IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A, LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 65 OF 2017

DAFFA MBWANA KEDI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Masoud, J.)

dated the 13th day of February, 2016
in
Criminal Appeal No. 124 of 2016

JUDGMENT OF THE COURT

11th & 18th February, 2019

LILA, J.A.:

The appellant was arraigned in the District Court of Korogwe at Korogwe for the offence of rape contrary to section 130(1) (2) (e) and 131(1) of the Penal Code [Cap. 16 R.E 2002]. It was alleged that on 25/05/2015 at night time at Lwengera Mkokora Village within Korogwe District in Tanga Region, the appellant did have canal knowledge of one Mariam d/o Seleman a girl of 12 years old.

The trial court upon hearing the prosecution and the defence, was satisfied that the case against the appellant was proved beyond reasonable doubts. It accordingly found the appellant guilty as charged, convicted him and sentenced him to serve 30 years imprisonment.

In protesting his innocence the appellant filed his first appeal in the High Court in Criminal Appeal No. 124 of 2016 which was dismissed on 13/02/2017 for want of merit, hence this second appeal.

Before the trial court, the prosecution case was founded on the evidence of six (6) witnesses namely Elia Mlewa (PW1), Mariam Selemani (PW2-victim of the offence), Salim Francis (PW3), Azimin Abdallah (PW4- the victim's mother), Anamaria Mpemba Leonard (PW5- a doctor who examined PW2) and WP 7394 Christina (PW6). The defence, on the other side, had the appellant as the sole witness.

It was the prosecution case that on 25/5/2015 at night time while PW4 was in the house watching television, PW2 went to the kitchen to collect some home utensils, the plates to be specific. PW2 told the trial court that upon entering in the kitchen the appellant also entered, held her by the mouth to disenable her shout, chopped her down, pulled down her underwear and then the appellant pulled out his male organ

and inserted the same in her female organ. The appellant was seen entering the kitchen by PW1 who was at the grocery just 10 to 15 steps from the kitchen and he asked PW3 who was also around there to accompany him to the kitchen so as to see what was happening therein between the appellant and PW2. On peeping into the kitchen the duo found the appellant ravishing PW2. PW1 touched the appellant and asked him *"Hivi wewe unamfanyaje huyu mtoto"* and the latter, in a verge to serve himself, pushed PW1 so as to give way for him to escape. The former resisted but a struggle ensued and the later managed to escape only to be apprehended a short while by the duo upon a chase. The appellant was taken to PW4, the victim's mother, whereat the victim said the appellant raped her when she went to take the plates in the kitchen. PW1, PW2, PW3 and PW4 told the trial court that they knew the appellant for he lives in the same village. PW2 was taken to the village authority (VEO) and then to police where she was issued with a PF3 (exhibit P.3). Upon a medical examination by PW5, a Medical Officer at Magunga Hospital in Korogwe, neither bruises nor any sign of penetration were seen in PW2's vagina. Instead, he found PW2 not virgin and the latter told him that it was her second time to have sexual intercourse with the appellant. PW6 drew the sketch map (exhibit P.2)

of the scene of crime which indicated where the rape was committed and where PW1 and PW3 were when they saw the appellant entering the kitchen after PW2 had entered.

In his sworn defence before the trial court, the appellant vehemently distanced himself with the accusations raised by the prosecution against him. He said he was arrested at the main road by the duo at the material time and date while coming from work. He admitted knowing PW1 as a person he used to meet at several football marches.

As hinted above, the trial court, at the end, found the case proved, convicted and sentenced the appellant as above stated.

Dissatisfied, the appellant has preferred nine (9) grounds of complaint intending to fault the concurrent decisions by the two courts below. The grounds, closely examined, boil down to four major grounds. **One**, that he was not properly identified at the scene of crime by PW1, PW2 and PW3. This complaint features in grounds number 2, 3, 4, 6, 7, and 9. His contention here hinges on failure by those three witnesses to explain the intensity of light at the kitchen (scene of crime) and failure by PW2 to name him as a person she knew before the incident and how

she identified him. **Two**, that the two courts wrongly believed that he was arrested flagrante delicto as alleged by PW1, PW3 and PW4 and that the Village Executive Officer where he was taken after his arrest was not called to testify to that effect (ground 5). **Three**, the two courts wrongly admitted and believed the sketch map (exhibit P2). This features in ground 8. And, **Four**, that the two courts did not scrutinise the circumstances in which the offence was committed (ground 1).

The appellant also filed written submissions in Court on 19/2/2019 amplifying his grounds of appeal.

Before us, when the appeal was called on for hearing, the appellant appeared in person and was not represented whereas the respondent Republic had the services of Mr. Waziri Mbwana Magumbo who was assisted by Ms. Donata Kazungu, both learned State Attorneys.

The appellant adopted his written submissions and opted to respond after the learned State Attorney had responded to his grounds of appeal.

In his written submissions, the appellant basically centred his arguments on identification. It is his contention that the evidence on identification at the scene was wanting. He argued that, while PW1 and

PW2 did not tell what kind of light illuminated the scene of crime and PW4 said there was electric light outside the kitchen, the intensity thereof was not explained. This was irregular, he stated and to bolster his argument he cited the case of **Said Chaly Vs. R**. (CAT), Criminal Appeal No. 69 of 2005 and **Hangi Said Mwinjuma and 2 Others Vs. R**. (CAT), Criminal Appeal No. 74 of 2000 ((both unreported) which stressed in the requirement for a witness testifying on identification to tell the source and intensity of light.

In resisting the appeal, Ms. Kazungu, argued grounds 2, 4, 6 and 7 jointly. They related to identification of the appellant at the scene of crime. She contended that the appellant was found by PW1 and PW3 flagrante delicto having sexual intercourse with PW2 in the kitchen and PW1 asked him *'Hivi wewe unamfanyaje huyu mtoto*". That the appellant forced his way out and ran away but was chased and apprehended by PW1 and PW3. She stated that where an accused is found red handed and arrested then the issue of identification does not arise. She referred us to the case of **Bahati Robert Vs. Republic**, Criminal Appeal No. 146 of 2013 (unreported). She also argued that the appellant is well known to prosecution witnesses. That apart, she

insisted, PW3 said there was electric tube light outside the kitchen. She accordingly urged the Court to dismiss those grounds of appeal.

In respect of ground 1 of appeal, Ms. Kazungu submitted shortly that the record bears it all that the two courts below properly scrutinized the circumstances in which the offence was committed by considering the evidence by the prosecution witnesses and were satisfied that the appellant was guilty of the offence.

Regarding failure by the prosecution to call VEO as witness to establish if the appellant was found in flagrante delicto committing the offence, Ms. Kazungu conceded that he was really not called as a witness but was quick to submit that his evidence in that respect would have been similar to that given by PW1, PW2, PW3 and PW4 hence there was no need to call him. In her view, that fact was sufficiently proved by those four witnesses.

In respect of ground 8 of appeal, the Learned State Attorney pointed out that the sketch map complained of by the appellant did not form the basis of the his conviction. Hence, she argued, even if expunged the appellant's conviction will still stand.

Arguing in respect of ground 9 of appeal, Ms. Kazungu simply said the same was not raised and canvassed before the High Court, hence cannot be raised at this stage and she referred us to the case of **George Maili Kemboge Vs. Republic**, Criminal appeal No. 327 of 2013 (unreported).

In all, the Learned State Attorney urged the Court to dismiss the appeal in its entirety.

The appellant had nothing in rejoinder. He urged the Court to consider his grounds of appeal and the written submission thereof in determining the appeal

In determination of the appeal, like the two courts below, we find ourselves faced with two crucial issues. These are first, whether PW2 was raped and second, whether it is the appellant who raped her.

We shall begin our discussion with whether PW2 was raped. We have scanned the entire prosecution evidence and we are satisfied without any iota of doubts that PW2 was raped. There is clear evidence by PW1 and PW3 that they found PW2 having sexual intercourse with a person they said is the appellant. That aside, PW2 explained all on what befell on her when she went to the kitchen to take plates. She explained

that upon entering the kitchen she was held down with the mouth closed, her underwear pulled down and a male organ was inserted in her female organ. In our strong view, that evidence which was not discredited coming from the victim of the offence sufficiently established that she was carnally known on the material date. We are guided in holding so by the stance this Court has maintained on what we regard as the best evidence in rape cases as was stated in the case of **Selemani Makumba Vs. Republic**, Criminal Appeal No.94 of 1999 (unreported) that true evidence of rape has to come from the prosecutrix (the victim) herself; a woman where consent is required and a girl where consent is immaterial. See also **Godi Kasenegala Vs. Republic**, Criminal Appeal No. 10 of 2008 (unreported). In the instant case PW1, a twelve years girl, was the best witness to prove that she was raped. We, however, wish to note that the fact that the doctor who examined PW2 found no bruises and hymen was not intact did not adversely affect the prosecution case. Under section 130(4) of the penal code, Cap. 16 R. E. 2002, all that is important in rape cases is that penetration, however slight, be established and that it is not necessary to prove resistance or injury to the body. That section states:-

" *(1) For the purposes of proving the offence of rape-*

(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) ***Evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place*** *without consent."* (Emphasis added)

Since, in the present case, PW2 categorically explained that the appellant inserted his male organ in her female organ then that was sufficient.

Identification of the appellant is definitely central in the appellant's grounds of appeal. The appellant contends that it was not satisfactory on account of failure to explain the intensity of light and not being named by PW2 as her ravisher.

The prosecution evidence in its totality leaves no doubt that it was the appellant who raped PW2. PW1 and PW3 clearly told the trial court that they peeped into the kitchen to see what was happening after PW2 had entered and the appellant later entered therein only to find the

appellant having sexual intercourse with PW2. They also said the appellant tried to escape but they made a chase and arrested him. There is no suggestion that they lost site with the appellant in the due course of chasing him and the circumstances do not suggest so. Given the fact that the appellant was found flagrante delicto and was arrested after a short chase and taken back to PW4, we fully agree with the learned State Attorney that the issue of identification does not arise. Further, upon being taken back to PW4, the victim (PW) unhesitatingly explained how the appellant had ravished her in the kitchen. It is also apparent, from the evidence by PW1 and PW3 that the apprehension of the appellant was done immediately hence gave no chance for PW2 to name the appellant as her ravisher as complained by the appellant in ground 9 of appeal. The Court has in a number of times held that where an accused is arrested at the scene of crime his assertion that he was not sufficiently identified should be rejected. [see **Bahati Robert Vs. Republic** (supra) and **Joseph Safari Massay Vs. Republic**, Criminal Appeal No. 125 of 2012 (unreported)]. In the latter case, the case of **Abdalla Bakari Vs. Republic**, Criminal Appeal NO. 268 of 2011 (unreported) was cited in which the appellant was overpowered and arrested at the scene of crime and his assertion on appeal that he was

not sufficiently identified was rejected. Applying the same principle, the Court rejected a similar assertion raised by the appellants who were upon a chase arrested not far from the scene at night time.

In the instant case, contrary to the complaint by the appellant in ground 1 of appeal that the circumstances in which the offence was committed was not scrutinized, the record clearly shows that the trial court considered the circumstances under which the offence was committed as narrated by PW1, PW2 and PW3 and arrived at the conclusion that it was the appellant who raped PW1 thus:-

> *" The issue of identification arises out of this matter because the rape is said to have occurred at night. The conditions as stipulated by PW3 were favorable for identification because there was sufficient light and PW1 said and it is not disputed that when he went into the kitchen he touched the accused on the shoulder and called him by his name. PW1 said that he knew the accused well before the rape incident and this was confirmed by the accused himself when he told the court that he on several occasions*

met PW1 at football matches and he knew by the name of Elia. Thirdly, the victim herself identified the accused as his rapist and lastly it is the same accused who was seen at the kitchen who ran away after physical confrontation with PW1 and it is who was shortly apprehended by PW1 and PW3 and taken before the victim and her parents....

I believe from the descriptive evidence tendered by the said prosecution witness (sic) it leaves no doubt that the person found in the kitchen with the victim was indeed the accused and no other person..."

The High Court agreed with the analysis of the prosecution evidence done by the trial court and the finding thereof.

Given the strong evidence by PW1 and PW3 that they saw the appellant having sexual intercourse with PW2 and apprehended him when he attempted to escape coupled with the clear evidence by PW2, the victim of the offence, we find no fault in the factual findings of the

two courts below that it is the appellant who raped PW2. His assertion that he was arrested while coming from work is highly improbable in the circumstances of this case. The Court has always considered the evidence of finding somebody red handed committing an offence to be conclusive. For instance in the case of **Abdallah Ramadhani Vs. Republic,** Criminal Appeal No.141 of 2013 (unreported), the Court stated as follows:

> *"When he responded to the call and went to the scene of crime, he found the appellant in "flagrante delicto" raping the complainant. The evidence to prove the offence of rape was therefore more than sufficient".*

In the above case the Court upheld the conviction of the appellant because he was found by a witness committing the offence. For similar reasons therefore the appellants appeal grounds number 1, 2, 3, 4, 6, 7 and 9 fail and are dismissed.

There was also the complaint in ground number 5 that the two courts below wrongly believed that the appellant was found red handed and was taken to VEO because VEO was not called to testify. We fully

agree with the learned State Attorney that that fact was well established when PW1, PW2, PW3 and PW4 gave their testimony. Under our law, section 143 of the Evidence Act, Cap 6 R. E. 2002, it is not the number of witnesses which determine proof of any fact but competence and reliability. In our view, there was no need of calling VEO to testify, for, as rightly argued by the learned State Attorney his evidence would not have differed with that of PW1, PW2, PW3 and PW4 whose evidence on that aspect was strong and unshaken. This ground also fails.

In ground 8 of appeal the appellant is faulting the two courts below for admitting and believing the sketch map (exhibit P.2) which does not show where the appellant was apprehended. We have dispassionately gone through the entire judgments of both courts below and we were unable to find any reliance made by the courts on exhibit P.2 in convicting the appellant apart from a mere mention of it by the trial court when giving the summary of evidence narrated by PW6. As rightly argued by the learned State Attorney, the appellant's complaint is unfounded. That ground is therefore without merit.

For the foregoing reasons we are satisfied that the evidence by the prosecution proved the case against the appellant beyond doubts. We accordingly agree with the learned State Attorney that there are no

valid grounds warranting the concurrent findings of guilty by the two courts below be faulted. More so, the sentence meted by the trial court is the statutory minimum. The appeal fails and is dismissed in its entirety.

DATED at **TANGA** this 18th day of February, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL