IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 338 OF 2017

TULIZO S/O KAHULO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Feleshi, J.)

dated 30th day of June, 2017
in
DC. Criminal Appeal No. 86 of 2016

JUDGMENT OF THE COURT

27th August & 30th September, 2019

KITUSI, J.A.:

This is a second appeal by Tulizo Kahulo who was charged with Rape contrary to section 130 (1) and 131 of the Penal Code, [Cap. 16 R.E. 2002], before the District Court of Mafinga at Mafinga. At the end of the trial he was convicted and sentenced to 30 years imprisonment.

It was alleged at the trial that on 13th April 2014 at Kididye village, Mufindi, District within Iringa Region, the appellant had carnal knowledge of Betina Kibiki without her consent.

The appellant pleaded not guilty but the District Court was satisfied that three witnesses for the prosecution proved his guilt. The background to the prosecution's case goes thus; the appellant and the alleged victim are cousins in that the appellant's father is a cousin to the victim's father. On 13th April 2014 the alleged victim (PW2) and her father PW1 were at the latter's farm at Udimila village. When dusk was setting in, and knowing that there was only a hut to sleep in, PW1 told his daughter to go back home at Mabaoni at Mgololo. PW2 set out for Mabaoni on foot.

While on the way at about 19.00 hours, when she reached at Kididye river, PW2 sensed that someone was approaching her from behind. She sensed this fact because, according to her, there was so much water on the road along which she was walking such that the water was causing some noise whenever someone walked on that road.

She turned back only to see the appellant whom, she said, was known for bad manners. So when the appellant called for her to stop, PW2 did not stop, but the appellant moved swiftly, got hold of her and pulled her off the road. She described the area as secluded, with no houses around so when she shouted for help, none was forthcoming.

The appellant allegedly pushed PW2 into the water, tore off her underpants lied on her as he removed his clothes. Thereafter he inserted his penis into her vagina and had sex with her for almost an hour amidst her unsuccessful resistance. When he was done, the appellant ordered her to go home but did not let her on her own. He walked behind her brandishing a knife, threatening to stub her and throw her body into the river if she dared to raise alarm. During Cross-examination, PW2 stated that the water was knee high but the appellant did not completely throw her into it because she was resisting. She also stated that the appellant was squeezing her neck to prevent her from shouting.

When PW2 arrived at her grandmother's house where she lived, she entered and as she did so, the appellant warned her not to disclose to her grandmother what he had done to her. When PW2 had entered the house, the appellant who allegedly stayed outside, left.

Immediately, PW2 informed her grandmother who, in turn informed her neighbours. They went to the Ten Cell leader of the area in order to report the matter but he was not there so they went to the hamlet Chair person who instructed them to report to him the next day. PW2 stated that

on the next morning she personally went to the Ten Cell leader then to the Village Executive Officer (VEO) who referred the matter to Mgololo Police, by a letter. At Police she was referred to Mgololo Dispensary where she was further referred to Mafinga Hospital.

PW1 testified that one Fraison, his cousin, informed him that his daughter (PW2) had been raped and was at Mgololo Dispensary but that he was supposed to take her to Mafinga Hospital. PW1 took PW2 to Mafinga Police Station first then to Mafinga Hospital. He stated that his daughter told him that it was the appellant who raped her.

At Mafinga Hospital, PW2 was attended by Dr. Rock John Kibasa (PW3) who completed a PF3 (Exhibit P1) after examining her. He read out his findings as injuries on PW2's finger, bruises in her vagina as well as on her neck.

In defence the appellant completely disassociated himself from the alleged rape alleging fabrication because he had conflict with PW1. He raised issue with the possibility of PW2 surviving in knee high waters within which she alleged the rape took place. He refuted the allegation that he

disappeared after the rape and went to live in the forest, stating instead, that he was in Dar es Salaam where his brother lives.

The trial District Court was satisfied and made a finding of fact that PW2 had been raped and posed one issue whether the appellant was the perpetrator. In resolving that issue the trial Court accepted PW2's evidence as to the identity of the appellant because he was a familiar person and he had even walked with her to PW2's grandmother after the rape. Further the learned trial magistrate considered the fact that the appellant disappeared from the village immediately after the rape, and found it as pointing to his guilt.

On appeal to the High Court the appellant had challenged the evidence of PW1 as hearsay and that he and that witness did not see eye to eye. He also faulted the trial court's conclusion for the reason that PW2 could not have identified him under the circumstances within which the alleged rape took place.

The High court was satisfied that PW2 was a truthful witness. After citing quite a few decisions that support the principle that the prosecutrix

of rape is the best witness, the learned High Court Judge, Feleshi, J. (as he then was) stated:-

> *"In this appeal, the court is convinced by the adduced pieces of evidence concerning; the fact that the appellant was well known to the victim (PW2) him being her brother; the time duration of the conduct; the conversation they held at the scene; and, the escort the appellant provided to PW2 up to her grandmother's house (PW1). These pieces of evidence manifested the perfect identification made by PW2 against her assailant."*

The learned Judge considered two more aspects namely; the fact that PW2 named the appellant to PW1 immediately and that he immediately disappeared. He cited the cases of **Mussa Shabani Issa Mzee Mwita @ Pius Chacha Nyarari v. Republic,** Criminal Appeal No. 11 of 2010; and **Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 195 (both unreported) for the principle that naming the suspect at the earliest opportunity provides assurance that the victim is reliable.

It also cited the case of **Amir Mohamed v. Republic** [1994] TLR 138 which held that the appellant's disappearance from his residence after the murder tended to show that he was responsible for it.

The appellant considers the decision of the High Court faulty and has come to us attacking it on 7 grounds of appeal which we paraphrase thus; **One**, the court erred in relying on the evidence of PW2 without evidence from an independent witness, **two**, and **three** that the Court erred in not finding it impossible that PW2 survived rape in water for one hour, **four**, that the Court erred in relying on PW2's uncorroborated evidence, **five**, that PW1's bare word could not prove the charge, **six**, the court erred in reaching its decision without considering the defence, **seven**, the prosecution failed to prove the case beyond reasonable doubt.

When the appeal was called on for hearing Mr. Adolf Maganda, learned Senior State Attorney appeared for the respondent/Republic as the appellant appeared in person unrepresented. When he had been allowed to address us first it being the style chosen by the appellant, Mr. Maganda stated that he would submit on the seventh ground of appeal which is all-

embracing. This is the ground that complains that the offence was not proved beyond reasonable doubt.

In his submissions Mr. Maganda relied on the principle that in sexual offences cases the best evidence comes from the victim and referred to PW2's evidence. The learned Senior State Attorney submitted that there was no doubt from PW2's evidence, regarding the identity of the appellant whom she knew well. He went on to point out that PW2 resisted as evidenced by the injuries she sustained, which PW3 confirmed in his testimony.

When we wanted Mr. Maganda to comment on the possibility of the rape taking place within water, the learned Senior State Attorney drew our attention to page 13 of the record and submitted that the incident took place along the river bank not within. We also drew Mr. Maganda's attention to the appellant's defence of alibi and that PW2 appears to have been examined about three days after the rape. Mr. Maganda stated that there was no explanation for the delayed medical examination nor was the defence of *alibi* deliberated on.

On his part the appellant complained about his cautioned statement having been recorded without the presence of his relative, and that he was not identified at the police station. He invited us to discredit PW2 on the ground that her contention that she was raped in the water was practically impossible. Further that she was examined by PW3 three days after the alleged rape.

Having heard the arguments by both sides we have decided to approach the matter in the way the learned Senior State Attorney suggested. Apparently that is the way the matter was dealt with at the High Court on first appeal. We shall address the issue whether the charge was proved by the prosecution beyond reasonable doubt.

However, we shall consider some straight forward issues that we think should not derail us. The first is the appellant's complaint about the cautioned statement. This complaint is misplaced because nowhere did the courts below rely on any cautioned statement to ground his conviction. After all, it was not even adduced in evidence. The second is the complaint by the appellant that he was not identified at police station. We think the

appellant is trying to raise a point that it was wrong not to conduct an identification parade.

The evidence of PW1 and PW2 which the two courts below believed, is that the appellant was known to both and related to them. The law is settled that when the victim of a crime knows the suspect before the alleged offence there arises no need to conduct a parade of identification. For that reason, this complaint is equally misguided.

We now turn to the main issue whether the charge was proved to the required standard. The appellant has invited us to find PW2 untruthful while the respondent Republic maintains that she was truthful. The appellant puts PW2's credibility to question on two grounds. First, the fact that it would not have been possible for her to be raped in the water for one hour and still survive. Secondly, the fact that she was examined at the hospital three days after the alleged rape. It is necessary to state that both these complaints were not raised before the High Court.

The PF3 was tendered at the trial by PW3. The allegation that it would have been impossible to rape the appellant into the water was raised by him at the trial. We think the High Court had a duty to re-

evaluate the evidence and pronounce itself on these two points. On the authority of the case of **Jafari Mohamed V. Republic** Criminal Appeal No. 12 of 2006 (unreported) we are satisfied that there was a non direction on those two points that warrants our interference. On that basis we shall re-evaluate the evidence on those two complaints.

Mr. Maganda addressed us on the alleged impossibility of committing rape in water. He referred us to page 13 of the record, but we have decided to trace the testimony from page 11- 13, and here is what comes out of PW2. She was walking along a rural road which had water on it such that it was easy for her to hear a person walking behind her. When PW2's assailant reached her, he pulled her outside the road or path. She stated that she was struggling so the assailant did not succeed in pushing her into the water completely.

Our understanding of this evidence is that the two were off the path, but in the course of the unconsented sex, PW2 was struggling to resist it while the appellant was trying to push her into the water on the path. We do not think that it is correct to say that rape could not have taken place in the circumstances described. We find no merit in this complaint.

We now consider the alleged delay in getting medical examination. Mr. Maganda conceded that there was no explanation why PW2 received medical attention three days after the alleged rape. There could be an explanation, because there is evidence that PW2 was first taken to Mgololo Dispensary then transferred to Mafinga. We note that it was on 14th April 2014 when PW2 obtained a letter from the VEO to go to Mgololo Dispensary.

All this is not relevant however. The question is whether PW3 could tell, three days after the incident, that PW2 had been carnally known, considering that she was an adult. Our conclusion is that the PF3 that was tendered by PW3 detailing his findings on the alleged rape that had taken place three days previously had no evidential value. We are however alive to the settled law that rape may be proved without medical evidence. This is because at the end of the day medical evidence is in a form of opinion to which we are not bound. In the case of **Godi Kasenegala V Republic**, Criminal Appeal No. 10 of 2008 (unreported), we said:

> *"Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so."*

In that case, the principle that the best evidence in rape cases comes from the victim was cited.

So finally the decisive question is whether PW2 is a witness whose word we can rely on. The two courts below endorsed her as a truthful witness, and we find no reason for faulting them.

For the foregoing reasons it is our Judgment that the case was proved beyond reasonable doubt. The appeal has no merits and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 9th day of September, 2019.

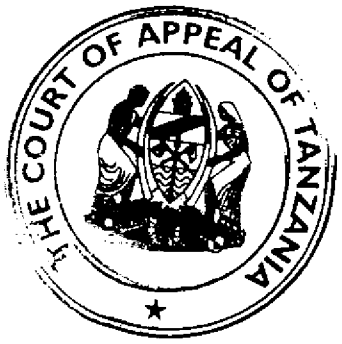
R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2019 in the presence of the Appellant in person and Mr. Alex Mwita learned

State Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.



L. M. CHAMSHAMA
A.G:DEPUTY REGISTRAR
COURT OF APPEAL