IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 342 OF 2017

RAJABU S/O PONDA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Feleshi, J.)

Dated 21st day of August, 2017
in
Criminal Appeal No. 103 of 2016

JUDGMENT OF THE COURT

16th & 26th August, 2019

MKUYE, J.A.:

The Resident Magistrate's Court of Njombe at Njombe convicted the appellant Rajabu Ponda of the offence of grave sexual abuse contrary to section 138C (1) (a) and (2) (b) of the Penal Code. He was sentenced to imprisonment for a term of twenty (20) years. His appeal to the High Court (Feleshi, J. as he then was) was dismissed hence this second appeal.

The facts as established by the trial court are that, the victim going by the name DM (PW1) (name withheld) was a standard one pupil at Mpechi Primary School. On 25/7/2016 she was called by a certain person (who came to be known as Rajabu Ponda) to go to his room. While inside the room that person undressed her clothes and started licking her anus, private parts and ears with his tongue. He also touched on her various parts of her body. Thereafter, he warned her not to tell anybody on what happened to her. PW1 dressed her clothes and went home.

Later on Desderia Kayombo (PW3) came home from church. She found PW1 crying. She took her inside the house and on asking her why she was crying she told her that Rajabu Ponda had called her in his house, undressed her and licked her private parts with his tongue.

PW3 in astonishment, called the victims' mother Wende Mng'ong'o (PW2) who was at the shamba and Rose Sambala (PW4), the landlady who rushed home and found PW1 crying. PW2 testified that she questioned PW1 and she said that Rajabu Ponda requested for ufagio (broom) and after she took it to him, he undressed her trouser and underpants and started licking her private parts and anus with his tongue. PW2, PW3 and PW4 testified that they inspected her and found some salivary juice in her

private parts and ears. Thereafter they took PW1 to the police station where they were issued with a PF3 and then went to Kibena Hospital where she was attended by the Doctor.

The appellant was arrested on the same date and taken to the Police Station at Njombe. WP 11153 DC Grace Nyamle (PW5) recorded his cautioned statement in which he admitted to cause grave sexual abuse to DM (Exh PE-A).

In his defence, the appellant admitted to have on 25/7/2016 morning, called DM to bring him the "ufagio" (broom). He testified that he swept his room while PW1 was there. There after he told her to take the rubbish. He testified further that as she was carrying that rubbish he cracked a joke calling her fiance "*mchumba mchumba*" while opening her clothes on her stomach. When cross-examined by the learned State Attorney Mr. Makungu, the appellant stated as follows:-

> *"...It is true that I opened her clothes and saw her stomach.*
>
> *-I agree that (sic) touched the vagina of **DM**."*

The trial court was satisfied that the prosecution particularly through the cautioned statement proved that the appellant touched PW1's private parts by using his hands. As we have alluded to earlier on, the appellant was convicted and sentenced.

On appeal to the High Court, the court found that the evidence on record by the victim (PW1) and the appellant himself left no room for the appellant to avoid the ends of justice to the charged offence. It upheld both the conviction and sentence.

In this Court the appellant has filed a memorandum of appeal consisting seven grounds of appeal which can be paraphrased as follows:-

(1) That, the evidence of PW1 was contradictory and doubtful.

(2) That, the evidence of PW2, PW3 and PW4 was a hearsay evidence which did not establish the charge.

(3) That, the prosecution side failed to call the doctor who examined PW1 to prove the charge as required by the law.

(4) *That, the prosecution side failed to establish that PW1 was sexually abused.*

(5) *That, appellate court did not take into account that the appellant was not checked to ensure his sanity for justice to be seen done.*

(6) *That, the appellant was wrongly convicted as the rules and procedures where not followed in the proceedings.*

(7) *That, the prosecution side failed totally to prove the case beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person and unrepresented whereas the respondent Republic had the services of Ms. Magreth Mahundi, learned State Attorney.

When given the floor to elaborate his grounds of appeal, the appellant opted to let the learned State Attorney submit first and reserved his right to rejoin later if need would arise.

On her part, Ms Mahundi from the outset declared her stance of not supporting the appeal. In responding to the grounds of appeal she sought

and leave was granted to begin with the 7th ground of appeal that the prosecution failed to prove the case beyond reasonable doubt. The learned State Attorney contended that this ground was baseless as four witnesses testified to prove the case. She pointed out that, PW1 in particular, testified to have been sexually abused by the appellant and that at the time of the incident they were only two of them, the appellant and the victim (PW1). After being abused, PW1 informed (PW3) who immediately called the victim's mother (PW2) to whom PW1 also mentioned the appellant as the person who abused her. Ms. Mahundi forcefully argued that the fact that PW1 mentioned the appellant immediately after the incident proved that she was a truthful and credible witness.

The learned State Attorney submitted further that even the appellant at page 23- 24 of the record of appeal admitted to have undressed the victim on the stomach and called her a fiancé "*mchumba*" and during cross-examination he again admitted to have touched the victims' private parts.

As regards the 3rd ground of appeal relating to failure by the prosecution to call the Doctor to testify in court, Ms. Mahundi urged us to find it to have no merit because, as PW1 testified that the appellant licked

on her private parts, the Doctor could not have detected anything worth to testify in court. After all, she said, in a situation where there is strong evidence from other witnesses the need of calling the doctor does not arise.

As regards the 1st, 2nd, 4th, 5th and 6th grounds of appeal, Ms Mahundi urged the Court not to consider them since they were not raised and determined by the High Court. She referred us to the case of **Abedi Mponzi v. Republic,** Criminal Appeal No. 476 of 2016 (unreported). In the end, she prayed to the Court to find the appeal has no merit and dismiss it in its entirety.

In rejoinder, the appellant prayed to the Court to consider his grounds of appeal and allow the appeal with an order for his release from prison.

Having considered the submissions from either side, we wish to begin with the submission by the learned State Attorney urging the Court not to consider the 1st, 2nd, 4th, 5th and 6th grounds of appeal for having not been raised and canvassed by the High Court. On our part, we agree with the learned State Attorney that the said grounds are new as they were not dealt with at the first appellate court. Since they were not dealt with by

the first appellant court they cannot be raised at this stage. This position was emphasized in the case of **Sadick Marwa Kisase v. Republic,** Criminal Appeal No. 83 of 2012 (unreported) where the Court stated:-

> *"The court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."* [Emphasis added].

The same position was also taken in the cases of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 416 of 2013; **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (both unreported).

In this regard, it is our finding that the 1st, 2nd, 4th, 5th and 6th grounds of appeal cannot be entertained for lack of jurisdiction to entertain them as per the dictates of the provisions of section 6(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 which specifically empowers this Court to deal with appeals from the High Court. (See also **Abedi Mponzi** (supra); and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 (unreported).

As regards the complaint in the 7th ground of appeal that the case was not proved beyond reasonable doubt, we think, we need to determine

whether PW1 was sexually abused and whether it was the appellant who did so.

After having examined the entire prosecution evidence we are of the view that PW1 was sexually abused. PW1 explained clearly on what befell her on the date of incident. She related on how on the material date 25/7/2010 the appellant called her to go to his room. She explained how that person undressed her clothes and started licking her anus, private parts and ears with his tongue. She also explained on how he touched her on various parts of her body by using his hands. At the end that person warned her not to tell any person on what happened to her. PW1 thereafter left and went home where she mentioned the appellant to PW2, PW3 and PW4 to be the one who sexually abused her.

We are aware that PW1 was a child of tender age whose evidence was taken after having promised to tell the truth on what happened in terms of section 127 (2) of the Evidence Act Cap to RE 2002 (the Evidence Act). Though her evidence under normal circumstances could require corroboration, in sexual offences cases, the sole evidence of the victim can

be relied upon to found a conviction. This is in terms of section 127 (7) of the Evidence Act which provides as follows:-

> *"127(7) Notwithstanding the preceding provisions of this section, where in a criminal proceeding* ***involving sexual offence the only independent evidence is that of a child of a tender years*** *or 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,*** *or 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 reason 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 added]

In this case, basically, the evidence that PW1 was sexually abused came from the victim alone, According to the above cited provision such evidence could be relied upon to convict the appellant for the offence charged without being corroborated.

Apart from that, the evidence of the victim regardless of her age can establish that she was sexually abused on the fateful date. On this we base

on the well-established principle by this Court that the best evidence in rape cases comes from the victim herself, if a woman where consent is required; and a girl where consent is immaterial. (See **Selemani Makumba v. Republic**, Criminal Appeal No. 94 of 1999 (unreported).

In this case, we are also satisfied that PW1 was the best witness to prove that she was sexually abused. Related to this, we find that the contention raised by the appellant in the 3rd ground of appeal that the PF3 was not produced in court or that the Doctor who examined the victim did not testify in court, is immaterial. This is so because, as was rightly submitted by the learned State Attorney, the offence having been committed in the form of licking the victim's anus, private parts and ears, the Doctor would not have detected anything unusual in the body of PW1. But again, we wish to emphasize that since PW1 had adduced a credible evidence that the appellant licked her private parts, anus and ears with his tongue, calling the doctor to testify in court was unnecessary.

Besides that, much as PW1's evidence could have sufficiently proved that the appellant committed the offence of grave sexual abuse to her, we find that the appellant also promoted the prosecution's case. We say so

because, in his caution statement admitted in court as Exh PE-A without being objected by the appellant, the appellant confessed to have on 25/7/2016 at about 09:30 hrs, called PW 1 to bring a broom (ufagio) in his room and that she brought it. He said, he started sweeping his room while PW1 was still in his room. He then told her to take the rubbish and that is when he started touching her breasts, undressing her shirt and touching her stomach and then her private parts. And when he was doing so he was calling her fiancé (mchumba, mchumba). From his confession in Exh PE-A, it is clear that the appellant admitted to have abused the victim in the manner we have explained above which tallies with PW1's evidence in material particular.

Also, the appellant in his defence went on to supported the prosecution's case by reiterating what he said in his cautions statement (Exh PE-A). This is reflected his testimony in chief at page 23 of the record of appeal where he stated:-

> *" ...when carrying rubbish, I called her to be my fiancé (mchumba). There I did open her clothes (stomach) nilimfunua tumbo."*

And yet during cross examination by the learned State Attorney Mr. Makungu, the appellant is recorded to have said:-

> *"....It is true that I opened her clothes and saw her stomach.*
>
> *-I agree that I touched the vagina of **DM.**"*

In this regard, looking at the evidence of PW1, the cautioned statement of the appellant and his defence evidence, we entertain no doubt that the appellant had indeed committed a grave sexual abuse to PW1.

We also take note that the victim PW1 mentioned the appellant to PW1, PW2 and PW3 to be the one who abused her and she did so while crying. It has been a long established position of this Court that the ability of the witness to name the suspect at the earliest possible opportunity is vital for assurance of reliability (See **Wangiti Marwa Mwita & Others v. Republic** Criminal Appeal No. 6 of 1995 (unreported). As the witness mentioned the appellant at the opportune time we find out the she was a reliable witness as regard the person who abused her.

In the event, looking at the totality of the evidence, we are satisfied that the prosecution proved the case beyond reasonable doubt that PW1 was sexually abused by none other than the appellant.

Hence, we find the appeal to have no merit. We accordingly dismiss it in its entirety.

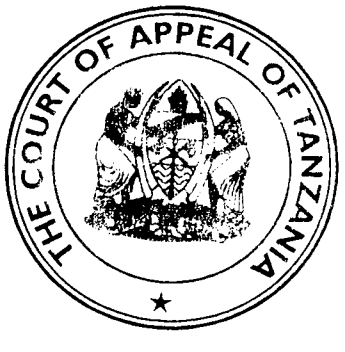
DATED at **IRINGA** this 23rd day of August, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of August, 2019 in the presence of Mr. Rwezaura Mwijage, counsel for the Appellant, Mr. Alex Mwita assisted by Hope Massangu learned State Attorney, for Respondent/Republic and in the presence of the Respondent in person, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL