IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUGASHA, J.A., LEVIRA, J.A, And FIKIRINI, J.A)

CRIMINAL APPEAL NO. 573 OF 2020

FAHADI KHALIFA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Dodoma at Dodoma)

(Dudu, PRM-Ext Juris.)

dated 2nd day of July, 2020
in
Criminal Appeal No. 16 of 2020

JUDGMENT OF THE COURT

5th & 9th May, 2022

LEVIRA, J.A.:

In the District Court of Kondoa at Kondoa, the appellant, Fahadi Khalifa was charged with the offence of rape contrary to sections 130(1) (2) (e) and 131 (3) of the Penal Code, Cap 16 R.E. 2019. Upon a full trial he was convicted and sentenced to 30 years imprisonment. Aggrieved, he unsuccessfully appealed to the Resident Magistrate's Court (Extended Jurisdiction) and hence the current appeal.

Briefly, the factual background leading to the current appeal is that, the prosecution alleged that on 6th April, 2019 at about 14:00

hours at Pahi Village within Kondoa District in Dodoma Region, the appellant did unlawfully have carnal knowledge of the victim, a girl of 13 years old whom we shall refer to as PW2 throughout so as to disguise her identity. According to PW2, on the material day she was at home alone when the appellant came and requested for a drinking water. However, having been served with water, the appellant pretended to leave but he was hiding behind bricks and after a while he suddenly appeared where PW2 was. He dragged her inside her mother's house, took off her gown and underwear and he as well took off his clothes. Thereafter, he inserted his penis in PW2's vagina, an act which made her feel pain. After a little while, PW2 saw some white stuff coming out of the appellant's penis which he poured on the bed and fled. PW2 shouted for help but nobody came to her rescue.

According to PW2 the appellant fled from the scene of crime after her mother, one Amina Hussein (PW1) had arrived home; and thus, PW1 found the appellant inside the house. PW2 narrated to PW1 the whole incident and later, PW1 reported it to the Village Executive Officer (the VEO). In her evidence, PW1 testified that when she got home on the material day, she found PW2 crying a lot and upon asking her what

had befallen her, the response was that she was raped by the appellant who fled from the scene after the incident. The matter was reported to the VEO as intimated above. While at the VEO's office, the appellant ran away upon seeing PW1. The VEO together with other people chased him and finally he was apprehended. PW2 was given a letter by VEO and sent PW2 to Pahi Medical Centre for medical examination. On 7th April, 2019 PW1 reported the incident to Kondoa Police Station where she was issued with Police Form No. 3 (PF3) by D/Corpl. Joseph (PW4) and she sent PW2 to Kondoa District Hospital for further examination and treatment after which, they returned to the police and later went home.

At Kondoa District Hospital, PW2 was attended by Amon James, Clinical Officer (PW3). In his examination which was conducted on 7th April, 2019, the second day after the incident, PW3 found that there were no bruises on the wall of PW2's vagina and the colour around it was normal. He made further examination by inserting his finger in her vagina, but PW2 did not feel any pain. PW3 proceeded to examine other sexual transmitted diseases but found none. He filled the PF3 (exhibit P1) and concluded that it was impossible that PW2 was raped.

In his testimony PW4 stated that his investigation of the matter depended on the information he gathered from the PF3 returned to the police station after examinations of PW2 by PW3. Since the report showed that PW2 was not raped and following the denial by the appellant that he did not rape the appellant at the time of recording his cautioned statement, PW4 said, he had no other evidence to connect the appellant with the offence he was charged with.

The appellant testified as DW1 and he raised a defence of alibi, that on the material day he spent almost the whole day in the farm cutting grasses for cattle. He left home in the morning and he returned at around 16:00 hours. Upon arriving home, his mother sent him to take sunflower to the machine which he did. He left the sunflower at the machine and headed to the market where he met a mob of people who started chasing him with stones claiming that he raped PW2 at around 14:00.

The appellant's defence was fortified by that of Hemeni Mashaka (DW2) who testified to the effect that, he was with the appellant on the material day and narrated almost exactly as what DW1 stated in his defence. According to him, when they left the milling machine with the

appellant, he returned home and that is when the appellant was arrested. Later, DW1 came to learn that DW1 was accused of raping PW2.

In this appeal, the appellant has raised seven (7) grounds of appeal which for convenience purposes, we shall cluster them under one complaint; thus, the prosecution case was not proved beyond reasonable doubt so it was wrong for the first appellate court to sustain his conviction and sentence.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Ms. Benadetha Thomas Sinyaw, learned State Attorney.

The appellant adopted his grounds of appeal and preferred to hear first from the State Attorney as he reserved his right to make a rejoinder.

In reply, initially, Ms. Sinyaw opposed the appeal. However, in the cause of making submissions she changed her mind and supported it on account that the prosecution did not prove the case to the required standard. It was her submission that much as the evidence of PW2 who

was the victim proved that she was penetrated, there was no sufficient evidence adduced to prove that it was the appellant who raped her.

Submitting in respect of identification of the appellant by PW2, the learned State Attorney stated that although the incident took place during broad day light, PW2 failed to describe the person who raped her. She added that the record of appeal is silent whether PW2 knew the appellant before the incident. She argued that although the evidence of PW2 revealed that when PW1 arrived home she found the appellant inside the house, likewise, there was no description of the appellant forth coming from PW1. However, she averred that it was not the evidence of PW1 that she found the appellant inside the house. According to PW1, she saw the appellant while at VEO's office and it is when the appellant was chassed and later arrested. It was also her argument that PW2 did not identify the appellant at the dock. According to the learned State Attorney, in totality PW2 was not a credible witness.

Ms. Sinyaw argued further that apart from failure of PW1 and PW2 to describe the appellant, their evidence had material contradiction as regards where the appellant was found by PW1. While on one hand PW2 stated that he was found inside PW1's house, PW1 on the other

hand stated in her evidence that he saw him while they were at the VEO's office.

Another weakness of the prosecution evidence spotted out by Ms. Sinyaw is on failure of the prosecution to re-examine PW4 when he stated that having done his investigation, he did not find any evidence to connect the appellant to the charged offence at page 25 of the record of appeal. She thus submitted that on account of PW4's evidence, the conclusion of PW3 at page 21 of the record of appeal that PW2 was not raped, stands.

Ms. Sinyaw concluded her submission by stating that the prosecution, particularly PW2 managed to prove that she was raped, but the evidence on record suffers shortfall as to who raped her. In the circumstances, she said, the prosecution case was not proved beyond reasonable doubt. She thus urged us to allow the appeal quash conviction and set aside appellant's sentence.

For obvious reason, the appellant had no rejoinder except to beseech the indulgence of the Court to set him free.

Having heard the submission by the parties and thoroughly gone through the record of appeal, we proceed to determine the sole issue in this appeal, whether the prosecution case against the appellant was proved beyond reasonable doubt. We are mindful that this being the second appellate Court, we are not required to interfere with the concurrent findings of the Courts below unless there has been misapprehension of the nature and quality of evidence occasioning miscarriage of justice. Having that position in mind, we now proceed to scrutinize the evidence on the record to ascertain the credibility of prosecution witnesses *vis-a-vis* the appellant's defence so as to satisfy ourselves whether the Resident Magistrate with Extended Jurisdiction was justified to uphold the appellant's conviction and sentence.

The law is settled that the best evidence in sexual offences like the current case, comes from the victim. It is also settled law that the evidence of a child of tender age in sexual offence can be relied upon without corroboration after assessment of such evidence by the court to ground conviction of an accused person. This is in terms of section 127 (6) of the Evidence Act, Cap 6 R.E. 2019 (the Evidence Act); it reads:

"(6) 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 sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years 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 the child of tender years or the victim of sexual offence is telling nothing but the truth."

In the present case, PW2 a child of tender years is a victim of sexual offence. According to the record, she was alone at home when the appellant came and committed the alleged offence. Although, she said her mother (PW1) found the appellant at home when she arrived and thereafter the appellant fled, the record is silent as to whether PW1 found the appellant *inflagrante delicto*. For this reason, PW2 remained

to be the only key witness. However, in assessing the credibility of the evidence of PW2, we shall as well consider the testimonies of other prosecution witnesses when the need arises. In the case of **Elisha Edward v. Republic,** Criminal Appeal No. 33 of 2018 the Court restated the position set in its previous decision in **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2001 (both unreported) when emphasising on assessment of credibility of witnesses; thus:-

> *"Credibility of a witness is the monopoly of the trial court but only in so far as demenor is concerned. The credibility of the witness can also be determined in two other ways.* ***One,*** *when assessing the coherence of the testimony of that witness and* ***two,*** *when the testimony of that witness is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

As intimated above it is clear on the record of appeal that, in her testimony PW2 narrated at page 16 on how the incident occurred on the

material day. However, throughout the record, she referred the person who raped her as the accused person. She never mentioned his name be it to neither her mother who allegedly found the appellant at the scene of crime nor to the police station when she went with PW1 to report the incident. Failure of PW2 to name the appellant at the earliest opportunity creates doubt on prosecution case. This position was stated in **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39.

As regards to whether PW2 was raped, this issue is straight forward in the record of appeal. PW2 clearly testified on how the accused took off her clothes and his and thereafter inserted his penis in her vagina. This act alone suffices to establish that she was raped taking into consideration that she was a child of tender age and thus consent was immaterial. To that extent, we agree with Ms. Sinyaw that the prosecution proved that PW2 was raped taking into consideration that in sexual offences the best evidence comes from the victim – see: **Selemani Makumba v. Republic** [2006] TLR 149. However, we should remark that it is not always the case that such evidence is taken as wholesome, believed and acted upon to convict an accused person without considering other evidence and circumstances of the case. In

the case at hand, upon examining the evidence of PW2 and that of other witnesses, we find that much as it established that she was raped, it was not credible enough to hold the appellant responsible for the offence of rape committed to PW2. We shall explain.

The record of appeal is silent whether PW2 knew the appellant before the incident. She only said the accused came, asked for a drinking water and later he dragged her into the house and eventually, raped her. The said accused fled when her mother (PW1) arrived home. To the contrary, PW1 testified at page 14 of the record of appeal that when she arrived home, she found PW2 crying. Upon inquiry as to what had happened, PW2 told her that she was raped by the accused who fled from the scene after the incident. Looking at the coherence of PW2's evidence in this respect, it is clear that there was none as she gave a different account of what had transpired to her mother (PW1) and in her evidence before the court.

Another aspect which we think is crucial is in respect of the identification of the person who raped PW2. The appellant was named by PW2's mother for the first-time during cross-examination by the appellant at page 15 of the record of appeal where she stated: -

"I asked the victim and she told me she was raped by Fahad Halifa."

The question that follows is that, if at all PW2 knew the appellant by name, why then she did not mention him in her evidence? This question does not leave PW2's evidence safe as she equally failed even to describe him or without prejudice make dock identification during trial. We make this remark full minded that normally dock identification is preceded by identification parade which is not the case herein. In **Francis Majaliwa Deus & 2 Others v. Republic,** Criminal Appeal No. 139 of 2005 (unreported), the Court subscribed to the position stated in a foreign decision of the Court of Appeal of Kenya in **Gabriel Kamau Njoroge v. Republic,** [1982 – 88] I KAR 1134, 136; thus: -

"Dock identification is worthless (the court should not rely on a dock identification) unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade."

See also **Wambura Mniko Bunyige v. Republic,** Criminal Appeal No. 256 of 2010 (unreported).

In the current case nothing on record indicates that PW2 described the person who raped her. There was no identification parade conducted to identify that person though we think, since the appellant was not familiar to PW2, there was a need for an identification parade. Failure of PW2 to mention and describe the person who raped her affected the value of her evidence and hence tainted her credibility. We are of the increasingly view that this might be a case of mistaken identity. See: **Shija Bosco @ Hamis v. Republic**, Criminal Appeal No. 20B of 2009 (unreported)

Equally, the evidence of PW2 and PW1 was as well, is not credible as it contradicted on evidence the place where the appellant was found by PW1 on the material day. In determining the issue of contradiction, we are guided by the settled position in **Dickson Elia Shapwata v. Republic,** Criminal Appeal No. 242 of 2010 (both unreported) which states: -

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out*

sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."

In the light of the settled position above, we think it was incumbent on the prosecution to clear doubt as to where exactly the appellant was found by PW1 on the material day. In his defence the appellant raised a defence of *alibi* which was not considered by the first appellate court. It is doubtful in the circumstances of this case, in the absence of identification of the appellant by PW2 and the contradiction of her evidence with that of PW1 thereof to conclude that the appellant was not elsewhere on the material day and that indeed, it was the appellant who raped her. We are settled that the contradiction on the place where the appellant was found by PW1 and lack of identification of the appellant was not a minor contradiction in the circumstances of this case as it watered down the credibility of both, PW1 and PW2. The evidence of those witnesses failed to bring the appellant into the scene of crime. As a result, such evidence could not be relied upon by the first appellate court to sustain the appellant's conviction and sentence.

Consequently, on account of incredible prosecution evidence coupled with contradictions, we find that the issue raised is answered in negative. The appeal is merited and we allow it, quash the conviction and set aside the appellant's sentence. We order immediate release of the appellant unless otherwise lawfully detained in custody.

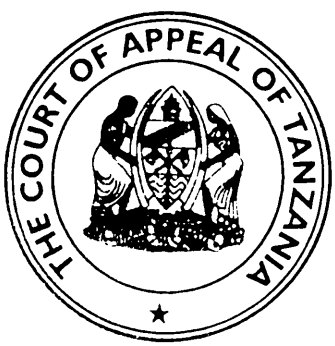
DATED at **DODOMA** this 9th day of May, 2022

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 9th day of May, 2022 in the presence of the appellant in person, and Ms. Bernadetha Thomas, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL