IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 201 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

HOJA MWENDESHA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

Dated 28th day of March, 2014
in
Criminal Appeal No. 63 of 2013

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JUDGMENT OF THE COURT

26th November & 1st December, 2015.

RUTAKANGWA, J.A.:

The appellant appeared before the District Court of Misungwi District ("the trial court") to answer two charges. These were Rape (1st count) and impregnating a school girl (2nd count). The victim of the preferred two offences was one Mageni d/o Lutubija, who by then was 13 years old. The said Mageni testified as PW1 at the trial of the appellant.

The prosecution case against the appellant rested mainly on the evidence of PW1 Mageni and his cautioned statement (exhibit P2) which contained an unequivocal confession to the offence of rape.

In her sworn evidence, PW1 Mageni told the trial Court that the appellant was her grandfather and that her mother had died prior to her being impregnated. Following the death of her mother, she narrated, her father took another wife who was residing at Manawa. Having secured a new wife, her father, PW2 Kisena Lutubija, used to spend most of his time at the residence of his wife, leaving PW1 Mageni looking after his other children who were younger than her. The appellant, who was also living in the same homestead, took advantage of PW2 Lutubija's absence to make passes at PW1 Mageni. PW1 Mageni succumbed to the appellant's advances and a sexual relationship between the two began in earnest in June, 2008. PW1 Mageni told the trial court that she had regular sexual intercourse with the appellant at their home at night when the other children were asleep, until October, 2008 when she was found to be pregnant. By then she was in Standard VI at Mwanangwa Primary School.

After naming the appellant as the person responsible for impregnating her, the appellant was arrested by PW3 Ndunya Lutonja, the Village's Sungusungu Commander, who surrendered him at Misungwi Police Station. At the said Police Station, the appellant was interrogated by PW4 No. C 5438

D/SGT Adam. In his cautioned statement the appellant freely admitted to have had regular sexual intercourse with PW1 Mageni. The said confessional statement was admitted in evidence, without any objection from the appellant as exhibit P2.

In his sworn evidence the appellant denied the charges. It was his defence that he was arrested by PW3 Ndunya not because he had raped PW1 Mageni but because he was prospecting for gold in the area of Mwanangwa Primary school thereby, according to the Headteacher, destroying the environment. As he failed to pay a fine of Tshs.40,000/=, he was sent to Misungwi Police Station and the two charges were preferred against him.

We have noted in the record of proceedings in the trial court that the Headteacher of Mwanangwa Primary School Augustino Ngowe, testified as PW5 at the appellant's trial. He confirmed that PW1 Mageni was found to be three-months pregnant on 06th October, 2008, and had named the appellant as the culprit. The appellant did not cross-examine him at all.

In his judgment, the learned trial Principal District Magistrate found PW1 Mageni to be "a truthful and credible witness." On the strength of her

evidence, he found the prosecution to have proved the offence of rape beyond reasonable doubt and convicted the appellant accordingly. As the second count was preferred in the alternative, he entered no verdict on it. The appellant was accordingly sentenced to the statutory minimum sentence of thirty (30) years imprisonment.

Aggrieved by the conviction and sentence, he appealed to the High Court, claiming that the offence of rape was not proved beyond reasonable doubt. The appeal was dismissed in its entirety.

In dismissing the appeal, the learned first appellate judge held thus:-

> *"The trial court was satisfied that the offence of rape was proved beyond reasonable doubt on the basis of the evidence of PW1, PW2, PW3 and PW4 and the exhibits P2 and P3 tendered in court. In this case, the most crucial witness is PW1 (the victim). It is now settled law that, the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence (See:* ***Selemani Makumba v. R.****, Criminal Appeal No. 94 of 1994 . . .)"*

Relying on the evidence of PW1 Mageni and the confessional statement (exh. P2), the learned first appellate judge found herself constrained to share the certitude of the learned trial magistrate that the offence of rape was proved to the hilt, hence this appeal.

This appeal is supported by a memorandum of appeal which contains only four grounds of appeal. They are as follows:-

> *"1. That, the trial first appellate court had erred in law and fact by basing their conviction on the charge in 2nd count which was not proved by lacking medical examination evidence.*
>
> *2. That, without prejudice the afore grounds (supra) the prosecution failure to prove charge in 2nd count renders the charge in 1st count i.e. Rape also unproven.*
>
> *3. That, after being noted that (PW1) she has understood the meaning of oath, but she had not sworn the trial and first appellate court erred in law and fact to rely on PW1's evidence which violated to the oath and statutory declaration Act and the C.P.A.*
>
> *4. That, the alleged caution statement of the appellate was wrongly relied upon by the trial*

court as its admission and reception into court violated the Criminal Procedure Act."

At the hearing of the appeal, the appellant appeared in person fending for himself. When the four grounds of complaint were read out to him, he adopted them and opted to say nothing in elaboration thereof until after he had heard the respondent Republic's response.

The respondent Republic was represented by Mr. Paschal Marungu, learned Senior State Attorney, who vigorously resisted the appeal.

Responding to the first ground of appeal, Mr. Marungu argued that since the appellant was not convicted on the second count, this complaint lacks merit and should be dismissed, The appellant had no counter argument to this submission. We agree with Mr. Marungu as the complaint is based on a misconception. The first ground of appeal fails accordingly.

On the second ground of appeal, it was Mr. Marungu's contention that to secure a conviction for rape in the 1st count did not depend on a conviction for impregnating PW1 Mageni. Again, we are in agreement with him. This is because although both offences involve, in this part of the world, physical sexual intercourse, one can be raped without necessarily being impregnated at the same time. We, therefore, dismiss this ground of appeal.

Regarding the 3rd ground of appeal, the appellant is belied by the record of proceedings whose authenticity has not been challenged. It is glaringly clear on pages 7-8 of the record that before PW1 Mageni testified, the learned trial Resident Magistrate duly conducted a ***voire dire*** examination and was satisfied that she understood the nature of an oath. She was then sworn and thereafter gave her testimony. This particular ground of appeal, therefore, is devoid of merit and it is dismissed.

Mr. Marungu equally pressed us to dismiss the last ground of complaint as it is not supported by the record and was not an issue in the first appeal.

In his attempt to prove Mr. Marungu wrong, the appellant responded claiming that before his cautioned statement was taken, he was threatened by the Police and had his arms tied. We find these claims to be wishful thinking on the part of the appellant. Apart from the naked fact that they are being raised for the first time in this Court as correctly argued by Mr. Marungu, the cautioned statement was tendered in evidence by PW3 D/Sgt. Adam without any objection from the appellant. It was only while under cross-examination that he sought to be wiser and claimed that he "never admitted to have raped the victim." He even went to the extent of denying knowing PW1 Mageni when the undisputed prosecution evidence is to the

effect that he is the young brother of PW2 Lutubija's father, and was residing at the latter's homestead. As the 4th ground of appeal lacks merit, it is also dismissed.

Having dismissed all the grounds of appeal, we were left wondering whether this was a fit appeal to go to a full hearing. Having perused the entire evidence and the judgment of the two courts below, we are now satisfied that it did not merit such a hearing. It ought to have been summarily rejected under s. 4 (4) of the Appellate Jurisdiction Act, Cap. 141. We are saying so deliberately because the evidence of PW1 Mageni and the appellant's own unequivocal confession proved him guilty beyond any shadow of doubt.

PW1 Mageni, who was found by the trial court to be a truthful witness, had categorically testified that:

> *"We were making love by inserting his penis in my vagina. The first day we made love I felt much pains; we went on . . . . I cannot remember how many times, it is several times. We used to make love at home."*

Answering the appellant's question, she said:

> *"You inserted your penis in my vagina. I know your penis, it is not tall (sic)."*

In his cautioned statement dated 8th October, 2008, the appellant categorically admitted to have had sexual intercourse with PW1 Mageni continuously for a period of three months until the day of his arrest. He stated clearly that they were doing so in the bedroom of PW1 Mageni at night. What better evidence was needed to prove the offence of statutory rape than the appellant's own confession?

All said and done, we find that this appeal to have been lodged without any sufficient ground of complaint. It is accordingly dismissed in its entirety.

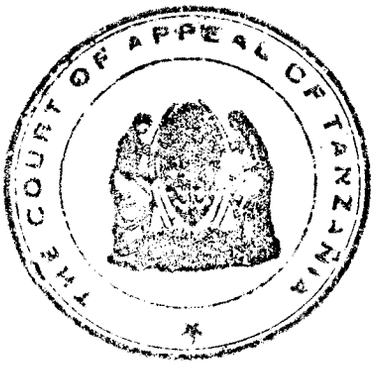
DATED at MWANZA this 30th day of November, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL