IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J. A., MWAMBEGELE, J. A. And MWANDAMBO, J. A.)

CRIMINAL APPEAL NO. 340 OF 2017

ALEX S/O NDENDYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Feleshi, J.)

dated the 14th day of July, 2017
in
Criminal Appeal No. 88 of 2016
.....

JUDGMENT OF THE COURT

27th April & 6th May, 2020

MZIRAY, J.A.:

The appellant, Alex Ndendya, was arraigned in the District Court of Njombe at Njombe for the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. It was alleged that on 24/3/2015 at Usita Primary School within Wanging'ombe District in Njombe Region the appellant had carnal knowledge of one **AK** a ten years old girl (Name withheld to hide her identity).

In proving the offence against the appellant, the prosecution lined up seven witnesses and produced two documentary exhibits which were; the cautioned statement of the appellant and the medical examination report (PF3) of the victim. On the other side, the appellant was the only witness for the defence.

In the trial that ensued, the trial court was satisfied that the prosecution had proved the charge to the hilt. Consequently, the appellant was convicted as charged and sentenced to the statutory minimum sentence of life imprisonment. Being discontented, the appellant appealed to the High Court where he was partly successful in that the sentence imposed was reduced to thirty years imprisonment but the conviction remained undisturbed. Still discontented, he lodged this appeal to the Court.

The appellant filed a memorandum of appeal before this Court with seven grounds of complaint as follows:-

"1. That, the High Court wrongly held that the testimonies of PW2 and PW7 corroborated that of PW1 without aggressing (sic) its mind

properly that their findings was irrelevant due to lapse of time hence cannot prove penetration.

2. *That, the Honourable Judge of the High Court erred in law to rely on the evidence of PW1 to dismiss the appellant's appeal without taking into account that the same is contradictory for failure to mention the time when the alleged rape took place, furthermore she admitted to have been couched by her parents (page 22 of the trial court proceedings).*

3. *That the Honourable Judge of the High Court erred in law for holding that the appellant confused (sic) before the Village Chairman without addressing his mind properly that the meeting took place in the office of the Head teacher and the Chairman of that meeting was the Head teacher and not the village chairman, hence Head teacher is not a person in authority.*

4. *The High Court contradicted itself for failure to draw inference adverse to call one Charles and Oliver as key witnesses reported to have been informed by PW1 immediately after the commission of the alleged incident of rape (page 21 trial court proceedings).*

5. *That, the High Court erred in law and fact for holding that the testimonies of PW2, PW3, PW4 and PW5 corroborated that of PW1 without taking into account that the same are purely hearsay evidence.*

6. *That, the Honourable Judge of the High Court erred in law for holding that the appellant's cautioned statement corroborated the testimony of PW1 without considering that PW1's testimony is not only contradictory but also fabricated and not credible to form the basis of the conviction.*

7. *That, the High Court wrongly dismissed the appellant's appeal without addressing its mind properly that the prosecution side failed totally to prove this case beyond reasonable doubt."*

Before we embark to determine the merit of the appeal, we find it pertinent to narrate, albeit briefly, the background giving rise to this appeal as could be gathered from the record of appeal. At the material time, the victim (PW1) was a standard five pupil at Usita Primary School aged 10 years old. She alleged in her testimony that on 24/3/2015 while clearing dishes at the school, the appellant who was employed as the school cook

lured her to go in the store and put some maize in the cooking pot. The appellant's real intention was not known to the poor girl. While in the store, the appellant entered, holding a knife and threatened her. The appellant then dragged her down, undressed her knickers and raped her on the piled sacks at the store. He released her with a strong warning that she should not reveal the incident to anyone. When she came back home her aunt Zela Kawogo (PW2) discovered that PW1 was walking with some difficulties and when she asked her what happened, recalling the threats of the appellant, she answered that nothing unusual happened. However, the secret was later on revealed by the son of PW2 one Alfa Mohamed, also attending school at Usita Primary School, who informed her mother that PW1 had a fiancé at school. With this tip, PW2 grilled PW1 until she finally revealed the truth that she was raped by the appellant. PW2 inspected PW1 and found that she had sperms in her vagina. The matter was reported to the school authority and the appellant was arrested. Upon interrogation he made an oral confession before PW2, PW3, PW4 and PW5, the Village Chairman. PW1 was issued with a PF3 for medical examination (exhibit PE2). It was PW7 who conducted the examination and observed

that the girl was raped. The appellant was interrogated by PW6 and upon caution, he gave a cautioned statement admitting the allegation.

In his defence before the trial court, the appellant evasively denied to have committed the offence. He denied also to have made the oral confession and the cautioned statement (exhibit PE1). He strongly alleged that the cautioned statement was extracted involuntarily after he had been arm twisted.

When the appeal was placed before us for hearing the appellant appeared in person, unrepresented; whereas Mr. Adolf Maganda, learned Senior State Attorney represented the respondent Republic. The appellant adopted the grounds of appeal and chose for the learned Senior State Attorney to respond first but reserved his right to rejoin if need would arise.

Mr. Maganda supported the decision of the trial court which was affirmed by the High Court. He strongly opposed the appeal. He opted to start with the complaint in ground No. 7 hoping that in discussing this ground he will be able to cover all other complaints raised in the remaining six grounds which in a nutshell are focused on the assertion that the

appellant's conviction was against weight of the evidence. He submitted that basically, the thrust of the complaint in ground No. 7 is that the case against the appellant was not proved beyond all reasonable doubt.

In his submission to support his contention, the learned Senior State Attorney took us back to the evidence of PW1 which was heavily relied upon to anchor the conviction. He submitted that the evidence of PW1 which starts at page 23 of the record of the appeal shows that she knew the appellant prior to the incident as he was the cook at Usita Primary School. PW1 stated that on 24/3/2015 while she was washing dishes, the appellant sent her to the store to collect maize. The appellant then followed her in the store and raped her. Before the incident he threatened her with a knife. It is the argument of the learned Senior State Attorney that the above evidence of PW1 alone if believed has sufficiently proved the charge against the appellant. He strengthened his position by citing to us the case of **Godi Kasenegala v. R.**, Criminal Appeal No. 10 of 2018 (unreported) where this Court held that:-

> *"It is now settled law that the proof of rape comes from the prosecutrix herself."*

He further submitted that the evidence of PW1 was sufficient to ground a conviction but in this case it has been corroborated by the oral confession of the appellant made before PW2, PW3, PW4 and PW5 and the cautioned statement of the appellant. Additionally, the medical evidence including the PF3 tendered has further corroborated the prosecution evidence. He challenged the defence case by submitting that it did not raise any reasonable doubt on the prosecution case. Finally, he invited the Court to confirm the findings of the High Court and dismiss this appeal.

In rejoinder, the appellant submitted that he was framed up with the case by PW2 to put him in jeopardy for reasons best known to herself. He denied to be a cook at the school and also challenged the cautioned statement to have been extracted under duress. He contended that it took almost a week for PW2 to discover that the victim was not walking properly something suggesting that the alleged sperms on her private parts was an afterthought. He wondered why Charles and Oliver who the incident was immediately reported to them were not called as witnesses for the prosecution. He stated that the incident could not have happened because at the material time the school was on vacation. In the end, he prayed for the appeal to be allowed and he be set at liberty.

After carefully considering the grounds of appeal and the submissions of both parties, the issue for determination as rightly submitted by the learned Senior State Attorney is whether the prosecution had proved the case against the appellant beyond reasonable doubt. We believe that the discussion on this issue which is ground No. 7 in the memorandum of appeal will encompass the other six grounds raised in the memorandum of appeal which basically challenges the decision of the High Court to be against the weight of the evidence adduced.

The charge preferred against the appellant is *inter alia*, under section 130 (1) and (2) (e) of the Penal Code, Cap 16 R.E. 2002 which reads as follows:-

> *"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:-*
>
> *a) N/A*
> *b) N/A*
> *c) N/A*
> *d) N/A*

e) With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

In the light of the provision above, age is of utmost importance and in a situation where the appellant was charged with statutory rape then the age of the victim must specifically be proved before convicting the appellant. In the case of **Wiston Obeid v. R.**, Criminal Appeal No. 23 of 2016 (unreported) while quoting the case of **Solomon Mazala v. R.**, Criminal Appeal No. 136 of 2012 (unreported) this Court held that:-

"The cited provision of the law makes it mandatory that before a conviction is grounded in terms of section 130 (2) (e) above, there must be tangible proof that the age of the victim is under eighteen years at the time of the commission of the alleged offence."

In the case at hand, the particulars of the offence allege that the victim was a girl of ten years old, a fact which was proved by PW4, the father of the victim when testifying at page 27 of the record of appeal on which he stated that the victim was born on 3/12/2004. There is no flicker

of doubt that the evidence of PW4 supports the averments in the particulars of the offence in the charge; consequently there was no doubt on the age of the victim.

Another important element to be proved in a charge of the nature is penetration. It is a settled principal derived from case law that the best evidence in rape cases is that of the victim as propounded in the case of **Selemani Makumba v. R.** [2006] TLR 380 where this Court held as follows:-

> *"True evidence of rape has to come from the victim, if an adult; that there was penetration and no consent; and in case of any other woman where consent is irrelevant, that there was penetration."*

In this case since it was proved that the victim was a minor then consent was irrelevant. What we are to establish is whether penetration was proved. In her evidence at page 21 of the record of appeal, (PW1) stated that:-

> *"....Alex Ndendya put me down undressed me took his penis and inserted into my vagina, he was wearing a trouser on that day he undressed himself before doing*

that, I felt some pains I did not sound an alarm because Alex Ndendya threatened me with a knife"

The above piece of evidence adduced by PW1 suffices to prove that there was penetration. The appellant highly disputes this evidence and he contended that PW1 was not a credible witness and that she was couched by her aunt PW2 to speak lies against him just to put him in trouble. With respect, we don't agree with the appellant in his argument because the trial court carefully analyzed the evidence of PW1 and after assessing her demeanour came to the conclusion that she was a credible witness. It is trite law that the assessment of a demeanour of a witness is purely the monopoly of the trial court. In **Shabani Daud v. R.,** Criminal Appeal No. 28 of 2000 (unreported) we held that:-

"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of witness can only be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two; when the testimony of that witness is considered with the evidence of other witnesses including that of the accused person. In these two other occasions the

credibility of a witness can be determined even by a second appellate Court when examining the findings of the first appellate court."

In addition to the evidence of PW1, we find as observed by the first appellate court that there was corroborative evidence of PW2 who inspected her and found sperms in her vagina and there is also the evidence of PW7, the doctor which corroborated the evidence of PW1 that she was raped. In **Godi Kasenegela** (supra) having pronounced that the proof of rape comes from the prosecutrix herself, the Court went further and stated that:-

"Other witnesses if they never actually witnessed the incident; such as doctors, may give corroborative evidence."

Another piece of evidence which the trial court relied to convict the appellant was the cautioned statement. In his submission before us, the appellant argued that the statement was involuntary as it was extracted by force. We have noted with concern from the record of appeal at page 31 that when the learned State Attorney sought to produce the cautioned statement, the appellant did not object to its production hence admitted as

an exhibit. The issue of admissibility of this document was also not raised in the High Court. We think that it is out of place for the appellant to raise this issue in this Court. Our position is fortified by the case of **Nyerere Nyague v. R.**, Criminal Appeal No. 67 of 2010 (unreported) where this Court observed that:-

> *"The appellant himself introduced that he gave a cautioned statement to the police. When the prosecutor sought to produce it, the appellant did not object to its production; and so it was admitted as exhibit P2. He is now seeking to challenge its admissibility in this Court. It was never raised with the first appellate court. Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the courts below to be raised on appeal ."*

On the strength of the above principle, the objection raised by the appellant is unfounded and cannot be entertained at this stage. We consider his submissions in this point to be an afterthought. Just like in the courts below, we are satisfied that the cautioned statement the appellant gave to PW6 was free and voluntary.

In another complaint which is reflected in the third ground of appeal, the appellant has emphatically denied to have made an oral confession before PW5, the village chairman in the presence of PW2, PW3 and PW4. We think that this complaint should not detain us. The evidence of PW2, PW3, PW4 and PW5 is very clear that after the arrest of the appellant, a meeting was convened and the appellant confessed before these witnesses that he raped PW1 in the school store. These witnesses were adjudged to be credible by the trial court and on our part we have no reason to doubt the assessment made by the trial court which apparently was sustained by the High Court. In this regard we are tempted to reiterate our position in the case of **Peter Sanga v. R.,** Criminal Appeal No. 91 of 2008 (unreported) which quoted the case of **Twaha Alli and 5 others v. R.,** Criminal Appeal No. 78 of 2004 (unreported) where this Court stated that:-

> *"An accused person who confesses his guilt is the best witness."*

The appellant has also complained in ground No. 4 of the memorandum appeal that two key witnesses to the incident were not called to testify hence the High Court was supposed to draw an adverse

inference for the prosecution's failure to call these two witnesses. It is to be noted in the record of appeal at page 23 that when PW1 was recalled to testify, she mentioned Oliver and Charles as the person she immediately narrated the rape incident to them. The complaint of the appellant is that the High Court was supposed to draw an adverse inference for the prosecution's failure to call these two witnesses. We wish to make it clear at the outset that in terms of section 143 of the Tanzania Evidence Act, Cap 6 R.E 2002, there is no specific number of witnesses required to prove a fact. What is required is the witnesses who could prove the case. (See also **Julius Kandonga v. R.,** Criminal Appeal No. 77 of 2017 (unreported) and **Bashiri John v. R.,** Criminal Appeal No. 486 of 2016 (unreported). We think that Oliver and Charles were not necessary witnesses for the prosecution because they did not eye witness the incident. If the appellant found that the two were important witnesses, he was at liberty to call them for the defence case, something he did not do. There was therefore no compelling reason for the High Court to draw an adverse inference for failure to call Oliver and Charles. On the contrary, we are satisfied that the seven witnesses who testified in the trial court with the two documentary

exhibits tendered had sufficiently proved the case for the prosecution to the standard required.

In the event, like the two courts below, we are satisfied that the case against the appellant was proved beyond reasonable doubt. Eventually, we find the appeal by the appellant lacking merit and dismiss it in its entirety.

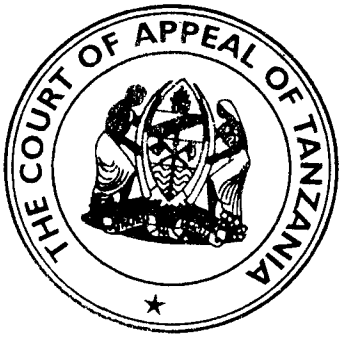
DATED at **IRINGA** this 4th day of May, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 6th day of May, 2020 in the presence of the Appellant in person through video conference and Adolf Maganda, Senior State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL