IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A. And KITUSI J.A.)

CRIMINAL APPEAL NO. 145 OF 2017

MOHAMED SAID .....APPELLANT

VERSUS

THE REPUBLIC..... ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Songea

(Mrango, J.)

dated the 27th day of March, 2017
in
DC. Criminal Appeal No. 7 of 2017

JUDGMENT OF THE COURT

16th & 23rd August, 2019

KITUSI, J.A.:

This is a second appeal by Mohamed Said who was first convicted by the District Court of Songea for Incest by Male Contrary to Section 158 (1) (c) of the Penal Code, Cap 16 R.E. 2002. He was sentenced to thirty years imprisonment, and his appeal to the High Court against both the conviction and sentence was fruitless. Hence this appeal.

Before the trial Court it was alleged that between 1 November, 2015 and 20 January 2016 at Mjimwema area within Songea Municipality, in

Ruvuma Region the appellant had carnal knowledge of JM (not her true name) who was 15 years old while knowing her to be his biological daughter. He denied the charge.

The prosecution sought to prove the case through six witnesses whose account gives rise to the following story.

Before October, 2015, JM who testified as PW1, was living with her mother in Tunduru District while the appellant, her biological father, was living in Songea at Mjimwema area and this was because the appellant and PW1's mother had separated. In October 2015 the appellant transferred PW1 from Tunduru where she was living and schooling, to Songea and enrolled her at Samora Primary School, where Agnes Galas (PW4) was working as a teacher. The reasons for the transfer are not clear in the prosecution case but feature prominently in the defence case, as we shall later see.

PW1 and the appellant were living in a rented house owned by PW3, but sleeping in separate rooms. However, according to PW1, from November, 2015 the appellant started paying PW1 night visits in her room and having sex with her. PW1 made some graphic narrations of the

encounters, describing, without mincing words, what her father allegedly did to her. On the first night, she stated, the appellant entered PW1's bedroom and told her that he wanted to sleep with her and that initially she refused, but she had to give in when he threatened to kill her. After undressing the unwilling PW1, the appellant had sex with her both vaginal and anal, and when he was done, he went back to his bedroom.

From that night it became a habit for the appellant to ravish his own daughter even when PW1 was on holiday and had to join her father to a farmland where they occupied a temporary farm shed. PW1 further described the appellant as a brutal parent who would beat her up and restricted her movement except when going to school. He even told PW1's teachers that she was a prostitute and this caused teachers and fellow pupils to shun away from her. According to PW1, the appellant did all this only to cover up for his own transgressions. PW4 stated that she found no truth in appellant's allegation that PW1 was a prostitute because, she being PW1's class teacher, knew the girl to be of good character and keen in attending classes.

When PW1 could stand her father's acts no more she opened up on 16 January 2016 and disclosed the ordeal to Tatu Mpanale (PW2), their neighbor. PW2, in turn, informed Neema Yordan Kayombo (PW3) the landlady and the two went to PW1's school where they disclosed the fact to her teachers. The matter was eventually reported to the Police where DC Beatrice (PW6) was assigned to investigate into it. PW6 recorded statements of the witnesses for the prosecution including that of PW1. She stated that PW1 told her that at Tunduru she was not attending school and that the appellant transferred her to Songea in order to make her go to school. In her statement, PW1 also told PW6 that her father was threatening her with a "panga" to make her succumb to sex and so as to scare her from disclosing his acts to anyone.

Dr. Magafu Majura (PW5) performed medical examination on PW1 and concluded that she was used to both vaginal and anal sex.

In defence the appellant stated that in 2015 he visited his family in Tunduru where PW1 lived with her mother. PW1 had stopped attending school and had decided to move in with a boy, so he transferred her to her grandmother's house (Appellant's aunt), in Songea. In November, 2015 he

received complaints from his sister and his aunt about PW1's bad behavior. The appellant made follow ups on PW1's school attendance and performance and discovered that she was not interested in classes because when he checked the new exercise books which he had bought for her they had not been written anything on.

He pointed out some discrepancies in the testimonies of PW2, PW3, PW4 and PW5. He stated that while PW1 told the court that at school she was being called a prostitute it is surprising that PW4 said it was him (appellant) who was calling her by that name. Then he wondered why PW2 and PW3 on the one hand, differed with PW4 on the other as to when the former went to PW1's school.

The appellant denied having sex with PW1 and accused her of fabricating the story in order to frustrate his close supervision on her school attendance. He said PW5's medical finding does not conclude that it is him appellant who had sex with PW1 and added that the girl could have had sex with other men, and also accused PW1 of using her age as a weapon against him.

The appellant called one Shaazima Lukas Juma (DW2), who seemed to know very little about the case, except what was aired on the radio about it. She recalled seeing PW1 stay at home without going to school for a week. The other witness is Mwanahawa Issah (DW3), who said she was the appellant's aunt to whom he took PW1 to stay for some time. DW3 was also of no help to the case because all she knew was what was broadcasted on the radio about the appellant's alleged abuse of his daughter. She supported the fact that PW1 ever stayed with her for two months but the appellant took her away.

The trial Senior Resident Magistrate took PW1's word and accepted the story that she was carnally known by the appellant and that she had no previous experience with any other man. The learned magistrate considered the medical evidence of PW5 as supporting the fact that there was penetration and citing the case of **Alfred Tedo v. Republic** [2001] TLR 126 she concluded that penetration however slight is sufficient to prove rape.

The first appellate court sustained the conviction on the basis that in sexual offences the best evidence comes from the victim and that,

although PW1's testimony was not corroborated she was a truthful witness. He cited our unreported decision in the case of **Issay Renatus V. Republic**, Criminal Appeal No. 542 of 2015.

This appeal raises six grounds for our consideration which in summary are; **One**, the judgment of the trial court did not comply with the provisions of Section 235 and 312 of the CPA. **Two**, the proceedings were a nullity because the provisions of Section 127(5) and (7) of the Evidence Act were not complied with. **Three,** the High Court erred in not complying with Sections 236 and 237 of the CPA. **Four,** that the court erred in believing PW1 without taking into account that she was in a foolish age, hence unreliable and without considering the defence case. **Five**, that the offence was not proved beyond reasonable doubt. **Six**, that the court be pleased to quash the conviction and set him free or order a trial De Novo.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Mr. Shaban Mwigole, learned Senior State Attorney. The learned Senior State Attorney addressed us first, the appellant having indicated his preparedness to submit by way of a rejoinder after hearing submissions

from him. Immediately upon taking the floor, Mr. Mwigole submitted that he was not going to submit on grounds number 1, 4 and 5 because those grounds were not raised before the High Court so they were not determined by that court. He cited the case of **Isaya John V. Republic**, Criminal Appeal No.167 of 2018 (unreported).

We have resolved that this is an issue that we must decide straightaway, and in doing so, we are quickly in agreement with the learned Senior State Attorney on the principle that a matter not decided by the High Court cannot qualify for consideration by this Court. There are so many decisions of this Court to that effect such as; **Diha Matofali V. Republic**, Criminal Appeal No. 245 of 2015; **Hussein Ramadhani V. Republic,** Criminal Appeal No. 195 of 2015 and **Nazir Mohamed @ Nidi V. Republic,** Criminal Appeal No. 312 of 2014 (all unreported). We therefore accept Mr. Mwigole's invitation to ignore grounds 1, 4 and 5.

Submitting on the second ground of appeal which relates to reception of evidence of witnesses of tender age, Mr. Mwigole pointed out that PW1 was above 14 years when she testified, which means that she was not of tender age so as to require the holding of *voire dire* test. In this case the

learned Senior Resident Magistrate conducted a *voire dire* examination, which was uncalled for, but the appellant was not prejudiced, the learned Senior State Attorney submitted.

On the third ground, Mr. Mwigole submitted that the provisions of Section 236 and 237 of the CPA are on the duty of the court to take into consideration previous convictions of an accused person. The learned Senior State Attorney went on to submit that the sentence of 30 years imprisonment imposed on the appellant is the minimum under the law whether or not the court considered the appellant's previous convictions. The learned Senior State Attorney, though aware that ground number four raises a new point, submitted on the alleged failure to consider the case for the defence drawing our attention to pages 73 where the point was raised at the High Court, and 87 where the High Court resolved the point.

It is now our duty to determine the appeal by considering the competing arguments made by the appellant and the respondent Republic. We are not losing sight of the fact that this is a second appeal and as a general rule we may not interfere with the concurrent findings of facts by the two courts below. Concurrently both the trial court and the High Court

considered PW1 a truthful witness on whose evidence the conviction was grounded, therefore per the general rule referred to above we may not fault that finding. However, there is an exception to that rule, and that is when the finding has been reached in misapprehension of facts or wrong interpretation of a principle of law. In **Jafari Mohamed V. Republic**, Criminal Appeal No. 112 of 2006 (unreported), we said the following in relation to our limited powers on appeal against matters of fact:

> *"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance,* ***Peters v Sunday Post Ltd****. [1958] E.A. 424:* ***Daniel Nguru and Four Others V.R.,*** *Criminal Appeal No. 178 of 2004, (unreported);* ***Richard Mgaya*** *(supra), etc".*

In the case at hand, for reasons that we will show later we have found it important to consider whether the two courts below applied the correct litmus test before concluding that PW1 is a truthful witness. We

have earlier shown how the trial magistrate took PW1's word as gospel, without testing it against the version given by the appellant. We entertain no doubt that at the High Court, the learned Judge's assessment of PW1's credibility was influenced by his belief that she could not tell a lie against her own father. Part of the Judge's pronouncement reads:

> *"PW1 being her daughter, it does not cross my mind that she could just incriminate her father without any reason let alone to abscond from school".*

With respect, we think the Judge's observation could be very true in an ideal situation where the daughter does not suffer from moral wickedness. Was PW1 a girl of good moral standing? According to the appellant, at Tunduru where she was living, PW1 had moved in with a man and had quit school. This fact was not contradicted, therefore PW1's contention that her first experience on sex was that with the appellant is nothing but a naked lie. The fact that PW1 had stopped attending school at Tunduru was supported by PW6 who recorded her statement. This witness told the trial court that PW1 told her that she had stopped school. When the appellant enrolled PW1 at Samora Primary school in Songea in a bid to

get his daughter attend school, he bought for her new exercise books. When he checked the books on a subsequent date, PW1 had not written anything on them. Ironically, this is the same pupil the teacher (PW4) painted as well-mannered and keen on classes. If, according to PW1 herself, the teachers and her fellow pupils were calling her prostitute and shunning away from her, whether rightly or wrongly, we wonder what informed PW4's opinion and conclusion that PW1 was good mannered? We have also found it very queer that during her testimony PW1 was quite at ease with use of vulgar words in reference to acts allegedly committed by her father. Use of such words as "alinitomba" which PW1 comfortably repeated, strike us as odd and inconsistent with good manners, especially when uttered in relation to one's own father. If we may reproduce part of her testimony:

> *"Akinifanyia kiuchi mbele na nyuma. Alitumia uchi wake na yeye kunifanyia mbele na nyuma. Alitumia uchi wake wa mbele kuweka kwenye uchi wangu, akawa ananitomba."*

In the end, for the reasons we have shown, we do not share with the two courts below the view that PW1 was such a truthful witness whose evidence would ground a conviction. With respect, we find no merit in the learned Judge's observation that it is inconceivable that PW1 would tell a lie against her father. This is a witness who told a lie that the first man she had sex with was the appellant, while the appellant's evidence that at Tunduru she had been living with a man, had not been controverted. It is settled law that a witness who tell a lie on a material point should hardly be believed in respect of other points. See, among others, the case of **Bahati Makeja V. Republic**, Criminal Appeal No. 118 0f 2006 (unreported).

Given the tricky nature of the circumstances of this case, we have deemed it necessary to make some observations pertaining to the need to exercise care in handling cases of sexual offences. To begin with, the cautionary statement of Lord Chief Justice Mathew Hale made in the 17th Century seems to have become a thing of the past. The Lord Chief Justice stated in **People v. Benson**, 6 Cal 221 (1856), that rape;

"is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never so innocent."

In an article titled **THE EMPRICAL, HISTORICAL AND LEGAL CASE AGAISNT THE CAUTONARY INSTRUCTION A CALL FOR LEGISLATIVE REFORM, DUKE LAW JOURNAL** (*https:/scholarship.lawlduke.edv/egi/viewcontent.cig article-3025*) the author demonstrates by data, that the caution is no longer valid in many states in America.

We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim.

However we wish to emphasize the need to subject the evidence of such victims to security in order for courts to be satisfied that what they state contain nothing but the truth. Section 127(7) of the Evidence Act Cap. 6 R.E. 2002 provides:-

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

We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases.

We are highly persuaded by the decision of the Supreme Court of Philippines in the case of **PEOPLE OF THE PHILIPPINES V. BENJAMIN A. ELMANCIL, G. R.** No. 234951, dated March, 2019. The Court held:

> *"In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on accusation of rape can be make with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted solely on the basis thereof."*

Since PW1 was the star witness for the prosecution on whose evidence the conviction was mounted, it is our conclusion that the

conviction rested on weak unreliable evidence and should not be left to stand. Accordingly we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release, if he is not being held for another lawful cause.

DATED at **IRINGA** this 22nd day of August, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on this 23rd day of August, 2019 in the presence of Appellant in person and Ms Magreth Mahundi, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL