IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 483 OF 2015

NIYONZIMANA AUGUSTINE.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

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

(Mwangesi J.)

dated the 12th day of October, 2015

in

Criminal Appeal No. 31 of 2015

JUDGMENT OF THE COURT

17th & 22nd FEBRUARY, 2016

MJASIRI, J.A.:

This appeal arises from the decision of the District Court of Karagwe at Kayunga. The appellant Niyonzimana Augustine was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code. He was convicted as charged and was sentenced to twenty (20) years imprisonment. Aggrieved by the decision of the District Court, he appealed to the High Court. His appeal was unsuccessful hence his second

appeal to this Court. The High Court substituted the illegal sentence of twenty years with the mandatory minimum sentence of thirty (30) years imprisonment as provided under the law.

The background to this case is as follows:- On or about November 4th, 2010 at 18:00hrs, at Kikurula Ranch within Karagwe District in Kagera Region, the appellant unlawfully had sexual intercourse with PW1, a sixteen years old girl. It was alleged that the appellant wanted to have a relationship with PW1, but she had no interest on the relationship. On the date of the incident the appellant met PW1 while crossing the bridge and threatened to rape her. She was in the company of her sister. Later in the day, the appellant went to the home of PW1, found children playing outside the house, beat the children up, chased them and forcefully entered the house, locked the door and took PW1 by force and raped her. PW1 screamed for help, and one of the children went to inform her brother in law, Rutabingwa Alexander (PW2). He rushed to the house and tried to open the door, but the appellant refused to open the door. Frederick Kyaruzi (PW3) who was PW2's neighbour came to the house when he heard the alarm. Moses Clavery (PW4) a neighbour of PW2 also responded to the alarm. PW2 had to break the door. The appellant was

found in PW2's bedroom. PW1 was partially dressed and was vomiting. The appellant was arrested at the scene. The appellant denied the charge.

The appellant presented a four-point memorandum of appeal. However the main grounds of complaint are as follows:-

1. *Whether or not the appellant was properly identified.*
2. *The offence of rape was not proved.*
3. *The age of the victim was not considered.*

At the hearing of the appeal, the appellant was unrepresented and had to fend for himself. The respondent Republic had the services of Mr. Athumani Matuma learned Senior State Attorney. The appellant opted for the learned Senior State Attorney to submit first.

Mr. Matuma strongly supported the conviction of the appellant and the sentence. According to him the offence of rape was proved to the standard required under the law. The incident occurred during the day, before dusk. The appellant was well known to the victim as he was her sister's neighbor. He contended that the best evidence of rape is that of the victim. PW1 called out for help. PW2 upon arrival raised an alarm. PW3 and PW4 responded to the call for help. The appellant was found in

PW2's bedroom by PW2, PW3, and PW4. PW2 had to break the door to enter his house as the appellant had the audacity to lock the door and refused to open the door. PW1 was found semi naked, on the floor, when the door was opened. The appellant was on top of her. She was so distressed that they found her vomiting.

Mr. Matuma submitted that PW1 was a credible witness and her testimony should be relied upon. He relied on the case of **Goodluck Kyando v Republic (2006) TLR 363.**

On the second ground of appeal, that penetration was not proved, Mr. Matuma's short answer to that is that this ground has no basis. The appellant was caught in the act by PW2, PW3 and PW4. It was also clearly established from the evidence of PW1 that she was raped. According to PW3, PW1 was found lying down on the floor and her underwear was partially removed. He made reference to **Hassani Bakari @ Mamajicho v Republic,** Criminal Appeal No. 103 of 2012 CAT (unreported).

In relation to ground No.3, on the age of the victim, Mr. Matuma argued that the age of the victim has no basis and the appellant was not prejudiced in any way.

In reply to Mr. Matuma, the appellant denied committing the offence. He complained that neither PW1's sister nor the children were called to testify. He also raised his concerns as to why the prosecution never called the village leadership. He stated that if he had the intention to rape PW1, he would have done it, when he met her at the bridge which is located in the bush where PW1 would not have been able to call for help.

We on our part following a careful perusal of the record, the memorandum of appeal and the submissions by the learned Senior State Attorney, and the appellant, we would like to make the following observations. The main issues for consideration and adjudication are as follows:

1. *Whether or not PW1 was raped.*
2. *Whether or not it was the appellant who committed rape.*

It is evident from the record that PW1 was raped taking into account the testimonies of PW1, PW2, PW3 and PW4.

The next crucial question is whether or not it was the appellant who committed the rape. The evidence of PW1, alone is sufficient to establish

that it was the appellant who raped her. As rightly argued by Mr. Matuma, the best evidence of rape comes from the victim. See **Selemani Makumba v Republic,** Criminal Appeal No.94 of 1999 CAT (unreported).

Section 127(7) clearly provides that where the evidence of a victim of rape is credible, it does not require corroboration. It is reproduced as under:-

> *"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 or as the case may be the victim of the 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."*
> *[Emphasis provided].*

In the instant case not only do we have the evidence of PW1, but the evidence of PW2, PW3 and PW4. All the said witnesses came to the scene after the alarm was raised. They all saw the appellant inside PW2's bedroom, after PW2 had broken the door following the drama created by the appellant, by refusing to open the door. This caused PW2 to force the door open with the assistance of PW3. In view of this the appellant was exposed to all the four witnesses. The appellant cannot deny under the circumstances, that he was the culprit. The appellant was definitely caught with his pants down and cannot escape.

The ground relating to the 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 old. The issue of the victim's age was never raised by the appellant during cross examination.

There is no shadow of doubt that the appellant was the one who raped PW1. The conditions were favourable to positive identification. The incident occurred at 6:00p.m. before darkness had set in. The appellant was known by all the witnesses.

The trial Court found all the prosecution witnesses to be credible and relied on their testimony. The first appellate Court, found no reason to fault the Judgment of the High Court.

We are of the firm view that once PW1, PW2, PW3 and PW4 were believed and the question of mistaken identity eliminated, we can find no justification for interfering with the concurrent findings of the two lower courts that PW1 was raped and that the person who raped her was the appellant.

In **Omari Ahmed v Republic** 1983 TLR 52, it was held that the trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for re-assessment of their credibility. See also **Dickson Elia Shapwata and Another v Republic,** Criminal Appeal No. 92 of 2007 CAT (unreported).

In the instant case the PF.3 report was expunged from the record by the High Court for being improperly admitted. However lack of medical evidence does not mean that rape has not been established as long as there is other evidence establishing the fact that the rape was committed. See for instance **Prosper Mjoera v Republic**, Criminal Appeal No. 73 of

2003 and **Salu Sosama v Republic**, Criminal Appeal No. 31 of 2006 CAT (both unreported).

In view of the reasons stated herein above, we find no merit in the appeal. The appeal is hereby dismissed.

DATED at **BUKOBA** this 20th day of February, 2016.

E.A.KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL