IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 131 OF 2017

HASHIMU ABDALLAH ISSA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Lukelelwa, J.)

dated the 25th day of March, 2004
in
Criminal Appeal No. 36 of 2003

.....

JUDGMENT OF THE COURT

4th & 7th November, 2019.

SEHEL, J.A.:

This second appeal originates from the judgment of the District Court of Masasi (the trial court) in which the appellant was convicted with the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code, Cap. 16 RE 2002. He was sentenced to thirty years' imprisonment.

The particulars of the charge alleged that on 29th day of May, 2002 at or about 17:00 hours at Magomeni village within Masasi District in Mtwara Region, the appellant had carnal knowledge of H.S, a girl aged sixteen years.

In order to prove the charge, the prosecution fielded four prosecution witnesses who were H.S the victim (PW1), Salima Ally (PW2), Rajabu Ausi (PW3), and B. D/Sgt. Jafari (PW4). The prosecution also tendered documentary evidence, namely: Medical Examination Report (Exhibit P1) and Laboratory Medical Results (Exhibit P2).

A brief account of the evidence which led to the conviction of the appellant is as follows: on that fateful day, PW1 escorted her friend, PW2 to the appellant's home to collect some medicine for PW2's sister. The appellant was a traditional healer, cum witch doctor. After reaching at the appellant's home, PW2 entered in the appellant's room whereas PW1 remained outside the house. While inside, the appellant ordered PW2 to undress, she did. He then asked her to lie on the bed but she refused. That annoyed the appellant, hence chased her outside and PW1 was ordered to get inside.

PW1 recounted that while in the room, the appellant ordered her to undress the skirt and underwear she wore that day but she refused because she was in her menstrual period. She was subsequently forced to undress and then the appellant had carnal knowledge of her until he satisfied his desire. She tried to raise an alarm, but the appellant threatened her that he would kill her if she continued to shout.

Then and there, PW1 told her friend PW2 and together they went to report the tragedy to their parents and later to the police.

PW3 who was living with the appellant confirmed the account of PW1 and PW2 that he saw them arriving at his home. He left them with the accused and went to take a shower. While in the bathroom, he heard cries coming from the house. He responded and found PW1 and PW2 outside the house. PW1 told him that she was raped by the appellant. He took PW1 and PW2 to their parents where a report was, later, made to the village leaders who ordered the appellant to be arrested and he was taken to the police.

PW5, a police officer who was on duty on that day, told the trial court that he received the appellant that was sent there by the village leaders on allegation of rape.

In his sworn evidence, the appellant denied the allegation alleging that it was framed against him.

The trial court convicted the appellant having concluded that PW1, PW2, and PW3 were credible and reliable witnesses and since the appellant in his cross examination said he had no previous grudges with any of the witnesses ruled out the possibility of the case being framed against him. Thus, he was sentenced to imprisonment to a term of thirty (30) years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where his appeal was dismissed on account of the credible evidence of the victim, PW2, and PW3 which did prove a charge against the appellant. Still aggrieved, the appellant has preferred this second appeal.

Initially, the appellant lodged a five point memorandum of appeal. Later on, he filed a supplementary memorandum of appeal containing four grounds. Essentially, the two memoranda of appeal raise four main issues. **First**, that the charge sheet ought to be under section 130 (1) (2) (3) (d) of the penal code (the PC), **Secondly**, the prosecution failed to prove its case beyond reasonable doubt. **Thirdly**, there was

non-compliance of section 127 (7) of the Evidence Act, Cap. 6 RE 2002 (hereinafter referred to as Cap. 6). And **fourthly**, there was a flouting of procedure by the trial court in admitting Exhibit P1.

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

After adopting his two memoranda of appeal, he preferred the learned Senior State Attorney to respond to his grounds of appeal and thereafter he would give his rejoinder, if need arose.

At first, Mr. Kimweri did not support the conviction and sentence imposed on the appellant by the trial court. He based his position on the submission that the age of the victim was not proved by the prosecution witnesses. However, when he was directed by the Court to look at the matters not in dispute recorded by the trial court after the conduct of the preliminary hearing he changed his position. He submitted that that ground of appeal has no merit because the record of appeal shows that at the preliminary hearing, there were matters recorded as not in dispute. These are:- the name of the victim, the school to which she was attending, and her age. To Mr. Kimweri's view, since age was not in

dispute then in terms of section 192 (4) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) that undisputed fact is taken to have been proven beyond reasonable doubt. As such, there was no need for the prosecution to parade a witness to prove a fact that was not in dispute.

Generally, Mr. Kimweri submitted that the evidence adduced at the trial court was water tight against the appellant. He pointed out that PW1 told the trial court that the appellant ordered her to undress and he had sexual intercourse with her. To him, that statement of PW1 appearing at page 8 of the record, conclusively establish proof of penetration. He elaborated that penetration happens when a male organ enters in the female organ thus the fact that PW1 used the words that the appellant had sexual intercourse then suffices to prove penetration. He also saw this ground to lack merits.

Regarding the ground that the charge sheet is defective as it ought to have been under section 130 (1) (2) (3) (d) of the PC, Mr. Kimweri responded that the appellant was properly charged under section 130 (1)(2) (e) of PC that deals with statutory rape which is in line with the evidence adduced by the prosecution witnesses. This ground also, he said, has no merit.

On non-compliance with section 127 (7) of Cap. 6, Mr. Kimweri distinguished the applicability of that provision it applies only to a situation where the evidence of rape comes from the victim alone and there is no any other independent witness. He submitted that in this appeal according to the facts there was evidence of PW2 who saw PW1 entering in the appellant's room and heard the help alarm. Further, there was evidence of PW3 who corroborated the evidence for PW1 and PW2 that they were at the appellant's place and heard the raised alarm. With those facts, he prayed for the ground to be dismissed.

On the complaint that the doctor was not called for the appellant to cross-examine, Mr. Kimweri conceded that the record shows the trial court flouted the procedure in tendering PF3 as it was not read out after its admission and the appellant was not addressed in terms of section 240 (3) of the CPA. With those irregularities, he prayed for Exhibit P1 to be expunged from the record. Nonetheless, Mr. Kimweri contended that the expulsion of Exhibit P1 from the record did not shake the prosecution case because the trial court's finding was based on the credible evidence of PW1, PW2, and PW3. Similarly, the first appellate court in upholding the conviction and sentence did not base its findings

on Exhibit P1 rather on the strength of the evidence of PW1, PW2, and PW3. With that submission, Mr. Kimweri prayed for the appeal to be dismissed and the conviction and sentence be affirmed.

In his rejoinder, the appellant repeated what is contained in the memoranda of appeal and reiterated that PW1 and PW2 were not credible witnesses. As such, he urged the Court to allow the appeal and set him free.

We have meticulously gone through the grounds of appeal as contained in the two memoranda of appeal and heard the submission made by the parties and we wish to start with the complaint on the charge sheet. This is because it is the foundation of any prosecution facing an accused person and it is the first document laid to the accused person that provides him with a road map of what to expect from the prosecution witnesses during his trial. See: **Mathayo Kingu v. Republic**, Criminal Appeal No. 589 of 2015 (unreported).

The appellant was charged with an offence of rape contrary to section 130 (1) (2) (e) and 131 of the PC. Section 130 (1) (2) (e) of the PC talks of commission of an offence of rape to a woman who is under eighteen years, with or without her consent. That section reads:

"130-(1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a)...not relevant

(b)...not relevant

(c)...not relevant

(d)...not relevant

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

The victim in the present appeal was a girl aged 16 years. Hence, she was under the age of eighteen years. Given that fact, we are inclined to Mr. Kimweri's submission that the ground has no merit as the appellant was properly charged.

Next, is the issue of penetration which also goes hand in hand with the issue as to whether there was cogent evidence to warrant conviction and sentence to the appellant. As correctly pointed out by Mr. Kimweri, the appellant's conviction which was later on upheld by the first appellate court was based on the evidence of PW1, PW2, and PW3. The record of appeal supports the contention made by Mr. Kimweri that PW1 explained how the appellant ordered her to enter in the room, undress her underskirt and underpants and thereafter he ravished her on the bed until he ejaculated. We agree that PW1 did not say that the appellant took his penis and inserted it in her vagina. However, our firm stand is that the evidence of PW1 narrating on how the offence was committed clearly established that the offence of rape was committed. Part of her testimony appearing at page 8 of the record was to the following effect:-

> *"I entered inside the house, the witch doctor ordered me to undress, so that he could have sexual intercourse with me. I undressed and he had sexual intercourse with me. I did not consent as I was bleeding. The accused forced me to undress my underskirt and underwear. I shout for help but no-body*

responded. The accused threatened to kill me if I shout. The accused ejaculated during the incident...."

In the case of **Hassani Bakari @ Mamajicho v. Republic**, Criminal Appeal No. 103 of 2012 (unreported) this Court expressly stated that whenever the words such as *"sexual intercourse or male/female organs or simply to have sex, and the like"* are used then it should be taken to mean that there was penetration of the penis of a male organ into the vagina of a female organ in so far the requirements of section 130(4) of the PC is concerned. Section 130 (4) of the PC provides that slightest penetration suffices to prove the offence of rape as held in **Hassani s/o Amiri v. Republic**, Criminal Appeal No. 304 of 2010, and **Daniel Nguru & Others v. Republic**, Criminal Appeal No. 178 of 2004 (both unreported).

We have shown herein that PW1 told the trial court that the appellant *"...had intercourse with me"*. With that statement coming from PW1 it is no gainsaying that penetration was proved. The evidence of PW1 was further corroborated by the evidence of PW2 and PW3. PW2 saw PW1 entering into the appellant's room and she even overheard the threat. PW3 on his part, he accounted on how he left PW1 and PW2

with the appellant and that later on he heard the alarm. He responded to the alarm and he was told by PW1 that she was raped by the appellant. The trial court in its decision found PW1, PW2, and PW3 to be credible and reliable witnesses.

It is trite law that the trial court is best placed to assess the demeanour of witnesses than an appellate court. This position of the law was stated in the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and Others** [1994] TLR 132 thus:

> *"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record." (at page 133)*

Again in the case of **Goodluck Kyando v. Republic**, [2006] TLR 363, we said:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness." (at page 367).*

Such good reasons may include, has the witness has given improbable or implausible evidence? or the evidence has been materially contradicted by another witness or witnesses. See- **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004 (unreported).

In the matter at hand, PW1 gave a coherent account of what had befallen on her on that fateful day. She clearly stated that the appellant forced her to undress and then had sexual intercourse with her. Her evidence was corroborated by the evidence of PW2 and PW3. Given the credible account of PW1, PW2, and PW3 like it was the case for the two courts below, we find that the offence was proved to the hilt. Consequently, we find no merit on this complaint.

We now turn to the issue of section 127 (7) of Cap. 6. On this we fully associate ourselves with the submission made by Mr. Kimweri that section 127 (7) of Cap. 6 has no relevance to the present appeal. That section allows a trial court to base its conviction in rape cases, on uncorroborated evidence of a single witness of the child of a tender age if that court is satisfied that the witness is telling nothing but the truth. In this appeal, the trial court did not base its conviction on the evidence of PW1 only. Its conviction and subsequent sentencing of the appellant

to 30 years' imprisonment based on the evidence of PW1, PW2 and PW3. The same applies to the first appellate court. It upheld the conviction and sentence on the strength of the evidence of PW1, PW2, and PW3. Therefore, we find this ground misplaced and has no merit to the present appeal.

Lastly, we consider the complaint on the flouting of the procedure for admitting Exhibit P1. We agree with the learned Senior State Attorney that Exhibit P1 was erroneously admitted in evidence because there was non-compliance with the procedure. First, section 240(3) of the CPA was not complied with in that the appellant was not informed of his right to have the doctor summoned for cross examination. That omission was fatal. See the case of **Juma Masudi @ Defao v. Republic,** Criminal Appeal No. 52 of 2007 (unreported). And secondly, the PF3 was also admitted in evidence without the appellant being afforded an opportunity to comment on it before its admission. It follows therefore, we have to expunge Exhibit P1 from the record for having been irregularly admitted. The order expunging Exhibit P1, notwithstanding, the evidence against the appellant was still intact to sustain his conviction.

In the end, we failed to find any cogent reason to disturb the concurrent finds of the two courts below. We, thus, find the appeal by the appellant lacks merit and we dismiss it in its entirety.

Order accordingly.

DATED at **MTWARA** this 6th 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 7th 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