IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 72 OF 2010

EVARIST NYONGO.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mmilla, J.)

dated the 1st day of April, 2010
in
Criminal Appeal No. 64 of 2008

JUDGMENT OF THE COURT

5th & 7th September, 2012

MASSATI, J.A.:

The appellant was charged and tried by the Court of the Resident Magistrate of Manyara at Babati for two counts, of rape, and unnatural offence, contrary to sections 130 and 131, and 154 of the Penal Code respectively. He was convicted as charged and sentenced to life and 30 years imprisonment in that order. On appeal to the High Court, the sentence in respect of the second count was set aside and in its stead that

of life imprisonment substituted. His appeal against conviction was dismissed. He has now come to this Court on a second appeal.

It was alleged before the trial court that on the 23rd day of September, 2006, at about 3:30 hours, at Songambele, within Simanjiro District, in Manyara Region the appellant raped and sodomised one EVA d/o FANUEL, a girl of 8.

The prosecution case was that, on the particular day, PW1 ELIZA SANDE, who lives at Magugu, had gone to Mererani, for a funeral, in the company of her two children and that of her sister, EVA FANUEL (the victim). At about 8:00 p.m. she sought them out so that they could go to bed. The victim was missing, but PW2 ANTHONY ALLY who was around, informed her that he had seen the victim in the company of one ERNEST NYONGO (the appellant) on the way to a shop. She combed the area for the missing victim without success. She lost consciousness. When she woke up at 3:00 a.m. she found the victim at home. The victim told her what happened. On inspection, PW1 found that the victim had no underpants, and had sustained injuries in her vagina and anus,

accompanied by sperms and blood. The matter was reported to the police at Mererani. A PF3 was issued and the victim had to be admitted at Babati Government Hospital for two days. She tendered the PF3 as an exhibit. The victim, EVA FANUEL testified as PW3 to the effect that she had seen the appellant for the first time at the funeral when she was playing with other children. The appellant enticed her out of the group so as to buy her biscuits. She followed him, and on the way, she met PW2. He took her down the river, undressed her, and had sexual intercourse with her both in her vagina and anus, threatening to stab her if she cried. After ravishing her, he left her to go home. PW4 D 4055 D/CPL MAULIDI, recorded the appellant's cautioned statement and produced it in court as Exhibit P2. PW5, WP 2159 CPL JUDITH was on duty when some people reported the rape. She inspected PW3 and found sperms and faeces in her anus and vagina before issuing a PF3. Later, some people arrived to report that the appellant had been arrested, and was being roughed up by a mob of angry people. She went there and rearrested him. She also issued a PF3 to the appellant.

In his defence, the appellant told the trial court that on the material day he had gone to Mererani to follow up his late father's unpaid debt of shs 780,000 from one SANDE ANTHONY, PW1's husband. He found that SANDE was attending a funeral, so he had to wait till the following morning. Next morning he went to PW1's house, where he was arrested by the police, and tortured. He was later taken to the police station where he was again tortured into signing on a piece of paper, whose contents he did not know. He denied to have given any statement at all or in the presence of a relative. He insisted that he was innocent of the charges he was facing; and that it was just a fabricated case. He tendered his PF3 as Exhibit D1 and a debt settlement agreement as Exhibit D2.

It was on the basis of the above evidence that the appellant was convicted.

Before us the appellant appeared in person. The respondent/ Republic was represented by Ms. Javelin Rugaihuruza, learned Senior State Attorney.

The appellant had filed a memorandum, consisting of five grounds of appeal, but essentially they boiled down to one; that his conviction was based on incredible fabricated and improbable prosecution evidence. He pointed out for instance, that, the evidence of PW3 was unintelligible and unreliable as she did not know him before; the contradictions between PW1, PW2 and PW3 as to the time he was seen with the victim, the failure by PW1, and PW3 to mention his name at the police station considering that they knew him well; the improbability of PW1 falling unconscious for 7 hours without being taken to hospital and the tainted credibility of PW5 who claimed to have issued the PF3s, (Exh P1 and D1) which she did not.

On her part, the learned Senior State Attorney did not support the conviction. She submitted that since the *voire dire* test of PW3 was faulted, in that the trial court did not make a finding as to her intelligence, her evidence should be discarded. She referred us to the decision of **GODI KASENEGALA vs REPUBLIC,** Criminal Appeal No. 10 of 2008 (unreported). She went on that in the absence of PW3's evidence, there was no evidence of rape. The evidence of PW1 and PW2, also relied on by the lower courts was insufficient. She said that, what PW1 heard from

PW3 now remains hearsay; and the evidence of PW2 was insufficient considering that it was at night when he allegedly saw the appellant and the victim, and there was no description of the intensity of the light which helped him to see them. She therefore, urged us to allow the appeal.

There is no doubt that the appellant's conviction rested on the evidence of PW1, PW2, PW3, and exhibits, P1 and P2. The first appellate court found that exhibits P1 and P2 were improperly introduced into evidence and so discarded them. We agree. The PF3 (Exh. P1) was admitted contrary to section 240 (3) of the Criminal Procedure Act. Exhibit P2, the cautioned statement of the appellant, was admitted despite objections from the appellant, and without holding an inquiry. However, the two courts below also found that PW1, PW2 and PW3 were credible witnesses and so found that their evidence was strong enough to found the appellant's conviction.

As has often been held, sitting in a second appeal, this Court, would usually not disturb concurrent findings of facts made by the lower courts, unless there has been a misapprehension of the evidence, or some

principle of law, as to lead to a miscarriage of justice. And especially, if those findings are based on the credibility of the witnesses. (see **JUMA SAID AND YAHAYA ABDALLA vs REPUBLIC,** Criminal Appeal No. 114 of 2005 and **SEIF MOHAMED EL-ABADANI vs REPUBLIC,** Criminal Appeal No. 320 of 2009 (both unreported).

In the present case, as submitted by the learned Senior State Attorney, the evidence of PW3 was improperly taken, as the findings made after the *voire dire* examination, did not fully comply with the requirements of section 127 (2) of the Evidence Act; which lays down that if a child does not understand the nature of an oath; the court may take down its evidence if it is satisfied that the child understands the duty of telling the truth, and is of sufficient intelligence. In his case, the trial court was only satisfied that PW3 understood the duty of speaking the truth. There was no finding as to whether she was possessed of sufficient intelligence. As held by this Court in **GODI KASENEGALA vs REPUBLIC** (*supra*) those two conditions must be satisfied conjunctively before taking unsworn evidence of a child; and that, if this is not complied with, such evidence must be discarded. So, we respectively agree with Ms. Rugaihuruza, that the

evidence of PW3 should be discarded, as we hereby proceed to do. As such, with or without corroboration such "evidence" cannot be the basis of any sound conviction.

But we also agree with the appellant that there are material contradictions between and in the evidence of PW1, PW2 and PW5. For instance, whereas PW1 told the trial court that PW2 informed her at 8 p.m. (20:00 hrs) that he had seen the appellant in the company of PW3; PW2 testified that he saw them at 10:00 p.m. (22:00 hrs) suggesting that either both or one of them was not telling the truth. Whereas PW5 claimed that she was the one who issued the PF3's to the victim and the appellant a close examination of the actual evidence tendered in court, showed that Exh. P1 was issued by a Cpl. Mathias, whereas Exh. D1 was issued by the Babati Police Station, although PW5 was stationed at Mererani. So PW5 must have lied on that aspect. These contradictions and lies, in our view, seriously dented the credibility of those witnesses.

On the other hand, since there is no dispute that both PW1 and PW2 knew the appellant, and had already known that he had ravished PW3,

(after she had told them before reporting to PW5,) we are left to wonder as did the appellant, why was the appellant's name not mentioned at the police station at the first opportunity? The charge sheet alleges that the offence was committed at 3:30 a.m., but according to PW1, when she regained consciousness at 3:00, PW3 was already at home and according to PW3, she had already reported the atrocity committed to her to her uncle, Sande. We asked ourselves, since the charge was not amended, could it be that the offence was committed much earlier than the time alleged in the charge sheet? Furthermore, in view of his role in the prosecution and the defence case, why was Sande not called to testify on what PW3 had reported to him? These, and many other questions that call for answers, show that, the prosecution case left a lot to be desired. So, if PW3's evidence was properly received and required corroboration, the remainder of the evidence on record could not provide one. Had the two courts below fully appreciated the evidence, by properly analysing it, and had they been alive to the provisions of section 127 (2) of the Tanzania Evidence Act, and the relevant case law, they would not have come to the conclusion they did. This, in our view, is a clear case where the courts

below have misapprehended the evidence and misdirected themselves on some principle of law, that has led to a miscarriage of justice.

So, for the above reasons, we think that the conviction of the appellant is not safe. We accordingly allow the appeal. The conviction is quashed and the sentence set aside. He is to be released from custody forthwith, unless he is otherwise in some other lawful incarceration.

DATED at ARUSHA this 7th day of September, 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL