IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO 260 OF 2016

IBRAHIMU IBRAHIMU DAWA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

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

(Mgonya, J.)

dated 13th day of June, 2016
in
Criminal Appeal No. 43 of 2015

JUDGMENT OF THE COURT

7th & 10th May, 2018

MMILLA, J.A.

The appellant, Ibrahimu Ibrahimu Dawa, seeks to challenge the decision of the High Court of Tanzania, Mtwara Registry, in Criminal Appeal No. 43 of 2015 for having upheld the decision of Nachingwea District Court in Lindi Region. Before the trial court, the appellant was charged with the offence of rape contrary to section 130 (1), (2) (a) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code). On conviction, he was sentenced to 30 years' imprisonment. On top of that, he was ordered to pay Tshs. 200,000/= to the complainant being compensation for the wrong she suffered.

The facts of the case were briefly that, on 31.3.2013 at about 22:00 hours, the appellant called at the matrimonial home of the complainant, one Tabia d/o Mandali (PW3), a 66 years old lady who around that time, was at home with her husband, Yusuf Ally (PW1). He lured PW3 into following him on the pretext that her longtime friend, one Desderia Manyalu wanted to meet her. She obliged and left with him. On the way however, the appellant turned hostile; he kicked her in consequence of which she fell down. He pulled her to a nearby mango tree, stripped her naked, lowered his trouser to the level of the knees, descended upon her, and began raping her. The shocked complainant raised alarm which was luckily answered by PW2, Fadhili Abdalla. On arrival at the scene of crime, PW2 flashed the torch he had in the direction of the mango tree and saw the appellant, a person he knew well, raping the complainant, likewise very well known to him. He quickly intervened, rescued her, and apprehended the appellant. He took the two of them to the complainant's home. On arrival there they found PW1 whom PW2 briefed of what befell the complainant. They resolved to report the incident to the Village Executive Officer of Mandawa village (he did not testify). Subsequently, the appellant and the complainant were sent to police station. The victim was issued with a PF3 with instructions to proceed to hospital for medical examination

and treatment. Meanwhile, the police commenced investigation and eventually charged the appellant with rape as it were.

The appellant's defence was very short. Without more, he was recorded by the trial court to have merely said that:-

> *"I know that they are charging me about rape, I did not object that I did not commit rape, that is all."*

In his judgment, the learned trial Resident Magistrate regarded that testimony as an admission that the appellant raped the complainant, hence the aforesaid conviction and sentence.

Before us, the appellant appeared in person and fended for himself. The memorandum he filed raised four grounds as follows; **one** that, the first appellate judge erred in law and in fact by upholding the appellant's conviction and sentence without considering that the prosecution did not prove the case against him beyond doubt; **two** that, the first appellate judge erred in law and in fact by upholding the appellant's conviction and sentence without considering that exhibit P1 (the PF3) was tendered by PW3 who was not the proper witness to tender it; **three** that, his conviction was erroneously made without considering his defence; and **four** that the trial court and the first appellate judge erred in law and in

fact when they failed to observe the surrounding circumstances of the case.

On the other hand, the respondent/Republic enjoyed the services of Mr. Wilbroad Ndunguru, learned State Attorney. He informed the Court at the outset that he was opposing the appeal.

At the commencement of hearing, the appellant invited the Court to adopt his grounds of appeal, after which he elected for the learned State Attorney to submit first. We readily asked Mr. Ndunguru to begin.

Mr. Ndunguru suggested to argue the first and fourth grounds together, but intimated to tackle the second and third grounds separately. We had no problem with that arrangement.

To begin with, Mr. Ndunguru submitted that the prosecution side proved its case against the appellant beyond reasonable doubt. He contended that the evidence of PW3 overwhelmingly showed that after being lured into following the appellant on a hoax call, at a certain point he stopped, wrestled her down and raped her. He added that the prosecutrix evidence on the point was corroborated by that of PW2, a witness who testified that in answer to an alarm which came from the direction of a mango tree, he caught the appellant *inflagrante delicto* raping PW3.

Although the prosecutrix said in short that she was raped without going into details, Mr. Ndunguru submitted that the word rape denotes forceful sexual intercourse, therefore that there was penetration – See the case of **Hassan Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012, CAT (unreported). On the basis of this evidence, he urged the Court to dismiss the first and fourth grounds of appeal.

On the second ground of appeal which allege that exhibit P1 (the PF3) was wrongly relied upon because it was tendered by PW3 who was not the proper witness to tender it, Mr. Ndunguru said that the complaint is misconceived because that exhibit was expunged from the record at the level of the High Court. He urged us to dismiss it.

Lastly is the third ground which asserts that the appellant's defence was not considered. Mr. Ndunguru submitted that this ground too lacks merit because his defence was considered. He referred the Court to page 19 of the Record of Appeal at which the trial court revisited the appellant's admission to commission of the charged offence, hence its conviction that the charge was proven against the appellant beyond reasonable doubt. He asked the court to dismiss this ground as well.

For those reasons, Mr. Ndunguru prayed the Court to dismiss this appeal in its entirety.

On his part, the appellant said he had nothing to add. He nevertheless urged the Court to favourably consider the grounds he raised and allow the appeal.

We have carefully gone through the proceedings of lower courts, their respective judgments, the grounds of appeal, and the submissions of both sides. We would like to begin with a remark that while Mr. Ndunguru felt that it was convenient to, and he tackled the first and fourth grounds together; we on our part, hold the view that the third ground too may conveniently be discussed together with these two grounds because of their resemblance. As already pointed out, while the first ground of appeal alleges that the prosecution did not prove the case against him beyond reasonable doubt; the appellant asserts in the third ground that his defence was not considered. On the other hand, he complains in the fourth ground that the two lower courts did not clearly observe the surrounding circumstances in the case.

To begin with, we crave to restate the principle of law that in any case of rape falling in the category of the present one in which the victim is

an adult, the prosecution is essentially required to prove two major aspects; **one** that there was penetration; and **two** that, there was no consent - See section 130 (2) (a) and (4) (a) of the Code, respectively, and the cases of **Hassan Bakari @ Mamajicho v. Republic** (supra), **Lucas Makinga Maduhu v. Republic**, Criminal Appeal No. 269 of 2009 and **Melkior Peter v. Republic,** Criminal Appeal No. 49 of 2010, CAT (both unreported), among others.

Essentially, the appellant's conviction in the present case hung on the evidence of two of the four prosecution witnesses; PW3 who is the victim of the charged incident, and PW2 who rescued the former. The evidence of PW3 revealed that the appellant raped her. The fact that she raised an alarm is sufficient indication that she did not consent. Equally important is the fact that her evidence was corroborated by that of PW2 who, after going closer to the mango tree where the alarm came from, he found the naked appellant red handed on top of the complainant who was also naked, busy raping the helpless old woman.

Of course, PW3 said the appellant raped her without making elaborations. We hasten to agree with Mr. Ndunguru that ostensibly, rape denotes forceful sexual intercourse, translating into penetration. That is

within the purview of what the Court expressed on the point in the case of **Hassan Bakari @ Mamajicho v. Republic** (supra). It was stated in that case that:-

> *"It is now and then read in court records that trial courts just make reference to such words as* ***sexual intercourse*** *or* ***male/female organs*** *or simply to have* ***sex,*** *and the like. Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina."*

In the circumstances, we find that penetration was proven.

Besides, as stated by both courts below, the appellant did not deny commission of the offence that faced him. As earlier on pointed out, without more, his testimony in defence was as hereunder:-

> *"I know that they are charging me about rape, I did not object that I did not commit rape, that is all"*

We find that in a big way, the appellant's admission in the course of trial corroborated in material particulars the prosecution's case that indeed, he raped the complainant. See the case of **Majid Hussein Mboryo and**

two Others v. Republic, Criminal Appeal No. 141 of 2015, CAT (unreported). In that case, the Court relied on the earlier case of **Mohamed Haruna Mtupeni and Another v. Republic**, Criminal Appeal No. 259 of 2007 CAT (unreported) in which it was stated that:-

> *"The very best of witnesses in any criminal trial is an accused person who freely confesses his guilt."*

We also noted that in the course of composing their respective judgments, both lower courts cast eyes on this very aspect of appellant's admission of commission of the charged offence during trial. This being the position, we find that the appellant's complaint that his defence was not considered is baseless.

On the basis of what we have covered above, we find and hold that the first, third and fourth grounds of appeal are devoid of merit and we dismiss them.

We now come to the second ground which asserts that the first appellate judge erred in law and in fact by upholding the appellant's conviction and sentence without considering that exhibit P1 (the PF3) was tendered by PW3 who was not the proper witness to tender it.

We think this ground should not unnecessarily detain us for the obvious reason advanced by Mr. Ndunguru that it was raised before the first appellate court which found in his favour that the said exhibit was improperly received and relied upon. Correctly so, that court expunged that evidence from the record, meaning that it never was amongst the evidence on which his conviction depended. In the circumstances, it was raised without sufficient cause. We accordingly dismiss it.

That said and done, we find and hold that the appeal lacks merit and we dismiss it in its entirety.

DATED at **MTWARA** this 9th day of May, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURTR OF APPEAL