IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 36 OF 2016

MHINA ZUBERI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Tanga)

(Khamisi, J.)

Dated the 4th day of September, 2015
In
Criminal Appeal No. 24 of 2015

JUDGMENT OF THE COURT

27th June & 1st July, 2016

MMILLA, J.A.

The appellant, Mhina s/o Zuberi was charged with and convicted of the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code by the District Court of Muheza and sentenced to 30 years imprisonment. His first appeal to the High Court of Tanzania at Tanga was dismissed. Still aggrieved, he appealed to this Court.

Briefly, the facts leading to the present case were that on 25.3.2014 at about 7.00 hours, on her way to school PW1 Rehema Shaban **(the**

complainant) passed over at the home of PW2 Magreth Lucas, her fellow pupil, so that they could go to school together. On arrival at the home of the latter, PW1 found her not ready and had to wait for her. She sat on the bench outside the home of PW2. While waiting for her friend, the appellant appeared and asked her to follow him in his room because he wanted to send her to buy cigarettes for him. PW1 obeyed. Upon entering into that room however, the appellant closed the door and commanded her to undress. PW1 refused. The appellant then held her by force, unzipped her skirt, removed her skin tight and underpants, after which he sexually assaulted her by inserting his penis into her female organ. In the process, PW1 cried for help by calling PW2 but to no avail. However, because she continued shouting the appellant went outside the room to see if Magreth was coming. It was then that he met PW2 outside looking for PW1. Upon being asked by PW2 the whereabouts of PW1, the appellant lied to her that she had gone to school. Since she doubted the appellant's answer, she began calling PW1 who responded and came out of the appellant's room. PW1 told PW2 that ***"huyu mtu ananifanya tabia mbaya,"*** meaning ***"this person is doing a bad thing to me."*** Afraid of the repercussions if PW1 and PW2 revealed the incident to other persons, the appellant warned

them not to report the incident anywhere, and threatened to stab them if they did.

At about 14:00 hours on the same day, PW3 Sophia Mussa was at her home when her daughter, PW1 arrived home in the company of PW2 and one Mariam. The latter informed PW3 that the appellant raped her daughter (PW1). PW3 then called two unnamed women and together they examined PW1 and found that she had mucus, blood and scratches in her female organ. After that, she and her daughter went to the appellant's home and luckily they found him. She asked the appellant what he did to her daughter, but the appellant sneaked away without responding to the question asked by PW3. The latter reported the incident to police at which she was given a PF3 with instructions to send the victim girl to hospital for medical examination and treatment. Meanwhile, the police traced and arrested the appellant. They subsequently charged him with the offence of rape.

The appellant denied involvement. He told the trial court that the charge against him was actuated by hatred perpetuated by the complainant's mother who was unhappy that he rented a room she had earmarked to rent but was refused by the land lord one Kisingi.

The appellant's memorandum of appeal raised three grounds which however, may sufficiently be bridged to two of them as follows:-

- That the two courts bellow erred in law and in fact when they failed to consider that the evidence of PW5 did not corroborate the unsworn evidence of PW1.
- That the two courts below erred in law and in fact when they failed to consider his defence.

Before us, the appellant appeared in person and fended for himself, while the respondent Republic enjoyed the services of Mr. Waziri Mbwana Magumbo, learned State Attorney, who was assisted by Ms Mariaclara Mtengule, learned State Attorney. They stated from the outset that they were supporting conviction and sentence.

When the appellant was called upon to argue his appeal he elected for the Republic to begin, undertaking to submit later if need would arise.

In the first place, Mr. Magumbo submitted that the evidence of PW1 was clear that the appellant raped her, adding that it was the evidence which counted much. He also submitted that the evidence of PW5 Dr. Hamisi Bungara was a mere expert opinion which was not binding on the

Court. He relied on the case of **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 CAT (unreported). Mr. Magumbo stressed that the law is settled that in rape cases, the best evidence comes from the victim. On this, he cited section 127 (7) of the Evidence Act Cap 6 of the Revised Edition, 2002 (**the Evidence Act**). He insisted that since the two courts below found that PW1 was a credible witness, her evidence was sufficient to anchor conviction. He urged the Court to uphold the concurrent finding by the two courts below.

On the ground touching on whether or not the appellant's defence was considered by the two courts below, Mr. Magumbo submitted that although it is true that the trial court did not adequately consider the appellant's defence, the omission was addressed by the High Court in a first appeal. He referred the Court to pages 55 to 57 of the court record of appeal. He contended that the first appellate court had the right to step into the shoes of the trial court as it did. He prayed the Court to dismiss this ground too. In all, he pressed the Court to dismiss the appeal in its entirety.

On his part, the appellant submitted that the trial court grounded his conviction on the weak and uncorroborated evidence of PW1, and that the

first appellate court erred in upholding his conviction and sentence. He wondered why those courts did not accept the evidence of PW5 who said that there was no sign that the victim was raped.

On our part, after earnestly going through the judgment of the two courts below, we realised that there was truth in the appellant's complaint that the evidence of PW5 did not corroborate in material particulars the evidence of PW1. This witness testified that he found nothing suggesting that the complainant was raped, and that the scratch he found at her female organ was tiny, hence his opinion that it appeared to be normal.

We agree with Mr. Magumbo that the evidence of PW5 was a mere expert opinion which, as the Court said in the case of **Godi Kasenegala v. Republic** (supra), such opinion is not binding. To be precise, the Court said in that case that:-

> *"Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See* ***C.D. de Souza v. B. R. Sharma*** *(1953) E.A.C.A. 41 . . . ."*

We similarly agree that what matters is whether or not there was evidence other than that of PW5 to establish the commission of the charged offence.

The lower courts carefully weighed the evidence of PW1. Both of them were satisfied that she was a credible and believable witness. They believed that she told the truth that upon entering into the appellant's room, the appellant closed the door and commanded her to undress. Although she refused, the appellant descended upon her, unzipped her skirt, removed her skin tight and underpants, and inserted his penis into her female organ. They further appreciated that under section 127 (7) of the Evidence Act, if found to be a credible witness, the complainant's evidence can alone ground a conviction as true evidence of rape has to come from the victim.

Once again, we agree with both lower courts' findings that PW1 was a credible and reliable witness and that under section 127 (7) of the Evidence Act, appellant's conviction could solely be anchored on her evidence. We reiterate what we said in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379 that:-

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent,* ***and in case of any other woman where consent is***

irrelevant that there was penetration." (Emphasis supplied.)

That notwithstanding however, in the present case there was the evidence from PW2 which fortified the complainant's evidence. That witness said that she saw PW1 emerging from the appellant's room and was crying. That was after the appellant had lied to her that PW1 had gone to school, which happened to be false. Also, PW2 stated that the appellant warned them to desist from telling anyone what had happened. One would ask questions, why did the appellant lie to PW2 that PW1 had gone to school whereas she was in his room? We are firm that he lied because he knew what he did to PW1. This explains why he warned them never to divulge the incident to any other persons unless they were risking his wrath to stab them if they did. That conduct collaborates the evidence of PW1 that the appellant raped her.

PW5 said that he found no blood, and that the scratch was tiny, and on top of the vagina appeared to be normal. We agree with both lower courts as well as Mr. Magumbo that the presence of tiny scratches in the complainant's female organ suggested that it was tempered with. In terms of section 130 (4) (a) of the Penal Code penetration, however slight, is

sufficient to constitute sexual intercourse necessary to the offence – See the case of **Octavian Moris v. Republic**, Criminal Appeal No. 254 of 2015 CAT (unreported). In the circumstances, we uphold the findings of the two courts below that the appellant was proven to have committed the charged offence. Therefore, the first ground of appeal lacks merit and we dismiss it.

We now revert to the ground which alleges that the appellant's defence was not considered by the two courts below.

As we have earlier on said, the trial court did not adequately consider the appellant's defence. On the other hand however, the first appellate court considered the appellant's defence as reflected on pages 55 to 58 of the court record. We have no flicker of doubt that it had a duty to reconsider and evaluate the evidence on record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified – See the cases of **Armand Guehi v. Republic**, Criminal Appeal No. 242, CAT (unreported).

In his defence, he said that there was personal grudge between him and PW3 prior to the date of incident, which was occasioned by her failure to win the heart of the appellant's landlord to rent the business premises to her, but decided to offer the same to the appellant, hence her hatred to

him. The High Court rejected this line of defence on the strength of the evidence of PW1 and PW2. We are entirely in agreement with that court on this aspect.

As we have repeatedly said, PW1's evidence was credible, strong, and reliable which makes the appellant's defence a mere attempt to frustrate justice in the case. We hold firm that the lower courts rightly rejected the appellant's defence. In the premises, we find and hold that this ground too lacks merits and we disallow it.

That said and done, we hold that the appeal lacks merits and we dismiss it in its entirety.

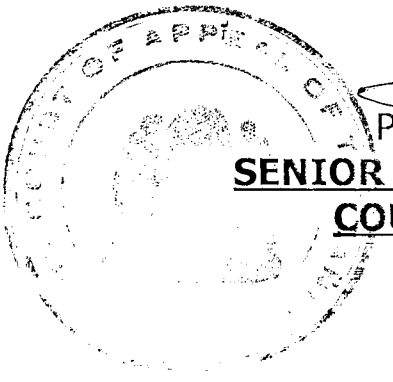
DATED at **TANGA** this 30th day of June, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL