IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: JUMA, CJ., MKUYE, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 2 OF 2020

SAID MAJALIWA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 11th day of November, 2019
in
DC Criminal Appeal No. 22 of 2019

JUDGMENT OF THE COURT

28th June & 2nd July, 2021

MKUYE, J.A.:

In the District Court of Kigoma at Kigoma the appellant, Said Majaliwa was charged with rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002 [now 2019] (the Penal Code). It was alleged that on 27/3/2019 during evening hours at Kashagulu Village within Uvinza District in Kigoma Region, the appellant did have carnal knowledge of one XM Norbert (name withheld to hide her identity) a girl aged 13 years old. He denied the charge.

To prove the charge, the prosecution fronted seven (7) witnesses namely, Gaudioza Raphael (PW1), XM Norbert (PW2), Gaudioza Malili (PW3), RM Norbert (PW4), Clement Anthony Edward (PW5), Hamis Said

Mwirangi (PW6) and G. 7329 DC Lupakisyo. For the defence, the appellant was the only witness. After a full trial, the appellant was convicted and sentenced to thirty (30) years imprisonment.

On appeal to the High Court, he succeeded on one ground concerning identification parade that it was not properly conducted. However, the appeal was dismissed as the 1st appellate court held a view that the case was proved beyond reasonable doubts.

The brief background leading to this appeal is as follows:

On the material day, 27/3/2019, the victim (PW2) who was in company of her two young brothers, among them being PW4, were heading home from their shamba. On their way, they met the appellant who was in company of two dogs while wielding a knife. According to PW2, the appellant accused them being the thieves of his sugar cane and suddenly started chasing them. Unfortunately, PW2 fell down and the appellant caught her and took her to the bush. He then, undressed her and raped her. PW4 who managed to get away relayed the incident to his brother, certain Mussa who in turn reported to the Village Executive Officer (VEO) (PW5). PW1, the mother of the victim, after being informed about the incident by PW4 contacted PW3 and together were led by PW4 to the place where the victim was caught by the appellant, and taken to the bush. According to PW1 and PW3 on arrival

at that place they heard voices and then they saw the appellant coming from the bush carrying the victim on his shoulders. It was testified that PW1 and PW3 inquired from the appellant as to what he had done to the victim and the appellant also asked them if they had seen him raping the victim. Then, appellant dropped the victim down and ran away.

Meanwhile, PW1 and PW3 took the victim who was bleeding on her private parts to the VEO's (PW5) office and they went to the nearby Dispensary. Thereafter, PW5 issued them a letter to go to the Police Station where they were issued with a PF3 for treatment. At the hospital, PW6 examined the victim and observed that she was raped as her hymen was perforated.

On 1/4/2019, while PW5 was at his office, he received the appellant who was arrested by civilians. He informed the police who came and took him to the Police Station. He was, thereafter, arraigned before the court.

In his defence, the appellant denied involvement. In his very short testimony, he concentrated on the discrepancy in the prosecution witnesses on what he wore on the material day and that PW6's testimony was that the victim was not raped.

Still undaunted, the appellant has presented five (5) grounds of appeal before us which, we think, can be extracted as follows:

1) That, the Hon. Judge erred in law and fact in not holding that the prosecution failed to prove the case beyond reasonable doubt.

2) That, the Hon. Judge erred in law and fact in not faulting the trial court for acting on the hearsay evidence of PW1, PW3, PW4, PW5 and PW6.

3) That, the Hon. Judge erred in law and fact for not considering that there was variance in the date of commission of the offence in the charge sheet with the evidence of PW2.

4) That, the Hon. Judge erred in law in dismissing the appeal without determining the appeal on merit.

5) That the Hon. Judge erred in law and fact by not considering the appellant's defence.

When the appeal was called on for hearing, the appellant appeared in person while linked through a video facility from Bangwe Central Prison in Kigoma; whereas the respondent Republic was represented by Mr. Adolf Maganda, learned Senior State Attorney,

assisted by Mr. Yamiko Mlekano and Ms. Antia Julius, learned Senior State Attorney and State Attorney, respectively.

When the appellant was invited to expound his grounds of appeal, he opted to let the learned State Attorneys respond to his grounds of appeal first with a view to rejoin later, if need would arise.

On his part, Mr. Mlekano did not support the appeal. He then informed the Court that ground nos. 1 and 2 will be argued by Ms. Julius and grounds nos. 3, 4 and 5 will be argued by him.

Responding to ground no. 2 on the complaint that the evidence of PW1, PW3, PW4, PW5 and PW6 was a hearsay evidence, Ms. Julius submitted that it was not true as each witness testified on what he witnessed. She elaborated that PW1 and PW3 explained what they saw after having gone to search for the victim to the bush and saw her being carried by the appellant on his shoulders. The learned State Attorney argued further that, PW4 explained on how the victim was caught and taken to the bush by the appellant who had chased them alleging that they were stealing his sugar cane. As regards PW5, she contended that, on 27/3/2017 he received the information that the victim was taken by the appellant to the bush. At 18:00 hours he received the victim with her mother while raped and took them to the dispensary and thereafter he wrote a letter referring them to the

Police Station. She added that, on 1/4/2019, the villagers brought the appellant to his office after having arrested him. Then he informed the Police who came to collect him. Concerning PW6, she said, he explained that on 27/3/2019, he examined the victim whose clothes were dirty and she was bleeding. That, he observed that the victim was raped as her hymen was perforated.

In this regard, it was her argument that, the witnesses' evidence was not a hearsay evidence but rather a direct evidence concerning what they saw or how they participated.

As regards ground nos. 4 and 5 that the appeal was not determined on its merit, Mr. Mlekano argued that the 1st appellate court heard the grounds of appeal and observed that his defence was considered by the trial court based on the clothes he wore on the date of incident as shown at pages 6-7 of the trial court judgment [pages 43-44 of the record of appeal]. However, at the High Court, the appellant brought new evidence which the 1st appellate court found and held that it was new evidence which was not raised before the trial court.

Next are grounds nos. 1 and 3 that the case was not proved beyond reasonable doubt; and that there was a variance of date in the charge sheet and the evidence of PW2. In relation to the issue of variance in dates, Mr. Mlekano contented that though the charge sheet

shows that the offence was committed on 27/3/2019 and in her testimony PW2 said that the incident took place on 23/3/2019, that could have been caused by a slip of a pen. He also pointed out another area in the record of appeal where the trial magistrate cited "section 26(2) of the Misc. Amendment No. 2 of 2016" instead of "section 127 (2)".

Alternatively, the learned State Attorney argued that PW2 could not have remembered each detail given the circumstances under which the offence was committed and her age. He was of the view that, such variance did not vitiate the evidence as it is curable under section 234 (3) of the Criminal Procedure Act, Cap 20 R.E. 2002 [now 2019] (the CPA). To support his argument, he cited the cases of **Issa Ramadhani v. Republic,** Criminal Appeal No. 409 of 2015 and **Nkanga Daudi Nkanga v. Republic,** Criminal Appeal No. 316 of 2013 (both unreported).

As regards the proof of the case appearing ground no. 1, it was Ms. Julius who responded. She argued that the prosecution proved the case beyond reasonable doubt. She pointed out that, in a rape case what is required to be proved is penetration (if a child) and whether the appellant committed the offence. In this case, she submitted that PW2

explained clearly how the appellant took her to the bush, undressed her and raped her. This was corroborated by PW6 who examined her and observed that she was raped, her hymen perforated and had blood.

As to who committed the offence, Ms. Mlekano explained that PW2 mentioned the appellant whom she knew even before the incident as they lived in the same village. She added that PW2's evidence was corroborated by PW1, PW3, PW4, PW5 and PW6's who each recounted on what he saw or how he participated as explained in ground no. 2.

In the premises, the learned State Attorney stressed that the case against appellant was proved beyond reasonable doubt and beseeched the Court to dismiss the appeal.

In rejoinder, the appellant stated that PW6 who examined the victim said he did not see sperms. He, thus, implored the Court to allow the appeal and set him free so that he can join his family.

We have considered the submissions from either side and, we think, the issue is whether the appeal has merit.

For convenience, we propose to tackle this appeal in the following arrangement. We will begin with ground no. 2, then 4 followed by 5 and lastly grounds nos. 1 and 3 together.

In the 2nd ground of appeal, the appellant's complaint is that, PW1, PW3, PW4, PW5 and PW6 gave a hearsay evidence. Admittedly, it is without question that the 1st appellate court sustained the appellant's conviction on among others, the evidence of PW1, PW3, PW4, PW5 and PW6. It believed in their evidence as far as the appellant's involvement in the crime was concerned. However, we are of the view that PW2 was the key witness in this case. And, all other witnesses gave a corroborative evidence in establishing the offence of rape. On this we are guided by the case of **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008 (unreported) where it was stated that:

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."*

In this case, the PW1 explained clearly how the appellant took her to the bush, undressed her and had carnal knowledge of her. PW4 saw when PW1 was carried by appellant to the bush and ran home to report about it. In response, PW1 and PW3 went to the very bush and saw appellant carrying the victim on his shoulders but ran away after seeing them leaving PW1 bleeding. PW1 and PW3 testified that they even inquired from appellant as to what he has done to PW1 and he

responded by inquiring them if they had seen him raping PW2. PW6 who examined the victim on the very same date confirmed that she was, indeed, raped. Though PW1, PW3, PW4, PW5 and PW 6 might not have witnessed when the offence was committed, their evidence gave some clues on how the appellant was involved with the offence based on what each witness saw or heard by their senses. Thus, as we have endeavoured to elaborate above, we find that their evidence was a direct evidence and not a hearsay evidence as suggested by the appellant. In this regard, we find this ground to have no merit and we dismiss it.

In relation to grounds nos. 4 and 5 that the appeal was not determined on merit, and that the defence was not considered, both appellant and the learned State Attorney did not come out clearly on the first limb. However, it is our view that, the 1st appellate court considered the grounds of appeal and found them to have no merit. In this regard we are of the considered view that the 1st appellate court cannot be faulted.

As to the issue that the defence evidence was not determined, we agree with the learned counsel for the respondent that both two courts below considered his defence evidence. At page 43 of the record of

appeal, the trial court tackled the issue raised by the appellant in defence on the contradiction of his identification on the attire he wore in the fateful date. The trial court answered that issue that under the state of shock after being accused of stealing sugar cane and started running away, chased down by appellant and his dogs it could not have been easy for them (witnesses) to note exactly the colour of his clothes. Yet, the 1st appellate court in dealing with a similar issue that the defence case was not considered, it found such complaint baseless since the contradiction on the clothes he wore, was dealt with at pages 8 to 9 of the then typed judgment of the district court [pages 43-44 of the record of appeal]. The 1st appellate court went further to consider the new defence he had raised on appeal and it wondered whether, the appellant meant what he submitted on appeal was what was not considered by the trial court and held that if that was the case, then the same was not brought to the trial court for its consideration. On our part, having examined the two decisions of the courts below, we are satisfied that the defence evidence was sufficiently considered and therefore, the appellant's claim that the defence case was not considered is not merited. We dismiss it.

Turning to grounds 1 and 3, we wish to begin with the issue of variance of date between the charge sheet and evidence of PW2.

Indeed, the charge sheet shows that the offence was committed on 27/3/2019 while PW2 testified that the offence was committed on 23/3/2019. This complaint was also raised in the 1st appellate court and it found that the variance was curable under section 234 (3) of the CPA. In reaching to that finding, the trial judge also relied on the cases of **Selemani Rajabu v. Republic**, Criminal Appeal No. 149 of 2013 and **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (both unreported). For instance, in the case of **Damian Ruhele** (supra) when the Court was confronted with similar scenario, it stated as follows:

> *"The complaint in the second ground has merit in the sense that it is true that the charge sheet reflected that the date of incident was 23/4/2002 whereas in the evidence of PW1 it was stated that the incident took place on 23/3/2002. However, as was correctly submitted by Mr. Hilla, this was probably a slip of the pen. At any rate, the variance in dates was curable under section 234 (3) of the Act...".*

Also, in the case of **Issa Ramadhani** (supra) cited by the learned State Attorney where the date of incident was contradictory, the Court held that considering the inconsistency was merely with regard to the date of incident with two witnesses saying it occurred on 13/12/2011 and another saying on 14/12/2001, it was not serious as it did not go to

the root of the matter. Yet, in **Nkanga Daudi Mkanga** (supra) when confronted with an akin situation on when did the incident occur between 25/7/2009 and 26/7/2009, the Court found that the variance was not a big deal because it was curable under section 234 (3) of the CPA.

In this case, as already hinted above, it is without question that the charge sheet indicates that the offence was committed on 27/8/2019 while PW2 testified that the offence was committed on 23/3/2019. Considering PW2 was aged 13 years old when she gave evidence in the trial court, also considering the circumstances under which the offence was committed (the appellant chasing them with two dogs and a knife), it could have not been possible for her to remember the exact date when the offence was committed. But again, considering that the trial magistrate committed another vivid error of citing "section 26(2) of the Misc. Amendment No. 2 of 2016" instead of "section 127 (2)", we think that the possibility of slip of a pen cannot be overruled. In any case, PW1, PW3, PW4, PW5 and PW6 testified that the incident took place on 27/3/2019, the date shown in the charge sheet. Thus, being guided by the cases of **Selemani Rajabu** (supra), **Damian Ruhele** (supra), **Issa Ramadhani** (supra) **and Nkanga Daudi Mkanga** (supra), we think that the variance in dates was curable under section

234 (3) of the CPA and, therefore, the 1st appellate court cannot be faulted in its finding. Hence, this ground also lacks merit, we dismiss it.

On the issue of the proof of the case, we agree with Mr. Mlekano that it was proved beyond reasonable doubt. As was stated by the learned State Attorney two crucial issues needed to be proved in a rape case, that is, penetration and whether it was the appellant who committed the offence.

We are satisfied that PW2, regardless her tender age, sufficiently proved that she was raped by the appellant who took her to the bush and ravished her. Her evidence that she was raped was corroborated by PW6 who examined her on the same date and found that she was, indeed, raped as he observed that her hymen was perforated and had some blood. The other evidence suggesting that PW2 was raped was that of PW1 and PW3 who saw her bleeding on her private parts immediately after she was dropped by the appellant who had carried her on his shoulders from the bush.

As to who raped her, we are also satisfied that the victim clearly identified the appellant as her assailant. This is so because, PW2 knew him even before the incident as they lived in the same village. We are mindful that in terms of section 127 (6) of the Tanzania Evidence Act,

[Cap. 6 R.E. 2019] (the Act), the court can base a conviction on the evidence of the victim of rape without any corroboration, as long as the court is satisfied that the witness is telling the truth. We are also minded with the principle that in sexual offences the best evidence must come from the victim herself – see **Selemani Makumba v. Republic**, [2006] TLR 379, **Mawazo Anyandwile Mwaikavaja v Republic**, Criminal Appeal No. 455 of 2017 and **Ally Ngozi v. Republic**, Criminal Appeal No. 216 of 2018 (both unreported). In this case, PW2 gave a cogent evidence that she was raped by the appellant which could have relied upon in convicting him.

That apart, the evidence of PW2 was corroborated by the evidence of PW4 who saw appellant dragging the victim to the bush before he ran to report to the village. Not only that, PW1 and PW3 who responded to the report made by PW4 and rushed to the bush, saw appellant carrying the victim on his shoulders and after seeing them he dropped the victim down and ran away. These witnesses, even inquired him what he had done to the victim but he also inquired them if they had seen him raping her which suggests that he suspected that PW1 and PW3 knew what he did to the victim. All this, in our considered view, shows that it was none other than the appellant who raped the victim. In the

circumstances, we find no reason to fault the 1st appellant court's finding that the prosecution proved the case beyond reasonable doubt.

In view of what we have discussed, we find that the prosecution proved beyond reasonable doubt that PW2 was raped by the appellant. Consequently, we find the appeal to have no merit and we hereby dismiss it in its entirety.

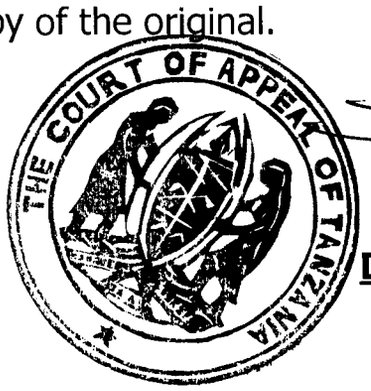
DATED at **KIGOMA** this 2nd day of July, 2021.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This judgment delivered this 2nd day of July, 2021 in the presence of the Appellant in person while linked through a video facility from Bangwe Central Prison in Kigoma and Ms. Antia Julius, learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL