IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A. NDIKA, AND J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 321 of 2016

ELIAH BARIKI ..... APPELLANT

VERSUS

THE REPUBLIC. .....RESPONDENT

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

(Sumari, J.)

dated on 27th day of June, 2016

in

DC. Criminal Appeal No. 42 of 2015

JUDGMENT OF THE COURT

9th & 12th April, 2019

KITUSI, J.A.:

This is a second appeal by Eliah Bariki who was, before Rombo District Court, charged with and convicted of Rape Contrary to sections 130 (1) (2) (e) and 131 (3) of the Penal Code, Cap 16 as amended by Act No. 19 of 2007. He was sentenced to 30 years' imprisonment. His appeal to the High Court before Sumari, J. brought more trouble to him as the learned judge not only upheld the conviction but enhanced the sentence to life imprisonment.

He appeals hereto against both conviction and sentence.

From the particulars of the offence, the case for the prosecution was that, on 7th day of August, 2013 at Holili Village in Rombo District, Kilimanjaro Region, Eliah Bariki had sexual intercourse with one RF, a girl aged 8 years. The evidence centrally consists of the testimony of the said RF (PW1), the alleged victim, who gives an account of what is alleged to have happened.

Here is what she stated on oath, after a *voire dire* test that satisfied the trial Resident Magistrate that she knew the meaning of an oath. On 7/8/2013 at 4:00 pm PW1 was hanging around the house near to where she lives when one Hassan sent her on an errand to the appellant at his place of abode to tell him to tune his radio for the news. She obliged. On reaching the appellant's residence, PW1 conveyed the message from Hassan but immediately thereafter she was pulled by the appellant into his single bedroom residence where he had forced carnal knowledge of the girl, during which he muffled her possible screams by shoving a piece of cloth on her mouth.

When the appellant was through, he dressed PW1 up and warned her against disclosing to anyone what had just been done to her.

However, PW1 defied the appellant's warning because immediately she got out from his room she disclosed the incident to her brother, Sele, who in turn, informed PW1's mother by phone. PW1 was eventually taken to hospital having obtained a PF3 from the police.

The trail of the information after the alleged rape is as follows; Ziada Said (PW3) ran into PW1 on 7/8/2013 at around 4.00 P.M and noticed that the girl was having difficulties in walking. When she raised the issue with PW1 she explained that she got hurt by a stick. At around the same time PW3 met Sabrina Juma (PW2) and told her about PW1's suspicious manner of walking. Since PW1's mother was not around, PW2 a neighbour to PW1's mother, took it upon herself to find out, so she checked PW1's private parts in the presence of Mama Naomi, only to detect bruises. PW2 inquired from PW1 as to what had happened to her, to which the young girl said she had been raped by "Bonge", the name used in reference to the appellant. PW2 and PW3 took PW1 to police, obtained a PF3 before they proceeded to Mawenzi Government Hospital where they also met Nancy Fredrick Mwanga (PW4), the victim's mother.

The account given by PW4 and her son Seleman Salehe (PW5) is that prior to that date, the appellant had suspicious relationship with PW1. PW5 said he had ever found the appellant seated with PW1 on his bed at night with the lights off. PW5 informed his mother about this fact and PW4 warned the appellant to stop seeing her daughter. Back at the hospital, Dr Eliniokoa Adam Massawe (PW7), examined PW1 and observed that she had wounds in her vagina and she was walking with her legs spread apart. PW7 completed the PF3 which he tendered as Exhibit P1

The appellant offered a surprisingly short defence which consisted of a denial that he did not commit the alleged rape, and a statement that at the time of the said alleged rape he was away from Holili village, as he was in Kenya. In cross examination the appellant admitted knowing PW1, his neighbor, and nothing more.

In convicting the appellant, the trial Resident Magistrate took PW1's word, but not before he had spent a good deal of time discussing the danger of convicting on an uncorroborated evidence of a victim of rape, even though he appreciated the principle that in such cases the best evidence comes from the victim. The learned Magistrate referred to

cases from foreign jurisdictions which are, but, considerably old. The cases are; **Sunmonu V Republic** (1957) WRNLR. 23; **DPP V. Hester** [1972] ALL ER 1056 (5) and; **Republic V Cherop Arap Kinei and Another** 3 E.A.C.A 124. Finally, the learned Magistrate was satisfied that PW1 was an agent of truth and that her story that she had been raped by the appellant was acceptable.

On first appeal the Judge believed PW1's version of the matter and rejected the appellant's defence of alibi for having been raised without the requisite notice under Section 194 of the Criminal Procedure Act, Cap 20 R.E 2002, and for lacking details. The Judge upheld the conviction and enhanced the sentence from thirty years' to life imprisonment.

The appellant has preferred five grounds of appeal, four in the main memorandum and one in the supplementary, filed on 5th April, 2019. These are; **(1)** the charge is defective; **(2)** the evidence for the prosecution had contradictions and doubts;**(3)** there were irregularities in the proceedings; **(4)** the burden of proof shifted to require the appellant to prove his innocence and; **(5)** that the provisions of Sections 192 (3) and 228 (4) of the CPA were not observed.

Before we address our mind to the competing arguments, we think we should observe, for the benefit of upcoming magistrates, that while industry, like the one shown by the trial magistrate in this case, is commended, it is always good to seek solutions and reference from within this jurisdiction where the issues under discussion have been litigated and decided upon, before crossing mountains and oceans to foreign jurisdictions. We have found it necessary to make that observation because in this jurisdiction the law on sexual offences is well ahead of the authorities from foreign jurisdiction, that the learned trial Magistrate cited. Section 127 (7) of the Law of Evidence Act, Cap 6, R.E 2002 provides that conviction for rape may proceed on an uncorroborated evidence of a child victim if the court believes her. Recently by the Written Laws Miscellaneous Amendments (No.2) Act No. 4 of 2016 even the requirement of a *Voire dire* has been done away with. See the case of **Kimbute Otiniel V. Republic**, Criminal Appeal No. 300 of 2011(unreported) which was cited in the recent decision of this Court in **Hassan Kamunyu V. Republic**, Criminal Appeal No. 277 of 2016 (unreported).

At the hearing of the appeal, the appellant appeared in person, without legal representation, whereas the respondent Republic enjoyed

the joint services of Mr Ignas Mwinuka and Ms Akisa Mhando, learned State Attorneys. The appellant took the floor and passionately submitted on each ground except the ground concerning violations of Sections 192 and 228 (4) of the CPA, which he chose not to submit on. However, we asked Mr Mwinuka, learned State Attorney to comment on that ground, so we shall, albeit briefly, pronounce ourselves on that point too.

We begin with the ground that alleges that the charge before the trial court was defective. The appellant submitted that the Miscellaneous Amendment No. 19 of 2007 which is referred to in the charge, is non-existent. Mr Mwinuka resisted this ground and drew the attention of the Court to Written Laws (Miscellaneous Amendments) Act No 19 of 2007, hereafter the Act. Section 8 (a) of the Act amends Section 131 of the Penal Code by adding subsection (3) which introduces life imprisonment for statutory rape involving victims of under the age of ten years.

On our part having gone through the said Act, and it being a matter that we only have to take judicial notice of, we are in full agreement with Mr Mwinuka that this ground is borne out of misinformation and must be dismissed. We accordingly dismiss the first ground of appeal.

Before we move to the second ground of appeal, we have decided to address another less involving ground of appeal that was raised in the supplementary memorandum. This ground alleges that Sections 192 and 228(4) of the CPA were violated. Mr Mwinuka's submission on this point is that this ground was not raised on first appeal so the appellant is precluded from raising it before us. The learned State Attorney cited the case of **Yusuph Masalu @ Jiduvi V. Republic,** Criminal Appeal No 163 of 2017 CAT at Dodoma (Unreported). We are in agreement with Mr Mwinuka that this Court may not decide on matters that were not first put before the High Court for determination, and the rationale is that this Court only sits on appeals against decisions arising from the High Court or from Magistrates' courts in their extended powers, and this is in accordance with Sections 5 and 6 of the Appellate Jurisdiction Act, Cap 141 RE 2002. We however hasten to add that this principle does not apply when the matter involves a point of law. Since the alleged violation of Sections 192 and 228(4) of the CPA appears to be a point of law, we had to satisfy ourselves on it. On perusal of the record we have found nothing wrong with the preliminary hearing that was conducted under Section 192 of the CPA nor is there justification for the complaint that the charge was not read over to the appellant, which is what

Section 228 of the CPA is all about. In the end we find no merits on this ground, so we dismiss it.

Then there is ground No. 3 which we have to dispose of at once, too. This ground complains that the procedure was fraught with irregularities. The appellant did not submit on it, so Mr Mwinuka was at a loss as to what is it that the said appellant has in mind. The learned counsel tried to figure out the appellant's complaint that the trial was not conducted in camera, and therefore it allegedly violated Section 186 of the CPA. He however submitted that this point was adequately dealt with by the High Court, and in any event, that provision is meant to protect victims of rape rather than the alleged perpetrators. He cited the case of **Godlove Azael @ Mbise V. Republic,** Criminal Appeal No 312 of 2007 (unreported). Once again we agree with Mr Mwinuka that this complaint though it raises a legal point, has no merits because it does not show how the appellant's rights were affected. We endorse the finding of the High Court Judge on this point and dismiss the third ground of appeal.

The second ground relates to alleged contradictions among the witnesses for the prosecution. The appellant submitted that PW1, PW2,

PW3 and PW5 are inconsistent as to what happened immediately after PW1 got out of the appellant's room. He referred to some of the contradictions as being that PW1 testified that she is the one who told 'Sele' (PW5) that she had been raped, and that in turn, PW5 telephoned PW4 to inform her about it. However, PW5's version is that it was Mama Mwanaidi who intimated to him about the rape by telling him that PW1 was having difficulties walking. Then again, when PW1 met PW3 and when the latter raised issue with the way the young girl was walking, she explained that she had been hurt by a stick. With this, the appellant put PW1's credibility to question.

Still on the second ground of appeal, the appellant raised issues with the PF3 appearing on pages 21 up to 22 of the record of appeal. He submitted that it was signed on 6/8/2013 a day before the alleged rape, then it shows that the victim was examined by the Doctor more than 56 hours after she had been ravished. With this, the appellant invited us to conclude that this is a fabricated story.

Mr Mwinuka rose to the challenge and submitted that the contradictions referred to by the appellant do not go to the root of the case, pointing out that the best evidence of rape always comes from the

victim. He further submitted that the evidence of the victim as to what took place in this case is cogent and it is supported by other witnesses. When called upon to respond to the appellant's attack on PW1's credibility, the learned State Attorney submitted that this Court should not interfere with the concurrent findings of the two courts below as regards her credibility.

On the issues raised regarding the PF3, Mr Mwinuka submitted, we think in concession, that there are two dates on it and that it must have been a slip of the pen that it was signed on 6/8/2013, a day before the alleged rape. He quickly implored us to proceed with deliberation of the appeal without that PF3, which he submitted has been done before by this court in the case of **Selemani Makumba V. Republic**, [2006] TLR 380.

After hearing the competing arguments for and against this appeal, we think our determination of the second ground of appeal is going to be decisive. But first, we agree with both the appellant and the learned State Attorney that the PF3, Exhibit P1, has no evidential value and should be discarded. On the settled law in **Selemani Makumba**

(supra), we shall proceed to determine the second ground of appeal without referring to that PF3.

Now we turn to issue number two concerning contradictions. By submitting that the contradictions do not go to the root of the case, Mr. Mwinuka is tacitly admitting that there are, indeed, some contradictions. We are grateful to Mr. Mwinuka because his concession helps to narrow the scope of the discussion, so that now the question is whether the contradictions go to the root of the case or not, instead of addressing the broader issue, whether there are contradictions or not. Quite a few times in the past, we have demonstrated that contradictions in a case are unavoidable. In **Armand Guehi V. Republic,** Criminal Appeal No. 242 of 2010 (Unreported) we said;

> *"We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case."*

What comes out from the evidence and the arguments in the instant case is that the contradictions are on what happened outside the room in which the alleged rape took place. PW2, PW3, PW4 and PW5 all

testified on how they came to suspect and eventually to know that PW1 had been raped.

However, the evidence as to what happened in the room, which we think is crucial, is told by PW1 only. She made very bold statements regarding the sexual intercourse and even described the appellant's penis. The appellant did not contradict PW1 by cross examination, and when it was his time to testify in defence, he made that short account to which we referred earlier, raising an alibi which did not introduce any reasonable doubt to the prosecution case. In addition, we agree with Mr. Mwinuka that we should not interfere with the concurrent findings of the two courts below as to the credibility of PW1. The reason for this is found on the settled law that the court sitting on a second appeal may only re-evaluate evidence if there were misdirection or non-direction by the first appellate court. [See, **Director of Public Prosecution V Jaffar Mfaume Kawawa** [1981] T.L.R 149, cited in **Sultan Seif Nassor V. Republic,** [2003] T.L.R 231]. More importantly, credibility is the domain of the trial court.

There is another feature which is not totally irrelevant and we think we should refer to it. This is that, prior to the alleged rape that

gave rise to this case, it is alleged that the appellant had been warned by PW4 to stay away from PW1. PW5 testified that he once found the appellant and PW1 in suspicious circumstances. Again the appellant neither cross examined nor alluded to these testimonies during his defence.

At this point we ask ourselves, whether the contradictions between PW2 and PW3 have any bearing to the evidence referred to above, regarding what happened in the room, or what the appellant had previously been told by PW4. The answer to that question is that they have no bearing at all. We are of a firm conclusion that the contradictions are minor and do not go to the root of the matter. In **Dickson Elia Nsamba Shapwata & Another V. Republic,** Criminal Appeal No 92 of 2007 (Unreported), cited in **Armand Guehi** (supra), the court held;

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

For the foregoing reasons, we dismiss the second ground of appeal.

Lastly we want to make an observation regarding the sentence, by repeating what we earlier took note of. The law as amended in the Act imposes life imprisonment for persons convicted of statutory rape where the victim's age is below the age of ten years. Therefore, it was wrong for the trial magistrate to have imposed on the appellant the sentence of 30 years' imprisonment, which the first appellate Judge rightly enhanced to life imprisonment.

Consequently, for the reasons discussed, we dismiss this appeal in its entirety.

DATED at **ARUSHA** this 11th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL