

TANZANIA / JUDGMENT

george amosi vs republic 2023

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: KWARIKO, J.A., SEHEL. J.A. And GALEBA, 3.A.1 CRIMINAL APPEAL NO. 401 OF 2020 GEORGE AMOSI..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Arusha) fGwae, 3.^ dated the 13th day May, 2020 in (D O Criminal Appeal No. 74 of 2019 JUDGMENT OF THE COURT 23* a 29thAugust 2023 GALEBA. J.A.: The appellant in this appeal, was arraigned before the District Court of Ngorongoro at Loliondo in Criminal Case No. 11 of 2019. He was charged for rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022]. Consequently, he was convicted and sentenced to thirty years imprisonment. His first appeal was dismissed by the High Court at Arusha, hence this second appeal. i The facts that led to the appellant's prosecution were that, on 2nd May, 2019, around 20:00 hours, a girl aged fifteen years, whose name we will conceal and refer to her as PW2 or the victim, went to the appellant's house where he deluded "his visitor" with a promise to marry her. From that evening, she stayed at the appellant's place for the next six days. As they were sleeping together, in the course of her stay, the appellant had sexual intercourse with her on three occasions. However, on 9th May, 2019, the relatively new relationship was suddenly interrupted. Following unconfirmed information that the victim might be at the appellant's place, Sospeter Amon PW3, Julius Kingu PW4 and the victim's mother PW1, (also whose identity we will conceal and refer to her as PW1), went to the appellant's house where they found PW2. From that point on, the seemingly enjoyable cohabitation life of the appellant and his "new bride", abruptly degenerated into a completely unpleasant affair on the part of the appellant. Issues of his arrest set in, the police investigation quickly took shape, and before he knew it, the entire status quo had very quickly metamorphosized into a mature court case. The next day, that is, 10th May, 2019, the appellant was arraigned before the trial court to answer the charge of raping PW2. As he denied the charge, witnesses were called without delay. The trial commenced 2 instantly and hearing proceeded expeditiously. In twenty days of instituting the charge, both the prosecution and the defence cases had been closed, and a decision pronounced. By a judgment dated 29th May, 2019, the appellant was convicted and sentenced as indicated earlier on. That judgment of the trial court, is the decision that was confirmed by the High Court, which confirmation in turn, is challenged before us. Initially, the appellant lodged a

memorandum of appeal containing seven grounds of appeal. However, on 16th August, 2023, the appellant lodged a supplementary memorandum of appeal containing one more ground. Nonetheless, for purposes of this appeal, we will only deal with grounds one and two in the initial memorandum of appeal which may be paraphrased as follows:-

1. That, the appellant was not permitted to cross examine PW5 and PW7, which act violated his constitutional right to be heard.
2. That, the trial court erred in law by relying on the evidence of PW2, who was not sworn as required by law. At the hearing of this appeal, the appellant appeared in person, whereas Mses. Amina Kiango, Donata Kazungu and Grace Madikenya, all learned State Attorneys, teamed up for the respondent Republic. As Ms. Madikenya indicated that she was supporting the appeal, the appellant opted for the learned State Attorney to respond to his grounds, in order that he would rejoin, in case such a need arose. The learned State Attorney started off with the second ground. She submitted that the victim who testified as PW2, did so without being sworn as required by section 198 (1) of the Criminal Procedure Act, (the CPA). In moving us to discard the evidence of PW2, the learned State Attorney relied on this Court's decision in *Nestory Simchimba v. R*, Criminal Appeal No. 454 of 2017 (unreported). She further submitted that, if that evidence will be discarded, there will be no sufficient credible evidence remaining on record, upon which the appellant could have been convicted. On the second ground of appeal, she argued that the complaint of the appellant is genuine, because after PW5 and PW7 had testified in chief, the appellant was not given a chance to cross examine them. Based on those shortfalls, the learned State Attorney implored us to allow the appeal, quash the conviction and set aside the sentence of the appellant and set him free from prison. As for any comment from him, the appellant just supported the position of the respondent's side. In this appeal, flowing from the supporting submissions of the learned State Attorney, the matter for our discussion is threefold; one, is to consider how the evidence of PW2 was taken, in view of the law on unsworn evidence in Tanzania. Two, is to assess whether the remaining evidence may still be sufficient to sustain a conviction of the appellant. And, three, is to finally determine the way forward. We will start with the first point, and to put it in an intelligible perspective, we propose to quote the relevant part of the evidence of PW2, contained at page 8 of the record of appeal. It goes:- "PW2; MR- victim, 15 years old, Wasso Primary School\ Christian. The victim promised to tell the truth and only the truth before the Court. " [Emphasis added] From the above text, it shows clearly that although PW2 was fifteen years old, she did not take oath before she could give her evidence. Instead of administering oath, the trial court required her, to promise that she would tell the truth, which she did. A promise to tell the truth and not lies, in terms of section 127 (2) of the Evidence Act, (the Evidence Act), is a requirement relevant to children of tender age, which in terms of section 127 (4) of the same Act, are persons of apparent age of not more than fourteen years. That means, as PW2 was fifteen years old, she had to swear, just like other adult witnesses in the case did. Failure to do so, offended the provisions of section 198 (1) of the CPA, which provides that:- "Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary be examined

upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act. Of course, the Oaths and Statutory Declarations Act, (the OSDA) and the Oaths and Affirmations Rules, Government Notice No. 125 of 1967, provide for the manner of carrying out oaths and affirmations. However, as the issue in the ground under review is not the manner the witness took oath, but a failure to take it, we will not dwell too much on the OSDA and its rules. Suffice to observe that, section 198 (1) of the CPA quoted above, was not observed; it was contravened by the trial court. According to law, the evidence taken in judicial proceedings from a witness who does not swear or affirm, and who is not exempted from doing so by section 127 (1) of the Evidence Act or any other law, amounts to no evidence in law. See this Court's decisions in Juma Kuyani and 6 Another v. R [2016] 1 T.L.R. 411; Norbert Kashindi v. R, Criminal Appeal No. 176 of 2016 (unreported); and recently, Nestory Simchimba (supra). Under the law, such evidence has to be discarded, for it has no force of law. For that eventuality, see this Court's decision in Anthony Mwita and Two Others v. R, Criminal Appeal No. 264 of 2010 (unreported). Following the above position of the law, we hereby discard the evidence of PW2 and declare it evidentially weightless. This discussion disposes the first point on the law applicable in Tanzania on unsworn evidence raised in the second ground of appeal. Next, we have to examine the evidence remaining on record and assess whether, it can still be adequate to sustain a conviction of the appellant. In this case, other than PW2, seven other witnesses testified for the prosecution. We will briefly navigate their evidence as far as it is material to our discussion. And we will start with the evidence of PW1. The relevant evidence of PW1 was that, on 2nd May, 2019, PW2 disappeared from home and on 9th May, 2019, in the company of PW3 and PW4, she found her at the appellant's home. They took the victim to the police and to hospital. This witness does not testify on whether or not PW2 told her that she was raped. The evidence of PW1 therefore cannot be of any assistance for purposes of sustaining the conviction of the appellant for the rape of PW2. PW3 went with PW1 and PW4 to the house of the appellant on the above stated date. He testified that when they got there, they found PW2 cooking food and she told them that the appellant promised to marry her. This evidence is not anywhere closer to proving rape of the victim. As for PW4, he went in the company of PW1 and PW3 to the appellant's home where they found PW2. The latter told them that she was living with the appellant and that the latter had promised to marry her. Briefly, the evidence of this witness and his colleagues, PW1 and PW3, had no relevance to the offence of rape. PW5 was No. 8175 WP Martina, who attended to PW2 when she was taken to the police. The evidence of this witness will be discussed along with that of PW7, Titus Thomas, a doctor at Wasso Hospital, because the trial court did not permit the appellant to cross-examine these two witnesses. Their evidence is challenged in the first ground of appeal quoted above. We have revisited the record and confirmed that at page 13 of the record of appeal, when PW5 was through with her evidence in chief, the appellant was not given an opportunity to cross examine her. The same is the case in respect of PW7 at page 16 of the record of appeal. In our view, to rely on the evidence of these witnesses would be to bless the appellants unfair trial. Generally, to ensure fair trial the provisions of sections 144 and 146 (2) of the Evidence Act, read together with section 195 (2) of the CPA provide for a right of a party against whom

evidence is adduced, when present in court, to cross examine the witness testifying against him. In that respect, section 195 (2) of the CPA provides that:- "The prosecutor or the defendant or his advocate, shall have the right to cross- examine any such person, and the court shall adjourn the case for that purpose if it considers it necessary." [Emphasis added] As highlighted above, noncompliance with the above provision was procedurally unlawful, leading to the appellant's unfair trial. Thus, we not only allow the first ground of appeal, but also, we hold that the evidence of PW5 and PW7 did not have any corroborative value to sustain a conviction of the appellant. PW6 was No. G 7611 DC Zackaria. He was an investigation officer who recorded the cautioned statement which had been admitted as exhibit PI, but which was expunged by the High Court one of the reasons being that the trial court did not carry out an inquiry when the same was objected to. Having expunged the exhibit, what remained on record as PW6's oral evidence, was dependent on what he was told by the appellant. The appellant stated however, that what he told PW6 was procured by coercion, which complaint was not resolved by the trial court. In the circumstances, the evidence of this witness is just as undependable and as weak as that of PW1, PW3 and PW4. PW8 was No. H 8955 DC Joseph. This witness only arrested the appellant after a report was made to the police, and there is no issue in this appeal relating to the appellant's arrest. We have tried to traverse the evidence of all other witnesses in order to find out whether after discarding the evidence of PW2 and discrediting that of PW5 and PW7, there could be any evidence remaining upon which a conviction could be sustained. However, we do not find any such evidence which can be said to remain on record which we can hold that it proved the offence of rape beyond reasonable doubt. Thus, we agree with Ms. Madikenya that the available path to tread along is to allow the appeal and make appropriate orders. For the above reasons, this appeal is allowed. We quash the conviction and set aside the sentence of thirty years imprisonment which was imposed upon the appellant. Finally, we direct an immediate release of the appellant from prison and set him to liberty, unless he is held there for a lawful cause. DATED at ARUSHA this 28th day of August, 2023. M. A. KWARIKO JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL Z. N. GALEBA JUSTICE OF APPEAL The judgment delivered this 29th day of August, 2023 in the presence of the appellant in person and in the absence of the respondent is hereby certified as a true copy of the original.

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