IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 365 OF 2015

ANSELIMO KAPETA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Sumbawanga)

(Sambo, J.)

Dated 30th day of October, 2013
in
Criminal Appeal No. 31 of 2011
.....

JUDGMENT OF THE COURT

4th & 8th April, 2016

KIMARO, J.A.:-

The appellant is in this Court for a second appeal after the High Court on first appeal, upheld the conviction and the sentence of thirty years imprisonment imposed on him for the offence of rape contrary to section 130(1) (2) (e) and 131 of the Penal Code [Cap 16 R.E. 2002].

The facts in brief upon which the conviction of the appellant was based are as follows. The appellant was married to Flora Michael (PW2). PW2 is the mother of Helen Patrick (PW1), the complainant. Helen's father is another man who was initially married to PW2 before she married the

appellant. The complainant (PW1) was aged 16 years at the time the offence was alleged to have been committed. According to the evidence that was adduced in court at the trial of the appellant, the complainant left with the appellant who is his step father on 12/ 07/2010 from Karema to Mpanda. She was sick. The appellant was taking her to hospital. They went to Majengo area where they lodged in one room. The testimony of the complainant PW1 is that the appellant raped her continuously until her mother PW2 went to rescue her. The mother corroborated the evidence of the complainant that her husband the appellant left with her daughter taking her for treatment and stayed for a long period without returning home. On making a follow up, she went to Mpanda in the room that the appellant had rented and she found the complainant there, pregnant.

Further testimony of the complainant was that when the appellant rented a room at Mpanda, she introduced the complainant as his wife. The complainant said she was afraid to disclose the incidence of rape because the appellant threatened to kill her. The mother of the complainant PW2 testified that the age of the complainant was 16 years. The evidence of the complainant that the appellant rented a room where he continuously raped her until that incident was discovered was corroborated by the evidence of

Theresia Silanda (PW3). She was the land lady of the house in which the appellant rented a room and stayed with the complainant. She said the appellant introduced the complainant as his wife.

The last prosecution witness was G 5072 D/Const. Patrick Laizer (PW4). He interrogated the appellant after his arrest. He also gave the complainant a PF3 and medical examination showed that the complainant was pregnant. The appellant was then charged with the offence of statutory rape. He admitted that the complainant was his step daughter and that he took her to Mpanda for treatment. However, he denied raping her. The trial court after assessing the evidence that was adduced by the prosecution and the defence was satisfied that it proved the offence of statutory rape that was laid against the appellant. The appellant was then convicted as charged and sentenced to thirty years imprisonment.

The appellant's first appeal to the High Court was dismissed after the learned first appellate judge was satisfied that the trial court made a correct evaluation of the evidence that the complainant was raped. He said the evidence that was adduced proved beyond doubt that the appellant raped the complainant PW1.

The appellant filed six grounds of appeal challenging the legality of his conviction and the sentence that was imposed on him. In the first ground his complaint is that the offence of rape was not proved against him as there was no reliable evidence to prove that the complainant was pregnant. The second ground of appeal is that there was no evidence to prove that the appellant was below the age of eighteen years. The third ground of appeal concerned the evidence that was given by the complainant that she saw the penis of the appellant and he was circumcised. In the fourth ground of appeal, the complaint by the appellant is that the evidence of the prosecution witnesses was not corroborated. As regards the fifth ground of appeal, the appellant laments that his defence was not considered. The last ground of appeal is that the case against him was not proved beyond reasonable doubt.

When the appeal was called on for the hearing, the appellant entered appearance personally. He had no counsel to represent him. The respondent/Republic was represented by Ms Catherine Gwaltu, learned State Attorney. The appellant had no additional grounds of appeal. When asked by the Court on how he wanted to proceed with arguing his appeal, the appellant felt comfortable to hear the response of the respondent first.

The learned State Attorney for the respondent supported the conviction and the sentence. On the first ground of appeal the learned State Attorney agreed that there was no PF3 which was tendered in court as an exhibit to prove that the complainant became pregnant because of the sexual act that took place between her and the appellant. That notwithstanding, said the learned State Attorney, it did not mean that the appellant did not have sexual intercourse with the complainant (PW1). She said the Court has decided several cases laying out the principle that, in rape cases the best evidence is that of the complainant. She cited to the Court the case of **Niyonzimana Augustine V Republic** Criminal Appeal No.483 of 2015 (CAT, Bukoba unreported). She said in this appeal the complainant Helena Patrick explained how the appellant committed the offence on her.

Regarding the second ground of appeal in respect of the age of the complainant that she was of the age of sixteen years when the offence was committed, the learned State Attorney said the ground of appeal had no merit because at the time the complainant gave her evidence the appellant did not cross examine her to rebut her age. To augment her position, she cited the case of **Kanisius Mwita Marwa V Republic** Criminal Appeal No. 306 of 2015 (CAT Mwanza unreported).

On the issue of the circumcision of the appellant, the learned State Attorney said much as it was proved that the appellant was not circumcised and hence the evidence of the complainant was not true when she said that the appellant was circumcised, that did not affect the finding of the trial court that the appellant committed the offence of rape on the complainant. She said the contradiction in the evidence is minor. In support of her submission she cited the case of **Oscar Josiah V Republic** Criminal Appeal No. 441 of 2015 (CAT Bukoba unreported).

As regards the complaint by the appellant that the evidence of the complainant was not corroborated, the learned State Attorney said the ground of appeal has no merit because section 127(7) of the Law of Evidence Act, [Cap 6 R.E. 2002] allows the Court to convict an accused person on uncorroborated evidence of the complainant.

The appellant also complained that his defence was not considered. In rebuttal of this ground of appeal, the learned State Attorney said the trial court considered the defence of the appellant when writing the judgment. She said the learned judge on first appeal was right to uphold the conviction of the appellant and the sentence that was imposed on him because the trial

was fair. The learned State Attorney prayed that the appeal be dismissed for lacking merit.

The appellant being a layman had nothing useful to tell the Court in rebuttal to what the learned State Attorney said in respect of his grounds of appeal. He insisted that he is innocent and he was wrongly convicted. He prayed that his appeal be allowed and he be set free.

On the part of the Court we do not think that the appeal is an involving one. The facts are straight. As indicated earlier on, the evidence that was adduced in the trial sufficiently explains how the offence was committed. We will not decide the appeal by going serially with the grounds of appeal but we will deal with them in a sequence we consider appropriate in the determination of the same.

The appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code. The section reads:-

> *"It is an offence for a male person to rape a girl or a woman. A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the*

following description: with or without her consent when she is under the age of eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

In terms of the provision of section 130 (2) (e) sexual intercourse between a man and a woman of the age which is under eighteen years is forbidden by the law. The sexual intercourse between a man and a woman under the age of eighteen years is allowed only if the woman is the wife of the man concerned with the sexual act and the woman is of the age of fifteen years or above, and is not separated from him.

On record, the evidence upon which the appellant was convicted for the offence of rape shows that he took the complainant Helena Patrick (PW1) from her mother Flora Michael (PW2), the wife of the appellant. The intention of taking her was to take her to hospital at Mpanda. On arrival at Mpanda, the appellant rented a room in the house of Theresia Silanda (PW3). The appellant introduced the complainant Helena Patrick (PW1) to Theresia Silanda (PW3) as his wife. According to both the complainant and PW3, the appellant and the complainant slept in the same room until when PW2 the mother of the complainant made a follow up and found out that her daughter was pregnant.

The issue before the Court is: with this evidence on record, was the judge on first appeal right to uphold the conviction and the sentence that was imposed on the appellant by the trial court.

In our considered opinion he was. On record, from the evidence of the complainant, the appellant had sexual intercourse with her in the room that he rented several times. The mother of the complainant testified that her daughter, PW1 was aged 16 years. This is evidence on record at page 10. When the appellant cross examined PW2, his wife at page 11 he asked no question to show that he was disputing the age of his step daughter, the complainant. The appellant introduced the complainant to PW3 as his wife. In his defence the appellant did not dispute taking the complainant to hospital. He did not dispute also that PW2 was the mother of the complainant. Equally not disputed is the fact that the complainant and the appellant shared the room that he rented. At the time the complainant gave her testimony, on 13/01/2011 she said she was seven months pregnant. Given the provision of the law under which the appellant was charged, that he had sexual intercourse with the complainant who was sixteen years and was not his wife the first appellate court correctly upheld the conviction.

As the learned State Attorney submitted, and correctly, evidence to prove the offence of rape comes from the victim. In this case the complainant testified that the appellant had sex with her. She was sixteen years when the offence was committed. Consent to sexual intercourse under the provision on which the charge against the appellant was preferred is immaterial. In the case of **Niyonzimana Augustine** supra the Court cited the case of **Selemani Mkumba V Republic** Criminal Appeal No. 94 of 1999 where the Court laid the principle that for the offence of rape the best evidence is that of the victim. See also case of **John Martin @ Marwa V Republic** Criminal Appeal No. 22 of 2008 CAT unreported which repeats the same principle. Regarding the age of the complainant there was no dispute that she had not attained the age of eighteen. Her mother PW2 confirmed that she was sixteen. In the case of **Niyonzimana Augustine** supra the Court held that:-

> *"The ground relating to age of the victim need not detain us. It is clear from the charge sheet that the appellant was charged with statutory rape and the victim was 16 years."*

In this case apart from the charge sheet indicating the age of the complainant being sixteen, her mother confirmed that she was sixteen. The

appellant committed statutory rape. Regarding the question whether the appellant married the complainant, the only evidence on record is that of PW3 that when the appellant rented a room from her he introduced the complainant as his wife. In our considered opinion that was made deliberately by the appellant to enable him fulfill his immoral act of having forbidden sex with the complainant. In addition, we would also say that the fact that the complainant was pregnant at the time she gave her evidence in court on 13/01/2011 fortifies the prosecution case that the appellant raped the complainant.

On the complaint by the appellant that he should not have been convicted because the complainant said he was circumcised while the examination by the doctor confirmed that he was not circumcised, our opinion is that the evidence of the complainant did not affect the finding of the trial court. The appellant was charged with statutory rape. The issue of whether he was circumcised or not is immaterial because Dr. Emmanuel Fidelis Kamgobe (DW2) said the penis of an uncircumcised man erects. The fact that the complainant testified that she became pregnant after the appellant had sex with her sufficiently proves that the appellant had erection when he committed the sexual act to the complainant. In the case of

Dikson Elia Nsamba Shapwata & another V Republic Criminal Appeal No. 92 of 2007 CAT (Unreported), the Court held that:-

> *"In evaluating discrepancies, contradiction and omissions, it is undesirable for the court to pick sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

As we have shown, the fact of the appellant being uncircumcised did not prevent him from having erection and hence he was not prevented from having sexual intercourse with the complainant. The fault he committed was having forbidden sexual intercourse under the law. He had sex with a sixteen year old girl. That is a forbidden sex under the provisions the appellant was charged.

The last complaint by the appellant was that he was convicted on an uncorroborated evidence of the prosecution evidence. The learned State Attorney submitted correctly that the evidence of the complainant did not require corroboration under section 127(7) of the Law of Evidence Act, [Cap 6, R.E. 2002]. The only requirement which has to be met before the trial

court enters a conviction is to be satisfied that the child witness told nothing but the truth. In this case there was not only the evidence of the complainant that the appellant had sexual intercourse with her but she was proved to be pregnant. That was sufficient to establish that the appellant committed the offence of rape to the appellant.

From what we have said, it is apparent that the appeal has no merit.

The appeal is dismissed in its entirety.

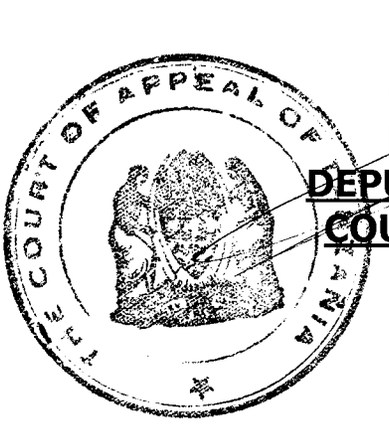
DATED at MBEYA this 6th day of April, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL