IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 468 OF 2019

ENOCK MATATALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 11th day of September, 2019
in
(DC) Criminal Appeal No. 16 of 2019

JUDGMENT OF THE COURT

22nd September, & 1st October 2021

MWAMPASHI, J.A.:

In the District Court of Iringa at Iringa, the appellant was charged and convicted of the offence of rape contrary to sections 130 (1) and (2) (e) and 131(1), both of the Penal Code [Cap 16 R.E. 2002; now R.E. 2019] (the Penal Code]. The particulars of the offence alleged that on 10.12.2012 at Lundamatwe area within the District and Region of Iringa, the appellant had carnal knowledge of 'D.M' a girl aged sixteen years (her name withheld to hide her identity and who will hereinafter be referred to as the victim or PW2). He was convicted and sentenced to thirty years

imprisonment. His appeal to the High Court was dismissed hence the present appeal.

Briefly, the prosecution evidence on which the conviction by the trial court was based, was as follows. On 10.12.2017 at about 19.00 pm, one Paul Mfambo (PW1) was on his way home when he passed at the house of the appellant and saw the appellant, who is his relative and friend, with the victim. According to PW1, the appellant was holding the victim's hand. This did not raise red flags to PW1 till when he got home and was informed by the victim's younger sister one Winfred, that the victim had gone to her grandmother. Being suspicious, he decided to go to the appellant's house where he found the door to the house closed. PW1 was still outside the appellant's house when one Teopister Seveline Mlawa (PW3), joined him. The two stayed out there till when the door was opened and the appellant got out with the victim. On seeing them, the appellant ran away. They raised an alarm that attracted a number of neighbours. Thereafter, it was agreed that the case be reported to the police and that the victim be sent to the hospital. PW1's evidence was supported by PW3.

The victim testified as PW2 telling the trial court that on the material date she had gone at PW1's who is her uncle, with her younger sister. Sometimes later, she decided to go to her grandmother's home. On her

way she met the appellant who held her hand and took her in his house. In the house, the appellant forced her to undress and raped her. She cried out and raised an alarm but the appellant threatened her and promised to give her money. After raping her the appellant asked PW2 to wash her vagina with water. When PW2 and the appellant got out of the house, they found PW1 and PW3 who took her to the police and then to the hospital where she was medically examined by Dr. Hassanat Mohamed Abdallah (PW4) who observed that the victim had no hymen or bruises in her vagina. PW4 posted her observation in a PF3 which was tendered and received in evidence as Exhibit P1.

In his brief sworn defence evidence, without making any reference to the incident that happened on 10.12.2012, the appellant told the trial court that the police arrested him on 18.01.2018 without telling him the offence he had committed till on 09.02.2018 when he was arraigned in court. He agreed that he is related to the victim and that he had no misunderstanding with her.

Basing on the evidence from PW2 which was found to have been corroborated by the evidence from PW1 and PW3, the trial court found that the case against the appellant had been proved to the hilt. On appeal,

the High Court upheld the trial court's findings and decision hence this second appeal.

At the commencement of the hearing, the appellant who had earlier filed a memorandum of appeal containing seven grounds of appeal, sought and was granted leave to add other five new grounds. In total the appellant did therefore, raise twelve grounds in support of his appeal. However, having examined the said twelve grounds we observed that the grounds could conveniently be consolidated into the following seven grounds:

1. *That, the evidence from the victim (PW2) was taken without her promising to tell the truth and not to tell lies as there is no record to that effect except the trial magistrate's remarks in the judgment.*
2. *That, the charge sheet was defective and was at variance with the evidence.*
3. *That, the High Court Judge and the trial magistrate erred In law and fact in basing the conviction on the circumstantial and hearsay evidence from PW1, PW2, PW3 and PW4 which did not prove the offence in question (penetration).*
4. *That, the evidence by PW4 that the victim had no hymen and bruises in her vagina which suggested that the victim had not been raped*

on the material instance, was not accorded the deserving weight and was not applied to his benefit.

5. *That, the conviction was based on the weakness of the defence and on the contradictory evidence from PW1, PW2, and PW3.*
6. *That, adverse inference ought to have been drawn against the prosecution for the failure to call as a witness a person who was with PW2 at the time she was being taken to the appellant's house.*
7. *That, the case against the appellant was not proved beyond reasonable doubt.*

At the hearing of this appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Ms. Hope Charles Massambu, learned State Attorney. When asked to argue his appeal, the appellant let the learned State Attorney to begin first but he reserved his right to rejoin, would the need to do so arise.

At the outset, Ms. Massambu declared the respondent's stance to oppose the appeal. As on the 1st ground of appeal, the learned State Attorney argued that the requirement for a child of tender years under section 127(2) of the Evidence Act [Cap 6 R.E. 2002; now R.E. 2019] (the Act) to promise to tell the truth is for children below 14 years of age. She contended that PW2 was 16 years of age and her evidence was taken on

oath. It was also argued by her that the learned trial Resident Magistrate's statement in his judgment on page 37 of the record of appeal that he warned himself on basing the conviction on PW2's evidence was a misconception by the learned magistrate who might have confused between a child of tender years and a minor. She however contended that the misconception did not prejudice the appellant in any way.

Turning to the 2nd ground, it was submitted by the learned State Attorney that though initially the charge that was read over to the appellant was truly defective, the said charge was amended before even the preliminary hearing could be commenced. To substantiate the contention, the learned State Attorney, referred us to page 9 of the record of appeal. She also argued that there is no variance between the charge and evidence.

In regard to the 3rd ground where it is being complained that penetration was not proved, it was submitted by the learned State Attorney that PW2's evidence sufficiently proved penetration. She insisted that in cases of this nature, the best evidence is that from the victim. It was further argued that PW2's evidence which did not require corroboration was believed by the trial court. To bolster her argument, the learned State Attorney cited section 127(6) of the Act and the case of

Mkumbo s/o Hamisi v. Republic, Criminal Appeal No. 24 of 2007 (unreported).

On the 4th ground of appeal, it was argued by the learned State Attorney that the findings by PW4 that PW2 had no hymen or bruises in her vagina did not necessarily mean that she had not been raped. She contended that the missing of hymen could mean that PW2 had been penetrated. The learned State Attorney referred us to section 130 (4) of the Penal Code insisting that penetration however slight is sufficient to constitute that ingredient of the offence of rape.

As on the 5th ground, the learned State Attorney submitted that the conviction was not based on the weakness of the defence but on the strength of the prosecution case. She argued that both the trial court and the High Court found the evidence from PW1, PW2 and PW3 credible and reliable. It was further submitted by the learned State Attorney that there were no contradictions between the evidence given by PW1, PW2 and PW3. She disagreed with the appellant's claim that PW1 and PW3 were spouse arguing that there was no such evidence.

On the 6th ground of appeal, it was submitted by the learned State Attorney that the ground is baseless because PW2's younger sister was not a key witness and she was not with PW2 when the appellant was

taking her in his house. She further submitted that the failure to call her did not water down the strong prosecution evidence from PW2 and also from PW1 and PW3 who saw the appellant taking PW2 out from his house.

Lastly, on the 7th ground of appeal, the learned State Attorney submitted that the case against the appellant was proved beyond reasonable doubt and therefore urged us to dismiss the appeal for lack of merit.

In his short rejoinder, the appellant maintained that the case against him was not proved to the required standard. He also insisted that the prosecution ought to have called PW2's younger sister as a witness because she allegedly was with PW2 and she saw when her sister was being taken to the appellant's house.

Having heard the submissions for and against the appeal we now proceed to determine the grounds of appeal. We propose to consider the grounds seriatim. Beginning with the complaint on the 1st ground that the trial court recorded the evidence from PW2 without her having promised to tell the truth and not to tell lies, we agree with the learned State Attorney that since PW2 was 16 years old, she was not subject to the requirement of promising to tell the truth and not to tell lies as it is required by section 127(2) of the Act. The provisions under section 127(2)

of the Act apply to children of tender age whose definition is given by subsection (4) of section 127, thus:

> *"For the purposes of subsection (2) and (3), the expression "child of tender age" means a child whose apparent age is not more than fourteen years".*

Since at the time PW2 was giving evidence, she was 16 years old, it is therefore a misconception for the appellant to refer to her as a child of tender age. Similarly, reference to PW2 as a child of tender age by the trial court in its judgment was also a misconception. Luckily, the misconception did not prejudice the appellant or occasion any failure of justice. We therefore find the 1st ground of appeal devoid of merit.

The 2nd ground of appeal should not detain us because the complaint that the charge was defective and that the evidence was at variance with the charge was based on the charge that was amended and substituted by a new one. As correctly argued by the learned Sate Attorney the initial charge dated 07.02.2018, appearing at page 1 of the record of appeal on which it is alleged that the offence was committed on 16.12.2017 at Igumbilo, was on 16.05.2018, before the commencement of the trial, amended and substituted by a new one. This is evident at page 9 of the record of appeal. The new charge dated 16.05.2018 and on

which the appellant was tried and convicted bears the correct date and place the offence was committed. There was therefore, no variance between the charge and evidence. It should also be pointed out that, the amendment and substitution of the charges was done in terms of section 234 (1) of the Criminal Procedure Act [Cap 20 R.E. 2002; now R.E. 2019]. For the above reasons, the 2nd ground of appeal fails too.

With regard to the 3rd ground of appeal where it is the appellant's complaint that there was no evidence proving that rape was really committed, it is our observation that basing on the principle of the best evidence in sexual offences and having revisited the evidence from PW2 it cannot be said that penetration was not proved. We find that penetration was sufficiently established by PW2. Although in her evidence PW2 did not plainly tell how she was penetrated, her evidence leaves no doubt that she was so penetrated. PW2 is on record telling the trial court that the appellant undressed her and raped her. She also testified that after raping her the appellant directed her to wash her vagina with water. We are of a considered view that these pieces of evidence from PW2 prove that there was penetration.

That PW2 was raped is also supported by the medical evidence from PW4 who examined her and observed that PW2 had no hymen. The fact

that PW4 found PW2 with no hymen or bruises in her vagina did not necessarily mean that PW2 had not been penetrated. As on the issue in regard to who raped PW2, there is circumstantial evidence from PW1 and PW3. These two witnesses saw the appellant and PW2 coming out of the appellant's house where the two had themselves locked in.

The trial court believed PW2's evidence. The High Court also agreed with the trial court that PW2 was a credible witness. We find no reason of faulting the concurrent finding of the two lower courts. After believing that PW2 had told the truth, the trial court properly convicted the appellant basing on her evidence. In sexual offences the best evidence, if believed to be true, is that which comes from the victim. This principle was laid down by the Court in **Selemani Makumba v. R** [2006] TLR 379 where it was stated that:

> *"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in case of any other woman where consent is irrelevant that there was penetration".*

Besides the fact that in the instant case there is corroborative evidence from PW1, PW3 and PW4, the evidence from PW2 is sufficient to found the conviction. PW2 being not a child of tender age and her evidence being recorded on oath, her evidence needs no corroboration. Further,

since PW2 was not an adult, proof of penetration from her evidence is enough to constitute the offence of rape. Consent is, in the instant case, irrelevant. We, for the above reasons therefore also find the 3rd ground of appeal devoid of merits.

The 4th ground of appeal is on the complaint that the evidence and findings by the Doctor PW4 that PW2 had no hymen and bruises in her vagina ought to have been applied to the appellant's advantage. On this, we again agree with the learned State Attorney that, as we have observed on the 3rd ground and under the circumstances of this case, PW4's findings did not necessarily mean that PW2 was not penetrated on the material day. It should also be stressed here that under section 130(4)(a) of the Penal Code, for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. We therefore also find this ground baseless.

The appellant's complaint on the 5th ground of appeal that the conviction was based on the weakness of defence is, as correctly argued by the learned State Attorney, unfounded. As we have endeavoured to show when determining the 3rd ground above, the conviction was mainly based on the evidence from PW2 and also from PW1, PW3 and PW4. The complaint by the appellant that PW1 and PW3 gave contradictory

evidence is baseless. We have observed no material contradiction in the prosecution evidence. There is also no evidence that PW1 and PW3 were spouses. The allegation that PW1 and PW3 gave different residential addresses is not only unsubstantiated but it is also immaterial. This ground also lacks merit and it is dismissed.

With regard to the 6th ground of appeal, we again agree with the learned State Attorney that PW2's younger sister was not a material witness and the failure to call her as a witness did not in any way water down the prosecution evidence against the appellant. Adverse inference cannot be drawn against the prosecution. There is no evidence that the said PW2's younger sister saw PW2 being taken to the appellant's house as it is being claimed by the appellant. The evidence on record show that PW2 left her younger sister at PW1's house when she allegedly headed to her grandmother's home before she met the appellant who took her in his house. When PW2 was being taken in the appellant's house, her younger sister was therefore not around there and she could therefore not have seen what was happening. This ground also fails and it is accordingly dismissed.

Consequently, in view of what we have discussed in the rest of the grounds of appeal, we agree with the learned State Attorney that the

charge against the appellant was proved beyond reasonable doubt. We find no reason to fault the decisions of the two courts below that the charge against the appellant was proved to the hilt.

In the event, we find the appeal devoid of merit and we thus hereby dismiss it in its entirety.

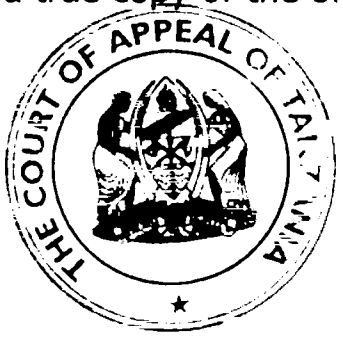
DATED at **IRINGA** this 30th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of October, 2021 in the presence of the Appellant in person, and Ms. Hope Charles Massambu, 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