IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 403 OF 2016

PASCHAL APLONAL.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora

(Mallaba, J.)

Dated 10th day of August, 2016
in
HC Criminal Appeal No. 152 of 2016

JUDGMENT OF THE COURT

23rd & 28th October, 2019

MUGASHA, J.A.

In the District Court of Kibondo, the appellant was charged with three counts namely: Marrying a school girl contrary to Rule 4 (2) of the Education (Imposition of Penalties to a Person who Impregnates a School Child) Rules, Government Notice No. 54 of 2003 (the Education Rules); Rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code **[CAP 16 RE.2002]** and Impregnating a school girl contrary to Rule 4 (3) of (the Education Rules).

It was alleged in the charge sheet that, between June and October, 2013 at Kitahana village within Kibondo District in the Region of Kigoma, the appellant did unlawfully marry and had sexual intercourse with one G.G a school girl aged fifteen (15) years.

To prove its case the prosecution called five witnesses and tendered two documentary exhibits; various love letters from the appellant addressed to the victim and a PF 3 which were admitted as Exhibits P1 and P2 respectively.

A brief account of the evidence which led to the conviction of the appellant is as follows: The victim together with her parents and the appellant resided in the same house. The appellant was employed by the victim's father **GADIUS NDIWAGO** (PW1) in a facility offering phone money based transfer and charging phones. According to the victim, she started to have sexual intercourse with the appellant in June 2013 subsequent to which she heeded to his advice and stopped going to school because he had promised to marry her. Having cohabited with the appellant at his residence for two months, in September 2013 she conceived. After revealing her status to the appellant, he ordered her to go back to her parents which she declined. The victim opted to notify her

mother who went at the scene of crime and found the victim cohabiting with the appellant who was subsequently arrested. The victim's account was supported by her parents PW1 and **EDA BAYINGA** (PW3), who both testified to the effect that, their daughter had stopped going to school after she began to cohabit with the appellant whose love letters addressed to the victim were unveiled and exhibited before the trial court. **NASHONI PHILLIPS** who testified as PW4 told the trial court to have notified the victim's mother after having seen the victim on several occasions in the appellant's room. **HAMZA SHABANI** (PW5) is the medical Doctor who examined the victim and confirmed that she was pregnant. Apparently, the record bears out that the appellant though present throughout the trial, did not cross-examine the prosecution witnesses except PW3.

On the other hand, the appellant who was the sole witness for the defence, denied the accusation by the prosecution account. He claimed to have been employed for several months by the victim's father but he was paid a salary for one month only. As such, he decided to quit from the job and subsequently he was followed by the victim's mother and later charges were commenced against him.

Having accepted the prosecution's version to be true, the trial court acquitted the appellant of the 1st count and convicted him of the 2nd and 3rd counts. He was sentenced to imprisonment for thirty years for the 2nd count and two years in respect of the 3rd count. The appellant's appeal before the High Court was partly successful since the conviction and the sentence in respect of the 3rd count was set aside and that for rape dismissed.

Still undaunted, the appellant has preferred this second appeal. In the memorandum of appeal he has raised five grounds of complaint faulting the learned trial judge to have erred in law and fact due to: **One,** upholding conviction without considering that the charge was not proved. **Two,** the absence of a specific dates on which the appellant had sexual intercourse with the victim. **Three,** failure to consider the defence evidence and thus denying the appellant a fair trial. **Four,** failure by the prosecution to parade as witnesses, the investigator and local leader to establish if the appellant was cohabiting with the victim. **Five,** lacking of proof that the victim was a student as in the absence of the teacher's evidence or the school register to that effect.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas the respondent Republic had the services of Mr. Innocent Rweyemamu, learned State Attorney.

Having adopted the grounds of appeal the appellant opted to initially hear the submission of the learned State Attorney while reserving a right of reply. Addressing us on the appellant's complaint to the effect that, there was no proof that he had carnal knowledge of PW2, the learned State Attorney argued that, the proof on the charge of rape against the appellant is cemented by the victim's evidence which is the best. Besides, such account is supported by the evidence of her parents who all testified about the victim having cohabited with the appellant from June 2013 as confirmed by PW4 who happened to have seen the victim in the appellant's room.

Regarding the appellant's complaint on the absence of the exact date on which he had sexual intercourse with the victim, Mr. Rweyemamu argued that to have been addressed by the victim's account, who testified to have had a sexual relationship with the appellant between June and September, 2013. Thus, relying on the case

of **SELEMANI MAKUMBA VS REPUBLIC** [2006] TLR 379, Mr. Rweyemamu argued that the victim's evidence was the best in the circumstances.

Addressing the complaint on failure to consider the defence evidence, the learned State Attorney faulted the same arguing that, though not addressed by the trial court, it was remedied by the first appellate court which considered the appellant's defence and concluded that, in the wake of his failure to cross-examine the prosecution witnesses that was tantamount to admitting the prosecution account on the charge of rape.

Pertaining to the grievance on weak prosecution evidence on account of the absence of the investigator and the local leader who were not paraded as prosecution witnesses to confirm if the appellant had cohabited with the victim, Mr. Rweyemamu argued the same to be an afterthought as it was not initially raised before the High Court. However, he submitted that, the appellant's complaint was well addressed in the victim's account who told the trial court to have been raped by the appellant. Finally, the learned State Attorney urged us to dismiss the appeal in its entirety.

As to the complaint on the failure by the prosecution to parade evidence to prove if the victim was a student, the learned State Attorney urged us not to consider it because the conviction of the appellant in the respective count was set aside by the first appellate court. In conclusion, the learned State Attorney urged us to dismiss the appeal in its entirety.

In reply to what was submitted by the respondent, the appellant raised entirely new complaints to the effect that, during the trial he was barred from calling his two witnesses and that though he cross-examined the witnesses the trial court record does not reflect so. When asked if he had raised such complaints before the High Court, he declined and ultimately, urged the Court to allow his appeal and set him free

Having carefully considered the arguments for and against the appeal and the evidence on record, it is clear that the conviction of the appellant which was upheld by the first appellate court hinges on **One,** the credible evidence of the PW1 that she was raped by the appellant between June and September, 2013 when cohabiting with the appellant which was confirmed by the testimonial account of PW4. **Two,** the victim mentioned the appellant to be the assailant to her parents PW1 and PW3. In this regard, this being a second appeal, it is trite law that the

Court should rarely interfere with the concurrent findings of the lower courts on the facts unless there has been a misapprehension of the evidence occasioning a miscarriage of justice or violation of a principle of law or procedure. See - **DPP VS JAFFAR MFAUME KAWAWA** (1981) TLR 149 and **FELIX KICHELE AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 159 of 2015 (unreported). In the latter case we said:

> *"It is an accepted practice that a second appellate court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate. Indeed, there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court. That is part of the reason why under section 7(6) (a) of the Appellate Jurisdiction Act, 1979 it is provided that a party to proceedings under Part X of the CPA, 1985 may appeal to the Court of Appeal on a matter of law but not on a matter of fact."*

Pertaining to the credibility of a witness, apart from that being a domain of the trial court only in so far as the demeanour is concerned, it can be determined by the second appellate court when assessing the

coherence of that witness in relation to the evidence of other witnesses including that of an accused person. See - **SHABAN DAUDI VS REPUBLIC,** Criminal Appeal No. 28 of 2001 (unreported). Lastly, in sexual offences, the best evidence is the credible account of the victim who is better placed to explain how she was ravished and the person responsible. See- **SELEMANI MAKUMBA VS REPUBLIC** (supra) and **EDSON SIMON MWOMBEKI VS REPUBLIC,** Criminal Appeal No. 94 of 2016 (unreported).

We shall be guided by among others the above cited principles to determine the present appeal.

Initially, we wish to point out that, the 5th ground of appeal is new before the Court as it was not raised in the first appellate court. This Court has in a number of instances emphasized that; matters not raised in the first appeal cannot be raised in a second appellate court. In this regard, the new ground of appeal which the appellant did not raise in the first appellate court will not be considered by the Court. This is in line with what in the case of **RAMADHAN MOHAMED VS REPUBLIC,** Criminal Appeal No. 112 of 2006 (unreported) as follows:

> " *We take it to be settled law, which we are not inclined to depart from, this Court will only look*

into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

[See also case of **FELIX KICHELE AND ANOTHER VS REPUBLIC**, (supra)].

Besides, in the present case since the new ground is a matter of fact regarding the person who saw the appellant cohabiting with the victim, this ought to have been initially raised and resolved at the High Court. In this regard, we cannot at any rate consider such factual matter at this stage.

Before addressing the remaining grounds of appeal, we deem it crucial to state that, having revisited the evidence of PW1 we are satisfied that, she was a credible witness who testified how she was raped by the appellant when they cohabited as husband and wife. Moreover, the victim was found in the appellant's house after her parents had traced her which was confirmed by PW4 who told the trial court to have on several occasions seen the victim in the appellant's room.

Regarding the complaint on the absence of exact dates when the two had sexual intercourse, we find the complaint baseless. We say so because at page 15 of the record of appeal at the trial the victim stated as follows:

> *" Me and the accused person used to have sexual relationship and we used to have sexual intercourse sometimes in June 2013."*

The month of June 2013 as recounted by the victim squarely falls between June and October 2013 being the period during which the appellant raped the victim as stated in charge sheet. In this regard, since the prosecution paraded supportive evidence to that effect, the absence of the specific date as to the occurrence of the rape did not materially impeach the strong victim's account as to when she was raped by the appellant. Also, as rightly found by the first appellate court, in the event the appellant did not cross-examine the crucial prosecution witnesses whose account incriminated him on the charged offence that was tantamount to acceptance of the evidence as accurate. See – **EMMANUEL SANG'UDA @ SULUKUKA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 422 B of 2013 (unreported). In the premises, we have no cogent

reason not to believe the prosecution account which was not materially contradicted be it by another witness or the appellant. See - **GOODLUCK KYANDO VS REPUBLIC** [2006] TLR 363 and **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No 62 of 2004 (unreported). In addition, we agree with the learned State Attorney that, the victim's evidence was the best because she was better placed to explain the manner in which she was raped by the appellant. See **SELEMANI MAKUMBA VS REPUBLIC** (supra).

Moreover, we found the appellant's complaint on being denied opportunity to call witnesses wanting since it is not borne by the record. On this, we have gathered that, after being addressed on the manner in which he elects to give his defence, at page 24 of this record, on 15/7/2014 the appellant intimated to the court that he intends to call two witnesses namely: Eliud Kajuna and Stoward all from Kibondo Town. The trial was adjourned and on 22/8/2014 the appellant told the trial court that he had not committed his witnesses and as such, he remained to be a sole defence witness. In this regard, though the said complaint was

never raised before the first appellate court, before us it is an afterthought and we cannot consider it.

In view of what we have endeavoured to discuss we are satisfied that the charge of rape was proved against the appellant and we do not find cogent reasons to reverse the verdict of the two courts below. We thus find the appeal not merited and it is hereby dismissed in its entirety.

DATED at **TABORA** this 25th day of October, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 28th day of October, 2019 in the presence of Ms. Mercy Ngowi, learned State Attorney for the respondent/Republic and the appellant in person is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL