IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 428 OF 2016

MARTIN MISARA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Sumbawanga)

(Sambo, J.)

Dated the 21st day of April, 2016
in
DC Criminal No. 51 of 2015

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JUDGMENT OF THE COURT

12th & 14th December, 2018

MWAMBEGELE, J.A.:

The appellant Martin Misara was arraigned before the District Court of Nkasi sitting at Namanyere for the offence of rape contrary to sections 130 (1) and (2) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (hereinafter referred to as the Penal Code). He pleaded not guilty to the charge after which a full trial ensued. After the full trial, the appellant was found guilty, convicted as charged and sentenced to a prison term of thirty (30) years. His first appeal to the High Court proved futile as Sambo, J. dismissed it entirely on 21.04.2016. Undaunted, he is knocking at the doors of this Court still

protesting his innocence on eight grounds of appeal which are presented in a discursive manner but may be condensed to only two; to wit:

1. That the appellant was not properly identified as the conditions obtaining at the scene of crime did not favour watertight identification; and

2. That the appellant's defence was not considered.

At this juncture, we find it apt to narrate, albeit briefly, the background material facts leading to the present appeal as far as they can be gleaned from the record before us. They go thus: the appellant and the victim (PW1) who we shall refer to her as "LM" to conceal her identity, lived in the same village; Katangolo Village in Nkasi District of Rukwa Region. On 19.10.2013, PW1 was at a residence of a certain Oscar Zumba who hosted video shows. While still there, Mariana Wakabula (also known as Maria d/o Makungu – PW2) who is her aunt, called her outside and gave PW1 her baby to take care of. The said Mariana went to dance music at a disco show in the vicinity. When the video show was over at about midnight, PW1 took Mariana's baby to the disco show and handed the baby to her. On her way back home, she met the appellant who was angry and shouted at her why she was taking care of his baby so that his wife Mariana could go places to sleep

with other men. The appellant subjected her to a thorough beating after which he tied her hands and legs with a rope and later dragged her to a place where there were no people; forcibly undressed her, tied her by a tree and raped her. He left her in that state; that is, while naked and still tied to the tree. PW1 was rescued in the morning by a herdsman grazing cattle who untied her. She went home and narrated what befell her and, later that very day, the appellant was arrested and taken to Kipili Police Station. PW1 was examined by Mbaga Kihita (PW3) and the PF3 (Exh. P1) shows that the hymen was not intact and she had bruises by her neck and vagina. There were stains of blood around her vagina as well.

In defence, the appellant dissociated himself with the allegations levelled against him. He brought to the fore a different episode altogether. He stated that he owed the victim's uncle; a certain John Nkwende, Tshs. 350,000/= and on 19.10.2013 while on his way to a pharmacy at 18:00 hours, he met the said John Nkende and demanded his money back. The said Nkwende, perhaps with a view to not paying the appellant the money he owed, allegedly, told him that he would teach him a lesson. He said that he did not rape PW1 and that PW2 did not say she saw him raping her. He also challenged the prosecution evidence that PW1 testified that she was rescued by a person grazing

cattle but that person was not called to testify, he charged. He ascribes the ordeal to the misunderstanding between him and the victim's uncle; the said John Nkwende who framed him up with a view to fulfil his promise to teach him a lesson.

When the appeal was called on for hearing on 12.12.20 18, the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Ofmedy Mtenga, learned State Attorney.

When called upon to argue his appeal, the appellant sought to adopt the grounds in the memorandum of appeal without any addition but reserved his right of rejoinder after the response of the Republic.

Responding, Mr. Mtenga, at first, was inclined to support the appeal but halfway into his arguments, shifted the goalposts and supported the appellant's conviction and sentence. He argued that the appellant and the victim knew each other well before the incident and that they conversed and encountered for some considerable time during which the appellant beat the victim and later dragged her to some other place where he raped her. Basing on the premise that in cases of this nature the best evidence is that of the victim, the learned State Attorney argued that PW1 was a trustworthy witness. To bolster up this proposition, he referred us to the case of **Selemani Makumba v.**

Republic [2006]] TLR 379, at p. 384 wherein the Court held that the best evidence in rape cases is that of the victim. He was thus of the view that the appeal was without merit and prayed that it be dismissed entirely.

Rejoining, the appellant submitted that the victim did not testify on how she identified him while the offence was allegedly committed deep in the night and the source of light and its intensity were not testified upon. He added that there was no identification parade carried during which he could be identified as the ravisher. Prompted, he stated that he did not cross-examine PW1 on the debt episode and that he did not cross-examine on the fact that the baby referred to was his. He ultimately prayed for sympathy claiming that he did not commit the offence he was convicted of.

We have considered the rival arguments by the appellant on the one hand and the learned State Attorney on the other. We now embark on the determination of the grounds of contention as appearing in the two grounds of appeal condensed above.

The first ground is anchored on the identity of the appellant. It is no gainsaying that the only eye witness to the incident is the victim herself. As rightly submitted by the learned State Attorney, on the

authority of **Selemani Makumba** (supra) and a string of authorities on the point, the best witness in cases of this nature is the victim herself. The evidence of the victim in the case at hand is as narrated hereinabove but for clarity, we wish to repeat here. PW1; the victim, stated that PW2 handed her the baby who happens to be the appellant's child and went to dance in the neighbourhood where disco was played. After the video show was over, she took the child to the mother in the disco place and handed the kid to its mother. On her way back, she met the appellant who verbally attacked her for taking care of his child and thereby allowing the child's mother; his wife to go to other men. Later he beat her and tied her hands and legs with a rope and dragged her to some other place where he tied her by the tree and ravished her. We have subjected this evidence to proper scrutiny. Having so done, we think, the victim speaks but the truth. She was dealing with a person well known to him. The complaint by the appellant to the effect that the victim did not identify him, we think, has no substance at all. We say so because the appellant and the victim knew each other very well and they conversed for quite some time before the poor girl was tied her hands and legs, severely beaten, dragged to some other place where she was undressed, tied by the tree and ravished.

It is apparent on the record that the question of identity was, in the appellant's mind, his trump card and his cross-examination was solely on this point. Responding to this question, PW1 is recorded as saying:

> *"I managed to identify you since there was electricity light. Also the process of pulling and raping me took more time since it was very easy to identify you and you were very familiar to me since we are staying in the same village. That is all."*

The message coming out of the above excerpt, despite some linguistic inelegancy, is clear; that the altercation took some considerable time during which the victim was verbally and physically attacked and that he was familiar to him as they were staying in the same village.

We have juxtaposed the appellant's story with that of the victim's and, with respect, find the latter's plausible and, with equal respect, find the former's implausible. We say so because the victim's uncle's debt episode surfaced for the first time in defence. No cross-examination was done when PW1 testified. It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the acceptance of the truth of the witness evidence; and any

alarm to the contrary is taken as an afterthought if raised thereafter – see: **Damian Ruhele v. Republic**, Criminal, Appeal No. 501 of 2007, **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992, **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 and **Ismail Ally v. Republic**, Criminal Appeal No. 212 of 2016 (all unreported). In **Damian Ruhele** (supra), for instance, we observed:

> *"It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence."*

And in the same parity of reasoning, we observed in **Nyerere Nyegue** (supra):

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

Adverting to the case at hand, the appellant did not cross-examine on the episode he relied upon in defence. He did not cross-examine on the issue of being framed up because of the misunderstanding between him and the victim's uncle, the latter who, allegedly vowed to teach him

a lesson. Neither did he cross-examine on not being the father of the baby under discussion and PW2 not being his wife. On the authorities cited above, we think the appellant's episode is but an afterthought. We dismiss it.

Given the circumstances, we find and hold that the appellant and PW1 knew each other before the incident and that the person who beat the victim severely and tied her hands and legs with a rope, dragged to some private place where he took her clothes off and tied her by the tree and raped her was none other than the appellant. For the avoidance of doubt, we have also considered the appellant's complaint to the effect that no identification parade was carried out. We think the appellant has misconceived the purpose of identification parades. We only wish to tell the appellant that an identification parade would only be conducted if he was a stranger to the victim. It is not conducted when a culprit is familiar to the identifying witness – see: **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004and **Moris Jacob @ Ombee & Another v. Republic**, Criminal Appeal No. 220 of 2012 (both unreported).

Next for consideration is the appellant's complaint to the effect that his defence was not considered by the trial court. This ground will not detain us because it was not considered by the first appellate court

as he did not raise it there. He is raising it for the first time before us. It is the law in this jurisdiction, of course founded upon prudence, that the Court will not have jurisdiction to entertain and determine on a complaint not raised in the first appellate court – see: **Zakayo Shungwa Mwashilingi and Two Others v. Republic**, Criminal Appeal No. 78 of 2007, **Birahi Nyankongo and Another v. Republic**, Criminal Appeal No. 182 of 2010, **Mashimba Dotto @ Lukubanija v. Republic**, Criminal Appeal No. 317 of 2013 and **Laurent Kisingo v. Republic**, Criminal Appeal No. 123 of 2013 (all unreported), to mention but a few. In **Birahi Nyankongo**, for instance, like in the case at hand, there was a complaint regarding differing dates which was not raised at the trial. Taking it as an afterthought, we observed:

> *"... the complaint about differing dates of arrest was not raised during the hearing of the first appeal so it is an afterthought not worthy of consideration by this Court."*

In the case at hand, the appellant did not raise an alarm on first appeal over his defence not being considered by the trial court. Raising it at this stage is but an afterthought not worthy of consideration by the Court. We dismiss the complaint in the second ground of appeal as well.

For the avoidance of doubt, the appellant's prayer for sympathy has not found purchase with us. This Court is a court of law, not one of sympathy. Much as we may have sympathy over the appellant, if anything, the opposite would be true, his prayer for sympathy is not maintainable.

The foregoing said, we are of the considered view that the charge levelled against the appellant was proved to the hilt. We thus find no merit in this appeal and dismiss it entirely.

Order accordingly.

DATED at **MBEYA** this 13th 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