IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 259 OF 2017

EMMANUEL S/O PHABIAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mujulizi, J.)

dated 31st day of March, 2009
in
DC. Criminal Appeal No. 72 of 2008

JUDGMENT OF THE COURT

19th & 27th April, 2021

MWARIJA, J.A.:

In the District Court of Kahama at Kahama, the appellant, Emmanuel Phabian was charged with the offence of rape. It was alleged that on 1/1/2005 at about 04.00 hrs at Mwendakulima Village within Kahama District in Shinyanga Region, he did have carnal knowledge of a woman whom for the purpose of hiding her identity, we shall hereinafter to be referred by her initials "CM" or simply "the victim". The charge was preferred under ss. 130 (2) and 131 of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019) (the Penal Code). Having heard the evidence of four

witnesses for the prosecution and the appellant's defence, the trial court found the appellant guilty and thus convicted and sentenced him to thirty (30) years imprisonment. Aggrieved by the decision of the trial court, he unsuccessfully appealed to the High Court hence this second appeal.

The facts leading to the arraignment of the appellant and his subsequent conviction may be stated briefly as follows: On 1/1/2005 during the night at about 04:00 hrs while the victim was asleep in her bedroom, she heard someone knocking at the door of her house asking her to open it. The victim, who testified as PW1, went to the door but did not open it because the would be visitor, who identified himself as Juma Ngozi, was not known to her. Suddenly however, that person pushed the door open and entered into the sitting room.

In her testimony, PW1 narrated what took place after the culprit had entered into the sitting room. She said that he demanded to be given money but she told him that she had none and offered to give him her bag of clothes, which offer was refused by the culprit contending that he would not bother himself going to sell the clothes.

It was PW1's further evidence that the culprit, whom she identified to be the appellant, known to her by the name of Vumi Phabian, caught her by

the neck and strangled her with a view of preventing her from shouting. She went on to state that, the appellant dragged her to the bedroom, laid her on the bed and forcefully had carnal knowledge of her. She testified further that, thereafter, the appellant wanted to rape her for the second time telling her that he was not sexually satisfied allegedly because of her old age menopausal status. According to her evidence, following that demand by the appellant, she lured him to wait pretending that she was going to fetch a lubricant so as to apply it to her vagina. Using that opportunity, she left the appellant in bed and went out of the house. She then locked the door from outside and then seizing that opportunity, she ran to inform her sons who resided in the neighbouring house. Following the information, her sons informed the neighbours who rushed to the scene and raised an alarm which was responded to by villagers who shortly thereafter, gathered at the scene. She went on to state that the appellant was then arrested and when he was taken out of the house she noticed that he had put on the trousers belonging to one of her sons.

Shilole Misambo (PW3) was one of the persons who were informed of the incident in the material night. In his evidence, he stated that after he had received information that PW1 had been invaded by the appellant, he went to the scene where he found that the door of her house had been

locked from outside. He said further that he witnessed the arrival of members of the people's militia (Sungusungu) who entered into PW1's house and arrested the appellant.

PW4 Kuli Masanja was also one of the persons who were informed of the incident. His evidence was to the effect that he immediately went to the scene where he found PW1 and her sons outside the house. His description of what he saw at the scene was as stated by PW3, that the door of the house was locked from outside and the appellant was inside the house. He added that he went to inform the Sungungu Commander (PW2) about the incident and the said person arrived and arrested the appellant.

PW2 Bundala Majaliwa, the Village's Sungusungu Commander testified that he was the one who arrested the appellant. He said that after having been informed of the incident on the material night, he went to the scene and found the appellant in PW1's house. Like the other witnesses, he said that he found the door of the house having been locked from outside. According to his evidence, when he asked the appellant the reason for being inside PW1's house, the former replied that he acted so under the influence of alcohol. It was PW2's evidence further that the appellant came out of the house after having been assured of his safety as he had earlier on resisted to get out fearing mob justice.

In his evidence, the appellant, who was the only witness for the defence, testified that he was arrested by Sungusungu at midnight, about 00:00 hrs at Mwendakulima Village Centre. He added that at the material time of his arrest, he was drunk. According to his testimony, he was beaten by the Sungusungu who arrested him to the extent of losing consciousness. When he became conscious, he said, he noticed that he was at the police station where he was later told that he raped PW1, the allegation which he denied.

In his judgment, the learned trial Resident Magistrate found that the prosecution had proved the case against the appellant beyond reasonable doubt. He found that the evidence of PW1 was credible thus proving that the appellant raped her. As to the appellant's defence, the learned trial Resident Magistrate was of the view that the same did not raise any reasonable doubt. He found that the evidence of PW1, that he was raped by the appellant was supported by that of PW2, PW3 and PW4 which was to the effect that the appellant was found in the victim's house.

The High Court (Mujulizi, J.) upheld the finding of the trial court. The learned first appellate Judge agreed with the trial magistrate that PW1 was a credible witness and thus relying on *inter alia*, the case of **Selemani Makumba v. Republic** [2006] T.L.R 379 which laid down the principle

that in sexual offences, the best evidence should come from the victim, he was of the view that her evidence was sufficient and did not, in that regard, require corroboration. The learned Judge found further that, even if PW1's evidence would have required corroboration, the evidence of PW2, PW3 and PW4 which was not disputed by the appellant, provided such corroboration.

As stated above, the appellant was further dissatisfied with the decision of the High Court and thus preferred this second appeal. His appeal is predicated on four grounds which may be consolidated into two grounds as paraphrased below:

1. *That the learned first appellate Judge erred in law in upholding the conviction of the appellant which was based on a defective charge.*
2. *That the learned first appellate Judge erred in upholding the appellant's conviction while the prosecution evidence acted upon by the trial court did not prove the charge beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney. When he was called upon to argue his

grounds of appeal, the appellant opted to let the learned Senior State Attorney submit first in reply to the grounds of appeal.

Submitting in respect of the first paraphrased ground of appeal, Mr. Kajiru admitted that the charge was defective because the prosecution did not cite paragraph (a) of s. 130 (2) of the Penal Code which provides for one of the categories of rape, that is, having sexual intercourse with a woman who is not ones wife or who has separated from him without her consent. The learned Senior State Attorney argued however, that the omission did not prejudice the appellant because, from the particulars of the charge and the evidence tendered, the appellant understood the nature of the offence which faced him, that he had carnal knowledge of the victim without her consent. He referred us to page 12 of the record of appeal where PW1 stated that the appellant did have carnal knowledge of her by force. To bolster his argument, Mr. Kajiru cited the case of **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016 (unreported).

Mr. Kajiru went on to argue that the omission did not render the charge fatally defective or having contravened the provision of s. 135 (a) (i), (ii) and (iii) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA) which provides for the manner in which a charge should be framed. This, he said, is because, despite non citation of paragraph (a) of

s. 130 (2) of the Penal Code the appellant understood the nature of the offence and was therefore, able to make an informed defence. The learned Senior State Attorney also disputed the appellant's complaint that the judgment of the trial court contravened s. 312 (2) of the CPA.

On the second ground of the paraphrased grounds of appeal, Mr. Kajiru started by refuting the appellant's contention that the case was not proved beyond reasonable doubt on account of, first, the prosecution's failure to call PW1's son to substantiate the evidence given by PW1 that at the time of his arrest, the appellant had put on the trousers belonging to her son and secondly, the failure by the prosecution to tender in court the said trousers. He argued that the complaint raises issues which were not dealt with in the High Court. He submitted therefore, that these issues cannot be entertained at this stage of the proceedings. He cited the case of **Festo Domician** (supra) to bolster his argument.

On the contention that the evidence tendered by the prosecution was insufficient to prove the case beyond reasonable doubt, the learned Senior State Attorney submitted that the evidence was cogent and that the same proved the charge to the required standard. Relying on the case of **Selemani Makumba** (supra) which was acted upon by the High Court, Mr. Kajiru argued that the evidence of PW1 was sufficient to found the

appellant's conviction. Citing also the case of **Emmanuel Saguda @ Sulukuka and Another v. Republic**, Criminal Appeal No. 422 'B' of 2013 (unreported), the learned Senior State Attorney added that, since from the record, the appellant did not cross-examine PW1, he did in effect accept her evidence.

On his part the appellant did not have any submission to make on rejoinder. He merely prayed to the Court to allow his appeal.

We have duly considered the grounds of appeal raised by the appellant and the submission made by the learned Senior State Attorney. To begin with the first ground of appeal, we agree with Mr. Kajiru that the omission by the prosecution to cite paragraph (a) of s. 130 (2) of the Penal Code did not prejudice the appellant. The reason, as argued by Mr. Kajiru is that, despite the omission, from the particulars of the offence and the evidence, the appellant was made aware of the nature of rape with which he was charged. The particulars showed that the rape was committed against a woman who was at the material time aged 56 years. Furthermore, in her evidence at page 12 of the record, PW1 stated as follows on what the appellant did to her:

"He put me on the bed, while [strangling] my throat so that I could not raise an alarm. He inserted his penis and had intercourse with me by force."

[Emphasis added]

From the above, there is no gainsaying that the appellant understood that the accusation against him was that of having carnal knowledge of a woman without her consent and therefore, was not prejudiced by the omission. We are supported in that view by the case of **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). In that case in which the appellant was charged with rape of a child aged 12 years, the prosecution cited in the charge s. 130 and 131 (1) (e) instead of s. 130(2) (e) of the Penal Code. Having considered the effect of the omission, the Court had this to say:

"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices."

Concerning the complaint that the judgment of the trial court did not comply with the provisions of s. 312 (2) of the CPA, which requires the trial court to specify the offence of which and section of the Penal Code or other

law under which the accused person is convicted, we also agree with Mr. Kajiru that the complaint is devoid of merit. In his judgment, the learned trial Resident Magistrate convicted the appellant as charged meaning that he was convicted of the offence of rape under ss. 130 (2) and 131 of the Penal Code which the trial magistrate specified at the beginning of the judgment. Thus the fact that the offence and the sections of the law were not restated did not amount to non-compliance with s. 312 (2) of the CPA. - See for instance, the case of **Hassani Saidi Twalib v. Republic,** Criminal Appeal No. 95 of 2019 (unreported). As found above, although there was omission to cite paragraph (a) of s. 130 (2) of the Penal Code, that did not vitiate the conviction. For these reasons we do not find merit in the first paraphrased ground of appeal.

With regard to the ground that the High Court erred in upholding the appellant's conviction while the prosecution did not prove the case beyond reasonable doubt, we wish to start with the appellant's complaint regarding the evidence that at the time of his arrest at PW1's house, he was found having put on the trousers of PW1's son. His complaint was that although PW1 contended so, neither the owner of the trousers was called to testify nor was the trousers tendered in evidence. Having gone through the record, we agree with Mr. Kajiru that the appellant has raised this matter

for the first time in this Court. In the case of **Hassan Bundala Swaga v. Republic,** Criminal Appeal No. 385 of 2015 (unreported), the Court stated as follows on the effect of raising issues which did not come up in the lower courts:

> *"It is now settled that as matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

Given that trite position, we decline to consider that ground of the complaint.

Turning to the ground that the rest of the evidence was insufficient to prove the charge, we hasten to state that this ground is devoid of merit. There is glaring evidence that the appellant was arrested in PW1's house. According to PW1, that was after she had lured him and got out of the house whereupon she locked the door from outside. The appellant was found in PW1's house by PW2, PW3 and PW4. In her evidence, PW1 explained the circumstances under which the appellant raped her. Her evidence was not challenged by the appellant during cross-examination. The effect, as submitted by Mr. Kajiru, is that the appellant accepted that evidence. In the case of **Emmanuel Saguda @ Sulukuka** (supra) cited by

the learned Senior State Attorney, the Court stated as follows on that principle.

> *"**In Browne v. Dunn** [1893] 6R. 67, H.L, it was held that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of the intention to impeach the relevant testimony – See also **Rex v. Hart** [1932] 23 Cr. App. R. 202. In **Hussen Bakari Kadogoo v. Republic,** Criminal Appeal No. 54 of 2006 CAT (unreported), a duty to cross-examine was underscored."*

The two courts below found the witnesses, including PW1, to be credible. On our part, we could not find any sound reasons to fault that concurrent finding. In the circumstances, having found that PW1 was a credible witness, we agree with Mr. Kajiru that, going by what was stated in the case of **Selemani Makumba** (supra), her evidence was sufficient to found the appellant's conviction, such evidence by a victim being the best evidence in proving a sexual offence.

On the basis of the foregoing reasons, the second ground of the paraphrased grounds of appeal also fails. As a result, we find that the appeal is lacking in merit. In the event, it is hereby dismissed in its entirety.

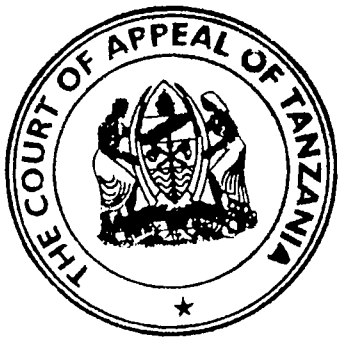
DATED at **TABORA** this 26th day of April, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 27th day of April, 2021 in the presence of the Appellant appeared in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL