IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 54 OF 2017

RAPHAEL MHANDO.. APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Aboud, J.)

dated the 5th day of August, 2016

in

Criminal Appeal No. 57 of 2015

JUDGMENT OF THE COURT

25th February & 1st March, 2019

MKUYE, J.A.

Before the District Court of Handeni at Handeni, the appellant, Raphael Mhando was charged with and convicted of the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code, Cap 16 R.E. 2002. He was sentenced to life imprisonment. His appeal at the High Court was unsuccessful hence, this second appeal.

It was alleged that on 01st day of March, 2014 at about 17:00 hrs at Komkole Village within Handeni District in Tanga Region, the appellant did have carnal knowledge of one Beatrice d/o Isihaka who was a girl aged six (6) years.

At the hearing of the case it was established that in the evening of the fateful day, the appellant went to Beatrice Isihaka's (PW1) home. He took PW1 together with Pascal Mode to the orange farm to harvest oranges. While at the farm the appellant ordered PW1 to sit down and get the money. However, the appellant took off her underwear and raped her. He inserted his penis into her private parts. PW1 testified that she felt pains in the course. Thereafter, she went home and informed her grandmother (PW3) to have been raped by the appellant. PW3 testified that she examined PW1 and found her private parts widened and reddish. The matter was reported to the relevant authorities which led to the appellant's arrest.

PW2's testimony confirmed about the appellant coming at their home and taking PW1 and Pascal to harvest oranges at a consideration of Tshs. 100/= each. She also testified that PW1 came home crying and Pascal told them that she was raped by the appellant.

In his defence, the appellant admitted to have gone at the victim's house and taken PW1 and Pascal to help him harvest oranges. He, however, denied to have raped her.

The appellant lodged a memorandum of appeal comprising four grounds of appeal. He also filed his written submission on 14/2/2018. The said grounds of appeal are as follows:

1) *That, the appellate judge erred in law by not complying with the mandatory provisions of section 127(2) of the Evidence Act which by then was in force as the crime was alleged to be committed before the decision of the full bench.*
2) *That, the appellate judge erroneously contravened Article 13 (6) (c) of the Constitution of the United Republic of Tanzania by sustaining the conviction of the appellant basing on the said decision of the full bench.*
3) *That the learned trial magistrate and appellate judge erred in law and fact by convicting the appellant based on incredible evidence of the prosecution witnesses.*

At the hearing of this appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic had the services of Mr. Waziri Mbwana Magumbo, assisted by Ms. Tussa Mwaihesya, both learned State Attorneys.

In his written submission, the appellant complained that the *voire dire* test conducted to PW1 and PW2 who were children of tender age, did not comply with section 127(2) of the Evidence Act, Cap 6 R.E 2002 (the TEA) as it was not recorded in accordance with the law. He pointed out that, the interview ought to be taken in the form of questions and answers because the trial was conducted before section 127(2) of the TEA was amended and the decision in **Kimbute's case** handed down. For that reason, he argued that, as the *voire dire* test was not properly conducted it is as good as if it was not conducted at all and hence, their evidence should be expunged. He added, if their evidence is expunged the conviction will not stand.

As to ground no. 2, the appellant submitted that the appellate court contravened the provisions of Article 13 (6) (c) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002 when it relied on **Kimbute's** case.

On the 3rd ground of appeal, the appellant argued that the appellant was convicted on the basis of incredible evidence of PW1, PW2 and PW3. He wondered why Pascal Mode who was taken together with PW1 by the appellant to harvest oranges was not called to testify in the trial court. He said, the said Pascal might have been the ravisher. For those reasons, he argued, the case was not proved beyond reasonable doubt and prayed to the Court to allow the appeal.

In reply, Ms. Mwaihesya resisted the appeal. With regard to grounds nos. 1 and 2 which were argued together, she adamantly argued that the *voire dire* examination conducted to PW1 and PW2 was in compliance with section 127(2) of the TEA. She was convinced that it did not contravene the provisions of the Constitution. She added that, even if the *voire dire* test was done contrary to that provision, it did not affect their evidence.

In relation to grounds nos. 3 and 4 which were also argued together, Ms. Mwaihesya submitted that, the case was proved beyond reasonable doubts as the witnesses who testified were credible. She referred us to the case of **Goodluck Kyando v. Republic**, [2006] TLR 367. She elaborated that, the evidence of PW1 and PW2 whose evidence was taken after a *voire*

dire test was conducted, proved that PW1 was taken by the appellant to the orange farm where she was raped. PW2, she said, corroborated that PW1 was taken by appellant. While making reliance on the cases of **Ramadhani Sango v. Republic**, Criminal Appeal No. 30 of 2011 and **Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999 both (unreported), she stressed that the best evidence of rape comes from the victim herself.

Before embarking on the merits of the appeal, we wish to point out that, this is a second appeal. This being the case, the Court is required to be cautious and very slow to disturb the concurrent findings of facts of the two courts below. The Court could only do that if there are completely misapprehensions of the substance, nature and quality of evidence which result into unfair conviction. (See **Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007.

Having examined the grounds of appeal and the submissions from both sides, we think, we shall deal with the 3rd and 4th grounds of appeal touching on the credibility of witnesses and the standard of proof as we consider them to be sufficient to dispose of the appeal without necessarily dealing with the remaining grounds of appeal.

As regards how credibility of witnesses can be determined, the case of **Aloyce Mgovano v. Republic**, Criminal Appeal No. 182 of 2011(unreported) may be of much guidance. In the said case the Court cited with approval the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000(unreported) where it was stated as follows:-

> *"The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of the witness. Two when the testimony of that witness is considered in relation with the evidence of other witness, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

In this case, both courts below based their findings of guilty on the credibility of the prosecution witnesses. They believed on the evidence of Beatrice Isihaka (PW1), Mwajuma Arafat (PW2) and Changwa Mkombozi (PW3).

PW1, who was a child aged of 6 years old, who knew nothing about oath following *voire dire* test that was conducted, testified without oath. She

told the trial court that she was, together with certain Pascal Mode, taken by the appellant to the farm to harvest oranges. She also explained on how she was ordered by the appellant to sit down to get the money but to the contrary he raped her by inserting his male organ into her private parts after he had undressed her underwear. PW1 said, she felt pain and she went home where she informed her grandmother (PW3) who later reported the matter to the relevant authority.

PW2 who was aged 10 years old testified under oath after *voire dire* test was conducted. Her testimony corroborated PW1's evidence that PW1 and Pascal were taken by appellant to harvest oranges and that PW1 came home while crying. PW2 said, on questioning her why she was crying, she said she was afraid to be beaten. PW2 testified that they asked Pascal who told them that PW1 was raped by the appellant.

PW3 also testified that PW1 came home crying and on asking her, she told her that she was raped by the appellant. PW3 testified further that she examined her and found her private parts widened and reddish.

On the other hand, the appellant did not deny going to the orange farm with PW1 and Pascal but he denied to rape her.

The appellant's main complaint is that his conviction was found on the basis of incredible evidence of PW1, PW2 and PW3. Apart from that, he wondered as to why the prosecution did not call Pascal to explain what transpired as he was together with PW1. On the other hand, Ms. Mwaihesya forcefully argued that Pascal Mode was not a material witness. She relied on section 143 of the TEA in that it does not provide for a certain number of witnesses to testify in court. She said that, failure to call Pascal to testify did not vitiate the prosecution's evidence.

On our part, with respect, we do not agree with the learned state attorney's stance. Much as under section 143 of the TEA no specific number of witnesses is required in order to prove the fact, we think, each case must be considered according to its circumstances in view of advancing the cause of justice. We think, it was under the circumstances like in this case that the Court in the case of **Boniface Kundakira Tarimo v. Republic,** Criminal No. 351 of 2008(unreported) observed as follows:

> ***"So, before invoking section 143 of the TEA regard must be had to the facts of a particular case. If a party's case leaves reasonable gaps, it can only do so at its own risk in relying on***

> ***the section.*** *It is thus now settled law that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such interference is only a permissible one."*
>
> [Emphasis added]

But again, in an earlier decided case of **Aziz Abdallah v. Republic,** (1991) TLR 71, when the Court was faced with a situation like the one at hand, it stated as follows:

> *"...the general and well known rule is that the prosecutor is under a primafacie duty to call those witnesses who 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."*

On our part, we hasten to subscribe to the above cited cases. In this case, it is clear in the record that the appellant took PW1 and Pascal Mode to the farm to pick oranges where PW1 was allegedly raped. The appellant

also admitted to have gone together with PW1 and Pascal Mode to the orange farm to pick oranges. PW2 testified that when PW1 came home while crying failed to tell them as to what happened to her for being afraid to be beaten; and that it was Pascal who told them that she was raped by the appellant. As it is, the evidence that PW1 was raped by the appellant came from PW1 alone whose evidence was taken without oath. This evidence is against the evidence of the appellant who denied to rape her.

We are aware that every witness is entitled to credence and has to be believed unless there are good reasons for not believing such witness. (see **Goodluck Kyando's** case (supra)). In this case, when assessing PW1's evidence the trial court stated as follows:

> *"Also the court has heard all the testimony of PW1,PW2 and PW3* ***but it has been attracted and satisfied by the evidence given by the key witness PW1 (who is the victim to this case) when she was proving*** *before this court that:"*

[Emphasis added]

As it can be seen in the above quotation, it is clear that the trial court was attracted by the evidence of PW1. However, as we have alluded to

earlier on, the evidence of PW1 was taken without oath. We think, this a situation where corroboration was required. It is settled law that unsworn evidence most often requires corroboration. (see **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No 386 of 2015). Hence, bearing in mind that PW1 gave unsworn evidence, her evidence needed to be corroborated. Unfortunately, Pascal Mode who was together with PW1 did not testify. PW2 and PW3 cannot be taken to corroborate her evidence as their evidence was a mere hearsay as regards to who raped PW1.

But again, the evidence of PF3 (Exh. P1) on rape was expunged for being admitted in contravention of section 240(3) of CPA. The remaining evidence of rape is that of PWI and PW3 who examined PW1 and observed that her private parts had widened and reddish. Even if PW3 saw some features suggesting that PW1 was raped, she could not be in a position to know who did it. These are the reasons which, we think that, had Pascal Mode been called to testify, he would have given a corroborative or an independent evidence on what happened the more so whether or not it was the appellant who really raped PW1. His evidence could have shaded some light to enable the court to meet the ends of justice unlike this state of affairs where the evidence of PW1, PW2 and PW3 have left a lot of doubts

unresolved. Unfortunately, no reasons were given for the failure to call Pascal as he was a material witness to this case.

Given the circumstances, we agree with the appellant that this a fit case in which the two courts below ought to have drawn adverse inference against the prosecution. It is for these reasons that we find grounds nos. 3 and 4 to have merit.

In the final event, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. Further, we order that the appellant be released forthwith unless held for other lawful reasons.

Order accordingly.

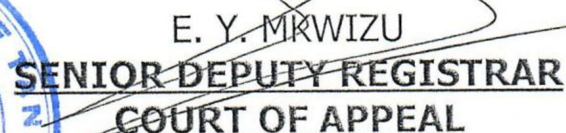
DATED at **TANGA** this 1st day of March, 2019.

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