IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 17 OF 2017

OSWARD KASUNGA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

dated the 22nd day of November, 2016
in
Criminal Appeal No. 103 of 2015

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JUDGMENT OF THE COURT

19th & 27th August, 2019

SEHEL, J.A.:

This is a second appeal by the appellant, Osward Kasunga whose first appeal at the High Court was dismissed and conviction on the offence of rape and sentence of life imprisonment imposed on him by the District Court of Rungwe were sustained. It was alleged in the particulars of the offence that between 21st day of October and 21st day of December, 2013 at Lusungo village within Rungwe District in Mbeya Region, the appellant had carnal knowledge to one, T.M, a girl aged 8 years.

The relevant background facts leading to the present appeal are that on 19th day of December, 2013 Theresia John, PW1 was at home. Her daughter, the victim who testified at the trial court as PW2 was outside playing with her friends. While PW1 was inside the house she overheard the children telling PW2 that they will report to her mother of what she had been doing with the appellant. Having heard that PW1 went out and asked the children what was it all about but they remained quiet. She then had to interrogate PW2.

It is at this moment when PW2 had to tell her mother that while she was returning home from school with her friends the appellant whom she referred to as "Babu Filato" called them and offered them banana fruits. Whilst they went to collect, the appellant discharged her friends and she remained with him. The appellant then took her to his room, undressed her and had sexual intercourse with her. Thereafter, Babu Filato gave her ripe banana and TZS 200.00. However, he warned her not to tell anyone otherwise she will be punished. She said the appellant did so on two occasions. First, when PW2 was with Jack and her other friends and at the second time she was with Bit and Faraja. It is pertinent to state here that according to the evidence of PW1 and DW2, Babu Filato is the other name of the appellant.

Upon hearing that story, PW1 went to report to his brother one Jackson John who convened a meeting. That meeting was attended by a ten cell leader, one Willium Segesa Kila (DW2) and neighbours amongst them were; Joseph Mbwile (PW3) and Joseph Mwasege (PW4). In that meeting, PW2 was requested to narrate the whole story again, which she did.

The meeting resolved to summon the appellant whereby he heeded to the call but he vehemently denied the allegation and he requested for medical examination to be conducted. According to the evidence of PW1, the child (PW2) was taken to Makandana hospital by her father, the ten cell leader, DW2 and Jackson John. PW2 was examined by Dr. Geofrey Sanga (PW5) whereby the examination report, PF3 which was received as Exhibit P1, showed there were neither the bruises nor wounds but her virginity was lost. Later, the matter was reported to the police. The appellant was arrested and charged with the offence of rape.

In his defence at the trial court, the appellant admitted to have been summoned at the meeting but denied raping PW2. He told the trial court that he was asked at the meeting to admit the allegation which he refused and instead he proposed for the medical examination to be conducted on PW2. Basing on the results issued by the Doctor, Exhibit P1, the appellant insisted

that he did not rape PW2. As part of his defence, he called Willium Segesa Kila (DW2) a ten cell leader who confirmed there was a meeting convened at Jackson's house and it was him who went to call the appellant to attend the meeting. In his cross examination, DW2 asserted that he did not think PW2 was telling lies. He said PW2 showed and pointed to the appellant as the person who raped her.

On the basis of the evidence, the trial court was satisfied that PW2 was credible and reliable witness whose evidence was the best in rape cases. The trial court further observed that the appellant did not cross-examine PW2 on the allegation of banana fruits and on the description of his room. So the offence of rape with which the appellant stood charged was found to have been proved to the hilt. Aggrieved with that finding, he unsuccessfully appealed to the High Court. Still aggrieved he has come to this Court.

The appellant had filed a memorandum of appeal comprising eleven grounds. However, they can be easily condensed into four: **First,** that there was no evidence to prove rape as the testimony of PW2 was uncorroborated and that the complainant's claim that she was raped was not corroborated by the doctor's evidence that there were no bruises or wounds. **Second**, that there was no proof of age of the victim. **Three**, that his defence was not

considered by both courts below. **And four**, that no witness was called to testify on the date appearing in the charge sheet which is between 21st October to 21st December, 2013.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Ofmedy Mtenga, learned State Attorney.

When given the chance to submit on his appeal, the appellant opted for the learned State Attorney to respond to his grounds and he reserved his right to rejoin.

The learned State Attorney supported the conviction and sentence passed against the appellant by the trial court and later on confirmed by the High Court. Relying on the principle established by this Court in proving rape offences, he argued that in this appeal the evidence of PW2 was the best evidence. He took us through the evidence of PW2 by stressing on key points that pointed a finger at the appellant's guilt. First, PW2 mentioned the appellant by his name is as "Babu Filato" which name according to PW1 was the nickname of the appellant and PW2 described the appellant as their neighbour. Therefore, Mr. Mtenga argued that the appellant was not a stranger to PW2, she knew him very well. Secondly, PW2 gave a detailed

account on the appearance of the appellant's room by describing the positioning of the bed, cups, table and windows wherein the appellant had sexual intercourse with PW2, twice. Mr. Mtenga wondered how the victim could have known all these details of the room if she had not been in it before. Thirdly, PW2 mentioned the names of the friends with whom she was with when they were called by the appellant to take banana fruits. To cement his submission the true and best evidence of a sexual offence is that of a victim, Mr. Mtenga cited the case of **Selemani Makumba v. Republic** [2006] T.L.R 384. Further, he said the provisions of section 127(7) of the Evidence Act, Cap 6 RE 2002 empowers the Court to base a conviction on the evidence of the victim of rape without any corroboration as long as the Court is satisfied that the witness is telling the truth.

Lastly on this ground, Mr. Mtenga contended that PW5 corroborated the evidence of PW2 when PW5 said the victim had no hymen which proves there was penetration even though there were no bruises or wounds.

Responding on the age of the victim, the learned State Attorney conceded that the mother of the victim, PW1, did not give evidence on the age of the victim. That apart, he said at page 34 of the record, PW5 who was the doctor informed the trial court that he received a patient aged about 8

years. It was the view of Mr. Mtenga that the age of the victim was proved by this prosecution witness. Mr. Mtenga further contended that in any event the age of the victim was not an issue at the trial court because even the appellant himself, at page 40 of the record, acknowledged that the victim was eight years old whom he said it was impossible for him to have sexual intercourse.

Regarding dates on the charge sheet, Mr. Mtenga stressed that PW2 was coherent in her evidence that it was the appellant who raped her twice but since she was threatened she could not report the matter until when her mother, PW1 pinned her on 19th December, 2013 having heard the children threatening PW1 that they will report to her mother on what she does with Babu Filato that is when she was able to tell. Therefore it was the contention of Mr. Mtenga that the two incidents took place few days before PW1 came aware, that is between 21st October and 21st December, 2013.

On the issue of the appellant's defence not been considered, Mr. Mtenga urged us not to find merit on the complaint because the record speaks itself at pages 56 to 57 that it was considered and determined by the trial court on basis of PW2's evidence on the graphics of the appellant's room which was not contested by the appellant.

In conclusion, Mr. Mtenga urged us to dismiss the appeal because of the strength of the prosecution's evidence which the trial court found to be cogent against the appellant and in the light of the concurrent findings of the first appellant court.

The submission made by Mr. Mtenga provoked a response from the appellant who in essence repeated his grounds of appeal and prayed to be set free.

At the outset we wish to restate that this is the second appeal. It is very rare for a second appellate Court to interfere with concurrent findings of fact by the courts below unless there are misdirections or nondirections on the evidence, a miscarriage of justice or a violation of some principle of law or practice. (See **The Director of Public Prosecutions v Jaffari Mfaume Kawawa** (1981) TLR 149 and **Mussa Mwaikunda v Republic,** [2006] TLR 387). The rationale behind that it is because the trial court having seen the witness is better placed to assess their demeanour and credibility whereas the second appellate court assessed the demeanor and credibility from the record.

In determining the present appeal, we shall be mindful of that principle. We shall start with the complaint regarding the evidence of PW2,

that it was not corroborated. Here we asked ourselves whether there is a requirement for corroboration and whether lack of it would render the evidence of PW2 unacceptable. It is the law, as rightly submitted by Mr. Mtenga that corroboration is not mandatory in cases involving sexual offences, so long as the trial court is satisfied that the witness is telling the truth and the said court records its reason for holding so. This is clearly provided under Section 127 (7) of the Evidence Act (supra) that reads:

> *"(7) Notwithstanding the preceding provisions of this section, where* ***in criminal proceedings involving sexual offence the only independent evidence is that of 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*** *or of a victim of the 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 provided)*

In the instant appeal, both the trial court and the first appellate court found PW2 to be a reliable and credible witness. The trial court gave its

reasons at pages 56 to 57 as to why it believed the evidence of PW2. For ease of reference we reproduce that part:

> *"It is the view of this court there is no reason to disbelieve the evidence of PW2 basing on the fact that her testimony in regard to identification has not been shaken in anyhow."*

Another reason stated by the trial court is the detailed description of the room of the appellant given by PW2 and how the appellant used to lure her by ripe banana. The first appellate court in dismissing the appellant's first appeal considered the same evidence. This is gathered at page 71 of the record of appeal.

On our part, given the status of the evidence of PW2 we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair and impartial decision. We have no reason to differ with them in aspect of the evidence of PW2 which was so descriptive and coherent that no court could have ignored it. For instance at page 24 she described the graphics of appellant's room as follows:

> *"I know the accused house very well. It has a room and a sitting room. The bed of the accused has a mat and a blanket also there is a bed sheet. I slept on the mat. In the accused sitting room there is a table,*

flask, cups and on the table there is Jaba and dumu. Previously, the bed was on the one side of the wall and when I went for the second time, he shifted the bed to the other side. The room has a window but he always closed it."

The above piece of evidence of PW2 tells it all. It is an illustration that PW2 had been in the appellant's room. Why she had been in that room? PW2 told the trial court that the appellant used to call her with her friends to take banana but instead he took her into his room that has one window which is always closed and raped her on his bed that has mat, blanket and bed sheet, not once but twice.

In the case of **Nguza Vikings @ Babu Seya and 3 Others v. Republic**, Criminal Appeal No. 56 of 2005 (unreported) wherein the appellants were appealing against the concurrent findings of the lower courts and in that appeal we sustained the conviction of rape against the first appellant on counts seven and twelve and also sustained a conviction of gang rape against the first and second appellants on counts ten and eighteen we held that the descriptive account of the room of the first appellant was corroborative evidence on who committed the offence. We said:

"Now what was the corroborative evidence on record? That was the description of the room of the 1st

appellant. PW9 said there was a mattress on the bed and another on the wall and that some of the children were put on the bed and others on a mattress on the floor."

In the present appeal, we still hold that the descriptive account on the appellant's room given by PW2 is corroborative evidence in proving the offence of rape against the appellant.

There is also another important complaint in this ground of appeal which we have to address here. The appellant banked on the doctor's report, exhibit P1 that it does not give an indication of rape (such as lacking bruises or wounds), therefore the case was not proved beyond all reasonable doubts. Indeed, Exhibit P1 appearing at pages 44 and 45 of the record reads there were neither bruises nor wounds except the virginity/hymen was not seen. The reason for the absence of wounds and bruises was explained by the doctor who examined PW2 and testified as PW5 that it was due to the passage of time. PW5 said since the child was found not to have a hymen in his opinion, the child was raped.

In the case of **Selemani Makumba v. Republic** (supra) we said:

"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it

does not prove that there was rape, that is unconsented sex, even if bruises are observed in the female sexual organ. 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."

Consequently, we find, like the lower courts, the evidence of PW2 in its totality leaves no doubt that T.M, a child of eight years old was raped and the person who raped her was the appellant. On this ground, we are of the firm view that there is no fault in the factual findings of the two courts below for this second appellate court to interfere.

We move now to issue of age of the victim. We have reviewed the record and observed that it is true that neither the mother PW1 nor PW2 put forward the evidence regarding the age of PW2. However, we find that piece of evidence from the evidence of PW5 at page 34 of the record when he said he received a patient of about 8 years. The evidence of PW5 tallies with the evidence of the appellant himself when he said at page 40 of the record that it was impossible for him to rape a child of 8 years. In that respect, we are in agreement with the submission made by the learned State Attorney that the

age of the victim though not stated by the mother of the child, PW1 was proved by the prosecution through its witness PW5.

Coming to the complaint about failure of the two courts below to consider his defence. This complaint shall not detain us much because the record of appeal speaks loudly that the appellant's defence was considered. At page 56 of the record the trial court considered the evidence as follows:

> *"In his part the accused denied to had rape the victim. But the accused did not refute the fact that PW2 was well aware about the appearance of the room where they used to conduct sexual intercourse the accused has not refuted the fact that he was giving the victim, PW2, the ripen bananas."*

From the above, it is no gainsaying that the trial court did consider his defence and overruled it due to the strength of the prosecution evidence. It is unfortunate that the first appellate court did not address it although the appellant raised it in his petition of appeal that is appearing at pages 60 and 61 of the record of appeal. It was raised as ground number seven. We, on our part as the second appellate court, have to evaluate that evidence in order to satisfy ourselves on whether or not the conviction of the appellant was justified or not. We have carefully done so and we are satisfied that had the first appellate court considered it, it would have come to the same

conclusion due to the overwhelming evidence of the prosecution coming from PW2, PW5 and exhibit P1. Besides, his own witness, DW2 supported the prosecution's case when he told the trial court he did not think PW2 was lying.

Lastly, we deal with the complaint on the dates appearing in the charge sheet. In this appeal it is common cause that none of the witnesses testified on the specific date (s) during which the alleged sexual intercourse(s) between the appellant and PW2 had occurred, except there is evidence from PW1 that she became aware of the appellant's acts over her daughter (PW2) on 19th day of December, 2013 after she had interrogated her on what she had been doing with the appellant. Having interrogated her, PW2 gave a detailed account on how the appellant lured her with ripe bananas and ended up ravishing her on his bed. Almost similar charges were leveled against the appellants in the case of **Nguza Vikings @ Babu Seya and 3 Others v. Republic** (supra). For instance at page 47 of the judgment reads:

> *"In count 22 the complainant is Dei Jaffari (PW13). The offence was alleged to have been committed against her during unknown time between September and October, 2003. In her testimony she said she was raped by the 1st appellant. The doctor confirmed that she was raped. The PF3 form was admitted in*

evidence as Exhibit P9. This is the witness who showed the trial magistrate how they used to go to the house of the 1st appellant from the school and how they gained access to the house. As indicated in count seven she also gave a description of the room of the 1st appellant which was as we have shown is corroborative evidence on who committed the offence. From the analysis of the defence of the 1st appellant, in count 7 we are satisfied that this offence was equally proved beyond doubt in respect of the 1st appellant."

We fully associate ourselves with the position we took in **Nguza Vikings @ Babu Seya and 3 Others v. Republic** (supra). As indicated herein, PW2 gave a distinctive account on the appearance of the appellant's room which account was not put in question by the appellant when he was given a chance to cross examine the witness. We have also considered his defence especially that of his witness DW2 and we are of the firm position that the offence of rape against the appellant was proved to the hilt.

For the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts as we are satisfied that the evidence taken as a whole established that the prosecution case against

the appellant was proved beyond reasonable doubt. Accordingly, we hereby dismiss the appeal.

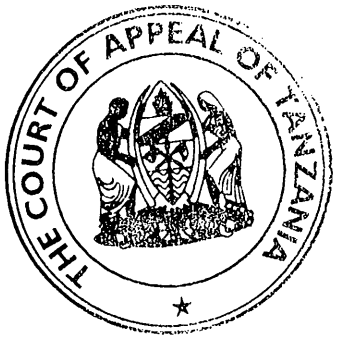
DATED at **MBEYA** this 27th day of August, 2019.

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 27th 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