

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 541 OF 2020

BARAKA STEVEN VS THE REPUBLIC

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT MUSOMA (CORAM: LILA, J.A., KENTE, J.A. And MGONYA, J.A.) CRIMINAL APPEAL NO. 541 OF 2020 BARAKA STEVEN..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania, at Musoma) f Kisanva, J.I dated 21st day of October, 2020 in Criminal Appeal No. 63 of 2020 JUDGMENT OF THE COURT 1st July & 12th September, 2024 LILA, J.A.: The appellant was charged and convicted by the District Court of Musoma of rape contrary to sections 130(1), (2) (e) and 131(1) and (3) of the Penal Code, an offence famously termed as "statutory rape" for a reason that consent of the victim is not a relevant factor to consider in proving it. He was sentenced to serve thirty (30) years' imprisonment. His appeal to the High Court had disastrous consequences against him as the High Court, Musoma Registry, not only sustained the conviction, but also enhanced the sentence to life imprisonment. He now seeks to fault the High Court's decision. The victim was said to be eight (8) years old at the time of the occurrence of the incident and testified as PW7. We shall therefore refer to her, interchangeably, as the victim or PW7 so as to disguise her identity in the course of this judgment. It was alleged that the offence was committed on 5/7/2019 at Butasha Village within Butiama District in Mara Region. Eight witnesses featured for the prosecution to prove the charge. According to the victim, it was the appellant who took her from school to his residence, in an unfinished house, having lured her to go and collect her mother's money. Therein, she claimed, she was undressed and, at knife-point, the appellant, after undressing himself, inserted his male organ into her female organ causing her to suffer pains. After the incident, the appellant washed her with water and took her back to school. Due to pains, on the same date, that is on 5/7/2019 at 16:00 pm, she reported the matter to her father one Gimonge Mwikwabe (PW2) and her mother Mgesi Sariza (PW5) while blood was oozing out from her female organ. PW2 and PW5 told the trial court that PW1 was then eight years old having been born on 24/4/2012 and PW2 produced a Certificate of Birth (exhibit P2) to prove so. PW2 checked her and found blood coming out from PW1's vagina and PW7 named Baraka Steven (the appellant) as her ravisher. PW2 took her to Butiama Police Station where they were issued with a PF3 and went to Butiama Hospital where PW1 was medically examined by Dr. Thomas Makuru (PW1). In his examination, he saw bruises and sperms in the victim's female organ which, to him, were sufficient proof that she was penetrated, the finding he endorsed on

the Police Form No. 3 (exhibit PI). On 6/7/2019, PW2 cooperated with other villagers including Moses Msafiri (PW3) and managed to arrest the appellant after PW1 had taken them to the crime scene, at the unfinished house belonging to Mr. Maziba which the appellant was a security guard. While on the way into the unfinished house on 5/7/2019 at 16:00 pm, the appellant and the victim were seen by Veronica Kilikimba (PW4), a petty trader and a neighbour to the house the appellant was guarding whom they greeted as they passed by her. Another person who said he had knowledge of the appellant raping the victim is Godfrey Samson (PW6), who said he was told by one Amos, who did not testify, that someone was raping a young girl in the unfinished house and he made a follow-up and noted that it was the appellant who was raping the girl. He said, he knew him as a person who was guarding and living in the unfinished house after one Kisomolo was terminated from guarding the house because he stole timber. A policeman E 9989 CPL Asukile, visited the crime scene and drew a sketch map (exhibit P3) guided by PW4 who stays in a house neighbouring the crime scene (unfinished house). At the closure of the prosecution evidence, the trial magistrate was of a finding that a prima facie case had been established against the appellant and she required him to enter his defence. Being the sole defence witness, he claimed to have been in church at the material time when one John Godfrey informed him that a young girl had been raped in the house he guards and he decided to go back where he met one Rahabu Zabron who arrested him on such accusation. He also sought to raise a defence of autre fois acquit that he was formerly charged in CC 61 of 2016 and acquitted of the same offence by the High Court (Hon Makaramba X) in which the victim's name was Belta John but has now changed her name to the present one. But, on being cross-examined by the State Attorney, he is recorded to have admitted that the victim in CC 61 of 2016 is not the same in this case and that he had contradicted himself. After conclusion of the trial, the trial magistrate found it established beyond reasonable doubt that the appellant was guilty. As the offence charged is statutory rape in which consent is irrelevant but proof of age and penetration are essential elements, citing the cases of Solomon Masala vs Republic, Criminal Appeal No. 136 of 2012 and Andrea Francis vs Republic, Criminal Appeal No. 173 of 2014 (both unreported), she was satisfied that the victim's age was established through the Birth Certificate (exhibit PE2) that she was under eighteen

(18) years of age. As regards proof of penetration, the trial magistrate relied on the victim's testimony and exhibit PE1 which showed that there were bruises in the victim's female organ. As to who raped the victim, the trial court relied on the evidence by the victim who is the best witness in sexual offences and that she reported and named the appellant as the one who ravished her. She also found relevant the evidence by PW4 that the victim was last seen with the appellant. The trial magistrate dismissed the appellant's defence as having no merit stating that he personally admitted having contradicted himself that the victim in CC 61 of 2016 is not the same as the victim in the instant case. The ultimate result was that, the appellant was convicted as charged and a thirty years' imprisonment sentence meted against him. For almost similar reasons, the appellant's appeal to the High Court could not successfully sail through. Adjudicating on grounds one (1), four

- (4) and six (6), conjointly, that the scientific evidence of DNA report was not tendered, medical examination report was not reliable and that the prosecution case was not proved beyond reasonable doubt, the learned Judge found that the victim's age was proved by persons able to do so citing the case of George Claude Kasanda vs The DPP, Criminal Appeal No. 376 of 2017 citing the case of Issaya Renatus vs Republic, Criminal appeal No. 542 of 2015 (both unreported), that is, the victim herself, by her parents PW5 and PW2, the latter producing a Certificate of Birth (exhibit PE7). As for proof of penetration, applying the guidance in the Courts' decisions in Paul Juma Daniel vs Republic, Criminal Appeal No. 200 of 2017 and Selemani Makumba vs R [2002] T.L.R. 39 that best evidence in sexual offences comes from the prosecutrix, the learned Judge found the victim's evidence, a part of which he quoted, consistent and sufficiently proving so. He also found PW2's evidence to have supported the victim's evidence. Like the trial magistrate, the learned Judge was moved by the victim's conduct to immediately report to PW2 and name the appellant as the culprit as lending credence to the victim's evidence that she was raped by no other person but the appellant and also the testimony by PW4, an eyewitness of the appellant taking the victim in the unfinished house and raped her. Adjudicating on the complaint that the defence evidence was not considered, the learned Judge, besides agreeing with the trial court's finding that the appellant had himself admitted contradicting himself, he went further to hold such complaint as being an afterthought because the appellant did not come out with such defence when the victim (PW7) and her parents (PW2 and PW5) testified by cross-examining them on the claim that the victim had just changed her name from the former one of Belta John. He took such omission as an admission that the victim's name to be a correct one. The sentence meted out to the appellant was also considered and she found it to be illegal, not in line with section 131(3) of the CPA, as the victim was below ten (10) years old. The learned Judge agreed with the learned State Attorney's view and enhanced the same to five imprisonment. Now, the appellant seeks to fault the High Court decision relying on six grievances advanced in a memorandum of appeal lodged on 4/5/2021. Paraphrased, they challenge one; that PW1's expert evidence was biased, two; PW7 evidence was irregularly taken for failure to ascertain that she promised to tell the truth, three; the trial court's proceedings violated the requirements of sections 219(3) and 210(3) of the CPA, four; the trial court wrongly admitted the testimony of PW7 it being unreliable and illegally procured, five; the appellant has been prosecuted twice on the same offence and six; exhibit PEI contained Swahili remarks which were not interpreted before being tendered in court. Fending himself before us, the appellant's elaborations on the complaints were very brief. His complaint in ground one was simply that, only the victim was medically examined by PW1 instead of both the victim and the appellant. To the appellant, that was unfair and signified bias on the part of the Doctor (PW1). In ground two, he elaborated that, the record does not show that the commitment to tell the truth and not lies to the court did not come directly from the victim personally. Instead, he complained, it was the court which noted that she did so. With regard to non-compliance with sections 219(3) and 210(3) of the CPA in ground three (3), he argued that he complained of having hearing problem not being insane and he did not hear the trial court asking the victim whether or not her evidence should be

read out after recording the same. The complaint in ground four (4) is about the evidence by PW7 being recorded in Kiswahili and he did not hear such words during trial. Being charged twice on the same offence he was formerly charged before Musoma District Court (before Maganga, DM) and later acquitted by the High Court not being properly considered, is the appellants elaboration of grievance in ground five (5) of appeal. In ground six (6) of appeal, the appellant explained that exhibit PEI contained Kiswahili words which were not translated and some words were added on it. In addition, he complained that it appears to have been issued after he was arrested hence contradicting with the evidence that the victim was taken to hospital prior to his arrest. On those basis, he urged the Court to allow his appeal and order his release from prison. Mr. Isihaka Ibrahim Mohamed, learned State Attorney, who was assisted by Mr. Tawabu Yahya Issa and Ms. Agma Agrey Haule, resisted the appeal on behalf of the respondent Republic. Mr. Mohamed began to respond to the appellant's contention in ground five (5) of appeal. It was his view, without citing any authority, that the appellant had a duty to prove being charged and being acquitted of the same offence at the earliest opportunity he had by mentioning the witnesses whose names changed as well as cross-examining the prosecution witnesses on the same but he did not. Otherwise and on reflection, he argued, the trial court had to look at its records so as to satisfy itself on the substance of the appellant's contention. While referring to section 280 of the CPA, he contended that such a defence ought to be raised at the time of arraignment which the appellant did not do. 9 Responding in respect of ground one (1) of appeal, he argued that, the appellant's conviction was grounded on the testimonies of PW2, PW5, the victim and medical examination report (exhibit PEI) conducted on the victim alone in the prosecution's bid to discharge its duty of proving penetration. He added that the prosecution is not legally bound to ensure that the appellant is also medically examined. On this complaint, we need not be detained much. As Mr. Mohamed rightly argued, it is not a legal requirement to subject both the victim and an accused person to a medical examination. Although a forced or non-consensual sexual intercourse may result into bruises in the genital parts or sperms being spread around the vagina, yet rape is not proved through medical examination. The Court pronounced so in the case of Daniel Nguru and Four Others vs Republic, Criminal Appeal No. 178 of 2004, (unreported) that: - "Penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region. If bruises were such a natural consequence, then many women would have opted for total abstinence. The best proof was provided by PW2 herself who categorically stated that all the appellants carnally knew her in turns "(Empha\$\$ added) It therefore turns to be true that, evidence regarding existence of sperms and of who, is of no essence making it unnecessary to subject an 10 accused person to medical examination. Such a legal proposition finds support from the settled position that best evidence on penetration in sexual offences comes from the victim and also in terms of section 131(4) of the Penal Code, penetration, however slight, is sufficient to establish it. Obviously, we do not intend to downplay the significance of subjecting an accused to medical tests like DNA test where the service is available, because, in certain circumstances, particularly when the victim and the accused are, immediately after the incident of rape, subjected to medical examination for it may assist to

establish if the sperms are of the accused or not. In respect of ground two (2) of appeal, Mr. Mohamed had it that it was a procedural error failing to show that the commitment words came from the victim that she would tell the truth. But was quick to argue that the trial magistrate reproduced what she had heard the victim telling the court hence, the omission is not fatal. He urged the Court to take it that there was full compliance with section 127(2) of the Evidence Act (the EA). In his further arguments, Mr. Mohamed dismissed the appellant's complaint in ground three (3) of appeal that section 219(3) of the CPA was not complied with arguing that the issue of insanity did not at all arise in the proceedings hence irrelevant before this Court. As for compliance with section 210(3) of the CPA, he argued that it is the right of a witness to complain about its omission not the appellant citing, in support of his assertion, the case of Shabani Haruna @ Dr. Mwagilo vs Republic, Criminal Appeal No. 396B of 2017 (unreported). Hence, he was of the view that the anomaly is curable under section 388 of the CPA. Mr. Mohamed found it easy to answer, in the negative, the appellant's grievance in ground four (4) for a reason that the use of Kiswahili in the proceedings when the victim testified was intended to properly capture the detailed account of the ordeal that befell on her and there was no harm occasioned to the appellant. He also argued that although it had Kiswahili words, exhibit PEI was properly admitted in evidence and read out in court adding that there was no objection from the appellant regarding its admissibility. On account of his submissions, Mr. Mohamed impressed upon the Court to dismiss the appeal for want of merit. In respect of ground four (4) of appeal, we think, the appellant is questioning part of the proceedings and some parts of the medical report (exhibit PEI) in ground six of appeal being written or filled in Kiswahili language. We hasten to hold that the complaint is substantially valid. The law on the language to be used in recording proceedings in court and in composing judgement is very clear. While section 13(1) of the Magistrates' Court Act (the MCA) imperatively requires the language in primary courts to be Kiswahili, section 13(2) is permissive of a resident magistrate presiding over a matter in the resident magistrate and district courts to use English or Kiswahili or any language he directs, but the record and judgment of the court shall be in English. There is an exception where the district court exercises appellate, revisional or confirmatory jurisdictions where it is optional to record and write judgment in English or Kiswahili. The section provides: - "(2) The language of courts of a resident magistrate and district courts shall be either English or Kiswahili or such other language as the magistrate holding such court may direct; save that in the exercise of appellate, revisional or confirmatory jurisdiction by a district court (in which case the record and judgment may be in English or Kiswahili), the record and judgment of the court shall be in English." In the light of the exposition of the law, a magistrate sitting in the district or resident magistrates' court in the exercise of original jurisdiction is, legally, required to record the proceedings and compose judgment in English. In this case, there are proceedings recorded in Kiswahili at pages 13, 21, 29 and 38 and, in the judgment, Kiswahili featured at page 53 of the record of appeal. Mindful of the settled position that not every procedural infraction is fatal and, this being a procedural flaw on the part of the trial magistrate, the prejudice test has to be applied so as to determine its fatality. This is determined by considering the nature of the appellant's

complaints in the course of trial or during defence as to how the anomaly, among others, affected his ability to understand, comprehend and therefore follow the proceedings or not be able to grasp the nature of the prosecution evidence so as to align his defence properly. In the instant appeal, the appellant's complaint is simply wrong use of Kiswahili in recording proceedings during trial and in Exhibit PEI, no more. He was not forthcoming as to how he was affected or an injustice occasioned to him by using Kiswahili. He did not tell that he was not conversant with Kiswahili language, either. We would also add that, section 13 of the MCA is about recording evidence and composing judgment. It has no concern with how and which language should be applied in filling a PF3 (exhibit PEI). In such circumstances, the infraction, though legally valid, is not just inconsequential but also ineffectual. We dismiss this complaint. We now proceed to determine other grievances. After thoroughly examining the record and, in particular, the appellant's defence evidence, we are compelled to state, at the outset, that the appellant relied on the 1H- defence of autre fois acquit to exonerate himself from liability. It is thus the crux of the appellant's complaint in ground five (5) of appeal that his defence evidence grounded on that principle was not well considered. It is a fact that such defence is available to an accused in terms of section 137 of the CPA which provides that: - "137. A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be tried again on the same facts for the same offence." From the wording of this provision, it is plain truth that such a defence is absolute in that it completely bars prosecution of an accused person of the offence he was formerly charged with and either acquitted or convicted. It is an absolute or full defence. That being the case, it ought to be raised at the time of arraignment, that is to say, at the earliest opportunity. The rationale is that, if successful it terminates the proceedings at the early stages. It operates like or bears the same effect as a successful preliminary point of law or objection and the duty rests on the accused to prove it. Such is the procedure the Court pronounced in the case of the DPP vs Christopher Kikubwa and Another [1980] TLR 162, where it was stated that: - 15 .. where a plea of autrefois acquit is put forward. It shall be tried whether such is true in fact or not This in my view, implies that the accused would adduce evidence in support of the plea. He is required to prove that he was the same accused in the previous trial, that the second charge related to the same or substantially the same issue and that the issue has been decided by a competent court. He would have to back up his evidence by a certified copy of the order of acquittal in the previous trial. The prosecution may then adduce evidence in rebuttal. If the court finds that the accused's evidence supports the plea, it would dismiss the charge forthwith. If it does not so find, it would call upon the accused to plead to the new charge." Given the above guideline, the issue now becomes whether the appellant complied with the procedure set out above. It is crystal clear that such a defence was raised during defence evidence and when the appellant was tasked by the prosecution by way of cross-examination to prove it, he admitted confusing the names of the victims something which proved that he was not certain that the victim in the present case is the same victim who was in CC 61/2016. We would also add that, had the appellant been serious with his defence evidence, he was, as rightly argued by the

learned State attorney, expected to have raised it by way of cross-examination to the prosecution witnesses, the victim in particular. Had he done so, the trial court would have, for the interest of justice, taken liberty to cross-check with its records before proceeding with the trial. This would be done in a situation where the accused may not, for an acceptable reason, be able to produce a certified copy of the requisite court's order. Unfortunately, the appellant totally failed to abide by the procedure laid down. He was not even sure or certain of what he was raising to the trial court making it impossible for it to know where to begin in checking its records. He cannot, now, be heard complaining that his defence evidence was not duly considered. The complaint fails and is dismissed. Non-compliance with sections 219(3) and 210(3) of the CPA, a grievance embraced in ground three (3) is next to be considered. It is a non-issue that section 219(3) of the CPA was not adhered to for a reason well submitted by Mr. Mohamed that nowhere, in the record of appeal or the trial and appellate court's proceedings and judgment, did the issue of insanity or failure by the appellant to follow proceedings arise. The Court is precluded from adjudicating on a matter not canvassed and determined by the lower courts [see section 4(1) of the appellate Jurisdiction Act (the AJA)]. This ground has no merit. 17 Parallel with the above, is the complaint that section 210(3) of the CPA was not complied with. It is about failure by the trial magistrate to cause the recorded evidence be read out to the witness who had concluded testifying. It is trite law that such right is available to the respective witness not an accused person. In the cited case of *Shabani Haruna @ Dr, Mwagilo vs Republic* (supra), and after quoting in full the provisions of section 210(3) of the CPA, the Court reiterated its position stating that: - "... reading the provision between the lines,, it is evident that the provision is essentially meant to take care o f the witnesses whose evidence is being recorded and not the appeiiant Therefore, only those witnesses whose evidence was recorded can exercise that right of calling for their recorded evidence be read over to them>and they could make comments and not the appellant. See: *Athumani Hassan v Republic*, Criminal Appeal No. 84 o f 2013, *Abuu Kahaya Richael v R*, Criminal Appeal No. 557 o f 2017; and *F/ano A/phonce Masa/u @ Sing Criminal and 4 Others v R*, Criminal Appeal No. 366 o f 2018 (all unreported). In the *Athumani Hassan* (supra) the Court stated as follows: "we do not see substance o f the appellant's complaint because it was the witnesses who had 18 the right to have the evidence read over to them and make comment o f their evidence." The above being the Court's settled position which is still good law, we see no reason to depart from it and, therefore, we follow suit and dismiss the appellant's complaint. Next for our consideration is the complaint that the victim's evidence was improperly taken for want of promise from her that she will tell the truth. We are alive, under the law as it obtained when PW7 testified, that a child witness may give evidence without oath provided that he promises to tell the truth and not lies. That is in terms of the then section 127(2) of the Evidence Act, which provided that: - "(2) A chiid o f tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to teli the truth to the court and not to teii lies." (Emphasis ours). In the instant appeal, the complaint is that the promise did not come from the child witness herself. The record of appeal, at page 29, reflects what transpired before PW7 testified, thus: - "Court: - The witness

is under age and promises to tell the truth in her testimonies and not lies." 19 Much as we agree that the declaration of a commitment to tell the truth and not lies did not come from the witness, it is equally plainly clear that the learned trial magistrate had regard to the dictates of the above imperative legal requirement. In compliance with the law, she did not invite PW7 to testify without checking her and satisfying herself that she was a child who should, first, promise to tell the truth. From the wordings above, it may be inferred, and it actually, appears that PW7 made the declaration that is why the learned trial magistrate recorded as above. The omission to record a declaration as coming directly from PW7, in the circumstances, is not fatal and we have not seen any prejudice caused to the appellant so as to vitiate PW7/s testimony. This complaint fails. In ground six (6) of appeal, we are left with a complaint that some words were added on exhibit PEI which also appears to have been issued after he was arrested hence not consistent with the evidence on record that the victim was taken to hospital prior to his arrest. No doubt, these are factual issues which ought to have been raised either before the trial court or before the High Court, on appeal for determination. Unfortunately, they were not brought to the attention of the High Court in the petition of appeal appearing at page 63 which were reproduced in the High Court judgment at page 72 of the record of appeal. Hence, they were not determined by the High Court for which an appeal could lay to this 20 Court in terms of Article 117(3) of the Constitution of the United Republic of Tanzania 1977 which mandate is regurgitated under section 4(1) of the AJA. Times without number, for a reason of lack of jurisdiction, the Court has refrained from entertaining a ground relating to a matter not first determined by the High Court or by the Resident Magistrate with extended jurisdiction, (see for instance, Hadija Ally vs George Masunga Msingi, Civil Appeal No. 384 of 2019 (unreported) citing other decisions of the Court in Hassan Bundala @ Swaga v. R, Criminal Appeal No. 416 of 2013, Yusuph Masalu @ Jiduvi v. R, Criminal appeal No. 163 of 2017 and Nasib Ramadhani v. R, Criminal Appeal No. 168 of 2018 (all unreported). For clarity, Article 117 (3) of the Constitution provides that: "(3) The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision of the High Court or of a magistrate with extended jurisdiction. '[Emphasis added] And, section 4 (1) of the AJA, provides: - "4 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. "[Emphasis added] 21 In line with the above legal position, we are compelled, as we hereby do, to refrain from considering the two complaints. For the foregoing reasons, this appeal is without merit. We dismiss it in its entirety. DATED at DAR ES SALAAM this 11th day of September, 2024. S. A. LILA JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL The Judgment delivered this 12th day of September, 2024 in the presence of the Appellant in person and Mr. Tawabu Vahya Issa, learned State Attorney for the Respondent/Republic, via video link from Musoma High Court is hereby certified as a true copy of the original. 22

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