IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 260 OF 2020

YUSUPH SELEMAN @ NDUWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, J.)

dated the 12th day of May, 2020

in

Criminal Appeal No. 6 of 2019

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JUDGMENT OF THE COURT

15th & 21st March, 2022

NDIKA, J.A.:

The High Court of Tanzania sitting at Mtwara (Dyansobera, J.) dismissed an appeal by the appellant, Yusuph Seleman alias Nduwa, from the judgment of the District Court of Lindi. In doing so, the High Court affirmed the appellant's conviction for rape and the corresponding sentence of thirty years' imprisonment. Resenting the said outcome, the appellant now appeals on five grounds whose thrust is that the charged offence was not proved to the required threshold and that his defence was ignored.

Relying on the evidence adduced by four witnesses and supplemented by one documentary exhibit, the prosecution sought to establish the allegation that the appellant, on 15th October, 2018 at Nangaru village within the District and Region of Lindi, had carnal knowledge of a woman aged seventy-five years without her consent. So as to protect her modesty we will not disclose her name. Henceforth, we will refer to her as "the complainant" or simply as PW1.

The abridged facts of the case as stated by the learned first appellate judge are as follows: the prosecution case tended to show that PW1 was a sickly elderly woman aged seventy-five years, living at Nangaru village in Lindi. On 15th October, 2018 around 16:00 hours, she was walking back home from a neighbouring village where she had gone to pay homage to a departed relative. On the way she encountered the appellant, whom she knew very well, riding a bicycle. The appellant approached and asked her the direction to the home of a certain Nayeya, a popular person in the village. She obliged and showed him the path to Nayeya's home and they parted. A few moments later, the appellant resurfaced and followed her from behind, telling her in Swahili, *"Twende nikakutombe"*, meaning that *"Let's go and have sex."* She resisted his

overtures but the appellant got off the bicycle, pushed her into the bush under a mango tree and undressed her gown, widely known as *dela*. He then inserted his penis into her vagina lying on top of her having laid her supine. She screamed for help but her voice was too weak due to her ill-health and that the appellant had put his hand on her mouth to muffle her screams. When he was through, he put on his clothes, went back to the path and cycled away.

Fortuitously, Issa Abdallah (PW2), who passed near the scene of the crime as he was riding his bicycle on way to Nangaru village, responded to the complainant's distress call. According to him, he saw the appellant at the scene wearing his trousers before he cycled away. He knew the appellant very well. At the time, the complainant was still naked, her *dela* having been pulled upward. Thereafter, she narrated to PW2 what the appellant had done to her. PW2 took her to her home where she told her relatives what had befallen her. Around 18:30 hours, she was taken to the Village Executive Officer, Rashid Salum Rashid (PW3), who, on learning of the incident, referred her to the Police Station. At the Police Station, she was issued with a medical examination request (PF3). She proceeded to Nangaru Hospital for initial medical

investigation but further medical examination was done by Mashaka Alinisi (PW4) at the Sokoine Regional Hospital, Lindi on the following day (that is, 16th October, 2018). He established that the complainant's vagina revealed a rapture, a fresh wound and blood stains. He treated her by stitching the rapture. A high vaginal swab (HVS) revealed the presence of spermatozoa in her vagina. All these indicated that the complainant's vagina had been penetrated by a blunt object. PW4's medical report (PF3) was admitted as Exhibit P1.

In his affirmed testimony, the appellant denied the accusation flat out and raised an alibi. He averred that on 13th October, 2018 he went out for a night dancing event near his home but the occasion was marred by a scuffle that arose after a certain reveller was robbed of money. On the following day (that is, 14th October, 2018) he was arrested on stealing suspicion. He was locked up at the village offices until the following day. He was taken aback that following his release, he was arrested and taken to the Police Station where he was booked for the offence committed during his confinement at the village offices.

The trial court (Hon. F.S. Kiswaga – RM) found it established, upon the testimonies of PW1 and PW4 as well as Exhibit P1, that the

complainant was sexually assaulted. As to who the perpetrator of the crime was, the learned trial magistrate believed the complainant's version pointing an accusing finger at the appellant. He reasoned that the incident occurred in daytime around 16:00 hours on 15th October, 2018 and that PW1 recognized the appellant whom she knew well. He also took into account PW2's evidence that he saw the appellant at the scene wearing his trousers immediately after the offence was committed and that he ran away shortly thereafter. Thus, PW2's evidence reinforced the complainant's narrative.

On the first appeal, the High Court sustained the trial court's findings of fact, which, it noted, were substantially based upon the credibility and reliability of the prosecution witnesses. Accordingly, the court upheld the conviction and sentence thereby dismissing the appeal.

As hinted earlier, the appellant lodged five grounds of complaint to the effect that the charged offence was not proved beyond reasonable doubt and that his defence was not duly considered by the courts below.

At the hearing of the appeal, the appellant, who was self-represented, basically urged us to allow his appeal and rested his case.

For the respondent, learned Senior State Attorney Ms. Faraja George supported the conviction and sentence. She contended that the evidence on record established the core of the charged offence laid under section 130 (1) of the Penal Code, Cap. 16 RE 2019, which is that there was penetration into the complainant's vagina, that the sexual intercourse was without the complainant's consent, and that the perpetrator of the sordid act was the appellant. Elaborating, she submitted that, PW1 gave a detailed and compelling account on how the appellant clutched her, in daytime around 16:00 hours, to a mango tree in a bush, undressed her and had sex with her by force. That, her narrative drew support from both PW2 and PW3. Beginning with PW2, she argued that he arrived at the scene when the appellant was wearing his clothes after the sexual act while the complainant was lying naked on the ground. PW1 related to him what had befallen her. At that point the appellant had vanished from the scene. Regarding PW3's testimony, she contended that the medic's findings as documented in Exhibit P1 were consistent with the complainant's evidence that she was sexually assaulted. It was her submission that the prosecution case was watertight.

As regards the appellant's alibi, Ms. George conceded that the trial court did not consider the defence having narrated it in summary in its judgment, as revealed at page 30 of the record of appeal. She submitted further that the anomaly was not remedied on the first appeal as the High Court only considered the defence rather fleetingly, as shown at pages 63 and 64 of the record of appeal. Nonetheless, she contended that the appellant's alibi was negated by the evidence of the Village Executive Officer (PW3) who procured the appellant's arrest after the rape complaint was reported to him. In conclusion, the learned State Counsel urged us to dismiss the appeal.

The appellant had nothing substantial in his rejoinder except that he reiterated his plea that his appeal be allowed.

Inasmuch as this is a second appeal, we are mandated, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2019, to deal with matters of law only but not matters of fact. However, in consonance with our decision in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a series of decisions that followed, we can only intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the

evidence or where there was a miscarriage of justice or a violation of some principle of law or practice – see also **D.R. Pandya v. R.** [1957] E.A. 336.

Furthermore, we are cognizant that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, the testimony of the complainant is mostly crucial and must be examined and judged cautiously. Indeed, in this context, we held, for instance, in **Selemani Makumba v. Republic** [2006] TLR 379, that the best proof of rape (or any other sexual offence) must come from the complainant. Accordingly, the complainant's credibility becomes the most important matter for consideration. If the evidence of the complainant is credible, convincing and consistent with human nature as well as the ordinary course of things, it can be acted upon singly as the basis of conviction – see section 127 (6) of the Evidence Act, Cap. 6 R.E. 2019.

We have considered the grounds of appeal and examined the record of appeal in the light of the contending submissions. At the beginning, we should state that, as rightly submitted by Ms. George, the gravamen of the offence that the appellant faced was that he had sexual

intercourse with the complainant without her consent. The prosecution had to establish that there was penetration into the complainant's vagina, that the sexual intercourse was without the complainant having consented to it, and that the perpetrator of the sexual act was the appellant.

We have re-appraised the testimonies of PW1, PW2 and PW3 as well as Exhibit P1 in the light of the concurrent findings of the courts below. To begin with, we think that it is too plain for argument that on the evidence on record it was proven that the complainant was raped on the fateful day. Her evidence on that aspect was not challenged by the appellant in cross-examination. PW4's findings as documented in his medical report (Exhibit P1), that the complainant sustained injuries due to forceful penetration by a blunt object into her vaginal orifice, were consistent with her claim that she was carnally known without her consent.

As to who the perpetrator was, the courts below gave full credence to PW1's testimony naming the appellant as the ravisher. It is clear that PW1 narrated about her painful ordeal at the hands of the appellant, so explicitly, truthfully and reliably. According to her, the incident occurred

in daytime around 16:00 hours and that she knew the appellant very well, implying that the identity of the assailant was a non-issue. Both courts took the view that her evidence was clear, spontaneous and reliable. It occurs to us that, in examining the evidence, both courts had in mind the important consideration that the best evidence of a sexual offence must come from the victim in consonance with the dictates of section 127 (6) of the EA – see also **Selemani Makumba** (*supra*). Moreover, to her further credit she named the appellant to PW2 and PW3 as the perpetrator of the crime at the earliest opportunity. That happened after PW2 came to the scene of the crime to her rescue, and afterward after her relatives took her to the village offices to the attention of PW3. It is apt to recall, in this context, our observation in the case of **Marwa Wangiti and Another v. Republic** [2002] T.L.R. 39 that:

> "***The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility,*** *in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."* [Emphasis added]

It is also re-assuring that after the victim had mentioned the appellant as the perpetrator, PW3 immediately arranged for the appellant's arrest, which occurred on later that day.

Strikingly, there was no evidence or even a suggestion that the complainant was prompted or actuated by an improper motive in making the accusation against the appellant. The absence of such a motive is further assurance that she reported the incident for no reason other than for pursuing justice for herself for the sexual act committed against her.

We go along with the learned Senior State Attorney that the complainant's testimony was supported by PW2, who, on arriving at the scene in response to the complainant's distress call, saw the appellant wearing his clothes after the sexual act while the complainant was lying supine on the ground naked. What the appellant did was what a criminal caught up at the scene would do: vanishing from the scene. All told, we think that the lower courts' concurrent finding that the appellant was the ravisher that abused the complainant is clearly unassailable. In the absence of showing that the courts below overlooked certain facts of substance or significance or that their findings are clearly arbitrary or

perverse, the concurrent conclusions of the said courts must be respected and upheld.

We recall that the appellant bewailed that his defence was not duly considered by the courts below. With remarkable forthrightness, Ms. George conceded, rightly so, to the anomaly. In that regard, she submitted that the High Court did not fully remedy the trial court's failure to consider the defence as it should have because it dealt with it rather fleetingly.

On our part, we were constrained to step into the shoes of the High Court to do what ought to have done. Accordingly, we reviewed and weighed the appellant's alibi against the prosecution case. In essence, the appellant claimed that the alleged rape occurred when or about the time he was detained at the village offices on suspicion of stealing and that he was stunned to be arrested and taken to the Police Station after he was released from incarceration on 15th October, 2018.

Certainly, it is on record that the appellant did not furnish any notice of his intention to rely upon an alibi by furnishing the particulars thereof to the trial court and to the prosecution in terms of section 194

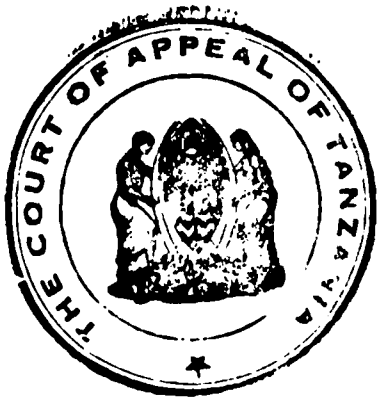
(4) of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA"). He raised that defence after the prosecution had closed its case. While the trial court had discretion in terms of section 194 (6) of the CPA on whether or not to accord any weight to the alibi, it was not authorized to treat it as if it was never made. The court had to take cognizance of the defence and proceed to exercise its discretion judiciously – see **Charles Samson v. Republic** [1990] TLR 39; **Mwita s/o Mhere & Ibrahim Mhere v. Republic** [2005] TLR 107; and **Marwa Wangiti** (*supra*).

Having said that, we are at one with the learned Senior State Attorney that PW3's evidence negated the alibi. It is in evidence that PW3 narrated clearly how the appellant was arrested after PW1 had reported her ordeal to him around 18:30 hours on the fateful day. He recalled that after learning of the allegation he sent out a militiaman who went out, apprehended and brought the appellant to the village offices that evening. PW3 did not suggest that the appellant had been detained at the offices since the day before. More importantly, the appellant did not cross-examine PW3 on this aspect. Had his claimed alibi been true, we think, he would have cross-examined PW3 on it so as to lay out the foundation for his intended alibi. In the premises, we take the view that

the alleged alibi was an afterthought. In the premises, we find no merit in all the grounds of appeal. We dismiss them all.

In the final analysis, we find that the appeal was lodged without any justification. We dismiss it in its entirety.

DATED at **MTWARA** this 19th day of March, 2022.



G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Abdulrahman Msham, Senior State Attorney learned counsel for the respondent/Republic is hereby certified as a true copy of original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL