IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 273 of 2018

MOHAMED JUMA@KODI .... APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Mlacha, J.)

dated the 1st day of August, 2018
in
Criminal Appeal No. 107 of 2016

JUDGMENT OF THE COURT

21st October & 4th November 2019

MWANDAMBO, J.A.:

Mohamed Juma @ Kodi, the appellant herein, appeals against the judgment of the High Court sitting at Mtwara which upheld the decision of the Resident Magistrate's Court of Lindi at Lindi. That Court tried, convicted and sentenced the appellant with an offence of rape contrary to section 130(2) (e) and 131(1) of the Penal Code, Cap. 16 [R.E 2002].

The appellant's arraignment and the eventual conviction and sentence was a result of the allegation that on 7th June, 2016 at Mwenge Ward within the municipality and region of Lindi, he (the

appellant) had carnal knowledge of a girl of twelve years old. For the purpose of hiding her true identity, we shall be referring to the victim of the offence as 'AR'. Since the appellant denied the charge, the prosecution called five witnesses to prove the accusations against him.

The sequence of events leading to the appeal run as follows: AR, a girl of tender age of twelve years was a standard five pupil at Raha Leo primary school within Lindi Township. At all material time, AR was a resident of Rupiani, Mwenge ward staying with her mother, Leila Bakari (PW4). The appellant happened to be staying in the neighbourhood and familiar to both AR and her mother. It occurred that the appellant was attracted to AR. To actualise his desires, the appellant started seducing AR who, nonetheless refused and reported the matter to her mother and Ahmad Salum Zuberi (PW3) who happened to be her uncle and also a local councillor. Both PW3 and PW4 warned the appellant to desist from disturbing AR but he was not deterred. On the date of the incident, 7th June 2016, at/about 1900 hours, PW4 sent AR to a buy some item from a shop in the neighbourhood. As she was proceeding to the shop, AR saw the appellant seated somewhere alone while two other boys were on the opposite side. As she was returning home, AR met the appellant on a small passage lit by electricity light illuminated by houses from both

sides. The appellant engaged AR with yet another round of seduction and after a while, AR found herself covered by a sulphate bag which had waste by an unknown person from behind who together with the appellant lifted her to some unknown place where she was raped before she was rescued by a Good Samaritan. That person took AR to her home and left having done what was necessary for her rescue.

PW4 who had already become concerned with AR's delay, noted her daughter in critical condition bleeding blood from her private parts. AR told her mother of what had befallen of her in the hands of the appellant whereupon PW4 dashed to the appellant's mother to break the shocking news of her daughter's rape by the appellant. Thereafter, PW4 took AR to the police where she obtained a PF3 and later to Sokoine Hospital where they were attended by Dr. Allinis Mashaka (PW1). At that time, AR was on a wheel chair because she was unable to walk. PW1's findings after the medical examination revealed that there was blood from AR's vagina and some bruises on the outer part of it up to the anus. Although the laboratory tests did not reveal existence of sperms inside the vagina, he was able to see sperms on its outer layer. It was his finding that there was a forced penetration into AR's vagina causing rapture and perforation of her hymen. His opinion was that the

perforation of the hymen must have been a result of the forced penetration of an object like penis.

Following AR's mentioning the appellant as the culprit, PW3 and other people pursued the appellant and after some resistance involving threats against them, the appellant was arrested the same night and taken to the police. E. 3805 DC Shein (PW5) conducted investigation in the case involving interrogating the appellant and collecting evidence necessary for the prosecution of the culprit. Eventually, the appellant was arraigned and stood trial on the charge of rape.

After a full hearing, the trial court found the prosecution to have proved its case beyond reasonable doubt. Alive to section 127 (6) of the Evidence Act, Cap. 6 [R.E 2002], the trial court found PW2's evidence as credible and sufficient to prove the offence. It (the trial court) also found that PW2's evidence was sufficiently corroborated by PW1, PW3 and PW4. That aside, the trial court found the appellant's defence supportive of the prosecution case and made a finding of guilt followed by conviction. Upon such conviction, the trial court passed a sentence of thirty years imprisonment plus twelve strokes of cane and compensation of TZS. 1,500,000.00 to the victim.

The appellant's appeal to the High Court was not successful. By and large, the appellant' complained before the first appellate court that he was convicted on weak evidence which did not prove the case against him beyond reasonable doubt. In the first place, the appellant complained that penetration was not sufficiently proved by PW1 and PW2 and if so, there was no evidence to prove that it is him who penetrated PW2. Secondly, he faulted the trial court for convicting him based on proof on balance of probabilities rather than beyond reasonable doubt a standard of proof applicable in criminal cases. Thirdly, the trial Resident Magistrate did not evaluate the evidence with objectivity. Fourthly, conviction being grounded on weakness of his defence rather that the prosecution proving its case on the required standard.

The first appellate court found the appeal wanting in merit upon being satisfied that the evidence proved beyond reasonable doubt that it is the appellant and no one else who committed the offence having been properly identified by PW2 since he was familiar to her. The first appellate court also concurred with the trial court that the appellant met PW2 on the material evening, talked to her which provided a good opportunity to recognize his voice and above all, there was enough

electricity light from the houses illuminating the small passage where the duo met. Furthermore, PW2 named the appellant at the earliest opportunity resulting into his arrest.

Believing that the two courts below were wrong in convicting him , the appellant has appealed to this Court on four grounds paraphrased as follows;-

1. *His conviction was grounded on poor evidence of visual identification.*
2. *The evidence of PW2 was too vague to link the appellant with the offence of rape.*
3. *The prosecution evidence did not prove its case beyond reasonable doubt.*
4. *His conviction based on the weakness of the defence case and not on the strength of the prosecution case.*

At the hearing of the appeal, the appellant appeared in person and fended himself whereas the respondent had the services of Mr. Joseph Mauggo, learned Senior State Attorney resisting the appeal. At the very outset, the appellant opted to let the Senior State Attorney submit before he could reply having urged the court to adopt his grounds of appeal.

Mr. Mauggo commenced his submissions with the appellant's criticism on the alleged weak evidence of identification. It was his submission that the evidence of visual identification was watertight, for the appellant was familiar to PW2 prior to the incident staying in the neighbourhood, the appellant used to seduce her on several occasions, the two met on a narrow passage sufficiently illuminated by electricity light from houses on both sides of the passage, the two had a discussion immediately before another person emerged from behind covered her with a sulphate bag whereupon the two lifted PW2 to unknown place where they raped her.

The learned Senior State Attorney pointed out further that, the victim named the appellant at earliest possible time which resulted into the appellant's arrest that very same night. Mr. Mauggo sought reliance from the decision of this court in **Wangiti Marwa vs. Republic,** [2002] TLR 39 to fortify his submission on the type of evidence required to prove visual identification. At any rate, the learned Senior State Attorney argued, PW2's evidence was sufficiently corroborated by PW1 who conducted medical examination revealing existence of bruises on her vagina and a perforated hymen. On the other hand, Mr. Mauggo submitted that by his own evidence at page 25 of the record, the

appellant admitted having seduced PW2 before the incident and indeed he admitted that he committed the offence although he was persuaded to deny that fact by his fellow prisoners. Relying on the Court's decision in **Seleman Makumba vs. Republic** [2006] TLR 339, the learned Senior State Attorney impressed upon the Court to hold that the appellant's evidence at page 25 of the record supported the prosecution's case and thus there was no question of mistaken identity.

Before winding up his submission, Mr. Mauggo conceded that although the PF3 (exhibit A1) was admitted , its contents were not read out in court and so it ought to be expunged from the record, the evidence for the prosecution was too strong to be diluted by the absence of the PF3. He thus urged the Court to dismiss the appeal for lack of merit.

When it was his turn, the appellant contended that the case against him was fabricated because he did not commit the crime urging the Court to sympathise with his plight having a family depending on him and the death of his father while in custody.

We have heard the submissions by the learned Senior State Attorney in the light of the grounds of appeal which the appellant urged the Court to consider as meritorious warranting the order allowing his

appeal. We need not overemphasise the fact this is a second appeal in which the Court has no power to interfere with the concurrent findings of the courts below. The power to do so can be exercised only in cases where it is established that the concurrent findings are based upon a misapprehension of the evidence or; as the case may be, if in the making of their findings, the lower courts demonstrably violated or acted on wrong principles of law or practice (see: **Salum Mhando vs. Republic** [1993] TLR 170 and **Mosense Nyanchage @ Mareke vs. Republic,** Criminal Appeal No. 131 of 2011, **Zabron Masunga and Dominick Mahondo vs. Republic,** Criminal Appeal No. 232 of 2011, **Hassan s/o Kitunda vs. Republic.,** Criminal Appeal No. 479 of 2015 and **Wankuru Mwita vs. Republic,** Criminal Appeal No. 217 of 2012 (all unreported) amongst many of the Court's previous decisions.

It is plain that the two courts below made concurrent findings on the identification of the appellant based on PW2's evidence which they found to have met the threshold of a proper identification. Firstly, the appellant was not new to the victim as she knew him before the incident as a person staying in the neighbourhood. That aside, the victim met the appellant on various occasions as the latter used to seduce her and so the question of mistaken identity did not arise. In effect, the

identification of the appellant was one of recognition. As held by the Court of Appeal of Kenya in **Mohamed v. Republic** [2006] 1 EA 209:

> *"Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant."*

That case was cited with approval in **Mosense Nyanchage @ Mareke vs. Republic**, Criminal Appeal No. 131 of 2011 (unreported at page 7).

The two courts below concurred also that the conditions for a favourable identification were met for several reasons. **one**, the victim met the appellant at a close range. **Two,** the appellant engaged the victim into a discussion at a narrow passage sufficiently illuminated by electricity lights from houses on both sides of the street before an unknown person came from behind and covered the victim with a sulphate bag whereupon the two culprits lifted the victim to an unknown place where they committed the heinous act. Above all, the victim named the appellant at the earliest opportunity which enabled the appellant's arrest on the same night. The naming of the culprit at the earliest opportunity has been held to be an assurance for a proper visual identification in a host of cases including; **Marwa Wangiti Mwita**

(supra) cited by the learned Senior State Attorney in which it was aptly held:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

In view of the above, we are satisfied that the two courts below were right in finding as they did that the appellant was properly identified. We have seen no justification in interfering with the concurrent findings of the two courts below with the net effect that ground one must fail and the same is hereby dismissed.

In relation to ground two, the complaint is that PW2's evidence was too vague to link the appellant with the offence which the appellant was charged with. We have already held that the evidence of identification by AR who testified as PW2 sufficiently established that the appellant's involvement was beyond reasonable doubt. It is trite law that the best evidence in sexual offences must come from the victim. The two courts below had concurrent findings on PW2's evidence as sufficient to prove the charge. See for instance; **Selemani Makumba** (supra) cited by the leaned Senior State Attorney, **Hamis Mkumbo vs.**

Republic, Criminal Appeal No. 124 of 2007, **Rashidi Abdallah Mtungwa vs. Republic,** CAT Criminal Appeal No. 91 of 2011 (both unreported). The Supreme Court of Philippines in **Philippines vs. Benjamin A. Elmancil**, G.R. No. 23495 dated March, 2019 made the following pertinent statement which we find relevant in this appeal:

> *"In reviewing rape cases, this Court has consistently been guided by three principles to wit, (i) an accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent, to disprove (2) in view of the intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complainant must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of things the accused may be convicted on the basis thereof"*

That decision was cited by the Court with approval in **Mohamed Said vs. The Republic,** Criminal Appeal No. 145 of 2017 (unreported). Essentially, that decision reflects the principle under section 127(6) of The Evidence Act, Cap 6 as amended by the Written Laws (Miscellaneous Amendments) (No.2) Act, 2016 that is; the best evidence in sexual offences must come from the victim of the offence subject to it passing the test of credibility.

The evidence adduced by PW2, the victim of the offence was to the effect that on her way back from a nearby shop, she used a narrow passage between houses and met the appellant in front of her with the aid of electricity from houses on both sides illuminating the passage. The appellant had engaged PW2 in seduction offering to buy for her a gift and take her to a place called Bwaloni and introduce her to his friends. Despite PW's objection, the appellant told PW2 that he was in love of her and did all he could to prove that yet she broke the news to her uncle. Suddenly, some unknown person from behind covered her face with a sulphate bag containing some waste and the two lifted her to an unknown place where the appellant undressed her and inserted his penis into her vagina. After the appellant had gratified his passion, AR had to face yet another round of rape by the appellant's friend

leaving the victim in severe pains only to be rescued by a Good Samaritan who took her to home bleeding. After gratifying her passion, the appellant told her that now that he had raped her, she should go ahead and tell her uncle.

PW2's evidence was corroborated by PW1 who conducted a medical examination whose findings revealed the presence blood from her vagina and some bruises on the outer part of it up to the anus. Although the laboratory tests did not reveal existence of sperms inside the vagina, PW1 was able to see sperms on the outer layer of the vagina. It was his finding that there was a forced penetration into PW2's vagina causing rapture and penetration of her hymen. His opinion was that the perforation of the hymen must have been a result of the forced penetration of an object like penis.

The foregoing evidence aside, although the appellant had initially distanced himself from the incident pleading alibi, later on he admitted having seduced PW2 and committed the crime but his fellow inmates told him to deny having committed the crime. It will be clear from the above that the appellant's attack against PW2's evidence is without any basis. Such evidence was not only credible but also it was supported by

the appellant's own evidence in defence confessing that he had committed the crime. Ground two is in consequence dismissed.

Considering our determination of the first two grounds, grounds three must fall suit. The evidence which led to the appellant's conviction left no doubt that it is him and no other person who committed the offence he was charged with and so this ground is likewise dismissed.

Lastly, ground four must equally fail because, contrary to the appellant's contention, his conviction was based on the strength of the prosecution's evidence which proved the charge against him on the required standard rather than the weakness of his defence. The appellant offered no defence raising any doubt in the prosecution's evidence. On the contrary, the appellant adduced evidence admitting that he had committed the offence he was charged with. The appellant's so called defence was supportive of the prosecution's case and so we see no justification for him faulting the first appellate court upholding the trial court's findings on the basis of which he was found guilty and convicted.

In consequence, like the first appellate court, we are satisfied that the appellant was rightly convicted based on the prosecution's evidence

which proved the case against him on the required standard in criminal cases. In fine, the appeal lacks merit and 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