parties this 29th day of May, 2020.

M. K. Ismail

JUDGE

At Mwanza

29.05.2020