IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 151 OF 2010.

BENJAMINI NZIKU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkuye, J.)

dated 30th day of June, 2010
in
(DC) Criminal Appeal No. 21 of 2009.

JUDGMENT OF THE COURT

23rd & 28th March, 2012.

MASSATI, J.A.:

In 2007, Brigita Mlowe (PW1) was 15 years of age and a resident of Lugenge Village, in Njombe District, Iringa Region. On the 18/9/2007, in the evening, she was walking home after taping some bamboo wine. She was alone. On the way, she met the appellant, who was also a village mate. He grabbed

her, and dragged her to a nearby forest threatening to stab her with a knife if she resisted. When they reached some place, he straddled her down, undressed her, covered her with some clothes and raped her. After satisfying his lust, he set her free. PW1 bled a lot all the way home. Since her mother came back home late at night, she reported the ordeal to her the next morning. Her father, PW2, who was also not around, was informed by the mother, and came back that very day. The matter was reported to the local authorities and later to the police, where she got a PF3 and taken to Kibena Hospital and later, to Peramiho hospital for treatment. Meanwhile the appellant was nowhere to be found, until November 2007 where he was arrested in Miva village.

It is then that the appellant was charged with rape contrary to sections 130 and 131 of the Penal Code Cap.16 – R.E. 2002. The District Court of Njombe convicted him as charged and sentenced him to 30 years imprisonment. He

unsuccessfully appealed to the High Court (Mkuye, J.), hence the present appeal.

Before the Court, the appellant appeared in person/unrepresented. Mr. Edson Mwavanda, learned State Attorney represented the respondent/Republic.

The appellant filed a total of seven grounds of appeal. First, he attacked the admissibility of the PF3 by the victim (PW1) basically for contravening section 240(3) of the Criminal Procedure Act Cap. 20 R.E.2002 (the CPA). Second, he attacked the evidence of PW1 as inconclusive, and not supported by her mother to whom she had reported. Third, he pointed out the contradictions in the age of the victim between what appeared in the charge sheet, and her testimony, arguing that it was a point that made possible that the case could be fabricated. Fourth, he contended that there were contradictions on the date on which PW1 reported the matter to the authorities. Fifth, he complained that there was no cautioned statement of his admission to the

commission of the offence before the Ward Executive Officer. Sixth, that the appellant was convicted on the weakness of the defence, and lastly, that the charge against him had not been proved beyond reasonable doubt. He thus prayed that the appeal be allowed.

Mr. Mwavanda, learned State Attorney, did not support the conviction, and sentence. He supported all the grounds of appeal as follows: First, there were contradictions between PW1 and PW3 as to the date the matter was reported. Second, PW1's mother, who got the information first and examined her, did not testify. Third, there is also a contradiction between PW1, PW2 and PW3. Fourth, there was no cautioned statement made by the appellant produced in court to substantiate that he admitted committing the offence as PW2 claimed in court. Fifth, since the trial court relied on Exh. P2 (the PF3) in corroborating the evidence of PW1, and since the PF3 was expunged by the High Court on first appeal, there is no other sufficient evidence

on record to support the conviction of the appellant, as PW1's evidence was not credible. Lastly, it was his submission that since the appellant's age was shown as 16 when he testified, it was wrong for the trial court to impose a sentence of 30 years imprisonment, because his case should have been treated under section 131(2)(a) of the Penal Code.

It is for these reasons that the learned State Attorney, urged us to allow the appeal.

This is a second appeal. It has been held in a number of cases by this Court that, where, there are concurrent findings of fact by lower courts, this Court should, as a wise rule of practice follow the long established rule, that an appellate court in such circumstances should not disturb those findings of fact, unless it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or procedure. (See **DPP v JAFARI MFAUME KAWAWA,** (1981) TLR.149; **SALUM MHANDO v R,** (1993)

TLR 170, **DR. PANDYA v R,** (1957) EA.336. This arises from another rule of practice that assessment of credibility of a witness is the monopoly of a trial court (See **SHABANI DAUDI v R,** Criminal Appeal No.28 of 2001 (unreported). In **ANTOMODIAS CALDERA v FREDRICK AUOUFUS** (1936) All ER.450 (PC) the Privy Council tried to put it this way:

> *"Where the trial judge has come to a conclusion upon a pure question of fact, the appellate tribunal cannot, merely ..... because the question is one of fact, and because it has been decided in one way by the trial judge, abdicate their duty to review his decision and to reevaluate if they deem it to be wrong, but the functions of the appellate tribunal when dealing with a pure question of fact on which questions of credibility are involved are limited in their character and scope".*

What the above exposition means, is that, although an appellate court, such as this Court, may interfere with findings of fact made by a lower court, its scope is limited, especially if such

finding is based on the credibility of witnesses. The question then, is, should we interfere with the concurrent findings of fact by the lower courts in the present case?

The appellant was charged with rape of PW1. The crucial question is whether PW1 was raped, and raped by the appellant. PW1 described in detail when, where and how the appellant was able to forcefully have sexual intercourse with her. They were in close contact and it was still day time. The ordeal must have lasted sometime and, the assailant was known to her as a village mate. So, the witness indisputably identified her assailant. The appellant raised the defence of alibi, which the trial court rejected. Once the defence of alibi was rejected, it only meant that the trial court believed PW1. It found her a credible witness. The trial court founded the appellant's conviction on her testimony and the PF3.

In the first appellate court, the PF3 was expunged, but it found PW1 a credible witness who was consistent in her

testimony, and that her evidence was nothing but true. We agree that the conviction was based on no other evidence than that of the victim (PW1); and not of any other witnesses. So, inconsistencies or contradictions in the testimonies of or between those other witnesses or some of them not giving evidence, is in our view, immaterial. The appellant has complained that there is a contradiction in the evidence of PW1's age between that shown in the charge sheet and that indicated in her testimony. Mr. Mwavanda, did not touch on this; but we do not think that criticism is justified. The charge sheet just shows that the girl was below 18, and in her evidence she said, she was 15, which was an age below 18. So that ground of appeal flops.

Now, it has been held that, the best witness to the offence of rape is the victim herself, (See **SELEMANI MKUMBA v R,** Criminal Appeal No.94 of 1999, and **SAIDI ALLY MKONG'OTO**

v R, Criminal Appeal No. 133 of 2009 (both unreported)). In **MKONG'OTO's** case (supra), this Court observed:

> *"It is not necessary for the prosecution to call other witnesses so long as the learned judge on first appeal was satisfied that PW1 told the truth".*

In the same vein, we think that the two courts below properly directed themselves and found PW1 in this case to have told the truth, and that makes it unnecessary to look at the other evidence, because that is sufficient to ground a conviction under section 127(7) of the Evidence Act.

For the above reasons, we are unable to agree with Mr. Mwavanda. We do not feel justified to interfere with the concurrent findings of fact by the lower courts based on the credibility of PW1. Her evidence alone is sufficient to found the conviction. The appeal against conviction is therefore dismissed. Since we have already disposed of Mr. Mwavanda's submissions in support of the appeal we do not think it is necessary to

consider the appellant's grounds separately because the learned state Attorney effectively responded to the same.

As to sentence, the record gives room for some doubts. According to the charge sheet, the appellant was 29 in 2008, when the offence was committed. However, when he testified, his age was shown to have been 16. His real age was therefore uncertain.

In **R v WAMBUI KAMAU,** (1965) EA 548, the defunct East African Court of Appeal observed that:

> *"The court has a duty in cases of doubt to satisfy itself judicially as to the age of the accused when that affects the criminal responsibility and this is best dealt with at the commencement of the proceedings without waiting for evidence relating to general issues".*

(See also **MOHAMED KESSY @NENGA AND 3 OTHERS v R**, Criminal Appeal No.98 of 1992 (unreported).

Both courts below overlooked to address themselves on this question. But they had to resolve it before sentencing the

appellant. It was important to do so, because, as rightly submitted by Mr. Mwavanda, the appellant was convicted under section 130 of the Penal Code. Since the record shows that he was or could have been 16, and since he had no previous convictions he should have been given the benefit of the doubt and treated under section 131(2)(a) of the Penal Code which reads:-

> *"(2) Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less –*
>
> *(a) if a first offender, be sentenced to corporal punishment only.*
>
> *(b) .....*
>
> *(c) ....."*

He could not suffer more than corporal punishment.

Although the appellant had indicated an intention to appeal against sentence, his memorandum of appeal does not, however, contain such ground. But since, the illegality has surfaced in the course of our hearing the appeal, and since we have had the benefit of hearing from the respondent on it, we

have decided to exercise our revisional powers under section 4(2) of the Appellate Jurisdiction Act Cap 141 – R.E.2002. We accordingly revise the proceedings of the lower courts, by setting aside the sentence of 30 years imprisonment. Since the appellant has already been in prison since 2008, we do not deem it just to impose any further corporal punishment.

In sum total, we dismiss the appeal against conviction, but proceed to set aside the sentence, and substitute it with one that would result into his immediate release from custody, unless he is otherwise lawfully held.

It is so ordered.

DATED at **IRINGA** this 27th day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL