IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 6 OF 2017

KUBAJA OMARY .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Fikirini, J.)
dated 19th day of December, 2016
in
(DC) Criminal Appeal No. 67 of 2016

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JUDGMENT OF THE COURT

12th & 19th August, 2020

MWANDAMBO, J, A.:

The District Court of Same tried and convicted Kubaja Omary, the appellant, for the offence of rape contrary to section 130 (1) (2) and 131 (1) of the Penal Code [Cap. 16 R.E 2002] henceforth, the Penal Code and meted out to him a sentence of 30 years' imprisonment. His appeal to the High Court at Moshi was not successful, for that Court found no merit in any of his grounds and dismissed it. He has now come to this Court on a second appeal in his bid to protest his innocence.

The appellant's arraignment and eventual conviction was predicated on a charge alleging that on 29th September, 2015 evening hours at Jitengeni Kihurio Village within Same District, he had unlawful carnal knowledge of a woman aged 67 years without her consent. We shall henceforth be referring to the prosecutrix as the victim or PW1 as the case may be. The prosecution preferred the charge sheet based on the following facts: the victim who testified as PW1 was a resident of Jitengeni Kihurio Village, in Same District. The appellant was also a resident in the same village. Naturally, he was known to the victim. On 29th September 2015 at/about 1600 hours, the victim had gone to her shamba to watch thieves in respect of the maize crop. For effective watch, she stood at an anthill some distance from the farm whereupon, she saw the appellant and some two other men herding cattle nearby. Within moments, the appellant drew near the place the appellant was and the two exchanged greetings. The appellant then requested the victim to cut grasses close to where the victim was standing to which the latter readily agreed.

Not so long from the moment the appellant was allowed to cut grasses, he realized that it was not enough and so he made another request to be allowed to cut grasses from the victim's farm. Nonetheless,

his mission was not successful as the grass had already dried. Undaunted, he soon thereafter approached the victim to where she was standing expressed his intention to look for the grass elsewhere. But alas!, the appellant did not leave. Instead, he lured the old woman to move from the anthill and hide somewhere in the farm so she could easily apprehend cows allegedly moving there for grazing. However, the victim did not oblige and instead, she asked the appellant to move out of her farm but to no avail. A moment later, PW1 dropped from the anthill. No sooner had she done so than the appellant grabbed her by the neck and fell her down, covered her mouth which prevented PW1 from shouting for help and indeed completely overpowered her thereby succumbing to the forceful sexual intercourse after the appellant had removed her clothes.

Having gratified his sexual urge, the appellant released himself but kept PW1 under his watch telling her to remain there for a second round. However, PW1 managed to escape from her assailant who was by that time busy looking at her mobile phone he had grabbed from her. Exhausted as she was, and having suffered the agony of a forceful and painful sexual intercourse which made it difficult for her to walk, PW1 was forced to crawl towards the side corner of her farm. In the process, she

saw a fellow villager, Joseph Ally Ngomoi (PW2) and alerted him of what the appellant had done to her a short while ago in her shamba. However, PW2 did not do anything to apprehend the assailant because he was armed with a bush knife. PW2 had seen the appellant dressing up. He took to his heels upon seeing PW2 approaching him. As PW2's mission to apprehend the assailant failed, he took PW1 to her home. The following morrow, the victim obtained a PF3 from a Police Station with which she took to a local dispensary for medical examination where Dr. Ally Said Ally (PW3) attended her. After the medical examination, PW3 found bruises on PW1's vagina; a positive indication that she had been raped.

Subsequently, the appellant was arrested and arraigned in the trial court facing the charge of rape of PW1 predicated under section 130 (1), (2) (e) and 131(1) of the Penal Code to which he pleaded not guilty. The trial which ensued thereafter involved four prosecution witnesses namely; (PW1) Joseph Ally Ngomoi (PW2), Ally Said Ally (PW3) and No. WP 3343 D. Cpl. Zena (PW4). In addition, two exhibits were tendered, to wit; the PF3 by PW3 (exhibit N1) and a cautioned statement by PW4 (exhibit N2).

In his defence, the appellant gave evidence under oath distancing himself from the accusations branding all prosecution witnesses as liars.

Instead, the appellant claimed that the case against him was framed- up by PW1 who had refused to pay him TZS 50,000.00 for work he had done in her farm. All the same, the trial court found that defence too weak to displace the prosecution's case which it held to have been proved beyond reasonable doubt and entered conviction followed by a custodial sentence of 30 years' imprisonment.

As alluded to earlier, on appeal, the High Court (Fikirini, J.) dismissed the appellant's appeal in all grounds except grounds 3 and 4 which resulted into expunging the PF3 (exhibit N_1) and the cautioned statement (exhibit N_2) for being irregularly admitted. That notwithstanding, the first appellate court was convinced that the remaining evidence particularly from PW1 was strong enough and credible to sustain the charge. It accordingly dismissed the appeal.

The appellant faults the judgment of the first appellate court on 5 grounds in the memorandum of appeal lodged on 4th May, 2018 and one ground in the supplementary memorandum lodged on 10th August 2020. That makes a total of 6 grounds running as follows:

" 1. *That, the appellate court grossly erred both in law and fact by holding the conviction and sentence of the appellant with an offence which was proved at all.*

2. *That, the appellate court grossly erred both in law and fact in upholding the conviction but failed to Note that the charge preferred against the appellant was defective.*

3. *That, the first appellate court grossly erred in law and fact when she used weak, inconsistence, incredible uncorroborated evidence that lacked collaboration as a basis of convicting the appellant.*

4. *That, the first appellate court grossly erred in law and fact when she failed to note that PW1, was totally a liar because it was not possible for the appellant to use bush knife (panga) to cut off her public hair – This is pure lie.*

5. *That, the first appellate court grossly erred both in law and fact by using the weakness of defence as a basis of convicting the appellant.*

6. That the first appellate court erred in law by failing to notice the irregularities in the proceedings of the trial court. See at page 14 of the Court records".

The last ground appears in the supplementary memorandum. At the hearing of the appeal, the appellant fended for himself. He was connected through a video link between the Court and the prison. The respondent Republic was ably represented by a team of 3 learned State Attorneys comprised of Ms. Riziki Mahanyu, Senior State Attorney, Mr. Felix Kwetukia and Ms. Mary Lucas, both State Attorneys. The appellant elected to exercise his right to begin but being a layman, the best he did was to make general complaints not necessarily connected to any specific ground of appeal. From what we were able to cull in his arguments, the appellant complained generally that his rights were violated because the charge sheet on the basis of which the trial court convicted him was defective it being preferred under an inapplicable provision of the Penal Code. Next the appellant attacked the proceedings of the trial court particularly at page 14 of the record complaining that the case was presided over by two magistrates which was irregular. This was a subject of the appellant's

complaint in the supplementary memorandum of appeal. Finally, he urged the Court to allow the appeal on the strength of his grounds of appeal.

Ms. Mary Lucas, argued the appeal on behalf of the respondent Republic's legal team. She was emphatic that the appeal lacked merit and urged the Court to dismiss it. The learned State Attorney combined grounds 1, 3, 4 and 5 and argued them together having realized that they are closely related. She argued grounds 2 and 6 separately.

Considering that ground 2 involved a legal issue, she chose to begin with it. Briefly, whilst conceding that the charge sheet cited section 130 (1) (2) (e) and 131 (1) instead of section 130 (1) (2) (a) and 130 (1) of the Penal Code, the learned State Attorney argued that the error was inconsequential, for it did not prejudice the appellant in any manner whatsoever. This is so, the learned State Attorney argued, because the particulars of the offence sufficiently informed the appellant of all the ingredient of the offence of rape of a named adult woman, the place at which the offence was committed as well as the date and time against which he entered his plea and later on exercised her right to cross-examine the witnesses for the prosecution and led evidence in defence.

To buttress her argument, Ms. Lucas referred us to our previous decisions in **Festo Domician v. R.**, Criminal Appeal No. 447 of 2016 (unreported) which relied on **Jamal Ally v. R., Criminal** Appeal No 52 of 2017 (unreported). The two decisions are relevant for the proposition that an error in citing a section creating an offence in a charge sheet is not necessarily fatal where the particulars of the offence are capable of informing the accused sufficiently the nature of the offence he stands charged with. Armed with the two decisions, the learned State Attorney invited us to find that the error is curable under section 388 (1) of the Criminal Procedure Act [Cap. 20 R. E. 2019], henceforth the CPA. She thus invited us to dismiss ground two for being misconceived. Not surprisingly, the appellant had nothing in rejoinder to the submissions canvassed by Ms. Lucas in ground 2.

Like Ms. Lucas, we find it compelling to deal with ground two ahead of all other grounds as it involves the validity of the charge which if upheld will adversely impact on the proceedings, judgment and consequential orders and ultimately the appeals before us and the first appellate court. As conceded by Ms. Lucas, the charge sheet appearing at page 1 of the record was preferred under section 130 (1) (2) (e) and 131 (1) of the

Penal Code. It is plain from the particulars that the victim of the offence was an adult woman aged 67 years at the time. It is equally true that an offence under section 130 (1) (2) (e) of the Penal Code involves rape to girls below the age of 18 years where consent is irrelevant. That is in contrast with regard to rape committed to adult women as it were but both attract the same sentence prescribed under section 131 (1) of the Code. That means that the prosecution should have predicated the charge against the appellant on section 130 (1) (2) (a) of the Penal Code consistent with the particulars of the offence. The appellant would want us make a mountain out of a molehill but we are confident that we cannot go along with him because the error complained of did not vitiate the charge.

As rightly submitted by Ms. Lucas placing reliance from our previous decisions in **Festo Domician** and **Jamal Ally** (supra), the error is one which is curable under section 388 (1) of the CPA. This is more so because despite the error in the section creating the offence, the particulars of the offence were very clear that the appellant was alleged to have committed rape to a named adult woman of 67 years of age to which he pleaded not guilty. In addition, the appellant knew the victim, had an opportunity to cross examine her and later on he defended himself. Under the

circumstances, it is hard to appreciate in what way the appellant was prejudiced by the error in citing the relevant paragraph in the section creating the offence. Apparently, the learned first appellate Judge dealt with this issue in her judgment at page 67 of the record and was satisfied, relying on the Court's decision in **Mussa Ally Onyango v. R,** Criminal Appeal No. 75 of 2016 (unreported) that the error was curable under section 388 (1) of the CPA. In **Jamal Ally v. R** (supra) the Court held:-

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."* [At page 18]

In the upshot, we have no lurking in upholding the learned State Attorney's submission that ground two is misconceived and we accordingly dismiss it.

After disposing of ground 2, we now turn our attention to grounds 1, 3, 4 and 5. We have found it convenient to deal with them together in the same way the learned State Attorney did because these grounds are closely related.

Ms. Lucas submitted that the trial court convicted the appellant on the strength of the evidence by PW1, the victim of the offence which indicated in sufficient detail how he committed the offence on the material date and that such evidence was corroborated by PW2 and PW3. It was her further submission that the trial court believed PW1 as a credible witness which was supported by the first appellate court. On the other hand, Ms. Lucas argued that the trial court considered the appellant's defence in which he complained that the case was framed against him after he had demanded payment of TZS 50,000.00, PW1 allegedly owed him for the work he had done in her farm but rejected it because it did not raise any doubt in the prosecution's case. Taking her arguments further, the learned State Attorney submitted that at any rate, the appellant's claim was an afterthought largely because he did not cross examine PW1 and raise the issue of indebtedness to her but raised it later in his defence after the prosecution had closed its case. Under the circumstances, the learned

State Attorney argued, the trial court and the High Court rightly concurred in their findings that PW1 had adduced the best evidence in line with the Court's holding in **Selemani Makumba v. R** [2006] T.L.R 379.

On the foregoing, Ms. Lucas invited the Court to dismiss grounds 1, 3, 4 and 5 because the appellant has not placed any material to justify interference with the concurrent findings of the two courts below holding that the case against the appellant was proved beyond any shadow of doubt.

The appellant for his part advanced two arguments in his rejoinder. One, it is inconceivable that the two courts could hold as they did that he committed the offence believing PW1 who stated that he did so having used a bush knife cutting her pubic hair. According to the appellant, it was impossible for him to have committed rape whilst holding a bush knife with which he is alleged to have used to shave PW1's long pubic hair. Two, had it been true that he committed the offence, he would not have remained in the village and risk being arrested.

Before discussing the grounds, we wish to point out that ground 1 in this appeal mirrors ground 6 before the first appellate court whereas ground 3 is substantially similar to ground 5 before the High Court. On the

other hand, ground 4 in this appeal is the same as ground 2 before the first appellate court. However, ground 5 is a totally new ground which never featured before the first appellate court. That ground contravenes rule 72 (2) of the Court of Appeal Rules, 2009 (as amended) because it does not arise from any point of law or fact alleged to have been wrongly decided by the High Court from which this appeal has arisen. The Court lacks jurisdiction to determine that ground consistent with our previous decisions in **Thomas s/o Peter @ Chacha Marwa v. The Republic,** Criminal Appeal No. 553 of 2015, **Galus Kitaya v. The Republic**, Criminal Appeal No. 196 of 2015 and **Godfrey Wilson v. The Republic,** Criminal Appeal No. 16 of 2018 (all unreported). We shall accordingly refrain from discussing the appellant's complaint in ground 5. In any event, and for the sake of argument only, as it will become apparent later, it is vivid from the record that the appellant was convicted on the strength of the prosecution's evidence rather than weakness in his evidence alone.

The first appellate court dealt with the issue whether the prosecution proved its case beyond reasonable doubt and found it baseless. Having examined the entire evidence, it concurred with the trial court that PW1 gave a detailed account explaining how the appellant had forceful sexual

intercourse after grabbing and falling her down while holding a bush knife with which he used to remove the overgrown pubic hair.

Like the trial court, the first appellate court found PW1 as a credible witness whose evidence was not only sufficient to sustain conviction, but it was corroborated by PW2 and PW3. It will be recalled that PW2 was the first person PW1 asked for his help a short distance from the scene of crime. It is PW2 who made an attempt to apprehend the appellant at the scene of crime but in vain because he was holding a bush knife and took to his heels to escape being apprehended. On the other hand, PW3 who examined PW1 at the dispensary and found bruises on her vagina which was corroborative of a forceful sexual intercourse. In her testimony, PW1 had told the trial court that she had not had sexual intercourse for a very long time and that is why she felt severe pains on the material date such that it became difficult for her to walk; she had to crawl from the scene of crime before being seen by PW2. With respect, we cannot but uphold the decision and the reasoning by the High Court at pages 70, 71 and 72 of the record in sustaining the trial court's findings. We agree with the learned State Attorneys that the law is settled with regard to the evidence required to prove a sexual offence. As the Court held in **Selemani Makumba v. R**

(supra), the best evidence in sexual offences must come from the victim and if the offence involves an adult woman, she must prove both penetration and lack of consent. Just as the first appellate court did, we are satisfied that the victim's evidence proved both penetration and lack of consent the essential ingredients necessary to prove rape involving adult women. PW1's evidence was not only sufficient to sustain conviction on its own but it was also corroborated by the evidence of PW2 and PW3.

For the sake of completeness, we need to reiterate that it is trite law that in a second appeal such as the instant one, the Court rarely interferes with the concurrent findings of the trial and the first appellate court. The only exception is where it is clear that those findings are based on misapprehension of the evidence or misdirection causing miscarriage of justice. That is evident from our previous decisions including: **Ezekiel Kakende v. R,** Criminal Appeal No. 492 of 2015, **Diskson s/o Joseph Luyana & Another v. R,** Criminal Appeal No. 1 of 2015, **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017 and **Felix s/o Kichele & Emmanuel s/o Tienyi @ Marwa v. R,** Criminal Appeal No. 159 of 159 of 2005 (all unreported) to mention but a few. The appellant has not placed before us any material to warrant interference with the concurrent findings of the

two courts bellow. Consequently, like the first appellate court we find no substance in the appellant's complaint in the first ground which we dismiss accordingly.

Having dismissed the appellant's complaint in ground 1, we find no difficulty in doing alike in relation to the complaint in the remaining grounds. The appellant's complaint that the two courts below erred for sustaining conviction on the basis of weak and contradictory evidence of the prosecution witnesses has no semblance of merit. The High Court addressed itself when dismissing ground 5 and found no contradiction whatsoever and dismissed it. We likewise find none in this appeal having held that PW1's evidence was too detailed and revealing on what transpired on the material date. Contrary to his contention, the appellant never contradicted PW1 in any of her pieces of evidence neither did he do so to PW2 and PW3. Be it as it may, if the appellant's complaint is connected to the use of a bush knife for shaving PW1's pubic hair, which is the basis of ground 4, we likewise find the complaint baseless.

As seen at page 73 of the record of appeal, the first appellate court dealt with this complaint and remarked:

"As stated in her (PW1) evidence, she panicked, was shaking due to fear to the extent of urinating on herself. Under the state of affairs that could be what or how she felt, that her pubic hairs were shaved using bush knife (panga). But even if, the discrepancy existed, I still find the evidence in support that the appellant raped PW1 outweighs the discrepancy."

It is plain that the learned first appellate Judge was as convinced as we are that the appellant's defence was not only fanciful but raised a remote possibility which could not have raised any doubt in the prosecution's case. She did so placing reliance on our decision in **Chandrakant Joshbhai Patel v. R.,** Criminal Appeal No. 13 of 1998 (unreported) in which we stated inter alia that:

*"As this court said in **Magendo Paul and Another v. R** [1993] TLR 2, 9 ... remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the administration of criminal justice if they*

were permitted to displace solid evidence or dislodge irresistible inferences."[at page 17]

We agree entirely with the learned first appellate Judge. In our view, whether or not it could have been possible for the appellant to commit rape and at the same time use his bush knife to cut off the overgrown pubic hair to facilitate entry of his male member into PW1's sexual organ was but a fanciful defence raising a remote possibility which was incapable of shaking the prosecution's case. Likewise, the fact that the appellant remained in the village after the event is not necessarily compatible with innocence. It is a remote possibility which was not capable of raising any reasonable doubt which could have benefited the appellant. The upshot of the above is that we must uphold the first appellate court's decision and dismiss ground 4 for being baseless.

In the same vein, we are unable to agree with the appellant regarding his defence in which he attributed his arrest and arraignment to the alleged debt the victim owed him. In actual fact, at the very outset PW1 told the trial court that the appellant never worked as labourer in her farm except his mother. The appellant never contradicted PW1 on this aspect. Under the circumstances, appellant's complaint that the case

against him was framed- up in connection with the alleged indebtedness was nothing than a mere afterthought which could not have raised any doubt in the prosecution's case. In the whole, there is no merit in any of the appellant's complaint in grounds 1, 3 and 4 and the same are dismissed.

Lastly, we have to deal briefly with ground 6 complaining against irregularities at page 14 of the record of appeal. Ms. Lucas submitted that this ground did not feature before the High Court but introduced at this stage and invited us to refrain from entertaining it. We agree with her that rule 72 (2) of the Rules bars us from entertaining a ground which does not arise from the decision of the lower court. For similar reasons discussed in relation to ground 5, there is no justification in entertaining this ground. At any rate, as we pointed out to the appellant, although the typewrite proceedings at page 14 shows that F.J. Kigingi RM presided over the case at some stage on 20th January 2016, the original record shows that it was J. J. Kamala RM1 who presided the case throughout. We are satisfied that reference to F.J. Kigingi – RM at page 14 of the record of appeal was attributed to typing errors and so that complaint could not have been sustained had it been a valid ground of appeal.

In the event and for the foregoing reasons, we find no merit in the appeal which we dismiss in its entirety.

Order accordingly.

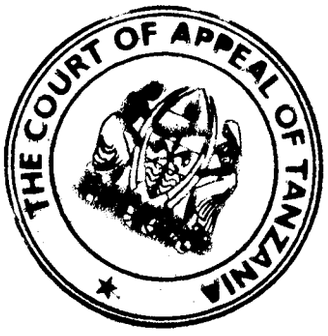
DATED at **ARUSHA** this 17th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2020 in the presence of the appellant in person through Video Link and Ms. Mary Lucas learned State Attorney for the respondent is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL