IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 412 OF 2017

MAKENDE SIMON ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matupa, J.)

dated the 17th day of June, 2017
in
Criminal Appeal No. 336 of 2016

.....

JUDGMENT OF THE COURT

21st April & 3rd May, 2021

MKUYE, J.A.:

The appellant, Makende Simon was charged with an offence of rape contrary to sections 130 (1), (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 [Now R.E. 2019]. It was alleged that the appellant, on 8th day of January, 2016 at Busekela village within Musoma District in Mara Region, had carnal knowledge of one MS (name withheld to hide her identity) a girl aged 17 years. Upon a full trial, the appellant was found guilty, convicted

and sentenced to thirty years imprisonment and to a corporal punishment of twenty-four (24) strokes of the cane. In addition, the appellant was ordered to compensate the victim an amount to the tune of Tshs. 500,000/=.

It is noteworthy at the very outset that the record of appeal has been unintelligibly prepared and thus posing a great challenge in reading and appreciating its content. That notwithstanding, the background of this case as it can be gleaned from the said record of appeal is that; the appellant and MS (the victim) were related as the latter was a daughter of the appellant's brother. On the material day, the appellant and the victim were asleep in the same house. Later in the night, the appellant knocked at the victims' room and requested her to bring him drinking water. The victim obliged and went to serve the appellant the requested water in his room. However, unbeknownst to the victim, the appellant closed the door and dragged her to his bed while threatening to kill her if she would raise alarm.

The victim was left with no option. Then the appellant undressed her and he too undressed and proceeded to ravish her. The victim who

testified as PW2 said, after the ordeal was over, she on the very same night locked the outer door of the house from outside, went to her other paternal uncle's house and narrated to him the whole incident. They together went back to the scene of crime but found the appellant had already escaped through the window.

The victims' father was informed and he arrived on the following morning. He took the victim to the Village Chairman and later to the Village Executive Officer (VEO). Ultimately, the matter was reported to the police where the victim was issued with a PF3 for medical examination. She was taken at Bukima Dispensary where Julius Makuge (PW3) examined her and found out that she was raped.

The appellant was arrested on 8th April, 2016 and arraigned before the District Court of Musoma at Musoma where he was convicted and sentenced as alluded to earlier on.

Aggrieved, he appealed to the High Court vide Criminal Appeal No. 336 of 2016 but his appeal was dismissed. Still undaunted, he has

appealed to this Court on six (6) grounds of appeal which can be conveniently paraphrazed as hereunder:

1) The charge was not proved beyond reasonable doubt.

2) The identification or recognition was made under unfavourable condition which led to inaccurate identity of the appellant, or rather it was based on presumption which in law is unreliable.

3) That, no arresting personnel came to court to testify as to why he was arrested.

4) There was no sufficient evidence connecting the appellant with the crime, in particular, Exh. P2 (the PF3) and that PW3, being a clinical officer, was not authorized to make such an examination according to the Dentist Act.

5) That the variance of names of the alleged rapist between "Makende Simon" and "Makende Siwema" as testified by PW2 was not resolved.

6) That the appellant was improperly detained at Bukima Police post and Musoma beyond the prescribed time by law and exhibit P1 was fictitious as it differed on the date when the appellant was apprehended.

At the hearing of the appeal, the appellant appeared in person, unrepresented and the respondent/Republic was represented by Ms. Lilian Meli Erasto assisted by Mr. Frank Nchanila, both learned State Attorneys.

When called upon to expound his grounds of appeal, the appellant sought to adopt his grounds of appeal urging the Court to consider them with a view to setting him free. Nevertheless, he preferred to let the learned State Attorney to respond first while reserving his right to rejoin later, if need arises.

On her part, Ms. Erasto prefaced her submission by declaring her stance that she supported both the conviction and sentence. She started by pointing out that grounds 3, 4, 5 and 6 of the appeal are new as they were not canvassed by the first appellate court. However, she was quick to clarify that since ground Nos. 4 and 6 are on points of law, they can still be

argued. As to grounds 3 and 4, she asked the Court to refrain from entertaining them as was stated in the case of **Karim Seif Salim v. Republic**, Criminal Appeal No. 161 of 2017 (unreported) at pg 9-10 of the typed judgment.

Having submitted on the new grounds, she intimated to the Court that she will argue the remaining grounds starting with ground No. 2, followed by ground No 4, then ground No. 6 and lastly ground No. 1 of appeal.

Regarding ground No. 2 challenging the visual identification evidence, she argued that the conditions were favourable to enable proper recognition. She explained that the appellant was familiar to PW2 (the victim) as her paternal uncle's son; the appellant and the victim slept in the same house but in different rooms; the appellant went to the victim to ask for drinking water and she took the said water to his room; PW2 mentioned him to the other paternal uncle (Maira Burere) on the same night. In this regard, it was her argument that the appellant was properly recognized and that there was no possibility of mistaken recognition. She referred us to the case of **Juma John v. Republic,** Criminal Appeal No.

119 of 2009 (unreported) to show that PW2 knew the appellant even before the incident.

Turning to ground No. 4 of appeal concerning the qualification of the Doctor (PW3) (clinical officer) who conducted medical examination to PW2, the learned State Attorney prefaced by stating that the clinical officer is not defined under the Medical Practitioners and Dentists Act, Cap 152 R.E. 2002. However, since PW3 was awarded a diploma in clinical officer, she said, he was qualified under the law. To bolster her argument, she cited to us the case of **Charles Bode v. Republic,** Criminal Appeal No. 46 of 2016 [unreported] at pg 16 – 17 of the typed judgment.

As regards ground No. 6 of appeal concerning the irregular admission of the cautioned statement, Ms. Erasto readily conceded that its admission was irregular since it was not read over in court after it had been admitted in court. Though she agreed that it be expunged, she was quick to state that even after its expungement, still there is sufficient evidence to prove the offence of rape beyond reasonable doubt.

On the complaint that the case was not proved beyond reasonable doubt as raised in ground No. 1, Ms. Erasto argued that the same was proved beyond reasonable doubt. She clarified that in the charge of this nature it was required to prove penetration and that it was the appellant who did it. She went on to submit that in sexual offences, the best evidence comes from the victim as was stated in the case of **Selemani Makumba v. Republic** [2006] TLR 379, cited in the case of **Karim Seif @ Slim** (supra). In this case, she argued, penetration was proved by PW2 and was supported by the evidence of PW3. She added that the PF3 (Exh. P2) also confirmed that PW2 was raped.

Apart from that, Ms. Erasto submitted that this being a statutory rape, the age of the victim ought to be proved and that the same was proved through her evidence, PW3's (doctor) testimony and the PF3. To buttress her argument, she also referred us to the case of **Karim Seif @ Slim** (supra). In the end, she urged us to find that the case was proved beyond reasonable doubt and dismiss the appeal in its entirety.

In rejoinder, the appellant insisted to the Court his earlier prayer to consider his grounds of appeal together with those supported by the learned State Attorney and allow his appeal and set him free.

In the light of the memorandum of appeal and the submission by the learned State Attorney, we think, the main issue for our determination is whether the appeal by the appellant is merited. We wish to point out at the very beginning that we shall deal with the appeal in the arrangement that was adopted by the learned State Attorney in arguing it.

To begin with, we shall deal with the issue that grounds Nos. 3, 4, 5 and 6 are new grounds of appeal. Basically, we agree with the learned State Attorney that those grounds are new as they were not raised and determined by the 1st appellate court (the High Court). Times without number, this Court has refrained from dealing with such new grounds of appeal because it does not have the jurisdiction to entertain them on the second appeal. This stance has been taken in numerous decisions of this Court. Among those cases are, **Karim Seif @ Slim** (supra), **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013 and **Omary Saimon v. Republic**, Criminal Appeal No.358 of 2016 (both

unreported). For instance, in **Karim Seif @Slim's** case (supra) the Court cited with approval the case of **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004 (unreported) and stated as under: -

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no jurisdiction. This ground is therefore, struck out".*

Admittedly, we are alive that that was the earlier position of the law as now the jurisprudence has been slightly improved to accommodate new grounds of appeal which are based on points of law. This position has been taken in a number of cases including **Julius Josephat v. Republic,** Criminal Appeal No.3 of 2017, **John Madata v. Republic,** Criminal Appeal No. 453 of 2017, **Godfrey Wilson v. Republic,** Criminal Appeal No. 165

of 2018 (all unreported). In particular, in the case of **Julius Josephat** (supra), it was stated that:

> *"...those three grounds are new. As often stated, where* ***such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction"*** [Emphasis added]

In this case, having looked at the said grounds of appeal, we agree with the learned State Attorney that grounds Nos. 4 and 6 are on legal points of law and, hence, we shall entertain them. As to grounds Nos. 3 and 5, since they are not on points of law, they cannot be entertained by this Court for lack of jurisdiction and, thus, we disregard them.

The 2nd ground of appeal is on the visual identification that there were no favourable conditions to enable proper identification. The principles guiding favourable identification of the accused were set out in the landmark case of **Waziri Amani v. Republic**, [1980] TLR 250 where it warned the courts that it is the weakest kind and most unreliable evidence, and that no court has to act on the evidence of visual identification unless all possibilities of mistaken identity are eliminated and

the court is fully satisfied that the evidence before it is absolutely watertight.

In the same case of **Waziri Amani** (supra), the Court stated some conditions to be taken into account when considering visual identification evidence such as the following: **One,** the time the witness observed the accused; **two,** the distance at which the witness observed the accused; **three,** the conditions where the observation occurred, for instance, whether it was during day or night time and whether there was good or poor light at the scene; and **four,** whether the witness knew or had seen the accused before.

Of course, we are alive that as was stated in the case of **Juma John v. Republic,** Criminal Appeal No. 119 of 2009 while citing with approval the case of **Emmanuel Luka and 2 Others v. Republic,** Criminal Appeal No. 325 of 2010 (unreported), the guidelines which were stated in **Waziri Amani's** case (supra) are not exhaustive and that each case has be considered in its own circumstances.

In this case, there is no doubt that the incident took place at night. However, we agree with the learned State Attorney that the circumstances were favourable to enable unmistaken recognition. Why? **one,** PW2 was familiar to the appellant as a son of his paternal uncle and so she could not confuse him. **Two,** PW2 and the appellant had slept in the same house though in different rooms; **three,** the appellant had gone to the victim's room to request for drinking water and the victim took the water to his room. **Four**, the appellant had a torch which was on. Though PW2 did not explain its intensity, we are of the considered view that the circumstances we have explained above provided favourable conditions for unmistaken recognition of the appellant.

If we may add, the victim mentioned the appellant immediately after the incident to her other paternal uncle and when they went to the scene of crime, they found the appellant had already left. It is a cardinal principle that the ability to mention the suspect at the earliest opportune time is of utmost importance as it proves reliability of the witness - See **Swalehe Kalonga and Another v. Republic,** Criminal Appeal No. 45 of 2001

(unreported), **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39.

Considering all these factors we are satisfied that the appellant was properly recognized by PW2 and as such, there was no possibility of mistaken recognition as the appellant seems to suggest. We, therefore, find this ground not merited. We dismiss it.

With regard to the 4th ground of appeal, the appellant's complaint is on the qualification of PW3 who had identified himself as a clinical officer. Fortunately, this issue is not new in our jurisdiction. It was traversed in the case of **Charles Bode** (supra) where the issue was whether a clinical officer was qualified to conduct a post mortem examination. The Court had to consider the definition of the term and it came across the definition to the effect that he was an officer who is qualified and authorized to practice medicine and that he can observe, interview and examine sick and healthy individuals in all specialities to document their health status and can apply pathological, radiological, psychiatric and community health techniques. At the end it concluded thus: -

"Our understanding of the term "clinical officer" from the meaning which has been given above, has left us with no doubt that, PW6 was a qualified medical person, to perform post mortem examination to the body of the deceased as such his report was properly accepted by the trial court".

In this case, PW3 at page 15 of the record of appeal gave his qualification as a clinical officer. He said, he was awarded a diploma in clinical medicine. As was argued by the learned State Attorney, under the Medical Practitioner and Dentists Act, the term "clinical officer" is not defined. However, guided by our previous decision in **Charles Bode's** case (supra), we are settled in our mind that the fact that PW3 had obtained a diploma in clinical medicine, he was qualified to conduct medical examination to the victim. Hence, this ground has no merit and we as well dismiss it.

Next is ground No. 6 concerning the cautioned statement that it was fictitious. We do not intend to dwell on the issue the appellant has raised due to the crucial anomaly raised by the learned State Attorney. Though on a different reason, we agree with the learned State Attorney that the

appellant's cautioned statement was not properly admitted in court. It is evident that the cautioned statement was not read in court after it was admitted in evidence. It is a settled law that whenever a document is admitted in evidence it must be read over in court. (See **Joseph Maganga & Another v. Republic**, Criminal Appeal No. 536 of 2015 and **Miraji Idd Waziri @ Simwana and Another v. Republic,** Criminal Appeal No. 14 of 2018 (both unreported). We, thus, expunge it from the record of appeal.

We now move to the 1st ground of appeal regarding the proof of the case. Despite the fact that we have expunged the appellant's cautioned statement, we are still convinced that the remaining evidence is still capable to sustain the conviction. We agree with the learned State Attorney that the available evidence sufficiently proves the case. As we have already stated, the appellant was clearly recognized by PW2 at the scene of crime. PW2 had known the appellant even before as her paternal uncle's son; they together slept in the same house; and appellant went to her room to ask for drinking water.

As far as proof of rape is concerned, PW2's evidence was corroborated by PW3's evidence and the PF3 (exh. P1). Of course, we are

mindful that in the offence of statutory rape, the victim must be under the age of eighteen years. In which case, the proof of the age of the victim must be given by either the victim, relative, parent, medical practitioner or through proof by a birth certificate, if available. [**See Issaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 (unreported)].

In this case, the age of the victim as shown in the charge sheet was 17 years. Yet, PW3 at page 16 of the record of appeal testified that the victim was aged 17 years on 8th April, 2016. This fact was also indicated in the PF3 (Exh P2). In this regard, we entertain no doubt that the age of the victim was proved beyond reasonable doubt.

As to who raped the victim, we are satisfied that PW2, though the lone witness sufficiently proved that it was the appellant who raped her. This is so because the best evidence in sexual offences is from the victim herself - See. **Seleman Makumba's** case (supra). In this case, PW2 managed to prove penetration and she gave a credible evidence against the appellant. We, therefore, do not see any reason to fault it.

With the foregoing, we find that the case was proved beyond reasonable doubt that the victim was raped by none other than the appellant. In the result, we dismiss the appeal in its entirety.

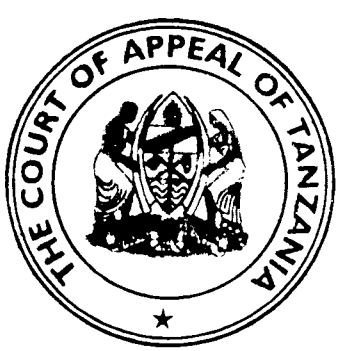
DATED at **MWANZA** this 30th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of May, 2021 in the presence of the appellant in person and Ms. Sabina Choghoghwe, assisted by Mr. Yese Temba both learned State Attorneys for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL