IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 38 of 2020

(Original Criminal case No 212 of 2019 of the District Court of Hai at Hai)

ELIA RICHARD SHOO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

MUTUNGI .J.

In the District Court of Hai at Hai, Elia Richard Shoo was charged with the offence of Rape **c/s 130(1) (2) (e) and section 131 of the Penal Code, Cap 16 of the Laws. R.E 2002.**

The particulars of the offence were such that, on July 2019 at Lyamungo Kati village within Hai District in Kilimanjaro region, did have sexual intercourse of one Prisca Straton Msangi a girl of 10 years old. Upon a full trial, he was convicted and sentenced to 30 years imprisonment'.

Before embarking on the merits or demerits of the appeal, I deem it appropriate to give albeit briefly the background of this appeal. The whole saga started at Move Primary School. The victim had given her fellow student a ball, unfortunately that ball hit the teacher (PW2). She was asked as to where she got the ball from and consequently narrated the full story that, she was given the money by the appellant who used to rape her after which he would give her money. She had no choice but to give in, since the appellant would threaten to let loose the dogs. Teacher Kitia (PW2) who apparently was PW1's grandmother went to the appellant with the Village Chairman (PW3), they arrested the appellant and handed him over to the Boma Police, after which the victim (PW1) was taken to hospital. Upon Medical examination it was revealed that, she had been raped. The Medical Doctor (PW4) observed some reddish colour in her vagina and the hymen had raptured. The PF3 was filled and in the trial court admitted, labelled Exhibit "P1".

The evidence adduced convinced the trial Magistrate who proceeded to convict the appellant and sentenced him to 30 years imprisonment as earlier noted.

Aggrieved with the decision of the Hai District Court, the appellant now appeals to this court. His Memorandum of Appeal contains seven grounds of appeal as hereunder: -

1. That the trial magistrate erred in law and fact by failing to distinguish between the law and morals.
2. That the trial court erred in law and fact in convicting the accused solely on uncorroborated evidence
3. The trial magistrate failed to comply with section 231 of the CPA.
4. The trial Magistrate erred in law and fact for failure to find non-reporting the crime to anyone at the beginning could not attract confidence/credibility of the victim
5. The trial Magistrate erred both in law and fact for failure to observe the police did not do what they were supposed to do to investigate more
6. The trial Magistrate erred both in law and fact on relying on the PF3 which corroborated the evidence while it was not read out loud after admission
7. That the trial Magistrate erred in law and fact by ignoring the evidence of the appellant.

Upon perusal of the grounds of appeal, I have reduced the same to two issues, ***first***, whether the case was proved

beyond reasonable doubt and **two**; whether there were procedural irregularities.

At the hearing the appellant was unrepresented while the respondent (Republic) was represented by Omari Abdallah Kibwanah (SSA). It was agreed and ordered that the appeal to proceed by way of written submissions.

Submitting on the **1st, 2nd, 4th and 6th** grounds challenging the conviction touching on the issue of credibility of evidence, the Appellant submitted that the trial Magistrate omitted to assign on record the reasons of her satisfaction with the truthfulness of the uncorroborated evidence by the victim. The appellant elaborated that, a credible witness would be expected to name a suspect at the earliest possible opportunity.

To the contrary the victim in this case managed to walk away painlessly and properly back home without letting anyone know of her ordeal. The act of being raped is unacceptable, shameful, painful and unforgettable yet as tender as the victim was remained peacefully silent without telling anyone. She further did not have any traces of blood after the rape. All these facts escaped the attention of the trial Magistrate. It is thus unconceivable for the victim to have hidden the truth for such an unexplainable delay. The

same holding was held by the Supreme Court of this land and the appellant quoted the case of **Ahmed Said vs. Republic, Criminal Appeal No. 291 of 2015 (unreported)** to support his argument.

Be as it may, the appellant argued that, the trial Magistrate had a duty to assign on record the reasons as to her satisfaction with the victim's credibility and truthfulness which is enshrined under **section 127 (7) of the Evidence Act, Cap 6 R.E. 2002**.

In that regard the trial Magistrate's omission vitiates the court's findings on the uncorroborated evidence. Even what was termed as corroborated evidence and in mind the PF3 (Exhibit "P1") had its contents not read out aloud before the court which omission was an illegality.

As far as the 3rd and 7th grounds of appeal are concerned, the appellant pointed out the procedural irregularity as failure to address him in terms of **section 231 of the Criminal Procedure Act, Cap 20**. In due thereof he failed to prepare and defend himself against the allegation levelled against him.

The appellant further raised his concern in the 5th ground on the proof of the case to the standard required in criminal jurisprudence. He was of the settled opinion that,

the police had a legal duty to shed more light and depict the truthfulness in order to minimise the possibility of any fabrication of the evidence.

In the final analysis, the appellant prayed for the court to find merit in his appeal and proceed to allow the same.

In reply thereof Mr. Kibwanah Senior State Attorney submitted on the first ground that, it is absurd that the appellant is blaming the law and the trial Magistrate for protecting a ten year old child. The allegation that the victim was mature/in terms of behaviour and sexuality connotes that, the appellant is not at all remorseful of his toxic acts and can in no way provide him a ground of appeal.

Replying as to the dictates of **section 127 (7) (supra)**, the learned Senior State Attorney submitted that, the trial Magistrate did on the offset asses the testimony of the victim and concluded she was telling the truth. The trial Magistrate then assigned reasons as to why she believed the victim's testimony. She then proceeded to find the victim was a key witness to prove whether she was raped or not. It is then that she went on, to consider the testimony of the Medical Doctor. To cap it all, the victim did identify the appellant by name and face before the court.

As far as the third ground is concerned, it was submitted that the trial Magistrate did comply with the mandatory requirements of **section 231 of the Criminal Procedure Act, Cap 20 R.E. 2002**. To this the Senior Attorney explained, the honourable trial Magistrate had recorded the appellant's reply that, he would defend himself on his own oath. This reply in itself is sufficient proof that, the trial Magistrate was keen and serious to abide by the law.

Commenting on the non-reporting of the offence at the earliest possible opportunity, the learned Senior Attorney expounded that, the evidence is very clear the victim was of a tender age and the offence committed against her was done so under threats from the appellant. To further silence her he gave her sweets. Given such circumstances, the victim could not have been in the position to report the incidence promptly.

The Senior Attorney further contended for the fifth ground that, it is common knowledge in criminal cases, the best evidence in rape cases comes from the victim herself. In this case the victim was the only witness to the offence. He wondered what more were the police supposed to investigate. Even though, the learned Senior Attorney

conceded the PF3 was not read over to the appellant. In that regard the same can be expunged from the record.

Responding to the allegation that, the trial Magistrate did not take into account the appellant's defence, Mr. Kibwanah to the contrary invited the court to find that, indeed the trial Magistrate did consider the same and gave reasons for her findings. The bottom line being that, the appellant by a mere statement that he did not rape the victim did not controvert the prosecution evidence nor did it cast a doubt against the prosecution case, hence the appellant defence was disregarded. In the upshot it was the respondent's prayer that, the appeal be dismissed for lack of merits.

Upon perusing critically, the submissions of both sides, that of the learned Senior State Attorney and the appellant on the other side, I shall address the issues as summarised earlier in the judgment. Starting with the ***grievances that conviction was based on a case not proved beyond reasonable doubt,*** the law is settled that, conviction in sexual offences can be grounded on the uncorroborated evidence of the victim if the court is satisfied that the victim speaks the truth. The same is supported by **section 127 of the evidence Act (supra)** which I wish to quote: -

"'"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 as the case may be the victim of sexual offence on its own merits, notwithstanding that such 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."

In reaching her verdict the trial Magistrate observed that, the evidence of the victim (a child of tender age) connected directly the accused to the offence and she was able to identify the accused by name and face even before the court. The evidence which was not controverted by the appellant.

It is a settled principle in law that, the best evidence in sexual offences comes from the victim though it is not the rule of the thumb. The Court of Appeal in the case of

Mohamed Said vs. Republic, Criminal Appeal No. 145 of 2017 (unreported) had this to say: -

> *''.....It was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness.''*

The victim in this case was better placed to explain how the appellant used to rape her. She was of tender age and the trial Magistrate was convinced that, she was telling the truth. The victim elaborated very clearly that she would be threatened by the appellant and ordered to undress otherwise she would be bitten by dogs. She consequently gave in for his sexual demands and desires. For this I support the submission by the learned State Attorney that, the case had been proved at the required standard in criminal cases.

The foregoing notwithstanding the raised doubt that the victim did not report promptly as to what had befallen her, I have painstakingly gone through the proceedings. It is alleged the appellant committed the offence repeatedly over several days in July 2019. The matter was reported to the police on 2nd August 2019. This court is alive with the principle laid down by of the Highest Court of this land in

the case of **Wangiti Mausa Mwita and others vs. Republic, Civil Appeal No. 6 of 1995** that: -

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his liability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry."*

There is clear evidence that the victim as young as she was, she had been threatened by the appellant hence she was acting under threats and fear. The period that had passed which could even be late July (anytime) to early August was still in the given circumstances of the case a period which could not raise any alarm for non-disclosure of the culprit. The ordeal was very much still fresh in the mind of the victim.

Regarding the issue of procedural irregularity, it was submitted by the Appellant that, there was non adherence to **section 231 of CPA**, which requires the trial Magistrate to inform the accused his rights before the defence case. The respondent submitted that this was done as seen at page 11 of the proceedings where the accused was recorded to have said, 'I will defend on my own on oath.'

I took time and pains to go through the trial courts proceedings, at page 11, I observed after the court pronounced that, the appellant had a case to answer, he stated ***"I will defend on my own on oath"***. This alone paints a picture that, the appellant was made aware of his rights to defend himself. Although the trial Magistrate did not indicate that section 231 was complied with but the appellant's response suggests otherwise. Be as it may, he did not show how he was prejudiced or how the omission occasioned miscarriage of justice.

Regardless, such omission of not indicating whether the section was complied with, can be cured by **Section 388 (1) of the Criminal Procedure Act** which provides that no finding, sentence or order made by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of error, omission or irregularity in proceeding unless such error has in fact occasioned a failure of justice. This grounds has no merit.

The appellant had raised the question of the PF3, it is undisputed that the PF3 was never read aloud after was tendered in court. In the case of **Bashiru Salum Sudi vs. Republic, Criminal Appeal No 379 of 2018** it was stated, failure to read out an admitted document is fatal and such

evidence can be expunged from the records but the content of the expunged document *can be saved by oral evidence*. Since the PF3 was never read aloud after being tendered and since it is fatal as per the case of **Bashiru (supra)**, I therefore expunge it from the record.

Once the PF3 is expunged, the question that remains is whether the prosecution case can stand without the PF3. In **Salu Sosoma vs. Republic Criminal Appeal No.4 of 2006 CAT-Mwanza (unreported)** the Court of Appeal, had this to say: -

> *"....likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence points to the fact that it was committed."*

Despite the fact that the PF3 has been expunged from the records, yet the content of such PF3 was elaborated by PW4 who testified that, he observed a reddish colour in the victim's vagina and the hymen had raptured. With such glaring evidence which was supported by that of the victim did establish that the rape was committed. It was proper for the trial Magistrate to conclude, the appellant

had raped the victim as charged. The evidence without a flicker of doubt pointed the appellant was guilty of the offence.

From the foregoing analysis, I support the submission that the case had been proved beyond reasonable doubt and this court upholds both the conviction and sentence and concludes the appeal is likewise dismissed.

B. R. MUTUNGI
JUDGE
11/3/2021

Judgment read this day of 11/3/2021 in presence of the Appellant and Mr. Mwinuka (S.A) for the Respondent.

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RIGHT OF APPEAL EXPLAINED.

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