IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 120 of 2018

ABDALAH AHAMADI LIKUNJA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 15th day of March, 2018
in
Criminal Appeal No. 76 of 2016

JUDGMENT OF THE COURT

22nd October & 4th November, 2019

MWANDAMBO, J.A.:

The District Court of Kilwa at Kilwa tried and convicted Abdallah Ahmadi Likunja, the appellant herein, on a charge of rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 [R.E. 2002]. Upon conviction, a sentence of thirty (30) years imprisonment was meted out together with compensation TZS. 100,000.00. The appellant's appeal to the High Court at Mtwara was unsuccessful hence his second attempt to vindicate his innocence before this Court.

The facts which led to the appellant's arraignment are that on the 28th day of October, 2015 at about 04:00 hours at Miteja- Sinza village within Kilwa District, Lindi Region, the appellant had unlawful carnal knowledge of a girl aged 12 years. Having pleaded not guilty to the charge, the prosecution paraded five witnesses including the victim of the offence who testified as PW1. For the purposes of concealing her identity, we shall refer to her as **'ZS'** or the victim as the case may be. Other witness included Hawa Mayanga, a girl of tender age of seven years who slept in the same room with ZS on the material night. Hawa Mayanga testified as PW2 followed by Hassan Hemed Mkali (PW3), a village Executive Officer to whom the appellant is said to have confessed committing the crime after the people's militia had arrested and taken him to his office. Another witness was Christopher Kuende (PW4), a Clinical Assistant who examined ZS on 28th October, 2015 at Tingi Health Centre and filled in a PF3 which he tendered in evidence as exhibit P1. PW4's findings after the medical examination were that he observed some bruises on ZS's vagina with some watery matter which, upon laboratory examination, was found

to be semen and some white blood cells. According to PW4, ZS was not virgin.

The last witness was Hamis Abdallah Khalfan (PW5) whose version of evidence was that on the material night, the appellant asked him to sleep in the house the appellant's absent grandfather had entrusted to him. That house happened to be the same PW1 and PW2 were sleeping. Shortly after arriving at the house, he had some discussion with the appellant and then excused himself to attend a call of nature. Upon his return, he did not see the appellant again and that prompted him to go to his uncle, one Said Litenje to inquire about the appellants' whereabouts but in vain. PW5 was not bothered anymore about the appellant's absence and so he went back to the house and retired to bed only to be awakened by noises at about 04:00hours from the room in which PW1 and PW2 were sleeping. He responded to the noise by dashing to that room only to see the appellant coming out of the children's room. PW5 enlisted the help of his uncle and upon his arrival, the appellant attempted to flee escaping arrest but he was overpowered and taken to the office of the Village Executive Officer before being taken to Samanga Police Station in the company

of PW3. In cross examination, PW5 told the trial court that on the material date, the appellant wore a yellow shirt with black stripes but had left his stomach open.

The unsworn evidence by ZS was that she knew the appellant before the incident. She testified that she slept on the same house with Hamis (PW5) and sometime in the night, the appellant entered her room, inserted his penis into her vagina and ejaculated which caused lots of pains. Like ZS, PW2 gave unsworn evidence. Her evidence was that on October, 2015 she slept in the same room with ZS. PW2 recalled that the appellant bumped into that room asking ZS to stretch her legs but responded that she did not want to do so. Thereafter, the appellant stretched ZS's legs by force and ejaculated into her. Despite the time being in the night, PW2 identified the appellant who was familiar to her.

In his defence, the appellant feigned ignorance of the incident but to his surprise he was invaded by the VEO on the allegations of rape. It was his testimony that he was beaten and later taken to the village office.

The trial court found the prosecution's evidence water tight proving the charge beyond reasonable doubt and convicted him as charged. The High Court on a first appeal concurred with the findings of the trial court and dismissed the appeal. The appellant faulted the trial court for convicting him on several areas of complaints. One, his conviction was premised on weak evidence of identification, two, reliance on hearsay evidence from PW3 and PW5, three, doubtful evidence by PW4 and four, his conviction was based on the weakness of his defence rather than the strength of the prosecution case. The first appellate court found no substance in any of those complaints and dismissed his appeal.

The appellant's appeal to this Court is predicated on four detailed grounds of appeal understandably so because he is a layman. However, upon scrutiny, the appellant's appeal boils down into the following areas of complaint:

1. *Failure to conduct a voire dire test to PW1 and PW2 contrary to section 127 (2) of the Evidence Act, Cap. 6 [R.E. 2002].*

2. *Reliance on uncorroborated unsworn testimonies of PW1 and PW2 in convicting the appellant.*

3. *Respondent's case not proved beyond reasonable doubt because the appellant was not properly identified.*

4. *Failure to comply with mandatory provisions of section 127 (1) (2) (5) and (7) of Cap. 6.*

At the hearing of the appeal the appellant appeared in person fending himself whereas Mr. Kauli George Makasi learned Senior State Attorney entered appearance representing the respondent Republic. At the very outset, the appellant urged the Court to consider his grounds of appeal and opted to have the Senior State Attorney make his submissions before he could make any reply if such need arose.

Resisting the appeal, Mr. Makasi urged the Court to uphold the conviction and sentence as held by the trial court and the first appellate court. The learned Senior State Attorney submitted that contrary to the appellant's first ground of appeal, the record shows (at page 6, 7, 8) that the trial court conducted the *voir dire* test to

both PW1 and PW2 before they gave their respective unsworn testimonies to test that each possessed intelligence, understood the duty of speaking the truth and meaning of the oath consistent with the Court's decision in **Mbaga Julius vs. Republic,** Criminal Appeal No. 131 of 2015 (unreported).

As to ground two, the learned Senior State Attorney, argued that PW1 and PW2 gave unsworn testimonies because they did not understand the meaning of the oath and thus their testimonies required corroboration. According to the learned Senior State Attorney, the testimonies of PW1 and PW2 were sufficiently corroborated by PW3 who told the trial court that the appellant confessed to him having committed the offence. It was his submission that the oral confession to PW3 met the provisions of section 3 (1) of Cap. 6. Apart from PW3, Mr. Makasi argued that other corroborative evidence came from PW4 who examined PW1 and found bruises on her vagina with semen although he could not establish that the loss of PW1's virginity was a result of the rape. Finally, Mr. Makasi implored upon the Court that the evidence of PW5 provided further corroboration to PW1's and PW2's

testimonies, for it is he who found the appellant exiting from the room where PW1 and PW2 were sleeping following noises from that room.

In relation to the complaint on poor identification evidence, Mr. Makasi submitted that the same was baseless because the appellant was apprehended in the same room where the offence had been committed that awkward time of the night. Furthermore, PW1 and PW2 identified the appellant coupled with the fact that he made oral confession to PW3. At any rate, Mr. Makasi argued, the appellant did not offer any defence to the accusations against him neither did he cross examine the prosecution witnesses. On the basis of the foregoing, the learned Senior State Attorney urged us to dismiss the appeal for lack of merit.

When the appellant was called upon to rejoin, he had nothing to say. He left everything to the Court.

We have scanned through the record of appeal, the grounds of appeal and the oral submissions by the learned Senior State Attorney. Upon on examination of the record it is plain that the trial Resident

Magistrate was too sketchy in his recording of evidence. That notwithstanding, we were able to cull the necessary information for the purposes of determining the appeal. Before doing that, we wish to make it clear that out of four areas of complaint before us, the complaint on the alleged failure to conduct a *voir dire*, conviction on unsworn testimonies by PW1 and PW2, and failure to comply with section 127(1), (2), (5) and (7) of Cap. 6 were not canvassed by the first appellate court because the appellant did not fault the trial court on any of the said complaints.

Bringing such complaints before this court is contrary to rule 72(2) of the Tanzania Court of Appeal Rules, GN. No. 368 of 2009 (the Rules) which restricts grounds of appeal before the Court in second appeals such as this one to points of law alleged to have been wrongly decided by the first appellate court. Those complaints were not part of the grounds of appeal before the first appellate court and so that court cannot be said to have wrongly decided on matters which were not before it. In **Asael Mwanga vs. Republic,** Criminal Appeal No. 218 of 2007 (unreported) for instance, the Court refused to entertain

grounds which were not canvassed by the appellant in the High Court and stated thus:

> "*Now, all those grounds, whatever may be their merits, should have been against in the High court had the appellant lodged an appeal to that court. In the event the High court failed to discuss and decide them satisfactorily, the appellant could resort to this court. What the appellant is trying to do is to turn this court to the first appellate court after the judgment of the District Court.*" (at page 3 and 4).

See also; **Damiano Qadwe vs. The Republic,** Criminal Appeal No. 317 of 2017 (unreported).

It follows thus that the only complaint for our determination is whether the appellant was properly identified as the person who committed the offence on the material night. In its judgment, the first appellate court concurred with the trial court that there was sufficient evidence to prove that the appellant was properly identified as the person who entered into the room in which PW1 and PW2 slept, forced PW1 to stretch her legs after she had refused and inserted his

manhood in her vagina. Further, the first appellate court was satisfied with the evidence by both PW1 and PW2 to the effect that the appellant was known to both of them and before committing the awful act to he uttered words asking PW1 to stretch her legs and despite the darkness, the appellant was identified through his voice.

The foregoing pieces of testimony aside, PW5 apprehended the appellant in the room in which PW1 and PW2 were sleeping. We, on our part find no merit in the appellant's complaint because the evidence implicating him with the offence as found by both courts below was watertight. Indeed, sitting as a second appellate court, this court is not entitled to interfere with the concurrent findings of fact of the courts below unless the same are based on a misapprehension of evidence. It has been held consistently by this Court that a second appellate Court as it were, should be loath to interfere with concurrent findings of fact by the trial court and the first appellate court unless it is shown that in evaluating the evidence, the two courts below misdirected themselves and in so doing occasioned a miscarriage of justice to the appellant. See for instance: **Salum Mhando vs R.** [1993] TLR 170, **Zabron Masunga and Dominick Mahondo vs. R.,**

Criminal Appeal No. 232 of 2011, **Hassan s/o Kitunda vs. R.,** Criminal Appeal No. 479 of 2015 and **Wankuru Mwita vs. R.,** Criminal Appeal No. 217 of 2012 (all unreported) to mention but a few.

We have not seen any misapprehension of the evidence by the trial and first appellate court with regard to identification of the appellant. If anything, we find no difficulties in expressing our dismay that this complaint is rather strange considering the undisputed fact that PW5 apprehended the appellant coming out of the room in which PW1 and PW2 were sleeping quite inconsistent with innocence, the appellant attempted to flee when PW5 and his uncle intervened. Above all, PW1's evidence was sufficiently corroborated by PW4 who conducted a medical examination on PW1 confirming existence of vaginal bruises and presence of watery substance in her vagina which was found to be semen. Additionally, PW3's evidence of oral confession by the appellant was not assailed through cross examination and so it remained unchallenged evidence against which the appellant offered no defence. In the final analysis, like the first

appellate court, we are of the firm view that the appellant's appeal is predicated on weak grounds.

In the event, we find no hesitation in upholding the decision of the first appellate court with the result that the appeal is hereby dismissed.

Order accordingly.

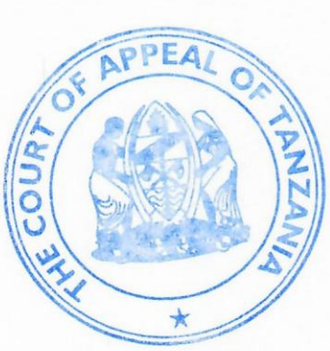
DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 4th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Paul Kimweri, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL