IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: BWANA, J.A., ORIYO, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 161 OF 2014

BAKARI HAMISI LING'AMBE.....APPELLANT

VERSUS

THE REPUBLIC..... .....RESPONDENT

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

(Kibela, J.)

dated the 18th day of February, 2014
in
Criminal Appeal No. 24 of 2013

JUDGMENT OF THE COURT

2nd & 3rd December, 2014

BWANA, J.A.:

The appellant, Bakari Hamisi Ling'ambe, was charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16. The trial court, the District Court of Lindi at Lindi, sentenced him to life imprisonment and to pay compensation of shillings One Million (Tsh. 1,000,000/=) to his victim. His first appeal before the High Court was unsuccessful, hence this second appeal. Before us he appeared in person, unrepresented, while Mr. Hashim Ngole, Senior State Attorney, represented the respondent Republic. In his Memorandum of Appeal, the appellant raised eight grounds of appeal which were summarized into four as follows:-

- That his defence evidence was not considered by the two courts below.
- That due care was not taken by the courts below in convicting him relying on the evidence of a single witness.

- That the courts below did not consider the glaring discrepancies evident in the prosecution case.
- That the order for compensation of 1,000,000/= did not take into account his ability to pay.

Briefly put, the facts leading to this appeal are as follows. On 19 August 2012 at about 12.00 noon at Muungano Village of Lindi district, Fatuma Kazembe, PW1, was going to her toilet. She saw Swabra Saidi (PW3) a girl aged 3 then and the victim of this offence, standing next to the toilet's door. The said girl then entered the toilet. After a short while, PW1 heard PW3 crying loudly and bitterly. PW1 rushed inside the toilet where she saw the appellant squatting while his pair of trousers was undressed down to his knees. He was holding PW3 over his thighs. PW3 was naked and her underpants was on the floor of the toilet room.

It was the prosecution evidence that when the appellant saw PW1, he uplifted PW3 from his thighs and put her down on the floor. In the process, PW1 could see the appellant's penis which was still erect. According to PW1 what she saw led her to an irresistible conclusion that the appellant's penis had penetrated PW3's vagina and that is why she was crying. In other words, the appellant was found *in flagrante delicto*. PW1 further testified that the appellant then told her: "sijamuumiza, mezea". He then took his "panga", threatened PW1 and ran away.

Having witnessed what was going on, PW1 raised an alarm. Among the people who responded immediately were Fatuma Mohamed, PW2, the victim's mother and Mwajuma Ally, PW6 who met the appellant running away from the toilet. The mother, PW2, upon reaching the toilet, she found PW3

still naked and her underpants still on the floor of the toilet. She examined PW3 and saw some mucus and bruises together with some blood stains around the vagina region. The matter was reported to the police where a PF3 was issued and PW3 was taken to hospital.

Josephine Leonard Ngonyani, PW4, a medical doctor who examined PW3, also saw the bruises and blood stains referred to above. She came to the conclusion that the bruises were near the vulva which amounted to grievous harm (the PF3-Exh.P2). She was of the opinion that the bruises were caused by a penis.

The victim, PW3, could not testify because of her tender age. Although the appellant denied to have committed the offence, he did, however, admit to have been at the scene of crime on the material day and time. Before us, the appellant did not break new ground, apart from what he had raised earlier. Some of the grounds of appeal raised new issues that had not been considered by the courts below. They could be an afterthought. However, being a second appellate court, we cannot deal with an issue which was either not disputed or raised in the courts below and a finding to the contrary made (**Charles Barnabas vs The Republic,** Criminal Appeal No. 145 of 2003 - unreported). On the part of the respondent Republic, Mr. Ngole learned Senior State Attorney, did support both the conviction and sentence meted out against the appellant.

We will now examine the grounds of appeal as raised. We start by considering the claim that the prosecution case contained many discrepancies. He did not elaborate. The law on this point is now settled. Not every inconsistency and or contradiction will make a prosecution case to

flop. In **Said Ally Ismail vs Republic**, Criminal Appeal No. 214 of 2008 (unreported), the Court held:-

> *"...however, it is not every discrepancy in the prosecution's witness that will cause the prosecution case to flop.* ***It is only where the gist of the evidence is contradictory then the prosecution's case wiii be dismantled..."***
> (Emphasis provided).

(See also: **Ally Kinanda and Others vs The Republic**, Criminal Appeal No. 206 of 2007; **Samson Matiga vs The Republic**, Criminal Appeal No. 205 of 2007; **Omari Kasenga vs The Republic**, Criminal Appeal No. 84 of 2011-all unreported).

The appellant, as stated earlier, did not point out what he considered to be discrepancies, inconsistencies or contradictions in the prosecution case. We are therefore hesitant to entertain general and or unsubstantiated claims, as raised by the appellant.

The other point raised by the appellant is that he was convicted relying on the evidence of a single witness. Our perusal of the court record reveals that the overwhelming evidence of PW1, the eye witness, and that of PW2, the mother of the victim, was corroborated by the evidence of PW4, a medical doctor and PW6 who met/saw the appellant running out and away from the scene of crime, the toilet. All these witnesses were material in proving the prosecution case beyond reasonable doubt.

It suffices to state here that the law is long settled that there is no particular number of witnesses required to prove a case (Section 143 of the

Tanzania Evidence Act, Cap 6). A court of law could convict an accused person relying on the evidence of a single witness if it believes in his credibility, competence and demeanour. In the absence of evidence to the contrary, there is no reason to fault the credence of a given single witness. (**Emmanuel Luka and Others vs The Republic**, Criminal Appeal No. 325 of 2010 – unreported). The pivotal question is whether the evidence on record is sufficient to uphold a conviction. In the instant case, there were more than one credible prosecution witnesses, who, as held by the two courts below, established the case beyond reasonable doubt. We have no reason to fault the courts' findings on this issue.

The appellant, as well, claims that the two courts below did not take into consideration his defence case. Again, he did not elaborate. The record proves the contrary. From page 46 to 47, the trial court in its judgment, examined extensively the defence case. Likewise did the first appellate court, at page 64 of the record. Both courts however, came to the conclusion that the prosecution case was established beyond reasonable doubt. What this means, simply put, is that the prosecution evidence was so strong as to leave no doubt to the criminal liability of the accused person. Such evidence did irresistibly point to the accused person (but not any other) as being the one who committed the offence (See: **Yusufu Abdallah Ally vs The Republic**, Criminal Appeal No. 300 of 2009; **Goodluck Kyando vs The Republic**, Criminal Appeal No. 118 of 2003; **Majaliwa Guze vs The Republic**, Criminal Appeal No. 213 of 2004 – all unreported). That is what was established in this case and therefore we have no reason to depart from that finding of the courts **a quo**.

One other issue that attracts our attention is whether there was penetration proved in this matter. Our view, when discussing this matter, should not be withdrawn from the uncontroverted fact that the victim of this crime was only three years old. She could not testify as to what befell her given her age and level of comprehension. The evidence of PW1 and PW2 as corroborated by PW4 and the PF3 (Exh P2) clearly establish that there was penetration of the victim's vagina by the appellant's penis.

The appellant has raised, as well, his concern over the order for compensation. He is of the view that the two courts below should have taken into account his ability to pay the compensation. We do agree with the appellant although from a different, perspective.

The order for compensation imposed by the trial court and upheld by the first appellate court was done without, going by the record of the case, the appellant being accorded an opportunity to state his ability or inability to pay. His means of life were not assessed so as to establish his ability to pay compensation and if so, how much. Therefore having been denied the opportunity to be heard on this vital point, he was not fairly treated. The order for compensation was not judicially imposed. (See: **Magabe Gokoya vs The Republic,** Criminal Appeal No. 254 A of 2010. We, accordingly, invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141, and revise that order by setting it aside.

As to the sentence of life imprisonment, that is the minimum mandatory sentence that may be imposed to a convict of this kind of offence (Section 131 (3) of Cap 16). Therefore we cannot disturb it. Accordingly, the appeal partly succeeds by setting aside the order for payment of Tsh.

1,000,000/= as compensation. As to the conviction and sentence of life imprisonment, the appeal is dismissed, conviction and sentence up held.

DATED at MTWARA this 3rd day of December, 2014.

S. J. BWANA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL