IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MKUYE, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 346 OF 2016

BONFANCE ALISTEDES .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De-Mello, J.)

dated the 15th day of June, 2016
in
Criminal Appeal No. 5 of 2016

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JUDGMENT OF THE COURT

13th & 18th July, 2018

MKUYE, J.A.:

This appeal arises from the decision of the High Court (De-Mello, J.) upholding the decision of the Resident Magistrates' Court of Mwanza at Mwanza in Criminal Case No. 19 of 2014 in which the appellant was convicted of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16, R.E. 2002 and was sentenced to 30 years imprisonment. Still aggrieved, he has brought this second appeal to this Court.

The appellant has filed a memorandum of appeal consisting of eight (8) grounds of appeal which can be conveniently deduced as follows:-

1) *The charged offence was not proved beyond reasonable doubt as penetration was not established and that pregnancy was not a substitute proof of penetration.*
2) *Neither DNA test report nor a certificate from the Chief Government Chemistry were produced to prove that the appellant was the biological father of the baby boy.*
3) *Exhibit P1 (PF3) did not link the appellant with the crime instead it linked one, Boniface James with the victim's pregnancy.*
4) *The age of the victim (PW1) was not proved as no birth certificate was produced in court.*
5) *There was no evidence to prove that PW1 was a student at Kiseke Secondary School as no admission book or PW1's registration number was produced in court.*
6) *The Introduction letter (Exh P2) was immaterial.*
7) *It is implausible for PW1 to be pregnant for twelve months.*

8) The appellant's defence raised a reasonable doubt against the poor and weak prosecution's case.

Before embarking on the merits of the appeal we find it appropriate to state albeit briefly the facts which led to the conviction of the appellant. They run as follows:-

The appellant and Amina Abdallah (PW1) who was aged 16 years old were lovers who knew each other since 2012. The two used to have sexual intercourse on several occasions which resulted in PW1's pregnancy. PW1 testified that the appellant used to penetrate his penis in her vagina. Sometimes in October, 2013, PW1's mother, one Zeinabu Omary (PW3), discovered that PW1 was pregnant and on questioning her she mentioned Boniface Alistedes (appellant) to be responsible for her pregnancy. The matter was reported to the Police whereupon PW1 was issued with the PF3 to enable medical examination to be conducted. After PW1 was examined, it was revealed that she was pregnant at 32 weeks as per the PF3 (Exh P1). PW1 gave birth to a baby boy on 15th December, 2013.

Meanwhile the appellant was arrested and charged accordingly.

In his defence, the appellant denied impregnating PW1. He, instead, raised an issue of there being a misunderstanding between his family and PW1's family. DW2 Beatus Alistedes and DW3 Angel John who testified for the defence also testified to the same effect.

As it was hinted earlier on, after a full trial the trial court believed in the prosecution's evidence and hence the appellant was convicted and sentenced accordingly.

At the hearing of the appeal, the appellant fended for himself. He did not have anything useful to elaborate on his grounds of appeal. He rather opted to let the learned Senior State Attorney submit first and reserved his right to respond later if need would arise.

On the other hand, Ms Levina Tibilengwa, learned Senior State Attorney who was assisted by Ms Subira Mwandambo prefaced her submission by stating her stance that she supports both the conviction and sentence. She in the first place drew to the attention of the Court that grounds No 3,5,6 and 7 advanced by the appellant were new as they were not canvassed by the first appellate court. For that reason, she said, the Court did not have jurisdiction to determine them.

Besides that the learned Senior State Attorney argued all grounds of appeal seriatim.

Submitting in relation to ground No. 1 that penetration was not proved beyond reasonable doubt, Ms Tibilengwa contended that the evidence of PW1 that the appellant and herself were lovers who had sexual intercourse for more than three times and her elaboration that the appellant inserted his penis in her vagina proved penetration. While relying on section 127 (7) of the Evidence Act, Cap 16 R.E. 2002 (the Evidence Act) and the case of **Seleman Makumba vs Republic**, (2006) TLR 379, she argued that the evidence of the victim was the best evidence to prove the offence. She added that as it was proved that the victim was aged 17 years old at the commission of the offence, the question of consent was immaterial. She wondered as to why the appellant failed to cross examine witnesses on that issue.

As regards to ground No. 2 relating to lack of DNA or Government Chemist Report to prove the paternity of the baby's father, the learned Senior State Attorney argued that the question of

biological father of the baby was not at issue before the trial court, but rather the issue was whether PW1 was raped.

As to ground No. 3 that the PF3 did not connect the appellant with the crime for having mentioned one Boniface James, Ms Tibilengwa agreed to that anomaly but she was quick to assert that it did not prove who raped PW1.

In relation to ground No. 4 that PW1's age was not proved, the learned State Attorney argued that PW1 and her mother PW3 clearly proved that she was born on 16/6/1996 as shown at pages 7 and 12 of the record of appeal. She relied on the case of **Edison Simon Mwombeki V Republic,** Criminal Appeal No 94 of 2016 in which it was stated that the evidence of parents in relation to the age of the victim was the best. She also wondered as to why the appellant did not cross examine the witnesses on the aspect.

As to grounds No. 5 and 7 regarding the proof that PW1 was a Kiseke Secondary School's student which to him was a Boys School, Ms Tibilengwa contended that PW2 testified to that effect and the letter he wrote titled "To whom it may concern" (Exh. P2) also

acknowledged her being a former student of that School. She, however, argued that since the appellant was not charged with impregnating a School girl/student but was charged with rape, the issue of the victim being a student was irrelevant to this case.

With regard to ground No. 7 as to how PW1 could have been pregnant for a period of 12 months, Ms Tibilengwa said that as PW1 gave birth at 39 weeks meaning at about 9 months and 3 weeks, she being not an expert in the area could not offer further explanation.

As to the last ground No. 8 she contended that, the evidence of appellant with his two witnesses failed to shake the prosecution's evidence which proved the case beyond reasonable doubt. For those reasons she urged the Court to dismiss the entire appeal.

In rejoinder, the appellant stressed that the case against him was a frame up due to the misunderstandings which existed between PW1's family and their family. He, therefore, prayed to the Court to allow the appeal and set him at liberty.

In the first place we wish to address the issue which was raised by Ms Tibilengwa that grounds of appeal Nos. 3, 5, 6 and 7 were new

as they were not dealt with by the first appellate court. She said, since they were not determined by the 1st appellate court, this Court lacks jurisdiction to entertain them. Our immediate reaction to that concern is that we agree with her. Our scanning of the entire record of appeal has vividly revealed that grounds of appeal No. 3, 5, 6 and 7 were neither raised by the appellant nor canvassed by the first appellate court. In the case of **Hassan Bundala @ Swaga Vs Republic**, Criminal Appeal No. 386 of 2015 (unreported) the Court rejected to deal with grounds of appeal which were not raised in the first appellate court. In that case the Court stated as follows:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court; not on matters which were not raised and decided by neither the trial court nor the High Court on appeal."*

See also **Nazir Mohamed @ Nidi V. The Republic**, Criminal Appeal No. 312 of 2014; and **George Maili Kemboge V. Republic**, Criminal Appeal No. 327 of 2013; and **Sadick Marwa Kisase V. Republic**, Criminal Appeal No. 83 of 2012 (all unreported).

Even in this case, since grounds of appeal No. 3, 5, 6 and 7 have been raised in this second appeal, without first having being raised in the first appellate court for determination, they cannot entitle this Court to entertain them. In other words, they cannot be legally for this Court to determine them as the Court lacks jurisdiction. Hence we expunge them.

We now turn to the remaining grounds of appeal. With regard to ground No. 1 on the complaint that penetration was not proved as pregnancy could not be a substitute to prove it, we agree with the learned Senior State Attorney that the evidence in that regard came from PW1. The appellant was convicted on the evidence of PW1 after the trial court and as was upheld by the first appellate court found her to be truthful and credible witness.

PW1 adduced a direct evidence that the appellant and herself were lovers since 2012 who used to have sexual intercourse for more than three times until in October 2013 when she was discovered and confirmed through medical examination (PF3) (Exh.P1) which showed her 32 weeks pregnancy. She mentioned the appellant to be

responsible for her pregnancy and gave birth on 15/12/2013. In her evidence she explained clearly that the appellant inserted his penis in her vagina. Unfortunately, even when the appellant was availed with the opportunity to cross-examine the witness he did not utilize that chance as he just cross examined her on the guest house they used to meet. He did not ask as to how the act of sexual intercourse was done. This may be taken to have accepted the evidence of PW1 in relation to penetration. In the case of **Damian Ruhele V. Republic**, Criminal Appeal No. 501 of 2007 (unreported) this Court stated as hereunder: -

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

We think, by not cross examining PW1 on the issue of penetration, the appellant accepted the truth of the witnesse's evidence.

We agree with Ms. Tibilengwa the evidence of PW1 was truthful and credible to be relied upon to ground conviction in terms of the

provisions of section 127(7) of the Evidence Act which provides as follows:

> *"(7). Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of a tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of 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 victim of the sexual offence is telling nothing but the truth."*

This position was emphasized in the case of **Selemani Makumba** (supra) on the aspect. In that case the Court upheld the conviction of

the appellant on the offence of rape solely on the evidence of the complainant (victim). The Court categorically held 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."*

In this case, since PW1 who was aged 17 years old when the offence was committed, had proved that there was penetration, we find no reason to interfere with the finding of the two courts below. It is our findings that PW1 established beyond reasonable doubt that the appellant had raped her as charged. This ground is therefore devoid of merit.

As regards to ground of appeal No. 2 that no DNA or Government Chemist Certificate was produced in court to prove the biological father of the new born, we agree with the learned State Attorney that the issue before the trial court and first appellate court was not the proof of the biological father of the baby boy born on 15/12/2013 so as to require such type of evidence. What was

required to be proved as per the charge sheet was the offence of rape committed to a child who was aged 17 years old at the time of the commission of the offence. For clarity we find it instructive to quote the relevant charge which was laid at the appellant's door. It reads as follows: -

STATEMENT OF OFFENCE

RAPE, contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16 (R.E. 2002).

PARTICULARS OF OFFENCE

Boniface s/o Alistedes on June, 2013 at KONA YA BWIRU area within ILEMELA District, in the City and Region of Mwanza, did unlawful have sexual intercourse with one AMINA D/O. ABDALLAH, a girl aged 17 years".

As the charge required proof of rape the evidence of DNA or a Certificate from the Government Chemist was not required. Hence, we find this ground of appeal devoid of merit.

Regarding ground No. 4 that the age of the victim was not proved we also agree with Ms. Tibilegwa that it was proved. We are aware that it is mandatory that before a conviction can be grounded in terms of section 130(2) (e) of the Penal Code, there must be a sufficient proof of the age of the victim who is under 18 years at the time of the commission of the alleged offence. (See **Solomon Mazala V. Republic**, Criminal Appeal No. 136 of 2012 (unreported).

In this case, as was correctly argued by Ms. Tibilengwa, the age of the victim was sufficiently proved. PW1 at page 7 of the record of appeal clearly testified to have been born on 16/6/1996. The offence was committed in between October 2012 to June 2013 which means that it was within the age below 18 years and in particular 17 years old. PW3 also testified that PW1 was born on the same date of 16/6/1996. It is worthy to note that the best evidence as to the age of the child comes from the parents. PW3 being the mother of PW1, her evidence cannot be easily faulted.

Unfortunately, again, the appellant did not cross examine the witnesses regarding the victim's age. In fact, we take it to have been

agreed with PW3's evidence after having said he had no question to her when he was given an opportunity to cross-examine her. The appellant said "**I have no question, as what she has told the Court it is true**". This, in our view, shows that he agreed even the testimony regarding PW1's age to be correct. On the basis of the case of **Damian Ruhele** (supra), we think, by not cross examining the witnesses, the appellant accepted the truth of the witnesses' evidence. Hence, the age of the victim was proved beyond reasonable doubt that she was below the age of 18 years at the time of the commission of the offence. For that reason, we hold that this ground is devoid of merit.

On the issue that the appellant's defence evidence raised doubt we do not agree with him. We do not agree because, the defence evidence that the appellant was implicated with the crime due to the misunderstandings which existed between PW1's family and their family was not proved. The appellant did not even cross examine the witnesses particularly PW1 and PW3 on the said misunderstandings. Since the appellant was faced with such a serious offence, it was expected that he could have raised such an important point at the time

when PW1 and PW3 testified in order to shake their credibility. Failure to do so at the appropriate time leads us to the conclusion that it was raised as an afterthought. This ground also fails.

Looking at the totality of the evidence we find that we do not have a reason to interfere with the findings of both two courts' below. In our view the evidence was sufficient to sustain the conviction against the appellant.

With the aforesaid we dismiss the appeal in its entirety.

DATED at **MWANZA** this 16th day of July, 2018

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL