IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 412 OF 2015

KIMOLO MOHAMED @ ATHUMANI . . . . . APPELLANT

VERSUS

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

dated the 19th day of August, 2015
in
DC. Criminal Appeal No. 38 of 2013

JUDGMENT OF THE COURT

13th & 15th April, 2016

KILEO, J.A.:

The appellant Kimolo s/o Mohamed Athumani was arraigned and convicted in the District Court of Kondoa on the charge of rape contrary to sections 130 (1) and 131. The rape was alleged to have taken place at Hamai Village in Kondoa District on the 19th day of April 2012. He lost his appeal to the High Court and he is now before us on a second appeal.

It was in evidence at the trial that on the date of the incident PW1, a girl aged 13 years, was on her way to school passing through a bushy area at around 8.00 hrs when she was accosted by the appellant who fell her down and raped her. She explained how he penetrated his penis into her vagina which made her feel pain. The appellant was well known to the victim as he was her uncle. There was also evidence from the victim's younger sister (PW5) who said that on the material date she was on her way to collect their grandmother's mobile phone which had been taken for charging when she heard her sister crying from the bush. As she drew near she saw the appellant *'lying on the body of PW1'*. PW5 also testified that when the appellant saw her he ran away. PW5 saw the victim *'bleeding at her legs'*.

Thereafter the girls reported to their grandmother (PW2) who in turn phoned the victim's mother (PW3) who was in Dar es Salaam at that time, to inform her of the incident. When PW3 received the report she promptly set out for the village and had the appellant arrested and sent to the police.

The prosecution also tendered in court the evidence of the doctor who attended the victim and filled in a PF3 which he tendered in court as

exhibit P4. He testified in court as PW6. According to the findings which are reflected on exhibit P4 the victim's hymen was perforated. He stated in his testimony that he also observed some bruises on the victim's vagina.

In his defence the appellant denied the accusation against him and claimed that the case was planted against him because of grudges that existed between him and the victim's mother.

The appellant appeared in person at the hearing and fended for himself. The respondent Republic was represented by Ms. Lina Magoma, learned State Attorney.

When we called upon the appellant to address us on his grounds of appeal he opted that the learned State Attorney submits first.

The appellant's memorandum of appeal consists of four grounds; however the appeal really revolves around just one ground which is whether the dictates of section 127 (2) of the Evidence Act, Cap 16 R. E. 2002 were complied with in the taking down of the testimonies of the child witnesses.

Before we embark on a consideration of the above ground we find that it is opportune that we dispose of the third and fourth grounds first

"240 (3) When a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

The learned State Attorney rightly submitted that the record does not support the appellant's complaint. It shows, at page 28, that one Isaya Matayo Ombaya testified as PW6. He was the doctor who attended PW1. At page 29 it is clearly indicated that the appellant cross examined him so

he cannot now be heard to say that the doctor was not called in evidence. The third and fourth grounds of appeal are thus unfounded and we dismiss them accordingly.

Ms. Magoma supported the conviction and the sentence imposed. She opined that looking at the record the trial magistrate could not be faulted in the way the *voire dire* examination was conducted. She further pointed out that the testimonies of both PW1 and PW5 was so comprehensible that the learned trial magistrate was justified to rely on it to arrive at a conviction.

In response the appellant did not have much to say. He wondered though why, if he was the one who committed the crime, it took so long for him to be taken to court.

The question before us is, whether in taking down the testimonies of PW1 and PW3 who were both children of tender age, the trial magistrate failed to adhere to the requirements laid down under section 127 (2) of the Evidence Act and if so whether the case for the prosecution was rendered futile.

A look at what is recorded at pages 10 and 22 of the record will help us to answer the question. Below is what transpired at the trial court on 13/9/2012.

"PW1 FATUMA ALLY, 13 YEARS OLD, STD VII.

Court: *Since this witness is a child let VOIRE DIRE TEST be conducted.*

Witness XD by Court:

I am 13 years old. I am Standard VII. I am Islam by religion. I have reported this wrong to Court to testify. To tell untruth is bad.

Court:

The court is satisfied that the witness understand the nature of Oath and therefore she will give sworn evidence/testimony."

And at page 22 the record reads:

PW5: SALIMA SHAIBU, 8 YEARS OLD

Court: *Since the witness is a child of tender age let the VOIRE DIRE TEST BE CONDUCTED.*

SALMA SHAIBU XD by court:

- *I know how to say the truth.*
- *If you say untruth is a sin to God.*

Court: *This court is satisfied that the witness knows the nature of Oath but due to her actual age the Court will receive her evidence without an Oath."*

As for PW1, the trial magistrate was satisfied that the witness understood the nature of an oath. The witness was 13 years old when she testified. She was on the threshold of a child of tender age because in terms of the definition of section 127 (5) a child of tender age is one who is not more than fourteen years old. We are mindful of the fact that how a *voire dire* examination is conducted is matter of style. Though determination of whether the witness understood the nature of an oath could have been better done, we are nevertheless of the considered opinion that in the circumstances of this case there was no prejudice occasioned to the appellant. After all the witness understood that to tell

untruth is bad. Moreover, as argued by the learned State Attorney, the evidence of PW1 was so comprehensible that we do not see any justification in interfering with the findings of both courts as regards the value of her testimony. In any case, for the sake of argument, even if the testimony of PW1 was to have been taken as unsworn testimony for failure to conduct proper *voire dire,* still in terms of section 127 (7) nothing would have prevented the court from arriving at a conviction if it believed that the child was telling the truth. The provision states:

"(7) 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 the 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 his judgment the learned trial magistrate stated that he had an opportunity to examine both PW1 and PW5 and came to believe that their evidence was as good as that of an adult. (See page 43 of the record). In the circumstances of this case we take this to mean that the trial magistrate found the child witnesses to have been truthful.

Even if it were to be considered that the testimony of the victim needed corroboration in this case there was corroboration in the doctor's evidence and the fact that the victim reported to her grandmother immediately after she was abused.

Before we are done with this case we need to mention that the testimony of PW5 was taken without oath even though the trial magistrate had found that she understood the nature of an oath. If the witness understood the nature of an oath she was entitled to have her evidence taken on oath because giving unsworn testimony has its implications. In some cases it may require corroboration and sometimes an adverse inference may be drawn against such evidence.

Section 198 (1) of the Criminal Procedure Act, Cap 20 R. E. 2002 provides:

"(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."

The appellant considered the delay in his being taken to court as having weakened the case for the prosecution. It is true that the record shows that the appellant first appeared in the District Court of 2/5/2012. The crime was committed on 19/4/2012. It is however in evidence that the victim's mother who was in Dar es Salaam on the day of the incident is the one who put the legal process into motion soon as she got back to the village. She explained how she reported the matter to the chairman of the Kitongoji then embarked on a search of the appellant who was later taken to the VEO and finally to Mrijo Police Station. It appears that Mrijo Police station was nearest to the village and that is where the appellant was first locked up as per evidence of PW4, D/Sgt Simon. Given this scenario we do not think that the delay in taking the appellant to court can be taken as having weakened the case for the prosecution.

In the light of our considerations above we have come to the settled view that the case for the prosecution left no doubt as to the guilt of the appellant. There was ample evidence from the victim who was his own relative that he actually raped her. The victim's evidence was supported by that of PW2, PW3, PW5 and the medical report. There is no way that the appellant could have avoided culpability in the circumstances.

In the end we find no merit in the appeal by Kimolo Mohamed @ Athumani and we dismiss it accordingly.

DATED at **DODOMA** this 14th Day of April 2016.

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL