IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 292 OF 2017

ATHUMANI HASSANI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mwingwa, J.)

dated the 18th day of May, 2017
in
Criminal Appeal No. 73 of 2016

.....

JUDGMENT OF THE COURT

24th September & 1st October, 2021

KIHWELO, J.A.:

What precipitated this appeal is the arraignment of Athumani Hassani, the appellant herein, before the District Court of Moshi at Moshi in Criminal Case No. 109 of 2016 in which he was indicted for trial with the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 of the Penal Code, Cap 16 R.E 2002 (now R.E 2019) ("the Penal Code"). It was the case for the prosecution that, on unknown date of November, 2013 at Shah tour area within the Municipality of Moshi in Kilimanjaro Region, the appellant, did rape a girl aged fifteen years, who

we shall henceforth identify her as ES, for purposes of concealing her identity. He maintained his innocence when the charge was put to him.

In an attempt to establish its case, the respondent Republic lined up four prosecution's witnesses to testify namely; ES (PW1), Christopher Eliud Mtweve (PW2), WP 4942 Detective Corporal Bakita (PW3) and Ladston Paul Mushi (PW4). The evidence of the prosecution witnesses, was supplemented by only one documentary, the PF3 of PW1 (exhibit P1). On his part in defence, the appellant relied on his own sworn testimony only, he did not call any witness to beef up his defence.

The learned trial Resident Magistrate after considering the evidence placed before him, was impressed by the prosecution and found that the case against the appellant was proved to the hilt. The appellant, was therefore convicted as charged and accordingly he was sentenced to the mandatory term of thirty years imprisonment. His attempt to challenge the finding and sentence of the trial court proved futile as the High Court upheld both the conviction and sentence. Disgruntled with the decision of the first appellate court, the appellant has come to this Court on a second appeal.

This appeal was predicated on self-crafted seven-point memorandum of appeal lodged on 24th October, 2017. Furthermore, on 22nd September, 2021 the appellant lodged in Court a self-crafted supplementary memorandum of appeal containing four points.

On our part, we have found that the grounds of appeal raise the following seven points of grievance: **One**, that there is a variation between the charge and the evidence. **Two**, that the witnesses were not credible and reliable. **Three**, that the prosecution evidence was contradictory, incoherent, and inconsistent. **Four**, that the prosecution did not produce material key witnesses to testify. **Five**, that the first appellate court did not consider the defence case. **Six**, that the first appellate court did not scrutinise exhibit P1; and **seven**, that the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal before us on 24th September, 2021, the appellant appeared in person, and had no legal representation. Upon being invited to address us on the grounds of appeal, he prayed to adopt the grounds of appeal as well as the supplementary memorandum of appeal and urged us to consider them in determining the appeal. He also opted to

let the respondent Republic respond to his grounds of appeal, while reserving his right of rejoinder, if need would arise.

On the adversary side, the respondent Republic was represented by Mr. Kassim Nassir Daud, learned Senior State Attorney who teamed up with Ms. Nitike Emmanuel Mwaisaka learned State Attorney who bravely resisted the appeal.

On his part, before responding to the grounds of appeal raised by the appellant, Mr. Kassim, contended that from the eleven grounds of appeal which have been raised by the appellant, five grounds did not feature in the appeal before the first appellate court, that is the second, fifth, sixth and seventh grounds in the substantive memorandum of appeal. Similarly, ground two and three of the supplementary memorandum of appeal were not raised at the first appellate court. Mr. Kassim, however, was quick to argue that ground six in the substantive memorandum of appeal can be entertained by this Court because it raises a point of law. As for the rest of the grounds which were not raised and determined by the first appellate court, Mr. Kassim, argued that this Court has no jurisdiction to determine them. Reliance was placed in the case of **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016 (unreported). He implored upon us to

strike these grounds of appeal and proceed to consider the merits of the rest of the grounds.

Responding to ground one, three and four of the substantive memorandum of appeal, and ground one of the supplementary memorandum of appeal, wherein the two lower courts have been challenged for giving credit to the prosecution case which was not proved to the hilt, the learned Senior State Attorney, argued that the prosecution case was proved beyond reasonable doubt. It was his firm argument, that PW1's evidence alone was sufficient to prove the charge without there being any need for corroboration. He argued further that, the position of the law is very settled and clear that the sole evidence of the victim of sexual offence may be relied upon to prove the case without any corroboration. To bolster his argument, he cited the provision of section 127 (6) of the Tanzania Evidence Act, Cap 6 R.E 2019 ("TEA"). In asserting further his submission, the learned Senior State Attorney, contended that, in cases of sexual offence the evidence of a sole witness who is a victim of sexual violence is the best and does not require any corroboration. Reliance was placed in the case of **Charles Yona v. Republic**, Criminal Appeal No. 79 of 2019.

The learned Senior State Attorney, submitted that, the evidence of PW1 in this case clearly reveals that, PW1 proved that she was raped by the appellant and that this was considered by the trial court which assessed the credibility of PW1 the victim, an exclusive domain of the trial court. He further argued that, having assessed the credibility of PW1 the trial court rightly relied upon the testimony of PW1 to convict the appellant in line with section 127 (6) of TEA. To fortify his argument, he referred us to pages 11, 43 and 44 of the record of appeal and also cited the case of **Eliah Bariki v. Republic,** Criminal Appeal No. 321 of 2016 (unreported)

Upon being prompted by the Court, on whether the elements of the offence of rape were proved, the learned Senior State Attorney submitted that, PW1 ably testified at page 11 of the record that, the appellant undressed her, took out his penis and inserted into her vagina more than once. He also argued that, PW1 was 17 years old according to the testimony of PW2.

Upon being prompted further, on whether the prosecution proved the age of PW1 to be 15 years as indicated in the charge, the learned Senior State Attorney admittedly submitted that, the prosecution did not prove that because PW2 said that PW1 was 17 years. He further contended that

all in all, the prosecution proved that PW1 was below 18 years at the time she was raped and referred us to the case of **Charles Yona** (supra) at page 18 in which the Court discussed at considerable length the issue of age of the victim of sexual offence. Finally, he argued, while referring to page 57 of the record of appeal that, the first appellate court addressed the issue of age by referring to the testimony of PW1 and section 130 (2) (e) of the Penal Code and found out that the appellant was rightly convicted and sentenced by the trial court. In that regard, the learned Senior State Attorney, urged us to dismiss the grounds of appeal for want of merit.

In relation to the sixth ground of the substantive memorandum of appeal, Mr. Kassim, argued that, this is a point of law in that the first appellate court did not consider the appellant's defence. He, therefore, implored upon us on the strength of the cited authorities to step into the shoes of the first appellate court and re-evaluate the appellant's defence and having done so find that the appellant's defence did not shake the prosecution evidence. He argued that, the appellant himself confessed to some facts such as being a neighbour who used to go and assist slaughter chicken at the house where PW1 was residing and that the general denial

by the appellant that the case was framed by one Halima Saidi is a mere afterthought and it did not affect the prosecution case. To facilitate the appreciation of the proposition put forward by the learned Senior State Attorney, he cited the case of **Rashid Omary Kimbwetambweta v. Republic,** Criminal Appeal No. 254 of 2016(unreported) at page 15 and 16 and the case of **Eliah Bariki** (supra) in which the court was faced with an analogous situation. He finally, urged us to dismiss the appeal in its entirety for want of merit.

In rejoinder, the appellant being a layperson and unrepresented did not have much to say. He prayed that his grounds of appeal be considered and that his appeal should be allowed so that he is set free.

It is now our precious duty to determine the appeal by considering the grounds of complaints raised by the appellant as against the submission by the respondent Republic. We shall start by addressing the allegations by the learned Senior State Attorney that ground two, five and seven of the substantive grounds as well as ground two and three of the supplementary grounds are new grounds not raised or determined by the first appellate court. We have left out ground six of the substantive grounds of appeal for reasons that will become apparent shortly.

Admittedly, going through the record of appeal, the alleged grounds were neither raised nor determined by the first appellate court as rightly argued by the learned Senior State Attorney. This Court has time and again discussed at considerable length this issue which is now settled and clear. See, for example, in **Emmanuel Josephat v. Republic**, Criminal Appeal No. 323 of 2016 (unreported) the Court stated that where grounds of appeal are raised in the Court for the first time, it will not entertain and determine them for lack of jurisdiction. Also, in **Hassan Bundala Swaga v. Republic,** Criminal Appeal No. 386 of 2015 (unreported) it was held:

> *"It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

The above restated principle of law is grounded on the provision of section 6 (1) of the AJA, where this Court derives its mandate to determine criminal appeals. Therefore, since we have determined that, ground two, five and seven of the substantive memorandum of appeal as well as ground two and three of the supplementary memorandum of appeal are

new grounds, because they did not feature at the first appellate court and since the first appellate court did not make any finding on them, this Court lacks the requisite jurisdiction to entertain them and therefore, we will not consider and determine them.

Next, we will determine the complaint that the appellant's defence was not considered by the first appellate court. We begin by noting the convergence of the submission that, both the trial court and the first appellate court did not consider the appellant's defence. Obviously, failure by the trial court and the first appellate court to consider the defence case was irregular. We wish to emphasise the time bound principle that, the defence case however weak, trivial, foolish or irrelevant may seem has to be accorded the requisite consideration by the trial court and if the trial court did not do so, then the first appellate court is duty bound to reconsider it.

With respect, we agree with the learned Senior State Attorney that, this Court has discretion to step into the shoes of the first appellate court and re-evaluate the evidence in order to come up with its own finding. This position has been stated in numerous decisions of this Court. In the case of **Hassan Mzee Mfinanga v. Republic** [1981] TLR 167 this Court held:

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

We are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence in view of making its own findings. See, for example **Salum Mhando v. Republic,** [1993] TLR 170, **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Zakaria John & Another v. Republic**, Criminal Appeal No. 9 of 1998 (unreported).

We have examined the evidence on record and have formed an opinion that the lower courts misdirected themselves by not considering the defence raised as rightly complained by the appellant. Having examined the evidence on record we are settled in our mind that the appellant raised a general denial. However, had the trial and the first

appellate courts critically considered the defence case they would have come to the conclusion that it raised some doubts more in particular as to the duration of the incident and the actual date of reporting to the police. This required remarks of some kind by the trial court and if not then the first appellate court. As for the defence case, we wish to let the record of the trial court at page 29 speak for itself:

> *"Your honour, I was just a neighbour, she was calling me to slaughter chickens, that woman was calling me and asking me to be her boyfriend. That woman went to Mombasa, and left his child and the house girl. She said that I raped the girl while in fact I didn't do so, your honour. It is not true that, I raped that girl because they are alleging that the offence was committed in November, 2013, but I was reported to commit the offence in February, 2014."*

Coming back to the rest of the grounds, we shall discuss them in a pattern preferred by the learned Senior State Attorney who discussed them conjointly. The main complaint in these grounds is on the credibility, coherence, consistency and contradictions on the prosecution witnesses. The conviction of the appellant was essentially based upon the evidence of

PW1 who was the prosecution star witness. The question that remains to be answered is whether PW1 was a credible witness. It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the TEA is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example **Goodluck Kyando v. Republic**, [2006] TLR 363.

There is no rule of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the presiding Judge/Magistrate, and the assessment which is made to the evidence which he/she gives in court. This is because the assessment of demeanour, as rightly submitted by the learned Senior State Attorney is the monopoly of the trial court. This Court in **Yasin Ramadhani Chang'a v. Republic** [1999] TLR 489, made a general observation that:

> *"Demeanour is exclusively for the trial court. However, demeanour is important in a situation where from the totality of the evidence adduced, an inference or inferences, can be made which would appear to contradict the spoken words."*

However, the monopoly of the trial court in assessing the credibility of the witness, is limited to the extent of the demeanour only. But there are other ways in which the credibility of a witness can also be assessed as the Court held in **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2001(unreported) that:

> *"The credibility of a witness can also be determined in other two ways that is,* ***one,*** *by assessing the coherence of the testimony of the testimony of the witness, and* ***two,*** *when the testimony of the witness is considered in relation to the evidence of other witnesses...."*

In the instant appeal, the learned trial magistrate took PW1 to be a very truthful witness because her demeanour in the witness box was remarkably impressive. While discussing, the justification for the delay for PW1 to mention the appellant until after three months, the learned trial magistrate held:

> *"I am the magistrate who heard and recorded the evidence of the victim,* ***I had an opportunity to assess her demeanour, she is a girl without much confidence, and she was very fearful especially when she was cross examined by***

the accused person that justifies her fear. *Due to these reasons, I am satisfied that the explanation given by the victim as to why she failed to give name (sic) of the suspect is enough and sufficient to clear a nagging doubt. The delay to mention the suspect therefore had a sound explanation."* [Emphasis supplied]

Furthermore, the learned trial magistrate while discussing the reason why PW1 as the victim of rape and principal witness should be believed he said:

> *"I am the Magistrate who heard and recorded the evidence of the victim, she testified veracity, truthfully and meant what she was saying, I find her credibility unquestionable."*

The above excerpts of the judgment of the trial court have exercised our mind quite considerably in particular as to the credibility of PW1 while testifying in the witness box, according to the statement of the trial magistrate who said, she appeared to have no confidence and was fearful. The conduct of PW1 raises a number of questions as to her credibility bearing in mind that, the alleged incident occurred in November, 2013 and PW1 testified on 12th February, 2016 more than two years and five months.

If its anything to go by, then the credibility of PW1 will be in question because she was not steady while testifying in court and this leads us to draw an adverse inference given her age at the time of the trial and the duration since the incident happened. Our doubt is further coupled by the fact that PW1 did not inform anyone that she was raped by the appellant for the entire three months until when she was found pregnant. This again raise questions on her credibility. In the totality of the above, we find merit on the ground of appeal relating to the credibility of PW1.

More glaring weaknesses in the prosecution evidence is the fact that while the incident occurred in November, 2013, the trial began in March, 2016 but surprisingly the prosecution did not subject the appellant to any medical test available including deoxyribonucleic acid (DNA) testing to prove that he was the father of the child who was already born at the time the trial began.

As if the foregoing is not enough, there is also another issue worth of concern. The learned trial magistrate covered extensively the issue of demeanour while composing the judgment six months after seeing PW1 in the witness box and relied on the latter's manner and demeanour as the only yardstick of her credibility. We have read the record of appeal

carefully and we have found out that these positive remarks on PW1's demeanour were raised for the first time when the judgment was being composed against the peremptory principle of law. Section 212 of the CPA provides that:

> *"When a magistrate has recorded the evidence of a witness he shall also record such remarks, if any, as he thinks material respecting the demeanour of the witness whilst under examination.*

The provision of section 212 of the CPA is couched in mandatory terms meaning that magistrates are duty bound to record such remarks of demeanour of witness if any. Failure to do so, the magistrate is precluded from noting those remarks in the judgment. Luckily, we had an opportunity to discuss at a considerable length this issue in the famous case of **Juma Kilimo v. Republic,** Criminal Appeal No. 70 of 2012 (unreported) in which the Court stated that:

> *"Remarks about demeanour of a witness must be factual and there should be a note of the observations by the court in the record of the proceedings and its inference. To note these remarks for the first time in the judgment might as*

well be a negation of the constitutionally enshrined right to a fair trial."

It is now elementary law that, the best evidence of sexual offence comes from the victim. See, for example **Omari Kijuu v. Republic**, Criminal Appeal No. 39 of 2005 (unreported). We are also aware that under section 127 (6) of TEA a conviction for sexual offence may be grounded on the basis of the uncorroborated evidence of the victim.

However, we think that, the evidence of such victims has to be subjected to thorough scrutiny in order for courts to be satisfied that what they state contain nothing but the truth. The reason is not far-fetched, sexual offences are very serious offences that attract public interest and public scrutiny but also have dire consequences for the accused once found guilty given the severity of the sentence imposed. In the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) while discussing section 127 (6) this Court held:

"We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires

strict compliance with rules of evidence in general...and that such compliance will lead to punishing the offenders only in deserving cases."

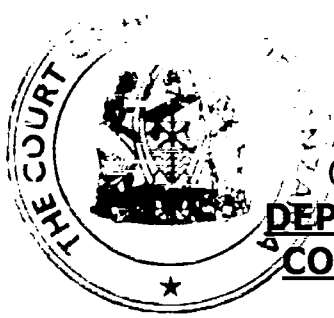
In view of what we have endeavoured to demonstrate, it is our conclusion that the conviction of the appellant rested on weak and unreliable evidence. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release unless held for another lawful cause.

DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL
W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered on 1st day of October, 2021 in the presence of the appellant in person, and Ms. Tusaje Samuel, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL