IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 519 OF 2019

JASPINI S/O DANIEL @ SIKAZWE.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mrango, J.)

dated the 14th day of November, 2019

in

Criminal Appeal No. 75 of 2019

.....

JUDGMENT OF THE COURT

16th & 26th February, 2021.

MWANDAMBO, J.A.:

The District Court of Sumbawanga, tried and convicted Jaspini s/o Daniel @ Sikazwe, the appellant herein for the offence of rape c/s 130(1), (2)(e) and 131(1) of the Penal Code [Cap. 16 R.E. 2002]. Following conviction, the appellant earned a sentence of 30 (thirty) years imprisonment. In addition, the trial court ordered the appellant to pay the victim compensation in the sum of TZS 1,000,000.00. On appeal to the High Court sitting at Sumbawanga, the appellant lost. His appeal

which was premised on 6 grounds of appeal was dismissed and hence this second appeal on the same grounds which the High Court dismissed in the first appeal.

The particulars of the charge on which the appellant was arraigned alleged that on the 13th day of April, 2019 at Sumbawanga Asilia area within Sumbawanga Municipality, Rukwa region, the appellant had sexual intercourse with a 15 years old girl whose name is withheld but to be referred to as MJ or the victim as the case may be. Not surprisingly, the appellant pleaded not guilty to the charge culminating in a trial in which five witnesses for the prosecution testified out of whom, MJ (PW2), Alfan Juma Chepe (PW3) and Amina Juma Chepe (PW4) were relatives. Whereas Godfrey Bwahama (PW1) was a medical doctor who examined PW2 after the alleged rape incident, Ayubu Gidion Mwankole (PW5) was a ten-cell leader in the same area where both the appellant and PW2 resided.

In his sworn defence evidence, the appellant distanced himself from the accusation branding the case as having been fabricated by the victim's mother due to the grudges she had against him. In the course

of his testimony, the appellant was forced to tender a cautioned statement he had recorded at the police which was admitted as exhibit P2. At the end of it all, the trial court found the prosecution evidence to have proved the case against the appellant to the hilt. It convicted him as charged followed by a custodial sentence of 30 years and an order for monetary compensation to the victim as alluded to earlier.

The case for the prosecution on which the trial court relied on to convict the appellant and which the first appellate court found no reason to disturb was to the following effect. The appellant and the victim's family stayed in the neighbourhood in a place called Sumbawanga Asilia in Sumbawanga Municipality. The victim stayed with her parents and her siblings including PW3. Both PW2 and PW3 were secondary school students at the time. It turned out that on the evening of 13th April, 2019, the victim and her two siblings, PW3 and Samila, were at their home eating sweet potatoes. Apparently, the victim's mother was away. In the process, the appellant surfaced at the victim's home and found the trio eating sweet potatoes. For reasons which are not apparent from the record, despite the fact the appellant found the victim and her siblings partaking sweet potatoes, he offered them with more from his

home which had to be collected by no other than PW2. Wittingly or unwittingly, PW2 readily obliged and followed the appellant to his home. According to PW3, the appellant had earlier in the morning visited their home and asked for some one to assist in fetching water a request which was turned down only to resurface later in the evening with an offer for supply of more potatoes. However, PW2 did not return as early as expected which prompted PW3 to ask his sibling; one Samila to go and look for PW2 from the appellant's home. Moments later, Samila returned with information that she found PW2's shoes outside the appellant's door whilst her sister (PW2), was heard crying inside the room amidst noise from high volume of music in the room

Just as any other doubting Thomas, PW3 took upon himself to confirm the story he had been told by his sister which turned out to be true, for he saw his sister's shoes at the door and heard her crying inside the appellant's room for release. Subsequently, he enlisted the help of a close friend, his sister (PW4) and a brother in law and went straight to the appellant's room where, upon a knock, the appellant opened the door for them telling them that PW2 had already left. That information did not find purchase with them and hence enlisting the

assistance of PW5. However, upon arrival of PW5, PW3 was sent away leaving behind PW4 who, together with PW5 entered the appellant's room only to find PW2 crying complaining of being raped by the appellant.

PW2 was subsequently taken to a hospital but was not attended until the following day after obtaining a PF3 and recording a statement at a police station. PW5's evidence had it that he found the victim seated at the appellant's bed and indeed, he heard PW2 complaining of being raped by the appellant. At the Hospital, PW2 was medically examined by PW1 on 15th April 2019, two days after the incident. Upon examination, PW1 found no bruises from PW2's private parts and formed an opinion that there was no penetration. He posted his findings on a PF3 which he tendered in evidence as exhibit P1.

As alluded to earlier, the trial court found the prosecution evidence to have proved the case against the appellant beyond reasonable doubt. It rejected the appellant's defence for being inconsistent with his cautioned statement (exh. P2) he had recorded at the police station. Being satisfied with the cogency of the evidence by the prosecution, the

trial court entered a finding of guilt followed by conviction and sentences which are challenged in this appeal.

The appellant's appeal to the High Court was premised on 6 areas of complaint. One; weak evidence to prove the charge on the required standard. Two, reliance on the evidence of PW2, PW3 and PW4 who were members of the same family. Three; disregarding the evidence of PW1 on lack of proof of penetration. Four; lack of proof of the victim's age in the absence of a birth certificate. Five; conviction and sentence in the absence of a caution statement tendered before the trial court by the investigative police officer. Six; lack of material facts to support conviction.

The first appellate court determined the appellant's appeal on four aspects. In a nutshell, it held that the appellant's conviction was according to the weight of the evidence which proved the charge against him beyond reasonable doubt. On the other hand, it rejected the appellant's complaint regarding the reception of and reliance on the evidence of PW2, PW3 and PW4 holding that the said witnesses were not barred from testifying so long as they were competent and their

evidence was credible. With regards to the victim's age, despite the contradictory version regarding her age, it held that there was satisfactory evidence from PW2 that she was 16 years of age which was not contradicted by the appellant. Lastly, regarding the evidence proving penetration, the learned first appellate judge took the view that despite the anomalies in the examination of the victim by PW1 which did not reveal any bruises and blood stains on her private parts and PW1's findings that PW2 was sexually experienced, such anomalies did not shake PW2's evidence of being raped by the appellant.

On the basis of the foregoing, the first appellate court dismissed the appellant's appeal which has culminated into the instant appeal raising the same grounds he raised before the High Court.

At the hearing of the appeal, the appellant appeared in person, unrepresented being connected through the court's video link facility from Ruanda Prison. The respondent Republic had the services of Mr. Paschal Marungu, learned Senior State Attorney assisted by Mr. John Kabengula, learned State Attorney. It was Mr. Marungu who took the floor to oppose the appeal.

The appellant had very little to address the Court in addition to his grounds of appeal which he adopted in full urging the Court to find them merited in sustaining his appeal. In addition, he brought to the fore variances in the date shown in the PF3 (Exh. P1) and the date of the incident which, according to him, raised doubts on the case for the prosecution. Similarly, he raised an issue on the delayed medical examination of the victim for twenty-four hours which, according to him, dented the respondent DPP's case. He urged us to allow his appeal.

Mr. Marungu argued all grounds of appeal individually except grounds 1 and 6 on which he combined his arguments and addressed the Court after his submissions on the additional issues raised by the appellant.

We find it convenient to dispose those two issues ahead of the grounds of appeal. Mr. Marungu was quick to admit that whereas the incident occurred on 13th April, 2019, the PF3 admitted in evidence as Exhibit P1 shows that it was obtained from the police on 14th February, 2019; two months earlier. However, the learned Senior State Attorney urged us to treat 14th February, 2019 as a typo considering that the

same exhibit shows that the victim was examined at the Mazwi U.H.C. Centre on 15th April, 2019; two days after the incident. We respectfully agree with him having regard to the evidence on record showing that the incident occurred on 13th April, 2019 and, due to the failure to get medical attention at a Mazwi Health Centre on 14th April, 2019, PW2 was examined on the following day on 15th April, 2019. At any rate, we also agree that in so far as the issue was not raised before the two courts below, being one of fact, it cannot be competently raised at this stage. We thus find no merit on both subsidiary issues on the variance of the dates in the PF3 as well as delayed examination of PW2 and we reject them. That takes us to the substantive grounds.

We shall start with the ground criticising the two courts below for relying on the evidence of relatives. Having examined the record as well as the judgments of both courts below, we sustain Mr. Marungu's submission that this complaint is bereft of merit. It will be clear from the judgment of the High Court and that of the trial court, that both courts were alive to the fact that PW2, PW3 and PW4 were members of the same family. However, guided by section 127 (1) of the Evidence Act, [Cap. 6 R.E. 2002 – now R.E. 2019] on the competence of the three

witnesses, the two courts concurred that the trio were competent witnesses whose evidence could be considered on merit unless there was any evidence proving that they teamed up to promote an untruthful story. The trial court for instance relied on our decision in **Paulo Tayari v. R.**, Criminal Appeal No. 216 of 1994 (unreported) to the same effect. The High Court for its part made reference to **Festo Mgimwa v. R.**, Criminal Appeal No. 378 of 2016 (unreported) and **Mustapha Ramadhani Kihiyo v. R.** [2006] T.L.R. 323 for the proposition that the evidence of relatives cannot be discredited unless there is evidence to prove their scheme to promote an untruthful story. There being no such evidence, the High Court rightly concurred with the trial court that the evidence of PW3 and PW4 was not only credible but it was also corroborated by PW5 to support a finding that PW2 was indeed found in the appellant's room on the material night. Consequently, we find no merit in this ground and dismiss it.

The next complaint the subject of ground 3 relates to the alleged failure to take into account the evidence of PW1 who opined that after his examination of PW2 found neither bruises nor sperms on PW2's vagina and hence it was doubtful that there was penetration. Mr.

Marungu urged us to share the view taken by the first appellate court that apart from PW1's remarks, there was strong evidence from PW2, the victim who proved that the appellant had sexual intercourse with her on the material night. At any rate, the learned State Attorney argued, despite PW1's oral evidence, his findings posted in exh. P1 show that there were signs of penetration.

We find compelled to remark at this stage albeit in passing that we are sitting on a second appeal in which our interference with the concurrent findings of facts by the two courts below is very limited. We can only do so upon being satisfied that those findings were a result of misapprehension of the evidence or omission to consider available evidence or wrong conclusion on the facts or misdirections and non-directions on the evidence. We are guided on this by our previous decisions in the cases of **Felix S/o Kichele & Another v. R.**, Criminal Appeal No. 159 of 2005, **Julius Josephat v. R.**, Criminal Appeal No. 03 of 2017 and **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017 (all unreported) amongst others.

To start with there is no dispute that PW2 was found sitting on the appellant's bed on the night of 13th April, 2019 in the appellant's presence. PW4 and PW5 said as much during the trial that PW2, the victim was a girl below 18 years. Under the circumstances, the prosecution was only required to prove penetration in terms of section 130(1)(2)(c) of the Penal Code under which the appellant was charged.

The trial court relied on the evidence adduced by PW2 whom it held to be the best evidence on the authority of **Selemani Makumba v. R** [2006] T.L.R 379 and **Gallus Kitaya v. R,** Criminal Appeal No. 196 of 2015(unreported). In addition, relying on our decision in **Godluck Kyando v. R** [2006] TLR 363, the trial court found PW2 as a credible and truthful witness who was entitled to be believed unless there were cogent reasons to the contrary say; giving an improbable or implausible evidence or evidence which materially contradicted by other witness. The trial court found none to warrant disbelieving PW2.

The first appellate court for its part quoted at length PW2's testimony and came to the conclusion that it was a best evidence having regard to **Selemani Makumba v. R** (supra)**.** It thus concurred with the

trial court that PW2's evidence was solid enough to establish penetration and hence proving rape. With respect, the appellant has not provided any material to support the contention that the concurrent findings of the two courts below were a result of misapprehension of the evidence, omission to consider available evidence or wrong conclusions from the facts or misdirections and non – directions of the evidence warranting our interference.

We understand the appellant would want to over capitalise on PW1's remarks that PW2 was sexually experienced and hence his failure to see any blood stains or sperms from her vagina upon examination. Without much ado, we can only say that penetration need not be proved by medical examination neither is it true that the fact since PW2 was sexually experienced that negated the fact that she was raped. Equally irrelevant is the absence of sperms from PW2's vagina. In our view, the absence of sperms had nothing to do with proving penetration, for in terms of s. 130 (4)(a) penetration, however slightest is sufficient to constitute rape.

At any rate, if exhibit P1 has anything to go by, PW1's finding on it indicated that there was a sign of penetration which falls in tandem with section 130 (4) (a) of the Penal Code. To conclude, we have found no merit in this ground and we dismiss it.

The appellant's complaint in ground 4 criticises the High Court for sustaining conviction in the absence of proof of the victim's (PW2) age by a birth certificate. Mr. Marungu invited us to sustain the reasoning of the first appellate court at pages 65 and 66 of the record of appeal to the effect that the age of the victim need not be proved by a birth certificate. The learned Senior State Attorney argued that in any event, PW2's age was proved by a medical report through exhibit. P1 which indicates that PW2 was 15 years. He buttressed his submission by our decisions in **Karim Seif @ Slim v. R.**, Criminal Appeal No. 161 of 2017 and **George Claud Kasanga v. The DPP**, Criminal Appeal No. 376 of 2017 (both unreported).

With respect we have no demur in endorsing Mr. Marungu's submissions. **Firstly**, contrary to the appellant's complaint, exh. P1 shows that the victim was 15 years and a student. The appellant did not

controvert that evidence. **Secondly**, from the decided cases cited to us by the learned Senior State Attorney, the victim's age could be proved by other means than the birth certificate on the authority of **Karim Seif @ Slim v. R.** (supra) citing with approval a decision of the Supreme Court of Uganda in **Byagonza v. Uganda** [2000] 2 E.A. 351. One of such means for proving age is through the witnesses' own oral evidence. The record shows (at page 14) that PW2 stated her age to be 16 years, a form two student at Katuma Secondary School. The appellant did not contradict PW2 in relation to age during cross-examination. It is settled law that failure to cross-examine a witness on an important matter implies acceptance of the truth of the witnesses' evidence in that respect. See for instance: **Bakari Abdallah Masudi v. R.**, Criminal Appeal No. 126 of 2017 and **Nyerere Nyague v. R.**, Criminal Appeal No. 67 of 2010 (both unreported). Since the appellant did not cross-examine PW2 regarding her age, a very crucial aspect in the case for that matter, her evidence remained unchallenged. It cannot be assailed at this stage.

Admittedly, there is no dispute that exh. P1 shows that PW2 was 15 years whilst her oral evidence shows that she was 16 years. Be it as it

may, the variance is, in our view immaterial in so far as PW2 was below 18 years to which section 130 (1) (2) (e) applies. Consequently, there is no merit in this ground and like the first appellate court, we dismiss it.

Ground 5 relates to a complaint that the prosecution did not tender any cautioned statement by a police investigative officer to prove the offence. We have failed to comprehend this complaint but, as rightly submitted by Mr. Marungu, the prosecution's case did not depend on any cautioned statement neither did the trial court and the High Court rely on any cautioned statement. This ground is equally dismissed.

Lastly on grounds 1 and 6 argued together by Mr. Marungu. The learned Senior State Attorney argued, and rightly so in our view that the first appellate court considered the evidence on record and concurred with the trial court that the case against the appellant was proved on the required standard. We have already discussed in some detail the evidence which both courts below relied upon justifying the finding of guilt and conviction. We have seen nothing to disturb those findings. We likewise dismiss grounds 1 and 6 for being misconceived.

On the whole, the appeal is held to be destitute of merit and we dismiss it. The decision of the first appellate court is upheld with the net effect that the appellant's conviction remains intact together with the sentence meted out by the trial court and sustained by the High Court.

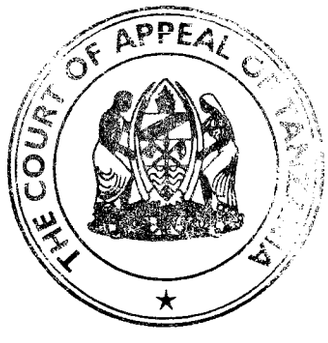
DATED at **MBEYA** this 26th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2021 in the presence of the Appellant unpresented/present in person and Ms. Prosista Paul, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
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