IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 416 OF 2019

ATHUMANI ALMAS RAJABU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)
(Muruke, J.)

dated the 30th day of November, 2017
in
Criminal Appeal No. 260 of 2016
.....

JUDGMENT OF THE COURT

14th & 23rd September, 2021

MWAMBEGELE, J.A.:

In the District Court of Ilala, the appellant Athumani Almas Rajabu, was charged with and convicted of rape and unnatural offence contrary to, respectively, sections 130 (1), (2) (e) and 131(1) and section 154 (1) (a) and (2) of the Penal Code, Cap 16 of the Revised Edition, 2002 (the Penal Code). He was sentenced to life in prison in respect of each count. He was also ordered to compensate the victim at tune of Tshs. 5,000,000/=. His first appeal to the High Court was not successful. Undeterred, he has appealed to the Court.

The facts giving rise to the appeal, as brought by the prosecution at the trial, may briefly be stated. The victim, a girl aged thirteen, who we shall refer to as LS to hide her true identity, was a house help of the appellant (aged nineteen) and his wife. The appellant and his wife had one kid going by the name of Tariki. The foursome lived in a single room and used to sleep together in the same bed. The appellant's wife used to wake up early at about 05:00 hours every morning to attend to business endeavours in the vicinity leaving behind in bed the appellant, the victim and Tariki. The prosecution story has it that, in diverse dates in the months of October and November 2014, after the appellant's wife left, the appellant used to rape and sodomize the victim. That heinous act proceeded for some days to the ignorance of the appellant's wife until 09.12.2014 when the victim let the cat out of the bag when she visited her uncle, a certain Mathias Alphonce (PW2). The victim told PW2 that she would not go back to where she resided because the appellant used to rape and sodomize her. PW2 reported the matter to the ten-cell leader and the matter was consequently brought to the attention of the police at Stakishari Police Station. The victim was given a PF3 and taken to Mnazi Mmoja Hospital where Wagesa Wambura (PW4), a medical doctor, medically examined her. He later filled-in the PF3 which was tendered and

admitted in evidence as Exh. P1. The appellant was finally arraigned, found guilty, convicted and sentenced in the manner alluded to above.

His appeal to the High Court to assail the conviction and sentences of the trial court, as intimated above, was unsuccessful, hence this second and final appeal to the Court.

The appeal to the Court is comprised in two memoranda of appeal; the substantive memorandum of appeal which contains ten grounds of appeal was lodged in the Court on 21.10.2019 and the supplementary memorandum of appeal which has eight grounds was lodged on 18.01.2021. However, the eighteen grounds may be condensed into only four grounds; that is:

1. The learned first appellate Judge erred in law in upholding punishment which was illegal;

2. That the first appellate Judge erred in law and fact by upholding the appellant's conviction as the trial court relied on the unprocedural testimony of PW1, a child of tender age, who was sworn by the trial court before conducting a *voire dire* test;

3. That, the learned first appellate Judge erred in relying on the PF3 (Exh. P1) which was tendered and admitted in evidence but its contents were not read out in court after admission; and

4. That, the first appellate Judge grossly erred in holding that the prosecution proved its case against the appellant beyond reasonable doubt.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Nancy Mushumbusi, learned State Attorney, assisted by Ms. Theresia Mtao, also learned State Attorney.

When called upon to argue his appeal, the appellant simply adopted the two memoranda of appeal and a nine-page written statement he earlier filed in support of his appeal as part of his oral submissions. He asked the Court to invite the respondent to reply to his grounds of appeal after which, need arising, he would make a rejoinder.

Rebutting, Ms. Mushumbusi supported the appeal. She was very brief in her response but focused. It was her contention that the case for the prosecution fell short of the requisite proof beyond reasonable doubt. She submitted that the case for the prosecution was highly dependent on

the evidence of the victim who testified as PW1. However, Ms. Mushumbusi argued, the evidence of the victim was taken on oath but without a *voire dire* test being conducted prior to the taking of that evidence as she was a child of tender years. That reduced the evidence of the victim to an unsworn evidence which would require corroboration for it to found a conviction. She buttressed this proposition with our decision in **Said Salum v. Republic**, Criminal Appeal No. 499 of 2016 (unreported) in which we supposedly so held.

Ms. Mushumbusi argued further that there was no evidence on record to corroborate the evidence of PW1. She referred us to the PF3 that it was tendered in evidence by the public prosecutor without being read in court after admission. She prayed that it be expunged. She argued further that the evidence of PW4 would not help to corroborate the testimony of the victim because it does not point out that it was the appellant who raped her. She added that PW2 and WP 1670 D/ Ssgt Magreth (PW3) were just told of what had transpired; their evidence would thus not corroborate the evidence of the victim.

In rejoinder, given the response of the respondent Republic which supported his appeal, the appellant had nothing to add. He simply prayed that he should be released from prison.

We will determine this appeal basing on the condensed four ground reproduced above. The appellant complains in the first ground of appeal above, which is the subject of the first ground in the substantive memorandum of appeal and the second ground in the supplementary memorandum, that the first appellate court upheld the sentence imposed on the appellant which was illegal. We have closely examined this ground and are of the view that the complaint has some justification. The appellant, as already stated at the beginning of this judgement, was arraigned on two counts. The first count was rape and the second one was unnatural offence. The age of the victim at the time the offences were committed was thirteen years. Thus on conviction in respect of the first count, the appellant ought to have been sentenced to a prison term of thirty years in terms of section 131 (1) of the Penal Code and not life imprisonment as the trial court did. The sentence in respect of the second count was appropriate in terms of section 154 (2) of the Penal Code. The complaint the subject of these two grounds as condensed in the first ground above justified to that extent. We allow it.

The second ground, which is the subject of the fourth ground in the substantive memorandum and the fourth ground in the supplementary memorandum, hinge on the testimony of PW1 who testified under oath without taking homage to the provisions of section 127 (2) of the Evidence Act. The law as it stood then; the moment the witness was testifying, dictated that it was mandatory that evidence of a child of tender years be taken after compliance with that section. Failure to comply with the section was fatal. If an authority is sought for this standpoint is the decision of a full bench of this Court in **Kimbute Otiniel v. Republic**, Criminal Appeal No. 300 of 2011 (unreported). That full bench was convened to resolve the issue of conflicting decisions of the Court on the legal and evidential consequences of the partial compliance or omission by a trial court in conducting a *voire dire* of a child of tender years under section 127 (2) of the Evidence Act. Having discussed the conflicting decisions at length, the full bench, on the omission to adhere to the *voire dire* requirement under section 127 (2) of the Evidence Act, held:

> *"... where there is a complete omission by the triai court to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted."*

The decision of the full bench of the Court settled the position with regard to conflicting decisions that were in place prior to it. Thus the position that evidence of a child of tender age taken without conducting a *voire dire* is fatal and such testimony must be discounted has been followed ever since **Kimbute Otiniel** was pronounced – see, for instance, **Charles Mlande v. Republic**, Criminal Appeal No. 270 of 2013 and **David Halinga v. Republic**, Criminal Appeal No.12 of 2015 (both unreported).

In the case at hand, that is what exactly transpired. The trial court, as appearing at p. 10 of the record of appeal, PW1 introduced herself that she was fourteen years of age but the learned trial magistrate went on to record her testimony without conducting a *voire dire* test in terms of section 127 (2) of the Evidence Act. That was fatal and, as a result, we discount the testimony of PW1. Having so done, the remaining evidence is only skeletal and cannot found a conviction against the appellant. We shall demonstrate.

PW2 was a witness who was told by PW1 as to what transpired. Without the evidence of the said PW1 who told him, his testimony is reduced to hearsay evidence, it cannot be relied upon. Likewise, the

testimony of PW3 who investigated the case falls in the same basket with that of PW2, for she also depended on what was narrated to her by PW1 and PW2. Her, in the absence of the testimony of the victim, testimony is therefore not reliable as well. With regard to the testimony of PW4, his evidence is as good as nothing, for even if it is proved that the victim was carnally known through sexual intercourse and against the order of nature, it does prove that it was the appellant who did that.

The episode with regard to the PF3 is also sad, as it was tendered by the public prosecutor in the course of the testimony of PW2. It does not augur with the sense of reason why the document was tendered in the course of PW2 testifying; not the victim, not the investigator (PW3) and not PW4; the medical personnel who medically examined the victim and filled the same. Even if we gloss over the anomaly, which indeed seems to us not fatal, the fact that it was the public prosecutor who tendered it is inexcusable. This is the subject of the third ground of appeal, to which we now turn.

It is evident in the record of appeal, at p. 18, that the PF3 was tendered in evidence by the public prosecutor in the course of PW2 testifying. That was an error. We have pronounced ourselves in a number

of our decisions that the course of action is fatal – see: **Sospeter Charles v. Republic**, Criminal Appeal No. 555 of 2016, **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2012 and **Tizo Makazi v. Republic**, Criminal Appeal No. 532 of 2017 (all unreported). In **Sospeter Charles** (supra) we grappled with an identical scenario and relied on our previous decisions in **Frank Massawe v. Republic**, Criminal Appeal No. 302 of 203 of 2012 and **DPP v. Festo Emmanuel Msongaleli and Nicodemu Emmanuel Msongaleli**, Criminal Appeal No. 62 of 2017 (both unreported) to hold that as the prosecutor is not a witness sworn to give evidence, he cannot assume the role of a witness. Likewise, in **Tizo Makazi** (supra), we also held that it is settled position that a prosecutor is not competent to tender exhibits because he cannot be both a prosecutor and a witness at the same time. Similarly, in **Thomas Ernest Msungu @ Nyoka Mkenya** (unreported) the prosecutor tendered in evidence the ballistic expert's report. In buttressing the point that the prosecutor, in tendering the ballistic expert's report, went beyond the borders of his empire, we observed:

> *"Under the general scheme of the Criminal Procedure Act ... particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a*

prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report."

On the authorities discussed above, we expunge Exh. P1 from the record. This done, the question whether it was read out after admission in evidence, in our view, becomes redundant. The complaint in the third ground of appeal has merit. We allow it.

The last ground seeks to assail the first appellate court for upholding the decision of the trial court in which the prosecution failed to prove the case beyond reasonable doubt. For the reasons we have endeavoured to assign hereinabove, we find difficulties in answering this ground positively. As it appears to us, the evidence brought by the prosecution fell short of the standard of proof required to prove the guilt of the appellant beyond reasonable doubt. Consequently, we find merit in this ground as well.

In the upshot, we allow the appeal and quash the conviction and set aside the sentences imposed on the appellant. We further order that the appellant Athumani Almas Rajabu be released from prison custody forthwith unless he is held there for some other lawful cause.

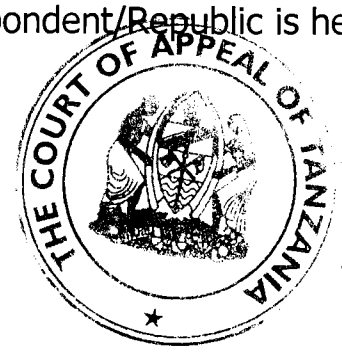
DATED at **DAR ES SALAAM** this 20th day of September, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 23rd day of September, 2021 in the presence of the Appellant in person appeared through video facility linked from Ukonga Prison and Ms. Nura Manja, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL