IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWARIJA, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 164 OF 2018

PATRICK FREDRICK @ MBOYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Aboud, J.)

Dated the 16th day of February, 2017
in
Criminal Appeal No. 60 of 2017

JUDGMENT OF THE COURT

14th September, & 2nd October, 2019

WAMBALI, J.A.:

On 26th February, 2016, the appellant Patrick Fredrick @ Mboya appeared before the Court of Resident Magistrate at Tanga, where the charge on the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal code Cap. 16 R.E. 2002 was read over and explained to him and asked to plead thereto. He pleaded not guilty.

The particulars laid down in the charge sheet were to the effect that on 4th February, 2016 at Magodi Kombe area within Mkinga District in Tanga Region, the appellant did have carnal knowledge of a girl aged five years, who for the purpose of this judgment will be referred herein as the "victim". As the appellant categorically disassociated himself from the said allegation by pleading not guilty, the prosecution fronted six witnesses and tendered a PF3 which was admitted as exhibit P1 to support its case at the trial.

After the prosecution's case was closed and the trial court found that a *prima facie* case had been made, the appellant gave sworn evidence during his defence in which he termed the prosecution's witness evidence as unfounded and baseless.

Nevertheless, at the end of the trial, the learned Resident Magistrate was fully convinced that the prosecution had proved the case against the appellant to the required standard. She therefore convicted him of the offence of rape and imposed a sentence of thirty years imprisonment.

Dissatisfied with both conviction and sentence, the appellant unsuccessfully appealed to the High Court, hence the present second appeal before the Court. It is however important to note that in the High Court, the learned first appellate judge expunged the evidence of the victim who testified at the trial as PW5. Her evidence will not therefore be considered in determination of this appeal.

The appellant's appeal has been preferred on the following grounds of appeal:

1. *"That, both the trial Magistrate and the appellate Judge erred in law and in fact by failing to notice that there was no proper identification.*
2. *That, both the trial Magistrate and the appellate Judge erred in law and in fact by acting upon contradictory evidence of the prosecution witnesses.*
3. *That, both the trial Magistrate and the appellate Judge erred in law and in fact by failing to realize that PW5*

(victim) did not know the appellant and never seen him in their house.

4. *That, both the trial Magistrate and the appellate Judge erred in law by contravene (sic) the provisions of section (1) of the Criminal Procedure Act. [Cap 20 R.E. 2002] hence lacks content of Judgment, which contain the points for determination, the decision thereon and the reasons for the decision.*
5. *That, both the trial Magistrate and the appellate Judge erred in law and in fact by failing to notice that the prosecution did not prove its case to the standard required by the law."*

To support his appeal the appellant also lodged a written submission.

At the hearing of the appeal, the appellant fended for himself while the respondent Republic was represented by Mr. Peter Mauggo and Ms.

Elizabeth Muhangwa, learned Principal State Attorney and State Attorney respectively.

In his brief remarks, the appellant urged the Court to consider his grounds of appeal and the written submission and find that the appeal has merit. He strongly argued that the first appellate judge of the High Court wrongly supported the findings of the trial court that the prosecution proved the case against him beyond reasonable doubt.

It is worth noting that during the hearing, the appellant opted to let the learned State Attorney for the respondent respond to his grounds of appeal first and briefly rejoined to the said submission.

In this respect, responding to ground one of the appeals, Ms. Muhangwa maintained that the prosecution witnesses namely Anna Sackre (PW1) and Thomas Kinyatakuya (PW3) properly identified the appellant both at the time he entered the house and at the scene of the crime respectively. She elaborated that PW1 testified that the appellant broke the door and entered inside the house where PW1 slept with her children and took away the victim and disappeared to an unknown place.

She further submitted that through a light which emanated from solar panel, PW1 managed to see properly the appellant and when she came out of the house she raised alarm for help while mentioning the name of the appellant as the person who was responsible for abducting the victim before he disappeared with her. The learned State Attorney emphasized that as PW1 properly named the appellant and described his involvement in the said abduction to those who responded to the alarm, including PW3; they started to search for the appellant and managed to apprehend him while raping the victim some notable distance from the house.

Ms. Muhangwa argued further that after the appellant was arrested in the presence of PW1 he was sent to the police station and later to the Mkinga Health Centre where he was examined together with the victim as testified by Gerald Simon Shirima (PW2) in the presence of PW1 and a police officer, one E.5708 CPC Julius (PW6).

In the event, Ms. Muhangwa submitted that the conditions of identification were favourable as there was sufficient light in the house which enabled PW1 to identity him. She elaborated that the said

identification was proper as per the guiding factors set out in the decision of the Court in **Waziri Aman v. The Republic** [1980] TLR 250. She thus urged us to hold that the first ground of appeal is not merited.

Submitting with regard to ground two, the learned State Attorney argued that there is no contradiction between the testimony of PW2 and Dr. Joseph Mbeleselo (PW4) concerning the time and date when they examined the victim as alleged by the appellant. It was her contention that both witnesses examined the victim on the same day but on different times as PW2 who was the first to attend the victim at Mkinga Health Centre was compelled to refer her to Bombo Hospital due to her health condition where she was examined and treated by PW4. She therefore, described the complaint as baseless and implored us to dismiss it.

Responding to ground three of the appeal, Ms. Muhangwa urged us to find the complaint that the victim (PW5) did not know and see the appellant in the house on the material day as unfounded. In her view, as the first appellate High Court judge expunged the evidence of PW5 for

procedural irregularities, the complaint at the stage of this appeal has no bases and should be disregarded.

The learned State Attorney played down the complaint of the appellant in ground four of the appeal and defended the judgment of the trial court and that of the first appellate court as proper in law. In her argument, the judgment of the trial court squarely complied with the requirement of section 312 (1) of the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA) concerning the necessary contents of the judgment. She also emphasized that the judgment of the first appellate court which confirmed the finding and sentence of the trial court contains relevant facts that lead to the appeal, the points for determination and the conclusion as required by law. In the circumstances, she similarly prayed for the rejection of the complaint on this ground of appeal.

With regard to the fifth ground of appeal, Ms. Muhangwa forcefully supported the decision of both courts below that the prosecution proved its case against the appellant to the required standard. She contended that even after expunging the evidence of the victim by the first appellate

court, the testimonies of PW1 and PW3 left no doubt that the prosecution witnesses proved that they identified the appellant during the invasion in the house and at the scene where he raped the victim. She argued further that the evidence of PW4 and the PF3 which was admitted as exhibit P1 corroborated the evidence of PW1 and PW3 that the victim was raped and there was penetration of her private parts.

The learned State Attorney therefore submitted that the totality of evidence leads to the conclusion that it was the appellant who raped the victim and thus the appeal against the findings of the two lower courts is baseless and should be dismissed in its entirety.

In his rejoinder, the appellant consistently maintained that the case against him was fabricated due to his long standing soar relation between him and the father of the victim. He contended that he was not arrested by a group of some persons while raping the victim as claimed by the prosecution witnesses, but he was invaded by a group of Masai persons in the forest where he had gone to collect firewood. He argued further that the said persons beat him severely to the extent of being unconscious

before he was taken to the police station where he stayed for twenty two days before he was taken to the trial court on the charge of rape. He thus firmly distanced himself from the allegation that he was arrested while raping the victim.

In the circumstances, he implored us to find that the prosecution did not prove the case against him beyond reasonable doubt and as a result the benefit of doubt should be resolved in his favour resulting in being set free.

Having heard the submission of the appellant and the learned State Attorney for the respondent Republic, we wish to begin our determination with ground three of the appeal. It is not in dispute that the evidence of the victim who testified at the trial as PW5 was expunged by the first appellate judge due to some procedural irregularities. It follows that presently, the said evidence is not part of the record of appeal which can attract any complaint on her credibility. In the result, ground three has no foundation upon which it can stand. We therefore agree with the

learned State Attorney that the same is misconceived. We accordingly strike it out.

With regard to the first ground, having gone through the evidence in the record of appeal and the submissions of both sides, we are settled that the appellant was properly identified by PW1 and PW3. We are satisfied that there were favourable condition for identification through solar light that enabled PW1 to identify the appellant when he broke the door and entered in the house where PW1 slept with her children including the victim who was grabbed, abducted and taken away to the bush by the appellant. There is unshaken evidence of PW1 who raised alarm outside the house and informed those who responded, including PW3 that, it was the appellant who invaded the house and left with the victim. Therefore, those who immediately mounted a search for the victim were aware of the name of the appellant and fortunately, they managed to arrest him at the scene some few hours after the abduction. The appellant was also identified at the scene of the crime by PW1, the mother of the victim who followed those who mounted a search to trace

the whereabouts of the victim and the person who was involved. Her testimony on how she identified the appellant at the scene is corroborated by PW3 who also used light that emanated from a torch to identify him. The cross-examination of the appellant did not shake the credibility of PW1 and PW3 on how he was identified. It is also important to emphasize that both PW1 and PW3 knew the appellant before the incident and he did not challenge this fact during cross-examination. Therefore, the appellant was not a stranger to the said witnesses.

In the circumstances, we join hands with the finding of both courts below, that the evidence on the identification of the appellant is watertight. We have no hesitation to state that most of the factors set out in **Waziri Amani** (supra) were fulfilled as the intensity of light in the house was sufficient which made PW1 to disclose the name of the appellant immediately to the person who responded to the alarm. Indeed, after the appellant was arrested he was with PW1 and PW3 for a considerable time. This ground accordingly collapses.

On the other hand, we also find that the complaint that there was contradiction on the issue of time and date between the evidence of PW2 and PW4 as alleged in the written submission of the appellant in support of the appeal is unfounded. The said evidence leaves no doubt that the incident occurred on 4th February, 2016 in the early hours of the morning and it was PW2 who was the first to examine the victim after the incident at Mkinga Health Centre. According to the record, it was after PW2 formed an opinion that the victim needed further attention that he referred her to Bombo Hospital at Tanga where PW4 examined her and administered the requisite treatment later on the same day. Thus the difference of time between PW2 and PW4 on the time they attended the victim on the same day was due to the different tasks which they performed at different times and place. It is in this regard that it was PW4 who filled the PF3 (exhibit P1) after he completed treating the victim. PW2 could not fill the said PF3 as he only attended the victim at the preliminary stage of the examination. Besides, the appellant did not dispute the evidence of PW2 that he was also examined at Mkinga Health Centre to determine if he was infected with any sexually transmitted

diseases. The appellant is also in record to have complained why he was not examined by PW4 at Bombo Hospital.

Therefore, we do not see any justification in the appellant's complaint on the alleged contradiction with regard to the date and time PW2 and PW4 attended the victim. We equally dismiss ground two of appeal.

Moreover, we have carefully scrutinized the judgment of both the trial court and first appellate court and we have no hesitation to state that they fully comply with the requirement of the law on their contents as to the points for determination, application of the law, the decision thereon and the reasons for the decision. We are satisfied that the judgment of the trial court met the requirement of section 312 (1) of the CPA and the same applies to that of the first appellate court. In the circumstances, we agree with the learned State Attorney that the complaint in ground four cannot be considered in favour of the appellant. This ground similarly fails.

Lastly, in respect of the complaint in ground five, we have examined the evidence for both sides in the record of appeal, and we are of the decided opinion that the prosecution proved the case against the appellant beyond reasonable doubt.

We have no hesitation to state that the evidence of PW1 and PW3 which was not shaken by the defence during cross-examination, demonstrate that the appellant is the one who invaded the victim mother's house, grabbed and abducted her and disappeared in the bush where he was found raping her. Indeed, after his arrest at the scene of the crime the appellant and the said witnesses spent considerable hours waiting for the police officer to appear for necessary action. Yet, this is one of the cases where after the arrest, the appellant was taken to the police station and later to Mkinga Medical Centre and examined along with the victim for the purpose of ascertaining whether they had been infected with sexually transmitted diseases. The said evidence on the examination of the appellant and the victim was also supported by PW2

and the appellant did not seriously discredit the same during cross examination.

In addition, the evidence of PW4 and exhibit P1 proved that there was penetration on the female organ of the victim which is an essential ingredient for the proof of the offence of rape as provided for under the provisions of section 130 (4) of the Penal Code. Indeed, the prosecution witnesses, PW1 and PW3 who found the appellant at the scene of the crime raping the victim sufficiently proved that it was the appellant who penetrated the female organ of the victim. It is in this regard that the defence of the appellant was considered by both courts below to have not sufficiently raised any doubt to the evidence of the prosecution concerning the proof of the commission of the offence of rape.

In the circumstances, we find that the complaint in ground five is without justification and deserves to be rejected.

In the end, in view of the reasons we have stated above, we do not find any justification to differ with the findings on the conviction and

In the final analysis, based on our deliberation above, we conclude that the appeal is unmerited; we hereby dismiss it in its entirety.

DATED at **TANGA** this 2nd day of October, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The judgment delivered this 2nd day of October, 2019 in the presence of the Appellant in person and Elizabeth Muhangwa, Principal State Attorney, for the Respondent is hereby certified as a true copy of the original.

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL