IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 75 OF 2016

MUSSA ALLY ONYANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

Dated 22nd day of February, 2002
in
Criminal Appeal No. 3 of 2001

JUDGMENT OF THE COURT

10th & 18th October, 2016

MJASIRI, J.A.:

In the District Court of Hai at Bomang'ombe in Kilimanjaro Region, the appellant was charged and convicted of the offence of rape contrary to section 130 (2) (e) and 131 of the Penal Code [Cap. 16 R.E. 2002]. He was sentenced to thirty (30) years imprisonment and to suffer twelve (12) stokes of the cane. Being aggrieved with the conviction and sentence, the appellant appealed to the High Court. His appeal to the High Court was unsuccessful, hence his second appeal to this Court.

It is the prosecution case that on 25th day of December, 1998 on or about 23.00hrs at Majengo Sanya Juu Village within Hai District in Kilimanjaro Region, the appellant unlawfully had carnal knowledge of one Shufaa Hassan without her consent.

On the fateful night, the victim, PW1 together with two other friends Hawa Miraji (PW2) and Zaituni Mshana (PW3) were returning home from work. Suddenly the appellant appeared and started using abusive language. He threatened to rape and to sodomise all of them. He slapped PW2 who fell down. He then grabbed PW1 and dragged her to his house. The two friends followed behind, but he was too quick for them. He took her to his home. He found people outside the house. However they could not do anything as he threatened them with a knife. He then closed the door, undressed her and raped her. According to her testimony she even lost consciousness. PW2 and PW3 went to the police station seeking for help.

Two policemen accompanied them to the appellant's house, PC Selemani, PW4 and PC Ezekia, PW5. The appellant refused to open the door when they asked him to. They had to force the door open. PW1 was

lying on the bed half naked, only wearing a blouse and the appellant was found naked. This led to the appellant's arrest and subsequent prosecution.

The prosecution relied on five (5) witnesses. The medical doctor was not called as a witness.

The appellant presented a six-point memorandum of appeal which can be summarized as follows:-

1. *Section 240 (3) of the Criminal Procedure Act was not complied with.*
2. *The charge against the appellant was not proved beyond reasonable doubt.*
3. *The conviction of the appellant was based on contradictory evidence.*
4. *The conviction of the appellant was based on weak, inconsistent and contradictory evidence.*
5. *The conviction of the appellant was based on a defective charge.*
6. *Section 226 (1) of the Criminal Procedure Act was not complied with.*

At the hearing of the application, the appellant appeared in person and was unrepresented while the respondent Republic had the services of

Mr. Augustino Kombe and Ms Elizabeth Swai, learned Senior State Attorneys. The appellant being without legal representation opted to let the learned Senior State Attorney submit first. He asked the Court to adopt his memorandum of appeal as part of his submissions.

Ms. Swai on her part, informed the Court that she was supporting the conviction and sentence meted out to the appellant. She argued the appellant's grounds of appeal in the following order:-

In relation to ground No. 1 on the failure to comply with the requirements under section 240 (3) of the Criminal Procedure Act [Cap. 20 R.E. 2002], the CPA she readily conceded that there was non-compliance. The appellant was not advised on his rights to have a doctor called, in order to avail him with the opportunity to cross examine him. She asked the Court to expunge the PF.3 report, Exhibit P1 from the record.

On the issue of a defective charge raised in ground No. 5, Ms. Swai's short answer to that was that even though the charge was defective, it was a minor defect which did not prejudice the appellant in any way. The appellant was supposed to be charged under section 130 (2) (a) instead of section 130 (2) (e) which made reference to rape with or without the

consent of the victim when she is under eighteen years of age. The correct section is section 130 (2) (a) which related to rape without the victim's consent. According to Ms. Swai this defect is curable under section 388 (1) of the CPA.

On non-compliance with section 226 of the CPA raised in ground No. 6, the learned Senior State Attorney submitted that it was evident from the record (page 10 - 11) that the appellant was absent in court without any lawful cause. On April 1, 1999, his surety reported that the appellant was indisposed. The matter was adjourned and set down for mention on April 12, 1999. The appellant failed to enter appearance and no valid explanation was made for his absence. The trial court issued an arrest warrant and summons to show cause. The matter was then set down for hearing on May 13, 1999, the appellant did not show up in court.

Upon his subsequent arrest, and when taken to court on November 1, 2000, the appellant had this to say at page 17 of the record.

> *"Accused: I know I had a case in this court, but I just decided not to come."*

This led the trial court to order that the accused person start sentence on the same date.

On grounds No. 2 , 3 & 4, Ms. Swai argued that the case against the appellant was proved beyond reasonable doubt. The account given by PW1 as to what transpired was supported by the testimonies of all the other prosecution witnesses including that of the two policemen PW4 and PW5 who accompanied PW2 and PW3 to the appellant's house. The only minor variation was in respect of the testimony of PW5, who stated that when the door was opened, he heard sounds made by PW1. The rest of the witnesses stated that PW1 was unconscious. There were no major contradictions and the contradictions/inconsistencies in the testimony of PW5 did not go to the root of the matter. She contended that the offence of rape was established, as there was penetration and there was sufficient evidence to establish that it was the appellant who committed the rape.

The appellant on his part did not have much to say. He contended that if the police had to force his door open, as claimed, why was no witness called in court. He lived in a rented house and a resident of the house should have been called to testify.

We on our part after carefully reviewing the evidence on record, the memorandum of appeal and the submissions made by the learned Senior State Attorney we are of the considered view that the main issues for consideration and decision are as follows:-

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

The first ground of appeal needs not detain us. Ms. Swai readily conceded that section 240 (3) of the CPA was not complied with and asked us to expunge the PF3 report (Exhibit P1) from the record.

This Court has stated in a number of occasions that failure to comply with section 240 (3) of the CPA renders the medical report to be of no evidencial value. It is a procedural irregularity. See **Mbwana Hassan v. Republic**, Criminal Appeal No. 98 of 2009, **Abdalla Elias v. Republic** Criminal Appeal No. 115 of 2009 and **Richard Bakari v. Republic,** Criminal Appeal No. 25 of 2011 CAT (all unreported).

The PF3 was admitted without advising the appellant of his right to have the doctor who prepared the report to be called as a witness in order

to give the appellant the opportunity to cross examine him. We are therefore constrained to expunge Exhibit P1 from the record.

In **Lazaro Kalanga v. Republic**, Criminal Appeal No. 348 of 2008, CAT (unreported) the Court relying on **Prosper Mjoera Kisa v. Republic**, Criminal Appeal No. 73 of 2003 and **Salu Sosana v. Republic** Criminal Appeal No. 31 of 2003 CAT (both unreported) stated thus:-

> *"We are mindful of the fact that lack of medical evidence does not necessarily, in every case mean that rape is not established where all other evidence point to the fact that it was committed"*

This means that medical evidence is not the only evidence that can be relied upon to prove a sexual offence as long as there is some other evidence to establish the offence.

On the ground of appeal in relation to the defective charge, we entirely agree with Ms. Swai that the defect in the charge is minor, and the appellant was not prejudiced in any way. The particulars of the offence are clearly set out in the charge sheet. The appellant therefore understood very well the charge he was facing. Paragraphs (a) and (e) of the Penal Code carry the same penalty of thirty (30) years imprisonment. The defect

is therefore curable under section 388 (1) of the CPA as the appellant was not prejudiced in any way.

On non compliance with section 226 of the CPA, it is evident from the record that the appellant was absent without any lawful cause and upon being brought before the court to explain for his absence, he curtly remarked that *"I know I had a case in this Court, but I just decided not to come."* Therefore the trial Court properly proceeded in his absence. When called upon to provide an explanation, which could have led the trial Court to allow him to present his defence under subsection (2) of section 226 of the CPA, he failed to do so.

On looking at grounds No. 2, 3 and 4, we need to establish that the case against the appellant was proved beyond reasonable doubt, and that there was substantial evidence to prove the charge against the appellant. Given the evidence on record, there is overwhelming evidence against the appellant taking into consideration the evidence of PW1, PW2, PW3, PW4 and PW5. The contradiction and inconsistency between the evidence of PW5 and the other witness was a minor one and did not go to the root of the matter. See **Mohamed Said Matula v. Republic** [1995] TLR 3.

In relation to the first issue, it is not disputed that the first issue can be answered in the affirmative. From the glaring evidence of PW1 and other prosecution witnesses, it is evident that PW1 was raped.

Now coming to the second issue as to whether or not it was the appellant who committed the rape, we are inclined to agree with the learned Senior State Attorney that according to the evidence on record it was the appellant, who was the culprit. The trial Court considered PW1 as a credible witness and opted to believe her account. The High Court and the trial court had a valid reason to do so given the testimonies of all the prosecution witnesses. In addition to the evidence of PW2 and PW3 who were in the company of PW1 when she was accosted and forcefully taken by the appellant. The two police officers PW4 and PW5 gave the same account as to what they saw when the door of the appellant's house was forced open.

On a second appeal this Court will not interfere on the concurrent findings of the High Court and the trial court unless it is shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of a principle of law or practice. See **Amratlal D.M. t/a**

Zanzibar, Silk Stores v. A.H. Jariwalla t/a Zanzibar Hotel [1980] TLR 31.

The law is settled that the best evidence of rape comes from the victim. In **Sulemani Makumba v. Republic** Criminal Appeal No. 94 of 1994 CAT (unreported) this Court stated thus:-

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

This means that in the instant case there is overwhelming evidence to establish that it was the appellant who committed the rape.

Subsection (7) of section 127 of the Evidence Act, [Cap. 6 R.E. 2002] the Evidence Act, allows a conviction to be founded on an uncorroborated evidence of the victim of rape if the court believes for the reasons to be recorded that the victim (witness) is telling the truth.

Section 127 (7) of the Evidence Act provides as follows:-

> *"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 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 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 sexual offence is telling nothing but the truth."***

[Emphasis provided].

Given the status of the evidence of PW1, and the other prosecution witnesses, we are satisfied that such evidence is sufficient to establish the guilt of the appellant and can therefore be relied upon. We therefore have no basis to interfere with the decision of the High Court.

For the reasons stated above, we find no merit in this appeal. We accordingly dismiss the appeal against both conviction and sentence.

Order accordingly.

DATED at **ARUSHA** this 13th day of October, 2016.

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL