IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 186 OF 2017

LEONARD JOSEPH @ NYANDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kitusi, J.)

dated the 18th day of May, 2017
in
HC Criminal Appeal No. 77 of 2017

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JUDGMENT OF THE COURT

19th February & 12th March, 2020

NDIKA, J.A.:

In the District Court of Temeke at Temeke, Leonard Joseph @ Nyanda, the appellant, was convicted of rape contrary to sections 130 (1), (2) (a) and 131 of the Penal Code, Cap. 16 RE 2002 ("the Code") and sentenced to thirty years' imprisonment. His first appeal to the High Court of Tanzania at Dar es Salaam brought him no solace even though the court quashed his conviction for rape for want of proof. As it turned out, the court went ahead and convicted him of attempted rape, an inchoate

offence under section 132 (1) (a) of the Code. The court, then, dismissed the appeal against sentence on the reason that the substituted conviction attracted the same tariff of imprisonment. Being aggrieved, the appellant has appealed to this Court against both conviction and sentence.

The prosecution had alleged before the trial court that the appellant had carnal knowledge of 'ASL', a woman aged seventy years, on 10th May, 2014 at Mwongozo Malimbika area within Temeke District in Dar es Salaam Region without her consent.

To prove its case, the prosecution presented four witnesses who included the prosecutrix (PW1). Their testimonies, woven together, present the following narrative: on 10th May, 2014 around midnight, PW1 heard a burglar breaking into her home where she was staying alone. She opened the door only to spot the appellant standing at the doorstep. Sensing imminent danger, she went past him in a flash running towards the direction of a nearby residence of Jumanne Sanya alias Baba Kalenge, the Ten Cell leader. She fell down on the way near a cashew nut tree whereupon the appellant accosted her and placed himself on top of her. He ultimately inserted his male member into her vagina while she was screaming frantically for help.

In response to PW1's screams for help, two people rushed to the scene of the crime, which lay within the Ten Cell leader's farm. These were Yakobo Isaka (PW2) and the Ten Cell leader's son called Ismail Jumanne (PW3). Both of them adduced that they found the appellant naked on top of PW1 raping her and that he attempted to flee but he was eventually apprehended and handed over to the police at Mjimwema. The prosecutrix was subsequently taken to Temeke Hospital for medical examination after she was issued with a request for medical examination (PF.3) by the police. She tendered that PF.3 in evidence and it was admitted as Exhibit P.1.

According to Emmanuel Shija (PW4), an Assistant Medical Officer that attended PW1, initial medical examination on PW1 revealed that she had no bruises or any sign of friction in her genitalia. However, further investigation established that there was hyperemia in the vagina. Hyperemia is a condition resulting from an increased flow of blood due to infection or friction. As there was no vaginal discharge, PW4 ruled out infection as the cause and went ahead to suggest that hyperemia must have arisen from friction in the vagina caused by a blunt object. On that

basis, he concluded that a blunt object must have penetrated PW1's vagina.

In his defence, the appellant denied breaking into PW1's home and raping her. Citing the absence of bruises or sperms in the victim's vagina as adduced by PW4, he claimed that there was actually no proof that the victim was ravished.

As hinted earlier, the trial court found the appellant guilty beyond all reasonable doubt of the offence of rape. That finding was anchored, first, on the oral testimonies of PW1 and PW4 supplemented by the PF.3 that the victim was raped. Secondly, the court accepted the evidence of PW1 as supported by PW2 and PW3 that the appellant was apprehended in the midst of ravishment.

On the first appeal by the appellant which hung on six grounds, the High Court, at first, sustained the complaint that the prosecutrix's evidence was wrongly taken at the trial without any oath or affirmation. That irregularity was an incurable contravention of the mandatory provisions of section 198 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 ("the CPA") as expounded by the Court in **Mwami Ngura v.**

Republic, Criminal Appeal No. 63 of 2014; and **Amos Seleman v. Republic**, Criminal Appeal No. 267 of 2015 (both unreported). Accordingly, the High Court expunged the victim's whole testimony from the record. In addition, the Court expunged the PF.3 (Exhibit P.1) from the record on the reason that it was irregularly and unfairly admitted in evidence without inviting the appellant to comment on its admissibility.

Perhaps we should interpose here and observe that since the PF.3 was tendered in evidence by PW1 whose testimony the High Court had already expunged on account of the contravention of section 198 (1) of the CPA, the failure by the trial court to invite the appellant to comment on its admissibility was noticeably inconsequential.

In the absence of the victim's testimony, the learned High Court Judge was of the view that penetration, an essential ingredient of rape, was not proven but that the inchoate offence of attempted rape was established. We find it imperative to extract the relevant part of the judgment thus:

> *"I have found no reason to doubt the veracity of PW2 and PW3 and the appellant said nothing suggesting that they had anything against him. I*

therefore agree with the trial court's finding that PW2 and PW3 caught the appellant on top of PW1 who had been screaming for help. I agree that they caught the two without clothes suggesting that they were having sex. Considering the evidence of screams by PW1, it is my conclusion that whatever was happening, was so happening without the consent of PW1."

The learned High Court Judge went on thus:

"The question is whether there is proof of penetration so as to conclude that rape was committed. Certainly, PW2 and PW3 cannot be witnesses of the fact that there was penetration and they did not allude to that fact. It is my finding therefore that penetration was not proved and thus rape was not proved because under section 130 (4) (a) of the Penal Code penetration is an important ingredient."

As hinted earlier, the learned High Court Judge was, nonetheless, satisfied that the evidence on the trial record sufficiently proved attempted rape as an inchoate offence under section 132 (1) (a) of the Code. Consequently, he quashed the conviction for rape and substituted for it the conviction for attempted rape. He then dismissed the appeal

against sentence on the reason that the substituted conviction attracted the same penalty imposed by the trial court.

Still aggrieved, the appellant has appealed to this Court on seven grounds which raise the following issues: **one**, that the conviction was substituted for attempted rape without the victim's age being mentioned on the charge sheet. **Two**, that section 198 of the CPA was violated in recording PW1's testimony. **Three**, that the prosecution evidence was contradictory and unreliable as regards who exactly reported the incident to the Ten Cell leader. **Four**, that the conviction was unsustainable for lacking material evidence of the Ten Cell leader. **Five**, that the investigator was not called as a witness to establish if the appellant was apprehended in connection with alleged rape. **Six**, that PW2 and PW3's evidence that they found the appellant in the course of raping the victim was weak and unreliable. And **finally**, that the trial court wrongly allowed PW4 to give evidence while he had not listed at the preliminary hearing as one of the earmarked witnesses.

At the hearing of the appeal, the appellant was self-represented whereas Mr. Yussuf Aboud and Ms. Monica Ndakidemi, learned State Attorneys, teamed up to represent the respondent. In his oral argument,

the appellant adopted the contents of his Memorandum of Appeal and urged us to allow his appeal. He had nothing useful to add. On the adversary side, Mr. Abood addressed the grounds of appeal having stated categorically that he was supporting the appellant's conviction and the corresponding sentence.

We wish to begin our determination of the appeal by addressing the complaint in the second ground of appeal that PW1's testimony was relied upon by the High Court even though it was recorded in contravention of section 198 of the CPA. As rightly submitted by Mr. Aboud, this complaint is plainly inconsequential, if not frivolous. As we indicated earlier, the learned High Court Judge did not act on PW1's evidence as he expunged it having held it worthless for having been recorded without oath or affirmation in contravention of the mandatory provisions of section 198 of the CPA. The ground under consideration is evidently misconceived. We dismiss it.

We now turn to the fourth and fifth grounds of appeal, whose common thrust is the complaint that two persons – the Ten Cell leader and the investigator – were not called to adduce evidence as prosecution witnesses. The appellant insisted that the said persons ought to have

been produced and that adverse inference be drawn against the prosecution case for failure to lineup the two persons as witnesses. On the other hand, Mr. Aboud disagreed as he contended that the prosecution had discretion to determine the witnesses it needed to produce at the trial to prove its case and that there was no need to produce the two persons because they were not material witnesses.

With respect, we hasten to say that we wholly agree with Mr. Aboud's submission. Since it was not suggested at the trial that the two persons were at the crime scene at the material time, we do not see them as material witnesses. They had no direct evidence of their own on the case apart from whatever facts they might have gathered from their conversation with or interrogation of the eyewitnesses (PW1, PW2 and PW3). In that sense, their evidence was not relevant to establish what exactly happened on PW1 at the crime scene. Accordingly, we hold the complaints in the fourth and fifth grounds unmerited.

Next, we deal with the third and sixth grounds of appeal conjointly. What the appellant posits here is, in essence, that the testimonies of PW2 and PW3 are contradictory, weak and unreliable. Mr. Aboud, on the other hand, refuted this complaint. Referring to the two witnesses' testimonies

appearing at pages 6 and 7 of the record of appeal, he submitted that the said evidence was clear, consistent, credible and reliable. We agree.

Beginning with PW2's evidence, it is noteworthy that he stated clearly that after hearing PW1's frantic screams for help he rushed to the Ten Cell leader's home and drew his attention to the distress call. The Ten Cell leader, then, instructed his son (PW3) to accompany PW2 to the crime scene. The twosome hurried to the scene and found the appellant naked on top of the victim, also in nudity, in the midst of committing a bestial act on her. On the whole, the PW3's testimony dovetails with that of the PW2. We discern no contradiction in their narratives.

It is significant to note that the trial court gave full credence to the testimonies of PW2 and PW3. It found those accounts credible and reliable. It is settled jurisprudence that when the credibility of a witness is a primary consideration, as in this case, appellate courts will generally not disturb the findings of the trial court, considering that the latter was in the best position to decide the issue as it heard the witnesses themselves and observed their deportment and manner of testifying at the trial. In the premises, such trial court's conclusions are, in the normal course of things, accorded respect, if not conclusive effect. Furthermore, when such

findings and conclusions by the trial court have been affirmed by the first appellate court, as in the present case, they become binding on this Court as a second appellate court except where there are misdirections or non-directions – see, for example, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In the instant case, we do not find any misdirection or non-direction to justify any interference with the findings and conclusions based on the testimonies of PW1 and PW2. In the result, we hold that the third and sixth grounds of appeal have no merit.

We now move to the seventh ground of appeal. Here the appellant faults the trial court for allowing PW4, the medical witness who examined the victim, to give evidence while he had not been listed at the preliminary hearing as one of the earmarked witnesses. On that reason, he urged us to expunge PW4's evidence. Conversely, the learned State Attorney contended that section 192 of the CPA under which a preliminary hearing is conducted does not require the prosecution to list its intended witnesses nor does limit the prosecution's discretion to produce witnesses at the trial to support its case on matters in dispute.

While conceding that PW4 was not listed at the preliminary hearing as one of the intended prosecution witnesses, he submitted that the prosecution was not precluded from calling him as a witness.

At the start, we acknowledge that holding a preliminary hearing after the accused has pleaded not guilty is a mandatory requirement under section 192 (1) of the CPA and rule 2 of the Accelerated Trial and Disposal of Cases Rules, 1988, G.N. No. 192 of 1988 ("the Accelerated Trial Rules") – see, for instance, **MT. 7479 Sgt. Benjamin Holela v. Republic** [1992] TLR 121; **Efraim Lutambi v. Republic** [2000] TLR 265; and **Joseph Munene & Ally Hassani v. Republic** [2005] TLR 141. The procedure is aimed at considering and determining such matters as are not in dispute between the parties so as promote a fair and expeditious trial and reduce the costs of the trial. It is noteworthy that this procedure is finalized in terms of subsection (4) of section 192 of the CPA once the court has prepared a memorandum of the matters not in dispute that has been read over and explained to the accused in a language that he understands, signed by the accused and his advocate, if any, and by the public prosecutor, and then filed.

While section 192 (5) of the CPA permits the accused person to be tried immediately after the preliminary hearing, it also contemplates the possibility of the case being adjourned due to the absence of witnesses or any other cause. Wherever it is necessary to summon witnesses if the ıring is adjourned, the court will give notice pursuant to rule 7 of the :elerated Trial Rules. That rule stipulates thus:

> *"**The court may give notice to any person who is likely to be called as a witness after a preliminary hearing**, that he may be required to give evidence before the court on a date to be specified in the notice and such notice shall be deemed to be summonses duly issued and served upon him to appear and give evidence as required in the trial."*[Emphasis added]

We have emboldened the above text to accentuate our view that the trial subordinate court is enjoined to give notice to any person who is likely to be called as a witness after the preliminary hearing is concluded. The court's discretion here seems unrestricted. Certainly, we are aware of the common practice by the presiding magistrate putting on record, after the memorandum of matters not in dispute is signed, names of all persons enumerated by the prosecutor as witnesses intended to be

produced at the trial by the prosecution. In our view, this practice, which we commend, is only meant to facilitate effective management of the case and issuance of summonses to intended witnesses in order to expedite trials. It does not preclude the prosecution's right to call a witness who was not named at the preliminary hearing. It seems to us that the appellant's complaint here is born out of a misconception of this practice. He might have as well confused this practice with the prohibition under section 289 of the CPA against the production before the High Court of a witness whose statement or substance of evidence was not read out at committal proceedings. The seventh ground of appeal, therefore, lacks merit.

Finally, we deal with the first ground of appeal, its gravamen being the contention that the appellant's conviction was erroneously substituted for attempted rape without the victim's age being mentioned on the charge sheet. In his brief submission on the issue, Mr. Aboud support the learned High Court Judge's approach. He contended that the victim's age was irrelevant, the key ingredient of the charged offence being unconsented sexual intercourse. As regards the substituted conviction, he said it was soundly based upon the evidence of PW2 and PW3 which both

courts below found credible and reliable. He added that as the learned Judge found penetration unproven, he rightly substituted conviction for attempted rape pursuant to section 301 of the CPA.

Certainly, the original charge of rape against the appellant having been laid under section 130 (1) and (2) (a) of the Code, the victim's age was irrelevant but that the prosecution had to prove that the appellant had unconsented sexual intercourse with the victim. As stated earlier, both courts below found, acting on the evidence of PW2 and PW3, that the appellant was caught on top of PW1 who had been screaming for help and that whatever happened between him and the victim was not consensual but a bestial sexual act.

At this point we ask ourselves whether the learned High Court Judge was right in quashing the conviction for rape for want of proof of penetration and substituting for it attempted rape.

There is no doubt that the learned Judge was conscious that the best proof of penetration ought to have come from the victim herself but that her testimony along with the PF.3 had been expunged due to the procedural infraction alluded to earlier. He then correctly held that PW2

and PW3 could not be witnesses of the fact that there was penetration as they could not allude to that fact. Nonetheless, we are decidedly of the view that the learned Judge slipped into error for not considering the testimony of the medical witness (PW4) because it sufficiently established penetration. In spite of the fact that the PF.3 that he had filled out after examining PW1 was discounted, PW4 adduced that the victim had hyperemia arising from friction in the vagina caused by a blunt object. He impeccably concluded that the victim must have had her vagina penetrated by a blunt object. We think that this finding is clear, unblemished and consistent. It corroborates PW2 and PW3's evidence that they found the appellant in the midst of ravishing the victim who was nude and screaming frantically for help all along.

Perhaps, we should add that the appellant's defence of general denial was duly considered but it did not impress the two courts below. We are not surprised; for, general denial is inherently a weak defenc it is negative and self-serving.

We think that had the learned Judge taken account of PW4's evidence, he would have arrived at a different conclusion. Accordingly, we find no merit in the first ground of appeal. All the same, we quash the

substituted conviction for attempted rape and restore the trial court's conviction of the appellant for rape. Needless to say, the thirty years' imprisonment sentence imposed by the trial court on the appellant and affirmed by the High Court remains undisturbed.

In the upshot, the appeal lacks merit. We dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 9th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of March, 2020 in the presence of the appellant in person and Mr. Benson Mwaitenda, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL