

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 394 OF 2017

THE DIRECTOR OF PUBLIC OF PROSECUTIONS..... APPELLANT

VERSUS

SIMON MASHAURI.....RESPONDENT

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

(Masoud, J.)

dated the 31st day of July, 2017

in

Criminal Appeal No. 138 of 2016

JUDGMENT OF THE COURT

20th February & 1st March, 2019

MKUYE, J.A.:

The respondent, Simon Mashauri was arraigned before the Resident Magistrate's Court of Tanga at Tanga for the offence of rape contrary to sections 130(1), (2) (a) and 131(1) of the Penal Code, Cap 16 R.E. 2002. It

was alleged that on the 16th day of February, 2013 at Kwaminchi area, within the City, District and the Region of Tanga, the Respondent did have carnal knowledge of one Maria D/o John Maduhu who was a girl aged 27 years without her consent.

In order to establish the offence against the respondent, the prosecution marshalled seven (7) witnesses and produced two (2) exhibits. For the defence, only the respondent testified.

After a full trial, the trial court found the prosecution to have failed to prove the case beyond reasonable doubt. Consequently, it found the respondent not guilty and acquitted him. Aggrieved with that decision, the Director of Public Prosecutions (the DPP) unsuccessfully appealed to the High Court (Masoud, J.). Still dissatisfied, the DPP has come to this Court in another attempt to challenge the decision of the High Court.

At this juncture we find it apposite to relate the background leading to this appeal. It runs as follows:

Before the date of incident the respondent had gone for lunch at the place where PW1's mother was selling food (chips). While there he met the victim Maria John Maduhu (PW1) who was assisting her mother in peeling

potatoes. They introduced to each other and exchanged their phone numbers.

On 16/2/2013 during the day, the respondent phoned PW1 and told her to go to his work place as before that day he promised to find a job for her. PW1 went at the respondents office and while there he informed her that there was a vacancy at Exim Bank and promised to find it for her. After sometime, they departed. Later in the evening at about 19:30 hrs, the respondent phoned PW1 to bring her certificates as he was with an officer from Exim Bank who was about to leave. She rushed at JJ Bar Sabasaba area where she found him with someone. Later they agreed to go to the respondent's home to scan her certificates as the respondent was traveling to Lushoto on the next day. They reached there at about 22:00 hrs. While at the respondent's place it is alleged that instead of scanning PW1's certificates as agreed, the respondent by force undressed PW1 and had carnal knowledge of her without consent. The respondent also grabbed her mobile phone which he stayed with it until she left his place. Meanwhile, PW1 shouted for help which culminated to Undule Shola (PW2), Elinipa Mramba (PW3) and Moses Boniface (PW4) who were the

respondent's co-tenants to respond. These witnesses urged the respondent to open the door for the victim but he did not do that until at about 01:00 hrs. On getting out, PW1 demanded to be given her phone but the respondent refused. PW2 and PW4 whom were incidentally known to PW1, escorted her to her home.

Upon reaching home late, PW1's mother asked her why she came late but PW1 told her she will tell her tomorrow. PW1 took shower and she retired to bed. On the following day, PW1 went to church. She also went to Dotto Mbusa (PW7) (guardian) where she related her last nights' ordeal who also informed her mother. The matter was reported to the police but PW1 testified that she was told to go back on the next day (18/2/2013). On that day, she was issued with the PF3 and was on the same day, examined by Doctor Damian Maruba (PW5) who through the PF3 (Exh. 1) filled on 4/3/2013 remarked that there was forced vaginal sexual penetration.

The respondent did not contest the facts relating to how they knew each other, trying to find a job for her, how they spend the fateful day until they reached at his home but he denied to have raped PW1. He testified

that in fact they were lovers. He said that all this cropped up after PW1 realized that he had cheated on her that he would marry her while he had a family. As hinted earlier on, the respondent was acquitted.

The DPP has filed a memorandum on five grounds of appeal as follows:-

- 1) That the Honourable High Court Judge grossly erred in law and in fact by failure to analyze the evidence adduced by the prosecution witnesses before concluding that there is no evidence to prove the offence beyond reasonable doubt.*
- 2) That the Honourable High Court Judge erred in law and in fact by holding that the prosecution failed to prove the charge as to the date and the place where the offence was committed.*
- 3) That the Honourable High Court Judge erred in law by concluding that the prosecution evidence is doubtful as to whether the alleged offence was committed on the specified date or that the*

evidence on record correspond with the particulars of the offence.

4) That the Honourable High Court Judge erred in law and fact by concluding that there was delay in reporting the incident by PW1.

5) That the Honourable High Court Judge erred in law and in fact by concluding that the evidence of examination of PW5 is doubtfully and not credible.

When the appeal was called on for hearing the appellant/DPP was represented by Mr. Waziri Mbwana Magumbo, learned State Attorney; whereas the respondent appeared in person and was unrepresented.

Submitting in support of the appeal, Mr. Magumbo contended that, **one**, though the date/ time of incident shown in the charge sheet is at variance with the date/time stated in evidence, it did not mean that the offence was not committed. **Two**, even if PW1 did not report the incident of rape to her mother or to the police, she reported it to PW2 and PW4 who were credible witnesses. He was of the view that, the courts below

misapprehended the nature of evidence of PW2 and PW4. **Three**, PW1 had sufficiently proved that the respondent had carnal knowledge of her without her consent. While relying on the case of **Selemani Makumba v. Republic**, [2006] TLR 384 he argued that, the courts below ought to have found her a credible witness. In totality, he argued that the prosecution's case was proved beyond reasonable doubt and he urged the Court to allow the appeal.

In response, the respondent who was brief and focused contended that the prosecution's evidence failed to prove their case as it left full of contradictions unresolved. For instance, he said, **one**, PW2, PW3 and PW4 gave contradictory evidence as to whether PW1 was raped. He pointed out that while PW2 said, PW1 informed them that she was beaten, PW4 said she told them that she was raped. And yet, PW3 said PW1 did not tell them anything. **Two**, PW1 failed to report the rape incident to neither her mother nor to PW2 and PW4 who escorted her to her home. She did not even report it to the police but instead she informed PW7 who was her guardian who in turn informed her mother. **Three**, the PF3 was issued 3 days after the date of the alleged incident of rape and that the same was

filled and signed by PW5 (doctor) on 4/3/2013 which was after almost 14 days. **Four**, there was uncertainty of time when the alleged offence was committed between 00:00hrs and 01:20 hrs. **Five**, it is inconceivable for PW1 to take shower and to go to church after having encountered such a serious incident of rape. For all these reasons, the respondent argued that the two court below were justified to find him not guilty and acquit him. Lastly, he prayed to the Court to dismiss the appeal in its entirety.

In rejoinder, Mr. Magumbo reiterated his submission in chief. He prayed for the appeal to be allowed.

We wish to preface our decision by stating from the outset that this is a second appeal. It is now settled law that where there are concurrent findings of facts of the two courts below, the Court should not under normal circumstances interfere with such concurrent findings of facts. However, if such courts below have misapprehended the substance, nature and quality of such evidence which result into unfair conviction in the interest of justice, the Court may interfere. This position was stated in the case of **Abdallahman Athuman v. Republic**, Criminal Appeal No. 149 of 2014; **Omari Mussa Juma v. Republic**, Criminal Appeal No. 73 of 2005;

Josephat Shango v. Republic, Criminal Appeal No. 62 of 2012; and **Yohana Dioniz and Another v. Republic**, Criminal Appeals No. 114 and 115 of 2009(all unreported).

For instance, in the latter case of **Yohana Dioniz and Another**, (supra) the Court stated as follows:

*"This is a second appeal. At this stage the Court of Appeal would be very slow to disturb concurrent findings of fact made by lower courts, unless there are clear considerations or misapprehensions on the nature and quality of evidence, especially if those findings are based on the credibility of witnesses - (see **Salum Mhando v. Republic**, (1993) TLR. 170)."*

There is no gain saying in this case that both courts below found the respondent not guilty of the offence on the basis of the incredible evidence of the prosecution witnesses and the PF3 (Exh P1) which was tendered in court. At this juncture we need to restate the guiding principles on credibility of witnesses. First and foremost, it is noteworthy that the

assessment of credibility of witnesses, especially on the question of demeanour, is in the monopoly of the trial court. The manner how credibility can be determined was stated by the Court in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2000 (unreported), as follows:

"The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, 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."

-(see also **Salum Ally v. Republic**, Criminal Case No 106 of 2013 (unreported)).

Starting with the issue of rape, PW1 who was the key witness testified to have been raped by the respondent at his home where they had gone to scan her academic certificates. PW1 told the court that she shouted for help and PW2, PW3 and PW4 responded and she said that she explained to them everything. In his submission, Mr. Magumbo while relying in the case of **Selemani Makumba** (supra) argued that, the offence of rape was proved and that PW1 informed PW2 and PW4 who were credible witnesses whom the courts below ought to believe. We are aware that in **Selemani Makumba's** case (supra) this Court held that the best evidence of rape comes from the victim herself. However, in this case, the evidence of PW1 relating to rape is wanting. We say so because, on what PW1 told PW2 and PW4 about rape committed to her leaves a lot to be desired. We shall explain. Though PW1 testified to have explained **everything on what happened to her** to PW2 and PW4, who escorted her to her home, the said witnesses seem not to know everything about it. According to PW2, PW1 told them that Simon (respondent) wanted to sex with her. On cross-examination, PW2 said that PW1 told them that "*the respondent decided to do sex with her.*" And PW2 went on to say that "since she didn't tell them exactly what was done to her" they did not

advise her anything. Yet the same PW2 on re-examination said that PW1 told them that the respondent wanted to have carnal knowledge of her thus they started fighting and she shouted for help. On his part, PW4 (who was together with PW2) testified that PW1 told them that the respondent wanted to have sex with her and when she refused he raped her. When PW4 was re-examined, he reiterated that PW1 told them that the respondent had carnal knowledge of her without her consent.

What can be deduced from the testimonies of PW1, PW2 and PW3 is that it is not certain as to what PW1 told PW2 and PW4 regarding the alleged rape incident. Though PW2 and PW4 were together they seem to have heard and or understood PW1 differently. We think, PW1, PW2 and PW3 were not credible witnesses worthy to be believed. Their evidence have contradictions which are not minor. They do go to the root of the matter as to whether PW1 was really raped or not.

Another aspect which makes PW1 to be an incredible witness is the manner she handled the whole matter. Though the learned State Attorney did not give it due consideration in his submission, we think, the respondent's concerns are valid. There is no controversy that PW1 and the

respondent knew each other even before the date of incident. Also it is not disputed that the respondent and PW7 knew each other. Also not disputed is the fact that PW1 and the respondent had spent some time at the respondent's office, meeting again at JJ bar at Sabasaba area where they decided to go together to the respondent's home at about 22:00 hrs where she was allegedly raped.

As to what happened after the said rape incident, PW1 said:-

*"... They (Undule Shola (PW2) and Moses Boniface (PW4) escorted me up to my house and left me outside our house. I knocked the door and my young sister opened the door for me. **My mother asked me as to why I was coming home late. I told her that something wrong happened to me but I would tell her on next day in the morning. I took shower and slept. In the morning I went to the church and after the prayers I followed my father and told him that I had a problem which I wanted to tell him. My***

father told me to go home and wait for him at his house. **I also saw Simon speaking with my father but I did not hear what they were talking.** When I went to my father called Doto I explained everything to him and was with his wife. My father called my mam and when my mam came they informed her about how Simon raped me. We went to report the matter to Chumbageni Police Station. **We were told to go there on the next date,** when we went we were given PF3 and went to Bombo Hospital on 18/2/2013. I was examined at my vagina. They told me that I had bruises at my vagina due to forced penetration. I did not consent to such rape at all. I also noted that I was bleeding, I felt pain when I washed my vagina. It was Simon who raped me.”

[Emphasis added]

As regards the conduct exhibited by PW1 as shown in the passage we have quoted above, we wonder as the respondent wondered as to why PW1 did not tell her mother who even asked her about the reason for her coming home at unusual time. Instead she went to report to her guardian (PW7). We think, her mother was a person who could have been easily approached on the issue she had encountered rather than her guardian. Even the fact that PW1 saw PW7 talking with the respondent (suspect) and asking PW1 to wait for him at home leaves a lot to be desired the more so, when taking into account that PW7 and the respondent knew each other. This, in fact, does not sound well bearing in mind that the respondent told the court that PW1 was apparently his girlfriend whom he had promised to marry. The questions we ask ourselves are why did respondent go to PW7 on that particular day; and why did PW1 think that PW7 was the right person to be informed first about the ordeal even before her mother or the police. We find that these nagging questions do point to the unreliability of PW1's evidence.

Besides that, PW1 did not report to the police station at the earliest opportune time. In that night, she took shower which was not proper in

the circumstances and slept. In the next morning she went to church. The question we ask ourselves, was it a wise idea going to church instead of taking the necessary steps of reporting the rape incident to the police station. PW1 said she did not do it during that night because it was late. We think, if that was the case, reporting to the police in the following day would have been the first thing to do instead of going to church and waiting to report to PW7 first. We find her evidence to be unreliable.

Another point is that PW1 said that when they reported to the police she was told to go back on the next day and that is when she was given a PF3. However, PW7 Mbusa Doto who went together with PW1 to the police and WP 1647 S/Sgt Laza (PW6) who received her, did not testify to the effect that PW1 was told to go back on the next day. To our knowledge, police stations do work in 24 hours a day. Unfortunately, PW1 did not give the reasons why she had to be referred to the next day. We think, this might have been an afterthought after realizing that she reported the incident late.

Another issue is linked with the PF3 which was admitted as Exh P1. PW1 was examined on 18/2/2013 which was two days after the incident

took place. In her evidence PW1 revealed that she had engaged in sexual intercourse even before that incident. The problems arising here are that, **one**, whether the examination could have revealed what had happened two days before. **Two**, wouldn't there be any possibility of PW1 having sexual intercourse with another person between the alleged date of incident to the time PW1 was examined. Another anomaly is that, even the PF3 itself shows to have been filled and signed on 4/3/2013 which was almost two weeks after the examination. The issue is whether the person who signed it could have memorized what he had observed two weeks before and fill it correctly. In our view, it was not an easy task.

With all what we have tried to demonstrate, we agree with the respondent that the prosecution evidence was marred with material contradictions and doubts which in effect weakened the prosecution's case. All these doubts need to be resolved in favour of the respondent.

All said and done, we find no misdirection or misapprehension in the prosecution's evidence to warrant us to interfere with the findings of both courts below. The lower courts were justified to find that the prosecution

failed to prove their case beyond reasonable doubt and acquit the respondent.

In the event, the appeal is dismissed in it's entirely.

It is so ordered.

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)