IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 423 OF 2018

KHAMIS ABDRAHAKIM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kairo, J.)

dated the 16th day of June, 2016
in
Criminal Appeal Case No. 57/2015

JUDGMENT OF THE COURT

13th & 14th May, 2019

MWARIJA, J.A.:

The appellant, Khamis Adrahakim was charged in the District Court of Muleba with the offence of rape contrary to section 130(1), (2) (e) and 131(3) of the Penal Code [Cap. 16 R.E.2002] (the Penal Code). It was alleged that on 28/11/2014 at Rushonga Island in Muleba district within Kagera region, the appellant raped one J.Z., a girl aged five (5) years. The appellant denied the charge.

After a full trial, the trial court found the appellant guilty and consequently sentenced him to thirty (30) years imprisonment. On appeal, the High Court (Kairo, J.) upheld the appellant's conviction. She also, enhanced the sentence of 30 years imprisonment imposed by the trial court to life imprisonment.

The facts giving rise to the appeal can be briefly stated as follows: The parents of the victim, the said J.Z. (PW1), were until the material date of the offence, living in Rushonga Island in Muleba district where PW1's father was engaged in fishing activity. Apart from PW1 and her younger sister, the couple were also staying with the appellant at their home.

On the fateful day, PW2 went to Mwaloni (the lake shore) to wash clothes. When she returned home, she found PW1 crying and when she (PW2) asked the appellant as to what had happened to the child, he replied that he did not know what caused her to cry. PW2 left and went for her business and when she returned, she found PW1 sleeping. When asked again as to what had befallen her, PW1 repeated the same answer that nothing had happened to her, the answer which dissatisfied PW2 thereby deciding to punish the child so that she could speak the truth.

According to the evidence of PW2, on the next day, PW1 continued to cry and upon being asked, she said that she was sick. She did not at first, disclose what she was suffering from because the appellant had warned her not to disclose what he had done to her. Later however, she disclosed that she was raped by the appellant.

It was PW2's evidence further that she inspected PW1's private parts and found that her vagina had bruises and was also discharging pus. She went on to state in her evidence that, when the appellant was asked about the allegation in the presence of PW2's husband and neighbours, he denied the allegation contending that on the material date, he was on safari.

On her part, in her unsworn evidence which was received after a *voire dire* examination, PW1 testified that on 28/11/2014 while at home with the appellant and her younger sister, the appellant required her to remove her underpants. She refused to do so and in turn, the appellant slapped her on the face with his hand. He thereupon got hold of her, widened her legs and raped her. She felt pains and started to cry but the appellant covered her mouth by using his hand. She suffered injuries to extent that she felt difficulty in walking. It was her further evidence that,

after having molested her, the appellant warned her not to tell anybody about what he had done to her. She later however, narrated the incident to her mother (PW2).

The incident was reported to the office of the Village Executive Officer and later to the police where the victim was issued with a P.f.3 so that she could be taken to hospital for medical examination. She was examined at Izigo Health Centre by Theonest Kashaija (PW3), a Clinical Officer. In his evidence, PW3 said that he conducted examination on PW1 on 2/12/2014 and found that she was raped about five days before the date on which he examined her. He tendered the victim's P.f.3 in which he had recorded his findings. The medical report was admitted in evidence as exhibit P.3. It shows that the victim had bruises on her *labia minora* and pus discharge was also noticed.

In his defence, the appellant disputed the evidence of the prosecution witnesses. He contended, without elaboration, that the evidence of PW2 is contradictory and for that reason, could not be used as a corroborative evidence. With regard to the evidence of PW3, the appellant contended that the same should have been found to be

unreliable because, although he examined PW1, he did not examine the appellant as well. It was his defence that the case was framed against him by PW2 because he refused to give her an amount of TZS 36,000.00 which she had demanded from him. In cross examination, he reiterated his defence of denial but contended that, even if he committed the offence of raping PW1, he was moved by the Satan to do so.

Having considered the prosecution and the defence evidence, the learned trial resident magistrate found that the evidence of PW1 as corroborated by that of PW2 and PW3, proved the case against the appellant beyond reasonable doubt. He was of the view that the appellant's evidence did not cast any doubt on the prosecution's case. He thus found the appellant guilty of the offence charged and consequently sentenced him to thirty (30) years imprisonment.

As stated above, the appellant's appeal to the High Court was unsuccessful. Furthermore, apart from upholding the appellant's conviction, the High Court considered the sentence which was awarded to him. The learned first appellate judge observed that, although from the record, the learned trial resident magistrate was alive to the mandatory

sentence provided by the law for a person who is convicted of raping a girl aged below ten (10) years; that is to say, a life imprisonment, the trial magistrate proceed to award the sentence of thirty years imprisonment. The learned judge thus enhanced that sentence to the mandatory term of life imprisonment.

The appellant was further aggrieved and has therefore, brought this second appeal which is predicated on two grounds as follows:

> *"1. THAT, the mandatory provisions of the CPA Cap. 20 R.E. 2002 was insufficiently complied/contravened as the appellant's comments were not recorded when addressed on (sic) the trial magistrates charge.*
>
> *2. THAT, the case against the appellant was not proved beyond reasonable doubt."*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Suzan Masule, learned State Attorney. From the manner in which the grounds of appeal were drafted, it was difficult to grasp the specific points raised by the appellant. We therefore required him to clarify the particular

points upon which the grounds of his appeal were based. He clarified that in the first ground of appeal his complaint is that the trial magistrate did not sufficiently comply with the provisions of section 214 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) for failing to record whether or not he was asked on the requirement of resummoning the witnesses. On the 2nd ground, which is a general contention, he clarified that he is challenging the evidence of PW1 and PW2; that the same did not prove the prosecution case beyond reasonable doubt. He challenged the evidence of PW1 on the ground of her age and the fact that, according to both witnesses (PW1 and PW2), the former was taken to the health centre on 2/12/2014 while according to their evidence, PW1 was raped on 28/11/2014. He contended further that the prosecution evidence was insufficient because the neighbours who included one Petro Edward were not called to testify on whether or not they were made aware that the incident took place on the material date.

After that clarification, the appellant opted to hear first the learned State Attorney's reply to the grounds of appeal and make a rejoinder thereafter, if the need to do so would arise.

In her reply, Ms. Masule stated at the outset, that the respondent was opposing the appeal. On the first ground of appeal, she argued that according to the record, the successor magistrate (B.B. Nkomola, RM.) sufficiently complied with the provision of s.214 of the CPA by stating the reason for taking over the proceedings from the predecessor magistrate (A.W. Kabuka, RM.). With regard to the appellant's complaint that he was not heard and his comments recorded on whether or not the witnesses should be recalled, the learned State Attorney argued that the successor magistrate was not under a duty to do so. She said that the magistrate exercised his discretion by deciding to continue with the proceedings at the stage where the predecessor magistrate ended.

On the 2nd ground, Ms. Masule submitted that the appellant's contention that the evidence of PW1 and PW2 should not have been relied upon as credible evidence is without merit. She argued that PW1 testified after a *voire dire* examination had been conducted on her, the result of which the trial court found her to be possessed of sufficient intelligence hence a competent witness. On the complaint that the incident could not have happened without drawing the attention of the neighbours, such as

Petro Edward who were listed as intended witnesses, Ms. Masule argued that, according to the evidence on record, the appellant covered PW1's mouth and could not therefore have raised an alarm to attract the attention of the neighbours.

The learned State Attorney argued further that, the evidence of PW1 was credible as, although she did not state categorically that the appellant inserted her penis into her vagina, but stated instead, that he widened her legs and did a wrong thing to her, the victim was in essence stating that the appellant raped her. Ms. Masule cited the case of **Hassan Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012 (unreported) to bolster her argument that the victim did not use direct words with regard to the act of rape because of her age thus being unable to mention such parts of her body like her female sex organ.

As for the evidence of PW2, Ms. Masule argued that the same was credible and in effect, it corroborated the testimony of PW1. She submitted that the witness testified on the condition in which she found PW1 and that, after inquiring from her, the victim later disclosed that she was raped by the appellant. Furthermore, when she inspected her private

parts, she found that the child had actually been badly ravished. The learned State Attorney argued that the two witnesses were rightly believed and their evidence was properly acted upon. He cited the case of **Goodluck Kyando v. Republic** [2006] TLR 363 in which the Court underscored the principle that every witness is entitled to credence and that therefore, his or her evidence must be believed unless there are good and cogent reasons to disbelieve such witness. On those arguments, the learned State Attorney urged us to dismiss the appeal for want of merit.

In his short response to the arguments made by the learned State Attorney, the appellant maintained that the evidence of PW1 and PW2 did not sufficiently prove the case against him beyond reasonable doubt. He insisted that existence of a gap between the date of the incident and the day on which PW1 was sent to the health centre for medical examination raises doubt in the witness' evidence. In another vein however, he submitted that in the event the Court finds that his appeal is devoid of merit, it should consider to reduce the sentence imposed on him by the High Court.

We have duly considered the arguments made by the learned State Attorney and the appellant. To start with the 1st ground of appeal, we agree with Ms. Masule that the same is devoid of merit. Section 214(1) of the CPA provides as follows:

> *"Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be,* ***and the magistrate so taking over may act on the evidence or proceedings recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial*** *or the committal proceedings."*
>
> [Emphasis added].

In the case at hand, there was no dispute that the successor magistrate assigned the reason for his taking over of the proceedings, that

it was because the predecessor magistrate who was a visiting magistrate to the trial court (Muleba District Court) ceased to hear cases in that Court, apparently because the successor magistrate had assumed jurisdiction. The appellant's complaint is on the second aspect of that provision. We agree with the learned State Attorney that complaint is without merit. We find that the same is misconceived. The provision vests the successor magistrate with discretion to resummon witnesses and recommence the trial. Where therefore, in the exercise of his discretion, the successor magistrate decides to continue with the trial from where his predecessor ended, the magistrate cannot be faulted. In the case of **Meshack Mdugo v. The Republic**, Criminal Appeal No. 147 of 2010 (unreported) for example, where a similar point was raised on appeal, the Court observed as follows:

> ***"First it should be noted that the requirement to resume witnesses, and/or recommence the trial, is discretionary (S.214 (1)). He would do so if he considers to be necessary. In this case, it seems that the magistrate did not find***

it to be necessary. Did that prejudice the appellant? After due consideration, we are of the settled view that it did not."

In our considered view, we find that in this case, the successor magistrate rightly exercised his discretion. The appellant was not prejuced in any way. In the circumstances, the first ground of appeal fails.

With regard to the second ground of appeal, the appellant is in essence challenging the credibility of the two witnesses (PW1 and PW2) whose evidence was believed by both the trial court and the first appellate court. This being a second appeal, the Court can only interfere with the findings of the two courts below only where there is a misapprehension of the evidence or where there is non-directions or misdirections. In the case of **Abdalla Bakari v. The Republic**, Criminal Appeal No. 268 of 2011 (unreported) for example, the Court had this to say on that principle:

> *"Both courts below based their conviction on the credibility of witnesses. This being a second appeal, the Court can only interfere with the concurrent findings of facts unless it is shown that*

there is a misdirection or non direction. (See ***DPP v. Jaffari Mfaume Kawawa*** *[1981] TLR 149).*

- (See also the cases of **Ally Hussein Dugange v. The Republic**, Criminal Appeal No. 122 of 2013 and **Joseph Sypriano v. The Republic**, Criminal Appeal No. 158 of 2011 (both unreported).

In this case, as argued by Ms. Masule, PW1 testified after the trial court had conducted a *voire dire* examination on her. She was found to be possessed of sufficient intelligence. Looking at her testimony, she was consistent and coherent on her narration of how the appellant molested her. Her evidence was corroborated by PW2, her mother who found her (PW1) crying and who, upon inspecting her private parts, discovered that she had suffered injuries, the cause of which the victim said was due to the appellant's act of raping her. The evidence of PW3 coupled with the medical report (Exh. P3) which was admitted in evidence, corroborated further the evidence of PW1 that she was raped. On the basis of such watertight evidence, we do not find any justification to interfere with the concurrent finding of the two courts below, that PW1 and PW2 were credible witnesses. As a result, we similarly do not find merit in the 2nd ground of appeal.

Finally the appellant urged as to look into the sentence awarded to him and consider to reduce it. The sentence of life imprisonment which was awarded by the High Court after having rightly enhanced the illegal punishment of thirty years imprisonment given by the trial court, is a statutory minimum punishment as provided for under S.131(3) of the Penal Code. The appellant's prayer is therefore untenable.

In the event, for the foregoing reasons, the appeal is hereby dismissed.

DATED at **BUKOBA** this 14th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL