IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI,.)

CRIMINAL APPEAL NO. 139 OF 2010

SIMON MWAKALINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Lukelelwa, J.)

dated the 15th day of December, 2009
in
(DC) Criminal Appeal No. 50 of 2009

JUDGMENT OF THE COURT

29 June, & 5 July, 2011

MBAROUK, J.A.:

The appellant, Simon Mwakalinga was charged and convicted in the District Court of Mbeya at Mbeya of the offence of attempted rape contrary to section 132(1) of the Penal Code, Cap 16 of the Laws as amended by section 4 of the Sexual Offences (Special Provisions) Act No. 4 of 1998. He was sentenced to thirty (30) years imprisonment. Aggrieved by the conviction and sentence, he unsuccessfully appealed to the High Court (Lukelelwa, J.) at Mbeya. Still aggrieved, the appellant has filed this second appeal.

In this appeal the appellant appeared in person unrepresented. The respondent Republic was represented by Mr. Vicent Tangoh, learned Senior State Attorney.

The appellant preferred six grounds of appeal which are as follows:-

1. That, PW1, PW2 and PW3 were relatives and the evidence was not corroborated by any other independent witness.
2. That, the appellant was not given a chance to object the PF3 when tendered as an exhibit before the trial court.
3. That, the doctor who wrote the PF3 was not called to testify.
4. That, the learned trial magistrate and the High Court Judge erred in law for convicting the appellant for the offence of attempted rape, while he had seen that rape was not proved against the appellant.
5. That, the learned trial magistrate and the High Court Judge erred by convicting the appellant by relying on the weakness of the defence case.
6. That, the charge against the appellant was not proved beyond reasonable doubt, and it was a fabricated case.

Before going to the grounds of appeal, we think it is important at this juncture to briefly examine the evidence upon which the appellant's conviction was based and sustained by the first appellate court. The prosecution evidence was that, on 11th December, 2001 at about 11.00

hrs Yolanda Adolf (PW1) a girl aged seven (7) years old was asked by her grandmother, Telezia Shema (PW3) to buy sugar from a shop. PW1 was accompanied by her brother Alex Suke (PW2) a boy aged six (6) years old. On their way, they met the appellant who asked PW1 to follow him to buy avocados. Thereafter, the appellant sent PW1 to an unfinished house, where he put off PW1's underpants and put off his trousers and took out his penis, pushed PW1 down and lied on top of her. PW1 stated that, the appellant's penis entered into her vagina. She further stated that, she failed to shout for help because the appellant closed her mouth. She contended that, it was when her grandmother (PW3) came seeking her, that the appellant heard PW3's voice and she was left by him. Having seen PW1, PW3 asked where she was, and PW1 told PW3 that she was with the appellant and narrated the whole ordeal to PW3. PW3 testified that, after she had heard PW's ordeal, she went to see PW1's mother. Together they examined PW1 and found her underpants wet with male sperms, and they reported to the police station where they were given a PF3 form and went to the Meta Referral Hospital for check up. PW3 further said the appellant was later arrested by the police.

In his defence, the appellant categorically denied to have attempted to rape PW1. He claimed to have only been arrested on 13-

12-2007 while he was at his work place and sent to central police post by police officers.

At the hearing of the appeal, the appellant opted to adopt what he had stated in his grounds of appeal. He had nothing further to add, understandably so being a lay person.

On his part, Mr. Tangoh, from the outset opted to support the appeal. He started by submitting on the 1st ground of appeal. He submitted that, there is no law which prohibits the evidence of relatives to be discredited. Hence, he urged us to find the 1st ground of appeal with no merit.

We agree with Mr. Tangoh on this point. It is a fact that, PW1, PW2 and PW3 were family members. However, generally, there is no rule of practice or law which requires the evidence of relatives to be discredited, just because they testified while all of them are family members. Such evidence may be discredited if there is good ground to do so. The decision of this Court in the case of **Mustafa Ramadhani Kihiyo v. Republic**, [2006] TLR 323 and **Ndege Koa v. DPP,** Criminal Appeal No. 34 of 2008 (unreported) support the argument. For that reason, we are of the considered opinion that the 1st ground of appeal is without merit.

Thereafter, Mr. Tangoh argued the 2nd and 3rd grounds together. He submitted that, it is true that section 240(3) of the Criminal Procedure Act was not complied with by the trial court for not having informed the appellant of his right of calling a doctor who wrote the said PF3. He said the record shows that, the PF3 was wrongly tendered in court by PW3 who was not the author of that document. However he said as long the trial court did not rely on it, it did not prejudice the appellant, there is no need to expunge it.

We agree with Mr. Tangoh, in what he said, but in addition what this Court had said in the case of **Dismas Kabaya Milanzi v. Republic**, Criminal Appeal No. 218 of 2005 (unreported) that:

> "Since section 240(3) is there to safeguard the interests of the accused, evidence, admitted contrary to the provisions will be expunged if it is prejudicial to the accused. If it is not, it need not be expunged".

In the instant case, the evidence found in PF3 (exhibit P1) shows that the doctor had opined that the victim's hymen was intact, whereas PW1 and PW3 testified to the effect that PW1 was raped. We think that

the PF3 tendered by PW3 did not prejudice the appellant, due to the circumstances which are to be explained later in this judgment. In the event, and following the spirit in the case of **Dismas Kabaya Milanzi** (supra), we do not see the need to expunge the PF3 as it did not prejudice the appellant.

Thereafter, Mr. Tangoh argued on the 4th ground of appeal, by submitting that, there was variance between the allegation in the charge sheet and the testimony of PW1 who was the victim. He said that where as the charge sheet alleged that there was an attempt to rape, the evidence of PW1 (who was the victim) and PW3 testified that PW1 was raped by the appellant. Mr. Tangoh, stated that this shows how the prosecution witnesses were not telling the truth. He contended that, this supports the 6th ground of appeal to the effect that the case against the appellant was fabricated. For that reason, he urged us to find PW1 and PW3 not credible witnesses.

We accept that there is a variance between the charge sheet and the evidence on record of PW1 and PW3 who were the main witnesses relied by the prosecution. We think, PW1 could not have been telling the truth that the appellant raped her by actually inserted his penis into her vagina when her hymen was totally intact. The appellant was therefore entitled to the benefit of these genuine doubts.

Mr. Tangoh then reverted to the issue of the voire dire test that was conducted to PW1 and PW2 who were children aged 7 and 8 years old respectively at the time they gave their evidence before the trial court. He said, the voire dire test was not conducted in compliance with section 127(2) of the Evidence Act. In support of his argument, he cited to us the case of **GODI KASENEGALA v. REPUBLIC**, Criminal Appeal NO. 10 of 2008 (unreported). He then urged us to expunge the evidence of PW1 and PW2 for contravening the requirements of section 127 (2) of the Evidence Act.

There is no doubt that the record shows that the voire dire test conducted to PW1 by the trial magistrate did not comply with the requirements of section 127(2) of the Evidence Act. At page 6 of the record, the trial magistrate started recording the voire dire test as follows:-

> "**PW1:** Yolanda Adolf
>
> **Ability of Child:** She is std three at Mabatini Primary School.
>
> **Court:** Do you understand the meaning of taking oath.

PW1: To tell the lie is a sin.

Court: You got knowledge where?

PW1: On the Church, that's if I am talling the lying, I will be fired.

Court: You never tell the lying to the court

PW1: Yes I will tell the truth.

Court: I have conducted a voire dire test and came out with the finding that the child does not understand means of an oath but she understand the knowledge and importance of speaking the truth."

In the case of **Kinyua v. Republic** [2002] 1KLR 256 quoted with approval in the case of **Godi Kasenegala** (supra) the voire dire test has two steps to be taken and summarized as follows:-

> "(a) The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court

immediately the child witness appears in court...

(b) **If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court will proceed to record unsworn evidence from the child witness. Further in John Muiruti v. Republic** [1983] KLR 445 this court reemphasized, inter alia that:-

(2) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(9)....The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding the duty to tell the truth" [Emphasis is ours].

In the instant case, the steps as summarized in **Kinyua v. Republic** (supra) were not fully complied with when the trial magistrate conducted the voire dire test to PW1. The same happened to PW2 who was a child aged 8 years old. The trial court did not record whether PW1 possessed with sufficient intelligence to satisfy the reception of her evidence. That was surely a defect. In the event, we are forced to expunge the evidence of PW1 and PW2. Also see the decisions of this

Court **in Kashana Bayoka v. Republic**, Criminal Appeal No. 176 of 2004, **Omary Kurwa v. Republic**, Criminal Appeal No. 89 of 2007 and **Wilbard Kamangano v. Republic** Criminal Appeal No. 235 of 2007 (all unreported) to name but a few.

Having expunged the evidence of PW1, Mr. Tangoh said, we remain with the evidence of PW3. However, he submitted that, standing on its own, it cannot prove the offence of attempted rape preferred against the appellant.

We fully agree with Mr. Tangoh that, standing on its own, the evidence adduced by PW3 cannot prove the offence of attempted rape against the appellant. This is because, apart from our finding above on her credibility, she was not an eye witness to the offence allegedly committed by the appellant. Even her evidence that she found the underpant of PW1 wet with sperms in not sufficient evidence to connect the appellant with the offence of attempted rape.

Apart from all that, just by the way we have found it pertinent to examine an irregularity to which we think, we cannot close our eyes. This is section 214(1) and (2) which states thus :-

S. 214(1)

"where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercise jurisdiction may take over and continued the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he consider it necessary resummon the witnesses and recommence the trial or committal proceedings.

(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction w as had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial."

The record shows that all the evidence of all the prosecution witnesses (PW1 PW2 and PW3) was taken by P. Kalala, RM and thereafter E.B. Luanda, RM took over and continued to take the evidence of the defence. We are aware that the law does not strictly demand that the second or subsequent magistrates should recall the witnesses who had testified before the preceding magistrate either for testifying afresh or further cross examination. However, we are of the considered opinion that each case must be decided on the basis of its own peculiar facts. In a case, like the present one, whose determination depended principally on the credibility and indeed the competence of the key prosecution witnesses to testify, prudence and the interests of

justice required the second magistrate to exercise his discretion judicially and resummon those witnesses. It is unfortunate that even the High Court did not address itself to this fact in order to satisfy itself as whether or not the appellant was not materially prejudiced by this change in magistrates.

For the reasons stated herein above, we find that, if the trial magistrate and the first appellate judge had considered closely the discrepancies we have shown, they would have come to a different conclusion.

In the event, we allow the appeal, quash the conviction and set aside the sentence of thirty (30) years imprisonment. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED at **MBEYA** this 5th day of July, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

W.P. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL