IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 409 OF 2019

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

EZRA PETER ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mgetta, J.)

dated the 30th day of October, 2018
in
Criminal Appeal No. 216 of 2018

JUDGMENT OF THE COURT

9th & 30th July, 2021

MWAMPASHI, J.A:

The appellant, Ezra Peter, was charged before the District Court of Kilombero at Ifakara with the offence of rape c/s 130(1) (2)(b) and 131(1) both of the Penal Code [Cap 16 R.E 2002, now R.E. 2019]. It was alleged by the prosecution that on 11th March, 2017 at Kibaoni – Ujenzi area within the District of Kilombero in Morogoro Region, the appellant had carnal knowledge of a lady, who, for the sake of hiding her identity, will hereinafter be referred to as PW1, without her consent. The appellant pleaded not guilty to the charge.

After a full trial the appellant was convicted of the offence and was sentenced to thirty (30) years imprisonment. His first appeal against the conviction and sentence to the High Court at Dar es salaam (Mgetta, J), was dismissed. Still aggrieved, the appellant, has filed this second appeal before this Court.

In proving the offence, the prosecution paraded a total of four (4) witnesses whose evidence, in brief, goes as follows; On 11th March, 2017 at midnight, PW1, a 26 years old girl, furtively sneaked from her cousin's house at Kibaoni where she had been staying, and headed to her lover's place. She did not get to her intended destination because on her way, she met the appellant who was on his bicycle who chased, grabbed and dragged her to nearby farms where he raped her. PW1's evidence was also to the effect that on that night she was wearing no underpants and that though she did not know the appellant before, she identified him at the scene of crime from the light of a lantern. PW1 did not tell how the said lantern got at the scene. She further testified that she could not shout or raise an alarm when being raped lest her relatives at home would know that she had sneaked from the house.

Luckily to PW1, militia men, including PW4, happened to be on patrol in the vicinity. According to her, the militia men found her and the

appellant at the scene and apprehended both of them but she, on her part, had to be released after explaining and informing the militia men that she had been raped by the appellant. After her report that the appellant had raped her, the appellant was handed over by PW4 to the police whereas she, on her part, was taken to the hospital for medical examination.

According to PW4, they were on patrol at Ujenzi area with his fellow militia men, when they bumped on PW1 who was crying and who complained to them that she had been raped. On looking around they saw the appellant who was in an attempt to flee from the scene. After being apprehended, the appellant's defence was that PW1 was his lover but he was not believed by PW4 who handed him over to PW3, a police officer, who also happened to be on patrol around there and who found them at the scene. PW3's evidence was to the effect that while on patrol with his team, they got at the scene where they found the appellant having been arrested by militia men on allegation that he had raped PW1 who was also there. The appellant was therefore, handed over to him and he had to take him to the police station where the appellant's cautioned statement was later in the morning recorded by him.

PW1 was medically examined by PW2 and observed bruises around her vagina and also that sperms were oozing from her vagina. According to PW2, the observations indicated that PW1 had sexual intercourse recently. PW2 issued a PF3 which was tendered by him in evidence as exhibit P1.

In his defence the appellant maintained his denial that he did not rape PW1. He said that he was on his way to attend a discotheque when he met PW4 with his team who apprehended, beat him up and fixed him with the case that he had raped PW1 who he did not even know.

In his judgment, the learned trial magistrate found it proved that PW1 was raped and that she was raped by none other than the appellant. The appellant's conviction was mainly based on the evidence from PW1 and PW4 who were found to be credible. The appellant's defence that he was apprehended while on his way to attend the discotheque, that the offence was fixed on him by PW4 and his team and that he even did not know PW1, was rejected for being in contradiction with what the appellant had stated in the cautioned statement (Exhibit P2). On the first appeal to the High Court, exhibit P2 was expunged but still the trial court's conviction and sentence was upheld hence this second appeal.

Eleven (11) grounds of appeal have been raised in support of the appeal. However, for reasons which will become apparent later in this judgment, we find it unnecessary to reproduce and consider all of the grounds of appeal as raised by the appellant. Our focus will be on the 1st and 8th grounds of appeal, which are paraphrased as hereunder:-

1. That, the learned first appellate judge erred in law and fact in sustaining the conviction that was based on a defective charge sheet in which the name of the trial court was not indicated, which had insufficient particulars and not in accordance with sections 132 and 135(a)(i)(ii)(iii) and (iv) of the Criminal Procedure Act, (Cap.20 R.E 2002).

8. That, the learned first appellate judge erred in law and fact in sustaining the appellant's conviction relying on unjustified and uncorroborated prosecution evidence.

At the hearing of the appeal, the appellant appeared in person and was unrepresented whereas the respondent Republic, was represented by Ms. Daisy Makakala, learned State Attorney who was being assisted by Ms. Ashura Mnzava also learned State Attorney.

When the appellant was called upon to argue his appeal he opted to let the respondent Republic respond to his grounds of appeal first and reserved his right of rejoinder if necessary.

The appeal was strongly resisted by Ms. Makakala. In her submission, the learned State Attorney addressed us on all of the grounds of appeal as raised by the appellant. However, having duly heard the submissions of Ms. Makakala and having reviewed the record of appeal, we are of a considered view that this appeal can be disposed of on the 8th and the 1st grounds of appeal. That being the case, for purposes of this judgment and as we have earlier pointed out, we will neither recast on all what was submitted by Ms. Makakala nor decide on all of the grounds of appeal save for the said 8th ground and also for the 1st ground which is on the propriety and correctness of the charge.

With regard to the first ground of appeal, Ms. Makakala argued that the charge was not fatally defective because it contained all the required ingredients including a statement of offence and that the appellant was made to grasp the nature of the offence he was being charged with. She contended that the fact that the trial court's name and time of commission of the offence were not indicated therein is immaterial because the omission was minor and curable under S. 388 of the Criminal Procedure

Act, [Cap 20 R.E 2002 now R.E 2019] (the CPA). In so arguing, she also relied on the case of **Flano Alphonce Masalu @ Singu and Others vs. Republic,** Criminal Appeal No. 366 of 2018 (unreported) where the Court held, among other things, that a charge possesses sufficient particulars if the name of an accused, an offence allegedly committed, a date, and place it was committed are indicated in the particulars. It was therefore argued by Ms. Makakala that the first ground is devoid of merits.

Ms. Makakala's submission on the 8th ground of appeal was that the case against the appellant was proved beyond reasonable doubts and that under section 127(7) of the Evidence Act, [Cap. 6 R.E 2002 now R.E 2019], PW1's evidence required no corroboration. She argued that so long as PW1's evidence was believed to be true then it needed no corroboration for the conviction to be founded on it. She insisted that this ground is also baseless and therefore, that the appeal should be dismissed for being baseless.

In his brief rejoinder, the appellant contended that all what was said against him is not true and therefore, that his appeal has to be allowed.

Beginning with the 1st ground of appeal which is founded on the complaint that the charge was defective, we find it proper, for ease of

reference to reproduce in ex tenso, the charge sheet that was preferred before the trial court as hereunder:-

TANZANIA POLICE FORCE

CHARGE SHEET

NAME, AGE, OCCUP AND TRIBE OR NATIONALITY OF PERSON'S CHARGED

NAME: EZRA S/O PETER

AGE: 22 YRS

OCCUP: PEASANT

TRIBE: MBENA

RESED: KIBAONI- KAMFICHENI

RELG: CHRISTIAN

***OFFENCE, SECTION AND LAW**: Rape c/s 130(1)(2)(b) and 131(1) of the Penal Code, Cap 16 of the Law Revised Edition 2002.*

***PARTICULARS OF OFFENCE**: That EZRA S/O PETER charged on 11th day of March, 2017 at KIBAONI–UJENZI area within Kilombero District in Morogoro Region did have sexual intercourse with on (PWI's name) without her consent.*

STATION: IFAKARA

DATE: 15/03/2017 *SIGNED.*

PUBLIC PROSECUTOR.

It is our considered view that from the above reproduced charge sheet, it cannot be argued, as also correctly submitted by Ms. Makakala, that the charge was incurably defective. We find that the charge was in accordance with sections 132 and 135 of the CPA under which it is required that every charge must contain a statement of the offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. We have no doubt at all that the charge as laid against the appellant was comprised of every required ingredient. The names of the accused and of the victim, the offence charged, the date, place of incidence and the fact that there was no consent, were all indicated in the charge. The particulars sufficiently made the appellant appreciate the nature of the offence he was being charged with. In the case of **Flano Alphonce Masalu @ Singu and Others** (supra) cited by the learned State Attorney, this Court held thus;-

> *"As regard the particulars of the offence, we go along with Mr. Katuga's submission that the impugned charge possesses sufficient particulars indicating the names of the accused persons, the offence allegedly committed and the date and place it was committed. In our view, the statement that the alleged offence occurred at 'Mabibo Luhanga area within Kinondoni District in Dar es salaam" was sufficient. Equally, the*

actual time of the armed robbery is not an ingredient of that offence and so it needed not to be specified as long as the particular date of the commission of the offence was stated".

The appellant's complaint that the name of the trial court was not indicated in the charge sheet is also of no merit. In **Maulid Juma Bakari @ Damu Mbaya and Another vs. Republic,** Criminal Appeal No. 58 of 2018 (unreported), the Court was confronted with a similar issue and resolved that non indication of the court in the charge is immaterial. The Court held, among other, as follows:-

"That said, indication or non-indication of the court to try an offence is immaterial and does not invalidate the charge. The same is the case where the charge is titled 'TANZANIA POLICE FORCE" which, in our view, refers to where the same originated. This cannot be said to have any prejudice to the appellant".

As we have earlier on alluded, we therefore agree entirely with Ms. Makakala that the charge was in compliance with sections 132 and 135 of CPA. At this point we should also emphasize that what is important for a properly laid charge is for the charge to contain particulars enabling an accused to grasp the nature of the offence he is charged with. On this we reiterate what we said in **Mussa Mwaikunda v. R** [2006]T.L.R 387 that;-

"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence".

For the above reasons the first ground of appeal fails.

Let us now turn to the 8th ground of appeal. On this ground it is being complained by the appellant that the prosecution evidence, on which the conviction was based was not corroborated. In other words, and to our understanding, what is being complained by the appellant is not only that the conviction was based on uncorroborated evidence but also and essentially that the prosecution case was not proved against the appellant to the hilt. At this juncture it should also be pointed out that, under the circumstances of this case, the complaint that the prosecution evidence was insufficient necessarily touches and relates to the credibility of witnesses, which, admittedly, is in the domain of the trial court. We are aware of the settled law that this Court as a second appellate court can rarely interfere with the concurrent findings of facts of the two courts below unless such courts have misapprehended the substance, nature and quality of such evidence which resulted into unfair conviction in the interest of justice. In the case of **Bahati s/o Mtega & Another vs**

Republic, Criminal Appeal No. 481 of 2015 (unreported) the Court reiterated the position thus;-

> *"The trial court's finding as on credibility of witnesses usually is binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility".*

Further, in the case of **Geofrey Laurent @ Mbombo vs. Republic**, Criminal Appeal No. 385 of 2015 (unreported) the Court had the following to say:-

> *"The first principle is that a second appellate court is required to be very slow in disturbing the concurrent findings of fact of the two lower courts below unless they completely misapprehended the substance nature and quality of the evidence rendering into an unfair conviction".*

Again in the case of **Hassan Mzee Mfaume v. R** [1981] TLR 167 it was held by this Court that;-

> *"Where the first appellate court fails to re- evaluate the evidence and consider material issues involved, the court on a second appeal may re- evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

In determining the appeal and particularly in determining this ground of appeal, we shall therefore be guided by the above principle as we find that the case at hand is a fit case for our interference as it will be amply demonstrated hereunder.

In finding the appellant guilty, the trial court mainly relied on the evidence from PW1 and PW4 who were found by the trial court to be witnesses of truth. The trial court also found that the appellant's defence raised no reasonable doubt in the prosecution case. These findings by the trial court were upheld by the first appellate court. We have carefully scanned the evidence on record particularly that of PW1 and PW4 and realised that the evidence of these two witnesses was not properly evaluated by the trial court. As it was for the trial court, the first appellate court also failed to re-evaluate the evidence and consider material issues involved.

We are certainly clear that the courts below misapprehended the substance, nature and quality of both the prosecution and defence evidence to the detriment of the appellant which, as we have pointed out earlier, justify our interference. Had the learned trial magistrate properly evaluated the evidence before him and had he properly appreciated the

weight of the defence evidence, he would not have found the case against the appellant proved to the hilt.

It is our view that the prosecution evidence and the appellant's defence that he did not rape PW1 and that he was apprehended by PW4 and accused of raping PW1 only because he happened to be passing close to where PW1 was with PW4 and his team, raised two issues that were not properly considered by the courts below. The first issue is whether the appellant was properly identified by PW1 and the second is whether or not PW1 consented, if at all, the appellant had carnal knowledge of her.

Our first observation is in regard to the issue of identification. From our close examination of PW1's evidence, the defence evidence and the whole circumstances surrounding the apprehension of the appellant, it is very doubtful that the appellant was positively identified by PW1 as the person who allegedly raped her. The evidence on record show that PW1 and the appellant did not know each other before. It is also not in dispute that the alleged rape was committed at night in the fields or farms. Further according to PW4's evidence, PW1 and the appellant were not found together. PW4's evidence is to the effect that PW1 was found first and it was after PW1 had explained why she was crying and after she had told

PW4 that she had been raped when the appellant was spotted getting away. In fact, the trial magistrate misapprehended the evidence when he concluded that PW1 and the appellant were apprehended at the scene. The evidence shows that PW1 was found on the road whereas the appellant was seen at some distance from where PW1 was. According to PW3, the two had to be taken to the scene after being apprehended. PW1 and the appellant were therefore not found together and they were also not found at the scene, that is, in the fields or farms.

As we have earlier hinted on, the appellant's defence is that he was on his way to attend a discotheque when while passing close to where PW4 and his team were with PW1, he was apprehended on accusations that he had raped PW1. The appellant's defence was therefore that if PW1 was really raped, then it was not him who raped her. On the other hand, PW1's evidence is that she was raped by the appellant and that she identified him when she was being so raped as there was light from a lantern. The crucial question that arises here is whether the prevailing circumstances and conditions allowed and enabled PW1 to positively identify whoever was raping her. In other words, the issue is whether, under those circumstances and condition, the appellant was positively identified by PW1 at the alleged scene of crime.

It should also be put on record at this point that the issue of identification of the appellant is not being raised for the first time by this Court. The issue came up before the trial court but, as alluded to earlier, that court did not deal with it properly. In examination in chief, PW1 is on record telling the trial court that there was lantern light around the said area and that she was able to identify the appellant through such light. In his judgment, the trial magistrate considered the evidence and he in fact decided the case basing on his finding that since there was moon light then it was easy for PW1 to identify the appellant (see paragraph 1 on page 8 of the trial court's judgment on page 35 of the record). Here the learned trial magistrate did not only fail to accord the identification evidence the deserved weight but he grossly erred when he imported his own evidence in his judgment. That there was moon light was never testified by any of the witnesses. All what was testified by PW1 is that there was lantern light around. The importation of such evidence was fatal and it definitely occasioned injustice. In the case of **Alawia Halifa vs. Republic,** Criminal Appeal No. 585 of 2015 (unreported) it was held by this Court, among other things, that:-

> *"Adding words to a judgment which are not reflected in evidence is fatal".*

The law on visual identification is settled. It is also trite principle of law on visual identification evidence that such evidence is of the weakest kind and most unreliable and further that no court should act on 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 (see **Waziri Amani v. Republic** [1980]T.L.R 250, **Raymond Francis v. Republic** [1994]T.L.R 100), **Emmanuel Luka & Two Others v. Republic**, Criminal Appeal No. 325 of 2010 and **Omar Iddi Mbezi & Three Others v. Republic**, Criminal Appeal No. 227 of 2009 (both unreported). In **Raymond Francis** (supra) the Court emphasized that;-

> *"It is elementary that a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance".*

The issue whether the conditions favoured a correct identification and therefore whether the appellant was correctly identified by PW1 was, as shown above, answered affirmatively by the trial court. The finding by the trial court was wrong not only because the finding was based on the imported evidence but also and most importantly because the identification of the appellant by PW1 was not watertight. Firstly, it is doubtful that there was any light at the scene. The evidence from PW1

that there was light from a lantern is highly implausible. Given the fact that the alleged rape was committed in the fields or farms and in the absence of any evidence on how a lantern could have gotten there, PW1's claim that there was light from a lantern leaves a lot to de desired in as far as its truthfulness is concerned. Secondly, the fact that PW1 did not know the appellant before and that she did not even tell what was the intensity of the light from the alleged lantern makes PW1's claim that she correctly identified the appellant very suspect.

Connected to the identification of the appellant as the person who allegedly raped PW1, is also the evidence from PW1 that the person who chased, grabbed, dragged her to the field or farms and raped her, had a bicycle. In the evidence on record, apart from PW1's claim that a person who raped her had a bicycle, there is no any other evidence which talks about that bicycle. Neither PW4 who apprehended the appellant nor PW3 to whom the appellant was handed over by PW4 told the trial court about the said bicycle. One would have expected that if the appellant was the person who had raped PW1, as claimed by PW1 and as he, according to PW1, had a bicycle, then he would have been apprehended while with his bicycle or at least there could have been evidence to the effect that the bicycle was found somewhere close to the scene or close to where he was apprehended. The doubt raised from that evidence is the possibility that

the appellant was not the person who raped PW1 and that when PW1 was found by PW4 on the road and when the appellant who happened to be passing over there was being apprehended, the rapist might had fled on his bicycle.

It is also our view that under the circumstances of this case, it was not only doubtful that it was the appellant who raped PW1 but the claim that there was no consent on the part of PW1, if at all she was raped, was also doubtful. PW1's conduct before, at the time the rape was allegedly being committed and after it had been committed, leaves a lot to be desired. First of all, PW1 a 26 years old lady had sneaked from their home at mid night without wearing underpants. Her claim that she intended to go at her boyfriend is not backed with any supporting evidence. There is equally no evidence that she had such a boyfriend and that she was really heading to him. PW1's claim that she did not raise an alarm when being raped lest her relatives would know that she had sneaked from their home, also negates her lamentation that she did not consent. It does not make sense that a 26 years old lady who is being raped by a 22 years boy would rather let the boy rape her than raise an alarm and seek assistance from her relatives in the vicinity, if really she had not consented. PW1's conduct does not support the claim that force was used and that there was no consent on her part. The courts below missed this point. It should

be emphasized that lack of consent on the part of PW1 was one of the necessary ingredients that needed to be proved by the prosecution. The ingredient needed to be proved beyond reasonable doubt but, as demonstrated above, it was not so proved.

Lastly, it is the considered view of this Court that the courts below did not address the fact that PW1 and PW4 gave different account on how and where PW1 and the appellant were apprehended. As we have pointed out earlier, while PW1 told the trial court that PW4 found her and the appellant together and that they were apprehended at the scene according to PW4, the two were not found together and they were not apprehended at the scene. Considering the appellant's defence that he was apprehended by PW4 just because he happened to be passing over there at the material time, the two different versions of evidence from PW1 and PW4 were, under these circumstances, not minor as they did not only go to the root of the credibility and reliability of PW1 and PW4, but they created reasonable doubts on whether the appellant was really involved in the rape in question which ought to have been resolved in the appellant's benefit.

In the circumstances and for the above reasons, unlike the lower courts, we are firmly of the view that the case against the appellant was

not proved beyond reasonable doubt. In consequence, we allow the appeal, quash the conviction, set aside the sentence against the appellant and order that he should be released from prison forthwith unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 29th day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of July, 2021 in the presence of the Appellant linked to the Court from Ukonga Prison via video link and Ms. Deborah Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL