IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 335 OF 2016

GEORGE MWANYINGILI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Levira, J.)

dated the 10th day of May, 2016
in
Criminal Appeal No. 62 of 2015

JUDGMENT OF THE COURT

5th & 12th December, 2018

MMILLA, J.A.:

George s/o of Mwanyingili (the appellant), is currently behind bars. He is serving a sentence of thirty years' imprisonment after he was convicted by the District Court of Rungwe at Tukuyu in Mbeya Region, before which he was charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002. He unsuccessfully appealed to the High Court of Tanzania at Mbeya, hence this second appeal to the Court.

The brief background facts of the case were that the complainant, R. E. (PW3) who was then 13 years old and the appellant were residents of Lubiga village within the District of Rungwe in Mbeya Region. The former was living with her father one Emmanuel Mwasanu (PW1).

On 19.3.2014 at about 13:00 hrs, PW3 left for the forest near the appellant's home to fetch fire woods. The appellant, a well-known person to her, spotted her and followed her where she was. He told her that he loved her, but she did not respond. At the time he was leaving for his home shortly afterwards, he directed her to follow him. Intimidated, she followed him.

On arrival at the appellant's compound, she was led inside the house in which there was a wooden bed. He laid her on that bed, removed her underwear and pulled up her skirt. He then unzipped and lowered his trouser and raped her. The latter raised alarm, but there was no response because the appellant's house was far away from other houses in that area. After he had accomplished his lustful and devilish act, the appellant released his victim. Amid cries, she left the appellant's house, picked the fire woods she had managed to fetch and hurriedly left the place.

A short distance from the appellant's house, PW3 met her friend one Prisca who asked her why she was crying. PW3 told Prisca that the appellant raped her. Prisca took her to her aunt's home whereat PW3 related the incident to the former's aunt before she left for home. On arrival home afterwards, PW3 told her father what befell her and mentioned the appellant as her assailant.

On his part, PW1 (victim girl's father) instantly reported the incident to the police. A PF3 was prepared and issued to PW3 with instructions to PW1 to send her to hospital for medical examination and treatment.

In compliance with the instructions of the police, PW1 sent his daughter to Makandana Hospital at Tukuyu whereat she was attended by a clinical officer one Ambele Mulangala (PW4). After medically examining her, PW4 filled and signed the PF3 and returned it to police. On the day he appeared to testify before the trial court, he tendered it as evidence and was marked exhibit P1.

The case was investigated by PW2 WP 3291 D/Cpl. Bupe. After being convinced that the evidence she had collected was sufficient to put the appellant on trial, she directed for the charge to be drawn after which the

appellant was eventually charged before the District Court of Rungwe as afore-pointed out.

The appellant's defence was very brief. Although he admitted that on 19.3.2014 PW3 passed at his home on her way to the forest near his home to fetch fire woods, he flatly denied to have raped that young girl. He contended that the said girl met Prisca to whom she related that she did not go to school because she had no shoes. Upon that recount, the appellant went on to explain, that girl broke down and began crying. Soon thereafter, he added, both girls left the place and headed to Prisca's home. The appellant complained that it was Prisca who spread the false news that he raped that girl. As afore said, after a full trial the trial court rejected his defence, it convicted him and sentenced him to thirty (30) years' imprisonment.

The appellant filed an 8 point memorandum of appeal. The grounds raised however, boil down to only six (6) of them as follows:-

1. That the prosecution did not prove the case against him beyond the required standard;

2. That the evidence of PW1 and PW2 was improperly relied upon because it was hearsay evidence;
3. That the evidence of PW2 was at variance with the charge on account that she said she was assigned the duty to investigate that case on 21.3.2011, whereas the charged offence was alleged to have been committed on 19.3.2014;
4. That the evidence of PW4 was not reliable because he did not clarify if the bruises were fresh, also that he did not explain why the sperms were not seen in the victim's female organ;
5. That the trial magistrate erred in in law in that in convicting him he did not cite section 235 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA); and
6. That his defence was not considered.

Before us, the appellant appeared in person and was not represented; whereas the respondent/Republic was represented by Mr. Ofmedy Mtenga, learned State Attorney. The appellant chose for the Republic to respond first but reserved his right for rejoinder if need would arise.

At the outset, Mr. Mtenga submitted that he was opposing the appeal. He tackled first the complaint which alleges that the prosecution did not prove the case against him beyond reasonable doubt. In this regard, Mr. Mtenga has asserted that the case against the appellant was proved beyond reasonable doubt. He contended that PW3 was the key witness whose evidence was held by both courts below to be credible and most reliable. He went on to submit that apart from the fact that the incidence occurred in broad daylight, the witness was clear that she had known the appellant before that day, and that he was their relative because they share the same clan. He similarly submitted that in fact, the evidence of PW3 was in part corroborated by that of the appellant himself when he said in his defence that PW3 went to the vicinity of his home on 19.3.2014 and saw her in the company of Prisca. Mr. Mtenga added that because her evidence was held to be credible and reliable, it was the best evidence in the case. He relied on the case of **Selemani Makumba v. Republic** [2006] T.L.R.379. He urged us to find that the prosecution side proved the case against the appellant beyond reasonable doubt.

As to the complaint by the appellant that the evidence of PW3 was unreliable because she did not describe the clothes he wore on that day,

Mr. Mtenga said that the complaint is baseless in the circumstances of this case because PW3 had very well known the appellant before.

The appellant complained similarly that the evidence of the doctor (PW4) was wrongly relied upon because he did not clarify if the bruises he saw at the victim's female organ were fresh or not, also that he did not explain the absence of sperms thereat. In this regard, Mr. Mtenga submitted that such clarification was not necessary because in essence those bruises established the crucial ingredient of rape that there was penetration. He urged us to dismiss this ground too.

On the complaint that the evidence of PW1 and PW2 was hearsay and ought not to have been relied upon, Mr. Mtenga was categorical that the evidence of those witnesses was important in as much as they told the trial court of the roles they played after they became aware of that incident; PW1 as a responsible father, and PW2 as a dutiful police officer.

The appellant had also complained about the variance between the charge and the evidence of PW2 on account that she said she was assigned to investigate that case on 21.3.2011, whereas the charged offence was alleged to have been committed on 19.3.2014. On this aspect,

Mr. Mtenga submitted that when the evidence of PW2 is read as a whole, it becomes clear that it was a topographical error. He added that at any rate that is a very minor contradiction which is required to be ignored. He pressed the Court to dismiss this ground as well.

On the complaint that the trial magistrate did not cite section 231 (1) of the CPA at the stage of convicting him, Mr. Mtenga urged us to ignore this ground on account that it was a new ground because it was not raised before the first appellate court. As such, he added, the Court has no jurisdiction to adjudicate it. He prayed for the same to be struck out.

Last but not least is the complaint that his defence was ignored. Mr. Mtenga referred us to pages 25 and 26 of the Record of Appeal at which, he insisted, the trial court discussed in detail the appellants defence but rejected it on account of the weight of the evidence mounted by prosecution. He asked us to dismiss this ground too. Overall, he urged the Court to dismiss the appeal in its entirety.

On the other hand, the appellant said he had nothing to say.

After carefully considering the grounds of appeal and the submission of the learned State Attorney, we have found it desirable to begin with the

fifth ground which allege that the trial magistrate erred because in the course of convicting him he did not cite section 235 (1) of the CPA. As already pointed out, Mr. Mtenga said, and we agree with him that because it was not raised before the first appellate court, this Court has no jurisdiction to adjudicate it.

There are a range of authorities which are to the effect that where a ground of appeal may have been raised for the first time before the Court, then it has no jurisdiction to adjudicate such a ground - See the cases of **Abdul Athuman v. Republic** [2004] T.L.R. 151, **Samwel Sawe v. Republic,** Criminal Appeal No, 135 of 2004, CAT and **Juma Manjano v. Republic**, Criminal Appeal No. 211 of 2009, CAT (both unreported), among others. The position was best put in **Samwel Sawe's** case in which it was stated that:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in*

the High Court. In the case of ***Abdul Athuman vs R*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

For that reason we have assigned, we are constrained to, and we hereby strike out the fifth grounds of appeal.

Next is the ground on whether or not the case against the appellant was proved beyond reasonable doubts. Unfortunately, when the appellant appeared before us he opted to say nothing. However, going by the hints in the first and second grounds of appeal, it appears that the basis of his complaint is twofold; one that the victim girl did not describe the clothes he wore on that day; and two that her evidence was not corroborated.

We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on

a balance of probability and shifts back to the prosecution – See the cases of **Joseph John Makune v. Republic** [1986] T.L.R. 44, **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 and **Boniface Siwinga v. Republic,** Criminal Appeal No. 421 of 2007, CAT (unreported). **In Joseph John Makune's** case the Court held at page 49 that:-

> *"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities . . . ."*

In the present case, Mr. Mtenga is steadfast that the prosecution proved the case against the appellant beyond reasonable doubt. We hasten to say that we agree with him for reasons we are about to assign.

The victim girl (PW3) was the key witness in this case. Her evidence which was found to be credible and reliable by the trial and first appellate courts was that the appellant lured her to his home and raped her thereat

in broad daylight at about 13:00 hrs. She also said she had known him very well before that day, and that in fact he was their relative because they are of the same clan. In our firm stand, given these facts, it was not necessary for PW3 to describe how the appellant was dressed. As is the case, such description is normally intended to vouch mistaken identity, which would be superfluous in the circumstances of this case.

We also agree with Mr. Mtenga that to an extent, PW3's evidence was corroborated by that of the appellant himself when he said in his defence that she went to the vicinity of his home on 19.3.2014 and saw her in the company of Prisca, adding that she was crying. That cements PW3's testimony that she encountered the appellant on that date, therefore that her evidence that he was the one who sexually assaulted her sticks. Now, having accepted that the evidence of PW3 was credible and reliable, it creates no doubt that the appellant's conviction was properly anchored on her evidence as envisaged by section 127 (7) of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the EAT). We reiterate what we said in the case of **Selemani Makumba** (supra) at page 384 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].

The appellant in the present case queried as well why PW4 did not explain whether or not the bruises he saw in PW3's female organ were fresh. He also demanded to know why that clinical officer did not see sperms therein.

Once again, we agree with Mr. Mtenga that what is important is the fact that there were bruised in the victim girl's female organ, an aspect which was indicative of the fact that there was penetration which is a crucial ingredient of the offence of rape. We similarly agree with Mr. Mtenga that for the same reasons that penetration was vindicated, the absence of sperms in PW3's female organ is not something material in the case. For reasons we have given, this ground of appeal lacks merit and is dismissed.

We now come to consider the complaint that the evidence of PW1 and PW2 was improperly relied upon because it was hearsay evidence. We hurry to point out that this complaint should not unnecessarily detain us because as correctly submitted by Mr. Mtenga, the evidence of those two

witnesses was important in as much as they told the trial court of the roles they played after they became aware of that incident; PW1 as a responsible father, and PW2 as a dutiful police officer. In fact, both courts below understood and applied the evidence of those two witnesses in that context. Thus, this ground is devoid of merit and is likewise dismissed.

The appellant complained as well that the evidence of PW2 was at variance with the charge on account that she said she was assigned to the duty to investigate that case on 21.3.2011, whereas the charged offence was alleged to have been committed on 19.3.2014. Mr. Mtenga admitted that the record reflects as such, but was quick to add that when the evidence of PW2 is read as a whole, it becomes apparent that it was a topographical error. He added that at any rate that is a very minor contradiction which is required to be ignored. We sincerely agree with him.

The queried part of the evidence of PW2 features at page 7 of the Record of Appeal. We think it is convenient to reproduce that part of the evidence and it runs as follows:-

> *"On **21.03.2011** I was in my office. I was assigned with a Police Case File by OC – CID to*

proceed with investigation. On the same day I interrogated her and she told me that on 19.03.2014 she went to the forest to collect firewood and as she was there she saw the accused who took her to his house and raped her. She further said that she wailed for help but she did not get assistance as the accused's hut (house) was in forest far from (other) people's residence."

A close reading of this part of PW2's evidence, its sequence clearly shows that she was talking about events which occurred in 2014. It is on this basis that we have accepted as plausible the explanation given by Mr. Mtenga that the mistaken date (21.03.2011) was indeed a topographical error. Once again, we find no merit in this ground and dismiss it.

Last but not least is the complaint that his defence was not considered. On his part, Mr. Mtenga is firm that it was considered but rejected on the strength of the prosecution case.

Sincerely, it cannot be over emphasized that in every criminal trial justice demands that the decision of a trial court must be reached after

analyzing and/or evaluating evidence of both the prosecution and defence sides as a whole - See the cases of **Hussein Idd and Anther v. Republic** [1986] T.L.R. 166, **Rajabu Abdalla @ Mselemu v. Republic,** Criminal Appeal No. 134 of 2014, CAT and **Abel Masikiti v, Republic**, Criminal Appeal No. 24 of 2015, CAT (both unreported). In **Rajabu Abdalla @ Mselemu's** case, we observed that:-

> *"Secondly, as has been correctly submitted by Ms Ngiluka, both lower courts did not take into consideration the appellant's defence case. As this Court has stated in different cases time and again, such omission constitutes a fatal error. To reiterate what has always been insisted in this regard, both courts below ought to have observed the well-established principle of law that in writing a judgment, a court has to consider not only the evidence in support of one party in a case and completely ignore the evidence for the other party, however worthless it may appear."*

We have carefully gone through the judgments of both courts below. We agree with Mr. Mtenga that the appellant's defence was clearly considered but rejected by the trial court for reasons which were assigned. This is reflected at pages 25 and 26 of the Record of Appeal. That part of the judgment reads as follows:-

> *"The accused denies of having committed the act and blames a girl named Prisca (PW3's Friend) of spreading the memor. A pat form that, however the accused had admitted that the victim (PW3) went around his house to collect firewood and that she left crying but he did not know what she was crying for.*
>
> *The fact that eh incident happened during broad day light at around 13:00 hours and as she stated that she knows the accused person by his name which she also stated in court and the fact that, even the caused confirmed her story that she did go around his house to collect firewood, diminishes the possibility of a mistaken identification.*

Apart from the PW3's testimony that accused was one who raped her, as I have said above that the accused admitted that the victim (PW3) did go around his house to collect firewood and she left crying. If the question as why was PW3 crying will be put before any reasonable man, the answer in my opinion would pretty easy and clear, something happened to her at that place, of which according to her, she was raped by the accused something which was proved as we have seen above by Exhibit P1 and the Medical Examiner (PW4's) testimony.

That being the case and taking into consideration the fact that even the accused himself admits that he only person around that area was him; I am satisfied beyond any reasonable doubt that he is the one who raped PW3. From the above narrated explanations, I hereby find the accused guilty as charge and convicts (sic: convict) him accordingly."

It is evident from this part of the judgment of the trial court that the appellant's defence was considered by rejected on the ground that the evidence of the prosecution side was water tight. The first appellate court was indeed justified in dismissing the sixth ground in the appeal before it. Thus, this ground too lacks merit and is accordingly dismissed.

For reasons we have herein given, we are satisfied that this appeal is devoid of merit. It is hereby dismissed in its entirety.

DATED at **MBEYA** this 11th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL