IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 5 OF 2018

DAIMU DAIMU RASHID @ DOUBLE D.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mlacha, J.)

dated the 13th day of November, 2017
in
Criminal Appeal No. 14 of 2017

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JUDGMENT OF THE COURT

21st October, & 4th November 2019.

SEHEL, J.A.:

This is a second appeal preferred by Daimu Daimu Rashid @ Double D (hereinafter referred to as the appellant). The appellant was charged before the District Court of Nanyumbu (the trial court) with the offences of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code, Cap. 16 RE 2002 and impregnating a secondary school girl contrary to section 60 A (3) of the Education Act, Cap. 353 RE 2002 as amended by section 22 of

the Written Laws (Miscellaneous Amendment) Act, No. 2 of 2016. The trial court found the appellant guilty as charged and a sentence of thirty years imprisonment was imposed on each count, to run concurrently. Aggrieved by both the conviction and sentence, he unsuccessfully appealed to the High Court of Tanzania at Mtwara (the first appellate court). Still dissatisfied, the appellant has come to this Court on appeal.

Briefly, the facts are that on 18th day of October, 2016 **Mwanaidi Simba** (PW1), the school discipline master and matron at Sengenya Secondary School , as a routine exercise, took all 98 female students of that school to a dispensary for pregnancy test. One of the students, S. J. M (the victim, PW5), a Form Two student was found to be pregnant. She was thus suspended from school and her guardian was requested to attend the school the next day.

Khalifa Masoud (PW3), the guardian of PW5 told the trial court that he was informed by the headmaster, **Mohamed Mabo Bakari** (PW4), that PW5 was discovered to be pregnant. It was the evidence of PW3 that upon receipt of that information, he asked PW5 as to who was responsible

for the pregnancy, and she named the appellant. He thus took PW5 to the District Welfare Officer before whom she also named the appellant. PW4 on his part told the trial court that he also had an opportunity to interview PW5 who yet again named the appellant.

The matter was reported to the District Welfare Officer and the police where PW5 was issued with PF3. Upon being tested for the second time by **Filibada Ngonyani** (PW2), it was confirmed that PW5 was sixteen (16) weeks pregnant. The appellant was arrested and charged. At the trial court, he denied the charges.

In order to prove its case, the prosecution paraded a total of four witnesses including the victim, PW5. In her sworn testimony, PW5 exonerated the appellant. She told the trial court that she named the appellant because she was afraid that her guardian and teachers would have punished her. She associated her pregnancy with a certain young man whom could not recall his name but was working with a Chinese company.

In his defence, the appellant denied committing the offence although he acknowledged that he knew PW5 as a neighbour and customer at his photo studio.

The trial court was convinced with the evidence of PW3 and PW4 that PW5 mentioned to them the appellant as the person who had raped and impregnated her and it discounted the evidence of PW5. In justifying as to why it did not believe PW5, the trial court said:

> *"I consider the testimony of PW3 that the accused, after this case, used to meet the victim (PW5) secretly and induced her to twist the truth....It seems to me that what PW5 tried to tell the court was an attempt to twist the truth which she had already revealed to PW3 and PW4...."*

The first appellate court concurred with the findings of the trial court that "*there was an interference to the evidence*" of PW5 and dismissed the appellant's appeal.

Initially, the appellant lodged a two point memorandum of appeal. Later on, he filed a supplementary memorandum of appeal containing

three grounds. Essentially, the two memoranda of appeal raise four main complaints. **First**, the prosecution failed to prove its case beyond reasonable doubt. **Secondly**, the two lower courts erred in law in disregarding the evidence of PW5. **Thirdly**, the two lower courts erred in law in basing the conviction and sentence on hearsay evidence. **And fourthly**, the charging provision for an offence of rape was defective.

At the hearing of the appeal before us, the appellant appeared in person fending for himself whereas Mr. Joseph Mauggo, learned Senior State Attorney appeared to represent the respondent/Republic.

When the appellant was invited to address the Court, he chose to first hear the response from the learned Senior State Attorney and reserving his right to respond, if need arose and prayed to adopt his two memoranda of appeal.

Mr. Mauggo forthrightly supported the appeal on the sole ground that the appellant was wrongly convicted on hearsay evidence of PW3 and PW4. He submitted that PW3 and PW4 claimed to have been told by PW5 that it was the appellant who had impregnated her but when PW5 gave her

evidence before the trial court as it appears at pages 19 to 20 of the record, she said it was not the appellant. In reliance to the case of **Selemani Makumba v. Republic** [2006] TLR 379, he impressed on the Court that the best evidence comes from the victim and in this appeal it should have come from PW5. He therefore contended that it was wrong for the trial court to disregard her evidence. Mr. Mauggo also faulted the first appellate court in upholding the conviction and sentence of the appellant on the pretext of circumstantial evidence. He submitted that the circumstantial evidence on which the first appellate court relied in upholding the conviction and sentence of the appellant, did not meet the test set up by the law, which is that, such evidence must irresistibly point to the guilt of the accused. Mr. Mauggo argued that according to the circumstances of this case there is another explanation that there was a young man working with the Chinese company mentioned by PW5 before the trial court. Generally, it was the view of Mr. Mauggo that, the charge against the appellant was not proved beyond reasonable doubt by the prosecution. He, thus, urged us to allow the appeal.

The appellant had nothing much to say than supporting the positive submission made by the learned Senior State Attorney.

In disposing this appeal, we wish to take off by asserting the cardinal principle of criminal justice system in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. This is clearly provided under Section 3 (2) (a) of the Evidence Act, Cap. 6 R.E 2002. As to what it means by proof beyond reasonable doubt, the Court in the case of **Samson Matiga v. R,** Criminal Appeal No. 205 of 2007(unreported) at page 5, had this to say:-

> *"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence. (See also* ***Yusuf Abdallah Ally v. Republic,*** *Criminal Appeal No. 300 of 2009, (unreported)). The said proof does not depend on the number of witnesses but rather, to their*

credibility (See section 143 of the Tanzania Evidence Act Cap 6 R.E 2002 and the case of ***Goodluck Kyando v. Republic****, Criminal Appeal No. 118 of 2003, and* ***Majaliwa Guze v. Republic****, Criminal Appeal No. 213 of 2004 (both unreported)."*

In the matter at hand, the prosecution bore the burden of proving beyond reasonable doubt that it was the appellant who raped and impregnated PW5. As indicated herein, the prosecution paraded a total of four witnesses, including the victim, PW5. Part of PW5's evidence was as follows:

"...the one who impregnated me was one young man who was working with Chinese company and at the material time he was not around....I never met Double 'D' for sexual intercourse. I am telling the truth that the man who impregnated me is not the accused person but another man whom I do not know his name."

That evidence is loud and clear that the person who impregnated PW5 was a young man who was working with the Chinese company and

not the appellant. Her evidence, therefore, does not support the evidence of PW3 and PW4 who claimed to have been informed by PW5 that it was the appellant who was responsible for the pregnancy. As rightly observed by Mr. Mauggo in rape cases, it is the established principle that the best evidence comes from the victim (see **Seleman Mkumba v. Republic** (supra). The victim in this appeal is PW5 who exculpated the appellant from liability.

The trial court instead of basing its findings on the evidence of PW5, discredited her and went ahead to base its conviction on the evidence of PW3 and PW4. We are alive to a settled principle that when it comes to the assessment of the demeanour of witnesses, the trial court is best suited to assess them as opposed to an appellate court, which in most cases depend on information discerned from a court record. See **Ali Abdallah Rajab vs Saada Abdallah Rajab and Others** [1994] TLR 132.

In this appeal, the first appellate court upheld the findings of the trial court. It is long established principle that the Court will only interfere with that concurrent findings of fact if there has been a complete

misapprehension of the substance, nature and quality of the evidence. This position was well stated in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 that was cited in the case of **Aloyse Maridadi v. Republic**, Criminal Appeal No. 208 of 2016 (both unreported) that:

> *"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure; or have occasioned a miscarriage of justice." (at page 6)*

Applying the above position to the instant appeal, we hold that there was a complete misapprehension of the substance, nature, and quality of the evidence of PW3 and PW4 with that of PW5. We say so, because the evidence of PW3 and PW4 that was heavily relied upon by the trial court to

find the appellant guilty of the offences charged, was a pure hearsay evidence. Consequently, we are compelled to interfere with the concurrent findings of the lower courts. Both PW3 and PW4 told the trial court that they were informed by PW5 that it was the appellant who raped and impregnated her. That piece of evidence coming from PW3 and PW4 is not direct evidence. It is hearsay evidence as it was narrated to them by PW5, which is inadmissible in law. As observed by Mr.Mauggo, the trial court was not supposed to act on it. It ought to have discarded it. To hold that the appellant raped and impregnated PW5 on hearsay evidence was a total misapprehension of evidence. Since hearsay evidence is inadmissible then we proceed to discard it from the record. Having done so, we remain with the evidence of PW5. Her evidence was conclusive to find the appellant not guilty of the offences charged. We therefore find merit in this sole ground of appeal.

In the upshot, we are of the settled view that the prosecution failed to prove its case beyond reasonable doubt against the appellant. We accordingly allow the appeal, quash the conviction, set aside the sentence

and order for the immediate release of the appellant from custody unless he is held on some other lawful cause.

Order accordingly.

DATED at **MTWARA** this 2nd 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