IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 337 OF 2015

YUST LALA.....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania
At Arusha)

(Magimbi, J.)

Dated the 6th day of January, 2015
In
Criminal Appeal No. 90 of 2015

JUDGMENT OF THE COURT

12th & 15th October, 2015

MWARIJA, J.A.:

The appellant was charged in the Resident Magistrate's Court of Manyara at Babati with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. He was also charged with an alternative count of impregnating a school girl contrary to section 35 (3) of the Education Act [Cap. 353 R.E. 2002].

After a full trial, the appellant was convicted of both offences and was consequently sentenced to imprisonment terms of thirty years for the offence of rape and five years for the offence of impregnating a school girl.

He was aggrieved and thus appealed to the High Court where his appeal was dismissed hence this appeal.

The facts in respect of the case can be briefly stated as follows:- The victim of the offence, Agness Geofrey (PW1) was at the material time of the offence a student of Sendo Primary School. She was living with her mother Aisha Hiiti (PW3) and grandmother. On the date when the alleged offence was committed against her, her mother was away at Arusha. Sometimes in November, 2013, PW3 suspected from the looks of PW1's stomach that she was pregnant.

When she was asked about that condition, PW1 admitted that she was indeed pregnant and that it was the appellant who was responsible for the pregnancy. PW3 decided to report the matter to the Head teacher of PW1's school, William Mapes (PW3). Upon that information, PW3 gave a letter to PW2 to take it to police where she was given a Police Form No. 3 (P.F. 3) so that PW1 could be taken to hospital for medical examination. The medical examination confirmed that she was pregnant.

It was PW1's evidence at the trial that on 14/7/2013 at 12:00 hrs., while grazing cattle in the bush, the appellant, who was known to her because they are neighbours, found her there. He undressed her and

warned her that if she made noise, he would slaughter her with a bush knife (panga) which he held in his hand. She said that the appellant inserted his penis into her vagina causing her to suffer pains. She added that she bled profusely as a result of the rape. According to her, she neither reported the incident to her grandmother nor to her mother because she (PW1) feared the appellant's threat that he would slaughter her if she disclosed to anybody that he raped her.

In his defence, the appellant denied the offence blaming PW2 for framing him up because of a land dispute which existed between them. He contended that although they were reconciled by PW3's brother, one Hangali, she was dissatisfied and promised to find an alternative way of dealing with the appellant. He raised the defence of *alibi* stating that on the alleged date of the offence, he was in Chemchem village harvesting maize in his farm. He called his wife, Sisilia Gidamisi (DW2) to support his defence.

In his memorandum of appeal, the appellant raised four grounds of appeal but the same can be consolidated into three; **firstly** that the prosecution did not prove the case against him beyond reasonable doubt, **secondly,** that his defence was not considered and **thirdly,** that the

voire dire was not properly conducted on PW1 who was a child of tender age when she testified in court.

At the hearing of the appeal, the appellant appeared in person and unrepresented. On its part, the respondent Republic was represented by Ms. Rose Sulle, learned State Attorney.

When he was called upon to argue his appeal, the appellant submitted a written submission and prayed that the same be adopted in his appeal. He then opted to hear first the arguments in reply by the learned State Attorney. In his written arguments, the appellant submitted that the evidence of PW1 was not credible because she lied when she stated that she was living in Sora village while in the charge sheet, it is stated that she lived in Mamire village.

He argued further that the case was framed up against him by PW2 who had been harbouring grudges against him because of a land dispute between them. He also questioned the credibility of PW1's evidence as regards the date on which he became pregnant contending that it could not be on 14/7/2013 because, according to the P.F. 3, when she was examined on 21/11/2013, she was found to be twenty one weeks pregnant

showing that she became pregnant three weeks before the date of the alleged rape.

The appellant also argued that the learned appellate judge erred in failing to consider his defence of *alibi* which, according to him, was supported by DW2. Finally, he argued that the *voire dire* on PW1 was not properly conducted because the questions which she was asked were not recorded.

Ms. Sulle submitted in response that the case against the appellant was proved beyond reasonable doubt. On the first ground, she argued that there was sufficient evidence proving penetration, an important ingredient of the offence of rape. According to the learned State Attorney, the appellant was known to PW1 because the two of them were neightbours, that he was mentioned by name by PW1 who gave the details of how he raped by her, that while threatening her with a panga, inserted his penis into her vagina. The learned State Attorney added that according to PW1, the appellant was the first man to have carnal knowledge of her.

Ms. Sulle submitted that on the authority of the case of **Baha Danguri v. R.,** Criminal Appeal No. 39 of 2014, penetration was proved beyond reasonable doubt. Relying further on the case of **Mkumba v. R.,**

[2006] TLR 384, she submitted that the evidence of PW1 proved beyond reasonable doubt that the offence of rape was proved against the appellant.

On the second ground that the appellant's defence was not accorded weight, the learned State Attorney submitted that the contention is devoid of merit because the learned appellate judge considered it and found that the trial magistrate was right in deciding to accord no weight on the *alibi* because the appellant did not raise it in accordance with the provisions of s. 194 (1) and (4) of the Criminal Procedure Act [Cap. 20 R.E. 2002].

With regard to the third ground, that the *voire dire* was not properly conducted on PW1, the response by Ms. Sulle was that the provisions of s. 127 (2) of the Evidence Act were complied with and that therefore, the contention by the appellant is lacking in merit.

The appellant's first ground is that the prosecution did not prove its case beyond reasonable doubt. In this case, what was required of the prosecution in proving the offence against the appellant is penetration and that the appellant committed the offence against PW1. In convicting the appellant, the learned trial Resident Magistrate relied on the evidence of

PW1, the medical report (Exh. P.2), and the appellant's cautioned statement (Exh. P1). He stated as follows:-

> *"That there is no dispute that the victim PW1 was raped, because apart from P.F. 3 which was tendered and admitted marked P2 which explains that on 21/11/2013 was found with pregnancy of 21 weeks ...The pregnancy proves rape because PW1 is a girl of 14 years of age... Besides, the cautioned statement of the accused (P2) (sic) which bears the signature of the accused did not confess to commit the offence of rape, but he admit that the victim is his lover, and they used to have sexual intercourse without force. He admitted so, without knowing that since the victim is a child of 14 years the issue of consent is irrelevant."*

The evidence of the two documents, the P.F.3 and the appellant's cautioned statement which the learned trial Resident Magistrate relied on in convicting the appellant were expunged by the High Court because the same were admitted contrary to the law. While the appellant's cautioned

statement was admitted without affording the appellant the opportunity of being heard on the question whether or not he made the statement voluntarily, the P.F.3 was admitted without explaining to the him his right under S. 240 (3) of the Criminal Procedure Act, that is the right to require that the doctor who prepared the medical report be called for cross-examination.

As correctly observed by the learned appellate judge therefore, after the two documents had been expunged, the case for the prosecution hinged mainly on the evidence of PW1. It was that evidence which was relied on by the High Court to uphold the appellant's conviction. In her decision, the first appellate judge relied on the provisions of s. 130 (4) (a) of the Penal Code and the case of **Reuben Juma v. Republic,** Criminal Appeal No. 151 of 2013. Having considered that evidence, she found that it sufficiently proved the case against the appellant beyond reasonable doubt.

It is trite law that this being a second appeal the Court can interfere on concurrent finding of fact by the two courts below only where there is a sufficient reason to do so. In the case of **Salum Mhando v. Republic,** [1993] TLR 170 the principle was stated as follows:-

"Where there are mis-directions and non-directions on the evidence a court of second appeal is entitled to look at the relevant evidence and make its own finding of fact."

The appellant's complaint as regards the evidence of PW1 is that she lied in her evidence and that a **voire dire** was not properly conducted on her. In our considered view, the fact that the charge sheet shows a different village from that which PW1 stated in her evidence that she resides in does not go to the root of her evidence that she was raped by the appellant. We find that defect to be minor. As to the **voire dire**, although it is advisable that the questions put to the child witness should always be recorded, the omission to do so does not necessarily vitiate the finding that the child is competent to testify. (See the case of **Joseph Leko v The Republic**, Criminal Appeal No.124 of 2013 (unreported). In this case, we find from the answers given by PW1, that the learned trial Resident Magistrate correctly found that she understood the nature of oath. We do not therefore find merit in the appellant's arguments.

The main issue however, is whether such evidence of PW1 alone was sufficient to prove the prosecution case beyond reasonable doubt. It is trite

law as stated in the case of **Mkumba v. R.,** (*supra)* that in sexual offences, the evidence of a victim alone, if believed, is sufficient to found conviction. In this case, PW1 mentioned the appellant as the person who raped her. She did so after she had become pregnant. While the offence is alleged to have been committed on 14/7/2013, the appellant mentioned him in November, 2013 as the person who is responsible for the pregnancy.

The issue is whether in the absence of any other evidence, such as medical evidence, the testimony of PW1 linking the pregnancy with the rape alleged to have been committed against her sufficiently proved the offence against the appellant. In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period because of his threat that he would slaughter her if she discloses to anybody that he raped her. Since she was not staying with the appellant we find it doubtful that with such a serious offence, she could for all that period fail to tell her mother about it.

These factors combined with the appellant's complaint that he was framed by PW2 due to grudges which existed between them because of a

land dispute, raise reasonable doubt on the prosecution's case. We find therefore that had the learned appellate judge considered these factors, she would have found that the evidence of PW1 was doubtfully, the result of which rendered the prosecution case unproved.

For these reasons, we allow the appeal, quash the conviction and set aside the sentences. The appellant shall be released from prison immediately unless he is otherwise lawfully held.

DATED at **ARUSHA** this 15th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL