IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., NDIKA, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 49 OF 2017

NELSON S/O ONYANGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 25th day of November, 2016
in
HC Criminal Appeal No. 94 of 2016

.....

JUDGMENT OF THE COURT

25th & 27th March, 2020

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania at Mwanza (Ebrahim, J.) in HC Criminal Appeal No. 94 of 2016 affirming the decision of the Resident Magistrate's Court of Mara at Musoma convicting Nelson s/o Onyango, the appellant, of rape. The said affirmation brought the appellant more grief as the High Court then enhanced the sentence of thirty years' imprisonment initially imposed on

him by the trial court to the statutory life imprisonment. Being aggrieved, the appellant has lodged this second and final appeal.

The prosecution produced four witnesses to prove what was alleged in the charge sheet, that on 12th February, 2015 at Taharani Village within Butiama District in Mara Region, the appellant had carnal knowledge of one, "LD", a girl aged seven years. We shall refer to her as LD or simply as PW2 so as to disguise her identity.

The prosecution case, on the whole, presents the following narrative: LD, a pupil in Class Two at Taharani Primary School, used to attend private additional tuition at Tumaini Church in the village after official school hours up to the evening. The appellant was her tutor there. In her unsworn evidence, she recounted that on 12th February, 2015 at 16:00 hours she was at the church for tuition as usual. At the end of the day's programme, the appellant let all the pupils except her leave for their homes. Without suspecting what was on the cards, LD found herself alone with the appellant in the church. Soon thereafter, the appellant closed the door to the church. He then unzipped his trousers as he was sitting on a chair, removed LD's underwear and made her sit on his lap. Finally, he inserted his male member into her vagina and

raped her until he ejaculated. After he was through, he opened the door and let her go home.

When LD reached home around 18:45 hours, she rather disturbingly narrated to her father (PW1) what had befallen her in the hands of the appellant. PW1 could not help but examined her daughter's genitalia and observed what looked like seminal fluid in her private parts. Afterwards, he took her daughter to Buhemba Police Post where the incident was reported and a PF.3 issued. He ensured that LD took no shower until the following morning when he took her to the Musoma Government Hospital for examination.

PW3 Dr. Regina Bernard Msonge, a Medical Assistant who examined LD at the hospital in the following morning, found her still bleeding in her genitalia. She also had bruises on her vagina and its opening was unusually wide. According to her, the said findings were consistent with LD having been raped. The PF.3 was admitted as Exhibit P.1, without any objection.

A police officer, No. G.4494 DC Ally (PW4), told that the trial court that on 13th February, 2013 he recorded a cautioned statement given by

the appellant by which he unreservedly confessed to the offence. Despite the appellant's protest that the said statement was irregularly obtained, the trial court brushed aside the complaint without inquiring into the statement's admissibility and admitted it as Exhibit P.2.

In his sworn testimony, the appellant denied liability. He adduced that in the fateful evening he visited the central shopping area of the village for some shopping. When he arrived back home a little later, he was surprised to be apprehended by two militiamen who, then took him to Buhemba Police Post for interrogation. Most tellingly, however, he admitted having performed his teaching duties at the church earlier in the fateful afternoon and that LD was one of the pupils that attended his class.

The trial court found LD's evidence credible and consistent and that it was sufficiently corroborated by the medical evidence (as adduced by PW3 and unveiled by Exhibit P.1) and the appellant's own confessional statement contained in Exhibit P.2. On that basis, the learned presiding Resident Magistrate convicted the appellant of the offence and sentenced him to thirty years' imprisonment. In addition, he ordered the appellant to pay TZS. 2,000,000.00 to the prosecutrix as compensation.

On the first appeal, the learned High Court Judge dutifully subjected the entire evidence on record to scrutiny and sustained most of the trial court's findings. Although she expunged the cautioned statement from the record after she had upheld the complaint that the said statement was irregularly procured and that it was admitted without any inquiry having been conducted into its admissibility, she sustained the appellant's conviction on the basis of the rest of the evidence, which was largely constituted by the testimonial accounts of the victim, her father and PW3 as supported by Exhibit P.1. As hinted earlier, the learned Judge enhanced the sentence to life imprisonment, which is the mandatory penalty for statutory rape in terms of section 131 (3) of the Penal Code, Cap. 16 RE 2002 ("the Code").

Still discontented, the appellant has appealed to this Court on three grounds: **one**, that his conviction was based on the weakness of his defence rather than the strength of the prosecution case. **Two**, that the victim's evidence was uncorroborated by other evidence. And **finally**, that the conviction was anchored on a case that was not proven beyond peradventure.

At the hearing of the appeal, the appellant, who was self-represented, adopted his grounds of appeal and urged us to allow the appeal. He then opted to hear the respondent's submissions but reserved his right to rejoin, if need be.

On the part of the respondent Republic, Mr. Juma Sarige, learned Senior State Attorney, who was assisted by Ms. Ghati William, learned State Attorney, made it known at the outset that he was supporting the appellant's conviction and sentence meted out to him.

In his oral argument, Mr. Sarige canvassed the three grounds of appeal conjointly contending that their thrust was the sole question whether the prosecution case was proven to the required threshold of proof. Briefly, he posited that in proving the charged offence, the prosecution had to establish that the appellant had carnal knowledge of LD and that the said victim was under the age of ten years at the time of the incident. It was his submission that the victim told the trial court that she was seven years old and then testified in graphic detail how the appellant raped her in the church in the fateful afternoon. He added that LD's unsworn evidence was materially corroborated by PW1's account and the medical evidence given by PW3 and shown by the PF.3 (Exhibit

P.1). To the credit of PW2 and PW3, he said, their testimonies were unchallenged as the appellant passed up the opportunity to cross-examine them. Relying on the case of **Ismail Ally v. Republic**, Criminal Appeal No. 212 of 2016 (unreported), he submitted that the appellant's failure to cross-examine the two witnesses implied an acceptance of the truthfulness of their respective evidence. Concluding, the learned Senior State Attorney supported the concurrent findings of the courts below that the charged offence was sufficiently proven.

Rejoining, the appellant, rather belatedly and unexpectedly, raised an additional ground of appeal in that he was not provided with the services of an interpreter at the trial and on that reason he was unable to understand and follow the trial proceedings. In particular, he attributed his omission to cross-examine PW2 and PW3 to his lack of proficiency in Swahili. He thus chose to keep quiet. When queried by the Court if he ever raised any such complaint at the trial or to the first appellate court, he candidly replied that he did not.

As regards the prosecution case, he sought to punch holes in the testimonies of PW3 and PW4 as the PF.3. He denied to have ever confessed to the charged offence and then contended that PW3's

evidence was mostly doubtful bearing in mind that she was the only witness who claimed to have found the victim bleeding.

We have examined the record of appeal and the grounds of appeal in the light of the arguments of the parties. We should hasten to say that we agree with the learned Senior State Attorney that this appeal turns on the issue whether the prosecution case was proven beyond reasonable doubt.

However, before we deal with the above question, we wish to remark that the appellant's belated grievance that he was denied the services of an interpreter at the trial is both an afterthought and inconsequential. We wonder how the trial court could have availed him such services if, by his own admission, he did not ask for such services in the first place. Besides, since it is evident from the record that he pleaded to the charge, cross-examined PW1 and then testified in his defence without any discernible diffculty, we think that the use of Swahili language was not a barrier to him in the proceedings and that the trial court was entitled to assume that he understood all the proceedings. This complaint falls by the wayside as it is unmerited.

Adverting to the issue whether the prosecution case was sufficiently established, we wish to state one of the key principles in reviewing cases involving the offence of rape is that in view of the essential nature of the crime of rape where only two persons are usually involved, the testimony of the prosecutrix is crucial and must be analyzed with extreme caution. Thus, the credibility of the victim is a single most crucial aspect. If the testimony of the victim is credible, convincing and consistent with human nature, and the normal course of things, the accused may be convicted solely on the basis thereof – see **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2019 [2019] TZCA 252 <www.tanzlii.org>.

We have carefully scrutinized LD's account and, like the courts below, have found it to be credible and reliable. As rightly argued by Mr. Sarige, her evidence was direct, explicit and consistent on how the depraved sexual act occurred. She was unambiguous that the appellant inserted his manhood into her vagina and ejaculated therein. To her credit, she raised the red flag against the appellant at the earliest opportunity by drawing her father's attention in the evening upon arrival back home around 18:45 hours. Her reporting led to the appellant being

arrested promptly that fateful evening. It is settled that in sexual offence cases, the best evidence is that of the victim who is found to be truthful by the courts – see **Selemani Makumba v. Republic** [2006] TLR 379 and **Vincent Ingi v. Republic**, Criminal Appeal No. 527 of 2015 (unreported). Besides, as rightly submitted by Mr. Sarige the fact that the appellant failed to cross-examine the victim on anything lends further credence to the veracity and cogency of her evidence. In this regard, we would recall what we held in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported) that:

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

As the appellant did not contradict the complainant either on her age or the sexual act allegedly committed on her, we would infer that he accepted the narrative that he carnally knew her and that the said victim was of the age of seven years at the material time.

The above apart, we are satisfied that the victim's account was sufficiently corroborated. In the first place, PW1 confirmed that his

daughter drew his attention to the ravishment promptly upon arrival at home in the fateful evening. He then took pains to examine his daughter's private parts which revealed what seemed like seminal fluid consistent with her having been raped a short period earlier. Both courts below found this evidence spontaneous, consistent and believable. We have no reason to interfere with this finding. Secondly, the medical findings as adduced by PW3 and exhibited by the PF.3 were consistent with the victim having been sexually molested. This finding too is tenable and sound.

We recall that the appellant complained that he was convicted upon the weakness of his defence as opposed to the strength of the prosecution case. In view of the prosecution case as we have analysed it above, this criticism is evidently built on quicksand. Furthermore, the appellant's defence, constituted by a general denial of liability interposed with what seemed like an alibi, was duly considered by the trial and first appellate courts but it was rejected. We are not surprised that it was rejected; for, general denial is intrinsically weak and self-serving. The High Court, therefore, rightly upheld the conviction against the appellant. As regards the sentence, we sustain the enhanced sentence of life

imprisonment imposed by the High Court as it is in consonance with the dictates of section 131 (3) of the Code.

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

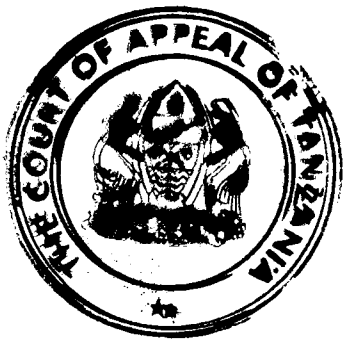
DATED at **MWANZA** this 26th day of March, 2020.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 27th day of March, 2020 in the presence of the appellant in person and Ms. Lilian Meli, learned State Attorney for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL