IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 23 OF 2017

PASCAL SELE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the decision of the High Court of Tanzania at Tanga)

(Khamis, J.)

dated the 2nd day of September, 2016

in

Criminal Appeal No. 7 of 2016

JUDGMENT OF THE COURT

26th February & 1st March, 2019

LILA, J.A.:

The appellant was arraigned in the District Court of Handeni at Handeni with the offence of rape c/s 130(1)(2)(b) and 131(1) of the PenalCode Cap. 16 R.E 2002.The trial courtfound him guilty as chargedconvicted and sentenced him to serve 30 years imprisonment. The High Court (Khamis, J.) upheld his conviction and sentence on first appeal. Still aggrieved, the appellant preferred the present appeal.

In proving the charge against the appellant, the prosecution relied on the evidence of three witnesses. Neema Damian (PW1) who is the victim of the offence told the trial court that on 10/10/2014 at night time she was asleep in her uncompleted house with her three children all being of the age six and below. A man she identified by means of light from a matchbox and by moonlight as being the appellant entered in the house which had no door, grabbed her, took off her clothes and raped her. That man who demanded sex introduced himself as Pascal. Thereafter she was pulled down the bed and latter outside. Samwel Amnay (PW2), Safari Gadie (PW3) and Sagdai Ingi (PW4) are persons who appeared for her rescue.In the course, she stated, the appellant was beaten with a club and he ran away but was arrested shortly thereafter. Elaborating on what transpired, PW2 told the trial court that he was awaken by Salehe and Safari who told him that Pascal (the appellant) had broken a shop of Safari. That in tracing the appellant they found him holding PW1 by the neck. He said the appellant wanted to kill PW1 so as to falsify the evidence on rape. On their part, PW3 and PW4 told the trial court that upon arrival at PW1's house they found the appellant holding PW1 who told them that the appellant wanted to kill her. E. 2571 D/Cpl Evarist, the investigator said the appellant admitted being at PW1's house but denied committing the rape.

In his sworn defence, the appellant denied the allegation that he raped PW1. He, however, admitted being at PW1's house but for a different purpose. He said he went there to follow his lost cow which PW1 had earlier on at 8.00 hrs phoned him informing him that it has been at her place. That, instead of giving him the cow, PW1 insisted the same be handed over in the presence of the chairman of the locality. As he forced to take it, PW1 shouted for help accusing him of trying to rape her. That he then took his cow and left only to be arrested the following morning.

Notwithstanding the appellant's defence, both courts below were satisfied that the prosecution had proved the charge beyond all reasonable doubts. They were of a concurrent finding that the evidence from PW1, the victim, was crucial and supported by PW2, PW3 and PW4 was enough to establish the appellant's guilt.

Determined to fault the findings of both courts below, the appellant has, substantially, fronted three grounds of appeal. **One**, that the witnesses were not consistent as to when (the date) the offence was committed; **two**, that the trial magistrate did not mention the provision of the law he used to sentence him; and **three**, that the PF3 was

irregularly received and admitted as exhibit and it did not prove penetration.

At the hearing of the appeal the appellant appeared in person and unrepresented while Mr. Peter Busoro Maugo, learned Principal State Attorney, appeared for the respondent Republic.

The appellant, when called to address us on the grounds of appeal he urged the Court to adopt both the grounds of appeal and the written submission thereof he had filed on 8/11/2018. He then opted for the learned Principal State Attorney to argue the appeal first.

In his written submission the appellant had submitted that the PF3 was not tendered by the doctor but by PW1 and the doctor was not called for cross examination by the appellant thereby contravening the requirement of section 240(3) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (The Act). In addition, he contended that the PF3 did not show that there was penetration. He also contended that the sentencing section was not also mentioned contrary to the provisions of section 312(2) of the Act. In respect of the dates, he contended that the prosecution witnesses gave different date regarding when the offence was committed. He said while PW1 said it was on 10/10/2014 at night time, PW2 said it was on 11/11/2012, PW3 said it was on 11/11/2014 at

night time and PW4 said it was on 11/10/2014 night time and PW5 said it was on 11/10/2014 at night time. He lastly submitted that the charge was defective for not being prepared according to section 132 and 135 of the Act.

Mr. Maugo, who right away desisted from supporting the appellant's conviction and sentence, argued the appeal generally. Basically, his attack on the findings of the two courts blow centred on the different versions given by the prosecution witnesses on what happened on the material date and time. According to him, PW1 said he was raped by the appellant, PW2 said the appellant was being traced for breaking the shop of Safari and when they arrived at PW1's house they found the appellant holding Neema and the later complained that the appellant wanted to kill her. A similar explanation was given by PW3. In view of these contradictions, Mr. Maugo was of the firm view that the prosecution evidence did not prove the charge against the appellant. In respect of the PF3, he did not mince words. He agreed with the appellant that it was tendered by PW1 and the doctor was not called to testify hence it was improperly admitted into evidence.

We respectfully agree with Mr. Maugo that the prosecution evidence was insufficient and could not validly form the basis of the

appellant's conviction. In the first place, as rightly argued by Mr. Maugo, it is plain that the PF3 was tendered by PW1 and the appellant was not accorded his right to choose whether or not the doctor who filled it be summoned for cross-examination as mandatorily required under section 240(3) of the Act. Its admission was improper and the usual consequence is to have it expunged from the record of evidence. We accordingly expunge it from the record of evidence. We will now proceed to consider if there is any other evidence implicating the appellant with the commission of the offence.

We appreciate from the judgments of both courts below that the conviction of the appellant was based on the evidence of PW1, PW2, PW3 and PW4. Both courts, relying on the decision of the Court in **Selemani Makumba Vs. Republic** (2006) TLR 379 found that the evidence of PW1, the victim, was crucial and was clear on what transpired on the fateful night.

According to the charge the offence was committed at night; that is at 20:30 hrs. PW1 was the victim of the alleged rape. Her evidence is very crucial to prove the case basing on the principle that in rape cases, the true evidence comes from the victim. That principle was enunciated in the case of **Seleman Makumba** (supra) and followed in the case of

Ndikumana Philipo Vs. Republic, Criminal Appeal No. 276 of 2009 (Unreported) where this court stated 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 women where consent is irrelevant that there was penetration."*

While we are agreed that the above is the correct position of the law, we hasten to say that that does not mean that such evidence should be taken wholesome, believed and acted on to convict the accused persons without consideringother circumstances of the case. In the present case apart from the word of PW1, the victim, there was no eye witness to the incident of rape. Neither of the prosecution witnesses claimed to have witnessed the appellant carnally knowing PW1. So, while PW1 claims to have been raped, the appellant denied committing the offence. It was a word of one against the other. The credibility of PW1 was therefore crucial in determining her truthfulness. Unfortunately, it is not reflected in the record that the trial court which had the opportunity to observe the demeanour of PW1 at the dock did so and reached at a conclusion that she was a credible witness. The record ought to reflect the observation done instead of simply stating

that the witness is credible. (See **Yusuf Simon Vs. Republic**, Criminal appeal No. 240 of 2008 (unreported). Apart from demeanour, the witness's credibility can be deduced through other ways.In the case of **Rashidi Shabani Vs. Republic**, Criminal Appeal No.310 of 2015 (Unreported), the Court made it clear that:

> *"...But apart from demeanour, credibility of witnesses can also be determined in other ways.* ***One****, when assessing the coherence of the testimony of such witness.* ***Two****, when the testimony of that witness is considered in relation with other witnesses, including that of the accused person. In those ways, the credibility of witnesses may be determined even by a second appellate court when examining the findings of the first appellate court. (See* ***Shabani Daudi Vs. Republic****., Criminal Appeal No. 28 of 2001 (Unreported) followed in* ***Abdalla Mussa Mollel Banjor Vs. Republic****., Criminal Appeal No. 31 of 2008 (Unreported).*
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> *In other words in evaluating the testimony of a witness the Court may take into consideration all the circumstances of the case, such as whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts,*

the witness's interest in the trial and the witness's emotional and mental state"

Given the circumstances of this case that it was a one againstone evidence, we are of a considered view that we are entitled to look at the evidence of PW1 in conjunction with that of other witnesses so as to determine whether she was a witness of truth or not.

Closely examined, the prosecution witnesses gave three different versions of what lead to the appellant's arrest and arraignment. PW1, the victim, alleged that she was raped by the appellant. PW2, PW3 and PW4 who went to rescue PW1 said the latter told them that the appellant wanted to kill her. That aside, PW2, said they were tracing the appellant on accusation of breaking the shop of Safari. It is therefore plain that PW1 was not consistent on what exactly befell on her on the material date and time. PW2, PW3 and PW4 were first persons to respond to her call for help. It does not occur to us why, instead of telling them that she was raped by the appellant she told them that the appellant wanted to kill her.Furthermore, it cannot, in the circumstances be said, with certainty, what were the accusations which lead to the appellant's arrest. It is apparent that both courts below did not consider these inconsistences which we think were crucial. Had they done so, no doubts, they would have found that PW1 was not a truthful witness. Her

evidence ought not to have been relied on. Since her evidence was crucial, then there is no other evidence on which the offence of rape could be founded. Conversely, the appellant's defence that he had gone to PW1's house to collect his cow only to find being pinned down by her that he had raped her, is, in the circumstances, highly probable.

In the end we find merit in the appeal and we hereby allow it.The appellant's conviction is quashed and sentence meted upon him is set aside. He is to be released from prison forthwith unless otherwise held therein for any other lawful cause.

DATED at **TANGA** this 28th day of February, 2019

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. Mkwizu
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL (T)