IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CRIMINAL APPEAL NO. 85 OF 2014

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

AMIGO MGIMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkuye, J.)

date 3rd day of November, 2010

in

Criminal Appeal No. 25 of 2010

JUDGMEMT OF THE COURT

23rd & 27th June, 2014

KAIJAGE, J.A.:

Before the District Court of Ludewa at Ludewa, the appellant, Amigo Mgimba, was prosecuted for rape contrary to sections 130 (1) and 131 (1) of the Penal Code. It was alleged that on 24th January, 2009 at about 13:00 hours at Lugarawa Village, Ludewa District, Iringa Region, he had carnal knowledge of one Prisca Mwinuka, a girl under fourteen (14) years of age.

Following a full trial, the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment and to pay the sum of Tshs.200,000/= as compensation to the victim of the offence. His appeal to the High Court was unsuccessful, hence this second appeal.

We have not lost sight of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are firmly of the view that the irregularity was curable under section 388 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA), the particulars of offence having sufficiently informed the appellant that he was charged with the offence of raping the said girl who was under fourteen years of age.

The evidence in support of the charge against the appellant came from PW1 Nathan Mwinuka, PW2 Prisila Mwinuka, PW3 Charles Mwinuka, PW4 Gwido Mbigi and PW5 Sperancis Boniface.

PW2 who was the victim of rape testified to the effect that on 24/1/2009 at 1:00 PM or thereabout, she was at home sifting maize for flour in the presence of the appellant who had paid her a visit. After she had finished her work, she went inside her bedroom to change clothes. The

appellant followed suit, pulled her to the bed and forcibly started having sexual intercourse with her. PW2's screams were heard by PW3 who rushed straight to the said bedroom wherein he found the appellant naked having sexual intercourse with PW2, his young sister. As he could not believe his eyes, PW3 ran fast to inform PW1, his father, who was having a booze somewhere in the neighbourhood. However, when PW1 and PW3 rushed back home, they found PW2 alone crying. The appellant had already left the scene of crime.

Testifying on the subsequent events that took place, PW1 and PW4 told the trial court that when they quizzed the appellant about the incident soon after its occurrence, the latter admitted to have raped PW2 and he offered an unequivocal apology pleading that the matter be settled amicably between them. As if that was not enough, the appellant also offered to pay money in cash to PW1 as an inducement to refrain from reporting the incident to the police authorities. PW1 was not impressed. The incident was reported to the Police who issued PW2 a PF3 (EXHPI) for medical examination.

It was PW5 who medically examined and treated PW2. Consistent with the endorsement on EXHPI, PW5 gave the following testimony in her evidence in chief:-

> *"I remarked that I have examined her and found a perforated hymen with pus and some blood at her vagina. Microscope showed pus cells and Epith cells and trichomonus vaginalis. The girl used to have repeated the act....."*

In his sworn defence, the appellant flatly denied to have raped PW2, stating that the whole evidence against him was concocted by PW1 who failed to repay the sum of Tshs.70,000/= he had earlier advanced to him.

Upon the aforestated evidence, the trial court was satisfied that the case for prosecution against the appellant was proved beyond reasonable doubt. It proceeded to find him guilty as charged. On appeal, the High Court fully associated itself with the findings and conclusions made by the trial court and, consequently, sustained the conviction entered and the sentence passed against the appellant.

The appellant filed a memorandum of appeal listing four (4) grounds which could be condensed into two grounds namely:-

1. *That both Courts below erred by relying on the evidence of PW2, a child of tender years, without voire dire tests being conducted.*
2. *That the case for the prosecution was not proved beyond reasonable doubt.*

Before us, the appellant appeared in person, unrepresented. The respondent Republic which resisted the appeal, was represented by Ms. Kasana Maziku, learned State Attorney.

We think that the first ground of appeal should not detain us. It has force and merit. It is common ground that the trial court did not address itself properly on the requirements stipulated under section 127 (1) as read with section 127 (2) of the Evidence Act, Cap 6 R.E 2002 (the Act). It did not conduct a *voire dire* test before the reception of PW2's evidence. The law is now settled that where there is a **complete omission** by the trial Court to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of tender years, the resulting testimony is to be discounted. **(See; KIMBUTE OTINIEL V. REPUBLIC;** Criminal Appeal No. 300 of 2001 at page 76 of the typed judgement (unreported). In this case, PW2's evidence should be discounted, as we hereby do.

Having discounted the evidence of PW2, the fundamental issue which calls for our determination in this appeal is whether the remaining evidence on record could sustain the appellant's conviction. This brings us to the second ground of appeal.

Arguing in support of the second ground, the appellant asserted, correctly so in our view, that the medical evidence in the PF 3 (EXHPI) does not establish that he raped PW2 or that he was responsible for perforating her hymen. Surely, the evidence in the PF3 taken in isolation from other evidence on record, may only serve the purpose of showing that there was sexual intercourse but does not establish that the appellant raped PW2. However, Ms. Kasana was of the firm view that even without the discounted evidence of PW2, the PF3 (EXHPI) is supportive of other sufficient incriminating circumstantial evidence upon which the appellant's conviction could be sustained.

Submitting in elaboration, Ms. Kasana made reference to the following circumstances, the combination of which point to the appellant's guilt. There is the undisputed evidence of the appellant himself who admitted, in the course of preliminary hearing, that on the material day of the occurrence of

an incident in question he was at the homestead of PW2, the victim of rape. Secondly, there is the evidence of PW3 who saw the appellant naked having sexual intercourse with PW2 in the latter's room. Thirdly, there is evidence of PW1 and PW4 before whom the appellant made an oral admission that he had raped PW2 and, on the same occasion, he offered an apology to them for what he did. Lastly, Ms. Kasana contended that the traces of blood found by PW5 around PW2'S vagina on 24/1/2009 were indicative of the fact that the latter was sexually assaulted.

On our part, we wholly subscribe to the pertinent observation in **SULEMANI MAKUMBA V. REPUBLIC** [2006] TLR 379 that true evidence of rape has to come from the victim. However, the decision in **SULEMANI** *(supra)* makes no proposition that the victim's evidence is the only evidence that should prove rape. Similarly, we see nothing in that decision suggesting that the evidence to prove rape **must** always come from the victim. It seems to us that ultimately the determing factor should be the circumstances sorrounding each particular case. (See; for instance, **RAMADHAN SHEKIKA V. REPUBLIC;** Criminal Appeal No. 330 of 2009 and **TEREKO BURIA V. RELPUBLIC;** Criminal Appeal No. 324 "A" of 2009 (both unreported).

In this case, the two courts below having found that PW1, PW3 and PW4 were credible and reliable witnesses, we are satisfied that the cumulative established strands of circumstances aptly pointed out by Ms. Kasana and summarised herein above, irresistibly point to the appellant's guilt.

That said and done, we dismiss the appeal in its entirety.

DATED at IRINGA this 26th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEA