IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 453 OF 2015

LEONARD SALIM KIMWERI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

Dated the 22nd day of July, 2015
In
DC Criminal Appeal No. 21 of 2014

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JUDGMENT OF THE COURT

1st & 5th August, 2016.

RUTAKANGWA, J. A.:

The appellant was married to one Asha Hassan. They both resided at Gonja village in Same district, together with their 13 year old granddaughter, Niwael Omary.

On the afternoon of 26th May, 2013, going by Niwael's account, while Asha was not at home, the appellant took her into his bedroom. He then undressed her, made her lie on the bed and proceeded to have sexual intercourse with her.

As fate would have it, Asha returned home early enough to find the appellant ravishing their granddaughter. Her sixth sense led her to promptly lock the door of the room from the outside and she went to inform her neighbours. The police were also informed. Finding himself trapped inside his own bedroom with his granddaughter, the appellant, in his attempts to save his neck, made Niwael exit through the window. The appellant remained inside the room until the door was opened after the arrival of the police. Niwael narrated what had befallen her. The appellant was arrested and charged with raping Niwael in the District Court of Same district ("the trial court").

At the trial, Niwael testified as PW1, while Asha testified as PW2 against her husband. PW1 Niwael, in her evidence given on oath, was very categorical that the appellant after stripping her naked penetrated his penis into her vagina. She went further to reveal that, that was not the first time, for the appellant to carnally know her. The medical officer who examined PW1 Niwael on the same day at Maore dispensary, one Chambua E. Mbwambo (PW4), confirmed to the trial court that he found her with a ruptured hymen and blood in her vagina.

In his sworn evidence, the appellant claimed that on the material day, after taking lunch, he went in his room for a nap. After a few hours he heard noises outside his house. He got out of bed but could not walk out of the room as the door had been locked from outside. He got out of the room, after the arrival of a police officer, who arrested him and took him to Gonja police post and later charged him.

The trial court after considering the entire evidence on record, believed the evidence of PW1 and PW2, found the appellant guilty as charged, convicted him and sentenced him to thirty (30) years imprisonment. Dissatisfied with the conviction and sentence, he appealed to the High Court. The High Court, sitting as the first appellate court, dismissed his appeal entirely, hence this appeal.

The memorandum of appeal lodged by the appellant in this Court contains eight (8) grounds of complaint, which can be condensed as follows: One, the case against him was not proved beyond reasonable doubt. Two, the learned first appellate Judge erred in law in not discounting the evidence of PW1 Niwael which was received without *a voire dire* examination being conducted. Three, the learned first appellate judge erred in law in failing to note that his trial was not conducted in camera. Four, the learned first appellate judge erred in law

when she abdicated "her duty of subjecting the entire evidence to an objective scrutiny", leading to a failure of justice as his defence was not considered. Five, one essential witness, the chairman, was not called by the prosecution to testify. Six, the first appellate judge erred in law when she failed to note that the PF3 was tendered in court by the prosecutor. Seven, the first appellate judge erred in law in acting on contradictory evidence.

The appellant appeared before us in person to prosecute his appeal. He adopted his grounds of appeal and had nothing of substance to tell us in elaboration of them.

Ms. Tarsila Gervas, learned State Attorney for respondent Republic, while finding merit in the fourth ground of appeal, urged us to dismiss the appeal in its entirety. It was her contention that although the learned first appellate judge did not consider at all the defence case, this omission was a curable one as this Court can step into the shoes of the first appellate court and do what that court failed to, if no patent failure of injustice was caused. We agree with her.

On the second ground of complaint, which was one of the complaints in the High Court, Ms. Gervas found it wanting in merit as the

appellant, it was the prosecution which stood to be prejudiced by this irregularity. We accordingly dismiss this ground of appeal.

The fifth ground of appeal ought not to detain us either. It is true that PW3 No. E. 9965 D/C Faustine told the trial court that when he visited the scene of the crime and found the appellant locked inside his bedroom he was accompanied by the Chairman of Mheza village. What the appellant failed to appreciate is the naked truth that by the time these two officials arrived, the offence had already been committed and PW1 Niwael was not in the room. As the appellant admitted in his defence, he was alone in the room and that's what PW3 D/C Faustine testified on. The evidence of the chairman therefore would not have made any difference. This ground of complaint, therefore, stands dismissed.

It is the contention of the appellant that PW3 D/C Faustine and PW4 Chambua Mbwambo contradicted each other. As an illustration of this, he referred us to the evidence of PW3 D/C Faustine to the effect that the *"doctor also noticed that sperms in the vagina of the victim."* This he contrasted with the evidence of PW4 Mbwambo, to the effect that *"also in the vagina there was a blood, nothing more was detected."* On the face of it, these are patent contradictions. However, they do not

go to the root of the case. The best evidence of whether PW1 Niwael was raped and by whom, in the circumstances of this case, could only come from the prosecutrix herself and not the arresting and/or examining officers. These contradictions, in our respectful opinion, did not affect the quality of the prosecution case which was primarily premised on the evidence of PW1 Niwael and PW2 Asha. This ground of appeal fails too.

Ground seven of appeal lacks merit too as the PF3 was tendered in evidence through PW1 No. E. 9965 D/C Faustine, who had issued it to PW1 Niwael and had been returned to him after PW4 Mbwambo had examined the prosecutrix.

The last ground of appeal we have to contend with is the first ground, in which the appellant is complaining that the case against him was not proved beyond reasonable doubt.

To satisfactorily prove the charge of rape, the prosecution had a duty to prove beyond reasonable doubt that on the mentioned date, the appellant had carnal knowledge of PW1 Niwael a girl below 18 years of age. There is no dispute here on the fact that as of 26th May, 2013, PW1 Niwael was 13 years old. It is now trite law that in sexual offences cases,

the best evidence on rape is that of the prosecutrix who is found to be truthful by the court(s). See, for instance, **Sulemani Makumba v. R.,** [2006] TLR 379, **Vicent Ingi v. R.,** Criminal Appeal No. 527 of 2015 (unreported), etc.

In this particular case, two key witnesses gave direct evidence on the fact that PW1 Niwael was on 25/05/2013, at around 16:00 hrs. raped by the appellant. These were the prosecutrix herself (PW1) and PW2 Asha. We have already shown that PW1 Niwael told the trial court that after the appellant had called her into his bedroom, he undressed her and himself, lay her on a bed and had sexual intercourse with her by inserting his penis into her vagina. PW1 Niwael, in spite of the trial being held in open court, was very candid and unequivocal on this. After her evidence in chief, the appellant was given opportunity to cross-examine her but he failed to do so. The evidence of PW2 Asha was equally damning to the appellant as already shown above. She, too, was never cross-examined by the appellant.

On the basis of the undiscredited evidence of PW1 Niwael and PW2 Asha, the learned trial Resident Magistrate had this to say:-

> *"This court had the opportunity to examine the evidence of PW1 who informed this court that the*

accused raped her. She said the accused took and lied on her and penetrated his penis to (sic) her vagina. The accused not even asked any question to her on cross-examination. This is a clear indication that the accused did commit such offence of rape. This court also considered the evidence of PW2 ASHA HASSAN the grandmother of PW1. Her evidence corroborated that evidence of PW1...."

After also taking into account the evidence of PW4 Mbwambo, he found the charge proved beyond reasonable doubt. The first learned appellate judge upheld the conviction after finding both PW1 Niwael and PW2 Asha to be credible witnesses. She could not have held otherwise. The appellant's defence, we are convinced, was a figment of his own imagination. In our considered opinion, the undiscredited evidence of these two prosecution witnesses proved the guilt of the appellant to the hilt. The High Court, therefore, rightly dismissed the appellant's appeal.

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

DATED at **ARUSHA** this 5th day of August, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL