IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 178 OF 2015

AMINI ISMAIL.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mruma, J.)

Dated the 5th day of December, 2014
In
(DC) Criminal Appeal No. 82 of 2011

JUDGMENT OF THE COURT

5th & 12th April, 2016

MWARIJA, J.A.:

The appellant was charged in the District Court of Kigoma with the offence of rape. It was alleged by the prosecution that on 1/1/2009 at about 20.00 hours at Igalula village within the District and Region of Kigoma, the appellant did have a carnal knowledge of one Olita Pius (PW1), a girl aged 15 years.

The background facts of the case can be briefly stated as follows: On 1/1/2009 PW1 was on the way going to fetch water from a lake. She

was with her friend, Adolfina Augustine (PW2) who was at the material time aged 17 years, both of them having carried buckets for that purpose. According to their evidence, when they arrived at the market area at about 19.00 hours, they met the appellant. He told them that he was the market guard and ordered them to put down their buckets. He further required them to name the person from whose house they came from. On being told that they were from the home of Ben Ya Mungu who is PW2's uncle, the appellant ordered PW1 to take him to that house so that the said person could bail out PW1 and PW2 because they had allegedly committed an offence by passing through the market area at restricted hours. PW2 was ordered to stay there to guard the buckets.

According to PW1, while on the way with the appellant, he subjected her to several acts of harassment. He took her to a quarry and ordered her to carry stones to the market telling her that such was a punishment for persons who pass at the market area after 19.00 hours. Mid way however, he ordered her to throw down the stones and squat. He then started to sexually harass her by touching her body, the act which PW1 forcefully resisted. Despite her resistance, the appellant got hold of her

and covered her mouth and nose causing her difficulty in breathing. He then fell her down and had a carnal knowledge of her only to be interrupted by Hawataki Yusufu Mbwiliza (PW3) who rescued her from further molestation by the appellant. As a result of being raped, she said, she bled profusely causing her clothes to be soaked with blood.

On his part, PW3 testified that while in the group of persons who were assigned to conduct a search following information that there was a girl who had been kidnapped, he found the appellant in the act of raping PW1 in the bush. He witnessed the incident after torchlight had been flashed at the place where they heard someone crying for help. According to PW3, the appellant attempted to run away. He was however, arrested and sent to the ward Executive Officer (WEO) and later to Police Station.

In his defence, the appellant denied the offence. It was his evidence that he was arrested on 1/1/2009 at Igagula Market. He was beaten by a mob who shouted to him saying that he was a thief. He said further that PW3 and PW2's uncle participated in the arrest. He was taken to the office of the Ward Executive Officer where he was locked up until the next day

when he was taken to police. It was his defence that he was framed because of grudges which existed between him and PW2's uncle. According to him, the grudges arose from a land dispute.

The trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It convicted the appellant under section 131 (1) of the Penal Code [Cap. 16 R.E. 2002] and consequently, sentenced him to thirty years imprisonment. He was further ordered to pay a compensation of Shs. 500,000/= to PW1. Dissatisfied with the judgment and sentence, he unsuccessfully appealed to the High Court hence this second appeal.

In his memorandum of appeal, the appellant preferred five grounds of appeal. The grounds may however be consolidated into three:

1. That the learned appellant judge erred in law and fact in failing to find that the prosecution had failed to prove its case beyond reasonable doubt.

2. That the learned appellate judge erred in law and fact in failing to find that the trial court wrongly relied on the evidence of family members which was not corroborated.

3. That the learned appellate judge erred in law in upholding the appellant's conviction which was based on the defective charge sheet.

At the hearing of the appeal, the appellant appeared in person and unrepresented. On its part, the respondent Republic was represented by Mr. Miraji Kajiru, learned State Attorney. When he was called upon to argue his appeal, the appellant informed the Court that apart from the grounds of appeal stated in his memorandum, he had additional grounds of appeal to argue. In essence however, three of his additional grounds amount to expounding of the first ground raised in his memorandum of appeal, that the prosecution did not prove its case beyond reasonable doubt. He complained in the first and third additional grounds that the omission to call as witnesses, the Ward Executive Officer, the doctor who examined PW1 and the investigator of the case, weakened the prosecution case. Secondly, he contended that although

he was taken to hospital together with PW1, it was only PW1 who was medically examined. He said that he should have been medically examined so that it could be established whether or not PW1 was found with his semen. The fourth additional ground is that the trial Court denied him the right of calling his witnesses.

With regard to the grounds which he raised in his memorandum of appeal, beginning with the first ground, he argued that the allegation of rape was not proved because neither was the doctor who examined PW1 called as a witness nor was a medical report tendered as an exhibit to establish that PW1 was raped. The appellant argued further that the evidence of PW1 was contradictory in that, while she stated that when she passed at the market area at 19.00 hours the shops were already closed, at another stance she said that the time of closing shops at the area is 20.00 hours.

On the second ground, the appellant argued that all the three prosecution witnesses were family members and therefore their evidence should not have been acted upon without being corroborated. He submitted that, to his knowledge PW3 is the brother of PW1 and

PW2. As to third ground, he faulted the High Court for upholding the trial court's conviction contending that the same was wrongly founded on a defective charge sheet. He intimated however that he could not advance detailed argument on that point and left the matter to the decision of the Court. This is for the obvious reason that he is a layman and the point is one of law.

On his part, although he opposed some of the grounds raised by the appellant, Mr. Kajiru supported the appeal. He submitted that whereas the prosecution's omission to call as witnesses, the WEO did not have any effect because he was not a necessary witness, the Doctor and the investigator were vital witnesses. On the appellant's argument that the prosecution depended on the evidence of family members and that the courts below should not have based conviction on that evidence without being corroborated, the learned State Attorney replied that even if it would have been established that the witnesses were relatives, there is no law which prohibits the use of evidence of family members to prove a case in which a family member is involved.

On the complaint that the appellant was denied the opportunity of calling his defence witnesses, Mr. Kajiru dismissed the complaint stating that the same is without merit because according to the record, the appellant was afforded that opportunity but informed the Court that he did not have any witness to call.

On the other hand, Mr. Kajiru supported grounds 1 and 3 of appeal. As to ground 1, he submitted that since according to S. 130 (4) of the Penal Code, penetration is an essential element of the offence of rape, the evidence of PW1 was lacking on that aspect. That evidence should have been corroborated by independent evidence, argued Mr. Kajiru. To bolster his argument, he cited the case of **Kayoka Charles v. The Republic,** Criminal Appeal No. 325 of 2007.

With regard to the 3rd ground of appeal, the learned State Attorney argued that the provisions under which the charge was brought, sections 130 and 131 of the Penal Code, do not disclose the category of the offence of rape which the appellant was alleged to have committed. He argued that the omission rendered the charge sheet incurably defective. In support of his argument, he cited the case of **Charles**

Makapi v. The Republic, Criminal Appeal No. 85 of 2012(unreported) He therefore prayed that the appeal be allowed.

As a starting point, we have to state that we do not, with respect, agree with the learned State Attorney that the prosecution's failure to call the investigator of the case and the doctor who examined PW1 would have affected the weight of the prosecution evidence in proving the offence. It is trite law that in sexual offences, the evidence of a victim, if believed can, without corroboration, found conviction of an accused person. S. 127(7) of the Evidence Act, [Cap 6 R.E 2002] provides as follows:

> " *Notwithstanding the preceding provisions of this section, where in Criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the Court shall receive he evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own*

merits notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the Court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

In this case, the trial Court acted *inter alia* on the evidence of PW1 (the victim). It believed that her evidence established the allegation that she was carnally known by the appellant. The court gave the reason that the evidence of PW1 was cogent and unshaken. Failure to call the doctor as a witness or to tender the medical report to corroborate that evidence could not, therefore have affected the credibility of the victim's evidence. Apart from the evidence of PW1, however there was, as stated above, the evidence of PW3. According to his evidence, he found the appellant in the act of raping PW1. His evidence would therefore have a corroborative value as found by the learned appellate judge.

With regard to the omission to call the investigator to give evidence, it is our considered view that there is no reasonable ground upon which an

adverse inference can be drawn for the omission. The appellant was arrested by PW3 who gave evidence on the circumstances under which the arrest was made. He was arrested in the presence of PW1. During the trial, the question concerning mistaken identity of the appellant did not arise. In their evidence PW1 and PW2 gave an account of how they met the appellant and his subsequent acts. Their evidence was not shaken. As stated above, there is nothing which could compel the Court to draw an adverse inference on the omission to call as a witness, the investigating officer. This applies also to the WEO whom the appellant argued that his evidence was necessary.

If, however, the appellant thought that the evidence of these witnesses was important to him, he was at liberty to seek the assistance of the Court so that they could be summoned as Court witnesses or witnesses for the defence – See **Isidori Patrice v. The Republic**, Criminal Appeal No. 224 of 2007 (unreported) and **Moses Muhagama Laurence v. The Government of Zanzibar,** Cr. Application No. 17 of 2002.

As to the complaints that the evidence of PW1 was contradictory, that all the witnesses and PW1 are all family members and that the

appellant ought to have been examined by a doctor, it is also our considered view that the contentions are devoid of merit. We agree with the finding that the contradiction was immaterial. The statement of PW1 that the shops at the area are usually closed at 20.00 hours and the one to the effect that at the time when she met the appellant at 19.00 hours the same were not closed, is not a serious contradiction which affected the evidence tendered in support of the charge. Similarly, the fact that the appellant was not examined by a doctor was immaterial because as shown above, the case could be proved without that evidence.

As to the second ground, that the evidence for the prosecution was from witnesses who are family members, we agree with the learned State Attorney that the ground is without merit. In the first place, the contention that the prosecution witnesses are family members is not borne out by the record. That notwithstanding, it is the position of the law that the evidence of a witness does not become unreliable because of being a relative of a person in whose favour the evidence is tendered.

In the case of **Mustapha Ramadhani Kihiyo v. Republic** (2006) TLR 324, it was held as follows:

"The evidence of related witness is credible and there is not rule of practice or law which requires the evidence of relative, to be discredited unless of course, there is good ground for doing so.."

On the basis of the position as stated above, the argument by the appellant that the evidence of the prosecution witnesses should not have been relied upon unless it was corroborated, is devoid of merit.

As to the third ground, the basis of that ground is the omission to cite the specific provision disclosing the category of the offence with which the appellant was charged. We agree that failure to cite the specific paragraph of section 130(2) of the Penal Code rendered the charge sheet defective. The effect of the omission has been the subject of decision by this Court in a number of cases. In some cases, the defect was held to be curable [see for example **Michael Martini Katibu v. The Republic,** Criminal Appeal No. 208 f 2012 and **Joseph Leko v. The Republic,** Criminal Appeal No. 124 of 2013 both cited in **Charles Makapi v. The Republic,** Criminal Appeal no. 85 of 2012 (all unreported]. In other cases, the Court took the position that the defect is incurable. (See for example

Simba **Nyagura v. The Republic,** Criminal Appeal No. 144 of 2008 (unreported). In that case, the charge sheet showed that the appellant was charged under sections 130 (1) and 131 of the Penal Code. The Court observed as follow on the omission to disclose the description of rape under S. 130 (2).

> *"....in a charge of rape an accused person must know under which description (a) – (e) the offence he faces falls so that he can be prepared for his defence ...this lack of particulars unduly prejudiced the appellant in his defence."*

In another case, **Marekano Ramadhani v The Republic**., Criminal Appeal No. 202of 2013, the appellant was also charged with the offence of rape. It was alleged that he raped a girl aged 14 years. Like in the present case, the provisions of the Penal Code were generally cited as Sections 130 and 131. The court observed as follows:

> *"This Court has had an occasion in the recent past to deal with a situation almost similar to the present one. In* ***Charles s/o Makapi versus The***

Republic, *Criminal Appeal No. 85 of 2012 (unreported) where the charge of rape was drawn up exactly as in the present case the Court observed that it is a mandatory required under section 135 of the Criminal Procedure Act, that a charge sheet should describe the offences and should make reference to the section of the law creating the offence".*

The Court also cited the case of **Simba Nyanguka v. The Republic,** Criminal Appeal No. 144 of 2008 in which the appellant was also charged with the offence of rape. In the charge sheet, the specific provision under Section 130 of the Penal Code was not cited. The Court held as follows:

> ".....this lack of particulars unduly prejudiced the appellant in his defence."

Having considered the above cited authorities, we agree with both the appellant and the learned State Attorney that the omission to state the particular description of rape under Section 130 of the Penal Code

rendered the charge sheet incurably defective. The omission breached the requirements of S. 135 of the Criminal Procedure Act [Cap. 20 R.E. 2002] particularly paragraph (a) (ii) which states that:

> " *The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment,* ***shall contain a reference to the section of the enactment creating are offence."*** *(Emphasis added)*

Having found the charge sheet defective, it is obvious that the conviction founded on that charge cannot stand. We accordingly hereby quash it and set aside the sentence of thirty years imprisonment imposed on the appellant.

That said, the remaining issue is whether or not despite the defect of the charge sheet the established facts disclose any other offence. If the answer is in the affirmative, conviction of the appellant can be accordingly

substituted. In the case of **Niyonzima Jamal v. The Republic,** Criminal Appeal No. 216 of 2008 (unreported), the appellant was charged with and convicted of the offence of attempted rape contrary to Section 132 (1) and (2) (a) of the Penal Code. Under that provision the offence is constituted

> *"if with intent to procure prohibited sexual intercourse with a girl or woman, [a person] manifests his intention by.....threatening the girl or woman for sexual purpose."*

The Court found the charge sheet fatally defective for failure to disclose that the appellant used any threats to the victim. It did, as a result, set aside the conviction for attempted rape. Despite that move, the court considered the established facts and held as follows:

> *"In as much as we have found that the charge is fatally defective to the extent explained above, the facts established constitute the offence of assault contrary to section 240 of the Penal Code. The conviction for attempted rape is accordingly set aside. We substitute therefore a conviction for assault."*

In the case at hand, the prosecution evidence, as pointed out above, has shown that the appellant sexually harrased PW1 in the manner which, no doubt, constitutes the offence of grave sexual abuse under S. 138 (a) of the Penal Code. The provision states as follows:

"138 C-

(1) Any person who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any office or part of the body of another person, being an act which does not amount to rape under S. 130, convicts the offence of grave sexual abuse if he does in circumstances falling under any of the following descriptions, that is to say:-

(a) Without the consent of the other person

(b)-(c)..... N/A

(2).....N/A

(a) – (b)..... N/A

is liable on conviction to imprisonment for a term of not less than twenty years and not exceeding thirty years and shall also be ordered to pay compensation of an amount determined by the

court to any person in respect of whom the offence was committed for injuries caused to that person".

Having therefore quashed and set aside the conviction on the offence of rape, we substitute the conviction of the offence of grave sexual abuse under S. 138 C (a) of the Penal Code and hereby sentence him to twenty years imprisonment. The term of imprisonment shall be computed from the date of the appellant's conviction by the trial Court. The order of compensation given by the trial Court shall remain intact.

DATED at **TABORA** this 11th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL