IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 438 OF 2019

AKWINO MALATA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 4th day of October, 2019
in
(DC) Criminal Appeal No. 75 of 2018

JUDGMENT OF THE COURT

14th & 21st September, 2021

KWARIKO, J.A.:

The appellant, Akwino Malata was arraigned before the District Court of Mufindi at Mafinga with the offence of rape contrary to section 130 (1) and (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019]. The prosecution alleged that on 17th day of May, 2017 at Ikilimonzowo village within Mufindi in Iringa Region, the appellant had unlawful carnal knowledge of a girl aged twelve years and for the purpose of hiding her identity we shall refer to her by acronym 'TM'.

Having denied the charge, the appellant was put on full trial and at the end he was convicted and sentenced to life imprisonment. While the appellant's appeal to the High Court was dismissed for lack of merit, his sentence was reduced to thirty years imprisonment with an order of compensation of TZS 300,000.00 to the victim of the offence. Still protesting his innocence, the appellant is before this Court on a second appeal.

We find it appropriate at this point to revisit the background of the case which led to this appeal. It all started one day in May, 2017 when the victim (PW1), her younger brother and her friend Farida Bazuli (PW3) were set to go to the church. However, when the three passed near the appellant's home, PW1 remained with him while the two proceeded to the church. When PW3 came back from the church, she reported to PW1's father one Clay Mbiduka (PW2) on what happened to PW1, that instead of going to the church, she had remained behind with the appellant.

Thereafter, PW2 reported the matter to the ten – cell leader and later to the Village Executive Officer, Fidelis Kidasi (PW4). For his part, PW4 evidenced that after he had received the report of the incident from PW2 on 4th October, 2017, he caused the appellant's arrest on 5th October, 2017 where upon interrogation, he denied the allegations. The appellant was subsequently sent to the Police Station.

On her part, PW1 evidenced that one day in May, 2017, she passed near the appellant's home on her way to fetch water. Following which the appellant called her and when she responded, he took her into his house and had sexual intercourse with her and threatened not to tell anybody. This episode was repeated in the same month when she was going to the bush to collect firewood. The third time is when she was going to church with PW3 and her younger brother.

At the police station, PW1 was issued with a PF3 to go to hospital for examination. Dr. Patrick Kivambe (PW5) attended her on 9th October, 2017. PW5 adduced that upon examination, he found PW1's vagina with bruises and with no hymen which suggested that she was forcefully penetrated by a blunt object. He posted his findings in the PF3 which was admitted in evidence as exhibit P1.

In defence, the appellant testified on his own behalf and called two witnesses. The appellant (DW1) denied the allegations of rape and raised a defence of *alibi* that he was not at home on the alleged material date but at his working place with his colleagues. Gregory Logo (DW2) and Elia Kalinga (DW3) adduced that on 4th October, 2017 the appellant had taken his bicycle for repair at DW3's place.

As indicated earlier, the trial court found the prosecution case sufficiently proved, hence entered conviction and sentenced the appellant as shown.

Before this Court, the appellant raised seven grounds of appeal which we have paraphrased into six grounds of complaint as follows:

1. That, there was variance between the charge and the evidence of PW4 regarding the date of the incident.
2. That, the best evidence principle was wrongly invoked to convict the appellant.
3. That, the PF3 and PW5 did not corroborate the evidence of PW1.
4. That, PW3's evidence did not corroborate PW1's evidence.
5. That, the prosecution evidence was contradictory.
6. That, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented whilst the respondent Republic was represented by Mr. Yahaya Misango, learned State Attorney. When he was invited to argue his appeal, the appellant preferred for the State Attorney to respond to his grounds of appeal first, reserving his right of rejoinder should the need to do so arise.

For his part, the learned State Attorney made his stance known of opposing the appeal. He argued the first ground of appeal that the charge indicated that the offence was committed on 17th May, 2017 which tallied with PW1 who said the offence was committed in May 2017. He went on to submit that there was no variance between the charge and PW4's evidence because what the latter mentioned was the date the incident was reported to him, that is 4th October, 2017 and not the date when the offence was committed.

In respect of the second ground, Mr. Misango argued that the best evidence principle which was applied by the courts below came from the case of **Seleman Makumba v. R** [2006] T.L.R 379 and in the instant case, PW1's evidence was the best hence the principle correctly invoked.

Arguing the third ground, the learned State Attorney submitted that the PF3 could not support PW1's evidence because it was not read over after admission hence deserving to be expunged from the record for lack of evidential value. He however, argued that the evidence of the doctor, PW5 remains on record and it corroborates the evidence of PW1. It was Mr. Misango's further contention that although PW1 said the incident occurred in May 2017, the medical findings by PW5 in October 2017 did not prejudice the case.

As for the evidence of PW3 which forms the appellant's complaint in the fourth ground, the learned State Attorney argued that, the same circumstantially corroborated the fact that PW1 remained with the appellant while she went to church.

As regards the fifth ground, Mr. Misango contended that the prosecution evidence was not contradictory and that the appellant was convicted on the basis of the evidence of PW1 and PW3 which was not at all shaken.

Basing on the foregoing, the learned counsel argued in the sixth ground that, the prosecution case was proved beyond reasonable doubt against the appellant and that PW1 was the best witness. He urged us to find the appeal devoid of merit and dismiss it.

When we prompted him, Mr. Misango submitted that the delay to report the incident of rape is inexplicable. Further that, though PW2 and PW4 contradicted themselves in respect of the dates of reporting the incident, it does not go to the root of the case. He also explained that because PW1 mentioned the appellant as the perpetrator of the offence and no any other, the findings made by PW5 in October 2017 supported her evidence.

In rejoinder, the appellant argued that had there been any rape incident in May 2017, the report to that effect would have been made soon thereafter. He went on to contend that the dates which the alleged rape occurred should have been mentioned in the charge.

What calls for our determination is the issue as to whether the appeal by the appellant is founded. We will answer the issue by going through the grounds of appeal which have been presented by the appellant and paraphrased herein above.

We agree with the learned State Attorney in the first ground of appeal that there was no variance between the charge and the evidence of PW4. This is so because, while the charge alleged the offence to have been committed on 17th May, 2017, PW4 testified that the incident of rape was reported to him on 4th October, 2017. Therefore, the charge and the evidence of PW4 presented two different scenarios thus it cannot be said that there was variance between the two. This ground of appeal fails.

The second ground likewise has no merit. As rightly argued by the learned State Attorney in this ground, we find no error for the two courts below to have invoked the *'best evidence principle'*. This is a principle of law to the effect that the evidence of sexual offence has to come from the victim

and if the court is satisfied that the victim is telling the truth it can convict without requiring any corroborative evidence. This is the import of section 127 (6) of the Evidence Act [CAP 6 R.E. 2019]. The principle has been invariably applied by the Court in its many decisions including the celebrated case of **Seleman Makumba** (supra). The question would be, whether the principle has been applied appropriately which again depends on the circumstances obtaining in a particular case.

The appellant's complaint in the third ground relates to the corroborative evidence to PW1 from the PF3 (Exh. P1) and PW5. We agree with both parties that because the PF3 was not read over after admission in evidence, it lacked evidential value thus deserves to be expunged from the record as we hereby do. In the case of **Robinson Mwanjisi and Three Others v. R** [2003] T.L.R 218 the Court held thus:

> *"...Whenever it is intended to introduce any document in evidence, it should* ***first be cleared for admission, and be actually admitted, before it can be read out."***

However, despite expulsion of the PF3, the evidence of PW5 remained in the record. Whether or not this evidence corroborated the evidence of PW1 will be discussed later in the course of the judgment. This ground succeeds to that extent.

In the fourth ground of appeal, what we have found as rightly contended by the learned State Attorney is that, PW3 circumstantially corroborated the evidence of PW1. According to the evidence, PW3 did not say that she witnessed the rape incident. However, this witness evidenced that, instead of them going together to the church as planned earlier, PW1 remained at the appellant's home while on her part went ahead. This ground fails.

The appellant's complaint in the fifth ground is that, the prosecution evidence was contradictory. On our part, we have not found any contradiction in respect of that evidence. This is so because upon learning of the rape incident, PW2 reported it to the ten-cell leader and then to the Village Executive Officer, PW4. He did not mention the dates in which he reported the incident to those leaders. Whilst PW4 said he received the report of the rape incident from PW2 on 4th October, 2017. Therefore, there was no any contradiction pertaining to that evidence as each testified on things within his own knowledge.

The last ground is whether the prosecution case was proved beyond reasonable doubt against the appellant. We have considered the prosecution evidence and found it materially wanting. Firstly, we have wondered as to why there was a delay to report the incident from May 2017

when PW1 and PW2 said it happened to October 2017 when it was reported to PW4 who put the law into motion. In the case of **Lameck Bazil and Another v. R,** Criminal Appeal No. 479 of 2016 (unreported), the Court discussed the importance of naming a suspect at an earliest opportune time and equated it to reporting an incident as soon as possible. It said thus:

> *"...the ability of the witness to name the suspect at the earliest opportunity is an important assurance of his reliability;* ***and in the same way unexplained delay or complete failure to report must put a prudent court to inquiry."*** [Emphasis added]

Secondly, while the charge and the evidence of PW1 and PW2 show that the rape incident occurred in May 2017, PW5 said he examined PW1 on 9th October, 2017 and found bruises in her vagina. The question here is how the bruises remained vivid from May to October. Therefore, the cumulative effect on these crucial matters, show that there are doubts on the prosecution case against the appellant. It is trite law that whenever there is doubt on the prosecution case, the same should be resolved in favour of the accused. There is litany of Court's pronouncements to the effect that it is the duty of the prosecution to prove the case beyond reasonable doubt and that duty never shifts to the accused. Some of them are: **Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R 296; **George Mwanyingili v. R,** Criminal Appeal No. 335 of

2016; and **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017 (both unreported).

Consequently, since there is doubt on the prosecution case, we resolve the same in favour of the appellant. We therefore, find that the prosecution did not prove their case beyond reasonable doubt. In the event, we find the appeal with merit and we hereby allow it, quash the conviction and set aside the sentence imposed to the appellant. He should be released from custody unless otherwise lawfully held.

DATED at **IRINGA** this 21st day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of September, 2021 in the presence of the Appellant in person, and Ms. Margreth Mahundi, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL