IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

KWARIKO, J.A., SEHEL , J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 57 OF 2022

HASSAN SINGANO @ KANG'OMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Tanga District Registry at Tanga)

(Mkasimongwa, J)

dated the 1st day of June, 2021
in
(DC) Criminal Appeal No. 22 of 2020

JUDGMENT OF THE COURT

6th & 11th May,2022

MAIGE, J.A.

At the District Court of Korogwe (the trial Court), the appellant was charged with the offence of rape c/s 130 (1) and (2) (e) of the Penal Code, [Cap. 16 R.E. 2019] (the Penal Code). In accordance with the charge sheet, the appellant on diverse dates between 11th January, 2020 and 18th January, 2020 at Kwasemangube area in the District of Korogwe in Tanga Region, had carnal knowledge of PW2,

a young girl of 17 years (name withheld) . Upon trial, the appellant was convicted and sentenced to 30 years imprisonment. On appeal to the High Court of Tanzania at Tanga Registry (the first appellate court), the conviction and sentence of the trial court were confirmed and henceforth the instant appeal.

The evidence leading to conviction of the appellant can be summarized as follows. Moshi d/o Athuman @ Omari (PW1), the mother of PW2, testified that, on the material day, PW2 was a form three student at Korogwe Girls Secondary School. In her 2019 end of year school vacation, PW2 was in Singida with her grandmother Zena d/o Issaya. The school was to be opened on 6/1/2010 and she was to report on 9/1/2020. On 14/01/202, she was notified by one of the school teachers that PW2 was yet to report to school. She, therefore, reported the matter to Korogwe Police Station and, on 22/1/2020, she gave the OC-CID a mobile number through which PW2 happened to communicate with her grandmother. On the same day, the appellant was arrested. On cross-examination, she testified that, the appellant was traced by police through his mobile number.

PW2 (the victim) testified that, she was a form three student at Korogwe Girls Secondary School. She was during 2019 December vacation, with her grandmother Zainabu d/o Omari in Singida. The school resumed on 6/01/2020 and she was on the said day, in her journey to Korogwe. She arrived there at around 19:00 hours. She hired a *bajaji* which was being driven by the appellant on agreement that she should be rushed to school. Instead of rushing her to school, the appellant took her to his residence where he stayed with her until on 22/1/2022. She testified that, in between 11/01/2020 to 18/1/2020, she had sextual intercourse with the appellant. She testified further that, on 22/01/2020, some people whom she did not know, came at the residence of the appellant and arrested both the appellant and her. They were taken to police and thereafter she was taken to hospital for medical examination. On cross examination, she testified that the appellant was arrested by aid of cyber unit. On further cross examination, she testified that, the respective police officer would testify on that.

No. G. 100 D/C Alex (PW3) is the police officer who arrested the appellant. He testified on how the appellant was arrested. His evidence in chief is, for clarity, reproduced hereunder. Thus:

> *"I am working at police station, I am an investigation officer of criminal offences, arresting, searching and charging criminals, on 16/1/2020, around 8:00 hrs. the morning I was called by the OC CID Mwandambo and he told me that the student is not at school, and her parent is here needs corporation (sic), the man is from Dar es Salaam, was also a police officer, I am a resident of Korogwe, he started to mention, the area and sent him (sic), on 22/01/2020 with the CPL Christopher from Dar es Salaam, we went to Kwasamangube, I was the one leading the way, we went to the house of the suspect, the student hiding them (sic) we entered the room of Hassan s/o Singano, the one sitting here, he knocked the door, he opened the door (sic) I introduced to him, I told him, please surrender the knife, he refused later on he surrendered, there was a student sleeping on the bed of Hassan, I told him, he said the girl is called Nasra, then I told*

him that you are under custody (sic), I sent him to Korogwe police station." (sic)

Ahmed Kawambwa (PW4) is the medical officer at Magunga hospital. He testified that, he medically examined PW2 on 22/01/2020 at around 18:38 hrs. and found white vaginal fluid in her vagina and bruises in her anus. Vaginal fluids, he testified, was an indication of sperms whereas bruises on anus indicates that she was sodomised. He produced, which was admitted as P1, the PF3.

In his defence, the appellant denied commission of the offence. He denied as well being arrested by PW3 at his home residence with PW2 or at all. He claimed to have personally reported to police on 20/1/2020 in connection with a bag containing a mobile phone and money which was left in his *bajaji* by a passenger. In his own words, the appellant testified as follows:

"It was on 7/1/2020 I had one passenger at a bus terminal- Korogwe. She was a lady I picked her to town, I left, she had a , there was a mobile phone without charge, the bag had Tsh. 400,000/= it was a smart touch

phone, I charged the phone in order if it will call (sic) to give her properties, after that on 7/1/2020 and on 8/1/2020 it call a new number (sic) it had no names, that sister told me that I was the one left the phone (sic) she said she was in Moshi, that I reported the event to police station, that sister said she had "RB" after communicating she said she should remain with her properties till I come, on 20/1/2020 she told me to go to the police station, after reaching at police she said she did not need a case, she wanted to verify, she wanted only her properties, then I was locked up, on 20/1/2020 (sic), I stayed there till 3/2/2020, then I was told that I was sent to the court, that sister left on the date, they did not interrogate me, on 3/2/2020 I come to court for the offence of rape".

In his judgment, the learned trial magistrate was persuaded by the testimony of the victim (P2) as corroborated by the evidence of PW1, PW3, PW4 and the documentary evidence in exhibit P1. In his view, the evidence of the victim was the best evidence. The first appellate court having fully subscribed to the factual findings of the

trial court, confirmed the conviction and sentence and dismissed the appeal. This time around, the appellant is trying a second appeal to this Court. He has raised the following grounds of appeal:

1. *That the trial magistrate and the learned High Court Judge erred in law and fact as they both failed to consider and evaluate the defence evidence.*
2. *That the allegation that the whereabout of the appellant and the victim was a result of tracing a mobile phone is unsubstantiated as no phone nor print out from telecommunication company was tendered in evidence.*
3. *That the allegation that the appellant was arrested at his home while with the victim is unproved as no leader from the local government witnessed.*
4. *That the learned High Court Judge failed to notice that the prosecution exhibit (PF3) was not properly admitted.*
5. *That the learned High Court Judge failed to notice that the prosecution evidence is wanting in proving the case of rape.*
6. *That the testimony of PW2 contradicted with the testimony of PW4.*

7. *That the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person, unrepresented. Ms. Tussa Mwaihesya, learned State Attorney, appeared for the respondent. When afforded an opportunity to address the Court on the grounds of appeal, the appellant fully adopted the memorandum of appeal and opted to let the learned State Attorney respond first while reserving his right to submit in rejoinder of rejoinder.

On her part, Ms. Tussa vehemently opposed the appeal. However, before submitting on the grounds of appeal, the learned State Attorney questioned the maintainability of the 2nd, 3rd and 6th grounds of appeal on account that though they do not raise any point of law, they were not raised in the first appeal. He thus urged the Court not to consider the same. There was no useful comment from the appellant.

On our part, having considered the learned State Attorney's submissions in line with the record, we agree with her that, the 2nd,

3nd and 6th grounds were not raised in the first appeal. They being not pure points of law, they cannot be the subject for consideration in the second appeal unless in the course of discussing other grounds it becomes apparent that there was misapprehension of evidence. The respective grounds shall thus not be considered as grounds of appeal. This is in line with the position in **Athumani Ramadhani v. R**, Criminal Appeal No. 26 of 2016 (unreported) to the effect that, a second appellate court cannot decide matters which were neither raised in the first appeal, unless they are points of law.

This now takes us to the substance of the appeal starting with the fourth ground of appeal as to admissibility of the documentary evidence in PF3. It is alleged that, it was not properly admitted. No clarification was made by the appellant. For the respondent, it was submitted, the exhibit was properly produced into evidence by PW4, the medical doctor who examined the victim. On our part, we observed from the record that after being admitted into evidence, the contents of the exhibit was read over and explained to the appellant and as correctly submitted for the respondent, the doctor who

examined the victim was available for cross-examination and was indeed cross-examined. In the circumstance, we find the ground without merit.

We now pass to the first ground as to failure to consider and evaluate the defence evidence. In her submissions, the learned State Attorney while making reference to page 42 of the record of appeal, submitted in the first place that, the same was considered. In the alternative, it was submitted, this Court enjoys jurisdiction to step into the shoes of the first appellate court and consider and evaluate the same. She placed reliance on the case of **Salum Mhando v. R** [1993] T.L.R. 170.

We have carefully examined the record and satisfied ourselves that, indeed the appellant's defence was not considered by the trial court. The position of the law on that aspect is settled. The trial court, before determining the guilty or otherwise of the accused, is obliged to consider both the prosecution and defence evidence. Where such a duty is omitted by the trial court, it is trite law, the first appellate court is bound so to do. See for instance, the decision in

Nyakwama s/o Ondare @ Okware v. R, Criminal Appeal No. 507 of 2019 (unreported) where it was held:

> *"Before we embark in considering the appellant's defence, we must state that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives to the conclusion of the case for and against the issues framed for determination. Indeed, if this task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion; more so where failure to consider the appellant's defence is remarkably an issue in a given appeal".*

In this matter, the first appellate court did not discharge such a duty. We agree with the learned State Attorney that, in such a situation, this Court is expected to step into the shoes of the first appellate court and reappraise the defence evidence in line with the prosecution case with a view to ascertaining whether or not the

defence case raises any reasonable doubt. Therefore, in **Hassan Mzee Mfaume v. R** [1981] T.L.R.167, it was held:

> *"Where the first appellate court fails to re-evaluate the evidence and consider material issues involved, on a subsequent appeal, the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

In the circumstance, while we allow the first ground of appeal, we shall, in view of the authority just referred, consider the defence evidence concurrently with the prosecution evidence under the proposition raised in the 5th and 7th ground of appeal that; the case against the appellant was not proved beyond reasonable doubt. In dealing with this issue, we shall be guided by the principle that, unless founded on a correct appreciation of evidence and consideration of the relevant principles of law, a second appellant court, would not interfere with the concurrent factual findings of the lower courts. Thus, in the case of **Salum Mhando v. R** (supra), it was observed:

"On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach rest on the premise that the findings of the fact are based on a correct appreciation of evidence. If as in this case both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction, this court must in the interests of justice intervene."

It was submitted for the respondent that, the evidence of PW2 was credible enough to establish that, it was the appellant who committed the offence. In the learned State Attorneys' view, the trial magistrate was justified to place reliance on such evidence because in rape cases, the evidence of the victim is the best evidence. Reliance was placed on the case of **Selemani Makumba v. R** [2006] T.L.R. 379 which is in support of that proposition. The discrepancies on the age of the victim and the date when she travelled from Singida to Korogwe, she submitted, were mere trivial contradictions which could not affect the credibility of the prosecution evidence in as long as PW2's testimony on the rape was consistent.

It is an elementary position of law that, in criminal cases, the burden to prove the allegation beyond reasonable doubt is on the prosecution. Where a reasonable doubt arises, it is also the law, it has to be applied in favour of the accused person. In this case, the trial court relied on the testimony of the victim (PW2) to sustain conviction. We subscribe to the learned State Attorney that, in rape cases, the evidence of a victim is the best and the trial court can solely rely on such evidence to sustain conviction. This is in accordance with the provision of section 127(7) of the Evidence Act [Cap. 6 R.E. 2019] as judicially considered in the case of **Selemani Makumba v. R** (supra).

It is however instructive to observe that, for such evidence to be relied upon as the best evidence, it has to be credible and probable as to leave no reasonable doubt. This position was discussed in the case of **Mohamed Said v. R,** Criminal Appeal No. 145 of 2017 (unreported) where it was observed:

> *"We think it was never intended that the word of the victim of the sexual offence should be taken as gospel truth but that her or his*

testimony should pass the test of truthfulness. We have no doubt that justice in cases of sexual offences requires strict compliance with rules of evidence in general, and s. 127(7) of Cap. 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."

The rationale behind the above requirement was explained in the case of **Athumani Hasani v. R,** Criminal Appeal No. 292 of 2017 (unreported) where it was stated:

"However, we think that, the evidence of such victims has to be subjected to thorough scrutiny in order for courts to be satisfied that what they state contain nothing but the truth. The reason is not far-fetched, sexual offences are very serious offences that attract public interest and public scrutiny but also have dire consequences for the accused once found guilty given the severity of the sentence imposed."

It is equally pertinent to note that, credibility of a witness, cannot be assessed in isolation of other pieces of evidence on the

record and the circumstance surrounding the case. On this, we are guided by our principle in **Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (unreported), where it was held:

> *"The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused."*

In her testimony, PW2 claimed to have been raped by the appellant in between 11/01/2020 to 18/01/2020. The incident happened in the appellant's room which is within Korogwe town. PW2 averred that from 9/1/2020 to 22/01/2020, she had been locked in the appellant's room. There is no dispute that, the appellant and PW2 were not known to each other before the incident. Equally so for the appellant and either of the remaining three prosecution witnesses.

In accordance with the evidence of PW1 and PW2, the whereabout of the appellant was tracked through his mobile number.

In his evidence in defence, the appellant denied to have been arrested at his residential home or at all. Instead, he claimed to have submitted himself to police, on 20/01/2020, in connection with a bag, a smart phone and money left in his *bajaji* by an unknown lady passenger. It was his evidence that, upon reporting to the police, he was incarcerated without being interrogated, until on 3/02/2020 when he was arraigned before the trial court. As we said above, this defence was not considered by both the lower courts.

The appellant was arrested by PW3. PW3 does not claim to have known the appellant before. Neither the victim. He did not claim knowledge of the appellant's residential home either. In the circumstance, it was a matter of prudence that, PW3 or any of the persons who arrested the appellant should have given an account as to how he or she established not only the residence of the appellant but more importantly his identity. There being claim from PW1 and PW2 that, the appellant's whereabout was established through his mobile phone, PW3 or any of the arresting police was expected to make a comment on how the alleged mobile phone was used to trace

the appellant. He would have at least mentioned the mobile number and ascertain if it belonged to the appellant or was in his possession on the material date. The silence in the prosecution evidence on that pertinent issue inevitably raises a reasonable doubt on the credibility and probity of the whole prosecution story about the commission of the offence.

The mentioning of the mobile number and the way it was used to arrest the appellant was, in our view, very crucial considering the fact that in his defence evidence, which was not considered, the appellant claimed that, the basis of his incarceration and subsequent prosecution was a smart phone and luggage left by an unknown lady passenger in his *bajaji.* There is thus a reasonable doubt that, perhaps the prosecution avoided to mention and produce the mobile phone because if produced, it would establish that the appellant was incarcerated in connection with a mobile phone left by the said lady and not the rape in question. We thus draw a negative inference for failure of the prosecution to produce evidence on the use of the mobile

phone to trace the appellant. This is in line with the principle in **Aziz Abdallah v. R** [1991] TLR. 71.

The above aside, there are some apparent discrepancies in the prosecution case which if weighed together with what we have discussed above would create further reasonable doubts on the prosecution case. We shall demonstrate some of them here below.

First, the prosecution story on the crime in question was such that, it happened when PW2 was on her way back to school. Whereas the facts of the case which were read over and explained to the appellant before trial appearing at page 3 of the record indicate that, the journey in question was on 7/1/2020, the evidence of PW1 suggests that it was on 9/1/2020. Conversely, in her evidence in chief, PW2 asserted that it was on 6/1/2020. Narrating the material facts of the case at page 62 of the record of appeal, the first appellate court stated:

> *"Sometime in December 2019, PW2 was on leave at Singida. On 06/01/2020 at 19:00 hrs. PW2 arrived at Korogwe, Tanga from Singida*

back to school where she was supposed to report on 09/01/2020 after the leave."

The rape in question is claimed to have happened between 11/01/2020 to 18/01/2020. The appellant is accused to have stayed with the victim from 9/1/2020. The evidence of PW1 suggests that when PW2 left from Singida, she was handled to Kapricon bus conductor. There is nothing in the prosecution evidence to suggest that the said conductor was ever asked if PW2 safely arrived at Korogwe. A question which may arise here is, where had PW2 been between 6/01/2020 when he arrived from Singida to 9/01/2020 when she was locked in the appellant's room?

Second, while the evidence in the PF3 is to the effect that PW2 had bruises in her anus signifying that she was carnally known against the order of the nature, there is no assertion in the evidence of PW2 or any of the prosecution witnesses that, it was the appellant who sodomised the victim. The question which may arise here is who sodomized the victim and when?

Third, while in accordance with her evidence, PW2 was for the last time raped on 18/01/2020, the medical examination which was conducted more than four days after, indicates that she had whitish fluids/ discharge in her vagina which according to PW4 it was indication of sperms. It is highly improbable to find remnants of sperms for a lady who was carnally known more than four days before. Therefore, if the evidence in PF3 is correct, there is a reasonable probability that, PW2 might have been raped subsequent to 18/01/2020. If so, the prosecution evidence does not tell who might have been behind that.

Still on the point, the prosecution evidence is such that, the appellant was during the end of year leave, staying with her grandmother in Singida. While PW1 names the said grandmother as Zena d/o Issaya, PW2 names her as Zainab s/o Omari. There was no evidential clarification of this.

In view of the foregoing discussions, we think that, the case against the appellant was not proved beyond reasonable doubt. The appeal is thus with merit and it is accordingly allowed. We

consequently quash the conviction and set aside the sentence. We order that the appellant be immediately released from prison custody unless held there for some other lawful cause.

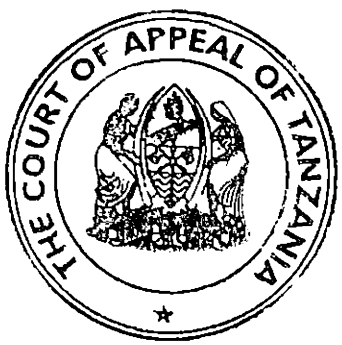
DATED at **TANGA** this 11th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 11th day of May, 2022 in the presence of Mr. Hassan Singano @ Kang'ombe, the Appellant in person and Mr. Paul Kusekwa, State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL