IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK,J.A.,MMILLA,J.A., And MWARIJA, J.A.,)

CRIMINAL APPEAL NO. 223 OF 2014

JOSEPH MAGINGO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kwariko, J.)

dated 21st day of May, 2014
in
Criminal Appeal No. 10 of 2014

JUDGMENT OF THE COURT

20th & 27th August, 2015

MWARIJA, J. A.:

This is a second appeal. It arises from the decision of the High Court (Kwariko,J.), sitting at Songea. The appellant had unsuccessfully appealed to that court against the decision of the District Court of Songea in Criminal Case No. 27 of 2013. In that case, the appellant was charged with the offence of Rape contrary to sections 130(1) (2) (e) and 131 (2) of the Penal Code [cap. 16 R.E. 2002].

It was alleged that on 15th February 2013, the appellant did have a carnal knowledge of one Rachael Martin, a girl aged 9 years. After a full trial, the appellant was convicted as charged and was sentenced to life imprisonment term with corporal punishment of twelve strokes of the cane. He was also ordered to pay a compensation of Shs. 1,500,000/= to the victim, the said Rachael Martin.

The facts giving rise to the case are not only simple but also mostly undisputed. On 15th February, 2013 Rachael Martin (PW2) and her sisters Fatuma Faustine (PW1) and Diana Faustine Ngamisha (PW3) left home and went to receive their young brother, Dereck from school. While on the way at a place near a bakery, they parted way. PW2 and PW3 decided to go on a different direction with the aim of going to pick mangoes. PW1 thus proceeded alone to take Dereck from school. Meanwhile on their way going to find and pick mangoes, PW2 and PW3 met a man who lured them that he needed their assistance. He asked them to assist him to carry some bananas from a nearby forest. They followed the man but when they arrived closer to the forest,

he played a trick. He told PW3 to wait for a person who would arrive there with a wheelbarrow to be used to carry the bananas. PW3 heeded to the directions thereby giving room to the person who deceived them to go with PW2 into the forest. While in the forest, he raped her.

After a short period, PW2 came out of the forest crying. She informed PW3 about the incident and together, they went back home where PW2 narrated the incident to her father. In turn, her father called PW2's mother. Immediately, PW2's mother went home with her friend and a co-worker, Siasa John (PW6) who used her motor vehicle for that purpose.

After an attempt to find the culprit by mounting a search at the scene of crime failed, PW2's parents decide to go with her to police station to report the incident. They were taken by PW6 in her motor vehicle. Because however, when she was informed about the incident, PW2's mother left her office in a hurry and in the course, she forgot her handbag, they decided to pass at the office so that she could collect it. PW6 stopped her motor vehicle near the office and PW2's mother disembarked and went in the

office to collect her handbag. Shortly thereafter, PW2 who remained in the motor vehicle with PW6, shouted, after seeing the appellant who was passing in front of the motor vehicle. She said that he was the person who raped her. PW6 quickly disembarked and arrested the appellant with the assistance of a traffic police officer who was within the vicinity. The appellant was taken to police station where he was later charged.

At the trial, PW2 and PW3 who were aged 9 and 6 years respectively gave their evidence after the Resident Magistrate had conducted a **voire dire** examination on them and found that they were possessed of sufficient intelligence and understood the duty of telling the truth. Testifying on how she was raped, PW2 stated that after he had taken her in the forest, the appellant told her that he wanted to have a sexual intercourse with her but she refused. The appellant then took a knife and threatened to kill her if she made noise. He then forced her down, undressed her underpant and a skin tighting underwear and then raped her. She was recorded to have said that the appellant "started to have sex with me by putting his penis in my place of urination".

The evidence on PW2's rape was supported by that of Dr. Benedict Ngaiza (PW5). According to his evidence, he examined PW2 and found that she was carnally known and caused to suffer pains and bruises in her vagina. He found further that her haymen was perforated.

In his defence, the appellant did not deny that he was arrested on 15th February 2013, under the circumstances stated by PW2 and PW6. He contended however that he was mistakenly arrested because he did not commit the offence which led to his arrest. According to his evidence, on that date, he arrived at the main market area from Madizini and that thereafter, while going to Mahenge area on foot, he was arrested by PW6 near the Prevention and Combating of Corruption Bureau (PCCB) offices.

At the hearing of this appeal, the appellant appeared in person and unrepresented by a counsel while the respondent Republic had the services of Mr. Shaban Mwegole, learned State Attorney. In his memorandum of appeal, the appellant raised eight grounds. As correctly stated by Mr. Mwegole however, the grounds can be consolidated into four. The first ground is that the

learned appellate judge erred in failing to find that the appellant was not properly identified. In this ground, the appellant contended that before he arrested him, PW6 did not have a prior information about his description. He also challenged the evidence on his identification on the ground that the prosecution did not conduct an identification parade. The second ground was that the trial Resident Magistrate did not properly conduct a **voire dire** examination on PW2 and PW3. In the third ground, the appellant contends that the learned appellate judge erred in upholding the appellant's sentence of life imprisonment term while there was no proof of the age of the victim of the offence, that is, PW2. The fourth ground is that the prosecution did not prove the case against the appellant beyond reasonable doubt.

When the appellant was called to argue his appeal, he opted to hear first the learned State Attorney's reply submissions to the grounds of appeal and make a response. Submitting in reply to the appellant's ground of appeal on the question of identification, Mr. Mwegole argued that the appellant was properly identified. He argued that PW2 and PW3 met the appellant at 12.00 hrs and

spent time with him, firstly while going where he deceived them that some bananas were to be collected from and secondly, with PW2 to the forest where he raped her.

Mr. Mwegole added that shortly after the offence, PW2 identified the appellant who was still in the same attire which he had put on when he met PW2 and PW3 and at the time when he committed the offence. As to the contention by the appellant that since an identification parade was not conducted the evidence of identification was not reliable, Mr. Mwegole argued that since the appellant had already been identified by PW2 before he was taken to police, it would have served no purpose for the police to conduct an identification parade.

On the ground that the learned Resident Magistrate did not properly conduct a **voire dire** examination on PW2 and PW3, the learned State Attorney argued that the examination was properly done, the result of which, the trial magistrate found that the two witnesses were possessed of sufficient intelligence and understood the duty of telling the truth. This, according to the learned State Attorney, is borne out by the record of the trial court.

As to the age of PW2, Mr. Mwegole submitted that this ground was not raised in the High Court and therefore the same is not worth consideration by this Court. He argued however that, since this fact was not disputed during the preliminary hearing, the appellant is barred from challenging the finding thereof.

On the ground that the prosecution did not prove the case against the applicant beyond reasonable doubt because the offence was not proved, Mr. Mwegole argued that on the basis of the evidence of PW2, PW3 and PW5 the prosecution proved that the offence was committed. He said that although the medical report was filled by the Doctor (PW5) on 18/2/2013, three days after the date of the offence, since the victim (PW2) was examined or the date of the offence, the delay in making the medical report did not in any way weaken the prosecution's case.

Mr. Mwegole relied on the reasoning of the trial Resident Magistrate that there is no law which provides a limitation of time within which a medical officer must make a report after conducting a medical examination on a victim of an offence. The learned State Attorney argued further that in any case, the evidence of

PW2 was self-sufficient to prove that she was raped. He cited to that effect, the case of **Suleiman Makumba v. R** (2006) TLR 379.

In his reply submission, the appellant maintained that since an identification parade was not conducted, the evidence on his identification is lacking. He also repeated his complaint that the offence was not proved beyond reasonable doubt because the PF.3 was filled by the Doctor who examined PW2 three days after the date of the offence without giving the reasons for the delay. He repeated also that the evidence of identification by clothes, shoes and face was not sufficient because while the clothes are items which could be put on by anybody, people do resemble and therefore, there is always a possibility of a mistaken identify.

Having considered the arguments made by the learned State Attorney and the appellant, we have to state at the out set that the fourth ground of appeal need not detain us much. There is sufficient evidence which proves that PW2 was raped. Apart from her own evidence, there is the evidence of PW5 who conducted medical examination on her and found that she was raped.

According to the PF.3 (Exh. P2), PW2 was found to have pain and a perforated haymen. Spermatozoa was also seen in her vagina.

The argument by the appellant that the evidence of PF.3 is unreliable because the form was filled by PW5 three days after the date of the offence is, in our considered view, without merit. Since PW2 was medically examined on the date of the offence, the fact that the findings were not recorded in the form on the same day does not render the medical report invalid. We also agree with the reasoning made by the learned trial Resident Magistrate that there is no law which prescribes a time limit for doctors to record the findings of a medical examination in a PF.3. We agree further with the learned appellate judge that according to S. 127 (7) of the Tanzania Evidence Act, [Cap. 6 R.E. 2002], the evidence of PW2 who was found to be credible, was self –sufficient to prove the fact that she was raped. For these reasons therefore, we find as a fact that PW2 was raped and we conclude that the offence was committed.

On the grounds that the age of PW2 was not proved and that a **voire dire** was not properly conducted, we agree with Mr.

Mwegole that since these grounds were neither at issue in the trial court nor raised as grounds of appeal in the first appellate court, the appellant cannot raise them as grounds at this stage of proceedings. We also agree with Mr. Mwegole that the age of PW2 was one of the facts which were not disputed during the preliminary hearing. We therefore find those two grounds of appeal to be devoid of merit.

The first ground is, in our view, a crucial one. The available evidence on the question of the appellant's identification is that of PW2 and PW3. Their evidence was supported by that of PW6. We have found above that the evidence of PW2 and PW3 was taken after a properly conducted **voire dire** examination. The two courts below found that the two witnesses gave a credible evidence that they identified the appellant. This being a second appeal therefore, this Court cannot interfere with that finding unless it is shown that there has been a misappropriation of evidence, a miscarriage of justice or violation of a principle of the law or practice. See the case of **Alfeo valentine v. The Republic.,** Criminal Appeal No. 92 of 2006 (CA) (unreported).

We have duly considered the evidence, particularly that of PW2 which was supported by that of PW6 and PW3. As argued by Mr. Mwegole, the witness spent a reasonably sufficient time with the appellant from the time when she met him at 12.00 hrs until the time of rape. It was in the day light and it was within a short time later between 14.00 and 15.00 hrs when PW2 saw the appellant in the same attire which he had put on at the time when they met and later raped her. Given the bad encounter with the appellant, the memories of PW2 were obviously still fresh to enable her identify the appellant.

It was an undisputed evidence further that when PW2 saw the appellant and shouted that he was the person who raped her and as PW6 ran to arrest him, the appellant reacted by pleading that he was not the one who committed the offence. He raised that defence before he was informed of the cause of his arrest. It is evident therefore that the conduct of the appellant after seeing PW2, cannot be interpreted otherwise than that he understood why he was being arrested. As stated in the case of **Makungire Mtani v. Republic** (1983) TLR 179 (CA), such evidence of conduct is

inconsistent with the appellant's innocence. That circumstantial evidence therefore supports the prosecution evidence on the identification of the appellant.

On the basis of the foregoing reasons, we do not find any sound reason for faulting the findings of the two courts below to the effect that PW2 and PW3 properly identified the appellant. We find that the identification evidence was watertight. In the result therefore, the appeal is dismissed in its entirety.

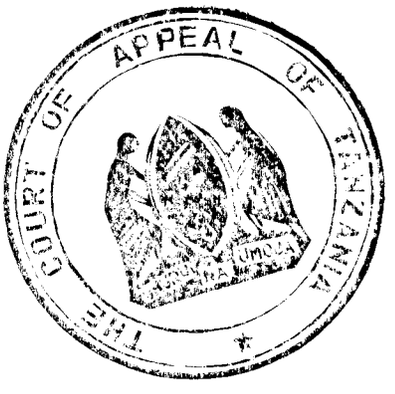
DATED at **IRINGA** this day 27th of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL