IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 100 OF 2011

ABDALLA ALI ABDALLA.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the decision of the Regional Magistrate's Court with Extended Jurisdiction held at Vuga, Zanzibar)

(Kayange, RM Ext. Juris.)

dated 16th day of September, 2010
in
Criminal Appeal No. 7 of 2010

JUDGMENT OF THE COURT

13 & 15 December, 2011

MBAROUK, J.A.:

This is a second appeal in which the appellant, Abdalla Ali Abdalla, is protesting his innocence. He was convicted by the Regional Magistrates' Court of Zanzibar at Vuga of the offence of defilement of a girl under fourteen years of age contrary to Section 125(1) of the Penal Decree, Cap. 13 as amended by Act No. 7 of 1998. He was sentenced to seven years

imprisonment. The first appeal court sustained the conviction and the sentence imposed on the appellant. Undaunted, hence this appeal.

At the trial court, the conviction of the appellant was based on the evidence of the complainant (PW1) which was corroborated by other prosecution witnesses. Asha Ramadhani Mkanga (PW1) testified to the effect that one day she was asked by the appellant to follow him to the bush so that he could show her fruits called "ngoo". When they reached at the bush, the appellant put his hand on PW1's mouth and had carnal knowledge with her on the ground. PW1 felt pains and blood oozed out of her vagina. When she reached her home, PW1 narrated the whole ordeal to her grandmother, Nyamato Haji Mwita (PW5). PW5 took PW1 to Paje Police Station and thereafter to Makunduchi Hospital. D.2647 D/Sgt Kondo (PW2) investigated the case and then charged the appellant accordingly.

In his defence, the appellant categorically denied the charges against him. He claimed that this is a fabricated case due to a misunderstanding which he had with PW5 from a land dispute they had. He also challenged

PW1's testimony for not being supported by the evidence of her colleagues who were with her on that material day but were not called to testify.

The appellant has filed seven grounds of appeal with eight other additional grounds. However, it transpired that most of the grounds have been brought in this appeal for the first time, they were not raised and decided in the first appeal. In essence, the appellant's grounds of complaint are as follows. **Firstly,** he is challenging the first appellate court for sustaining a conviction based on the evidence of PW1 alone which was not corroborated. **Secondly,** the appellant is challenging the decision of the first appellate court which relied on the evidence of PW4 (the Doctor) which was not conclusive.

During the hearing of the appeal, the appellant appeared in person, whereas the respondent Director of Public Prosecutions was represented by Mr. Mgeni Jailani Jecha assisted by Mr. Ali Rajab Ali, learned State Attorneys.

The appellant had nothing to add apart from what he had stated in his grounds of appeal. He opted to adopt his grounds as found in his memorandum of appeal.

On his part, Mr. Mgeni did not support the appeal. As shown earlier, he urged the Court not to consider grounds No. 1, 4, 5, 6 and all the eight additional grounds as they were not raised and decided by the first appellate court. In support of his argument, he cited to us the decision of this Court in the case of **Komando Chisama v Republic** (1995) TLR 140.

As to the ground that there was no corroborative evidence, Mr. Mgeni submitted that, the record clearly shows how PW2, PW3, PW4 corroborated the evidence of PW1. He said PW2 who was the investigator of the case went to the scene of crime and obtained an underpant (Exhibit PE.1) containing blood and semen. Mr. Mgeni also said that PW3, Halima Jecha Zidi examined PW1's sexual organ and saw blood oozing out of it. Mr. Mgeni added that PW4, Hassan Haji Jecha, the medical officer who examined PW1 reported that PW1 had bruises in her sexual organ which was caused by a blunt object forced into it. The learned State Attorney

further claimed that PW5 testified to the effect that she saw PW1 crying and when she asked the reason of her to cry, PW1 replied that *"baba ake Rama kanisokota"* meaning she was raped by the appellant. PW5 further stated that when she examined PW1 she saw her underpant covered with blood. Collectively, the evidence of PW2, PW3, PW4 and PW5 corroborated the evidence of PW1, Mr. Mgeni submitted. He further submitted that, the aspect of PW1 naming the appellant to PW5 at the earliest possible opportunity, meant that PW1 was a reliable witness. He then urged us to find this ground of appeal with no merit.

In response to the arguments in this ground of appeal concerning lack of corroborative evidence, we are of the considered opinion that the record is very much clear on how PW2, PW3, PW4 and PW5 corroborated the evidence of PW1. There is no need to repeat on what has already been submitted by the learned State Attorney on this point to which we fully agree with him. Apart from that, we also agree with him on the point that the act of PW1 to name the appellant at the earliest possible opportunity showed how reliable that witness was. This point was underscored in the decision of this Court in the case of **Marwa Wangiti**

Mwita and Another v. Republic, Criminal Appeal No. 6 of 1995 (unreported) where it was stated that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assuarance of his reliability..."*

In the instant case, PW1 named the appellant to PW5 at the earliest opportunity. This meant that PW1 was a witness to be relied upon. Also PW5 reported the matter to Paje Police Station immediately after the incident. For that reason we find that both PW1 and PW5 were reliable witnesses. Hence this ground of appeal is without merit.

As to the second ground of appeal which challenges the decision of the first appellate court to rely on the evidence of PW4 (Doctor) which did not specifically state that PW1 was raped, we are of the opinion that the task of the doctor as an expert was to give his opinion on the matter sent before him. It was not his task to give an actual cause or reason of the matter sent before him for analysis. After all, a doctor is not expected to be at a scene of crime. He is only expected to give his opinion on the

source of the offence. For example in an offence of rape, a doctor is supposed to give his opinion on whether there were bruises and if there was penetration. He is not supposed to give a conclusive answer in his analysis to the effect that a male organ entered into a female organ. In the circumstances of this case, we are increasingly of the view that what PW4 (the Doctor) did in his testimony was a correct approach in the analysis of a matter sent before him.

Bearing in mind that this is a second appeal, normally the practice is that, this Court does not interfere with concurrent findings of fact by the courts below. See the decision of this Court in the case of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149.

In the instant case, we have found no reason to fault the concurrent findings of the courts below. In the event, and for the reasons stated herein above, we find no merit in this appeal. Hence, we dismiss it in its entirety.

DATE at **ZANZIBAR** this 14th day of December, 2011

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(M. A. Malewo)
DEPUTY REGISTRAR
COURT OF APPEAL