IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 28 OF 2017

HASHIM S/O AMASHA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgement of High Court of Tanzania at Mbeya)
(Mambi, J.)

dated the 27th day of January, 2017
in
Criminal Appeal No. 80 of 2015
.....

JUDGMENT OF THE COURT

27th & 29th August, 2019

NDIKA, J.A.:

This is a second appeal by Hashimu Amasha, the appellant, who was before the District Court of Chunya at Chunya charged with and convicted of rape contrary to sections 130 (1) and (2) (e) and 131 (3) of the Penal Code, Cap. 16 RE 2002 (the Code). Apart from being sentenced to thirty years' imprisonment with eight strokes, he was ordered to pay the victim TZS. 2,000,000.00 as compensation. His first appeal to the High Court of Tanzania at Mbeya was barren of fruit as Mambi, J. dismissed it in its entirety. The dismissal was accompanied by more desolation as Mambi, J. enhanced the sentence to the mandatory life imprisonment in terms of section 131 (3) of

the Code in view of the age of the victim being under the age of ten years. Being aggrieved by the outcome of his first appeal, the appellant now appeals to this Court.

It was the prosecution's accusation that on or about 19th July, 2014 at Kimbelekete Hamlet of Mapogolo Village within Chunya District in Mbeya Region, the appellant had carnal knowledge of "PS", a girl aged five years. In proving the charge at the trial, the prosecution produced four witnesses and a medical examination report (PF.3) on the victim – Exhibit P.1. Conversely, the appellant testified on oath but called no witness.

After a *voire dire* test on her, PS gave evidence as PW1 without oath. In the fateful evening she was at the home of Mama Nelly, her maternal aunt, who used to sell local brew. The brew attracted to her home quite a number of carousers including the appellant. Around 19:00 hours that evening, the appellant grabbed PS, quietened her by shoving a piece of *khanga* on her mouth and carried her on his shoulders all the way to a nearby anthill. While there, he removed PS's clothes as well as his trousers and then had forced carnal knowledge of her. Once he was done, he threatened PS that he would kill her if she divulged to anybody what had befallen her. Then and there, he fled the scene.

PW1 remained at the scene alone for a while in deep pain and agony with her private parts injured. She finally collected herself and walked back home but she told nobody of the sexual attack as she feared the appellant's possible reprisal.

PW1's elder sister, "SG", gave evidence as PW2. She recalled visiting at Mama Nelly's home on 25th July, 2014. While there her younger sister appeared sickly. After a brief conversation with her, she confided to her what the appellant did to her on 19th July, 2014, saying that she could not tell anybody for fear of the appellant's threats. On examining PW1's female organ, PW2 saw bruises and yellowish discharge.

PW3 Mary Peter Mkombozi, a Clinical Officer who attended PW1 at Chunya District Hospital on 26th July, 2014 at 10:15 hours, said that PW1's female organ revealed whitish vaginal discharge and sustained pains with no hymen. The victim also had some infection. The PF.3 was admitted as Exhibit P.1. A police investigator, No. G.8186 D/C Ibrahim (PW4), also gave evidence but his account mostly rehashed what he learnt from the witnesses in his interviews with them.

In his sworn defence evidence, the appellant disassociated with the accusation by the prosecution. He recounted to have been arrested by a mob

at 8:00 hours on 19th July, 2014 over PW1's alleged rape. But then he gave what appears to be a long winded tale suggesting that the case against him was framed up mainly because PW1's mother had grudges against him.

The learned trial Resident Magistrate found PW1's evidence truthful and credible; that it linked the appellant to the criminal act committed on her. Further, it was held that PW1's account was sufficiently corroborated by the evidence of PW2 and PW3 as well as the PF.3 (Exhibit P.1). Accordingly, the learned trial Resident Magistrate convicted the appellant of the charged offence and sentenced him as stated earlier.

The High Court, as hinted earlier, dismissed the appellant's first appeal as it affirmed the trial court's finding that there was sufficient evidence to sustain a conviction against the appellant. As stated earlier, the Court increased the sentence to the mandatory life imprisonment in terms of section 131 (3) of the Code.

Resenting the outcome of his first appeal, the appellant has come to this Court in this second appeal raising a total of eight grounds of appeal, which, in our view, can be condensed into six points of complaint: **first**, that the evidence that he was recognised at the scene of the crime as the culprit was not watertight; **secondly**, that the age of the victim was not sufficiently

proven; **thirdly**, that the *voire dire* examination on PW1 was improperly conducted rendering PW1's evidence liable to be discounted; **fourthly**, that the medical evidence adduced at the trial by PW3 and supported by the PF.3 could not sustain conviction for rape; **fifthly**, that his defence evidence was fully considered; and **finally**, that the prosecution did not, on the whole, establish its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person while Mr. Ofmedy Mtenga and Ms. Hanarose Kasambala, learned State Attorneys, represented the respondent.

On his part, the appellant adopted his grounds of appeal and urged us to allow his appeal, without more.

Responding, Ms. Kasambala strongly contested the appeal. To start with, she denied the complaint that the appellant was not properly identified, arguing that PW1 was familiar with him as both came from the same village (Mapogolo village) and that he used to visit her home for a drink with his colleagues. She stressed that PW1 gave a straightforward and convincing narration of the events that happened culminating with the appellant taking her to an anthill where, having undressed her and himself, he raped her. That since the victim and the appellant were in close contact she properly

identified him as the rapist. She added that PW1's evidence was not controverted because the appellant did not cross-examine her or adduce any evidence in his defence on that aspect. To support her submission, the learned State Attorney referred us to the case of **Duda Ndugali v. Republic**, Criminal Appeal No. 237 0f 2004 (unreported).

On the victim's age which was an essential ingredient of the charged offence, Ms. Kasambala submitted that it was sufficiently proven that she was seven years at the material time. In this regard, she cited PW1's evidence at page 22 of the record of appeal that she was 7 years old, the evidence of PW2 (PW1's elder sister) at page 25 that she was age 7 years and PF.3 (Exhibit P.1) at page 41 that she was 6 years and eight months old. She observed that although PW4 (the police investigator) said the victim was 5 years old, that contradiction was immaterial.

Submitting on the conduct of the *voire dire* examination on PW1, Ms. Kasambala argued that the test was properly conducted by the learned trial Resident Magistrate, as shown at pages 22 and 23 of the record of appeal, by asking appropriate questions aimed at determining if the said witness understood the meaning of an oath and, if not, whether she possessed sufficient intelligence and understood the duty to speak the truth. The

learned trial Resident Magistrate rightly determined that PW1 did not know the meaning of oath and allowed her to adduce evidence without oath. The appellant was then allowed to cross-examine her as shown at page 23 of the record. Reliance was placed on our decision in **Tumaini Mtayomba v. Republic**, Criminal Appeal No. 217 of 2012 (unreported).

Regarding the ground that the medical evidence adduced at the trial by PW3 and supported by the PF.3 could not sustain conviction for rape, the learned State Attorney contended that the appellant's conviction was founded not just on evidence adduced by PW3 (the medical witness who attended the victim) and PF.3. The conviction was also anchored on the evidence of the victim and her elder sister (PW2). She cited the case of **Selemani Makumba v. Republic** [2006] TLR 384 to support her proposition that PW1's evidence, being an account from the victim of the charged offence of rape, was the best evidence in the circumstances to establish the offence.

Ms. Kasambala rejected the claim that the appellant's defence was ignored. Referring to the learned trial Resident Magistrate's judgment at pages 70 to 74 of the record of appeal, she submitted that the appellant's defence was fully considered but it was rejected. On the final ground questioning whether there was sufficient proof to sustain a conviction against

the appellant, the learned State Attorney said that the evidence adduced by PW1, PW2 and PW3 supported by Exhibit P.1, on the whole, proved the charged offence.

Rejoining, the appellant questioned the probity of the victim's claim that she was raped on 19th July, 2014 while the PF.3 was issued on 26th July, 2014, which was four days after he had been arrested on 22nd July, 2014.

We wish to state at the very outset that we are guided in our determination of this appeal, it being a second appeal, by the principle that the Court would not normally interfere with the concurrent findings of fact made by the courts below unless they are perverse or demonstrably wrong: see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

We begin our determination of the appeal by addressing the first complaint, which raises the issue whether the appellant was positively identified at the scene. Without any qualms, we are of the opinion that the appellant was properly identified as the person who committed the depraved sexual act on the prosecutrix. To reach that conclusion, we have taken into account that PW1 and the appellant were familiar with each other as they

came from the same village (Mapogolo village) and that he used to visit her home (Mama Nelly's home) for a drink with his colleagues; that even if it was in the evening the victim and the appellant were in close contact allowing PW1 to observe and recognize him properly as the assailant; and that PW1 gave a straightforward and convincing chronicle of the events that happened culminating with the appellant taking her to an anthill where, having unclothed her and himself, he raped her. We are also in accord with Ms. Kasambala that it is most significant that PW1's evidence of identification was not controverted as the appellant shied away from cross-examining her on that aspect or specifically challenging that piece of evidence in his defence. It is trite law that failure to cross-examine a witness on an important matter implies the acceptance of the truthfulness of the witness's evidence – see **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992; **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007; **Ismail Seleman Nole v. Republic**, Criminal Appeal No. 117 of 2013; and **Niyonzima Augustine v. Republic**, Criminal Appeal No. 483 of 2015 (all unreported).

We are conscious of the principle in the celebrated decision of the Court in **Waziri Amani v. Republic** [1980] TLR 250 that visual identification should only be acted upon after all possibilities of mistaken identity have

been eliminated. In the instant case, we are satisfied, based on the circumstances that we have mentioned above, that there was no possibility of a mistaken identification. In the circumstances, we agree with the learned State Attorney that the appellant was properly identified by the victim as the assailant. Thus, there is no cause for interfering with the concurrent finding of the courts below based on evidence that was found credible and reliable that the appellant was properly recognized. The complaint under consideration is unmerited and we dismiss it.

On the victim's age, we hasten to say that we are in full agreement with Ms. Kasambala that it was sufficiently proven that she was seven years at the material time. Indeed, besides PW1 identifying herself at page 22 of the record as being 7 years old at the time she adduced evidence at the trial, her elder sister (PW2) testified, as shown at page 25, that her younger sister was aged 7 years. We think that PW2, being an elder sister, aged 20 years at the time she adduced evidence, was a credible and reliable person on that aspect. We note that the appellant did not bring any issue with it when he cross-examined PW3. Besides, we note further that PW3 (the Clinician), indicated on the PF.3 (Exhibit P.1), shown at page 41 of the record, that PW1 was 6 years and eight months old at the time she was brought to her at the hospital for examination. Admittedly, PW4 (the police investigator) adduced

at the trial that the victim was 5 years old, which was obviously contradictory. Nonetheless, we are of the same mind as Ms. Kasambala that this piece of evidence by PW4 does not bring up any material contradiction. At any rate, it does not deflect the fact that the victim was a girl under the age of ten years, a necessary ingredient of the offence the appellant was charged with. This complaint lacks merit. It stands dismissed.

As regards the *voire dire* examination on PW1, we are persuaded by Ms. Kasambala that the said test was properly conducted by the learned trial Resident Magistrate, as shown at pages 22 and 23 of the record of appeal, by asking appropriate questions aimed at determining if the said witness understood the meaning of an oath and, if not, whether she possessed sufficient intelligence and understood the duty to speak the truth – see, for example, **Jafason Samwel v. Republic**, Criminal Appeal No. 105 of 2006 and **Kimolo Mohamed @ Athumani v. Republic**, Criminal Appeal No. 412 of 2015 (both unreported). The learned trial Resident Magistrate rightly determined that PW1 did not know the meaning of oath and allowed her to testify without oath and be cross-examined by the appellant.

It is worth mentioning that in the course of evaluating the evidence on record, the learned trial Resident Magistrate was aware that PW1's testimony

being an unsworn statement required corroboration although it could also be acted upon without corroboration in terms of section 127 (7) of the Evidence Act, Cap. 6 RE 2002 if the court was satisfied that it was nothing but the truth. Having evaluated the evidence on record he came to the conclusion, at page 50 of the record, that "the child is telling nothing but the truth." We wish to emphasise here that the determination of the credibility of the victim's testimony is a most basic consideration in every trial involving a sexual offence, for a single witness's testimony, if credible is sufficient to sustain a conviction. In addition, the learned trial Resident Magistrate took the view that the evidence of PW1 and PW3 with the support of the PF.3 was "substantial" and that it proved that the victim was sexually assaulted. These findings were upheld by the first appellate court. We find no reason to interfere with these concurrent findings. The ground of appeal at hand fails.

In dealing with the ground that the medical evidence adduced at the trial could not sustain conviction for rape, we examined the evidence adduced by the Clinician (PW3) and the PF.3 (Exhibit P.1) that she tendered as well as how that evidence was treated by the courts below. It defies dispute that PW3 told the trial court that upon examining PW1's female organ, it revealed whitish vaginal discharge and ruptured hymen and that the victim experienced constant pains and had an infection. That much was

captured in the PF.3. In our considered view, even though the examination was done on 26th July, 2014, about seven days after the criminal act had occurred on 19th July, 2014, PW3's findings were convincing and consistent with PW1's claim that she was ravished. It established the crucial element of penetration.

We would also agree with Ms. Kasambala that the appellant's conviction was not anchored solely on the medical evidence adduced at the trial. The trial court's judgment bears out that the appellant's conviction was founded on the totality of the evidence adduced at the trial – the testimonies of PW1, PW2 and PW3 along with the PF.3. Even, for the sake of argument, were the medical evidence ignored for a moment, PW1's evidence, being the victim's evidence is the best proof of the sexual offence perpetrated against her as the Court held in of **Selemani Makumba** (supra), cited to us by Ms. Kasambala. We find it instructive to extract the relevant statement of that principle thus:

> *"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 woman where consent is irrelevant, that there was penetration."*

The complaint against the medical evidence is, as a consequence, devoid of merit. We dismiss it.

The appellant's complaint that his defence was not considered is decidedly hollow. We wish to recall that when he was put on his defence, the appellant made a general denial of the accusation against him and raised what appears to us to be a long winded tale suggesting that the case against him was framed up mainly because PW1's mother had grudges against him. As rightly submitted by Ms. Kasambala, this defence was considered but rejected by the learned trial Resident Magistrate in his judgment at pages 70 to 74 of the record of appeal. At any rate, his line of defence was inherently weak and hence liable to be rejected in view of the evidence that the courts below found credible and truthful that he was positively identified by the victim, who also gave a straightforward and convincing account detailing the circumstances and events leading to the depraved and appalling sexual act. This complaint too is without substance. It fails.

On whether there was sufficient proof to sustain a conviction against the appellant, we have no hesitation to hold, as we have sufficiently demonstrated herein above, that the evidence adduced by PW1, PW2 and PW3 supported by Exhibit P.1, on the whole, proved that the appellant had

sexual intercourse on 19th July, 2014, with PW1, a girl under the age of ten years. He was rightly convicted of the charged offence and his enhanced sentence, being the mandatory penalty for that offence, is proper. Accordingly, the final ground of appeal is bereft of substance. We dismiss it.

In the final analysis, we find the appeal unmerited. It is dismissed in its entirety.

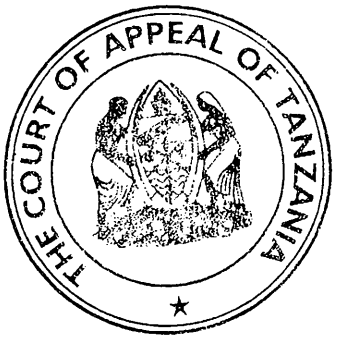
DATED at **MBEYA** this 29th day of August, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent Republic and the appellant in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL