IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPEAL NO. 486 OF 2016

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

BASHIRI S/O JOHN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Shangali, J.)

Dated the 7th day of July, 2016
in
(DC) Criminal Appeal No. 32 CF 38 of 2014

JUDGMENT OF THE COURT

14th & 16th May, 2019

LILA, JA.:

The appellant was arraigned in the District Court of Iringa at Iringa of the offence of rape which was preferred under sections 130(1)(2)(e) and 131(1) of the Penal Code Cap. 16 R.E 2002 (The Code). As the victim is below ten years and for the purpose of this appeal we shall conveniently refer the victim (PW2) by the acronym "**SM**" or "**PW2**" or "**Victim**" so as to hide her identity. It was alleged that on 28/9/2013 at

Kilala Kidewa village within Kilolo District in Iringa Region, the appellant had carnal knowledge of SM, a girl aged seven (7) years.

The appellant was found guilty as charged, convicted and sentenced to serve thirty (30) years imprisonment. Dissatisfied with the finding of guilty and sentence, he lodged his appeal to the High Court. Contemporaneously, the Director of Public Prosecutions (The DPP) lodged a cross appeal to challenge the sentence of thirty (30) years imprisonment meted on the appellant instead of the statutory life imprisonment as the victim was a girl below ten (10) years.

As it were, the High Court (Shangali, J.) dismissed the appellant's appeal for being devoid of merit. The cross-appeal succeeded. The sentence of thirty (30) years was set aside and a sentence of life imprisonment substituted thereof.

The appellant felt further aggrieved, hence this second appeal which is comprised of eight (8) detailed grounds of appeal seeking to impugn the decisions of both courts below. However, seriously examined, they can be paraphrased thus:-

1. That, there is contradiction between the charge and evidence on the age of the victim (PW2) which was not resolved by the appellate judge.
2. That, there was contradiction between the evidence of the victim's mother (PW1) and the Doctor (PW4) who medically examined the victim on the finding of semen on the victim's private parts.
3. That, The PF3 is unworthy of believe because while medical examination was conducted on 28/9/2013 the same was filled on 30/9/2013 without accounting for the delay.
4. That, the Village Executive Officer (VEO) and the militiaman whom the incidence was reported and arrested the appellant, respectively, were not called to testify so as to corroborate the evidence by PW1.
5. The victim's (PW2) evidence was not corroborated by Irene and Lulu, her fellow children she was playing with who were well positioned to hear PW2 crying while being raped in the "pagare" (unfinished house).
6. That, the evidence of PW3 was wrongly believed as the appellant admitted giving PW2 Tshs. 100/= as gift for assisting him carry bricks during construction.

7. That, his defence evidence that the case was fabricated against him by PW1 so as to grab him the land and that he refused her offer to have sexual intercourse was not considered.
8. That, the charge against the appellant was not proved beyond reasonable doubt.

The salient facts leading to the present appeal are simple and straight forward. They can be briefly stated thus. On 28/9/2013 evening time (03:00pm) Ziada Samira (PW1) was preparing dinner while her children namely SM, Irene and Lulu were playing outside her house. On being ready, she went out to call them only to find SM who was born on 25/10/2005 not there. Upon inquiring, she was told that she was called by Bashiri who turned out to be the appellant, their neighbour and relative as he was the son of her young mother. Not satisfied, she loudly called her and a short while; she saw her emerging holding her underpants from the "pagare" belonging to Bashiri in which construction was still going on. Upon inquiring her on what had befallen her, she innocently said "Bashiri amenitoa chupi na kunitomba kanipa mia hii hapa". Not sooner, Bashiri also emerged from the same "pagare" which had one door and various windows. Afraid, PW1 did not ask Bashiri anything instead, she went into her house and examined PW2's private

parts where she found semen. She then took PW2 to the VEO of Kilala Kidewa who sent a militiaman to arrest Bashiri. Thereafter she reported to Ilula Police station and was issued with a PF3 for medical examination. PW2, the victim, who was, upon being subjected to a *voire dire* test, found to be competent to testify but did not understand the meaning of oath, gave unsworn evidence. Examined in chief by the Public Prosecutor, she is recorded to have told the trial court that, we quote:-

> " - *My name is SM.*
> - *I recall one day Bashiri called me in his "Pagare" then undressed my underpants and raped me.*
> - *Yes he is around (she is pointing him)*
> *"...alinivua chupi akanitomba alinipa hela mia".*
> - *Later my mother took me to hospital.*
>
> *Sgd. H. R. Mareng, RM*
> *17. 12. 2013*
>
> *XXD by Accused: NIL*
> *REXD by PP: NIL*
>
> *Section 210(3) of CPA c/w*
>
> *Sgd. H. R. Mareng, RM*
> *17. 12. 2013"*

A policeman, E.9797 DC Mohamed, who investigated the case said that he was told by PW1 that PW2 was raped and was given Tshs. 100/= which he tendered and was received by the court as Exhibit P.1. the appellant remarked that it was true that he gave the victim the money but did not rape her. Nickson Mdegela (PW4), the Doctor, informed the trial court that he examined PW2 on 28/9/2013 when she was taken to hospital by her mother and observed some bruises on her vagina but there was no semen or blood stain and the hymen was intact hence concluded that the victim's vagina was either raped or penetrated by a blunt object. He tendered the PF3 he filled after two days and was admitted as exhibit P.2 without objection from the appellant.

In his sworn defence, the appellant completely distanced himself with the commission of the offence. He attacked the prosecution evidence on three fronts; **one**, that the case was a fame up by PW1 so as to grab his land, **two**, no sketch map of the scene of crime was produced to describe the scene, **three**, he refused PW1's offer to have sex with her and, **four**, that, although PW4 revealed that a blunt object was used his manhood was not examined to find out if it was blunt. He, however, admitted that on the material date (28. 9. 2013) he was on

construction of his house (pagare) and PW2 was just assisting him carry bricks and he gave her Tshs. 100/= as a gift. He denied raping her.

As hinted above, the trial court was convinced that the charge was sufficiently proved. That finding was based on the fact that it was not disputed that the "pagare" belonged to the appellant, on the material date he was on construction of that "pagare" and PW2 was helping him carry bricks and he gave her Tshs. 100/=. In respect of the absence of semen and hymen being intact, citing the case of **Fundi Omari Vrs Republic** [1972] HCD n. 98, he found that it was not necessary to prove emission of semen or even rapture of hymen so as to prove penetration but what is required is proof of the accused's genetalia being in contact with the genetalia of the victim. Also relying on PW1's evidence that she saw PW2 coming out from the appellant's "pagare" holding her underpants, later the appellant emerging from therein, that the appellant conceded being with PW2 in the "pagare" and that PW2 named the appellant as her ravisher, he firmly concluded that it was the appellant who raped PW2. In respect of the appellants defence, he stated that the same was an afterthought as the appellant did not cross-examine PW1 on the land issue so as to establish the extent of the grudges. He also dismissed the appellant's contention that

PW1 concocted the case on the bases that they are relatives. He also stated that the demeanour of PW2 was impeccable and supported by the evidence by PW1, PW3 and PW4 and the PF3, sufficiently implicated the appellant with the commission of the offence charged. In sum, he was satisfied that PW2 was raped by the appellant. Finally, he convicted the appellant and sentenced him as indicated above.

On appeal, the High Court, in Criminal Appeal No. 32 of 2014 which consolidated both the Criminal Appeal No. 32 of 2014 filed by the DPP and Criminal Appeal No. 38 of 2013 filed by the appellant, first determined the later appeal. It held that the appellant was properly identified because the offence was committed during the broad day light and the appellant did not dispute being with the victim on the material date. On the issue of PW2's evidence not being corroborated, the High Court was of the view that it was corroborated by evidence of PW1 and PW4 coupled by the PF3. It further held that under the provisions of section 127(7) of the Tanzania Evidence Act, (TEA) the court can convict on the sole evidence of PW2. It further held that *voire dire* was properly conducted and that the age of PW2 was proved by PW1 and PW2 to be seven (7) years. In respect of the PF3, it held that according to PW4, it was filled two days after he had examined PW2 hence there was nothing

suggesting that it was filled before the incident so as to incriminate the appellant. The victim's age was properly proved by her parent (PW1) hence there was no contradiction. On the issue of the defence case not being considered, the High Court held that it was considered by the trial court and rightly rejected as being an afterthought. Ultimately, the High Court dismissed the appellant's appeal.

In respect of the appeal by the DPP, the High Court observed that as the victim was a girl of seven (7) years, then the proper sentence was that provided under section 131(3) of the Code which is life imprisonment hence allowed the appeal and thereby substituted the sentence of life imprisonment in place of the thirty (30) years imprisonment meted by the trial court.

The appellant appeared in person before us when the appeal was called on for hearing and the respondent Republic had the services of Mr. Allex Mwita, learned State Attorney.

When the appellant was called on to elaborate on the grounds of appeal he had filed, he opted to make a rejoinder after the State Attorney had first argued the grounds of appeal.

Mr. Mwita, first, sought leave of the Court to bring to the attention of the Court a point of law he found pertinent before we commenced the hearing of the appeal. We granted him leave to do so.

Addressing us, Mr. Mwita contended that while the charge sheet at page 1 of the record shows that it was filed in the District Court of Iringa at Iringa on 7/10/2013, both the proceedings and the judgment of the trial court indicate that the trial was conducted in the Resident Magistrate Court of Iringa at Iringa. He observed that to be legally improper. He, however, did not propose the way forward.

We propose to pause here and resolve the contention by Mr. Mwita.

In fact the above contention raised a jurisdictional issue. However, upon our careful perusal of the original record of trial, we are satisfied that the trial was conducted in the District Court of Iringa at Iringa where the charge sheet was filed. The indication "IN THE RESIDENT MAGISTRATE COURT OF IRINGA AT IRINGA" in both the typed proceedings and judgment of the trial court was, therefore, a pure typographical error. In fact the anomaly does not feature in the High Court, for, in both the proceedings and the judgment of the High Court

it is correctly indicated that the appeal before it originated from the District Court of Iringa at Iringa in Criminal Case no. 241 of 2013.

Arguing in respect of ground 1 of appeal, Mr. Mwita said there are no contradictions on the age of the victim between the charge sheet and the evidence. He said that PW1 who is the mother of the victim told the trial court that the victim (PW2) was seven years at the time she testified on 17/12/2013. He said proof of age by a parent is sufficient. To bolster this position he cited to us the persuasive High Court decision in the case of **Emanuel Kibwana and Others Vrs Republic** [1995] TLR 241.

Regarding ground 2 of appeal, Mr. Mwita conceded that while PW1 said she saw semen in the victim's vagina, PW4 did not find semen. He was, however, of the view that such contradiction is minor because it is not material to prove that there were semen so as to prove penetration. He accordingly urged the Court to ignore it.

In respect of ground 3 of appeal, Mr. Mwita contended that the PF3 was not read aloud to the appellant after it was admitted as exhibit to enable the appellant understand the contents thereof. He urged us to expunge it from the record. In that accord, he said, no contradiction remains.

Regarding failure by the prosecution to call so as to testify both the VEO and the militiaman in ground 4 of appeal, the learned State Attorney submitted that the two did not witness the incident and all they could tell the court is how the appellant was arrested which is not material to the case. He thus concluded that they were not crucial witnesses.

Again, in respect of ground 5 that Lulu and Irene who were playing with the victim were not called to testify, Mr. Mwita stated that the two did not see what happened in the "pagare" hence they had nothing material to tell the trial court. He insisted that as PW1 said she saw PW2 coming out from the "pagare" and the appellant admitted being with the victim in the "pagare" assisting him carry bricks then that was sufficient.

In respect of ground 6 of appeal, the learned State Attorney submitted that PW3 tendered as exhibit Tshs 100/= which the appellant allegedly gave the victim after raping her. There was therefore nothing wrong for the court to believe him, the learned State Attorney argued.

Regarding the complaint in ground 7 of appeal that the defence evidence was not considered, Mr. Mwita referred us to page 26 of the record in which he contended that the trial magistrate considered the

defence evidence and ruled out that it was an afterthought because the appellant did not cross-examine PW1 on the grudges allegedly obtained between him and PW1 on the land issue.

In respect of ground 8 of appeal, the learned State Attorney argued that as the trial court observed that PW2 who narrated the whole incident was reliable and as the best evidence in rape cases comes from the victim and such evidence was supported by PW1 and PW4, then the prosecution proved the charge beyond reasonable doubt. He accordingly impressed on the Court to dismiss the appeal.

On his part, the appellant had nothing in rejoinder. He urged the Court to consider his grounds of appeal and determine the appeal according to law.

Having heard the parties, we now turn to consider the merits of the appeal in the manner it was argued by the learned State Attorney.

In ground 1 of appeal, the appellant is complaining that there was contradiction in respect of the victim's age between the charge sheet on the one part and the evidence by PW1 who said she was born on 25/10/2005 and PW2 who said she was seven years on the other part. The learned State Attorney was of the view that there is no

contradiction. The charge shows that at the time the appellant was charged (7/10/2013), the victim was seven years old. PW1 and the victim gave evidence on 17/12/2013. By a simple arithmetic calculation, at the time the appellant was charged, the victim was slightly above seven (7) years of age but was yet to be eight years old. Proof of age is done by either evidence from the parents, medical practitioner or by birth certificate (See **Isaya Renatus Vrs Republic**, Criminal Appeal No. 542 of 2015 (Unreported)). It was therefore proper for both PW1 and PW2 to say that PW2 was seven years of age as was indicated in the charge sheet. We accordingly agree with both the finding of the High Court and argument by the learned State Attorney that there is no any material contradiction on the age of the victim (PW2). This ground therefore fails.

The appellant's complaint in ground 2 of appeal is in respect of the contradiction in the evidence between PW1 and PW4 on the finding of semen on the victim's private parts. The learned State Attorney conceded existence of such contradiction. However, he conceded, that the PF3 (Exhibit P. 2) was not read out after it was admitted as exhibit so as to enable the appellant know the contents thereof hence urged the Court to expunge it from the record. We entirely agree with him.

This is the legal position as was stated by the Court in the case of **Robinson Mwanjisi and Three Others Vrs Republic** [2003] TLR 218 at page 226 and **Misango Shantiel Vrs Republic**, Criminal Appeal No. 250 of 2007 (Unreported). The evidence by PW4 and the PF3 is therefore discounted. Upon the PF3 being expunged, the learned State Attorney was of the view that such contradiction no longer exists. We, again, entirely agree with him. Had the High Court judge considered that the PF3 was improperly acted on for having not been read out after its admission as exhibit she would have had expunged it from the record and no contradiction would thereby exist.

We are agreed with the learned State Attorney that the appellant's grievance in ground 3 of appeal that the delay in filling the PF3 was not accounted for is unfounded. As rightly submitted by the learned State Attorney, the PF3 has been expunged from the record hence not worth being considered.

In grounds 4 and 5 of appeal the appellant's complaint is that the VEO and the militiaman and also that Lulu and Irene who were playing with the victim, respectively, were not called to testify. In fact the appellant intended to ask the Court to draw an adverse inference on the prosecution case against him for failure to call crucial witnesses. The

learned State Attorney contended that they did not witness the incident and as the fact that the appellant was arrested and that he was with the victim in the "pagare" on the material date, respectively, were not in dispute, hence they were not material witnesses. We wish to restate that the Court would only draw an adverse inference on the prosecution case only in situations where the prosecution fails to summon as a witness a person who is well versed with the necessary information connected to the commission of the offence and whose presence can be procured without assigning good reasons. We also add that, the above would be the case only where no other witness(es) have given identical evidence on the matter. The Court lucidly elaborated the above position in the case of **Azizi Abdallah Vrs Republic** [1991] TLR 71 where it was stated that:-

> *"The general and well known rules is that the prosecutor is under a prima facie duty to* ***call those witnesses who, from their connection with the transaction in question, are able to testify on material facts.*** *If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."* (Emphasis added)

The record bears out and as demonstrated above, it is not in dispute that the appellant admitted being with the victim in the "pagare" on the material date and the appellant did not dispute being arrested. On the above proposition of the law, we entirely agree with the learned State Attorney that it was, in the circumstances of this case, not necessary to call the VEO, militiaman, Lulu and Irene to testify. They were not material witnesses. This is, therefore, not a case befitting the drawing of an adverse inference. We accordingly turn down the appellant's invitation to draw an adverse inference on the prosecution case. The two grounds accordingly fail.

In the sixth ground of appeal, the appellant's grievance is that the evidence by PW3 was wrongly believed. Unfortunately it was not elaborated either in the memorandum of appeal or orally before us. Actually, PW3 investigated the case and tendered the Tshs. 100/= given to PW2 by the appellant. The appellant admitted giving the victim that money but for another reason that it was a gift after having helped by PW2 to carry bricks. The well established legal position is that every witness is entitled to credence unless proved otherwise. That was stated by the Court in the case of **Goodluck Kyando Vrs Republic** [2006] TLR 363 at page 367 where it was categorically stated that:-

" It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.."

Since the appellant advanced no any reason why PW3 should not be believed, like the learned State Attorney, we see no reason to disbelieve him. This ground is baseless and it also fails.

The appellant, in ground 7 of appeal, complains that his defence evidence in respect of the case being a fabricated one on account of PW1's wish to grab his land and that he turned down her offer to have sexual intercourse was not considered. Mr. Mwita emphatically resisted this contention pointing out that both courts considered those contentions and were of a concurrent finding that they were an afterthought because the appellant did not cross-examine PW1 on those issues. We have seriously perused the record and we are satisfied that those grounds of defence were sufficiently considered by both courts below. It is evident that the trial court considered them at page 37 of the record where it stated that:-

"Actually, I would say that the defence given by the accused is an afterthought because it is inconceivable that the accused did not mention or cross-examine PW1 Ziada Samira on this issue

when she was giving evidence, thus the intensity of that grudge was known to himself. Furthermore, as it was transpired (sic) that PW1 and accused are relatives, thus PW1 being his sister therefore it is impossible to fabricate the case against him therefore his complaint is baseless hence rejected."

We entirely agree with the trial magistrate that the only room available to an accused person to challenge or to discredit a witness's evidence is to cross-examine him or her after she has testified. This is the essence of section 146(2) of the TEA. The purpose of cross-examination is essentially to contradict a witness's evidence [See **Mathayo Mwalimu and Another Vrs Republic**, Criminal Appeal No. 147 of 2008 (Unreported)].

The record is apparent that the appellant did not cross-examine PW1 on the two issues he raised during his defence. Both courts below were therefore entitled to arrive at the findings that it was an afterthought. We find support from the Court's decision in the case of **Cyprian Athanas Kibogoyo Vrs Republic**, Criminal Appeal No. 88 of 1992 in which the Court said that it is trite law that failure to cross-examine a witness on an important matter implies the acceptance of the truth of the witness's evidence. We, in the circumstances, agree with the

learned State Attorney that the appellant's defence was adequately considered by both courts below and rightly discounted for being an afterthought. This ground of appeal is without merit and it is hereby dismissed.

In respect of the last ground of appeal (ground 8), we wish to revisit the entire evidence and, in particular, the testimonies of PW1 and PW2.

We have dispassionately considered the entire evidence and the submission by the learned State Attorney and, like the trial court and the first appellate court, we are satisfied that it is not in dispute that the "pagare" belonged to the appellant and on the material date the appellant was with the victim in that "pagare" and that the appellant gave her Tshs. 100/=. It is, further, not in dispute that the appellant and PW1 are relatives and, apart from living in the same village, they are neighbours.

We are also in agreement with the trial court that the pressing issue for determination, therefore, is whether PW2 was raped and whether the evidence point at the appellant as the person who ravished her.

In view of the strong and clear evidence by PW1 and PW2 we entertain no any reasonable doubt that PW2 was raped by the appellant. PW2, the victim of the offence was, as reproduced above, clear in her evidence that the appellant called her in the "pagare" and she stated further that "alinivua chupi akanitomba..." and that "later my mother took me to hospital". Her Mother (PW1), in the same vein told the trial court that upon the victim emerging from the "pagare" , soon thereafter the appellant also emerged from therein. She further said she took PW2 inside the house, examined her and found semen on her private parts. She also said she later reported the matter to the police who issued her with a PF3 and went to hospital. Even in the absence of the evidence of PW4 and the PF3, there still remains sufficient evidence by the Victim (PW2) and PW1 that the victim was raped by the appellant. The trial court observed the demeanour and found PW2 to be credible and as the best evidence in rape cases come from the victim, then we are satisfied that she was raped by the appellant (See **Selemani Makumba Vrs Republic**, Criminal Appeal No. 94 of 1999 (Unreported)).

In the circumstances, we are satisfied beyond any shadow of doubts that the prosecution evidence taken together with the appellant's defence which actually carried further the prosecution case, the

appellant was properly convicted with the offence charged. In respect of the sentence, the High Court rightly varied the illegal sentence of thirty (30) years imprisonment wrongly meted by the trial court and substituted it with the sentenced of life imprisonment which is the statutory sentence provided by the law.

For the foregoing reasons, the appeal fails in its entirety.

DATED at **IRINGA** this 16th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL