IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MJASIRI, J.A., MUGASHA, J.A., LILA, J.A.)

CRIMINAL APPEAL NO. 270 OF 2016

JAFFARY NDABITA @ NKOLANIGWA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mrango, J.)

dated the 28th day of September, 2015
in
DC. Criminal Appeal No. 51 of 2015

JUDGMENT OF THE COURT

16th & 20th February, 2018

MJASIRI, J.A.:

In the District Court of Kasulu at Kasulu, Kigoma Region, the appellant Jaffary s/o Ndabita was charged and convicted with the offence of Rape contrary to sections 130(1), (2) (e) and 131 of the Penal Code [Cap. 16, R.E. 2002], the Penal Code. He was convicted as

charged and was sentenced to thirty (30) years imprisonment. He was also ordered to pay Tshs. 200,000/= as compensation to the victim.

It was the prosecution case that on October 8, 2013 at about 03:00 hours at Janda Village within Buhigwe District in Kigoma Region, the appellant had carnal knowledge of Tamasha d/o Moshi. The incident took place on the night when there was a wedding. When the victim stepped outside, the appellant grabbed her, undressed her and raped her. The victim screamed for help and was finally rescued by the people who heard her cry for help. One such person was Yoktani Kibabi (PW2). He claimed to have caught the appellant in the act as he found the appellant on top of the victim. PW2 claimed to have chased the appellant, caught him and sent him over to the Village Chairman. The trial court and the High Court relied on the evidence of PW1, PW2 to enter a conviction.

Being dissatisfied with the decision of the trial court the appellant appealed to the High Court. His appeal was rejected by the High Court, hence this second appeal. The appellant has presented an

eight-point memorandum of appeal. The grounds of appeal are hereby summarized as under: -

1. *The first appellate Judge wrongly upheld the conviction when penetration was not proved.*
2. *The first appellate Judge wrongly concluded that the appellant was recognized by PW1 and PW2.*
3. *The evidence of the key witness was not corroborated.*
4. *Identification of the appellant was weak.*
5. *The Judgment and sentence meted out by the two courts below were a nullity as the age of the victim was not proved.*
6. *The evidence of PW2 carries no weight.*
7. *The prosecution failed to prove its case beyond reasonable doubt and the defence of the appellant was not considered.*

At the hearing of the appeal, the appellant appeared in person, was unrepresented and had to fend for himself. The respondent Republic had the services of Ms. Juliana Moka, learned State Attorney.

The appellant being a laymen opted for the learned State Attorney to make her submission first. Ms. Moka did not support the

conviction for the following reasons. She condensed the appellant's grounds of appeal to five. In relation to grounds No. 2 and 3, she submitted that the appellant was not properly identified by PW1 and PW2. The incident occurred very late at night. The Village Chairman was never called to testify. The absence of the testimony of the Village Chairman leads to suspicion, since both PW1 and PW2 stated that the appellant was taken to the Village Chairman.

In relation to ground No. 4, she submitted that there was a mix up of dates as to when the incident took place. The charge sheet stated that the incident occurred on October 8, 2013. PW2 also stated that the incident occurred on October 8, 2013. However, the victim PW2 testified that the incident occurred on October 18, 2013. She stated that the variance between the evidence and the charge sheet is a serious anomaly.

As far as ground No. 5 was concerned, the learned State Attorney stated that the complaint had no basis, as there was no dispute that the victim was 13 years old, and it did not affect the nature of the sentence.

The learned State Attorney also brought to the attention of the Court that the appellant was convicted under wrong provision of the law. She made reference to page 21 of the record. The appellant was supposed to be convicted under the provisions of the law he was charged with namely Sections 130(1), (2) (e) and 131 of the Penal Code and not Section 235 of the Criminal Procedure Act [Cap. 20. R.E. 2002]. She stated that ordinarily the record could have been remitted to the District Court in order for the trial magistrate to enter a proper conviction, however in view of various anomalies, in the record, she would not seek the said remedy.

Relying on the case of **Anania Turian v. Republic**, Criminal Appeal no. 195 of 2009, she asked the Court to allow the appeal.

The main issues for consideration and determination in this appeal are as follows:

(1) Whether or not the victim was raped.

(2) Whether or not it was the appellant who committed the rape.

It is evident from the record that both PW1 and PW2 did not properly identify the appellant. The law is settled. The best evidence of rape is that of a victim. See – **Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999 (unreported). The Court stated that: -

"The evidence of rape has to come from the victim."

See **John Martin @ Marwa v. Republic**, Criminal Appeal No. 22 of 2008 (unreported).

According to section 127(7) of the Evidence Act Cap. 6 the Court can convict the appellant on the basis of the evidence of the victim.

It is provided that: -

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

In the instant case PW1 and PW2 have failed to establish that the appellant was properly identified. A careful analysis of the record, clearly demonstrates that both PW1 and PW2 failed to give a very elaborate description of the appellant and how the appellant was identified. See **Waziri Amani v. Republic** [1980] TLR 250 and **Raymond Francis v. Republic** [1994] TLR 103.

PW1 and PW2 also gave two contradictory dates, in respect of the occurrence of the rape incident.

Given the evidence on record we are of the firm view that the evidence on record was not sufficient to sustain a conviction.

This Court has stated time and again that it would not readily interfere with the concurrent findings of fact by courts below unless there are serious misdirections, non-directions, or misapprehensions or a miscarriage of justice. See **Salum Mhando v. Republic**, [1993] TLR 170, **Jaffari Mfaume Kawawa v. Republic**, [1981] TLR 149

and **Mussa Mwaikunda v. Republic**, Criminal Appeal No. 174 of 2006 (unreported).

We are of the firm view that the circumstances in the instant case calls for such interference. The variance between the charge sheet and the evidence, as far as the date in which the rape occurred is a serious anomaly. It is important for the Republic to lead evidence showing exactly the date the victim was raped. The rationale is that when a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the basis of that specified date. In **Anania Turian** (supra) the Court making reference to **Christopher Maingu v. Republic**, Criminal Appeal No. 222 of 2004 (unreported) stated thus:

> *"If there is a variation in the dates then the charge must be amended forthwith and the accused explained of his right to require the witnesses who have testified be recalled.* ***If this is not done, the preferred charge will remain unproved and the accused shall be***

entitled to an acquittal as a matter of right. *Short of that, a failure of justice will occur."*

[Emphasis provided].

See – also **Ryoba Mariba @ Mungare v. Republic**, Criminal Appeal No. 74 of 2003 (unreported).

On the failure by the prosecution to call the Village Chairman, we are fully aware that it is settled law that no specific number of witnesses is required to prove a case (Section 143 of the Evidence Act, Cap. 6). See – **Yohanis Msigwa v. Republic** [1990] TLR 148. However, an adverse inference can be drawn if the prosecution omits to call an important witness. See – the case of **Azizi Abdallah v. Republic** [1991] TLR 71 (CAT). It was stated that: -

"i. .....

ii. .....

iii. The general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses whom from their connection with the

transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

See – **Mokeshi Mlowe v. Republic**, Criminal Appeal No. 121 of 2013, and **Amiri Hassan Kudura v. Republic**, Criminal Appeal No. 271 of 2013 (both unreported).

Given the status of the evidence of PW1 and PW2, we are satisfied that such evidence is not sufficient to establish the guilt of the appellant. Had the courts below considered this they would have come to the inevitable finding that it was not safe to sustain the conviction.

On the failure to properly enter conviction by the trial court under the provisions of the law the appellant was charged with instead of section 235 of the CPA, we entirely agree with the learned State Attorney that given the various anomalies, we would not remit the record to the trial court.

For the foregoing reasons, we accordingly allow the appeal, quash the conviction and set aside the sentence of thirty (30) years imprisonment. The appellant is to be released from prison forthwith, unless, he is otherwise lawfully held.

DATED at **TABORA** this 17th day of February, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL