IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MZIRAY, J.A. MWANGESI, J.A. And KWARIKO, J.A)

CRIMINAL APPEAL NO. 297 OF 2016

KIMANGI TLAA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Mwaimu, J.)

dated the 25th day of February, 2016
in
Criminal Appeal No. 51 of 2015

JUDGMENT OF THE COURT

28th September & 8th October, 2018

MZIRAY, J.A.:

The appellant was charged in the District Court of Kiteto at Kibaya, on two counts. On the first count he was charged with unnatural offence and on the second count he was charged with assault. He was acquitted on the second count. According to the charge sheet, the appellant was charged on the first count under section 154 (1)(a) of the Penal Code, Cap 16 R.E 2002. It was alleged that on 8th December, 2009 at about 18:45 hrs at Magungu Chapakazi Village within Kiteto District and Manyara Region,

the appellant did have carnal knowledge of one Selina d/o Deemu against the order of nature.

At the end of a full trial he was convicted and sentenced to 30 years imprisonment. Aggrieved, the appellant preferred an appeal in the High Court of Tanzania at Arusha. He lost the appeal. Thereafter, he filed a second appeal to challenge that decision (Criminal Appeal No. 22 of 2013). On hearing the appeal, the Court realized that the appellant was not convicted by the trial court as required under the provisions of section 235 of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA). As a result, the Court quashed and set aside the judgment of the trial court and all the proceedings in the High Court together with its judgment, and remitted the record to the trial court for it to enter a conviction and deliver judgment within the dictates of sections 235 and 312 (2)of the CPA. The trial court (H.M. Hudi, RM) complied with the order. The appellant was on 20/10/2014 convicted and sentenced to serve thirty (30) years in jail.

Once again, the appellant was aggrieved. He filed an appeal to the High Court (Criminal Appeal No. 52 of 2015) wherein the High Court (Mwaimu, J), found no cause to fault the verdict of the trial court. He dismissed the appeal. Still dissatisfied, the appellant presently seeks to

impugn the decision of the High Court upon a memorandum of appeal comprising of three (3) points of grievance:

1. *That, the first appellant court grossly misdirected itself and consequently erred in law in holding that the appellant was properly identified at the scene of crime on the basis of tenuous and unreliable evidence of PW1 and PW2.*
2. *That, the first appellate court erred in law and in fact when it failed to take into account the glaring contradictions that were apparent in testimonies of the witnesses.*
3. *That, the first appellate court erred in law and in fact in finding that the case for the prosecution against the appellant was proved beyond reasonable doubt.*

Briefly stated, the facts as found at the trial court were that, on 8th December, 2009 at about 18:45 hrs, the victim, Selina d/o Deemu was on her way to Magungu Village. All of a sudden, the appellant appeared from

behind carrying a knife in his hand. He told her in Iraqw language that he was desirous in having sexual intercourse with her. The victim disagreed with the proposition and tried to walk fast to avoid the appellant. On seeing that the victim was about to escape, the appellant got hold of her and started to assault her. He then dragged her to the ground where he undressed her and had sexual intercourse with her, first in the vagina and then against the order of nature. As luck would have it, PW2 appeared at the scene and saw PW1 on the ground quarrelling with the appellant who was standing nearby. The appellant took to his heels when PW2 arrived. PW1 narrated to him the ordeal. It happened that the appellant was well known to PW2 on account of the fact that the two belonged to the same tribe and that they resided in neighboring villages. Subsequently, the matter was reported to Matui police station where a PF3 was issued to the victim for medical examination. According to the evidence of PW3, Mary Fidelis, a clinical officer who examined the victim, she had bruises on the rectum something suggesting that she was sodomised. The appellant was subsquently arrested and charged in connection with the offence.

In his defence, the appellant denied to have committed the offence.

At the hearing of the appeal the appellant appeared in person, unrepresented, while the respondent Republic was represented by Ms Sabina Silayo, learned Senior State Attorney.

Amplifying the first ground of appeal the appellant emphatically criticised the evidence of identification adduced by PW1 and PW2 and contended that it was not sufficient to prove beyond reasonable doubt that he was correctly identified at the scene of the crime. He contended that the two witnesses did not state the specific distance between the place of incident and where they were standing to enable them to make a correct identification. Further to that, he said that the witnesses did not explain in detail his appearance and the attire that he was putting at the time of the incident.

On the second ground, the appellant claimed that there were material contradictions in the case for the prosecution as per the evidence of PW1 and PW2, in particular to the actual time of the incident. Whereas PW1 said that the incident took place at around 18.45hrs, on the other hand, PW2 testified that the incident took place at around 17.00hrs. He asked the Court to resolve this contradiction in his favour.

As regards the third ground of appeal, the appellant stated that for the reasons he explained in his first and second grounds, he was of the view that the case against him was not proved beyond reasonable doubt. On that basis, he urged us to find that there was no evidence to implicate him with the offence charged. He asked the Court to set him at liberty.

In rebuttal, Ms Silayo, learned Senior State Attorney, stated that the appellant was positively identified by PW2 who arrived at the scene when the crime was in action. She submitted that the appellant was properly identified by PW1 and PW2 who knew him since the year 2006 prior to the incident and that he mentioned his name to be Kimangi. The learned Senior State Attorney went on to submit that it was not difficult for PW1 and PW2 to identify the appellant because the incident took place in broad daylight. On the basis of the above submission, the learned Senior State Attorney was of the view that the case against the appellant was proved beyond all reasonable doubt.

With respect, we agree with Ms Silayo that the case against the appellant was proved beyond all reasonable doubt.

It is now settled that true evidence of rape has to come from the victim. See **Selemani Makumba v. Republic** [2006] T.L.R. 379. In the

instant case, PW1, the victim sufficiently explained how the appellant assaulted her and dragged her to the ground where he undressed her and had sexual intercourse with her naturally and against the order of nature.

PW2 on his part, just to corroborate, he explained that on his arrival, he saw the appellant quarrelling with PW1 who was still on the ground. He added that he knew the appellant even prior to the incident and mentioned his name to be Kimangi. Without prejudice, as we have gathered from the trial court record, it appears that the incident occurred in between 17.00hrs and 18.45hrs where under normal circumstances, there was enough light. As such therefore, and on the basis of the evidence on record we find that in the circumstances, there was no question of probable mistaken identity.

As to the issue of contradictions, learned Senior State Attorney was of the strong view that there were no material contradictions in the case for the prosecution. At any rate, she went on to say that, contradictions, if any, were minor and did not go to the root of the prosecution case.

On our part, we are in agreement with the learned Senior State Attorney's submission that the inconsistencies or contradictions pointed out by the appellant were not fundamental. This is because; the evidence of

PW1 and PW2 were similar in material particular, except for one aspect of time. While PW1 said the incident occurred at 18.45 hrs, PW2 on the other hand said it occurred at 17.00hrs. Even if that is taken to be a contradiction, we are of firm view that such a contradiction has not gone to the root of the matter. In the case of **Luziro s/o Sichone vs. Republic,** Criminal Appeal No. 231 of 2010 (unreported) this Court had this to say on the issue of inconsistencies:-

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness' evidence is fatal to the case. Minor discrepancies on details or due lapses of memory on account of passages of time should always be disregarded.* ***It is only fundamental discrepancies going to discredit the witness which count."***
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> *(Emphasis added).*

Based on the minor discrepancy on the aspect of time, which we think is not fundamental, we fail to discredit the evidence of PW1 and PW2, which appears to us to be cogent. For that reason, we find the ground of

appeal concerning a complaint that there were contradictions between prosecution witnesses to have lacked merit.

We could have ended up there, but upon careful perusal of the record, particularly the record of the trial court, we noted a glaring procedural flaw that we think we should comment on it. That, when this Court quashed and set aside the lower courts proceedings and remitted the record to the trial court for it to enter conviction and deliver judgment within the dictates of sections 235 and 312 (2) of the CPA, the magistrate (N.A. Baro, RM) who tried the matter ought to have taken the case file and comply with the Court's order by entering conviction and deliver judgment. To the contrary, H.M. Hudi, RM assumed jurisdiction by taking over the case file. He entered conviction and delivered the judgment without assigning reasons why his predecessor was unable to comply to the Order of this Court. With respect, that was unprocedural.

However, having considered the circumstances of the case and the fact that the new magistrate read the evidence before composing the judgment, we subscribe to the argument by the learned Senior State Attorney that the appellant was, in the circumstances not prejudiced.

That said and in the light of the above considerations, we are increasingly of the view that, this appeal was filed without serious and sufficient grounds of complaints. For that reason, we accordingly dismiss the appeal in its entirety.

DATED at ARUSHA the 4th day of October, 2018.

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL