IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 99 OF 2012

MUHSIN MFAUME ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Aboud, J.)

Dated the 1st day of June, 2012
in
Criminal Appeal No. 116 of 2011

JUDGMENT OF THE COURT

26th February & 5th May, 2020

KITUSI, J.A.:

The appellant Muhsin Mfaume was prosecuted for rape under section 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 as amended by Act No. 4 of 1998. The trial court convicted and sentenced him to 30 years' imprisonment for that offence, plus twelve strokes of the cane. His appeal to the High Court against both the conviction and sentence was unsuccessful, hence this appeal.

The case arose from the following background; The appellant is a step father of the alleged victim, a girl whose true name we shall conceal and henceforth refer to her as NS or PW1. PW1's mother Janeth Peter Msabaha (DW2) testified that the appellant is her husband and that PW1 is her daughter with another man. She was away from the matrimonial home from December 2008 to March 2009, having moved to her farmland at Bagala village.

There were three people left at the homestead when DW2 was away; these are, the appellant, PW1 and PW1's half-sister who testified as DW3. On the eventful date at night according to PW1, the appellant took her to the sitting room and offered her a drink which looked to her as "black Currant" juice. As it had a bitter taste PW1 hesitated to take it but the appellant forced her to take a ful glass of that drink. The drink had an instant effect on the girl as she felt weak immediately after taking it, a state which the appellant allegedly took advantage of. He undressed her and had sex with her.

In the morning PW1 went to her aunt Fatuma Ally (PW4) who was living within the same village and told her what she had gone through the previous night. PW4, Mikidadi Jagala (PW2) and Gidion Tembeleni Chaurembo (PW3) were within earshot when PW1 was narrating that

story, and they testified to have heard her narration to her aunt, PW4, that the appellant had sex with her.

PW4 examined PW1's private parts and noted that her hymen had been perforated, her vagina was swollen and she could hardly walk properly. She informed PW1's uncle who was living at Mburahati in Dar es Salaam. However, it was PW2 who reported the matter at Mlandizi Police Station where a PF3 was issued for PW1's medical examination. Baruma Mussa (PW5) the medical officer who examined PW1, confirmed in his testimony that the girl's private parts were swollen and her hymen had been perforated.

In defence the appellant denied having carnal knowledge of PW1. He, instead, accused her of disappearing from the family residence from 26th March 2009 causing him to go frantically in search for her. He shared his worries about PW1's disappearance with DW2 when she returned home, and DW2 testified on that account. When the search did not bear results, he reported the disappearance of the girl to the local government office. Said Daud Said (DW4) the Ward Executive Officer of Gumba Village testified in support of this version to the effect that he received a report from the appellant about the disappearance of the girl.

The appellant went on to state that on 31st March 2009 he was informed by the police at Mlandizi that PW1 had been seen at Mburahati in Dar es Salaam but that she was alleging that he had raped her. He was consequently put under arrest.

The trial Court and the first appellate Court accepted PW1's version of the matter as true and found the account given by the defence insufficient to raise reasonable doubt.

Before us the appellant raises a number of complaints, including the manner of his arrest, appearing as ground number 5. In ground one he alleges that he was prosecuted under a defective charge. In ground two he questions why medical examination was delayed. In ground three he complaints that there was variance between the charge and evidence as regards the date of the alleged offence. In ground four it is alleged that the age of the victim was not proved. In the Sixth and last ground it is generally alleged that the charge was not proved beyond reasonable doubt.

At the hearing, the appellant appeared in person without legal representation. For the respondent Republic Ms. Ellen Masululi and Ms. Aziza Mhina, both learned State Attorneys, appeared and argued against

the appeal. When the appellant took the floor, he did not address the first ground of appeal that alleges defect in the charge. He instead addressed us on the variance between the charge and the evidence as regards the dates of the alleged rape, which features as ground three of appeal. We shall therefore treat the first ground as abandoned, but not before we satisfy ourselves that the charge is valid. Our duty to scrutinize the propriety of the charge is fundamental, irrespective of the arguments from the parties, because that touches on our jurisdiction. See the case of **Antidius Augustine v. Republic**, Criminal Appeal No 89 of 2017 (unreported).

The charge was drawn under sections 130(1) (2) (e) and 131 of the Penal Code, Cap 16. These provisions create a category of rape involving victims of the age below 18 years, commonly known as statutory rape. We see nothing wrong in the charge sheet both on the statement of the offence and the particulars thereof, therefore section 135 of the Criminal Procedure Act [Cap 20 RE 2002] (the CPA) was complied with.

However, a copy of that charge sheet is missing from the record of appeal placed before us, and the question is whether hearing of the appeal could proceed without it. When the State attorney was engaged

on this issue, she took the view that in composing its judgment the trial court reproduced the charge sheet sufficiently to enable us as well as the appellant know the gist of the allegations placed at the appellant's door. The appellant, being unrepresented, did not offer much on this rather technical aspect of the case.

On our part, we agree with the learned State Attorney that the charge was adequately reproduced by the trial court at the opening statement of its judgment, which goes thus;

> *"The accused person Muhsin Mfaume stands charged with the offence of Rape C/S 130 (1)(2) (e) and 131 of the Penal Code, Cap 16 as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998".*

We are satisfied that the above statement represents what the charge sheet stated in substance, and it was drawn in compliance with section 135 of the CPA.

We now revert to the substantive grounds of appeal. The first complaint is that appearing on ground two of the appeal questioning why medical examination of PW1 was delayed. In his submissions the appellant referred to the span of time between 25th March when PW1

was allegedly raped to 30th March when she received medical attention. He wondered how she could manage to survive without getting any medical aid in that duration of five days.

In response Ms. Masululi conceded that there was a delay in conducting medical examination but submitted that every case has to be decided upon its own peculiar facts. She referred to what she considered to be peculiar facts of this case, that the incident occurred at Kibaha District and the victim escaped to Mburahati area in Dar es Salaam. However, she submitted, the victim is said to have immediately reported the matter to her aunt because her mother was away.

The third ground of appeal forms the appellant's major complaint and he submitted quite at length in that regard. This is in respect of the alleged variance between the dates appearing in the charge sheet and those featuring in the evidence. According to the charge sheet discerned from the judgment of the trial court, the alleged rape took place on 25th of March, 2009.

The appellant submitted that the witnesses for the prosecution contradicted each other as regards the date of the alleged rape and its aftermaths. He cited the said inconsistences. The charge mentions the

date of the rape as being 25th of March and PW4 stated that he reported it to the police on 26th March. However, the police including PW6, testified that they received the report on 30th of March and yet PW2, stated that it was on 16th March, 2009 when he heard PW1 disclose the rape story to PW4.

In her submissions in relation to the third ground of appeal Ms. Masululi argued that PW2's reference to 16th March was a typing error. The learned State Attorney submitted in general that there was evidence from PW1 that she was raped and that PW4 who checked the girl's private parts immediately in the morning confirmed this fact. She insisted that the best evidence as regards whether PW1 was raped or not must come from the victim herself according to settled law. We were referred to the case of **Tumaini Mtayomba v. Republic**, Criminal Appeal No. 217 of 2012 (unreported). She added that in this case PW1's evidence was supported by that of PW4 and PW5 the medical officer.

In the fourth ground of appeal, the appellant complains that there was no proof of the victim's age. Apart from raising this issue, the appellant was not quite elaborate on it and how he felt that evidence was missing. On the other hand, Ms. Masululi submitted that there was

proof of the victim's age by the victim herself at page 5 of the record and by the doctor who attended her, at page 17 of the record.

The fifth ground of appeal is that which criticizes the prosecution for failing to establish how the appellant was arrested. This is a new ground of appeal which was neither raised nor determined at the first appellate court. It is settled that we cannot deal with such issues unless they were first raised and determined at the High Court. If we have to cite authorities for this, they are quite a handful. See, for instance, **Birahi Nyankongo and Another v. Republic**, Criminal Appeal No. 182 of 2010 and **Mashimba Dotto @ Lukubanija v. Republic**, Criminal Appeal No. 137 of 2013 (both unreported).

The sixth ground of appeal is a general one, charging that the case against the appellant was not proved beyond reasonable doubt. The appellant submitted that the medical doctor (PW5) could establish that PW1 had been carnally known but could not link it with him as the perpetrator. Ms. Masululi submitted in this respect that the evidence of PW1 the victim, was corroborated by PW4 who inspected the girl immediately in the morning, and that of PW5 the medical doctor.

After hearing the submissions for and against the appeal, it is now our duty to resolve the grounds of appeal. Since we resolved the first ground of appeal concerning the alleged defect in the charge earlier, we shall commence with the second ground of appeal. The appellant raises issue with the delayed medical examination of PW1. While conceding to this issue, Ms. Masululi explained away the delay as being a result of the peculiar circumstances of the case. That the alleged rape took place in Kibaha District and PW1's uncle living in Dar es Salaam was the one expected to take action.

In our determination of this ground we reiterate the settled principle that in sexual offences the best evidence comes from the victim. See **Selemani Makumba v. Republic** [2006] TLR 379. We shall therefore consider the complaint under ground two of appeal in terms of whether or not it dilutes the credibility of the victim. In this case PW1 reported the rape immediately in the morning following the night when it took place. Whether PW2 and PW4 dragged their feet and failed to take action immediately but that inaction cannot be blamed on PW1. In an almost similar scenario, in **Edson Simon Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016, the Court made this observation;

> *"In this regard, in our considered view, the inaction by PW2 and PW3 to immediately report to the Police does not in any way impeach the credibility of PW1 as viewed by the appellant's counsel".*

We find this position relevant to our case and similarly hold PW1's credibility to be unaffected by the inaction on the part of the people to whom she reported the alleged rape. We therefore find no merit in the second ground of appeal.

We now address ground three of appeal on the variance of dates. From PW1 there is evidence that she was raped on 25th March, 2009 at night and disclosed the ordeal to her aunt in the morning of 26th March, 2009. There is evidence from PW4, the aunt, that on 26th March 2009 she received from PW1 the complaint of having been raped by her step father the previous night. We think these are the cornerstone facts of this case and that the two courts below found them as established. We see no reason to disturb those concurrent findings because they were based on sound evaluation of the evidence. Interestingly, in the evidence of Tumaini Said (DW3), she stated that the appellant told her that PW1 had disappeared, but when she visited PW4 she found her there. Further that PW4 told DW3 to go call the appellant. We consider

the appellant's evidence stating that PW1 disappeared from the residence on 26th March 2009, and DW3's testimony that she found PW1 at PW4's residence as being consistent with the prosecution case. We are satisfied that the appellant's testimony on that aspect furthers the prosecution case and we are entitled to take it into account. In **David Gamata and Another v. Republic,** Criminal Appeal No. 216 of 2014 (unreported) which we associate ourselves with, the Court held;

> *"We take it to be one of the settled principles of law that if an accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt".*

Consequently, it is our conclusion that the variance as to the dates could only be due to lapses of memory which does not go to the root of the case, because it has been established that PW1 was raped on 25th March 2009, and on the next morning she took refuge to some other place. We dismiss appellant's story that he was looking for PW1 as fanciful, because we wonder why it did not occur to him to visit PW4 as DW3 did. We therefore see no merit in this ground of appeal.

Ground four of appeal is on proof of the victim's age. We readily agree with the learned State Attorney in that the evidence of the victim's age came from herself. Significantly the appellant, who was PW1's step father did not cross examine her on that evidence if he wished to contradict her, nor did he allude to the victim's age during his defence. We took a similar position in the case of **Mustapha Khamis v. Republic,** Criminal Appeal No. 70 of 2016 (unreported). We dismiss this ground as an afterthought and for want of merit.

We have already dealt with the fifth ground of appeal complaining about the manner of the appellant's arrest. We now turn to the last ground of appeal which alleges that the charge was not proved against the appellant beyond reasonable doubt.

We observed earlier that the two courts below accepted the evidence of PW1 as representing the truth, and they rejected the defence case. We are satisfied that that conclusion cannot be faulted in view of the position we have taken in this case. First of all, we have equally found PW1 to be a candid witness whose version of the matter was supported by PW4 and PW5 and that the inaction by those to whom she first reported the rape did not dent her credibility. Secondly, we have found the prosecution case as being advanced by what was stated

by the appellant himself and DW3, specifically on the point that on 26th March, 2009, PW1 left her home and went to PW4. In the end we find this ground far from meritorious.

All said, our conclusion is that the appeal has no merit and we hereby dismiss it in its entirety.

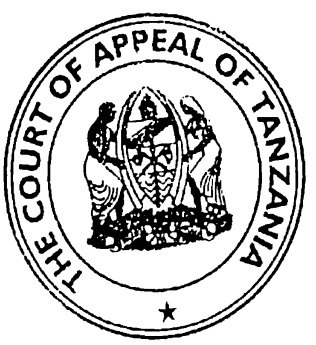
DATED at **DAR ES SALAAM** this 25th day of April, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 5th day of May 2020 in the presence of the appellant in person-linked via video conference and Ms. Chesensi Govyole, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL