IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 182 OF 2011

ALOYCE MGOVANO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Kihio, J.)

Dated 27th day of June, 2011
in
DC. Criminal Appeal No. 39 of 2010

JUDGMENT OF THE COURT

24th July & 2nd August, 2013

LUANDA, J.A.:

The appellant Aloyce Mgovano was charged, convicted and sentenced to life imprisonment for raping a girl aged 6 years by the District Court of Iringa at Iringa. Dissatisfied with the finding and sentence of the trial court, he unsuccessfully appealed to the High Court of Tanzania sitting at Iringa. Still aggrieved he has preferred this appeal in this Court.

The appellant who appeared in person was unrepresented and so he fended for himself. The appellant has raised three grounds in which he attacked the evidence of the prosecution not strong to ground a conviction. The grounds raised are:-

1. That the learned Judge of the High Court erred in law and fact when he relied on the testimony of PW1, PW3, PW5 and PW6 which contradict each other.
2. That the learned High Court Judge erred in law and fact when he relied on the testimony of PW8 and the PF3 admitted in the trial court as exhibit P2 as the word used on it was "probably she is raped."
3. That the learned High Court judge erred in law and fact by upholding the decision of the trial court while the prosecution side failed to prove the case beyond reasonable doubt.

In this appeal, the respondent had the services of Mr. Okoka Mgavilenzi learned State Attorney. At first, Mr. Okoka resisted the appeal. Later he changed position and supported the appeal.

Before we go into the merits or otherwise of the appeal it is useful to give a short historical background of the case. The prosecution case which was found credible by both lower courts is this: on the fateful day i.e. 11/12/1998 around 21:00 hrs. Rosa d/o Chussi (PW2), the mother of Tumliche d/o Mateleke, the victim of rape, was at her homestead cooking. At some stage she claimed to have started tracing her daughter whom she said had disappeared from home. When she went to the nearby house where the appellant, who was employed by the family to do shamba work, was occupying with her two male children who were on the floric of their own, she met the appellant therein in the act of having sexual intercourse with her daughter, Tumliche. The appellant was lying on top of Tumliche. She queried the appellant what he was doing. The appellant got frightened, he got up and apologised by saying he was confused. PW2 raised an alarm and contained the appellant not to escape. Her neighbours responded. Among the neighbours who allegedly responded were Venance s/o Chussi (PW3), Mwatatu d/o Gohagi (PW4). Moses Mateleke (PW1), the father of the victim of rape, who had earlier testified that he found the appellant raping the girl later said he responded the call from his wife PW2 and returned home from a pombe shop. It is not in evidence as to who delivered that message to him and it took how long after the incident.

Further we are not told the distance from his house to the pombe shop. But by calling PW1 from the pombe shop no doubt that at least someone was dispatched to deliver that message to PW1. We shall revert to his evidence in this judgment at a later stage.

Be that as it may, after people had gathered, the appellant is reported to have apologized. The victim was examined by PW2 and PW4 whereby they saw blood coming out from the victim's vagina and some sperms. The appellant was sent to the village chairman one John Sungwa (PW7). There, upon interrogation, the appellant admitted to have committed the offence of rape. It is not in evidence what the appellant really said. Whatever the position, PW7 wrote a letter and referred the matter on the same day to police and the victim was sent to hospital. However, it is not clear exactly when the appellant was received at Police station. S/sgt Lawrence (PW5) who investigated the case said he found the appellant already in police custody on 12/12/1998; whereas Cpl. Lazaro (PW6) who took the cautioned statement (exht. P1) of the appellant said the appellant was sent there on 13/12/1998!

Again whatever the position, according to Ayub s/o Mhagama (PW8) a medical practioner who attended Tumliche, said the victim was sent at

Ilula Health Centre on 12/12/1998 at night which was the following day! PW8 examined the victim's vagina and said that he observed some bruises, blood was slightly coming out and white liquid. He formed an opinion that the victim was raped. He wrote a report Exht. P2.

The appellant had elected to remain silent.

As regards the first ground of appeal, Mr. Okoka submitted that in the first place the learned High Court Judge did not discuss the evidence of Sgt. Laurence (PW5) and Cpl. Lazaro (PW6) who contradicted each other. The evidence of PW1, PW2, PW4 and PW8 also contradicted each other. The complaint raised is meritorious. Turning to the second ground, Mr. Okoka said PW8 filled in the PF3 Exht. P2 that "probably she is raped." However, his concern is why it took such a long time 24 hours to send the victim to hospital. And lastly he said taking the evidence as a whole, the evidence on the prosecution side is not strong to ground conviction. In other words, the prosecution did not prove its case to the standard required that is, beyond reasonable doubt. The appellant's silence notwithstanding, he submitted. He accordingly urged us to allow the appeal.

However, before we go on to discuss the merits of the appeal, we wish to point out that it is a cardinal principle that where there is a concurrent finding of facts by the lower courts the higher court will not lightly interfere with that concurrent finding unless there is a misdirection or non-direction (See, **D.P.P. v. Jaffari Mfaume Kawawa** [1980] TLR 149; **Salum Mhando v. R.** [1993] TLR 170). We entirely agree with Mr. Okoka that the prosecution case is full of contradictions and lacked coherence. We are alive to the fact that the credibility of a witness in any judicial proceeding be it criminal or civil has always been recognized as the monopoly of the trial court. (See **Siza Patrice v. R.,** Criminal Appeal No. 19 of 2010 (unreported)). And there are two ways in determining the credibility of a witness. This has been stated by this Court in **Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (unreported). The Court said:-

> *"The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two*

determined even by a second appellate court when examining the findings of the first appellate court."

Both courts below based their finding of guilty on the credibility of witnesses of course with accompanying documentary evidence like cautioned statement and PF3. So the question is, were the witnesses credible?

The key witness in this case PW2 testified to have found the appellant in the act of having sexual intercourse with her daughter. When she queried the appellant, the appellant apologized. She raised an alarm, people responded. Among those who responded were PW3 and PW4. According to PW3 and PW4 on arrival they saw PW1 and PW2 at the scene of crime. But PW1 said when he was cross-examined by the Court, he said, we reproduce:-

"My wife called me from the club after the incident."

He did not say to have heard the alarm raised by PW2, his wife. So, PW1 did not go back home due to the alarm raised by PW2. If that is the case, then it is clear that the pombe shop was a bit far vis-à-vis the homesteads

of PW3 and PW4 who responded immediately to the alarm raised otherwise PW1 would have also responded to the alarm raised if it were nearer. We are of the settled view that indicates that PW3 and PW4 were nearer to PW2's homestead than to the pombe shop and so PW1 could not have arrived much earlier than PW3 and PW4 as claimed by these two witnesses to have met PW1 also already there.

Further PW3 contradicted with the evidence of PW2 and PW4 as to the place where the victim was first examined. PW3 said the victim was examined by PW2 and PW4 by order of PW7. Naturally it must be at the homestead of PW7, if it is true, because PW7 was not among the people who went to PW2's homestead; whereas PW2 and PW4 said they examined the victim at PW2's homestead. Who among these are saying the truth? In addition, it is on record that the victim and the appellant were sent to hospital and police respectively on direction of PW7. But the victim according to PW8 was sent a day after the incident. No explanation was given for such a delay. Likewise the day the appellant was sent to police is not exactly known. PW5 said as follows, we reproduce:-

"On 12/12/1998 I found the accused in remand at Ilula Police station for this offence."

But PW6 who was also at Ilula Station said, we quote:-

*"I know the accused because he was brought at the office for this offence on **13/12/1998."***

The question is when exactly was the appellant sent to Police? We do not know. So, PW2, PW3 and PW4 contradicted with PW8 as to the day the victim was sent to hospital. And they also contradicted with the evidence of PW5 and PW6 as to the date the appellant was sent at police. And the evidence of these two police officers was not discussed by the first appellate court. Not only that PW2 evidence as to have met the appellant in the act of sexual intercourse with the victim differed with the alleged cautioned statement of the appellant which was tendered without objection where the appellant stated that he went with the child to PW2. That is to say he was not met in the act of having sexual intercourse.

We have found out that the evidence of PW2 and the evidence in Exh. P1 cannot stand side by side. They cannot both be true at the same

time, as they fundamentally contradict each other. We have no assurance if any of them is containing a grain of truth. Furthermore, the evidence of PW3 and PW4 is not trouble free. PW3 testified that when he arrived at the alleged scene of crime he found only PW2 and PW1. This evidence is contradicted by that of PW4 who testified that when he arrived there he found only PW1 and PW2. He added:-

"Other villagers were not yet to arrive."

These witnesses therefore might have been lying. This suspicion gets support from the evidence of PW1 and PW2 who never mentioned them at all.

The evidence on the prosecution case is full of contradictions and lacked coherence. Such evidence creates doubts as to whether the appellant was the one who committed the offence. The doubt should be resolved in favour of the appellant. Had the courts below properly scrutinized the evidence, they would have not reached the decision they had reached.

In sum, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant be released from prison forthwith unless he is lawfully detained.

Order accordingly.

DATED at **IRINGA** this 1st day of August, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL