IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL No. 239 OF 2019

SOSPETER RAMADHANI ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... RESPONDENT

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

(Mashauri, J.)

dated the 10th day of June, 2019
in
Criminal Appeal No. 149 of 2018

.....

JUDGMENT OF THE COURT

7th & 15th February, 2022

KIHWELO, J.A.:

What precipitated this appeal is the arraignment of Sospeter Ramadhani, the appellant herein, before the Resident Magistrates' Court of Katavi at Mpanda in Criminal Case No. 21 of 2017 in which he was indicted for trial with the offence of rape contrary to the provisions of section 130 (2) (e) and 131 (1) 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 15/02/2017 on or about 12:00 Hours at Msasani area within the District of Mpanda in Katavi Region, the appellant, did rape a girl aged ten years, who we shall henceforth

identify as PW1, 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 three prosecution's witnesses to testify namely; the victim (PW1), Fortunate William (PW2) and Anthony Jumanne Kisubi (PW3). The evidence of the prosecution witnesses, was supplemented by one documentary exhibit, the PF3 of PW1 (exhibit P1). On his part in defence, the appellant relied on his sworn testimony and that of Berta Sospeter (DW2) to beef up his defence.

Before canvassing the points of grievance, we find it desirable first, to give essential factual background to the appeal as can be gleaned from the totality of the evidence on record.

Briefly, the prosecution case which was believed by the trial court shows that, on 15/02/2017 at about 12:00 HRS, PW1 who was a Standard IV pupil at Muungano Primary School went back home from school for a short break and was allured by the appellant who had left with PW1's young brother to the appellant's house. Upon arrival at the appellant's house, PW1 was directed by the appellant to go inside and take the child who was said to be sleeping but as soon as PW1 entered inside the appellant's living room she found herself in the arms of the appellant who forcefully restrained her

from leaving with the child and instead the appellant pushed PW1 to his bedroom and tightly held her throat, undressed her and started threatening to kill her with a knife in case she attempted to scream or tell anyone. The appellant then satisfied his dark desires by forcefully raping PW1 and later let her leave with the child. PW1 frantically went back home where she reported the incident to a friend who informed his brother who ultimately relayed the information to her mother, PW2 who inspected PW1's private parts and noticed blood stains and some whitish substances. PW2 reported the matter to the police and the wheels of justice were put in motion upon which the appellant was arrested and apprehended before the trial court.

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 (Mashauri, J.) 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.

The appellant lodged a memorandum of appeal comprising of five grounds. On our part, we have found that the grounds of appeal raise the following five paraphrased points of grievance: **One**, that the prosecution did not prove its case beyond reasonable doubt. **Two**, that the prosecution did not produce documentary evidence and material key witness to testify. **Three**, that the evidence of PW1 and PW2 was family evidence and therefore not credible to warrant conviction. **Four**, that the first appellate court did not consider the defence case, and **five**, that the clinical officer was not a competent person to examine the victim and prove the serious allegations.

At the hearing of the appeal before us on 07/02/2022, the appellant appeared in person, and had no legal representation. Upon being invited to address us on the grounds of appeal, he implored us to adopt the grounds 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. Paschal Marungu, learned Principal State Attorney who teamed up with Ms. Hongera Malifimbo and Mr. Gregory Muhangwa both learned State Attorneys who bravely resisted the appeal.

In his reply submissions, Mr. Marungu, expressed his stance at the very outset that the respondent Republic was supporting the appellant's conviction and the flanking sentence meted out to him and prefaced his submission by arguing that from the five grounds of appeal which have been raised by the appellant, one ground did not feature in the appeal before the first appellate court, but since it raises a point of law it can be entertained by the Court and therefore would be argued. He went on to submit that from the remaining four grounds of grievance, two grounds are legal and two grounds are factual and as a matter of practice he would start with legal grounds and finish with factual grounds.

Responding to ground four which is a complaint that the first appellate court did not consider the appellant's defence, Mr. Marungu, who was very brief and to the point replied that the first appellate court sufficiently addressed and accordingly considered the defence case. He referred us to page 66 paragraph 5 as well as page 67 paragraph 1 of the record of appeal to buttress further his submission. The learned Principal State Attorney argued that this ground should be dismissed.

With regard to ground five wherein the appellant complains that, the clinical officer was an incompetent person to fill the PF3, (exhibit P1) and therefore his evidence was inadmissible, Mr. Marungu, rebutted the

contention by arguing that it is true that the clinical officer is not defined by neither the Medical Practitioners and Dentist Act, Cap 152 of the Revised Edition 2019 nor the Medical, Dental and Allied Health Professionals Act, 2017, Act No. 11 of 2017. However, the learned Principal State Attorney argued that the Court has since settled this and resolved that a clinical officer is a qualified medical practitioner authorized to conduct medical examination. To facilitate the appreciation of the proposition put forward by the learned Principal State Attorney, he referred us to our earlier decision in the case of **Juma Said v. Republic**, Criminal Appeal No. 449 of 2017 (unreported).

Moreover, the learned Principal State Attorney argued an additional point of law which was not raised by the appellant and this is in relation to the PF3 exhibit P1. While referring to pages 18 and 19 of the record, Mr. Marungu, contended that exhibit P1 was irregularly admitted in evidence since the same was not cleared first for admission and furthermore exhibit P1 was not read over after admission contrary to the requirement of the law. He therefore prayed that exhibit P1 should be expunged from the record.

In relation to ground three which is about the evidence of PW1 and PW2 which was regarded as evidence of family members the learned Principal State Attorney submitted that, the conviction of the appellant did not solely depend on the evidence of PW1 and PW2 but also PW3 the clinical

officer who was not a family member. He further submitted that, even if that was the case the law does not prohibit family members or a relative in that case from testifying in cases relating to relatives. Reliance was placed on section 127 (1) of the Evidence Act, Cap 6 Revised Edition 2019 (henceforth "the EA") as well as the case of **Simon Emmanuel v. Republic**, Criminal Appeal No. 531 of 2017 (unreported).

As to ground two which relates to the complaint that the cautioned statement of the appellant was not produced in evidence and the police who investigated the crime was not called to testify, the learned Principal State Attorney was fairly brief. He argued that the law does not specify any particular number of witnesses required to prove or disprove a fact and to fortify his argument, he referred us to section 143 of the EA as well as the case of **Tafifu Hassan @ Gumbe v. Republic,** Criminal Appeal No. 436 of 2017 (unreported). He further argued that it is upon the prosecution to choose which witness to produce and which evidence to tender.

Finally, as regards to the first ground of appeal that the prosecution did not prove the case to the required standard, the learned Principal State Attorney submitted that, the prosecution proved the case beyond reasonable doubt through the evidence of PW1, PW2 and PW3. He contended that the appellant was charged for rape contrary to section 130 (2)(e) of the Penal

Code in which two elements are critical to be proved, that is age and sexual intercourse and that PW2 proved the age of PW1 to be 11 years at the time PW2 testified and that in any case age was not in dispute and that PW3 testified that he examined PW1 the victim who was below 18 years and found out that she was a victim of forceful vaginal penetration. The learned Principal State Attorney, argued further that the issue of sexual intercourse was further proved by PW2 who inspected PW1 after the incident but more so PW1, the victim testified that she was raped by the appellant. He further argued that even if exhibit P1 is expunged from record, the oral evidence of PW3 is strong to corroborate the evidence of PW1 and PW2.

Having argued as above, the learned Principal State Attorney impressed upon the Court that the case against the appellant was proved beyond reasonable doubt. He implored us to dismiss the appeal in its entirety.

In a short rejoinder, the appellant being a layperson and unrepresented did not have much to say. He briefly submitted that the case against him was not proved beyond reasonable doubt and implored upon us to consider his grounds of appeal, allow the appeal and set him free.

Having summarised the background facts of the case and the submissions of the parties, we should now be in a position to confront the grounds of appeal. 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). In discussing the grounds of appeal, we shall discuss them in a pattern preferred by the learned Principal State Attorney.

Starting with the fourth ground of appeal, the appellant complains that the first appellate court did not consider the appellant's defence. Mr. Marungu, resisted this argument with some force and to our mind rightly so. We wish to emphasise the time honoured 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. We have scanned the record of appeal in some considerable detail and have been able to

conspicuously establish that the first appellate court discussed the appellant's defence and that of DW2 who was called by the appellant. However, the first appellate court observed that what the appellant testified before the trial court was in variance to what he said before the first appellate court in support of the appeal and the first appellate court came to the conclusion that the appellant's defence was a mere afterthought. We are thus in agreement with Mr. Marungu and dismiss the complaint by the appellant to the effect that the first appellate court considered the appellant's defence before dismissing the appeal.

We now turn to consider ground five the kernel of which is that, the clinical officer was an incompetent person to fill in the PF3, (exhibit P1) and therefore his evidence was inadmissible. We think this ground should not detain us, for, as rightly submitted by the learned Principal State Attorney, this is not the first time the Court is faced with the question on whether a clinical officer is a competent person to conduct medical examination. It suffices to restate that the Court has since settled and made it clear that a clinical officer is a qualified medical practitioner authorised to conduct medical examination. We find solace in the case of **Juma Said** (supra) in which we relied on our previous decisions in **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016, **Julius Kandonga v. Republic**, Criminal

Appeal No. 77 of 2017 and **Filbert Gadson @ Pasco v. Republic**, Criminal Appeal No. 267 of 2019 (all unreported). In **Charles Bode** (supra) the Court defined the term "clinical officer" to mean:

> *"A gazetted officer who is qualified and authorised to practice medicine. A clinical officer observes, interviews and examines sick and health individuals in all specialties to document their healthy status and applies pathological, radiological, psychiatric and community heath techniques...."*

By parity of reasoning, PW3 in the instant case as a clinical officer was competent to examine PW1 the victim as he did and established that PW1 was actually raped. In the circumstances, we find that the fifth ground of appeal is devoid of merit.

With regards to irregular admission of the PF3 (exhibit P1), Mr. Marungu argued and to our mind rightly so, that exhibit P1 was irregularly admitted in evidence. Indeed, the record of proceedings bear out that the PF3 was tendered and admitted in evidence before it was first cleared for admission and immediate after admission it was not read over to the appellant for him to understand its contents. For the sake of clarity, we wish to let record of appeal at pages 18 and 19 speak for itself:

"PW3- XD by Muhangwa (SA)

I can identify the PF3 of Rehema Ramadhani, amongst other facts, by hand mittings (sic), signature etc.

I pray to tender PF3 of Rehema Rmadhani (sic) dated 16/02/2017. ***Accused****: I object. I did not commit rape.*

Court*: PF3 of Rehema Ramadhani dated 16/02/2017 is admitted as evidence and marked exhibit P1.*

Objection overruled.

That is all section 210 (3) of the CPA Clwith (sic)"

As it can be seen in the excerpt of the proceedings above the PF3 (exhibit P1) was not first cleared for admission before it was admitted in evidence as the court overruled the objection after the PF3 was admitted in evidence and marked exhibit P1. Furthermore, exhibit P1 even after its admission in evidence was not read out. This is contrary to the dictates of law which requires that whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out. See, for instance **Robinson Mwanjisi and Others v. Republic**, [2003] TLR 218 in which this principle was laid out.

In the circumstances above and for the reasons stated, we accordingly expunge exhibit P1 from the record. As to the consequences that may befall

following the expunging of exhibit P1, we reserve the answer to this question for now.

We have considered the learned submissions in relation to ground three which is about the evidence of PW1 and PW2 which was regarded by the appellant as evidence of family members and in our view, there is, in this regard, a long and unbroken chain of decisions of the Court which underscores the fact that there is no provision of the law which prevents a relative or family member from testifying in cases involving relatives - See, for instance the case of **P. Taray v. Republic**, Criminal Appeal No. 216 of 1994 (unreported) which was cited in **Simeon Emmanuel** (supra). In the former case we stated that:-

> *"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events it must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them."*

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 EA 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. In the instant appeal the trial court considered and was satisfied that PW1 and PW2 were competent, credible and reliable witnesses and in any case credibility of witnesses is the exclusive domain of the trial court which had an opportunity of seeing the demeanour of witnesses. We thus find this ground wanting in merit. We dismiss it.

As regards to the second ground of appeal which relates to the complaint that the cautioned statement of the appellant was not produced in evidence and the police who investigated the crime was not called to testify, at the outset, we wish to reaffirm the elementary principle of law under section 143 of the EA as rightly stated by the Principal State Attorney that, there is no particular number of witnesses required to prove a fact as it was aptly discussed in **Yohana Msigwa v. Republic** [1990] TLR 148, **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 and **Godfrey Gabinus @Ndimbo and Two Others v. Republic**, Criminal Appeal No. 273 (both unreported).

It is commonplace that, the truth is not discovered by a majority of votes. One solitary credible witness can establish a case beyond reasonable

doubt provided that the court finds the witness to be cogent and credible and the case in point is the victim of sexual offence as laid down in the celebrated case of **Selemani Makumba v Republic** [2006] TLR 379.

We think, with respect, that, the complaint by the appellant that the respondent Republic failure to produce some documentary evidence and key material witness to testify at the trial affected the weight of the prosecution's case is unfounded. This complaint, therefore, does not merit and we dismiss it.

With regard to the first ground, we are firm that the prosecution proved the case to the required standard, that is, beyond reasonable doubt. As rightly argued by the learned Principal State Attorney, the victim, a child under eighteen was found by the trial court to be a witness of truth. She testified that the appellant had sexual intercourse with her, the fact which was proved by PW2 the victim's mother who inspected PW1's private parts immediately after the incident and found out that her underpants had blood stains and she was bleeding from her private parts and had slippery whitish substance. The evidence of penetration was also given by PW3 the clinical officer who medically examined PW1 and observed that there was forceful vaginal penetration and the hymen was raptured and bleeding. The oral

evidence of PW3 remained intact even after exhibit P1 was expunged from the record and therefore it corroborated the evidence of PW1 and PW2.

Be that as it may be, we are, on the strength of the evidence on record, satisfied that the case for the prosecution was proved beyond reasonable doubt. In similar vein, we have found no justification for interfering with the concurrent findings by the two courts below. We dismiss the appeal.

DATED at **MBEYA** this 14th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered on this 15th day of February, 2022 in the presence of the appellant in person, unrepresented and Safi Kushindi Amani learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL