IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 493 OF 2017

HALFAN NDUBASHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mruma, J.)

dated the 5th day of May, 2015
in
DC. Criminal Appeal No. 96 of 2013

.....

JUDGMENT OF THE COURT

22nd & 29th October, 2021

MWAMPASHI, J.A.:

Before the District Court of Kasulu at Kasulu, the appellant, Halfan Ndubashe was arraigned, tried and convicted of the offence of rape of a 65 years old woman whose name is withheld and who shall interchangeably be referred to as PW1 or the victim. The statement of the offence in the charge laid against the appellant showed the offence to be contrary to sections 130 and 131 of the Penal Code, Cap 16 [R.E. 2002] (the Penal Code).

According to the particulars of the offence, on 29.09.2011 at about 07.00 hrs at Nyekitonto village within the District of Kasulu in Kigoma Region, the appellant did unlawfully have sexual intercourse with PW1 without her consent. The appellant's plea of not guilty prompted the prosecution to call two witnesses namely PW1 and Jese Rudondi (PW2). In addition, the prosecution tendered a PF3 of the victim which was received in evidence as Exhibit P.1. The appellant was the sole witness in his defence.

The material background facts leading to the appellant's arraignment as they can be gleaned from the record of appeal are straight and not complicated. In the morning hours of the material day at about 07.00 am, PW1 went to Nyabihuna river to fetch some water and cut grasses for feeding her grandson's hares. While there, the appellant who is her relative and a neighbour, approached her, took hold of her, fell her down and took her underpants off before he forcefully inserted his penis in her vagina. PW1 felt great pains when being penetrated to the extent that she excreted faeces. PW1's screams and alarm were responded by PW2 who happened to be in the vicinity and who came to her rescue. Thereafter, PW2 took PW1 to the Village Executive Officer (VEO) and the case was reported to Mtabila Police

Station where the PF3 was issued before PW1 was sent to Mtabala Refugee hospital for medical examination and treatment. A doctor who attended PW1 issued the PF3 in which his findings were posted. The PF3 which was tendered by the prosecutor was admitted in evidence as Exhibit P.1.

According to PW2, on the material morning, he was attending his garden close to Nyabihuna river when she heard someone screaming. He walked towards the direction where the screams were coming from and when she got closer, he saw the appellant who is his neighbour fleeing from the scene. He tried to chase him but he could not apprehend him. When he got at the scene, he found PW1 who complained that she had been raped by the appellant. He also observed faeces coming out of PW1's anus. Thereafter, PW2 rendered his assistance to PW1 by taking her to the VEO where the case was reported for further steps.

In his affirmed defence, the appellant maintained his denial. He denied to have committed the rape in question and gave narration as on where he had been during the material morning and how he was arrested. He told the trial court that on the material morning at about 08.00 am he went to visit his friend at Murubanga. On his way back

home, at about 10.00 am, he met PW2 who was with a school boy. He got home and was later fetched by his friends Flugence Samwel, Fredrick Mwendamiye and Sadiki Bakari who took him to PW2's house where local brew was being sold. He was at PW2's home drinking with his friends when one George Andrea came and arrested him without telling him the offence he had committed. He was then taken to Nyakitondo village offices before he was sent to Mtabila Police Station where he was informed that he had raped PW1. He lastly testified that PW1 was holding grudges against him because at one time she accused him of not attending the burial of one of their fellow villagers.

At the end of the trial, the trial court found that the prosecution had proved the charge against the appellant to the required standard. The appellant was accordingly convicted and sentenced to serve a period of thirty years imprisonment. Aggrieved, he appealed to the High Court where, except for the PF3 which was expunged for being un-procedurally admitted in evidence, the rest of the trial court's findings were upheld and the appeal was entirely dismissed.

Still aggrieved the appellant has preferred this second appeal on four grounds which can however be condensed into two grounds, **one**, that the charge sheet on which the appellant was convicted was fatally

defective for failure to cite relevant subsections of sections 130 and 131 of the Penal Code and **two**, that the courts below erred in relying on the evidence from PW1 and PW2 which lacked independent supporting evidence particularly that of the VEO and police officers from Mtabila Police Station.

Before us, at the hearing of the appeal, the appellant appeared in person and was unrepresented whereas the respondent/ Republic was represented by Mr. Tito Ambangile Mwakalinga, leaned State Attorney.

In support of the appeal, the appellant had little to submit. He fully adopted his grounds of appeal listed in the memorandum of appeal insisting that he did not rape PW1 and prayed for the appeal to be allowed.

On his part and at the outset, Mr. Mwakalinga intimated his stance that he was not supporting the appeal. As on the complaint that the charge was defective, it was conceded by Mr. Mwakalinga that indeed the charge was defective for omitting to cite the relevant subsections of sections 130 and 131 of the Penal Code. He however argued that the defect was curable and that it was cured by the particulars of the offence and the evidence that was led to prove the charge. He insisted that since the particulars and the evidence enabled the appellant to

appreciate the nature and the seriousness of the offence then the defect was curable. To cement his argument that the defect was curable, Mr. Mwakalinga referred us to the case of **Masalu Kayeye v. Republic**, Criminal Appeal No. 120 of 2017 (unreported) wherein another decision of the Court in **Jamali Ally @ Salum v. Republic**, Criminal Appeal No. 52 of 2017 (unreported) was quoted. He contended that in **Jamali Ally @ Salum** (supra) the Court held that defects on citations of relevant sections in the statement of the offence can be cured by particulars of offence and evidence. He thus concluded that this ground is baseless and should be dismissed.

As on the complaint that the evidence from PW1 and PW3 lacked corroboration from the VEO and police officers, it was submitted by Mr. Mwakalinga that the evidence from PW1 and PW2 was credible and reliable. He also contended that the evidence from the two prosecution witnesses sufficiently proved the offence and that there is no specific number of witnesses required in proving a fact. It was insisted by him that the instant case being a sexual offence case, the best evidence was that which came from PW1. Here the Court was referred to the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379.

Still on the second ground of appeal, it was argued by Mr. Mwakalinga that the finding by the trial court that PW1 and PW2 were credible witnesses which was upheld by the High Court, can rarely be interfered with by this second appellate Court. On this, the Court was again referred to the case of **Masalu Kayeye** (supra).

Lastly, it was submitted by Mr. Mwakalinga that the prosecution managed to prove the case against the appellant beyond any reasonable doubt. He argued that since PW1 was an adult two important things that required proof was penetration and consent. As on penetration, it was contended by him that even in the absence of the PF3 which was expunged from the record by the High Court, the evidence from the victim sufficiently proved penetration. He therefore prayed for the appeal to be dismissed.

In his brief rejoinder, the appellant reiterated his prayer for the appeal to be allowed insisting that the case was framed against him.

We have dispassionately considered the appellant's grounds of appeal and the submissions made for and against the appeal. We propose to begin by considering the ground on the propriety of the charge. On this, as also readily conceded by Mr. Mwakalinga, there is no dispute that the charge was defective for omission to properly cite the

relevant sub sections in the statement of the offence. As pointed out earlier, the statement of the offence cited "sections 130 and 131 of the Pena Code". Since the victim of the rape in question was an adult, the proper citation ought to have been sections 130 (1) (2) (a) and 131 (1) of the Penal Code. Now that it is apparent that the charge was defective the only issue for our determination is whether the defect was not curable and if it prejudiced the appellant.

In terms of sections 132 and 135 (a) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) every charge must contain a statement of a specific offence or offences with which the accused is charged. It is also required that the statement of offence must make reference to the specific provision of the law creating such offence. Further, the charge must contain particulars of offence. The reason or aim of the charge to contain the statement and particulars of offence is to give an accused person reasonable information as to the nature and seriousness of the offence and to enable him prepare his defence.

It is also settled that in determining whether a charge which suffers ailments of wrong, non or improper citation of provisions of the law under which the accused is charged is curable or not, the test is whether from the particulars of the offence and the evidence, the

accused is able to fully understand the nature and seriousness of the offence he stands charged. In the case of **Deus Kayola v Republic**, Criminal Appeal No. 142 of 2012 (unreported) the charge of rape was challenged for being preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1) of the same law. The Court held, among other things, that:

> *"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of the offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old."*

The decision in **Deus Kayola** (supra) was cited in **Jamali Ally @ Salum** (supra) where the provisions under which the appellant was charged were not properly cited. It was observed by the Court as follows:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence*

facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."

Being guided by the above settled principle, let us now examine the particulars of the offence in the instant case and find if from the particulars the appellant was able to appreciate the nature and seriousness of the offence he stood charged. The particulars of the offence in question were as follows:

"That HALFAN S/O NDUBASHE is hereby charged on 29th day of September, 2011 at about 07.00 hrs at Nyakitonto village within Kasulu District in Kigoma Region did unlawfully have carnal knowledge [of] the victim aged 65 yrs without her consent."

It is our observation that looking at the above particulars it cannot be said that the appellant did not understand the nature and the seriousness of the offence of rape he was charged with. The particulars were very clear giving the appellant sufficient notice about the date, the place the offence was committed, the nature of the offence committed, the name of the victim and her age. In addition, PW1 in her evidence

clearly narrated how she was ravished by the appellant. It is from the above that we agree with Mr. Mwakalinga that the particulars of the offence and the evidence on record sufficiently enabled the appellant to appreciate the nature and the seriousness of the offence he was charged with. Therefore, the ailment in the charge is curable under section 388 (1) of the CPA. The ground that the charge was fatally defective is thus found not meritorious and it is accordingly dismissed.

In the second ground of appeal the appellant essentially seeks to challenge the credibility and reliability of PW1 and PW2. He faults the findings of the two lower courts that PW1 and PW2 were credible and reliable witnesses and that their evidence sufficiently proved the case in the absence of the evidence from the VEO and police officers to whom the case was reported first. On this, it should firstly be pointed out, as also argued by Mr. Mwakalinga, that we are mindful of the settled principle of law that a second appellate court should not disturb the concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice- see **Director of Public Prosecutions v. Jafari Mfaume** [1981] T.L.R. 149, **Jamali Ally @ Salum** (supra) and **Hamis Mohamed v. Republic**, Criminal Appeal

No. 297 of 2011 (unreported). Without beating around the bushes, we find no justification for us to interfere with the concurrent findings of the two lower courts in the instant case.

In convicting the appellant, the trial court believed the evidence given by PW1 which was to the effect, not only that she was raped but also that it was the appellant who raped her. In her evidence PW1 clearly explained how, without her consent and by force, the appellant inserted his penis into her vagina causing her feel great pains to the extent of excreting faeces. The fact that in sexual offences the evidence from the victim is of paramount importance has been insisted in a number of our decisions. In the case of **Victory s/o Mgenzi @ Mlowe v. Republic,** Criminal Appeal No. 354 of 2019 (unreported) it was held, among other things, that there can be no more direct evidence than the evidence of the victim of the crime concerned. In the instant case, we have examined PW1's evidence and we have no grain of doubt that she was a truthful witness. We find so not only because in sexual offences the best evidence is that which comes from the victim but mostly because of the coherence of the evidence she gave.

In his defence the appellant denied being the one who raped PW1 claiming that at the material time he was nowhere close to the scene.

The trial court disregarded the defence because of the heavy evidence against him from PW1 and PW2. The incident happened during the day time, PW1 and the appellant knew each other well since apart from being neighbours, they were related and for that reason, as correctly found by the trial court there was no possibilities of mistaken identity. It should also be borne in mind that the evidence from PW1 that it was the appellant who raped her does not stand alone. PW2 clearly testified that when he was rushing to the scene in response to the screaming from PW1, he saw the appellant fleeing from the scene.

In addition to the above, the possibilities of mistaken identity are eliminated not only because the rape was committed during the day time or because the appellant was not a stranger to PW1 but also because of the fact that PW1 named the appellant at the earliest opportunity to PW2. The ability of a witness to name a suspect at the earliest possible opportunity is an all- important assurance of his reliability- see **Marwa Wangiti Mwita v. Republic** [2002] T.L.R. 39, **Jaribu Abdallah v. Republic** [2003] T.L.R. 271 and **Minani Evarist v Republic,** Criminal Appeal No. 124 of 2007. In **Jaribu Abdallah** (supra) the Court observed as follows:

"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identifications for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible opportunity is in our view reassuring though not a decisive factor."

On the basis of the above, the appellant's claim in his defence that at the material time he was nowhere close to the scene and thus that there might have been a mistaken identity fails.

Regarding the complaint that the VEO and police officers to whom the case was reported first were not called as witnesses, we again agree with Mr. Mwakalinga that from the evidence given by PW1 and PW2 which was believed by the two courts below, the fact that the VEO and the police officers were not called as witnesses, did not water down the strong prosecution evidence on record. As we have earlier pointed out, the evidence from PW1 which was supported by that from PW2 proved the case against the appellant to the hilt. It should also be reminded that what matters is not the number of witnesses but the quality and relevancy of the evidence the witnesses give.

In conclusion, we find no reason of faulting the concurrent findings by the two lower courts that the case against the appellant was proved beyond any reasonable doubt. The evidence on record supports the conviction and sentence meted out to the appellant.

For the foregoing reasons, we find this appeal devoid of merit and we accordingly dismiss it in its entirety.

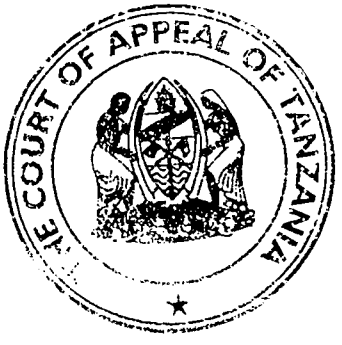
DATED at **TABORA** this 29th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2021 in the presence of the Appellant in person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL