IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 108 OF 2017

MOHAMED SELEMAN @ NYENJE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mutungi,J.)

dated 24th day of November, 2016
in
Criminal Appeal No. 31 of 2016

JUDGMENT OF THE COURT

15th & 28th August, 2019

MKUYE, J.A.:

In the District Court of Tunduru at Tunduru, the appellant Mohamed Seleman @ Nyenje was arraigned for an offence of rape contrary to section 130(1) and 2(e) of the Penal Code, Cap 16 R.E 2002. The particulars of the charge were that the appellant, on 27th day of May 2016 at about 18.06 hrs at Lugunga area within Tunduru District in Ruvuma Region did have carnal knowledge of one **A** d/o **S** a girl aged six (6) years. Upon a full trial, he was convicted and sentenced to life imprisonment and a

corporal punishment of six strokes of the cane. His first appeal against his conviction and sentence was dismissed by the High Court of Tanzania at Songea (Mutungi,J.) for lack of merit. Still dissatisfied, he has preferred this appeal.

The facts giving rise to this appeal are that on 27/5/2016 at about 18.00 hrs Tabia Yusufu (PW2) was at her home. As she was heading to attend a call of nature at the latrine, she saw Mohamed Selemani Nyenje (appellant) calling "we dogo we dogo njoo". Then she heard another voice which she recognized to be of **AS** (PW1) asking where should she pass to get through where she was called. PW2 again heard a male voice telling her to pass through the backyard and go where he was. Though PW1 seemed to hesitate, the male voice insisted that she should go.

Meanwhile PW2 became suspicious. She decided to call her neighbour Fatu Rashid (PW3) and they decided to go to the house where PW1 had entered. They knocked on the door several times but nobody responded. They entered inside and when they knocked on the door to the second room they saw the appellant (DW1) who came to open the

door while his trouser was hanging down. They peeped inside that room and saw PW1 lying on the floor facing up while holding her underparts. PW2 and PW3 asked the appellant as to what he was doing with the child but he did not respond. They decided to raise alarm and the appellant fled away. PW1 was left crying. Suspecting that PW1 might have been raped, PW2 and PW3 took PW1 to her parents.

Thereafter, the matter was reported to the police whereby the PF3 was issued by G.6220 D/Constable Mangi (PW4) and the victim who was not able even to walk was taken to Kiuma Hospital where she was examined and treated by David Mbashani Kapela (PW5). The appellant was arrested and arraigned before the court.

When the appellant was addressed on his right to defend himself after the trial court had found that a prima facie case had been established against him, he opted not to defend his case and left it to the court to decide. In his words he said:-

"I opt not to defend my case. I leave to the court to decide".

As alluded earlier on, the appellant was convicted and sentenced.

The appellant filed a memorandum of appeal comprising six grounds of appeal which can be summarized as follows: **One,** that the *voire dire* test conducted under section 127(2) of the Evidence Act did not show that the victim understood the meaning of oath; **two,** that the PF3 did not show sperms into the victim's vagina and that the same was filled on 2/6/2016 while the victim was examined on 27/5/2016. **Three,** the evidence of the Doctor was contradictory as during cross examination he said he examined the whole body of the victim. **Four,** the evidence of PW2 did not corroborate the story of the victim. **Five**, the trial court relied on the prosecution evidence which was from family members; and **six,** none of the VEO, Chairman, ten cell leader or WEO from the area where the event occurred was called to testify in court.

When the appeal was called on for hearing, the appellant who appeared in person and unrepresented opted to hear from the learned Senior State Attorney first and reserved his right to rejoin later if need would arise. On the other hand, the respondent Republic had the services of Ms. Tulibake Juntwa learned Senior State Attorney.

From the outset Ms. Juntwa declared her position that she supported both the conviction and sentence meted out against the appellant. While

acknowledging that all the grounds of appeal except the 1st ground were new she urged the Court to entertain all the grounds of complaint on account of meeting the interest of justice. Submitting on the 1st ground of appeal on the improper *voire dire* test the learned Senior State Attorney argued that it was properly conducted under section 127(2) of the Evidence Act as the trial magistrate showed in her finding that the witness can answer questions truthfully, and that though she did not know the meaning of oath she was a competent witness. She submitted further that in terms of that section before it was amended, the trial magistrate was required to establish three elements which were understanding the nature of oath; understanding the duty of speaking the truth; and whether the witness of a tender age possessed sufficient intelligence for reception of her evidence. For that matter, she stressed that all the elements were indicated in the trial courts finding and, hence, PW1's evidence was properly taken.

On the 2nd and 3rd grounds of appeal, on the appellant's complaints that the PF3 did not show sperms into PW1's vagina and its having been filled on 2/6/2016 after the doctor had examined the victim's whole body, Ms Juntwa submitted that the offence of rape is not proved by sperms in

the vagina but rather by penetration however slight. Regarding the date when the PF3 was filled, she argued that it does not raise any doubt as the Doctor fills it in stages depending on how he/she sees the victim/patient. After all, she added, that the evidence of Seleman Said Kalolo (CW1) showed that the victim was admitted for 5 days and thus it was possible for it to be filled on that date. The learned Senior State Attorney also countered the argument that the Doctor (PW5) found no injuries after examining the victim's whole body in that PW5 clarified that he examined her private parts and found bruises.

On prompting by the Court on whether or otherwise the PF3 was read over at the trial court after its admission, Ms Juntwa conceded that it was not. However, she was quick to argue that even if it is expunged, still the evidence particularly of PW1 was watertight. To support her argument she referred us to the case of **Selemani Makumba v. Republic**, [2006] TLR 379.

On the 4th ground that PW2 did not corroborate PW1's evidence, Ms. Juntwa argued that, though PW1 did not say that she was called by the appellant as was testified by PW2, the appellant admitted during the Preliminary hearing that he told **AS** to enter his house.

Regarding the 5th ground that the evidence came from members of the family, she submitted that there is no law which prohibits evidence from family members as under section 127 of Evidence Act every person is a competent witness adding that what was required is the credibility of the witnesses. In this case, she said, all witnesses were credible witnesses. She referred us to the case of **Mustafa Ramadhani Kihiyo v. Republic**, TLR [2006] 323.

In relation to the 6th and 7th grounds of appeal regarding failure of village leaders to testify in court, she countered by saying it is not known as to what they could have testified in court as they did not in any how participate in the matter or knew anything. Insisting on her stance of supporting both the conviction and sentence, Ms Juntwa urged the Court to dismiss the appeal.

In rejoinder, the appellant urged the Court to resolve the anomaly of failure to read the PF3 in court, in his favor.

It is without question that PW1 was the key witness in this case. Basically the trial court relied on her evidence in convicting the appellant. The record of appeal shows that the witness (PW1) being a witness of

tender age was subjected to *voire dire* examination before her evidence was taken as follows:-

> *"PW1:* ***AS*** *6 years old, resident of Ligunga and muslim:-*
>
> ***CONDUCTING VOIRE DIRE.***
>
> *Court: Do you go to school.*
>
> *PW1: Yes I do, I am the nursery school student.*
>
> *Court: Do you know why you are here.*
>
> *PW1: I don't know where I am.*
>
> *Court: Do you know the meaning of oath.*
>
> *PW1: I don't know.*
>
> *Court: Do you know what a lie is.*
>
> *PW1: Not telling the truth.*
>
> *Court: Can you tell the truth on what you saw or heard or did.*

PW1: Yes I can.

COURT FINDINGS:

The witness possess the intelligence to answer the questions imposed to her and she can answer truthful, even though she does not know the meaning of oath I find the witness competent witness.

Sgn: G.N. BARTHY.

RESIDENT MAGISTRATE

28/06/2016"

As it can be vividly seen in the court's finding, the trial magistrate indicated three elements, that is, the witness possessed intelligence to answer questions; the witness can give truthful answers; and that she did not understand the nature of oath.

In the case of **Rashidi Ibrahim v. Republic**, Criminal Appeal No. 437 of 2015 (unreported), the Court cited with approval the case of **Nyasami d/o Bichana v. R.**, [1958] E.A in which the Court of Appeal for

Eastern African stated the purpose of conducting *voire dire* examination as follows:-

> *"It is clearly the duty of the court under that section to ascertain first whether a child tendered as a witness understands the nature of oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."*

Applying the principles stated in the above cited case, we find that the trial magistrate properly conducted the *voire dire* test in terms of section 127(2) of the Evidence Act. In the court's finding the trial magistrate clearly indicated that the witness possessed intelligence to answer questions; she could give truthful answers meaning that she understood the duty of speaking the truth; and that she did not know the meaning of oath, meaning that she did not understand the nature of oath. We thus agree with Ms. Juntwa that the criteria set out under section 127 (2) of the Evidence Act was met for the receiption of PW1's evidence.

It is also noteworthy that failure by the witness to understand the nature of oath is not a bar for the reception of the victim's evidence. (See **Kimbute Otiniel V Republic,** Criminal Appeal No. 300 of 2011 (unreported). 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 as per 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, there is no doubt that the evidence that PW1 was carnally known came from the victim alone. In terms of the above cited provision such evidence could be relied upon to convict the appellant for the offence charged without being corroborated.

Likewise, the evidence of the victim regardless of her age can be acted upon to 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's case** (supra). Even in this case, we are also satisfied that PW1 was the best witness to prove that she was sexually abused.

PW1 also mentioned the appellant to G.6220 D/Constable Mangi (PW4) when the matter was reported to the police. This was also important because as we have observed in times without number that, the ability of the witness to mention the suspect at the earliest possible opportunity is

an important assurance of reliability. (See **Swale Kalonga and Another v. Republic**, Criminal Appeal No. 46 of 2001; and **Wangiti Marwa Mwita and Others v. Republic**, [2002] TLR 39.

We are also aware that apart from PW1's evidence, the other evidence relied upon by the trial court to convict the appellant was the PF3 (Exh P1). However, we fully agree with the learned Senior State Attorney that it was not read over after its admission and we expunge it. Nevertheless, we equally agree with Ms. Juntwa that even if the PF3 is expunged, the evidence available can sufficiently prove the offence of rape against the appellant. This is so because, in rape cases, the PF3 is not the only evidence which is to be considered as it just provides a supportive evidence to the offence. In the case of **Ally Mohamed Mkupa v. Republic**, Criminal Appeal No. 2 of 2008 (unreported) the Court clearly stated that:-

> *"It is true that PF3 (Exh. P1) would have supported the commission of the offence but rape is not proved by medical evidence alone. Some other evidence may also prove it."*

In this case, PW1 whom we find to be a credible witness was very consistent in her testimony. She testified on how she knew the appellant even before the incident. She was consistent in her testimony that the appellant had carnal knowledge of her while pointing at him at the accused's dock. Testifying on the incident in her own words, PW1 explained repeatedly the act done by the appellant in such a vulgar language in order to be understood. She said:-

> *"... I have met the accused person, I met him at his house "alinitombaga" (the victim is pointing on her vaginal area). I was hurt so I went to tell my mother that "Rido alitombaga" (the victim is pointing to the accused person at the dock)."*

Apart from that, PW1 mentioned the appellant to PW4 at an opportune time. Also, the appellant admitted during preliminary hearing that he called her in his room. All these factors, in our view, proved that PW1 was raped by none other than the appellant.

As regards grounds nos. 2,3,4,5 and 6, we agree with the learned Senior State Attorney that they are new as they were not raised or

determined by the first appellate court. However, we do not agree with her move to consider them. This is so because there is a long chain of authorities which have taken a stance that matters not canvassed by the lower courts cannot be raised in this Court. For instance, in the case of **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 (unreported) the Court emphatically stated as follows:-

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

[See also **Hassan Bundela @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013; and **Yusuph Masalu @ Jiduvi v. Republic**, Criminal Appeal No. 163 of 2017 (both unreported).

In that regard, we decline to deal with those grounds of appeal as the Court would not have jurisdiction to entertain them in terms of section 6 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 empowering us to hear appeals from the High Court. (See **Abeid Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 (unreported).

We have also considered the contradiction raised by the appellant that PW2's evidence did not corroborate PW1's evidence on what PW2 heard. However, much as PW1 did not say that he was called by the appellant, we think that the appellant might have promoted the prosecution's evidence when he admitted during preliminary hearing to have called the victim into his house. As to the appellant's complaint on the court's reliance on evidence from family members, we agree with the learned Senior State Attorney that there is no law that prohibits family members to testify in court. Section 127 of Evidence Act is very clear on this in that every person is a competent witness. At most what would be looked at is the credibility of the respective witness. In the case of **Mustapha Ramadhani Kihiyo** (supra) the court refrained from discounting the relatives evidence and in emphasizing that position and it stated as follows:

> " *The evidence of related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless of course, there is ground for doing so; in this case we find no reason for discounting the evidence of the said related witnesses".*

Even in this case since there is no material warranting discrediting the relatives evidence we see no reason to discredit it.

As regards failure to call village leaders to testify in court, we in the first place, find it to be baseless as in terms of section 143 of the Evidence Act. No specific is required to prove the issue in fact. In **Yohanis Msigwa vs Republic** (1990) TLR 148, it was stated as follows:-

> *"As provided under section 143 of the Evidence Act, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*

See **Separatus Theonest @ Alex vs Republic**, Criminal Appeal No. 138 of 2005; **Lubelejea Mavina and Another vs Republic**, Criminal Appeal No. 172 of 2006 (both unreported) and **Adel Muhammed el Dabbah vs Attorney General for Palestine** (1944) A.C. 156. But at any rate, the said village leaders could not have been called to testify in court for having not taken any role in the incident.

In view of the aforesaid, we entertain no doubt that with the available circumstances, the trial court properly held that the case was proved beyond reasonable doubt to sustain the appellant's conviction.

In the event, we find the appeal is without merit and hence, we dismiss it in its entirety.

DATED at **IRINGA** this 27th 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 28th day of August, 2019 in the presence of the Appellant in person and Mr. Abel Mwandalama, learned Senior State Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL