IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: OTHMAN, C.J., MBAROUK,J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 98 OF 2010

BETWEEN

ABILAHI MSHAMU MNALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mipawa, J.)

dated 5th August, 2009

in
Criminal Appeal No. 175 of 2007

JUDGMENT OF THE COURT

15th & 27th JUNE, 2012

OTHMAN, C.J.:

Before the District Court of Newala, the appellant, Abilahi Mshamu Mnali, then head teacher of Lukokoda Primary School (hereafter referred to as the school) was charged with the offence of rape contrary to sections 130 (1)(2)(e) and 131(1) of the Penal Code, Cap 16 as amended by Sexual

Offences Special Provisions Act, No 4 of 1998 and the offence of Impregnating a school girl, namely Fadina a/o Hamisi (PW1), while she was pursuing her education contrary to Rule 4 (5) of the Education (Imposition of Penalties to Persons who Marry or Impregnate a School Girl) Rules, 2003, G.N. No 265 of 2003. On 17/10/2007, the District Court convicted him on both counts and sentenced him to thirty years imprisonment on the first count and to three years imprisonment on the second count, the sentences to run concurrently.

On first appeal, the High Court (Mipawa, J.) dismissed his appeal. Aggrieved, the appellant has preferred this second appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Peter Ndjike, learned Senior State Attorney.

At the trial court, the case for the prosecution as testified by its primary witness, PW1, was that in January 2006 at about 19:00 hrs the appellant had sexual intercourse with her at his office. He gave her Tz. Shs. 1,000/=. They continued making love, until 18/01/2007 when a medical check up of thirty six girls initiated by the school revealed that she

was pregnant. PW1 claimed that the appellant was the only one that she had been having a sexual relationship with. PW1 delivered a baby on 26/07/2007. She and her mother, Hadina Chonde (PW2) were adamant in court that PW1 had only named the appellant as the person responsible at an inquiry held by the village authorities on 18/01/2007 and at the police on 19/01/2007.

In his defence on oath, the appellant denied involvement. As head master, he had officially asked Christopher Rubben (DW2), the Ward Executive Officer (W.E.O.) to assist the school in finding the person responsible. That when PW1 was discovered pregnant, on 18/01/2007, she had admitted in the presence of five male persons, including the appellant that the person responsible was Hamisi Rashidi Nalinga. He was arrested. Soon thereafter, PW1 named Hamisi Selemani Sobi (Chitenga) as the person responsible. Then she changed her mind and pointed at Hamisi Mchiwala Issa.

The District Court found out that there was no corroborative evidence to support PW1. However, it considered her as an honest and truthful witness. It held that no reasonable doubt had been raised by the defence allegations. On its part, the High Court held that the trial court had

properly warned itself under section 127(7) of the Evidence Act, Cap 16 R.E. 2002, of the dangers of acting on the uncorroborated evidence of PW1. It held that the trial court was entitled to convict the appellant and dismissed the appeal.

Essentially, the appellant's memorandum of appeal faults the High Court in three domains.

First, that it had erred in relying on PW1's PF 3 Form (Exhibit A) without noticing that the appellant was not given an opportunity to object to its admission, rendering it an improperly admitted exhibit. Furthermore, that the trial court had not complied with section 240(3) of the Criminal Procedure Act, Cap 20 R.E. 2002 in according him his right to require the attendance in court of the medical officer who had examined PW1, for cross-examination. He urged us to expunge the PF3 Form (Exhibit A) from the record.

On his part, Mr. Ndjike readily conceded.

The law is well-established that this Court is extremely loath to interfere with the concurrent findings of facts by the courts below. In

Director of Public Prosecutions V Jaffari Mfaume Kawawa (1981) T.L.R. 149 at 153 the Court stated:

> *"This is a second appeal brought under the provisions of S. 5(7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non directions on the evidence a court is entitled to look at the relevant evidence and make its non findings of fact".*

With respect, we agree with the first ground of complaint. The law is now well settled that failure to comply with requirement of section 240(3) in according an accused the right to require the medical officer at Muhuta Health Centre who made the medical report be summoned for cross-examination, will result in the exhibit being expunged from the record. This we do so now. (See: **Alfeo Valentino V. Republic**, Criminal Appeal No. 92 of 2006; **Wilbard Kilimanjaro V.R**, Criminal Appeal No. 235 of 2007 (CAT, both unreported).

That apart, it is on the record that the trial court also admitted PW1's clinic card as an exhibit without affording the appellant the opportunity to object or otherwise, as it had done with Exhibit A, contrary to section

240(3) of the Criminal Procedure Act. We hereby also expunge it from the record. With great respect, the High Court did not direct itself on all the above. Not only that. It even went further and erroneously relied on PW1's clinic card as having named the appellant as the person responsible for the rape and pregnancy. Accordingly, we find merit in this ground of appeal.

Second, the appellant faults the High Court in relying on PW1's watered-down credibility as a basis for his conviction. The appellant submitted that PW1's demeanor had not been taken into account by the trial Court which had recorded that she testified hesitantly. The appellant argued that if he was named on 18/01/2007 or on 19/01/2007 as testified by PW1 and PW2, why was it that he was arrested only on 12/02/2007, twenty four (24) days later. At the High Court, the appellant had submitted that PW1's testimony was tainted as she did not reveal the secret of her pregnancy even to her best friends at home or at the school, for over a year. This he urged, had affected the reliability of her evidence.

In response, Mr. Ndjike submitted that there was no dispute that PW1 was medically examined on 18/1/2007 and found pregnant. Her delay in reporting the alleged rape and her pregnancy for over a year left a lot of doubt. That as she was in a school community, the prosecution was under

an obligation to adduce evidence from her friends, family or teachers to show that she had a sexual relationship with the appellant, before or after the event. Moreover, as she had testified evasively her evidence lacked credibility.

This ground of appeal directly attacks PW1's credibility and the veracity of her evidence. The facts unequivocally establish that PW1's pregnancy was detected during a medical examination of thirty six girl students organized at the instance of the school on 18/01/2007, of which the appellant was its head teacher. DW2's assistance was sought to find the person responsible.

Having closely scrutinized the record, it is crystal clear to us that PW1 attempted to distort or suppress the truth. Contrary to what she insisted in Court, the evidence of DW1, DW2 and DW3 revels that six months earlier on 18/1/2007 she had named before DW2 at least, three others persons as responsible for the pregnancy and not the appellant, who was then present. She may have been intimidated by DW2, the W.E.O. as she alleged or by the five men present at that occasion, but why continue the bold assertion that she only named the appellant while testifying. It was also sufficiently established that she did not name him at the police on

19/01/2007, for if she did, then the prosecution has not shown why he was arrested on 12/02/2007, twenty four days later. The record shows that he was brought to the court for the first time on 14/02/2007.

Moreover, her repeated false implication of Hamisi Selemani Subi (Chitenga) as the person responsible, who was arrested by police and later released, speaks volumes about the reliability of her evidence. With respect, in appreciating the evidence of PW1, the High Court omitted to properly direct itself on the above aspect of her testimony. Having examined the whole evidence, we feel reluctant to vouchsafe the truth of her story.

With regard to Mr. Ndjike's criticism on the non-reporting of the rape and pregnancy by PW1 for over a year, we are of the considered view that not each and every delayed reporting or disclosure of an allegation of rape or pregnancy to a person of confidence or any other in a proximate or trust relationship casts doubt on the victim or witness or prosecution case. Understandably, a genuine victim of rape may not always cry for help immediately. Reasons for delayed reporting are varied, multiple and complex. They could be attributable to duress, threats, fear of retaliation, trauma, psychological conditions, fear of being outcasted or other causes.

In our communities, rural or urban, these incidents are matters of disgrace and dishonor, even shame or taboo for a victim to divulge to anyone, including to close relatives or intimate friends. In this, we fully subscribe to the observations of the Supreme Court of India in **State of Uttah Pradesh V Chhoteyeal** (2011) I.S.C.R. 406 at 429:

> *"The important thing that the Court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person".*

To achieve justice, the court must be sensitive and responsive to the plight of victims. The evidence must be scrutinized objectively and free of any myths or preconception. When the need arises a plausible explanation for the delayed silence in reporting the incident should suffice. Each case should be approached on its own set of facts and circumstances. That said, in the instant case we are not prepared to throw overboard PW1's evidence on that score alone. Given all the circumstances and her age, we are of considered view that it is best that her evidence is closely scrutinized and assessed, bearing in mind the totality of the evidence.

The appellant also faulted the High Court in misdirecting itself in law and fact in failing to consider the defence case occasioning an unfair

conviction. Mr. Ndjike submitted that DW2's evidence had raised not only reasonable, but a serious doubt on the prosecution case. He flagged the *maxim*: it was better to free nine guilty persons than convict one innocent accused.

It was the learned Judge's finding that:

> *"There was no evidence on record to confirm that there were six other persons alleging to have been involved with DW1 (i.e the appellant) apart from the evidence of the appellant himself that the girl named six men who had love with her".*

With great respect, DW2 and DW3 had plainly testified that PW1 had named three other persons on 18/1/2007. True, the appellant and DW3 (Ahamadi Alfan Peter), another teacher who was then present had said PW1 had named six men, but DW2 who conducted the inquiry stated in court that she had named three persons.

Having considered the whole evidence on record, with respect, it would appear to us that the High Court kept the defence case at the backdrop and misread the material facts contained in the evidence of its witnesses. We, therefore, find merit in this ground of appeal.

In the result and for all the above reasons, we are constrained to interfere with the concurrent findings of fact by the courts below. With the serious doubt raised on the prosecution case, it cannot be held that it had proved its case beyond reasonable doubt. Accordingly, we allow the appeal and quash the convictions and set aside the sentences imposed. The appellant is to be forthwith released from custody unless otherwise lawfully held.

DATED at **MTWARA** this day of 26th June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.
DEPUTY REGISTRAR