

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 354 OF 2016

BENEDICT BUYOBE @ BENE APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Shinyanga)

(Ruhangisa, J.)

Dated the 17th day of June, 2016

in

DC. Criminal Appeal No. 13 of 2015

.....

JUDGMENT OF THE COURT

3rd September & 19th November, 2018

MUSSA, J.A.:

In the District Court of Maswa, the appellant was arraigned and convicted for rape, contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, Chapter 16 of the Revised Edition 2000 of the Laws of Tanzania. Upon conviction, he was sentenced to a term of thirty years imprisonment. His first appeal to the High Court was dismissed in its entirety (Ruhangisa, J.), save for the sentence which was enhanced to life imprisonment.

The appellant is aggrieved and presently seeks to impugn the verdict of the High Court by way of a memorandum of appeal which is comprised of four points of grievance. Ahead of our consideration of whatever are the issues of contention in this appeal, we think it is necessary to explore the background of the case, albeit briefly.

During the trial, the case for the prosecution was upon a charge sheet which alleged that on the 23rd day of February 2014, at Malampaka Village, within Maswa District, the appellant raped a certain "DJ" (PW1) who was then nine years of age. Subsequent to a *voire dire* test, PW1 introduced herself as a standard one pupil of Mwenge Primary School at Malampaka Village. The infant previously knew the appellant in the name of Bene. She told the trial court that on the fateful day, the appellant stopped her around 2.00 pm or so, as she was walking towards home from school. The appellant then took the kid to his residence on the pretext that he had her grandmother's parcel which he (the appellant) intended to give her. Soon after, the appellant closed the entry door to his residence, undressed the little girl and raped her. Having finished the ungodly act, the appellant threatened PW1 that he will kill her if she disclosed the incident to anyone.

The victim recalled to have experienced untold pains as she walked towards home. Upon arrival, her aunt, namely, Sali Mange (PW3) immediately became suspicious much as PW1 was not walking normally and was discharging a bad smell from her vagina. PW3 then took PW1 to her (PW1's) grandmother, namely Devota Mange (PW2) who examined PW1's genital area and found her to have bruises around her vagina which was also discharging a bad smell. Unimpressed by what she saw, PW2 enquired of PW1; *"Who did this to you?"* By then, PW1 was profusely crying and gave no response. Thereafter, PW2 and PW3 reported the incident to Malampaka Police Station where they found Assistant Inspector Joansen Justine Mkera (PW5). According to PW2, at the police station this is what PW1 told of:-

"PW1 was interrogated by Police. She told me further that, she saw one Bene ground her (sic) Malampaka Primary School. That my granddaughter say (sic) that, one Bene called her to his house in order to give a parcel to her home. Then she was raped by the accused person."

Corresponding remarks were told by PW3 in her testimony:-

"PW1 did interrogated (sic) by police. She replied to the police that, she was raped by one Bene who stays

near Malampaka Primary School. She also admitted (sic) to show the police up to the scene. PW1 and police (sic) went to visit the scene."

In his testimony, the Inspector (PW5) also replicated the detail about PW1 being raped by a certain Bene. He accordingly, issued a PF.3 to the victim and, from his testimony, it comes to light that the appellant was arrested on that same day and taken to Malampaka Police Station. In the meantime, PW1 was examined by a medical officer, namely, Ally Subi Kilambulilo (PW4) who noticed that her genital parts were swollen just as there were some bruises thereabouts.

Upon his arrest, on the 24th February 2014, PW5 placed the appellant amongst four suspects at Malampaka Police Station lock-up. Then PW1 was called and, at the inspector's prompting, she positively identified the appellant as her ravisher from amongst the four suspects. With this detail, so much for the version as told by the prosecution witnesses during the trial.

In his reply, the appellant told the trial court that he travelled to Tabora on the 20th February, 2014 and arrived back home on the 22nd February, 2014. On the 23rd February, 2014 he was busy distributing

pork meat to his customers only to be arrested by "sungusungu" leader and implicated of the rape accusation which he categorically denied. The appellant said the alleged victim was not previously known to him as he saw her, for the first time, at the police station when she was brought to identify him. He brought a witness, namely, Omary Mzee (DW2) to fortify his account that he travelled to Tabora on the 20th February, 2014. That concludes the appellant's version of the episode during the trial.

As we have already intimated, on the whole of the evidence, the two courts below were satisfied that case for the prosecution was established to the hilt, hence their respective verdicts. In his memorandum of appeal, the appellant challenges the decisions of the two courts below on the following grounds, namely:-

- "1. THAT, the trial and first appellate court had grossly erred in law and fact by disregarded the identification of the appellant through unfairly conducted identification parade which was/is a crucial issue in determining/resolving the case under the instant appeal.*
- 2. THAT, the trial and first appellate court had wrongly relied on incredible witness – i.e PW7, victim, whose evidence was rather dragged and or*

succumbing to pressure by the PW's so unworthy belief.

3. THAT, the PW1, victim's failure to mention her rapist at the earliest possible opportunities – i.e. PW2 and PW3, renders the prosecution case to be shaky.

4. THAT, the first appellate court erred when ignored (sic) the incurable intricacies between PW5 and PW1 and PW2, pertaining when the crime was committed as well as the time the suspect was mentioned as the rapist."

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Shaban Massanja, learned State Attorney. The appellant fully adopted the memorandum of appeal but opted to let the learned State Attorney to first submit on the merits of the appeal ahead of his elaboration, if need be.

The learned State Attorney commenced his address by expressing his disinclination to support the appellant's conviction. His sole reason for taking that stance was, according to him, that the evidence was at variance with the charge sheet with respect to the date when the offence was committed. Whereas, he said, it is alleged, in the charge

sheet, that the offence was committed on the 23rd February, 2014, the evidence is to the effect that the offence was committed on the 21st February, 2014. It is noteworthy that the alleged discrepancy is also somehow reflected in ground No. 4 of the appellant's memorandum of appeal.

The learned State Attorney took the position that the discrepancy vitiated the conviction and, accordingly, he invited us to adopt the position taken by the Court in the unreported Criminal Appeal No. 274 of 2009 – **Massawe Mathias Vs The Republic** where it was observed:-

"The record of appeal does not reflect that there was any amendment to the charge sheet in compliance with section 234 (1) of the Criminal Procedure Act. We are therefore of a considered opinion that the charge in the 2nd count remains defective. In the event, we are constrained to allow the appeal on the 2nd count having found that the same is defective."

The stance taken by Mr. Massanja was, understandably, fully supported by the appellant in his rejoinder. We, nevertheless, invited either side to additionally express their respective positions on the merits of the appeal, that is, aside from the alleged variance between the charge sheet and the evidence adduced. Whereas Mr. Massanja expressed the view that the evidence overwhelmingly implicates the

appellant, the latter, in contrast, invited us to allow the appeal on the strength of the grievances raised in the memorandum of appeal.

Addressing the issue pertaining to the alleged variance, we do not think, in the first place, that this case involves a variance between the charge sheet and the adduced evidence with respect to the date when the offence was committed. Generally speaking, the entire evidence was to the effect that the rape was committed on the 23rd February, 2014 as alleged in the charge sheet. The one and only witness who mentioned the 21st day of February, 2014 was PW2 who, incidentally, did so in the following words:-

*"That my granddaughter was raped on 21.02.2014. it was Friday. **We have noticed that my granddaughter was raped on 23.02.2014.**"*

[Emphasis supplied.]

To say the least, having initially assigned an incorrect date, the witness went further and immediately corrected the date of the incident to the 23rd February, 2014. In the circumstances, it cannot be stated that the evidence of PW2 is at variance with the date stated in the charge sheet and, all said, we, respectfully, disagree with the learned State Attorney who invited us to allow the appeal on account of the

alleged discrepancy. In similar vein, we also reject the corresponding complaint as raised by the appellant in the fourth ground of appeal.

We now turn to consider the appellant's remaining grounds of appeal. If we may express at once, the appellant has a valid complaint in his first ground of appeal. The procedure adopted by PW5 to facilitate the appellant's identification by PW1 at the police station was a travesty and not worth the name of a properly conducted identification parade. Furthermore, the exercise was, after all, uncalled for inasmuch as, from the very outset, PW1 indicated that the appellant was previously known to her. That piece of the prosecution evidence, we note, was discounted by the first appellate court, in our view, rightly so.

Coming to the second and third grounds of appeal, we note that, in both grounds, the appellant seeks to challenge the credibility of PW1. In this regard, it is often said that the credibility of any given witness is the monopoly of the trial court whose presiding officer had the advantage of seeing and observing the demeanor of the witness in the course of testimony. Thus, for one, a trial court's finding on the credibility of a witness is binding on the first appellate court unless there are circumstances which call for a re-assessment of the witness's testimony. For another, on a second appeal, the Court will not reverse

the concurrent findings of fact of the two courts below it, unless both courts completely misapprehended the substance, nature and quality of the evidence before it (See **DPP Vs Jaffari Mfaume Kawawa** [1981] T.L.R. 149).

In the matter under our consideration, the concurrent findings of the two courts below were to the effect that PW1 was a credible witness and that her telling was nothing but the truth. True, she hesitated a bit in disclosing the appellant to PW2 but, in the course of her testimony, PW1 explained away her hesitancy in the following words:-

*"My grandmother has poused (sic) me a question that, I quote. **"Umefanyaje."** I remain (sic) silent because Bene accused (sic) told me, I quote, **"nitakuua wewe iwapo utamwambia mtu."***

Given her age as well as the trauma of the moment, one can hardly doubt the plausibility of PW1's account.

To this end, we have found no cause to fault the concurrent findings of the two courts below on the credibility of PW1 and, we just as well find the second and third grounds of appeal to be unworthy of merit. On the whole, the appellant's defence was justifiably rejected

much as his travel detail did not, at all, relate to the fateful day. That is to say, the appeal is wholly bereft of merit and we, accordingly, dismiss it.

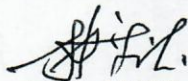
DATED at DAR ES SALAAM this 18th day of September, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



H.S. MUSHI
DEPUTY REGISTRAR
COURT OF APPEAL

