IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 238 OF 2017

YUDA JOHN..APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 27th day of May, 2016
in
DC Criminal Appeal No. 21 of 2015

JUDGMENT OF THE COURT

09th & 12th February, 2021

KEREFU, J.A.:

This is the second appeal by Yuda John, the appellant, who was before the District Court of Arusha at Arusha, charged with and convicted of incest by male contrary to section 158 (1) (a) of the Penal Code, [Cap. 16 R.E. 2002] (now Revised Edition, 2019) (the Penal Code). It was alleged that, on 29th day of March, 2013 at Baraa area, within Arusha City in Arusha Region the appellant had unlawful carnal knowledge of his daughter aged seven (7) years. The appellant was sentenced to thirty (30) years imprisonment term. To conceal the victim's identity, we shall henceforth refer to her as 'XYZ' or simply 'PW1' as she so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of two witnesses. The appellant relied on his own evidence as he did not summon any witness.

In a nutshell, the prosecution case as obtained from the record of the appeal is that, PW1 (the victim) was living with her father (DW1) and her aunt (step mother) together with a young baby. PW1 testified that on the fateful date, when the step mother went out to buy vegetables and asked PW1 to take care of the baby, DW1 undressed himself and then undressed her by removing her underpants and put his penis into her vagina and raped her. She said that, after the incident she went to the house of Glory Uweza Frednand (PW2), but she did not reveal the ordeal to her or even to anyone. However, on the next day, PW1 told PW2 what had befallen her and that DW1 had raped her twice. PW1 testified further that PW2 took her to Mount Meru Hospital for medical examination. PW1 added that she started living with PW2 after being raped by DW1.

In her testimony, PW2 supported the narration by PW1 that she was living in the neighbour-hood with DW1's family and that she started living with PW1 after she noted that the environment she was living in

was not safe, as PW1 was sleeping together with DW1 and her step-mother in one bed. PW2 said that PW1's parents consented that she should live with her. PW2 testified further that on 29th March, 2013 PW1 was asked by her step mother to go to their house to watch over the baby as the said mother was going out to buy vegetables. PW2 said, immediately thereafter he saw DW1 going to his house where PW1 was with the baby. PW2 testified further that, when PW1 returned to her house, she was sad and refused to eat the food but she did not ask her anything. PW2 stated further that, on 2nd April, 2013, PW1's step mother came to her house and requested her not to allow PW1 to go to their house when she is not there, because DW1 had the habit of sleeping with her. PW2 said, while the step mother was still there, she asked PW1 on what has been going on between her and DW1 and PW1 told her that DW1 had raped her several times.

PW2 went on to state that, upon receiving that shocking information, they examined PW1's vagina and found that she was raped because the size of her vagina was not of a girl of her age. PW2 said, she reported the matter to the ten-cell leader who did not take any action. As such, PW2 decided to inform her fellow women and the appellant was

arrested. PW2 added that they took PW1 to Mount Meru Hospital for medical examination where the doctor confirmed that PW1's vagina had been penetrated.

In his defense, the appellant denied involvement in the commission of the offence and challenged the evidence of PW1 and PW2 that they gave untrue story before the trial court. He, in particular, asserted that, he was framed up by his second wife because she wanted to destroy him. Though, he admitted that he allowed his children to live with neighbours, he said the said children were Nickson and Theresia but not PW1. However, at the end of it all, the trial court found the charge proved against the appellant to the hilt. Hence, the appellant was found guilty, convicted and sentenced as indicated above.

The appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were confirmed. Still aggrieved, he has come to this Court, hence the present appeal. In the Memorandum of Appeal, the appellant raised three (3) grounds of appeal. It is noteworthy that, on 20th January, 2020 and 5th February, 2012, respectively, the appellant submitted other sets of supplementary memoranda with a total

of four (4) grounds of appeal. All the seven (7) grounds raised by the appellant can be conveniently paraphrased as follows: -

1. That, the first appellate court failed its duty for not re-evaluating the evidence presented before the trial court;
2. That, the first appellate court erred in law and in fact for sustaining the conviction of rape on uncorroborated evidence of PW1;
3. That, the first appellate court erred in law for failure to observe the irregularity conducted by the trial court when it failed to explain the option available to the appellant in giving his defense;
4. That, the trial court did not comply with section 210 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002, which renders the High Court proceedings and judgment a nullity;
5. That, the first appellate court erred in law and in fact when it upheld the conviction while there were procedural mistakes committed by the trial court;
6. That, the first appellate court erred in law and in fact when it upheld the appellant's conviction and sentence imposed by the trial court while the defense case was not closed; and
7. That, the first appellate court erred in law and in fact when it upheld the decision of the trial court while the prosecution did not prove their case beyond reasonable doubt.

The hearing of the appeal was conducted through video conference linked to the Arusha Central Prison where the appellant appeared in

person without legal representation. The respondent Republic was represented by Ms. Adelaide Kassala, learned Senior State Attorney assisted by Ms. Mary Lucas, learned State Attorney.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted all the grounds of appeal and urged us to consider the same, allow the appeal and set him free. He did not, however, make any submission in support of the third and fifth grounds.

Elaborating on the first ground of appeal, the appellant faulted the first appellate court for failure to subject the evidence on record to scrutiny and proper re-evaluation. He specifically referred us to the testimony of PW1 and argued that, although she claimed that she was raped on several times, but she did not tell anyone. It was his argument that the act of PW1 to remain silent, is a clear proof that nothing was done to her. The appellant argued further that, PW1 was unreliable witness as even in her evidence she failed to mention specific date and time when she was raped.

As regards the second ground of appeal, the appellant contended that the prosecution case was not proved beyond reasonable doubt as the evidence of PW1 was not corroborated because some of the crucial

witnesses including a person who investigated on the case together with the doctor who was alleged to have medically examined PW1 were not summoned to testify before the trial court. It was his argument that, failure by the prosecution to summon such important witnesses, without explanation, was sufficient to have moved the trial court to draw an adverse inference to the prosecution case. To support his proposition, the appellant cited the case of **Peter Abel Kirumi v. Republic,** Criminal Appeal No. 25 of 2016 (unreported).

On the fourth ground, the appellant argued that the witnesses' testimonies were recorded contrary to the dictates of section 210 (3) of the Criminal Procedure Act [Cap.20 R.E.2019] (the CPA) as their evidence, after being recorded was not read over to them. It was his argument that since the said evidence was not properly recorded, the same should be disregarded.

As regards the sixth ground, the appellant faulted the procedure adopted by the trial court of not according him the right to close his case. To amplify on his argument, he referred us to page 20 of the record of appeal and argued that the said omission was fatal and he was prejudiced. Based on his submission, the appellant concluded that the

prosecution case was not proved to the required standard and he thus urged us to allow the appeal and set him free.

In response, Ms. Kassala from the outset, declared her stance of opposing the appeal by fully supporting the conviction as well as the sentence meted out against the appellant. Responding to the first and second grounds of appeal, Ms. Kassala argued that, the same has no merit as the first appellate court properly re-evaluated the evidence on record. To clarify her point she referred us to pages 52 to 53 of the record of appeal and insisted that in its judgment the first appellate court re-evaluated the evidence and was satisfied with the findings of the trial court that PW1 was reliable and credible witness and that her testimony was corroborated by PW2. Relying on the principle established by this Court in proving sexual offences, Ms. Kassala argued that, the evidence of PW1 was the best evidence. To cement her proposition, she cited section 127 (7) of the Tanzania Evidence Act, [Cap. 6 R.E. 2019] (the Act), which empowers the Court to base a conviction on the evidence of the victim of rape without any corroboration, as long as the court is satisfied that the witness is telling the truth. To bolster her argument, she referred us to the case of **Selemani Makumba v. Republic** [2006] T.L.R 379. She

also added that in this case the testimony of PW1 was corroborated by PW2.

In relation to the appellant's complaint on the failure by the prosecution to call the investigation officer and the doctor as witnesses, Ms. Kassala relied on section 143 of the Act and stated that the law is settled on this aspect that there is no legal requirement for the prosecution to call a specific number of witnesses. it was her strong argument that even without summoning the said witnesses the evidence adduced by PW1 and corroborated by PW2 was sufficient to sustain appellant's conviction.

The learned Senior State Attorney refrained from submitting on the third and fifth grounds as she said that the appellant did not submit on them and had not specified the nature of the alleged procedural irregularities.

In respect of the fourth ground, Ms. Kassala admitted that there was non-compliance with the provisions of section 210 (3) of the CPA as the record does not indicate that after recording the evidence the same was read out to the witnesses. However, it was her argument that the said omission did not prejudice the appellant and thus the same is curable under section 388 of the CPA.

On the sixth ground, Ms. Kassala also readily conceded that the record is silent on the closure of the defense case, but she was quick to remark that the appellant was not prejudiced. To justify this point, she referred us to page 18 of the record of appeal where the appellant after being addressed in terms of section 231 (1) of the CPA, chose to testify under oath alone without summoning any other witness. In conclusion, Ms. Kassala contended that the prosecution case was proved to the required standard and urged us to dismiss the appeal in its entirety for lack of merit.

In rejoinder submission, the appellant did not have much to say other than reiterating what he submitted earlier and insisted that the appeal be allowed and he be set free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we find it appropriate to start by stating that, this being the second appeal, we are guided by a salutary principle of law which was restated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Omary Lugiko Ndaki v. The Republic**, Criminal Appeal No. 544 of

2015 (unreported) that, in a second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below if there is a misdirection or non-direction made. The rationale behind that, is that the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record.

Starting with the first and second grounds and to ascertain the appellant's complaints that the first appellate court failed to re-evaluate the evidence on record and that PW1 and PW2 were not credible and reliable witnesses, we have scanned the entire record of appeal and we agree with Ms. Kassala that the first appellate court properly re-evaluated the evidence and was satisfied with the findings of the trial court. We have also revisited the testimonies of PW1 and PW2 and there is no doubt that they clearly explained the incident. PW1 in particular at page 13 of the record of appeal testified on how the appellant undressed himself and then undressed her by removing her underpants and inserted his penis into her vagina and raped her. Likewise, PW2 at page 14 to 15 of the same record, testified on how she started living with PW1 after she found that she was sexually abused by the appellant and how she

examined her and took her to the hospital for further medical examination.

Pursuant to section 127 (7) of the Act, as rightly submitted by Ms. Kassala, in cases involving sexual offences the best evidence is that of the victim. The sole evidence of the victim can be safely relied upon by the court to sustain a conviction. For the sake of clarity, the said section provides that: -

> "*Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that, such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth*".

In the instant appeal, both the trial and first appellate courts properly applied the above principle and found PW1 to be a reliable and credible witness. The said courts also found that the testimony of PW1 was corroborated by PW2. The trial court at page 26, last paragraph

stated that, after assessing the credibility of the prosecution witnesses it had opted to believe them and concluded that the appellant raped PW1. See the case of **Selemani Makumba** (supra).

We are mindful of the fact that in his submission the appellant argued that the evidence of PW1 was not corroborated because the investigation officer and the doctor were not called to testify before the trial court. We find this argument to have no legal basis. As argued by Ms. Kassala, under section 143 of the Act, there is no legal requirement for the prosecution to call a specific number of witnesses. We also wish to add that, in rape cases, the testimony of the doctor or the PF3 are not the only evidence to prove rape. Other evidence on the record can as well prove it. We find support in our previous decisions in the cases of **Ally Mohamed Mkupa v. Republic,** Criminal Appeal No. 2 of 2008 and **Charles Joseph v. Republic,** Criminal Appeal No. 199 of 2016 (both unreported), where among other things, it was observed that rape is not proved by medical evidence alone, some other evidence may also prove it.

Similarly, in the case at hand, we hasten to remark that, even without the evidence of the doctor or even the PF3, the testimony of PW1

and PW2 is quite sufficient to prove that PW1 was raped. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore our settled view that there is no fault in the factual findings of the two courts below on these grounds for this Court to interfere. In the circumstances, the first and second grounds have no merit.

The fourth ground is straight forward and should not detain us. Much as we agree with both parties that the record does not indicate on how the trial magistrate complied with the requirements of section 210 (3) of the CPA, we hasten to remark that the said omission did not cause miscarriage of justice on the part of the appellant. We say so because, in his complaint the appellant made a blanket claim without indicating how he was affected. We are settled that such an omission is an irregularity which is curable under section 388 of the CPA, as the Court decided in the case of **Paul Dioniz v. Republic,** Criminal Appeal No. 171 of 2018 while quoting with approval the case of **Flano Alfonce Masalu @ Singu v. Republic,** Criminal Appeal No. 366 of 2018 (both unreported), that: -

> *"If we may go further and ask ourselves whether non-compliance of section 210 (3) of the CPA prejudiced the appellant to the extent that it occasioned*

miscarriage of justice, our answer would be in the negative. This is so because such anomaly can be cured under section 388 of the CPA. On this we are guided by the case of ***Flano Alphonce Masalu @ Singu v. Republic,*** *Criminal Appeal No. 366 of 2018 (unreported)..."*

For the reasons we have endeavoured to state above, we find no merit on this ground.

On the sixth ground, we also agree with both sides that the appellant was not accorded his right to close his case. Nevertheless, we equally agree with Ms. Kassala that the said omission had not occasioned any injustice on him. It is on record at page 18 of the record of appeal that on 6th October, 2014 after the appellant was addressed in terms of section 231 (4) of the CPA, he clearly indicated that he will testify alone without calling any witness and will produce three exhibits. However, at page 20 of the same record, on 20th October, 2014 when he testified in chief he did not tender any exhibits and during cross-examination when asked as whether he had any PF3 to produce, he responded that he had none. In the circumstances, we are satisfied that the omission to accord him the right to close his case did not occasioned any miscarriage of

justice as he had fully testified and had no any other witness to call. As such, we also dismiss this ground for lack of merit.

In conclusion and for the foregoing reasons, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

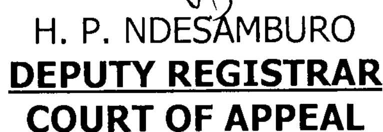
DATED at **ARUSHA** this 11th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of February, 2021 in the presence of the Appellant in person linked via video conference and Ms. Amina Kiango, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL