IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: ORIYO, J.A., KAIJAGE,J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 74 OF 2011

SALIM HASSANI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

At Moshi)

(Mchome, J.)

Dated the 8th day of October, 2001
in
Criminal Appeal No. 39 of 2001

JUDGMENT OF THE COURT

10th & 18th June, 2013

MUSSA, J.A:

In the District Court of Moshi, the appellant was arraigned and convicted for rape, contrary to section 130 and 131 of the Penal Code, Chapter 16 of the laws. The particulars on the charge sheet alleged that on the 26th day of March, 1999, at Mabogini Village, Moshi District, the appellant did have carnal knowledge of Shakila Ayubu, who was then aged 4 years. Upon conviction, the appellant was sentenced to life imprisonment with corporal punishment of ten strokes of a cane. His appeal to the High

Court was dismissed (Mchome, J;) hence this second appeal. The factual background giving rise to the conviction may briefly be stated:-

From a total of five prosecution witnesses, it was common ground that Shakila Ayubu (PW2), the alleged victim, used to reside with her Parents in a rented house at Mabogini Village. Shakila's mother and father are, respectively, named Mwajuma Ayubu (PW1) and Ayubu Ramadhani (PW3). At the material times, the appellant occupied a room in the same house. Evidence was to the effect that the appellant was nursing a leg injury, following which PW3 invited him to rent a room at the residence for a closer attention. The appellant was not related to PW3, but the latter's apparent gesture of sympathy was on account that they hail from the same District.

On the fateful day, PW1 and PW3 left home early morning as they were destined to work on their *Shamba*. The alleged victim (PW2) was left home, ostensibly, under the care of the appellant. Around 5.00 pm or so, PW1 returned home ahead of her husband, whereupon she heard PW2 wailing from the appellant's room. PW1 immediately ordered her daughter to come out of the room and, as she did so, PW2 was heard to lament, apparently, with reference to the appellant:-

Kaka amenitemea mate.

Literally, PW2 was complaining that the appellant had spat on her. The little girl was crying and upon her complaint, PW1 became suspicious, more so, as her daughter's underskirt was smeared with dirt. On a closer inspection on her body, the mother observed bruises on PW2's genitalia which was also swollen. A good deal later, around 8.00pm, PW1 and PW3 reported the incident to a ten cell leader, namely, Michael Moshino (PW4). Upon suspicion that she was ravished, PW2 was there after medically examined by Dr. Honest Kitungati (PW5). The medical officer just as well told the trial Court that PW2 had bruises in the vaginal area and her hymen was perforated. Laboratory tests did not reveal any male spermatozoa but, nevertheless, it was the medical officer's opinion that PW2 had been raped. PW5 posted his findings on a PF 3 which was adduced into evidence as exhibit A. Eventually, the appellant was securely apprehended and arraigned. In her testimonial account, PW2 was very brief in her claim that the appellant spat on her and, she actually demonstrated how the appellant eventually put what she called his "Mdudu" unto her private parts.

In reply, the appellant completely disassociated himself from the prosecution accusation. He contended, in effect, that PW3 was indebted to him for a sum of Tshs.20,000/= and that, presumably, on that score, the entire accusation against him was a fabrication. In the course of his defence, the appellant was cross-examined by the prosecutor with respect to a previous police statement made prior to his testimony. Somehow the statement was subsequently adduced into evidence as exhibit B, the way it appeared, to impeach his credit.

As hinted upon, on the whole of the evidence, the trial Court was impressed by the version told by the prosecution witnesses, hence the conviction and sentence. More particularly, the presiding officer found the evidence of PW2 amply corroborated by the testimony of PW5 as well as the accompanying PF3. In its brief verdict, the first appellate court fully endorsed the findings of the trial court. As it turned out, the first appellate Judge, additionally, construed exhibit B as a confessional cautioned statement by the appellant before the police. In the upshot, the conviction and sentence were upheld. The appellant, presently, seeks to impugn the decisions of both Courts below upon a memorandum that may be crystalised into four headings:-

1. *That the trial was a nullity on account of a non-compliance with the provisions of section 192 of the Criminal Procedure Act;*
2. *That the testimony of PW2 was improperly accessed without recourse to a voire dire test;*
3. *That PW1 and PW3 were not credible and;*
4. *That the conviction was against the weight of the evidence.*

Before us, the unrepresented appellant fully adopted his memorandum without more. The respondent Republic had the services of Ms. Sabina Silayo, learned State Attorney, who fully supported the appeal. At the outset, Ms. Silayo conceded that, in the trial at hand, the preliminary hearing was not conducted at all and, for that matter, the Provisions of section 192 of the CPA were not heeded in their entirety. She was quick to add though, that the irregularity did not have the effect of rendering the trial a nullity. To bolster this contention, the learned State Attorney referred us the unreported Criminal Appeal No. 238 of 2008- *Peter Paul Vs. Republic.* As correctly formulated by Ms. Silayo, in that case, it was

held that the failure to conduct a preliminary hearing does not have the effect of nullifying the trial; rather, the prosecution will have been imposed an uphill task to call and adduce evidence to prove each and every material fact.

Advancing to the appellant's second point of grievance, the learned State Attorney just as well conceded that the mandatory *voire dire* test was not done at all with respect to the testimony of PW2 who, undoubtedly, was a child of tender age. In agreement with Ms. Silayo, obviously, it was improper for the trial Court to access the evidence of PW2 without recourse to a *voire dire* test. This Court has been confronted with a similar situation upon numerous occasions and, in all instances, the evidence of the particular child was expunged either for failure to conduct the *voire dire* or on account of a defective test(see; Criminal Appeal No.87 of 2007- **Omari Kurwa V.R;** Criminal Appeal No. 42 of 2003- **Juma Raphael V.R;** Criminal Appeal No. 71 of 2002- **Hassan Hatibu V.R;** Criminal Appeal No. 253 of 2006- **Sokoine Chelea V.R;** Criminal Appeal No. 103 of 2004- **Justine Sawaki V.R;** and Criminal Appeal No.320 of 2010- **Khamis Samwel V.R).** On the

premises, we are left with no other option than to expunge the entire evidence of PW2 from the record of the evidence.

Having expunged the testimony of PW2, a question promptly arises as to whether or not there is some other cogent evidence to sustain the conviction. In this regard, Ms. Silayo submitted that the evidence of PW2 was of such a vital nature without which the conviction cannot be upheld. We entirely agree and may only add that having discounted the testimony of PW2, the respective accounts of her parents with respect to the alleged sexual occurrence are reduced to hearsay. Furthermore, the expert opinion of PW5 cannot assist anyhow so long as it did not go so far as to implicate the appellant as the rapist. That would suffice to accord the appellant the benefit of doubt.

Finally, by way of a postscript, we wish to remark that the finding by the first appellant Judge that the appellant made a confessional statement was rather unfortunate, not being anchored by the evidence on record. To us, exhibit B was, seemingly, adduced by the prosecutor for the purpose of impeaching the credit of the appellant in the course of the latters' testimony. In any event,

upon a closer scrutiny of what was told in exhibit B, the appellant did not quite confess, but was even more resolute in his denial of the accusation against him.

To this end, on account of the foregoing reasons, we find merits in this appeal which is, accordingly, allowed. In the result, the conviction and sentence handed down against the appellant are, respectively, quashed and set aside. He is to be released from prison custody forthwith, unless if he is otherwise held for some other lawful cause.

DATED at **ARUSHA** this 17th day of June, 2013.

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

MALEWO, M.A.
DEPUTY REGISTRAR
COURT OF APPEAL