IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 197 OF 2020

MAJALIWA IHEMO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Matuma, J.)

dated the 8th day of April, 2020
in
(DC) Criminal Appeal No. 2 of 2020

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JUDGMENT OF THE COURT

9th & 15th July 2021

GALEBA, J.A.:

Majaliwa Ihemo, the appellant, was arraigned before the District Court of Kibondo in Criminal Case No. 67 of 2018 and was convicted on three (3) counts; rape contrary to sections 130(1)(2)(b) and 131(1) of the Penal Code [Cap 16 R.E. 2002], now [R.E. 2019] (the Penal Code), unnatural offence contrary to section 154(1)(a) of the Penal Code and grave sexual abuse contrary to section 138C(1)(2a) of the Penal Code. According to the prosecution the appellant raped and committed the other offences to his 29 years old lover who, for purposes of concealing her identity in this judgement, we will refer to her as DL, the victim or PW3. Subsequent to the conviction, the appellant was sentenced to

thirty (30) years imprisonment in respect of each of the first two counts and twenty (20) years for grave sexual abuse. He was also ordered to pay TZS. 1,500,000.00 to the victim as compensation. The appellant was aggrieved and appealed to the High Court where he succeeded to have the convictions in respect of rape and grave sexual abuse quashed and the respective sentences set aside. Nonetheless, the conviction and sentence of thirty (30) years imprisonment imposed upon him for unnatural offence was confirmed. Still aggrieved with the decision of the High Court, the appellant has approached this Court with the present appeal moving us to quash the conviction and set aside the above sentence which was upheld by the first appellate court.

The facts material to this appeal as can be gleaned from the evidence on record is that DL, an assistant nurse at Kibondo District hospital, was living in a rented home at Migombani Street within Kibondo district in Kigoma region, where the appellant, being DL's lover would always go and spend a night or nights with her and leave for his normal work. He was a passenger vehicle driver plying between Kibondo and Kahama and sometimes between Kibondo and Kasulu townships. They were close lovers, so much so that the appellant was in contact of DL's brother one Denis and even her mother.

According to the prosecution, on 06.03.2018 at round 21.00 hours the appellant went to the residence of DL with a plastic bag containing two bottles of beer, Balimi brand. Upon entering the house, there was a knife in the basin at the living room, which the appellant took and placed on the table and forced the victim to drink the entire content of one of the bottles of beer he had come with, while threatening to stab her with the knife in case she resisted to consume the alcohol. According to the victim, all this was because the appellant was concerned with her clear intention to terminate cohabitation with him.

However, that was not all. In the meantime, the appellant mixed the contents of the second bottle of beer with 30 flagyl pills in a plastic mug and forced the victim to drink the solution. She resisted to take it and a fracas ensued between the two. Amidst the scuffle, the victim managed to push the cup which fell over the table and the contents spilled on the floor.

The victim testified that all that time the two were sitting in the sitting room but later they went to the bedroom to sleep. In the room the appellant informed her that his plan that night, was to have with her a farewell or a goodbye sex. According to her, what followed was that the appellant forced her to have sex with him which demand she helplessly surrendered herself to, albeit unwillingly because he tore her

top dress and forced her to strip naked her pair of trousers, she wore that evening. After the rape, it seems the appellant was not yet done with the woman, according to the victim, he applied body jelly on his male organ, hopefully, as advance preparations to ensure that his counterpart's target organ would be well lubricated in order to achieve a hassle-free encounter that was soon to follow. Having done that, the appellant advanced towards her and had carnal knowledge of her against the order of nature. Before the appellant was to be through with the alleged chain of the obscene sexual acts, he took an empty bottle of beer and inserted it in the victim's female genitalia.

As per the victim, scenes of all the above illegal acts were recorded by the appellant's telephone video camera and stored in the gadget. Thereafter the two slept together and the next morning the appellant left very early at 05:45 hours for his daily routine duties. At 11:00 AM, she reported the incident to the police who gave her a PF3 and went to her place of work, Kibondo District Hospital for check-up and possible medication. At the hospital her co-worker, Dr. Kizito Nicolaus Ruhamvya (PW1) examined her and found no evidence of penetration in her female organ but noted that a foreign blunt object had penetrated her anal part of the body about one day previous. As for

treatment, he administered some antibiotics, painkillers and gave her psychological counselling.

Assistant Inspector Shabaani Madangula (PW2), arrested the appellant on 13.03.2018 and investigated the case. He tendered the telephone that was alleged to contain electronic still pictures and video recordings containing the obnoxious sexual materials.

The appellant's position was that, DL was his wife as they were cohabiting since 2016 to 2018 but the victim had determined to leave him as she had secured a new lover, one Killian Aloyce. On the fateful day, he testified that he was in Kahama and denied any involvement in the offences alleged, adding that the case had been framed against him because, the victim had threatened him with what came to be true because she had said that she had a grandfather who was a judge and her mother a court clerk.

Based on the facts, the District Court of Kibondo found that the respondent had proved the case beyond reasonable doubt, convicted the appellant and sentenced him on all the three counts of rape, unnatural offence and grave sexual abuse as earlier indicated. Upon appeal to the High Court, the appellant's convictions in respect of rape and grave sexual abuse were quashed and their respective sentences

set aside. However, the High Court upheld his conviction and sentence in respect of unnatural offence. This appeal is challenging the decision of the High Court upholding the conviction and sentence for unnatural offence. The appeal is predicated on three (3) grounds, that: -

> *"1. The Honourable Judge erred in law and fact by entering judgement in favour of the respondent who failed to prove the case beyond reasonable doubt.*
>
> *2. The Honourable Judge erred in law and fact by entering judgement in favour of the respondent and charged him with unnatural offence which was not proved beyond reasonable doubt.*
>
> *3. The Honourable Judge erred in law and fact for relying on electronic evidence which was not properly admitted by the trial court".*

At the hearing of this appeal on 09.07.2021, the appellant appeared in person through video link from Bangwe Prison in Kigoma town, without legal representation. The respondent Republic had the services of Ms. Antia Julius and Happiness Mayunga, both learned State Attorneys.

Prior to commencement of hearing, the Court brought to the attention of the appellant the fact that although he was appealing against conviction and sentence in respect of unnatural offence, the

notice of appeal shows that he intended to appeal against a decision in respect of rape. On noting that anomaly, the appellant prayed to amend his notice of appeal so that it reads that his appeal is challenging the decision of the High Court in respect of unnatural offence and not rape and upon having no objection from Mr. Julius, we granted it in terms of Rule 68(8) of the Tanzania Court of Appeal Rules, 2009.

Upon being invited to elaborate his grounds of appeal, the appellant prayed to adopt his grounds of appeal and preferred that the State Attorneys to respond on his grounds first so that he could rejoin if such a need would arise.

To start off, Ms. Julius informed us that she will submit in reply to the first and second grounds together and respond to the third ground alone. As for the first and second grounds, she contended that the grounds had no merit because at the trial unnatural offence was proved beyond reasonable doubt. Elaborating that point, she contended that the offence was sufficiently proved by the evidence adduced by PW1 and PW3. In order to prove an unnatural offence, the prosecution needed to prove penetration of the appellant's male organ into the anal opening of the victim. To support that position, she relied on this Court's decision in **Joel Ngailo v. R**, Criminal Appeal No. 344 of 2017 (unreported), where it was held that penetration of the victim's anal organ however slight is

an essential ingredient of unnatural offence under section 154(1)(a) of the Penal Code.

She submitted that the evidence of PW3 that the appellant applied jelly on his manhood which act was followed by having sexual intercourse with her against the order of nature satisfied the requirement of the law for proving the offence. She added that the above evidence of PW3 was corroborated by that of PW1, who testified that when he carried out the physical examination of the victim, he found out that there were bruises, a wound and anal expansion in the orifice of the victim, which conditions, he remarked, were medically unusual.

Based on those arguments, the learned state attorney implored us to dismiss the first two grounds of appeal for want of merit.

In rejoinder to the arguments of the learned state attorney, the appellant was brief. He submitted that the victim and PW1 were co-workers so there is no way could PW1 have testified against the interests of the victim, his fellow employee. He finally beseeched us to quash the conviction and set him to liberty so that he can go home and take care of the child he has with the victim and his other family at Kahama.

To start with, we are live with the general principle of court practice that a second appellate court would not easily disturb or interfere and undo the concurrent findings of two lower courts unless the two courts completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction or where there was misdirection and or non direction on evidence. This has been the position of this Court in various decisions including in **Salum Mhando v. R,** [1993] TLR 170 and **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149. Other decisions of this Court on the same point are **Omari Mohamed China and 3 Others v. R,** Criminal Appeal No 230 of 2004 and **Wankuru Mwita v. R,** Criminal Appeal No 219 of 2012 (both unreported).

The other principle of law relevant to this appeal, is that in sexual related trials, the best evidence is that of the victim as per our decision in **Selemani Makumba v. R**, [2006] TLR 379. We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point. See our decisions in **Shabani Daudi v. R,** Criminal Appeal No. 28 of 2000 and recently in **Pascal Yoya Maganga v. R,** Criminal Appeal No. 248 of 2017 (both

unreported). In this case, since at the time of the alleged offence the victim was alone, it is critical that her credibility is impeccable, faultless and her evidence completely reliable.

In order to verify whether the prosecution proved the case beyond reasonable doubt and to ensure that PW1 and PW3 were credible to the extent that their evidence discharged the burden of proof, we will rely on our decisions in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** and **Shabani Daudi v. R (supra)** to re-evaluate the material evidence of those witnesses and consider it afresh in view of the complaints in the first and second grounds of appeal. That is to say, the issue for determination in this appeal is whether the evidence of the prosecution was that credible to the extent of proving that the appellant had sexual intercourse with the victim against the order of nature. We will resolve that issue by considering several pieces of evidence that both the trial and the High Court either did not adequately address or that they completely overlooked. Those aspects of the prosecution evidence on record raise eyebrows and cast shadows of doubt befitting inquiry.

First, although the offence is alleged to have been committed on 06.03.2018, the appellant was arrested six (6) days later on 13.03.2018. There is no evidence that for all the time (the six (6) days), the

appellant had fled to an unknown location in order to defeat efforts of arrest. There is no prosecution evidence pointing to the reason or reasons why the appellant was not arrested as soon as the report was made to them on 07.03.2018 or at least soon thereafter. We are of the firm view, in the circumstances, that if the appellant truly threatened to murder the victim with a knife or to poison her (with a solution of beer flagyl tablets) and he soon thereafter raped her, had her sexually molested in the manner alleged, it is unlikely that there would be a delayed arrest of such a "dangerous" criminal. On the issue that an unexplained delay in arresting the suspect leads doubts in the credibility of a witness see, **Samwel Thomas v. R**, Criminal Appeal No. 23 of 2011, **Michael Msigwa v. R**, Criminal Appeal No. 216 of 2019 and **Elias Yobwa Mkalagale v. R**, Criminal Appeal No. 404 of 2015 and **Azizi Athumani Buyogera v. R**, Criminal Appeal No. 222 of 1994, (all unreported).

Secondly, according to the evidence of the victim, on 13.03.2018 the appellant, went to her residence voluntarily and on his own accord. It is however our view that, if it be true that the appellant threated to kill the victim, raped her, had sexual intercourse with her against the order of nature and forced a bottle in her private parts as alleged by the victim, it is least expected, with that magnitude of atrocities, that the

appellant would have comfortably and unsuspectingly visited the scene of crime in broad daylight on 13.03.2018. We are of the opinion that, such a conduct of the appellant of visiting the scene of crime, is least likely because he would then be volunteering and exposing himself to a potential arrest as it turned out to be the case.

Thirdly, according to the victim, after the fracas in the living room at night on 06.03.2018, herself and the victim went to the bed room to sleep. However, there is no evidence that the victim was forced to go to the room where she slept with the appellant till the following morning. It appears that she went to the room in company of the appellant just normally as she used to do on all other occasions, at the time when all was well during their intimate relation. On that point she testified: -

> *"All the time we were at sitting room. Thereafter we went inside the bedroom."*

Upon getting to the bed room, according to her, she was sexually abused, but after going through all that untold ordeal, the victim freely slept with her 'aggressor' from that time (around 21.30 hours in the night) till next day on 07.03.2018 at 05.45 hours when the appellant left her in the room. In appropriate circumstances, what transpired ought to have made parties poor bed fellows, but in this case, it was the reverse, the two slept together. Based on the evidence of the victim, we are of

the considered view, that had the story of the threats of killing her been true, she would not go to the bed room voluntarily in company of her assailant in a mood suggesting harmony. Similarly, had the evidence of sexual abuse in the bed room been authentic and credible, after the abuse as detailed by the victim, the lovers, so to speak, would not have shared the same bed and most likely the same beddings till the next day. The point we want driven home is that the appellant that having sexually abused the victim to the proportions detailed by her, it is highly improbable and contradictory that the victim would have accepted to share a bed with her aggressor.

Fourthly, the victim raised no alarm before, during or after the alleged threats of death and even the alleged sexual violence. She did not tell anybody from around 21.00 hours on 06.03.2018 when the appellant went to her residence till the next day around 11.00 hours when she went to the police and to Kibondo District hospital for medical check-up. As to why she did not raise any alarm for all that time, her explanation was that if she did, the assailant would have stabbed her with the knife. Fair enough, that sounds convincing and appropriate, only when they were in the sitting room. But there is an immediate turnaround of events; after all that happened in the sitting room, the duo in company of one another proceeded to the bedroom to sleep.

That happened with no evidence of force, threat or coercion by the appellant towards his victim. That is where the doubt kicks in. That relaxed mood ought to have made it possible for the victim to escape and raise alarm. There is too, no evidence suggesting that when the parties slept in the room from early night to following morning, the appellant continued to restrain her to the extent that she would not escape and tell neighbours of what the appellant had done to her, for an immediate arrest in the same night.

In this case, had the evidence of the victim carried the actual weight it entails on the face of it; the fact that she was threatened to be murdered, actually raped, sodomized and even a bottle of beer forced into her genitals, the victim would not have been comfortable and at that much ease with such horrible criminal information for over 14 hours, from 9:00 o'clock at night to 11:00 o'clock the next day, without telling anybody, not even the land lady in the vicinity of her residence.

Fifthly, the victim and PW1, were co-workers both at Kibondo District hospital, as assistance nurse and a medical doctor respectively. The appellant submitted that, PW1 had interest to serve in favor of the victim. He would not give evidence contrary to the interests of the co-worker, he meant. This complaint seems linear with part of the evidence of PW1 where he testified that the victim had shower before going to

hospital for check-up, although the victim did not testify so. But it was the positive evidence of PW1 that PW3 took bath before going to hospital. That evidence does not have any backing. PW3 did not make any reference to any such point in her evidence. Because the witness, PW1, had audacity and boldness to bring in his evidence a matter from nowhere, there is no strong reason why the rest of his evidence should be believed and taken as credible.

Sixthly, as the evidence of the prosecution was that the appellant threatened the victim with a knife, mixed flagyl pills and beer in a plastic cup, in the process of gaining access to sex he tore the victim's blouse and he inserted an empty bottle of beer in the victim's genitals, it was expected that the knife, the plastic cup, the torn cloth and the empty bottle would be presented to the Police and finally tendered in court as part of the prosecution evidence. In this case, none of those items was tendered as an exhibit. Although, those items are not core to prove the offences charged in this case, however, the objects would add weight and value to the story of the victim.

Lastly, the final doubtful aspect, in our view, is surrounding how the victim was stripped naked before the alleged offences were to be committed. Her evidence was that the appellant tore her blouse, but it was not clear why the appellant, a determined male rapist at the

maximum heat of the urge, would tear the top dress which would only expose the victim's chest and the back, while the vulnerable female organs for sexual abuse were necessarily those covered by the trousers. She testified that, whereas the appellant tore the blouse, she is the one who unzipped or unbuttoned, as the case might be, her own trousers thereby facilitating exposure of her nudity and unrestricted access of her assailant to her appropriate organs for the contested rape and sodomy. The point here, is that had the appellant really tore any cloth in a struggle to access the victim's sexual organs, as sexual intercourse, is not performed on the back or on the chest, the appellant would have torn the trousers, which in this case, it is the victim who put it off as earlier on indicated. Her evidence was that she was forced to undress, but the details of how she was forced are missing on record.

All the above matters, undermined the credibility of the prosecution to core. In **Goodluck Kyando v. R**, [2006] TLR 363, this Court held that every witness is entitled to credence and his evidence believed and accepted unless there are good and cogent reasons for not believing him. Good and cogent reasons to be shown in order to disbelieve a witness according to this Court in **Alyoce Maridadi v. R**, Criminal Appeal No. 208 of 2016 (unreported), includes where such

evidence appears to the judge or magistrate that it is improbable, implausible or where it is materially contradictory.

In our view, the above narrated scenarios in the evidence of the material witnesses constitute good and cogent reasons to disbelieve the prosecution evidence, particularly that of PW3 who was the only eye witness. It has also been the position of this Court that for a court to base a conviction on the evidence of a sole eye witness, his or her evidence must be absolutely watertight, see **Ramadhani Said Omary v. R,** Criminal Appeal No. 497 of 2016 and **Masero Mwita Maseke another v. R** Criminal Appeal No. 63 of 2005 (both unreported). In this case, that was not the position. The evidence of the victim was so lousy, incoherent, improbable and implausible so much so that, it left much to be desired as highlighted above.

Relevant to the issue of credibility of evidence in sexual offences, is section 127(6) of the Evidence Act [Cap 6 R.E. 2019] (the Evidence Act), which, provides that:-

> *"(6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of*

the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

In other words, although the best evidence in criminal cases arising from sexual violence, is that of the victim of the abuse as per **Selemani Makumba v. R** (supra), the above law requires that such evidence of the single eye witness, in this case the victim, must be credible. If the evidence is not credible it cannot be relied upon to ground a conviction, even when the crime is sexual. That is, in our view, a proper interpretation of the above provision.

The point we want to drive home in the context of section 127(6) of the Evidence Act quoted above, is that had the trial court and the first appellate court, critically analysed the evidence of PW1 and PW3 in the manner we have endeavoured to do above, we think with respect, the courts would have reached to a conclusion that the credibility of those witnesses' evidence was very much wanting. The courts would have found that the evidence of those witnesses was insufficient so much so that, it would not be able to found a valid conviction not only for the

offences of rape and grave sexual abuse, in respect of which convictions were quashed by the High Court, but also for unnatural offence whose conviction and sentence were upheld and confirmed by the appellate court.

Accordingly, it is our firm position, that the two courts below to the larger extent did not appreciate the poor quality of the incoherent evidence of PW3 which resulted in an unfair conviction of the appellant, in which case, this Court is entitled to interfere and disturb the concurrent findings of the two courts below as per our decisions in **Omari Mohamed China and 3 Others** (supra) and **Wankuru Mwita** (supra). In the circumstances, we find meritorious the complaints of the appellant in the first and second grounds of appeal that the case against him was not proved beyond reasonable doubt.

Having resolved the first and the second grounds as we have, we find that mobilizing resources seeking to resolve the third ground of appeal would be a fruitless venture.

Consequently, we allow the appeal. We quash the conviction of the appellant and set aside the sentence of thirty (30) years imprisonment and the order for compensation of TZS 1,500,000.00 imposed upon him by the trial court and confirmed by the High Court.

We further order Majaliwa Ihemo's immediate release from prison unless he is held there for any other lawful cause.

It is so ordered.

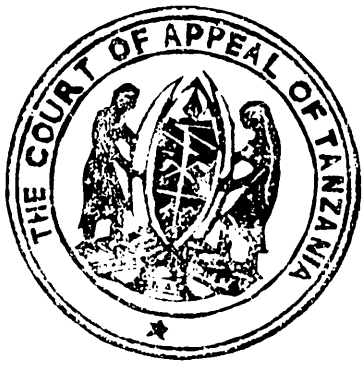
DATED at **KIGOMA**, this 15th day of July, 2021

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This judgment delivered this 15th day of July, 2021 in the presence of the Appellant in person through video link from Bangwe Prison in Kigoma town 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