

TANZANIA / JUDGMENT

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1 , 1 IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CRIMINAL APPEAL NO. 31 OF 2014 (original criminal case no. 510 of 2001, District Court of Morogoro at Morogoro) KAROLI BERNARD @MUNGA VERSUS REPUBLIC KOROSSO W.B, J.

JUDGMENT

The appellant was prosecuted for the offence of rape contrary to section 130 (1)(2)(e) and 131 (1) of the Penal Code, Cap 16 [R.E 2002] in the District court of morogoro, at morogoro whereby he was convicted of the offence charged and sentenced to thirty years imprisonment. The appellant being aggrieved by the conviction and sentence meted appealed to this Court. The appellant appeared on his own behalf, being unrepresented and, Mr. Katuli, State Attorney represented the Republic at the hearing of the appeal. 1 During the hearing of this appeal, the appellant relied on the grounds in his petition of appeal, that has five grounds of appeal. The first ground of appeal the complaint being that the trial magistrate erred in law and fact by considering the evidence of PW2 the victim of tender age in a case where the 'voire dire' test was not well illustrated as rational questions put to her in court were not recorded. The second ground of appeal was that the trial magistrate grossly erred in law and fact by admitting in evidence and considering a caution statement of would be witness unprocedurally and unfairly against the appellant contrary to Section 34B2 (d) (e) of the Law of Evidence Act, Cap 6 [R.E 2002]. The third ground of appeal was to the effect that the trial magistrate erred in law and fact by convicting the appellant in a case where the prosecution failed to adduce investigatory evidence as to how he was apprehended in connection with the crime charged. The fourth ground, was that the trial magistrate erred in law and fact by convicting the appellant on basis of unjustified evidence taken to corroborate prosecution evidence and ground five being that the trial magistrate erred in law and fact by convicting the appellant in a case where the prosecution evidence did not prove the offence and correlate with legal provisions the appellant was charged with. The republic, represented by State Attorney, Mr. Katuli did not support the conviction and sentence and decided to compound all the grounds of appeal and deal with ground number five, stating that that was in effect the main ground which had led to their position of not supporting the conviction. 2 LI The respondents stated that the prosecution case at the trial court did not provide evidence that could have proved the case the appellant was being charged with. It was the argument of the respondent republic that S. 130 (1) (2)(e) of the Penal Code, Cap 16, which in effect refers to statutory rape, essentially the prosecution is expected to prove beyond reasonable

doubt two main issues; First, is proving the victims age to be under eighteen years and secondly, that sexual intercourse between the accused and the victim had occurred, and in this case proving that the appellant had sexual intercourse with PW2. The respondent republic contended that on the matter relating to proof of age, there was no evidence adduced to show the age of the victim. That PW2 whose evidence was critical did not anywhere bring to the court evidence relating to her age. The only time one can discern the age is what is written in the proceedings prior to the 'voire dire' proceedings conducted by the magistrate, but there was nothing relating to narration of the age of the victim in the testimony of PW2. It was argued further by the respondents that it is legally recognized that evidence before "voire dire" proceedings is not accepted evidence, and reference was made to the case of Solomon Mazara V. R, Criminal Appeal no. 136 of 2012 CA, Dodoma Registry. On the second point . on whether there was evidence of sexual intercourse, the republic argued that on assessing the victim (PW2) evidence, the witness did not give plausible evidence to show what really happened to her and whether there was penetration of the male organ. The republic contended that PW2 evidence as can be seen in the 3 proceedings had contradictions and ambiguities with regard to the sexual act alleged to have been meted as against PW2 by the appellant. Pg 13 line 3-14 of the proceedings it states "... he started penetrating slowly slowly ... " that this does not provide evidence on what was being penetrated, and that further the evidence goes on "... when he raped me I felt pain ... ". State Attorney Katuli referred the court to the case of Ali Mkombozi V. R Criminal Appeal no 7 of 2007, CA, Arusha Registry pg 7 and 8, where the court stated that "the essence of the rape offence is penetration of a male organ ... ". The other matter which the State Attorney submissions alluded to was the fact that there was other things narrated in the judgment but which were not in the proceedings, such as pg 3 line 4 and 5 of the judgment which was not seen in the proceedings, one would think the magistrate used evidence not meted in court when analyzing the evidence leading to the determination of the guilt of the appellant a fact which should not be accepted as good practice by the appeal court. The State Attorney also queried the act of the learned trial magistrate in admitting the evidence of Mwajuma statement without making due consideration of factors and ingredients necessary for admitting such statements. All in all the Republic prayed to the court that the appeal be allowed. The facts of the case are that on the 26th september 2011, the Police at Turiani police station received a report that on the 24th of September 2011 around 20:00 hours, one Asha Kassim, a child and a niece to one Mwajuma Seif had been raped. It was alleged that the said rape had occurred in the house of one Subira Seif the younger sister of Mwajuma 4 l. Seif and the mother of Asha Kassim, who had narrated the incident to the Police officers and had a statement written before the police on her version of what transpired. It is also in evidence that Asha Kassim was examined by a doctor and found not to have the hymen intact. The case for the prosecution was that on the 24th of September, 2011 at Mapambalamba village, Turiani Division within Mvomero district, Morogoro Region, at around 20,00hrs whilst sleeping in her room, Asha Kassim the victim, was visited by the appellant, who then took off his clothes and her clothes and raped her. Before he finished, Asha's aunt called her name it was then the appellant finished the act put on his clothes and enroute out ran into the aunt one Mwajuma Seif. The facts also show that Asha was threatened and told by the appellant not to raise alarm, therefore during the attack/ assault, Asha could not shout or raise any alarm but after the

appellant left and the aunt arrived she narrated the incident to her aunt, which then led them to go to the police and the next day to go to the hospital with a PF3. In the instant case, being the first appeal, it is the role of this court to consider the grounds of appeal, and in doing that to also scrutinize, analyse and evaluate the evidence upon which the conviction of the appellant was based. We therefore find three issues to address after going through the judgment and proceedings of the trial court, a feat which will also in effect deal with the grounds of appeal submitted by the appellant and especially ground number 5, stating that the trial magistrate erred in law and fact by convicting the appellants in a case where the prosecution evidence does not correlate with the provisions of 5 „,,,„_ · the Penal Code under which he was charged with. Reasons for concentrating on this ground will be seen as we progress with determination of this appeal. In convicting the appellant with the offence charged the trial magistrate was convinced that the prosecution had proved its case beyond reasonable doubt relying on the evidence of PW2, the victim and the statement, the evidence of PW3 the doctor and the contents of the PF3 and the statement of Mwajuma Seif tendered in court by PW4 who took the statement. Though unfortunately, nowhere in the proceedings on the prosecution side there was no prayer on the provisions to be used nor did the trial magistrate provide the provision used to admit the said statement. We shall discuss this matter in detail later. At this juncture we venture into analysis of evidence on two main issues, which will assist the court in determination of ground no. 5 of the submitted memorandum of appeal by the appellant. The appellant was charged and convicted of the offence for contravention of the provisions of 130 (1)(2)(e) and 131 (1) of the Penal Code, Cap 16 [R.E 2002]. To warrant conviction three major facts must be proved. That is the age of the victim; the culprit must be identified and penetration of a male organ against the victim however slight must be proved. S. 130-(2) (e) of the Penal Code which provides as follows: 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: 6

(a) NI A {b) NI A {c) NI A

(d) NIA

(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 (emphasis is ours) The cited provision of the law makes it mandatory that before a conviction is grounded in terms of Section 130 (2) (e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence. Once the age of the victim is established to be below 18 years, it negates consent of the victim, if any. In the case under consideration, the particulars of the offence in the charge sheet explicitly state that PW2, Asha Kassim, was eleven (11) years old. During the Preliminary Hearing conducted on the 8th of December 2011, fact number 4 which stated "That when he was at that area he did have unlawful carnal knowledge to one Asha Kassim, a girl of 11 years. This was the only fact alluding to the age of the victim and it is a fact which the appellant disputed to. During the trial on the 18th of January 2012, PW 1 evidence given in court, where he referred to PW2 as a child, was evidence narrating what he had been told by

Mwajuma Seif, but in his evidence PW 1 never alluded the age of the victim. On the 19th of June 2012 it is recorded as follows:- 7) "PW2: Asha Kassim ,Female Tanzania 13 years, Torian pupil of standard 6 (six) muslim" Thereafter the trial court proceeded to receive her evidence after conducting voire dire examination. However, PW2 did not give any evidence to establish her age and none other witness, the doctor PW3 led evidence to her age just referred to her as a child, and the PF3 tendered as Exhibit P 1 did not disclose the age of the victim. We have perused the entire record, the evidence on the age of PW2, is conspicuously lacking. Therefore it is not clear where the trial magistrate relied on when it is stated in the judgment on the first page that Asha Kassim is 11 years old. Even if this court goes further and takes the liberty to assume that the fact that the trial court conducted a voire dire examination, after being satisfied that PW2 was under eighteen years of age, that assumption, in our view, would be contrary to the dictates of the law. And as we stated in the case of *Andrea Francis vs. Republic*, Criminal Appeal No. 173 of 2014 (unreported):- "... it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age. From the above provision it is discerned that for a male person to be convicted of the above offence, which is sometimes referred to as "statutory" rape, it must be established, first and foremost, that the victim was under eighteen years of age. Similarly in this case the citations of the age of the victim in the charge sheet and before giving her evidence as shown above, are not part of the 8 evidence before the trial court and cannot therefore be taken to prove the age of the victim. In the absence of proof of the age of PW2 the conviction as on the date of alleged commission of the offence, the charge of rape grounded under section 130 (2) (e) (supra), cannot hold. Reference is made to the findings in the case cited by the respondent republic that of *Solomon Mazala Appellant Versus The Republic* Criminal Appeal No. 136 of 2012 CA, Dodoma Registry. Therefore we find the trial magistrate erred in law and fact in finding that the victim Asha Kassim was 11 years old at the time of commission of crime in the absence of any evidence to show the age to the standard required. The other issue which is also pertinent in proving the offence of rape under S. 130 (2) (e) is penetration of the male organ. Section 130(4) as amended by the Sexual Offences Special provisions Act 1998 provides as under:- "penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence" See *Omari Kijuu v Republic*, CAT, Criminal Appeal No. 178 of 2004 and *Daniel Nguru & Others v Republic*, CAT, Criminal Appeal No. 39 of 2005 (unreported). In the case of *Ryoba Mariba @ Mungare v R*, Criminal Appeal No. 74 of 2003 (unreported), the Court of Appeal held that it was essential for the Republic to lead evidence showing that the complainant was raped. See *Christopher R. Maingu v R*, Criminal Appeal No. 222 of 2004 (unreported). The evidence by PW2 before the trial court was to the effect that "at about 20.00hrs I was asleep but the door was not closed where the accused entered in our house and closed the door. He removed his 9 clothes and removed my clothes. He told me that I should not say anything. He started penetrating me slowly ... when he raped me I felt pain. He did the act for a short time" when cross examined PW2 states "when you raped me it was around 20.00hrs". That the appellant had covered her mouth so that she may not raise alarm.

In the judgment, the trial magistrate seems to have rephrased this statement by PW2, and writes that PW2 had stated as follows "the accused person started raping her. He did put his penis in the vagina of the PW2 and started penetrating slowly". a statement which is not supported by the narrated evidence in the trial proceedings before this court. Reading this in the judgment, as a court of first appeal with a duty to analyse evidence submitted in trial court, we are duty bound to query where this evidence comes from because it is not part of the proceedings. The honorable trial magistrate believed PW2 evidence on the matter relating to penetration but this court with the available evidence, we are restrained from finding the same. We state this with awareness that the Court has laid up a principle that in rape cases the victim is the best witness. She is the one in a position to describe her feelings during the sexual intercourse. See the case of Seleman Mkumba V R Criminal-; Appeal No. 94 of 1999 (unreported). But the totality of evidence on this matter of penetration in this case. We are also guided by the case of In the case of Minani Evarist V R supra the Court held that: "It is generally accepted that in determining cases a court has to look at the peculiar facts of the case. In other words, each case has to be decided on the basis of its own facts. This is important because the facts may not necessarily be the same as the other. " 10 Therefore we find no plausible evidence showing penetration of a male organ as required by law to prove the offence of rape as charged. The last issue which we find pertinent to consider is the admission of the statement of Mwajuma Seif (who it is alleged by PW 1 cannot be traced) and reliance of this evidence by the trial magistrate in determination of the case and finding that it strengthened the case for the prosecution. As stated earlier, unfortunately, we could not find a cited provision that moved the trial court to admit the said statement neither in the proceedings or judgment. On our review of the Evidence Act, Cap 6 of the Laws, the section dealing with such situations is S.34B which we have decided to quote it in full. 34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

- (2) A written statement may only be admissible under this section-
- (a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;
 - (b) if the statement is, or purports to be, signed by the person who made it; 11 "-", (c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not believe to be true;

- (d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;
 - (e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;
 - (i) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read
- (3) NI A
- (4) NI A
- (5) NI A
- (6) For the purposes of any rule of law or practice which requires that evidence be corroborated or regulates the manner in which uncorroborated evidence is to be treated, a statement admissible under this section shall not be treated as corroboration of evidence given by the maker of the statement. 12 _1· Looking at this provision it is clear that before a statement is admitted there must be fulfilled certain condition which unfortunately the trial court did not show that they were fulfilled prior to admission of the said statement. These provisions are cumulative, therefore to admit a statement in Evidence under s.34B(2) (b) all conditions set forth form paragraphs(a) to (f) must be satisfied R. V. Hassan Jumanne (1983) TLR
432. In the referred case, my learned brother Lugakingira J, (as he then was) expounded on the contents of the relevant section, views which I am inclined to share, that The provisions of S. 34 (B)(2) of the Evidence Act are cumulative and therefore to admit a statement in evidence under the said provision all conditions set forth from paragraph (a) to (f) must be satisfied. He went further by stating that, for a court to admit the statement, it must be reasonably impracticable to call the deponent; the statement must have been signed by him; it must contain a declaration on liability for perjury; a copy must have been previously served on the accused; the accused must have failed to serve a notice of objection within ten days; and, where the deponent cannot read, it must be accompanied by a declaration to the person who read it to the effect that it was so read. Failure to fulfill the outlined conditions renders the statement to be inadmissible. Unfortunately in the present case, the honorable trial magistrate did not provide an opportunity for this court to be able to assess and analyse whether the said conditions were fulfilled, because of the silence on the relevant provision used to admit the statement of Mwajuma Seif. We find that bearing the fact that it is the only provision of law which could have been used, the outlined conditions under S. 34 (B) (2) were not fulfilled 13 ti and consequently, the reliance of the said contents of the Mwajuma's statement by the trial magistrate as can be discerned from the judgment when making a determination and analyzing the evidence before the court leading to the conviction of the

appellant, the learned trial magistrate relied on inadmissible evidence. The other matter we venture to discuss in passing is the conduct of the *voire dire*, suffice to say one can say it did not pass the test of what a *voire dire* should be. A *voire dire* is a process for the court had to satisfy itself of the intelligence of the child witness, that is, the child understanding of telling the truth and consequences of not telling the truth and the child understanding of taking an oath. There are various cases which have outlined the principles in conducting *voire dire* and the most recent one is the case of Kimbute Otiniel V. R., Criminal Appeal no. 300 of 2011, CA. DSM Registry (Unreported), which in effect states that for convenience, competency determination by the courts under section 127 (2) of the Evidence Act should be labeled has that involving (i) the "oath test" and (ii) the "intelligibility and truth test". The competency test for receiving unsworn evidence of a child of tender years goes to added commitment by a witness that he or she understands the duty of speaking the truth and thus whose evidence may be relied upon. It is a "two steps" process; the first requires the court to ascertain whether the child understands the nature of an oath. If it finds that he or she does, it should proceed to swear or affirm the child and take the evidence on oath or affirmation. On the other hand, however, if the court finds out that the child does not understand the nature of an oath or affirmation, it must proceed to the next and second step and continue with the *voire dire* by ascertaining from the child whether he or she is possessed of sufficient intelligence and understands the duty of speaking the truth. In view of the limited information on the questions asked to the witness, this court was not privy to what led the trial court to find the witness Asha Kassim had sufficient intelligence that she had good understanding the meaning of an oath therefore went on to take unsworn evidence. We think it is important for trial magistrates to ensure that the questions and answer meted to the witness are clear, to enable an appeal court to make an analysis of the said evidence and make its own findings of fact on the intelligence, understanding of telling the truth and the meaning and implications of an oath. In this case, it was difficult for the court to support the views of the learned trial magistrate findings. According to all that we have stated above, this court is therefore, of the firm view that, had the honorable trial magistrate had no legal basis to convict the appellant there being no plausible evidence to connect the appellant with the offence charged. The prosecution had not established the guilt of the appellant to the standard required. In the event, and for the reasons stated above, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from custody forthwith unless lawfully held. 15 ~ W.B. Korosso Judge 2th December 2014 Delivered this 12th December 2014 in the presence of ~ fu~ ~'~ ~4 ~ ~p<Sv-d.o•J:~s ~~l.LQ, . a~ k ~', ~~ r ~ CL{Jpillant 1.--Yl pu!<JV\ ~ W.B. Korosso Judge 12/12/2014 16

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