IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 542 OF 2015

ISSAYA RENATUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mgonya, J.)

dated the 29th day of June, 2015
in
DC. Criminal Appeal No. 210 of 2014

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JUDGMENT OF THE COURT

25th & 29th April, 2016

MUSSA, J.A.:

In the District Court of Kibondo, the appellant was arraigned and convicted for rape, contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code). Upon conviction, he was sentenced to thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Mgonya, J.), hence this second appeal. The factual setting as unveiled by the prosecution during the trial may briefly be recapitulated:-

From a total of four witnesses and two documentary exhibits, the prosecution allegation was that on the 7th day of July, 2010, at Twabagondozi Village, within Kibondo District, the appellant had carnal knowledge of a certain Faith Takimazi (PW1).

At the opening of the trial, the victim introduced herself as an eleven (11) years old, whereupon a *voire dire* test was conducted in accordance with section 127 (2) of the Evidence Act, Chapter 6 of the Revised Laws (TEA). At the end of the enquiry, the court found that PW1 knew the meaning of an oath and she was, accordingly, sworn and proceeded to testify.

Her evidence was to the effect that she was, at the material times, a class five pupil at Twabagondozi Primary School. On the fateful day, PW1 was digging out sweet potatoes from a family farm which is located within Twabagondozi Village. As she was engaged in the task, the appellant suddenly emerged and momentarily pulled her to a nearby shrub. According to PW1, the appellant was holding what she called a big knife in his hands. Next, the appellant forcefully undressed PW1 and inserted his manhood into the girl's vagina. As he did so, PW1 was repeatedly wailing to attract helping hands. Her screams were heard by two ladies, namely, Jesca

Boniface (PW2) and Violeth Philemon (PW3), around 12:00 noon. The two ladies who were thereabouts, were also engaged in the task of digging out cassava from their respective farms. Jesca and Violeth immediately rushed towards the direction of the screams and, getting there, they saw the appellant in the middle of the act of sexual intercourse with PW1. Upon seeing them, the appellant withdrew and picked up his knife with which he threatened PW2 and PW3. Soon after, he took to his heels and disappeared from the scene. The two ladies then checked PW1's genitals and noticed that she was bleeding from her vagina. Jesca and Violeth escorted and handed over the victim to her parents.

There was some further prosecution evidence from a woman police No. 3546, Detective Corporal Frida (PW4). Whilst at Kibondo Police Post, PW4 was assigned the task of investigating the rape case on that same fateful day. She prepared a PF 3 which she handed over to PW1. Incidentally, the PF 3 was adduced into evidence by PW1 but, as it turned out, the trial court did not inform the appellant of his right to require the medical officer summoned in accordance with the provisions of section 240 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (CPA). That being so, it is noteworthy that the first appellate court discounted the

document on account of the infringement and we need not refer to it any further.

Back to PW4, her evidence was further to the effect that she proceeded to the scene where she found the appellant already arrested by Twabagondozi Village authorities. The appellant was formally arraigned in court on the 9th July, 2010 and, that concludes the prosecution version which was unfolded during the trial.

In his sworn evidence, the appellant claimed that he hails from Malagarasi Village but he also told the trial court that he has a farm at Twabagondozi Village. His account was that, on the fateful day, around 10:00 a.m., he went to his Twabagondozi farm where he dug out some cassava. He departed from the farm around 1:00 p.m. and proceeded straight home where he sold a portion of the cassava roots to an unnamed neighbour. On the next day, around 4:30 a.m. or so, he was awakened by the Village Executive Officer (VEO) of the locality who disclosed to him that he was wanted for an offence of rape which he allegedly committed at Twabagondozi Village. The VEO was in the company of a police officer, the alleged victim and her parents. According to the appellant, when asked to identify the ravisher, the victim pointedly implicated him. He was then taken

to a hospital where the medical officer wanted to take his blood sample but was refused permission by the police officer. From there, he took the police officer to his farm and, eventually, he was formally arraigned for the offence which he completely refuted.

On the whole of the evidence, the two courts below were concurrent in the finding that PW1, PW2 and PW3 told a credible tale on what transpired at the scene of the crime. The two courts, thus, found as an established fact that the appellant ravished PW1 and was caught red handed by PW2 and PW3 in the middle of the act. Against this backdrop, the trial court and the first appellate court, respectively, convicted and upheld the conviction of the appellant to the extent as already indicated. As hinted upon the appellant is aggrieved of both the conviction and sentence upon five substantive points of grievance which may conveniently be reproduced follows:-

1. *That, the learned hon. judge erred in law in upholding the findings of the trial court while charge was not proved beyond all shadows of doubt since there was a need of proving the age of the victim (PW1) demanding medical proof or Biological parents as a fact in issue. My lord Judges in the case at hand no any available evidence had been*

proved on oath credibly to that effect. The thing which vitiated the whole proceedings.

2. *That, the leaned Hon. Judge erred in law in uphold the trial courts findings, while the charge was not proved, since no penetration however slight might be, was proved by the medical man. Hence the whole decision appears to be arbitrary.*
3. *That, the leaned Judge erred in law in upholding the trial court's findings, while the prosecution evidence contradicted with the charge sheet on the time of the occurrence of the incident. Therefore, it was unsafe to be relied upon to convict me.*
4. *That, the learned judge erred in law in holding the trial court's finding while the visual identification evidence given by prosecution witnesses was unlawfully, since they failed to mention my name at the earliest opportunity for my name is ISSAYA S/O RENATUS and not "KIZIWI" moreover I was not arrested at the material date. Therefore, the identification lacked mandatory requirements to prove their allegation.*
5. *That, the leaned judge erred in law in upholding the trial courts findings relying on the laid charge sheet, whereby the purported victim in the charge sheet is FACE D/O NTAKIMAMAZI but the one*

who appeared before the trial court is FAITH D/O TAKIMAZI. Therefore the two passed lower courts failed to observe the fundamental contradiction which effect the root of the case.

6. *That, I pray to be present at the court during the hearing of this appeal.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Ms. Jane Mandago, learned Senior State Attorney, stood for the respondent Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned Senior State Attorney.

For her part, Ms. Mandago initially supported the appeal on account that the *voire dire* examination exercise was flawed and that the evidence of visual identification of the appellant was not watertight. As regards the *voire dire* test, the learned Senior State Attorney commenced her submission by criticizing the trial court for not ascertaining whether or not PW1 was possessed of sufficient intelligence and understood the duty of speaking the truth, to justify the reception of her evidence. But, in the course of a dialogue, Ms. Mandago appreciated that having found that PW1 understood the nature of an oath, the trial court need not have, in the first place,

engaged itself on such an ascertainment. Similarly, on a reflection, the learned Senior State Attorney was of the view that the appellant was amply identified by PW2 and PW3 given the fact that the incident occurred in broad daylight and the fact that both witnesses previously knew him well. Thus, upon realizing that she was treading a solitary path, Ms. Mandago abandoned the course and threw her weight in support of the conviction and the sentence meted out against the appellant. In rejoinder, the appellant simply reiterated the complaints raised in the memorandum of appeal.

In dealing with the points of contention, we propose to address the grounds of appeal in sequence. The first ground complains of lack of prosecution evidence establishing the age of the alleged victim. True, apart from the charge sheet and the fact that PW1 introduced herself in the witness box to be eleven years old before she gave her testimony, there was no direct evidence on the fact of her age. We are keenly conscious of the fact that age is of great essence in establishing the offence of statutory rape under section 130 (1) (2) (e), the more so as, under the provision, it is a requirement that the victim must be under the age of eighteen. That being so, it is most desirable that the evidence as to proof of age be given by the victim, relative, parent, medical practitioner or, where available, by the

production of a birth certificate. We are, however, far from suggesting that proof of age must, of necessity, be derived from such evidence. There may be cases, in our view, where the court may infer the existence of any fact including the age of a victim on the authority of section 122 of TEA which goes thus:-

> *"The court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."*

In the case under our consideration there was evidence to the effect that, at the time of testimony, the victim was a class five pupil at Twabagondozi Primary School. Furthermore, PW1 was introduced into the witness box as a child of tender age, following which the trial court conducted a *voire dire* test. Thus, given the circumstances of this case, it is, in the least, deducible that the victim was within the ambit of a person under the age of eighteen. To this end, we find the first ground of appeal to be devoid of any merits.

In the second ground of appeal, the appellant suggests that the prosecution ought to have proved penetration through medical evidence. With respect, whilst there may be cases where medical evidence is relied upon to establish the occurrence of rape, but as this Court has consistently stated, the best evidence in any given occurrence of rape is that of the victim (see, for instance, the unreported Criminal Appeal No. 94 of 1999 – **Selemani Makumba vs The Republic).** In the present case, the most crucial witness was the victim (PW1) who categorically stated that the appellant penetrated her by inserting his manhood into her sexual organ. The appellant's demand is clearly a misapprehension which we, accordingly, reject.

The third and fifth grounds of appeal have a similar denotation and we will, accordingly, determine them together. In the third ground, the appellant complains of a variance between the time of the occurrence as alleged in the charge sheet, with the time which was alleged by the prosecution witnesses in their respective testimonies. The appellant had reference to the alleged time of the occurrence which was put at "10:00 hrs" in the charge sheet as contrasted to "12:00 hrs" which was mentioned by PW2 and PW3. If we may express at once, the complaint would not yield

any material consequences, particularly in the light of the clear provisions of section 234 (3) of the CPA which stipulates:-

> *"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within time, if any, limited by law for the institution thereof."*

The proceedings giving rise to this appeal were instituted within time and, in any event, the variance did not in any way, detract from the material account by the witnesses to the effect that the appellant was involved in the offence. As regards the complaint on the fifth ground, the appellant claims that, in the charge sheet, the victim is named "Face Ntakimazi," whereas during her testimony, she was recorded as "Faith Takimazi." With respect, we find this complaint to be a mere display of semantics as it was, in the first place, not put to PW1 by the appellant at the close of her testimony. Throughout the trial, there was no suggestion that the victim was mixed up

with another girl and the apparent variance of names was, at best, an inadvertent mishap.

Finally, in the fourth ground, the appellant complains that his identification by PW2 and PW3 is unreliable as both witnesses named him as "Kiziwi" and not his real name. True, during the trial, both PW2 and PW3 referred to the appellant as "Kiziwi" which, they said, is his popular name. But, in our view, that does not imply that they did not know him simply because they did not name him by his real name. It may be that PW2 and PW3 had a cause to refer him as such the more so as, in his petition of appeal before the High Court, the appellant complained of a hearing impairment. In any event, as we have already intimated, both the courts below were concurrent in the finding that PW2 and PW3 told a credible tale and that they were coherent in their telling of it. We, on a second appeal, can only vary this finding if both courts completely misapprehended the substance, nature and quality of the evidence or, applied some wrong principle of the law. We are unable to find any shortcoming and, accordingly, we uphold the finding that the appellant was sufficiently recognized at the scene of the incident.

Thus, for the foregoing reasons, we find this appeal to be without a semblance of merit and, in the result, we dismiss it in its entirety.

Order accordingly.

DATED at **TABORA** this 28th 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