IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MZIRAY,J.A.)

CRIMINAL APPEAL NO 21 OF 2017

KHAMISI ABDEREHEMANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Twaib, J.)

dated the 2nd day of November, 2016
in
Criminal Appeal No. 28 of 2016

JUDGMENT OF THE COURT

22nd & 27h February, 2019

JUMA, C.J.:

The appellant was convicted by the District Court of Masasi, at Masasi, of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 and sentenced to thirty (30) years imprisonment. His appeal to the High Court at Mtwara against conviction and sentence was dismissed on 2nd November, 2016. Aggrieved, he filed a memorandum of appeal to this Court on 2nd May 2017, which shows that

he would like this Court to allow his appeal and set him free on the following grounds:

> *1). That the two courts below erred to rely on the evidence of the victim (PW1) to convict him of rape, without taking into account the failure of the prosecution to tender the statement which the victim had earlier made to the police as this is required under section 166 of the Evidence Act.*
>
> *2). that the prosecution failed to prove the offence of rape beyond reasonable doubt.*
>
> *3). that the two courts below should not have convicted the appellant of rape in circumstances where the PF3 which the prosecution tendered, did not certify if it was the appellant who raped the complainant (PW1).*
>
> *4). that the evidence of the complainant (PW1) does not show that there was any penetration as the law requires.*
>
> *5). that the two courts below erred when they relied on evidence of the police investigator (PW3) and that of the caution statement (exhibit P2), to convict him.*

The particulars of the charge against the appellant were that around 07:00 hours on 27th February, 2014 at Silabu area in Masasi District of

Mtwara Region he had carnal knowledge of Tabia d/o Issa without her consent.

The substance of the prosecution case was built around the evidence of the complainant Tabia Issa (PW1). She recalled how, while cultivating her farm alone, the appellant suddenly appeared. He took out a knife and demanded sex. The appellant threatened he would kill her should she make any noise. He threw her down to the ground, had sexual intercourse with her by force, and then ran away. PW1 picked herself up from the ground and walked back home where she reported what had happened. She later reported her ordeal to the police. After getting the PF3 from the police, PW1 went to the hospital for medical examination. It was while she was returning back home from the hospital, she saw the appellant standing beside a pool game table. She duly informed the police. The police arrested the appellant that same day.

Testifying in his defence, the appellant did not deny he and PW1 had sexual intercourse, he only insisted that was consensual. He and PW1 had earlier arranged to meet at the farm. That, after exchanging greetings they went ahead with sexual intercourse. According to the appellant, their

differences only arose when he gave her Tshs. 3,000/= (which she had refused to accept) instead of Tshs. 10,000/-, the amount the two had on earlier agreed.

In his judgment, the learned trial Resident Magistrate (H. Ulaya—RM), did see the need to spend much time on the question whether there was sexual penetration because the appellant himself had alleged that the two had consensual sexual intercourse, and their disagreement came up when he paid PW1 Tshs. 3,000/= which was less than Tshs. 10,000/= the two had agreed. After making a finding on proof of sexual penetration, the learned trial magistrate made a further finding that the consent for sexual intercourse was not freely given. He accordingly convicted the appellant.

Apart from the earlier memorandum of appeal whose grounds of appeal we outlined; at the hearing of his second appeal, the appellant asked, and we allowed him to rely on a Supplementary Memorandum of Appeal containing the five grounds of appeal faulting the trial and the first appellate for:-

> *1). convicting him on the basis of a defective charge sheet, which wrongly cited section 130 (2) (e) of the Penal Code*

instead of section 130 (2) (b). This prevented him from properly understanding the nature of the offence he was charged with, amounting to an unfair trial.

2). convicting him against the weight of evidence. The charge against him was not proved beyond all reasonable doubt. He complained that the trial magistrate failed to make any specific findings on the credibility of PW1, which contravenes section 127(7) of the Evidence Act.

3). fundamentally shifting the burden to the appellant, prove consent, and not the prosecution who should bear this burden.

4). failing to address him in terms of section 240(3) of the Criminal Procedure Act when admitting the PF3, and failing to give him the opportunity to object before admitting the PF3.

5). the error of the High Court Judge in holding that the defects in the charge sheet are curable.

At the hearing of the appeal, the appellant appeared in person and opted to let Mr. Abdulrahman Mohamed, the learned Senior State Attorney who appeared for the respondent Republic, to respond to his grounds of appeal contained in his two sets of Memoranda of Appeal. The learned Counsel opposed the appeal and supported the conviction and sentence.

The learned Counsel combined and argued together supplementary grounds number 1 and 5 of the Supplementary Memorandum of Appeal. Through these two grounds the appellant took issue with the way the charge sheet cited section 130 (2) (e) of the Penal Code, which was not applicable to the facts of his case; instead of section 130 (2) (b), which was applicable. Further, through these grounds the appellant takes exception to the way the first appellate Judge found that the defects in citation curable.

The learned Counsel readily conceded that indeed charge sheet cited sections 130 (1) (2) (e) and 131 (1) of the Penal Code which relates to the offence of rape of girls under the age of eighteen (18). It was not applicable to charge an accused person where the victim (PW1) is a woman who testified that she was 32 years old. In that respect, the learned Counsel submitted the charge sheet should have cited sections 130 (1) (2) (b) and 131 (1) of the Penal Code. He was however quick to point out this defect was not fatal, but curable under section 388 of theCriminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) and in any case, he added,

the appellant was not prejudiced because the proceedings show that he all along knew that he was charged with rape of a 32-year old woman.

Responding to the complaints over lack of proof beyond reasonable doubt, and over the credibility of PW1; the learned counsel referred us to the evidence of the victim (PW1) on page 5, where she explained how the appellant used a knife, and threatened to kill her. He further submitted that the appellant does not deny he had had carnal knowledge of PW1, only that he insisted its consensual nature. To the extent the appellant conceded sexual intercourse with PW1, the learned Counsel urged us to regard him as the best of witness of what he did to PW1. For this proposition he referred us to the case of **IBRAHIMU IBRAHIMU DAWA VS R.,** CRIMINAL APPEAL NO. 260 OF 2016 (unreported) which had referred to a statement in **MOHAMED HARUNA MTUPENI AND ANOTHER V. R.**, CRIMINAL APPEAL NO 259 OF 2007 (unreported) to the effect that an accused person who freely confesses to his guilt; is very best witness of witnesses.

To support his stance that there was no consent, the learned Counsel submitted that the trial court found PW1 credible and believed her. He

added that there is nothing in this appeal to lay any basis to question the credibility of PW1.

On the complaint that the courts below had shifted the burden of proof on the appellant's shoulders, the learned Counsel questioned the basis for this complaint. He submitted that nowhere in the judgments of the district court and the High Court, where the two courts below, shift the burden of proof, from the prosecution to the appellant.

The learned Counsel joined and submitted together the appellant's fourth ground in his supplementary memorandum of appeal and the third ground in his first set of memorandum of appeal. He urged us to reject these grounds which the appellant claimed, had faulted the way the medical examination report (PF3) was admitted without affording him the opportunity to cross examine the medical officer who prepared that report PF3 (exhibit P1).

He submitted that this complaint does not hold because Dr. Sadiki Ally Hassani (PW2), who prepared exhibit P1, testified as PW2. The only shortcoming which the learned Counsel was prepared to concede, was the failure by the trial court to invite the appellant to express whether he

objected the admission of this exhibit. For only this reason, the learned Counsel was prepared to agree with the appellant and urge that exhibit P1 should be expunged from the record.

The learned Counsel urged us to ignore the appellant's fifth ground of appeal in the first memorandum of appeal dated 2nd May, 2019 where he is contesting the cautioned statement. He urged us to disregard this complaint because the first appellate Judge had already expunged the cautioned statement on the reason that it was recorded outside the statutory period of four hours prescribed under sections 50(1)(a) of the CPA and no extension had been sought and obtained under section 51 (1)(a) of the CPA.

Next, the learned Counsel offered us several reasons why he thought we should disregard the appellant's first ground of appeal in his first memorandum of appeal. In this ground the appellant asks why, the victim's statement (PW1) which she had recorded to the police, was not tendered as evidence as envisaged under section 166 of the Evidence Act. First, he submitted that the appellant did not include this ground in his first appeal before the High Court. Secondly, section 166 of the Evidence Act which he

cited, does not compel the prosecution to tender these police statements. Thirdly, the appellant was not prejudiced in any way by failure to tender PW1's statement as evidence.

The learned Counsel combined grounds Nos. 2 and 4 of the first Memorandum of Appeal and argued them together. Through these two grounds, the appellant had faulted the two courts below for failing to determine that the prosecution case was not proved against him beyond reasonable doubt. The appellant also contended that sexual penetration was not proved against him.

The learned Counsel referred us to his earlier submissions where he had shown us that sexual penetration was proved by the evidence of the victim (PW1) and that of the appellant himself. The learned counsel referred to the evidence of the victim (PW1) and argued that even after expunging the medical examination report; the oral evidence of the medical officer (PW2) supports the finding that PW1 was raped.

The learned Counsel rounded up his submissions by urging us to dismiss the appeal for lack of merit.

In reply, the appellant had nothing useful to add, other than to insist that PW1 had consented to the sexual intercourse.

This being a second appeal the jurisdiction of the Court derives from Section 6 (7) (a) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) which restricts the Court to hearing appeals on matters of law but not on matters of fact: **see SALEHE MWENYA, LADISLAUS TUJAKAMA, JOVIN SHIRIMA & BUSHIRI HAMISI,** CRIMINAL APPEAL NO. 66 OF 2006 (unreported). This Court can only interfere with the concurrent findings of facts by the trial and first appellate courts if these courts had misapprehended or misapplied the evidence so as to occasion a miscarriage of justice to the appellant: **ZABRON MASUNGA AND DOMINIC MATONDO VS. R.,** CRIMINAL APPEAL NO.232 OF 2011 (unreported).

Having considered all the ten grounds of appeal and the submissions thereon, there are no doubts in our minds that the grounds contending that the appellant should have been charged under section 130(1) (2) (b) and 131 (1) of the Penal Code instead of section 130(1) (2) (e) and 131

(1) he was charged and convicted with, raises matters of law worth our attention.

It is appropriate to observe here that the anomaly of the appellant being charged under the provisions governing victims of rape who are under the age of eighteen (18), was first raised in the High Court, not by the appellant; but by Ms Naomi Mollel, learned State Attorney during the hearing of the first appeal in the High Court. Ms Mollel informed the High Court that the appellant was charged and convicted under section 130(1) and (2) (e) and 131 (1) of the Penal Code while the proper provision should have been section 130(1) and (2) (b) and section 131 (1). She cited to the High Court a decision of this Court in **JAMES SHARIFU V. R.,** CRIMINAL APPEAL NO. 160 OF 2013 (unreported) to support her stance the defect is curable under section 388 of the CPA. The learned first appellate Judge (Twaib, J.) addressed this anomaly and concluded that the defect did not prejudice the appellant's case because the particulars of the offence were explicit enough to inform him of the nature of the offence he was facing, which enabled him to defend himself appropriately.

On our part, we agree with the first appellate Judge that section 388 of the CPA provides a proper guide where a defect, error or omission is belatedly discovered at appellate stage. The section provides a general guidance relevant to this appeal where the charge sheet under which the appellant was tried and convicted, was found with defects during the course of the hearing of first appeal. This guidance is to the effect any error, omission or irregularity in the charge sheet *per se*, cannot by itself vitiate a decision of the trial court based on that defect unless, such a defect in the charge sheet, has in fact occasioned a failure of justice. The relevant section 388 of the CPA provides:

> *388. Subject to the provisions of section 387,* ***no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal*** *or revision* ***on account of any error, omission or irregularity*** *in the complaint, summons, warrant,* ***charge,*** *proclamation, order, judgment or in any inquiry or other proceedings under this Act;* ***save that where on appeal*** *or revision, the court is satisfied that* ***such error****, omission or irregularity* ***has in fact occasioned a failure of justice****, the court may order a retrial or make such other order as it may consider just and equitable.* [Emphasis added].

In the first ground of his supplementary memorandum of appeal, the appellant mentioned how the defective occasioned him a failure of justice:

> *"....he could not properly understand the nature of the offence he was charged with in order to be able to properly enter defence and as a result he was not given a fair trial."*

On our part, we do not share the appellant's view of the defect. The way the appellant responded to the charge when it was read out, and the way he cross-examined PW1 and the way he testified in his own defence, are not consistent with a person who did not understand the seriousness of the charge facing him, or with a person who was prejudiced in any way. For instance, when he was cross-examining the victim (PW1), the appellant pressed her over negotiation he alleged they had. He also raised the price for sex they allegedly agreed on. The appellant was not deterred when PW1 pushed back by insisting that she neither consented to the sexual intercourse nor did she and the appellant negotiate any payments for sex. All these exchanges show that the appellant fully understood that consent is a full defence in rape cases.

By his coming up with the defence of consensual sex also serves to show to what extent that the appellant knew that the victim of rape was not a girl of under the age of 18 where consent is immaterial, a woman whose lack of consent is an essential ingredient which prosecution needed to in the offence of rape against him. The appellant was also not prejudiced by the sentence of thirty years imprisonment upon being convicted for rape of adult woman. This is quite different from the sentence of life imprisonment had he been convicted for raping a girl of under the age of 18.

From the foregoing, we find that the appellant was not prejudiced by the charge sheet citing 130 (1) (2) (e) and 131 (1) of the Penal Code instead of the applicable 130 (1) (2) (b) and 131 (1).

We will not spend much time on the remaining grounds of appeal revolving on proof of lack of proof, proof of penetration and credibility of PW1. These are matters of facts over which the two courts below made concurrent findings thereon. As this Court restated in **JULIUS JOHN SHABANI VS. R.,** CRIMINAL APPEAL NO. 53 OF 2010 (unreported) *"credibility of a witness is always in the province of a trial court which is in*

a better place to assess the witness being face to face with him/her. The appellate courts merely depend on the record of proceedings from the trial court."

In the upshot of the foregoing, we find the appeal to be without merit and dismissed in its entirety. We order accordingly.

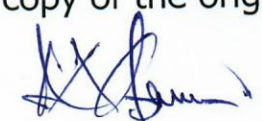
DATED at **MTWARA** this 26th day of February, 2019.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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



A. H. MSUMI
DEPUTY REGISTRAR
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