IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: RUTAKANGWA, J.A.,KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 4 OF 2011

JUMA MOHAMED.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated 19th October, 2010

in

Criminal Appeal No. 4 of 2010

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JUDGMENT OF THE COURT

20 & 27 June, 2012

KIMARO, J.A.:

Juma Mohamed, the appellant in this case, was charged and convicted by the District Court of Tanga, at Tanga, for the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code [CAP 16.R.E.2002]. He was sentenced to thirty years imprisonment and corporal punishment of twelve strokes. The charge sheet alleged that the offence was committed on 28th April, 2008 at about 10.00 hours within the city and

District of Tanga at Mapinduzi area where the appellant had sexual intercourse with Khauda d/o Abdallah, a girl who was then aged 9 years.

The evidence that was led in the trial court was that one Kijoli Salawi (PW1), the Street Chairperson of the Mapinduzi Street received information from an informer who was not disclosed, and did not even testify, that the appellant was having sexual affairs with the victim of the offence, namely Amina Abdallah @ Khauda (PW2), the complainant in this case. PW1 called PW2 to ascertain from her whether the information was true. Upon PW1 interrogating PW2 on the truthfulness of the information of her sexual affairs with the appellant, PW2 confirmed that the information was true. Apparently PW2 was living with her grandmother, Mwanaisha Omary (PW3).

Explaining on how the relationship of the appellant and the complainant started, PW2 said she used to see the appellant on her way to school. By then she was in standard II. The appellant called her by making certain sounds which surprised PW2. PW2 responded by asking the appellant what he meant by making that sound. At first the appellant did

not say anything. As days went by, the appellant started to lure PW2 by giving her money, and for that matter a very small amount. Lastly, he started to caress her breasts and later on, the appellant required PW2 to have sexual intercourse with him. According to PW2 she had sexual intercourse with the appellant three times; one times in the appellant's shamba, and the two time at his home. PW1 said she succumbed to the appellant for the sexual intercourse because the appellant threatened her not to disclose the relationship to anyone, or else the appellant would cut her head and take it to her grandmother and remain with the rest of her body. PW2 was not specific in her evidence that she had sexual intercourse with the appellant on the 28th April as shown in the charge sheet.

The evidence that came from her grandmother, PW3, was that the appellant was known to him for a long period because PW3 was at one time a tenant in the house of the appellant's mother. Furthermore PW3 who used to prepare local fans commonly known as "*vipepeo*" was [illegible] appellant had informed her that she wanted "*vipepeo* " and on one Saturday the appellant went to her house for the

said local fans. As regards the sexual relationship between the appellant and her granddaughter, the grandmother seemed to have no information at all. All that she recounted was that on the day in which the appellant went to her house for the local fan, the appellant told PW3 that he was going to his shamba with PW2 to uproot cassava. When PW2 returned home, she had cassava leaves but was not walking properly. When she inquired from her what the problem was, PW2 said she had a boil in her private parts. PW3 examined her and confirmed that the information was correct. Then PW3 waited until the boil was ready for pressing and she accordingly attended to it. Another thing PW3 recalled was that PW1 summoned her, and required her to go with PW2. When she went to see PW1 she met him with persons who were introduced as policemen. It was then her granddaughter was questioned about her sexual relationship with the appellant. PW2 admitted that she was having a sexual relationship with the appellant and she disclosed when that relationship started, where they used to meet and for how many times they met for sexual intercourse.

There was also medical evidence from the doctor who examined PW2. He is Dr. Fred Mtatifiko, PW5 and he is a specialist Obstetrician Gynaecologist. His testimony was that PW2 went to him with a PF3 that was issued to her by the Police on 7/5/2008. He examined PW2. The examination revealed that PW2 had been sexually abused and she had sexual transmitted infection- STI. The PF3 was admitted in evidence but without following the procedure. It was not shown to the appellant for his comment or any observation before the trial court admitted it.

In his defence the appellant denied the commission of the offence. He admitted knowing the complainant through her mother. He also admitted knowing the grandmother of PW2. He explained that he was related to PW2 as he was his paternal uncle. He also wondered why he was not medically examined to see whether he was equally infected with STI.

With this evidence, the trial court was satisfied that the prosecution proved the case against the appellant on the standard required. His defence was found to have not casted doubt on the prosecution case.

The first appellate court sustained the conviction and the sentence on the ground that PW2 candidly told the truth against the appellant.

The appellant is still aggrieved by the decision of the first appellate court and he filed this second appeal. He has filed four grounds of appeal challenging the decision of the courts below. In his grounds of appeal the appellant mainly faulted the prosecution for failure to summon the informer who disclosed the alleged sexual relationship between him and the complainant. In his considered opinion his/her evidence would have corroborated the evidence of the rest of the prosecution witnesses because they were not eyewitnesses to the commission of the offence. He wondered why the Courts below trusted the evidence of the prosecution witnesses while they were not eyewitnesses to the commission of the offence, and in convicting the appellant the trial court did not even warn itself of the danger of convicting him on uncorroborated evidence. He also lamented why the doctor's evidence was found to be reliable for his conviction while he was not tested to find out if he was also infected with the sexually transmitted infection -STI.

At the hearing of the appeal the appellant appeared in person. The respondent /Republic was represented by Mr. Joseph Sebastian Pande learned Senior State Attorney, assisted by Mr. Saraji Iboru, learned State Attorney. The appellant opted to respond to his grounds of appeal after the respondent had expressed their views on the appeal.

Mr. Saraji Iboru, learned State Attorney who argued the appeal for the respondent supported the conviction and the sentence. He said the evidence that was produced by the prosecution sufficiently proved the case against the appellant. As he went through the grounds of appeal by the appellant, the learned State Attorney said the charge against the appellant was proved beyond reasonable doubt and the appellant was not convicted on the weakness of the defence but the trial court considered the evidence for the prosecution and the defence and was satisfied that there was overwhelming evidence from the prosecution to sustain the conviction for the appellant.

At the intervention of the Court the learned State Attorney was required to say whether the evidence that was led by the prosecution

proved that the appellant committed the offence on 28th April 2008 as alleged in the particulars of the charge sheet. The learned State Attorney answered frankly that the only eyewitness to the commission of the offence was the complainant-PW2. But in her evidence she did not say that the offence was committed on the 28th April 2008. When he was required to comment on the effects of such omission, the learned State Attorney said the omission did not affect the credibility of the evidence of the complainant and the Court can also use its powers to re-assess the evidence and give its opinion. As for the failure by the prosecution to bring evidence to show that the appellant was also infected with the STI, the learned State Attorney admitted that the omission weakens the prosecution case and makes it suspicious. However, he was adamant to change his position. He insisted that the appeal should be dismissed and the conviction and sentence upheld.

The appellant in reply said the case was first filed in the trial court but it was later withdrawn and he was discharged. Later on it was filed again in court in November and after the trial, he was convicted. He

claimed that he is innocent and the case was framed against him. He prayed that the appeal be allowed.

We are mindful that this is a second appeal. Our right to interfere with the concurrent findings of facts by the courts below is limited to misapprehension of evidence, miscarriage of justice and violation of principle of law or practice. See the cases of **DPP V Jaffari Mfaume Kawawa** [1981] T.L.R 143 and **Mussa Mwaikunda V R,** Criminal Appeal No. 174 of 2006

In this appeal it is apparent that the offence of rape as alleged in the charge sheet was committed on 28th April 2008. But as conceded to by the learned State Attorney there was no evidence led to prove that the offence was committed on 28th April, 2008. In this case PW2 was the victim of the alleged rape. The Court has always held that the best evidence in rape cases is that of the victim. See the case of **John Martin alias Marwa V R,** Criminal Appeal No. 22 of 2007 (unreported). PW2 did not say in her evidence the date when the offence was committed. The only witness who said the offence was committed on 28th April 2008 was PW1.

However, PW1 was not an eyewitness to the commission of the offence. Worst still, he did not even disclose the name of the person who informed him about the sexual relationship of the appellant and PW2. To that extent his evidence was hearsay. Even the closely related person to PW2, her grandmother PW3 who was living with her said she had no information about the sexual relationship of the appellant and PW1 as PW2 never disclosed such information to her. The doctor who examined PW2 said she was infected with STI. The examination was done on 5th June, 2008 more than a month after the commission of the alleged offence. The prosecution never made any efforts to have the appellant examined to see if he was suffering from the same infection. With such obvious shortfalls in the prosecution evidence there is need for the Court to interfere.

In the case of **Anania Turian vs R**, Criminal Appeal No. 195 of 2009 (unreported), it was alleged that the appellant raped the complainant on 24th day of August, 2001. However, no evidence was led to show that the offence of rape was committed by the appellant on the 24th August, 2001. Instead, all witnesses who were summoned testified that the offence was committed on 22nd August, 2001. The Court held that:

"In our considered opinion, it was wrong for

the two courts below to find the appellant guilty

as charged and proceed to convict him."

Similar circumstances of not giving evidence to prove that the offence was committed on the date that was alleged in the charge sheet arose in the cases of **Ryoba Mabiba @ Mungare v R** Criminal Appeal No. 74 of 2003 and **Christopher Raphael Maingu V R** Criminal Appeal No.222 of 2004 (both unreported). In both cases the conviction of the appellant was quashed and set aside and the appeals by the appellants were allowed because of that defect.

The Court in **Simon Abongo V R** Criminal Appeal No. 144 of 2005 also quashed the conviction and set aside the sentence because the evidence showed that the offence was committed on a date other than the one that was shown in the charge sheet. The Court held:

"In our view, the medical examination apart from

showing that the offence took place earlier than

11.9.2000 contrary to the date shown in the charge it also casts doubt on the credibility of the witnesses PW2 and PW3. It raises the question why the delay on the part of the parents of PW2 including PW3 in bringing their child, the victim of the alleged rape to the hospital for medical examination."

In this appeal we have shown a number of displeasing laxity in the prosecution case which casts a lot of doubt in the prosecution case. First, is non compliance with the procedure in the admission of exhibits. Second, is failure to summon material witnesses to support the evidence of PW1. Third, is failure to lead evidence to prove that the offence was committed on the date alleged in the charge sheet. Four, is failure to ascertain the evidential value of the medical report on the STI. This could be ascertained by having the appellant examined on his status of STI. Having pointed out all the deficiencies in the prosecution case, we find the need to emphasize here that it is important for the prosecution to strictly comply with the procedure for charging accused persons and prosecuting

them properly in the courts. It is also the duty of the Court to ensure that the procedure for conducting trials fairly is complied with and give fair decision in accordance with the evidence made available in the trial.

The importance of conducting fair trials is well expounded by the Court in the case of **Alex John V R,** Criminal Appeal No. 129 of 2006 (unreported). The rights and dignity of the respective parties in the proceedings have to be respected and each one treated fairly in all stages of the proceedings. An accused person should never be denied the right to defend himself properly because the prosecution failed to disclose important evidence which should enable the appellant to defend himself/herself properly and so forth. Likewise it is important to remind each one in the administration of justice that the prisons were built for persons who are proved to have really committed the offences they are charged with. The innocent ones should not be sent there because of failure in the administration of justice.

With what we have demonstrated above, we are satisfied that the appeal has merit. We allow the appeal, quash the conviction and set aside

the sentence and order the immediate release of the appellant from prison unless he is held there for other lawful purpose.

DATED at **TANGA** this 25th day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL