IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO.183 OF 2008

AINEA GIDEON..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Bwana, J.)

dated the 21st day of January, 2008
in
(DC) Criminal Appeal No. 60 of 2007

JUDGMENT OF THE COURT

23rd & 30th September, 2011

MJASIRI, J.A.

In the District Court of Arusha, the appellant, Ainea Gideon was charged and convicted on two counts, namely rape contrary to section 130(1) and (2) and 131 (1) and (3) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998) and was sentenced to thirty (30) years imprisonment and the offence of abduction contrary to section 133 of the Penal

Code. He was also found guilty of the offence of abduction and was sentenced to 5 years imprisonment. The sentences wee ordered to run concurrently.

Being aggrieved by the decision of the District Court, he appealed to the High Court against both conviction and sentence. His appeal to the High Court was partially successful. His conviction on the second count of abduction contrary to section 133 of the Penal Code was set aside. His appeal on the first count of rape was not successful, hence his appeal to this Court.

Briefly the facts of this case are as follows. The appellant and the complainant, PW3 were both residents of Moita Village in Monduli District. PW3 was a 16 year old girl going to Monduli Kiloriti Primary School. It was the prosecution case that on October 19, 2005 at 9.00 hours, PW3 was raped by the appellant. PW3 was also abducted by the appellant with the intention of marrying her knowing that she was a school girl. The appellant intended to marry PW3 but his marriage proposal was rejected by PW3's parents as their daughter was still a student. The appellant denied committing the offence.

At the hearing of the appeal the appellant was represented by Mr. Cheapson Kidumage, learned Advocate and the Republic was represented by Mr. Juma Ramadhani, learned Senior State Attorney.

The appellant presented five (5) grounds of appeal which are reproduced as under:-

1. *That, both the trial Court and the 1st appellate Court erred in law and fact for acting upon unsworn evidence.*

2. *That the 1st appellate Court having established that there was no corroboration of the prosecution evidence on the offence of rape ought to have allowed the appeal.*

3. *That the 1st appellate Court having established that the trial Court judgment did not warn itself of the dangers of convicting the appellant on uncorroborated evidence of the victim of the sexual offence ought to have allowed the appeal.*

4. *That the 1st appellate Court erred in law and fact in holding that PW3 was 16 years old without any proof from an expert witness as age was a crucial issue in this case.*

5. *That having regard to the fact that the High Court was the 1st appellate court, the learned Judge misdirected himself in law for not stepping into the shoes of the trial Court in assessing the*

   credibility of the evidence of PW3 and making a finding therefrom.

In the course of arguing the appeal Mr. Kidumage abandoned ground No.1 as there was no basis for the complaint as all the witnesses were sworn by the trial Court.

In relation to grounds No. 2 and 3, Mr. Kidumage argued that the conviction of the appellant was not proper. According to him the conviction was based on the sole evidence of the victim, PW1 and her evidence was not corroborated. He also stated that the PF.3 report did not establish rape and only stated that PW1 contacted syphilis. The appellant was not medically examined and the doctor was also not called as a witness.

With regards to ground No. 4, Mr. Kidumage argued that there was no evidence adduced in the trial Court to establish that PW3 was 16 years old.

On ground No. 5, he complained that the first appellate Court failed to review the evidence of the trial Court in order to reach its own conclusion. If it had done so it would have come to the conclusion that the evidence on record did not establish rape.

In relation to the second count of abduction, Mr. Kidumage argued that the offence has not been established.

Mr. Juma Ramadhani on his part, supported the conviction and sentence. In relation to ground Nos. 2 & 3, he submitted that the evidence of PW3 did not require any corroboration, in view of section 127 (7) of the Evidence Act, Cap 6, R.E. 2002 (hereinafter "the Evidence Act") as long as the Court is satisfied that the witness is telling the truth.

On the complaint that PW3 was not 16 years old, as raised in ground No. 4, Mr. Ramadhani stated that it has been clearly established that the appellant was 16 years old at the time the offence was committed. The evidence of PW2, the mother of PW3 is relevant.

In his response to ground No. 5, Mr. Ramadhani argued that the first appellate Court conducted a proper analysis of the evidence.

In relation to the second count, he submitted that the offence of abduction was established. He submitted further that even though this is a second appeal, this Court has powers to interfere with the concurrent findings of fact by the Courts below where there are mis-directions and non-directions on the evidence. The Court is entitled to look at the relevant evidence and make its own findings of fact. review the proceedings and to make a finding. He made reference to the case of **Shehe Hamza v Republic, Criminal Appeal No. 114 of 2004** (unreported).

The major issue for consideration on the first count is whether or not the complainant PW3 was raped and whether or not it was the appellant who committed the rape. On the second count, the central issue for consideration is whether or not PW3 was abducted and whether or not it was the appellant who abducted PW3.

This is a second appeal. The principles to be followed in dealing with the findings of fact and conclusion reached by the lower Courts is

clearly set out in various decisions of this Court. In **R v Hassan bin Said** (1942) 9 E.A.C.A. 62 it was held that the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think possible or even probable, that it would not have itself come to the same conclusion. See **also R v Gokaldas Kanji Karia and another**, 1949 16 E.A.C.A. 116; **Reuben Karari s/o Karanja v R** (1950) 17 E.A.C.A. 146.

In **Peter v Sunday Post**, 1958 EA 424 it was held that whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand, this jurisdiction is to be exercised with caution where there is no evidence to support a particular conclusion or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. See **Okeno v R** 1972 EA 32; the **Director of Public Prosecutions v Jaffari Mfaume Kawawa** and **Salum Mhando v R** 1993 TLR 170.

After carefully reviewing the evidence on record and the submissions made by Counsel, we are inclined to agree with the learned Advocate for the appellant that the offence of rape has not

been proved beyond reasonable doubt. In order to establish the offence of rape, the following elements have to be proved:-

1. That there was penetration
2. That there was lack of consent
3. That it was the appellant who committed the act.

Under section 130 (4) (a) Cap 16 RE 2002, the offence of rape is proved by penetration. In this appeal there is no evidence to support penetration. See **Ally Mlawa v R,** Criminal Appeal No. 77 of 2007 (unreported). No evidence of rape has been established. In admitting the PF.3 report, Exhibit P1, there was non-compliance with Section 240(3) of the Evidence Act. The appellant was not informed of his right to have the doctor called to testify in court in order to give him the opportunity to cross examine the doctor on the PF.3 report.

This omission is a fundamental irregularity therefore the medical report cannot be acted upon. See **Kashana Buyoka v R**, Criminal Appeal No.176 of 2004; **Sultan s/o Mohamed v R,** Criminal Appeal No. 176 of 2003 and **Nyambaya Kamuoga v R,** Criminal Appeal No. 90 of 2003 (all unreported). The only evidence linking the appellant with the

offence of rape is that of PW3. Her evidence did not meet the standards required to establish the offence of rape.

In the case of **Ryoba Mariba @ Mungare v R,** Criminal Appeal No. 74 of 2003 (unreported), this Court 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 law is clear that in criminal cases the burden of proof lies on the prosecution to prove the case against the accused beyond reasonable doubt. See **Woolmington v Director of Public Prosecutions** (1935) AC 462; **Ally Mlawa v R** (supra) and **Boniface Siwingwa v R**, Criminal Appeal No. 421 of 2007 (un reported).

We are therefore not satisfied that the prosecution has established on the standard required under the law, that PW3 was raped by the appellant. We cannot therefore uphold the conviction of the appellant based on the testimony of PW3.

We are however in agreement with the learned Senior State Attorney, that there is sufficient evidence to establish that PW3 was abducted by the appellant. Section 133 of the Penal Code Cap 16 RE 2002 provides as follows:-

> *"Any person with intent to marry or have sexual intercourse with a woman of any age or to cause her to be married or have sexual intercourse with any other person, takes her away, or detains her against her will, is guilty of a felony and is liable to imprisonment for seven years."*

PW3 testified that she was taken by the appellant against her will. She was under surveillance while she was in the appellant's custody and could not escape. When she tried to escape she was caught and returned to the appellant's house. PW2, the appellant's mother witnessed the appellant and his friends take PW3 out of possession of her parents against her will without lawful authority or excuse with the intention that she will marry. She heard the helpless cry of PW3 'please save me' as she was carried out of her house by more than twenty (20) boys. PW2 reported the incident to the school

authorities as well as the village leaders and the police.PW1, the policeman who arrested the appellant found PW3 in the house of the appellant.

In view of what we have stated hereinabove, we hold that the appellant's conviction of the offence of rape was not proper. We accordingly allow the appeal, quash the conviction and set aside the mandatory sentence of thirty (30) years imprisonment.

As far as the second count of abduction is concerned the evidence on record implicating the appellant in the commission of the offence is overwhelming. We have no doubt in our minds that he was the one who abducted her. The second count was therefore proved beyond reasonable doubt.

For the foregoing reasons we invoke section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E, 2002 and hereby revise the decision of the High Court acquitting the appellant on the offence of abduction. We therefore restore the conviction and sentence of the trial Court. Taking into consideration the time that the appellant has been in custody, that is a period of five years, the sentence imposed

by the trial Court is restored on such terms and conditions that would result in the immediate release of the appellant from prison. It is so ordered.

DATED at **ARUSHA** this 29th day of September, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL