IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMIMAL APPEAL NO. 272 OF 2012

PETER ASSENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Munisi, J.)

Dated the 7th day of February, 2011

in

Criminal Appeal No. 109 of 2010

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JUDGMENT OF THE COURT

1 & 29 July, 2013

KIMARO, J.A.:

This is a second appeal in which Peter Assenga, the appellant is protesting his innocence. He was charged in the Court of Resident Magistrate at Kinondoni with the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, [CAP 16 R.E. 2002]. He was convicted and sentenced to life imprisonment. The victim of the rape,

Penina Julius (PW4) was a child of tender age, aged six years. The appellant's appeal to the High Court was dismissed in its entirety.

The appellant has five grounds of appeal and at the hearing of the appeal, he added two other grounds. In his first ground, he challenged the first appellate court for failure to properly evaluate the prosecution case. He contends that the trial court failed to see that the prosecution witnesses number one to four contradicted themselves. In his second ground of appeal the appellant complains that the trial court did not ascertain his age and that led to his being unlawfully sentenced. He says at the time of the commission of the offence he was below eighteen years and so he was supposed to be dealt with under the Children and Young Persons Act, [CAP. 13, R.E.2002]. He also faults the courts below for admission of the evidence of a doctor in contravention to section 289 of the Criminal Procedure Act, [CAP 20 R.E.2002]. The appellant alleges that the doctor who in the trial court testified as (PW3) did not have qualifications of a doctor. The complaint of the appellant in ground four is that his defence was not considered. In ground five he says there was no compliance with section 231 of the Criminal Procedure Act, Cap. 20. The grounds added

at the hearing of the appeal are that the charge sheet is defective and the statement of the appellant was not taken at the police station.

At the hearing of the appeal the appellant appeared in person. He did not have services of an advocate. Mr. Peter Njike, learned Senior State Attorney represented the respondent Republic.

This being a second appeal, the Court is guided by the principle enunciated in the case of the **DPP Vs Jaffari Mfaume Kawawa** [1981] T.L.R. 133. The case gives the circumstance under which the Court can interfere with findings of the courts below. That is when there was misapprehension of evidence resulting in a miscarriage of justice or a violation of some principle of law or practice. See also the cases of **Issa Said Kumbukeni V R** [2006] T.L.R.227, **Daniel Nguru V R** Criminal Appeal No.178 of 2004 and **Ally Kinanda and three others V R** Criminal Appeal No.206 of 2007 (both unreported).

The evidence that was led in the trial court was that Juma Musa (PW1) was a mason. On the morning of 9th November, 2009, he reported at his construction site, a storey house at Mbezi. After preparing building materials and was ready to start his work, he heard a child crying from

upstairs. He responded to the cry and walked quietly to the room from where the cry was coming from. There he found the complainant lying on the floor and the appellant, who did not have his trouser on, was lying on top of her. PW1 called Maeda Brown Mwakasege (PW2). The witness is a neighbour to the scene of crime and the place where PW1 kept his building materials. This witness corroborated the evidence of PW 1 that she found the complainant crying and the appellant was there holding his trouser.

The complainant informed PW2 that the appellant hurt her in the vagina. PW2 examined the complainant's vagina. She found her bleeding. She also confirmed that the complainant had difficulties in walking. A lot of people gathered at the scene of crime. The complainant and the appellant were taken to the police station. At the police station WP 2196 D/Sgt Rukia (PW5) inspected the complainant and she corroborated the evidence of PW2 that the complainant had bruises in her vagina. The complainant's mother, Getrude Julius (PW6), testified that she took the complainant, her daughter, to school on the date of the commission of the offence in the morning and left her at school. Later she received information that her daughter was raped. She made a follow up and found her at the police station and sent her to hospital. At the Tumbi hospital where the

complainant was sent, Dr. Shabani Mohamed Sheshe (PW3) attended her. His examination revealed that the complainant had bruises and rupture of hymen and this was abnormal for a child of the age of the complainant. According to the charge sheet and the testimony of the complainant, the offence was committed to her at the age of six years. The PF 3 was admitted in evidence as exhibit P1.

Explaining the sad event as she gave evidence, the complainant who testified as PW4 after a satisfactory "voire dire" test said after her mother, PW6 sent her to school; the appellant followed her after she refused to go to him when he called her. He pulled her by force and took her upstairs in a building, away from school. There, the appellant removed her underpants, and then undressed her pair of trouser and laid her on the floor. The appellant then inserted her penis in the complainant's vagina. The complainant said she felt very bad and cried for help. In response to the cry, a lot of people gathered at the scene of crime and later the incident was reported to the police, followed by the prosecution of the appellant.

In his defence the appellant denied the commission of the offence. He said he was arrested as he was on his way going to collect his debt

from one Mama Neema. He said he deals with petty business. The trial court was satisfied that the evidence adduced by the prosecution proved the commission of the offence on the standard of proof required by the law. The High Court as we have said, sustained the conviction and sentence.

Coming now to the grounds of appeal, the appellant as layman did not have anything substantial to say in support of his appeal. He requested the Court to rely on his grounds of appeal and allow his appeal. On his part the learned Senior State Attorney supported the conviction and the sentence.

Starting with the additional grounds of appeal, the learned State Attorney said the charge sheet has no defects. The appellant was charged with the offence of rape and because the complainant was a child of tender age the offence is statutory rape.

The learned State Attorney argued grounds one and two of the appeal together. He said the appellant has not pointed out the contradiction he says was found in the evidence of the witnesses. Traversing the prosecution evidence, the learned State Attorney said the

complainant explained clearly how the appellant raped her, after grabbing her from school. He said from her evidence, the complainant was able to show that there was penetration. Furthermore, said the learned State Attorney the evidence of the complainant is corroborated by that of PW1 who said he found the appellant in "fragrante delicto" and PW3, the doctor who examined the complainant and found her with a ruptured hymen, that was something unexpected from the child of that age.

Mr. Njike said the trial court was in the best position to assess the credibility of the witnesses.

Regarding the duty of proving the prosecution evidence, the learned State Attorney said the law imposes the burden of proof in criminal cases on the prosecution and the prosecution did discharge that burden.

As regards the age of the appellant, the learned State Attorney agreed that the trial Court had to ascertain the right age of the appellant at the time the offence was committed for purposes of meting out the proper sentence. On the aspect of non-compliance with section 231 of the Criminal Procedure Act, the leaned State Attorney said it is a new ground,

not raised in the first appellate court. He prayed that the appeal be dismissed.

We have carefully gone through the grounds of appeal and the submissions made. In determining the appeal, we will start with the ground of appeal on the charge sheet which was raised by the appellant as an additional ground. The charge sheet in the record of appeal has no defects. Section 132 of the Criminal Procedure Act, CAP 20 requires a charge to contain a statement of the particular offence together with such particulars as will be necessary for giving information as to the nature of the offence charged. The charge sheet gives the name and particulars of the appellant. It has the statement of the offence which shows that the appellant was charged with rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code CAP 16 R.E. 2002. It also has the particulars of the offence showing the date, time, and the area and to whom the offence was committed. With such information in the charge sheet, this ground of appeal has no merit.

Regarding ground five of the appeal where the appellant complains about the qualifications of the doctor who attended the complainant, that is PW3, we think the appellant is working under a misconception and

ignorance. He doubted the qualification of PW3 because in cross-examination the witness said he was a Senior Assistant Medical Officer. He also said section 289 was not complied with. The appellant says that because the witness did not possess the qualifications of a doctor and he testified, he should be held liable under section 198 of the Criminal Procedure Act for testifying on oath and giving false information on qualifications which he did not possess. The appellant thinks that the witness was a liar.

This ground has no merit. While giving his evidence, the witness said he is a medical doctor stationed at Tumbi Special Hospital. He was the Senior Assistant Medical Officer. What more did the appellant require the witness to say. The witness was the best person to tell who he was. He was a witness called by the prosecution. Under section 198 of the Criminal Procedure Act, he was required by the Oaths and Statutory Declarations Act [CAP R.E.2002] to testify on oath. That is what the witness did. Section 289 of the Criminal Procedure Act which was cited by the appellant is not applicable in subordinate courts. The section is in PART VIII of the Act and it deals with trials in the High Court. This ground also lacks merit.

Regarding the complaint by the appellant that his defence was not considered, we must say that the appellant is not right. The record of appeal at page 8 shows that the defence of the appellant was considered. The record shows as follows:

> *"However, the accused, in his final submission averred that all the prosecution witnesses are family friends /related so the evidence was cooked against him and that PW3, the said Medical practitioner failed to establish his experience as professional and that he is not the one who attended the patient."*

After making such remarks the trial magistrate then considered the prosecution evidence and made a finding that the appellant was guilty as charged.

Coming to the complaint that the evidence was not properly evaluated, this ground lacks merit. In this case the appellant was caught "*fraglante delicto*" raping the complainant. The appellant complained that there was discrepancy in the evidence of the witnesses. However, he has not pointed out the discrepancy. In sustaining the conviction, the learned

judge on first appeal after going through the evidence of the prosecution witnesses said:

> *"The law is very clear on this aspect that penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence of rape (section 130(4)(a). Hence the evidence of PW4 supported by that of PW3 and PW1 who observed bleeding from PW4's vagina, proved beyond any shadow of doubt that the appellant penetrated PW4's vagina and therefore committed the offence complained. The chain of events as explained by PW1 who witnessed the incident and PW2 who responded to the call for help and came the scene outweighs the complaints by the appellant that he did not commit the offence. Considering the age of the victim who did not even know appellant and the totality of the evidence on record, there is no doubt in my mind that the appellant did what he is alleged to have done."*

As stated before, we went through the record of appeal. From what is reflected in the record of appeal, we have no reason to doubt the findings of the lower courts on the conviction of the appellant for the

offence of rape. PW4 explained clearly how the whole incident took place. She showed in her evidence that the appellant penetrated her vagina. In the case of **Seleman Mkumba V R** CAT Criminal Appeal No. 94 of 1999 the Court held that in rape cases the best witness to prove the offence of rape is the victim herself, a woman where consent is relevant and a girl child where consent is irrelevant. We see no reason to fault the decision of the first appellate court on this matter.

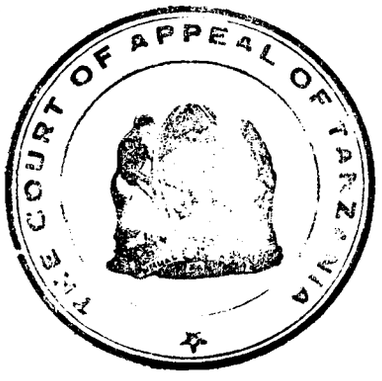
Regarding the ground of complaint that there was no compliance with section 231 of the Criminal Procedure Act, we agree with the learned Senior State Attorney that this ground was not raised in the first appellate court. It cannot be raised now.

The last ground we have to deal with is failure by the learned judge on first appeal to address the issue of the correct age of the appellant before the sentence was imposed. The appellant said he was not interrogated at the police station. The charge sheet which was prepared on the 11th November, 2009 shows that the age of the appellant was 19

years. On 19th May 2010 when he gave his defence he also said he was 19 years. Under such circumstances we entertain doubt on the correct age of the appellant at the time of the commission of the offence. The appellant has cited section 16 of the Children and Young Persons Act [CAP 13 R.E.2002] to substantiate his complaint. This is not the right provision for his problem. There is a provision in the Penal code which caters for his problem. The doubt is resolved in favour of the appellant since it was not unlikely that he was eighteen years when he committed the offence.

In the event we dismiss the appeal on conviction, but allow it on the sentence. Section 131(2) of the Penal Code provides for a sentence of corporal punishment only for offenders of eighteen years and below. The appellant was convicted on 30th June, 2010. This is 2013. He has already spent three years in jail unlawfully. Since he was unlawfully imprisoned instead of being sentenced to corporal punishment, and there is no other alternative sentence, we order his immediate release from the prison unless he is lawfully held for other purposes. It is ordered.

DATED at **DAR ES SALAAM** this 12th day of July, 2013.



N.P.KIMARO
JUSTICE OF APPPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. M. KENTE
REGISTRAR
COURT OF APPEAL