

TANZANIA / JUDGMENT

20180820 TZHC Mwanza

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20 August 2018

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I IN THE HIGH COURT OF TANZANIA I AT MWANZA APPELLATE JURISDICTION I He
CRIMINAL AP.PEHL I NO 45 o-F 201s {Original Criminal Case No 97 Of 2016 Of The District Court
Of Misungwi District At Misungwi Before Mkisi PDRM} . I BAHATI DAUDI
APPELLANT I VERSUS . I . THE REPUBLIC RESPONDENT I I

JUDGMENT

25.07.2018 & 20.08.2018 . Matupa,J. The appellant was convicted with one count of rape contrary to section 130 (1) (2) (e) and 131 (~) of the Penal Code. He was also convicted under section 5 of the Education Act, no 25 of 1978 Government . . ' notice 266 published on 05.09. 2013. The facts of the case are as follows. That the appellant, on the unknown 1date of December, 2015 at Usagara village within Misungwi district in Mw~nza region had carnal knowledge of I I i the one suzana Kisanga a girl of sixteen years who was a school girl and II impregnated her. The appellant was sentenced to a term of thirty years I . imprisonment, in respect of the both ,counts.The court also directed that the ~entences should run concurrently. The appellant was dissatisfied with the decision of the trail court. He has 'appealed to this court against both, the conviction and sentence. I The appellant has filed a petition, whic~ contains the following grounds: . I

1. That the charged offence against; the appellant was not proved I . beyond reasonable doubt too contradicted on the date between charge and evidence adduced, further was remoteful.
2. That the age of PWl was not proved to the standards of law . . I . whereas no birth certificate was tenderedas to prove whether she was under eighteen years as claimed. I
3. That according to thefact of evidence by PWJ Clinical officerhe I made a laboratorytest PWJ and found to attained the age of I. twenty years old on ltfh May 2016 I i ;
4. That without prejudice to foregoing the offence proof rape charged I against the appellant had no legs to stand since there was consent ·1 between as per PWl evidence. 1 2 I
5. That there was no any school admission book was tendered in court to probe whether P/w1 was a student of Sanjo Secondary () , J school and registered therein the trial court was· acted on mere .saying uncorroborated and cooked •

6. That the prosecution failure to establish or prove that the appellant escaped from his locality promptly after the charge of rape and impregnating a school girl school girlinstituted against No VEO/MEO testify on the effect to had an information of tracinghim due to charge
7. That the chain of custodyupon specimen taken DNA test was neither established nor the person/ expert alleged to collect it did not turn to testify thus the process was doubtful unbelievable and unreliable as was tempered wit. At the hearing of the appeal, Mr. Mutalemwa Advocate, represented the appellant and MS. Ajuaye Bilishanga learned Senior State Attorney represented the republic, the respondent herein. I allowed the learned counsel to argue one additional ground of appeal on the question of procedure. The appellant contended that the trial magistrate did not sign after every script of evidence of witnesses. This omission rendered the unsigned scripts of evidence unauthentic. Also the impugned manner of recording the evidence offends the procedure laid down under section 210 of the Criminal Procedure Act. According to the learned counsel, although the section relates to trials before subordinate
- I Courts, it can be emulated for trials before the High court, as was done by the Court of Appeal in the case of Yohana Mussa Makubi and another
- I I . versus The Republic Criminal Appeal no 556 of 2016 (Mwanza Registry) (Unreported). In that case the trial was before the High court, while the present trial was conducted by the subordinate court. Hence section 210 . I . properly applied. The learned Senior State Attorney conceded to the lapse. I have revisited the record myself. What transpired is this, the trial magistrate signed the testimony of every witness. However, she did not sign separately, examination in chief and cross examination. In terms of the case of Yohana Musa Makubi, it is true that unsigned script of evidence remains unauthenticated. That is the standing instruction of the Court of Appeal. The issue before me is whether the record of the present case, which does not bear separate signature for the examination in chief, cross-examination and re-examination cannot qualify as a signed script of the evidence. The record of evidence of a witness has three parts in terms of sections 146 and 147 of the Evidence Act, Cap 6 of the 2002 Revised Edition Laws of Tanzania, which provides as follows:-

146. Examination of witnesses

- (1) The examination of a witness by the party who calls him is called his examination-in-chief.
- (2) The examination of a witness by the adverse party is called his cross-examination.
- (3) The examination of a witness subsequent to the cross-examination/ by the party who called him is called his re-examination.

147. Order and direction of examinations

- (1) Witnesses shall be first examined:..in-chief, then {if the adverse party so desires) cross-examined, then {if the party calling them so desires) re-examined.

- (2) The examination-in-chief must relate to relevant fact~ but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
- (3) The re-examination shall be directed to the explanation . of matters referred to in cross-examination/ and if new matter is/ by permission of the cou~ introduced in re-examination/ the adverse party may further cross-examine upon that matter.
- (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross- examination and if it does so/ the parti~s have the right of further cross-examination and re-examination respectively.
- (5) Notwithstanding the other provisions of this section the court ma½ in any case1 defer or permit to be deferred any r. ::, examination or cross-examination of any witness until any other witness or witnesses have been examined-in-chief, cross-examined ,I (~;J or, as the case may be, further examined-in-chief or further cross- examined. // From the foregoing, examination of a witness is complete after re- examination. Where the record of a witness is deferred for any reason as is allowed under subsection (5) of section 147 or a case is adjourned, I think, the record of the case for the time being, ends at the point of interruption on adjournment, and it resumes when the proceedings are recalled to order. In such a case, signing of the record of the proceedings at that time becomes necessary, in order to make it authentic, as at the time it stops. Else, the record of the evidence of the witness does. not stop after
 - I examination in chief or for that matter, after cross-examination. There is another reason for this position I have decided to adopt. The testimony of a witness starts with an oath. Throughout the time the witness remains on oath, the testimony continues to remain authentic by the fact of the oath taken. It is only authenticated after the witness finishes giving evidence the subject of the oath. The failure to sign a script of the . evidence in chief, cross-examination or re- examination does· not make the record unauthentic. 6 The learned counsel for the appellant has made reference to the case of Yohana Musa Makubi and anotherlas authority for the proposition that, · failure to sign the evidence of every witness is an incurable irregularity. I am bound by that dedsion. However, lince I have shown that in this case the trial ·magistrate signed the eviden1e of all the witnesses, I do not find the lapse in signing parts of it, that is, the examination in chief, cross- 1 examination · and re-examination to ~e fatal. The additional ground is I therefore, dismissed. II . I. On the first ground of appeal, Mr. M,utalemwa contends that there was material contradiction as to the timJ the offence was committed. The I particulars of the offence according to the first count are as follows:- "That Bahati s/o Daudi charged at the unknown day and place of December, 2015 at Usagara villaJe within Misungwi district in . I . Mwanza Region did commit sexual inter course to one Suzana D/o Kisanga 16 years without her conseht. " The particulars of the charge on the secoJ count are as follows:- "That Bahati s/o Daudi is charged on the same date and place within Misungwi District in Mwanza Region did impregnate a l school girl one Suzana d/o Kt~anJf of Sanjo Secondary School ' while knowing that is against the law,. " I 7 The evidence of the case is tliat ·according to the said Suzana I Kisanga, who featured as

PW1, the incident took place during the months of November and December, 2014. The relationship continued until the month of May, 2015 when the girl realized that she was missing her 'menstruation periods. At first, the appellant brushed aside, the information I by the girl, that she was pregnant. But as the girl continued to miss her menstruation periods, he took her to a dispensary for pregnancy test, which was confirmed. By that time, the pregnancy had advanced. The I . parents realized the condition of the daughter at about this time. They reported the matter to the school. The Lttness tendered a certain medical I treatment card as exhibit P1 against the protest of the appellant. I will I revert to this in passim at some stage of My judgment. It is clear from the foregoing therefore that, there is variation between the charge and evidence. Whereas the appellant was charged for an incident which had occurred in thJ month of December, 2015, the evidence relates to an incident which oclurred a year before. I am satisfied that there are contradictions and an inconsistency between the particulars . I .. of the offence and the evidence. The learned counsel argues that the way . . I out here would be to amend the charges. The learned counsel for the appellant is urging the court to find that the inconsistence is fatal. 8 The present case is one of variation between the charge and the evidence, as to the period when the offence was committed. The variation here is whether the offence was committed in Dece~ber, 2015 or 2014. the charge sheet. speaks of the offence, which was committed in the month of December, 2015. As shown, the complainant speaks of the offence, which was committed in the months of November and Decem.ber,

2014. The question here is whether the trial of the appellant can be vitiated by the variance as to the time? Section 234 of the Criminal Procedure Act, directs on procedure in relation to variance between charge and evidence and amendment of charge in the following terms:-

- (1) Where at any stage of a trial it appears to the court that the charge is defective/ either in substance or form/ the court may make such ordet for alteration of the charge either by way of amendment of the charge or by substitution or addition of'a new charge as the court thinks necessary to meet the circumstances of the case unless/ having regard to the merits of the case/ the required amendments cannot be made without injustice/ and all amf! ndments made 'Under the provisions of this. subsection shall be made upon such terms as to the court shall seem just.
- (2) 9
- (3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is . proved that the proceedings were in fact instituted within the time/ if anYt limited by law for the institution thereof. Sub section (3) of the Criminal Procedure Act deals with failure to make amendments of charges in relation to time. The section provides that this is not necessary, where there is variation as to time. I must add that, where the variation as to time, unless it is demonstrably clear, that the appellant has been prejudiced then it is curable in terms of section 388.

- (1) Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent Jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint summon~ warrant charge/ proclamation order, Judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable,, In considering the consequences :of the defects as to the time the offence was committed, I have to consider if at all, the appellant was IO preJudiced. The appellant in his defence, addressed himself to the events of the month of July 2015, which is the period before that stated in the charge. Looking at the scheme of the ~vidence, and the· manner the appella_nt cross-examined the complainant and the mother one Jenipher Kani PW 2. It is clear that the appellant took issues with the time when the incident occurred as on the evidence. I am aware of the case of Peter 1 Ndiema and Nikas Ndiema versus The Republic Criminal appeal number 469 of 2015 (CA) (MZ) in which there was variance between the charge and the evidence in relation to time. The court of Appeal considered the lapse in terms of subsection (3) and decided that, the variance of time was not intended to include even dates of the commission of the offence. i I am satisfied that the appellant was definitely prejudiced by the wrong reference to the year 2015 rather than the year 2014. The learned counsel did not address me on the merits of the offence of rape. It would appear both, the appellant and the learned counsel for the appellant were banking on the evidence of pregnancy to establish the offence of rape. They thus invested heavily on disproving the evidence for the offence of pregnancy to dislodge that of rape. I think they are not correct. 11 The offence of rape is a distinct offence, and it is not predicated on that of causing pregnancy. Whereas it is true that the proof of rape may in C some circumst~nces prove the offence of causing pregnancy, but it may not be always true that pregnancy may result from the rape the -subject of the charge, unless the evidence shows that the only rape happened and there was no other relationship that could lead to the pregnancy. A good exam.pie is the rape of a person in an established relation as was the case in the present case. With this approach, I will deal with the present case. The girl claims that she had a sexual relationship with the appellant, which started in November, 2014 and continued for a considerable period of time. The girl yielded to the persistent persuasion by the appellant. On this, the appellant gave in, after she was enticed with shillings 20,000/=, after which, they had the relationship. It is no doubt that the relationship occurred. As a matter of rule, the victim .is the best witness for the offence of rape. In the present case, parties were agreed to having the relationship. The charge is founded on section 130 (1) and (2) (e) which provides as follows:-
- (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions: 1.2 (a). ..
- (b) ...

- (c) .; . . (d) ... {e)with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more
- years of age and is not separated from the man. The shortfall in the evidence is that, there is nowhere in the script of the testimony of the victim and the mother, where the prosecution sought to establish the age of the girl. It must be appreciated that in a charge under section 130(2)(e) of the Penal Code, the age of a complainant is an ingredient of the offence. If age is not proved, then the offence under the subsection collapses. The matter becomes even more complicated where the evidence is such that the victim agrees that she gave her consent. The accused proposed to the victim and enticed her to submit to the relationship. He made an arrangement for the meeting and at the end, he obtained her consent after passionate efforts. It was imperative for the prosecution to suggest facts that would fit into section 130 (2) (e). Under this section, as said, age is an ingredient of the offence. As such, the age must be proved by evidence. J.3 This, the prosecution did not do, I cannot assume it. As such the offence of rape under section was not made out. ; (. The court also convicted the appellant on the second charge of impregnating a school girl. To this, there are two basic flaws. The first flaw, to which the parties did not make reference, but I have taken the liberty to point out; is the legality of the charge itself. The second count reads as follows:- "Impregnating a school girl c/s 5 of the Education Act no 25 of 1978 Government Notice Published on 05.09.2013. // The charge is clearly intelligible. It is not clear if the framer of the charge wanted to refer to the Regulations or to the Act itself. Section 5 of the Principal Act reads as follows:- "5. for the purposes of discharging his responsibility under this Act; the Minister may- {a). subject to the provisions of any written law in that behalf cause modifications to be made in the development plans of any parastatal organisation engaged in , or whose activities are connected with the provision of educational services or facilities; {b). seek and secure modifications in the educational development plans prepared by managers of private schools; 14 (c). after consulting with the Minister responsible for regional administration/ modify and co-ordinate the development plans of . I local authorities in so far as they relate to the provision education and incorporate those plans in the educational development plans for the whole of Mainland Tanzania/ (d). give to managers of schools directions of a general or specific character regarding the use of public funds by their schools/ (e). order or cause research or inquiry to be carried out into/ or ' I returns to be .made to him relating to/ the various aspects of education and of the provision of education services and facilities for the purposes of ensuring the better provision education; (f). subject to the provisions .of this Act and of any other written law I in that behalf do any other act or thing which in his opinion is designed to or may further the promotion of education/ having . I regard at all times to the national interests and the interests of the people of the United Republic." I . I . Looking at the foregoing section, it is clear that it does not create any offence, let alone that of impregnating a school girl. The appellant was not therefore, convicted on a correct section of the law. The charges were . I ' therefore defective. This is because section 135 (a): I I (a)(i) . A count of a charge or information I shall . commence with a statement of the offence charged, called the

statement of the offence/ (ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence; In the case of Joseph Marando Ikanda versus the Republic Criminal Appeal no 555 of 2015 the appellant was charged under section 130 (1) (e) which is non-existent. The Court of Appeal nullified the proceedings on the ground that the appellant was not accorded a fair trial. The court relied on a range of cases such as *Marekano Ramadhani V. R. Criminal Appeal no 201 of 2013 Abdalla Ally v. R, Criminal Appeal no 253 of 2013* for the position that:-

• • .. Being found guilty on a defective charge, based on wrong and/or nonexistent provision of the law it cannot be said that the appellant was fairly tried in the courts below... In view of the foregoing shortcomings it is evident that the appellant did not receive a fair trial... the wrong and or no citation of the appropriate provisions of the penal code under which the charge was preferred left the appellant unaware that he was facing a serious charge of rape... In that case the trial of the appellant was nullified. This would have taken care of the appeal. However, even on the merits of the appeal, I have also considered the evidence, which the court relied on to convict the appellant. This constituted mainly of the DNA report. The learned counsel 16 for the appellant has challenged it on the ground that the chain of custody in relation to the samples was broken and non-existent all together. They rely on the case of *Twaha Kilbogo versus the Republic Criminal Appeal no 258 of 2016*. Like in the cases under reference, the officer who collected the samples did not give evidence to show that the labeling of the samples tallied those, which formed the subject of investigation. The officer who did the comparison received the samples with a letter from the police officer, intimating that the samples belonged to the appellant and the child. Sections 32, 33 and 34 of the DNA Regulation Act no 2009 prescribes a strict chain of custody for the DNA samples. The only evidence of the custody of the samples came from Fidelis Segumba PWS. According to him, the samples surfaced for the first time at the central Laboratory at Dar es Salaam. The samples found their way to the DNA laboratory by a letter. I - We are not told how were the samples sourced and who transported them to the Sampling Laboratory. Where the chain of custody of samples has not been credibly established, the credibility of the evidence is eroded and cannot be acted upon. The trial court was therefore not entitled to act on the evidence. 17 . . Without the evidence, the only claim is that of the victim. The victim did not claim that the appellant was the only partner she had. The trial court was not under the circumstances, justified in relying on the evidence . . j . to convict the appellant for the offence of impregnating the appellant. The evidence of parentage collapsed with the impugned DNA report. In the light of the evidence, I find it improper to order a retrial on this count. In the upshot, I will allow the appeal, quash the conviction of the appellant and set aside the sentence. I do hereby order that the appellant shall be released from custody, unless he is held there for some other lawful cause. I j I I l8 I j I I Date: 20.08.2018 Coram: Hon. Matupa, J (~ Appellant: Mr Mutalimwa Advocate . . Respondent: M/s Ajuaye Bilishanga Senior State Attorney. B/c: Denis Mjuni Court: The judgment has been delivered in chambers in the

presence of the learned counsel of the respective parties and also in the presence of the th
appellant this 20 day of August, 2018. Right of appeal fully explained. · ~°" ..· ~ S. /J. ·M. G.
Matupa Judge ,. T 0,: /. 19

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Prepared on 13 October 2026 · Esheria