IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 171 OF 2018

PAUL DIONIZ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

dated the 31th day of May, 2018
in
(HC) Criminal Appeal No. 226 of 2017

JUDGMENT OF THE COURT

11th August, & 2nd November, 2020

MKUYE, J.A.:

The appellant, Paul Dioniz was charged and convicted with an offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, R.E. 2002 (the Penal Code) by the District Court of Kinondoni at Kinondoni. He was subsequently sentenced to thirty years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam (Dar es Salaam Registry) in which his

appeal was dismissed. Still undaunted, he has preferred an appeal to this Court.

The background of the case leading to this appeal is as follows: -

On 6th August, 2016 morning, Tuntufye Godfrey, the victim's father, (PW1) saw the victim EO (name withheld), (PW2) to have urinated on her dress. On asking his wife about the matter, she told him that that was a second time as she had earlier on noted the same; and that EO had recently been coming home late from school and sometimes she could not even take meals. PW1 reported it to her school teacher and on being questioned, PW2 disclosed that the appellant gave her some money and chips. She also unveiled to PW1 that the appellant used to take her to an unfinished house (pagala) and raped her by penetrating his manhood into her vagina. PW1 then reported the matter to the police station.

PW2, after a *viore dire* test, testified without oath to have known the appellant, one, Paul who was a shoe maker and a water seller. He used to give her money Tshs. 100/= to Tshs. 200/= and directed her to go to the unfinished house where she was undressed and raped by him while threatening her not to disclose it to anybody for, he would kill her. Thereafter, the matter was reported to the police where upon the

appellant was arrested and she was taken to the hospital for medical examination.

The matter was investigated by WP 5656 D/C Neema (PW3) who issued the PF3 to the victim and interrogated the appellant who by then was already arrested. At Palestina Hospital at Sinza, PW2 was examined by Dr. Italevi Makere (PW4) who observed a discharge on her vagina with no bruises or blood and that in the said discharge there was no spermatozoa found. PW4 added that on further examination of the victim, it was revealed that her hymen was not intact which was uncommon to the victim at her age of 8 years and the PF3 was tendered and admitted as Exh P1.

In defence, the appellant testified that he was arrested at his place of business where he makes shoes and taken to remand custody without being told his offence. On 2nd September, 2016 he was arraigned before the court for the offence of rape.

Robert Jackson Kihiri (DW2) testified to the effect that he knew the appellant's place of business which was adjacent to his working place and that he was informed of his arrest by the investigator. Moreover, Mary Dioniz (DW3) testified that on being informed by DW2 that appellant was arrested on 12th August, 2016, she visited him at

Mbezi kwa Yusufu Police Post and got to know that the appellant was suspected to have committed rape to three children.

As alluded to earlier on, the appellant was convicted and sentenced accordingly.

In this appeal the appellant has raised a total of six grounds of appeal. In the substantive memorandum of appeal, he has fronted four grounds which can be summarized as follows:-

1. *That, the 1st appellate judge sustained the appellant's conviction on the basis of a defective charge.*
2. *That, the 1st appellate judge failed to realize that there was a discrepancy between PW1 and PW4's evidence as to when the offence was detected, reported and eventually when the victim was examined.*
3. *That, the 1st appellate judge heard the appellant's appeal un-procedurally as he was not accorded an opportunity for rejoinder.*
4. *That, the 1st appellate judge grossly erred in holding that the prosecution proved the case beyond reasonable doubt.*

Also, in the supplementary memorandum of appeal, he has raised two grounds which can be extracted as follows:-

1. *That, the 1st appellate judge upheld the appellant's conviction and sentence on the basis of a defective charge as the particulars of offence did not disclose the words "unlawful" before the phrase "carnal knowledge of one....." which was an essential element or ingredient in the offence of rape.*

2. *That, the 1st appellate judge sustained the appellant's conviction and sentence while there was noncompliance of section 210 (3) of the CPA, Cap 20 RE 2002.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented while linked through video conference from Ukonga Central Prison; whereas the respondent Republic was represented by Ms. Gloria Mwenda and Ms. Daisy Makakala, both learned State Attorneys.

When the appellant was given the floor to amplify his grounds of appeal, he opted to adopt both memoranda of appeal together with the written submission to form part of his submission and asked the Court to

let the State Attorney submit first while reserving his right to rejoin later, if need would arise.

In grounds No. 1 of the substantive memorandum and No. 1 of the supplementary memorandum of appeal, the appellant's complaint is that the appellant's conviction was based on a defective charge as the word "carnal knowledge" used in the charge sheet is not stated in the enabling provisions of section 130 (1) and (2) of the Penal Code while the word "unlawful" was omitted. It was his contention that the particulars of the offence did not give him proper information to enable him understand the nature of the offence, hence subjected him to unfair trial.

The appellant's complaint in ground No. 2 of the supplementary memorandum of appeal is that the provisions of section 210 (3) of Criminal Procedure Act, Cap 20 RE 2002 (the CPA) requiring the magistrate to inform the witness of his/her entitlement to have his/her evidence read over were not complied with. He said, failure to comply with the said provision caused him to be uncertain whether the evidence recorded was authentic or not; and thus, prejudiced him in his defence. He also attributed his conduct of being remorseful in his mitigation to such anomaly.

On the 2nd ground of the substantive memorandum of appeal, the appellant complains that there are discrepancies in the evidence of PW1 and PW4 as to when the offence was discovered, reported to the police and time the victim was examined. Whereas PW1 said, he detected the victim having urinated on her dress on 6th August, 2016 and took her to the hospital on 2nd August, 2016; PW4 said, he examined her on 12th September, 2016. It is his contention that, since the witnesses' evidence was heavily relied upon to convict the appellant, the 1st appellate judge ought to have re-evaluated it and come to her own conclusion.

The appellant's complaint in ground No.3 of the substantive memorandum of appeal is that the 1st appellate court denied him the right to rejoin his case. He took us to pages 46-49 of the record of appeal to show where he started to submit in chief on his appeal and then the respondent replied but he was not given opportunity to rejoin his case after the respondent's submission. This, he said, contravened the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania providing for a fair hearing.

As regards the 4th ground of appeal of the substantive memorandum of appeal, the appellant complains that the prosecution failed to prove the case beyond reasonable doubt because, **one,** the

evidence of PW2 who was of tender age was received without having promised to tell the truth as per section 127 (2) of the Evidence Act, Cap 6 RE 2002 as amended more so when she indicated that she did not know the meaning of oath. **Two,** the evidence of PW3 does not have evidential value as it was received without having taken oath. **Three,** the PF3 (Exh P1) has no evidential value as it was not identified by PW4 before being tendered; it was tendered by the public prosecutor instead of the witness; and that it was not read over in court after its admission.

In reply, Ms. Makakala, admitted that the word "unlawful" was not stated in the particulars of offence, however, she was quick to state that failure to state it did not affect the charge since all the relevant provisions of the law were cited. The learned State Attorney contended further that, the word "carnal knowledge" used in the particulars of offence simply meant "sexual intercourse" which in essence explained the nature of the offence committed. In any case, she argued that there is no lawful carnal knowledge to a child adding that, there was no indication that the appellant was prejudiced.

Regarding non-compliance with section 210 (3) of the CPA, Ms. Makakala argued that it related to a respective witness and that, unfortunately, the appellant did not say which evidence was not

recorded so as to impeach the record of appeal. As to the appellant's contention relating to his contrition in mitigation, she was of the view that, that was not part of evidence.

In relation of to the discrepancies in the evidence of PW1 and PW4 as to when the offence was detected, reported to the police and time the victim was examined, the learned State Attorney contended that each witness testified regarding the date he/she was involved on the matter. She also pointed out that even the charge does not specify the date when the offence was committed. At any rate, she said, the contradictions on time were minor as they did not go to the root of the matter.

On the complaint that the appellant was denied the right to rejoin his case, the learned State Attorney conceded to it. She, however, argued that it was a matter of practice and not of law adding that even the appellant did not ask for such an opportunity. In any case, she contended that the appellant was not prejudiced since the 1st appellate court considered and determined all the grounds of appeal.

As to whether the case was proved beyond reasonable doubt, she argued that it was. She said, PW2 explained in details how she was raped by the appellant. She explained the circumstances of the place

where the incident took place and she pointed at him for him to be arrested and identified him in court.

On being prompted by the Court on the propriety of the sentence, Ms. Makakala submitted that the sentence of 30 years imprisonment imposed to the appellant was not proper under the circumstances of the case. She urged the Court to enhance it to life imprisonment, having regard that the offence was committed to a child aged 8 years old.

We propose to begin with the issue relating to the defective charge sheet. The complaint has two limbs, that is, the use of the word "carnal knowledge" while it is not stated in the enabling law; and the omission of the word "unlawful" in the particulars of the offence.

We have examined the charge sheet and we acknowledge that, indeed, the word "carnal knowledge" is used in the particulars of the offence though it is not stated in the law. We have also noted that the word "unlawful" is omitted in the particulars of offence. However, we agree with the learned State Attorney that the term "carnal knowledge" used in the particulars of offence simply means "sexual intercourse". In **Blacks' Law Dictionary** Eighth Edition Bryan A. Garner at page 226, the term "carnal knowledge" has been defined to mean "sexual intercourse especially with an under age female". In our considered view

the said term clearly shows the kind of the offence alleged to have been committed.

On the other hand, non-inclusion of the word "unlawful" in the circumstances of this case does not make the charge defective. This is so because inclusion or non-inclusion of such word is immaterial in a charge of rape involving a child aged 8 years. As was rightly submitted by the learned State Attorney, there is no lawful sexual intercourse to a child aged 8 years old.

In any case, in the matter at hand, all the relevant provisions for the offence the appellant was charged with were mentioned. And, the record shows that the charge was read over to him and he pleaded not guilty. Various witnesses testified to prove the offence and he cross examined them and he defended himself with the aid of two other witnesses. This shows that he understood the nature of the offence. After all, there is no indication that the appellant was prejudiced as he did not raise it as a complaint in the course of the trial. This ground is, therefore, devoid of merit and we dismiss it.

With regard to the appellant's complaint relating to the non-compliance with section 210 (3) of the CPA, we find it instructive to first reproduce the said provision which states as hereunder: -

*"The magistrate shall inform **each witness** that he is entitled to have his evidence read over to him and if the witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence".* [Emphasis added]

To our understanding, this provision requires the magistrate to inform the respective witness of his/her right to have his/ her evidence read over to him/her. This includes the accused person after having testified as a witness. In this case, we acknowledge that indeed, there is no indication in the record of appeal that the evidence of each prosecution witness and that of the appellant together with his witnesses was read over to the respective witnesses. Nevertheless, much as the record is silent if the appellant asked for his evidence to be read over to him, he has not specified any piece of evidence that might have not been recorded so as to impeach the court's record. His contention that he did not understand the charge to the extent of being remorseful during his mitigation, in our view, is not acceptable since it is not part of evidence. At most, we think that it was a mere afterthought.

If we may go further and ask ourselves whether non-compliance of section 210 (3) of the CPA prejudiced the appellant to the extent that it occasioned miscarriage of justice, our answer would be in the negative. This is so because such anomaly can be cured under section 388 of the CPA. On this we are guided by the case of **Flano Alfonce Masalu @ Singu v. Repubic,** Criminal Appeal No. 366 of 2018 (unreported) where, the Court when faced with akin situation had this to say:

> *"At any rate, based on the principle of the sanctity of the record we are inclined to hold that the record is accurate and unimpeachable. In the premises we do not think that this infraction occasioned a failure of justice and so, we hold that it is curable under section 388 of the CPA. In the result, we dismiss this ground of appeal."*

With the aforesaid, we find this ground to be baseless and we dismiss it.

We now turn to the issue that the evidence of PW1 and PW4 is marred with discrepancies as regards the dates of detection of the offence, reporting to the police and examination of the victim. PW1

testified as shown at page 10 of the record of appeal that it was on 6th August, 2016 when he was told by the victim that she was raped by the appellant but he did not state when the offence was reported to the police. As to when the offence was reported to the police, PW3 does not show the exact date but she said that it was on 12th June, 2016 when she received the police case file and issued the PF3 to the victim. PW4 testified that he examined the victim on 12th September, 2016 but did not say when the offence was discovered or reported.

In the first place, it is noteworthy to state here that even the charge sheet does not refer to a specific date on which the offence was committed or detected but rather it covers the period between January, 2016 and August, 2016. Apart from that, it is not disputed that the said witnesses testified as such. However, it seems to us that each witness had an occasion to attend the victim on different dates depending on what/how he/she was involved. Though PW1 became aware of the offence on 6th August, 2016, PW3 was assigned the case on 12th June, 2016; and PW4 examined the victim on 12th September, 2016, there cannot be said that there was discrepancy because they did not refer or differ on a similar event that happened at a specific time. In our view, a discrepancy would have arisen/happened if the witnesses gave different

accounts on the same event or aspect. This was not the case in the matter at hand.

At any rate, the law regarding contradictions/ discrepancies is that it is not every discrepancy in prosecution case that will cause the prosecution case to flop - See **Said Ally Ismail v. Republic,** Criminal Appeal No 242 of 2010 (unreported) cited with approval in **Bakari Hamis Ling'ambe v. Repulic,** Criminal Appeal No 161 of 2014 (unreported). In any case, assuming there was a discrepancy on the dates, it is our considered view that such discrepancy is minor as it does not go to the root of the matter. Similar position was taken in the case of **Armand Guehi v. Republic,** Criminal Appeal No 242 of 2010 (unreported) in which the Court cited with approval the case of **Dickson Elia Shapwata v, Republic,** Criminal Appeal No 92 of 2007 (unreported) and stated as follows:

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

In this regard, this ground also lacks merit and we dismiss it.

We now turn to the complaint that the appellant was not given an opportunity to rejoin his case on appeal. It is true that, indeed, the appellant did not get a chance to make his rejoinder after the learned State Attorney had submitted against the appeal. The right to be heard or fair trial is well articulated under Article 13 (6) (a) (ii) of the Constitution of the United Republic of Tanzania Cap 2 R.E 2002 which provides as follows:

> *When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

(See also **Mbeya, Rukwa Autoparts and Transport Ltd v. Jestine George Mwakyoma** [2003] TLR 251).

In this case, the record of appeal bears out that, the appellant had indicated and prayed to the court to consider his memorandum of appeal and the written submission thereof. The learned State Attorney submitted on the grounds of appeal as well as the written submission and the 1st appellate judge considered the arguments from both sides.

Though the 1st appellate judge did not and, we think in advertently, afford the appellant with the opportunity to rejoin his case, we think, the appellant himself ought to have asked for that opportunity from the court. That, unfortunately, he did not do. But again, he also ought to complain on which submission he thought was not recorded. In any case, it is our considered view that, since the appellant has not specifically shown as to what was not dealt with, this ground lacks merit and we dismiss it.

On the issue whether the appeal was proved beyond reasonable doubt, we go along with the learned State Attorney to answer it in the affirmative. PW2 explained clearly on how she knew the appellant by the name of Paul as shoe maker and water seller in that area. She also explained on how the appellant lured her by giving her Tshs. 100/= to Tshs. 200/= and some chips and raped her in a semi-finished house (pagala). She also made a clear account on circumstances of the place where the said rape was committed that it was the place where the appellant kept his equipment for his job of sewing shoes. PW2's evidence was corroborated by DW2, whose office was adjacent to the appellant's place where he used to sew shoes and that he was a water seller. Not

only that PW2 also mentioned him to PW1 and pointed at him at the place where he went to fetch some water and identified him in court.

We are alive that PW2 gave her evidence while she was a child of tender age and she gave it without oath after *viore dire* test was conducted though, we think, was not required. The appellant took an issue that she testified without giving a promise of telling the truth. Having looked at the record of appeal we agree that the witness was unable to know the meaning of oath. Neither was the promise to speak the truth made by her regard being that her testimony was recorded after the amendment of section 127(2) effected through Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (Act No. 4 of 2016) which introduced a requirement of such witness to promise to speak the truth. However, we think each case has to be considered on its own circumstances.

In this case, among the questions that PW2 was asked was *"...Unajua kusema ukweli? And she answered affirmatively. "Ndiyo..."* Then, the court made a finding that she knew the meaning of speaking the truth and proceeded with recording her evidence. In our view, much as the record of appeal does not show that the witness made the promise, so long as the witness indicated to the court to know the

meaning of telling the truth, that was tantamount to promising that she will tell nothing but the truth.

Of course, her evidence in terms of section 127 (7) of the Evidence Act could be relied upon to convict without any corroboration if the court is satisfied that the witness is telling nothing but the truth. On top of that there is cardinal principle that the true and best evidence of a sexual offence is that of the victim (**See Selemani Makumba v. Republic,** [2006] TLR 379). In this case PW2 gave a cogent evidence on how the offence was committed by the appellant. With the foregoing, we are satisfied that the case was proved beyond reasonable doubt.

The last issue is on sentence. The learned State Attorney argued that the sentence that was imposed against the appellant was illegal and implored us to enhance it to life imprisonment. The appellant urged the Court to do justice. On our part, we agree with the learned State Attorney that the sentence of 30 years for the offence of rape to a child aged 8 years was not proper. Section 131 (2) of the Penal Code is quite settled in that it imposes the sentence of life imprisonment for a person who is convicted with an offence of rape (statutory) specifically when the person to whom the offence is committed is below 10 years old. Thus, it

was not proper for the two courts below to maintain the sentence of 30 years imprisonment.

Hence, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2019, we revise the sentence from 30 years imprisonment to life imprisonment. Consequently, we find the appeal devoid of merit and we hereby accordingly dismiss it in its entirety.

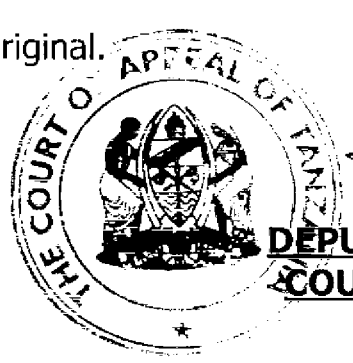
DATED at **DAR ES SALAAM** this 23rd day of October, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 2nd the day of November, 2020 in the presence of the appellant in person unrepresented linked through video conference at Ukonga Prison and Ms. Dhamiri Masinde, learned, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL