IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 23 OF 2018

RICHARD JARED..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkasimongwa, J.)

dated the 11th day of December, 2017
in
HC. Criminal Appeal No. 102 of 2017

.....

JUDGMENT OF THE COURT

20th July & 5th August, 2020

MMILLA, J.A.:

In this appeal, Richard Jared (the appellant), is contesting the judgment of the High Court of Tanzania at Dar es Salaam in Criminal Appeal No. 102 of 2017 in which his conviction and sentence entered in Criminal Case No. 73 of 2008 by the District Court of Kilosa at Kilosa (the trial court), were upheld. Before the trial court, the appellant was charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002

(the Penal Code). It was alleged that on 20.2.2008 he raped PW1 (name withheld), an old woman who was then 69 years old. Upon conviction, he was sentenced to thirty (30) years' imprisonment.

The facts of the case were briefly that on 20.2.2008 during day time, PW1 was at her farm at Mfuru area within Kilosa District. At a certain point in time, the appellant arrived at that place and held a brief conversation with her. Subsequently, he grabbed her by the neck, threw her down, unzipped his trousers, took his penis and forcefully inserted it into PW1's female organ, thus compelling her to raise alarm. Fortunately, one Ismael Ally (PW2) who was in a farm not very far from that of PW1 heard the alarm and rushed to the scene, thereby scaring the appellant who ran away. He attempted to chase him, but he was outsmarted and the latter managed to escape. Upon that, PW2 took her to Police Station and later on to hospital for medical examination and treatment.

The case was investigated by No. D. 1792 Cpl. Paulo (PW3). He managed to arrest the appellant on 25.2.2008, prepared the charge and sent him to court.

The appellant's defence was very brief. He denied to have committed the alleged offence. He also challenged that the evidence of PW1 and PW2 was unreliable because it was contradictory. Likewise, he wondered why it took them long to arrest him if at all PW2 really knew where he was living.

The appellant's memorandum of appeal raised four grounds as follows: **one** that, the first appellate court erred in upholding his conviction without figuring out why he was not readily arrested if at all PW1 and PW2 knew him in advance; **two** that, the first appellate court wrongly upheld his conviction where none of the village leaders were called to testify; **three** that, he was denied opportunity to cross examine PW3; and **four** that, the prosecution did not prove the case against him beyond reasonable doubt.

On the date of the hearing of this appeal, the appellant was not physically present in Court, but was linked through video conference facility from prison, and had no legal representation. On the other hand, the respondent/Republic was represented by Ms Brenda Nicky, learned State Attorney.

At the commencement of the hearing, the appellant prayed to adopt his memorandum of appeal and chose for the Republic to respond first, opting to say something thereafter if need would arise. We honoured his election and invited Ms Nicky to respond first.

The learned State Attorney declared at the outset that she was opposing the appeal. Before she proceeded to address the grounds raised by the appellant however, she alerted the Court of the defect in the charge sheet. She observed that since the victim of rape was 69 years old, the offence was wrongly anchored on section 130 (1) and (2) (e) of the Penal Code which is in respect of rape committed on a girl age below eighteen years. Instead, she added, the appellant ought to have been charged under section 130 (1) and (2) (a) of that Act. Ms Nicky quickly added however, that the defect was curable on the ground that the particulars of the offence as well as the evidence on record were so clear that the appellant understood the nature and seriousness of the offence which was facing him. She cited to us the case of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). In the circumstances, she urged the Court to find that he was not prejudiced.

On Court's probing, she admitted as well that the particulars of the offence were silent on whether or not the alleged victim consented. She quickly added however, that like the first defect, this defect too was curable because the evidence of PW1 was quite clear that she did not consent but was forcefully violated, therefore that the appellant was not prejudiced.

We have found it desirable and convenient to dispose of this point before we may proceed.

Admittedly, the record shows that the amended charge of 8.4.2008 was based on section 130 (1) (2) (e) of the Penal Code, essentially connoting that the victim of rape was a person below the age of 18 in respect of whom consent was immaterial. To the contrary however, the victim in the circumstances of this case was an old woman aged 69 years as shown in the charge sheet, therefore that the requisite provision ought to have been section 130 (1) (2) (a) and 131 (1) of the Penal Code. Also, the particulars of the offence did not aver absence or otherwise of the consent of the victim as it ought to. As such, the two mentioned aspects constituted irregularities.

After carefully going through the Record of Appeal however, we agree with Ms Nicky that the two irregularities were not fatal because the particulars of the offence and the evidence of PW1 and PW2 remedied the defect in that they were so clear as to enable the appellant to understand the nature of the offence which was facing him. To illustrate the point, it is important to point out that the charge sheet showed that the victim was a 69 years old woman and not a child. Also, the evidence of PW1 showed that after the command to strip off, the appellant grabbed her, threw her down and forcefully had sexual intercourse with her. On seeing PW2 rush to the scene, the culprit released his victim and ran away, all of which signaled that she had not consented. Thus, we agree with Ms Nicky that the situation in the present case is similar to that which obtained in **Jamali Ally @ Salum** (supra). In that case, the decision of the Court on the point was that where the particulars of the offence and the evidence on record might have been so clear as to enable the accused to appreciate the nature and seriousness of the offence he was facing, thereby eliminating all possible prejudices, the court may be entitled to gauge that the error is minor, thus curable under section 388 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002. Thus,

since appellant in the present case understood the nature and seriousness of the offence he was faced with, the two defects were curable because they did not prejudice him.

We now turn to address the first ground of appeal on why he was not readily arrested if at all PW1 and PW2 knew him in advance. On this, Ms Nicky submitted that since the appellant was arrested on 25.2.2008 which was only 5 days after the commission of the charged offence, it cannot be said it took too long for him to be apprehended. Also, Ms Nicky attributed the delay in arresting him to the fact that the appellant ran away after the incident. She requested us to find no merit on this ground. We sincerely agree with her.

The proceedings in the record show that the offence was committed at Mfuru village within Kilosa District on 20.2.2008, and that he was arrested on 25.2.2008. In our firm stand, the difference of 5 days cannot be said to have been an alarming delay. Also, as reflected at page 9 of the Record of Appeal, the appellant testified that he was living at Berega village, but was arrested at Dumila. That means, he was on the run. For reasons we have assigned, we find that this ground lacks merit and we dismiss it.

The appellant's complaint in the second ground of appeal is on why the village leaders were not called to testify. Ms Nicky's response was that in terms of section 143 of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the Evidence Act), there is no specific number of witnesses required to prove the case. She banked on the case of **William Kasanga v. Republic**, Criminal Appeal No. 90 of 2017 (unreported). She added that the important witnesses in the case were PW1 and PW2 as well as PW3, the police officer who investigated the case. The learned State Attorney maintained that the evidence of those witnesses proved the prosecution case beyond reasonable doubt. She urged us to dismiss this ground too.

It is certain that under section 143 of the Evidence Act, no specific number of witnesses is required to prove any particular case. As often stressed, what is important is for the prosecution to call witnesses who may prove their case beyond all reasonable doubts - See the case of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148 cited in **William Kasanga** (supra). It was held in **Yohanis Msigwa** that:-

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact.* ***What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility."*** [Emphasis added].

In the circumstances of the present case, the prosecution produced before the trial court two key witnesses, PW1 who was the victim and PW2 who rushed to her rescue. They also called PW3 who explained the appellant's arrest. We agree with Ms Nicky that those were the most important witnesses upon whose evidence the appellant's conviction was based.

Apart from what we have just said, we consider it proper to also point out that in fact, the matter was never reported to the village leadership of Mfuru, therefore that they played no role in the case. Instead however, it was reported to the police straight away and one of them (PW3) appeared to testify in court. In the premises, this ground lacks merit and is hereby dismissed.

In the third ground, the appellant's complaint is that he was denied opportunity to cross examine PW3, an allegation which has

been strongly rebutted by Ms Nicky. The learned State Attorney submitted that she checked the original record and satisfied herself that the appellant was given opportunity to cross examine PW3. She attributed the skipping of that part in the Record of Appeal to a human error in the course of typing.

We also checked the original record in an endeavour to confirm Ms Nicky's assertion. We satisfied ourselves that indeed, the appellant was given the opportunity to cross examine PW3, but he declined. In the circumstances, we agree with Ms Nicky that omission of that portion in the typed proceedings forming the Record of the Court was a typing error. As such, this ground too lacks merit and is accordingly dismissed.

Finally is the appellant's complaint that the prosecution did not prove the case against him beyond reasonable doubt, an assertion which has been vehemently contested by Ms Nicky. The learned Stated Attorney has ardently submitted that the prosecution proved the case against the appellant beyond doubt.

After carefully considering both the prosecution and defence evidence, the two courts below held the view that the appellant's

defence did not raise any reasonable doubt and rejected it. To the contrary, they considered the evidence PW1, PW2 and PW3 and found that they were witnesses of truth. As earlier on alluded to, PW1 thoroughly explained how she encountered the appellant at her farm and the conversation that ensued between them. She also described how he grabbed her, threw her down and procured his penis which he inserted into her female organ and raped her. There was also the evidence of PW2 who said he heard an alarm which was raised by PW1 and rushed to the scene, whereupon on seeing him come, the appellant ran away. PW2 attempted to chase the culprit, but he failed to catch him.

Likewise, the two lower courts considered the appellant's evidence in defence. As already pointed out, it comprised a general denial that he was innocent, also that on that day he was at Berega. However, basing on the strength of the evidence of PW1 and PW2, they held the view that the appellant's defence did not raise any reasonable doubt and rejected it. We think their conclusions were justified and we have no good cause to interfere with their concurrent findings. We hold therefore, that the first appellate court was justified

to uphold conviction and sentence as was found by the trial court. So, this ground too has no merit and we dismiss it.

For reasons we have assigned, we find that the appeal is devoid of merit. We accordingly dismiss it in its entirety.

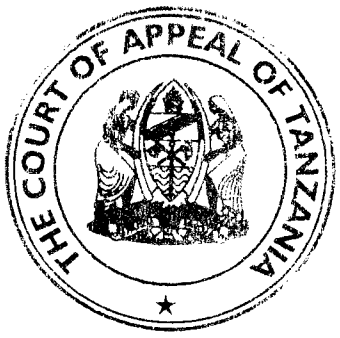
DATED at **DAR ES SALAAM** this 3rd day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 5th day of August, 2020 in the presence of the appellant in person-linked via video conference and Ms. Dorothy Massawe, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL