IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 96 OF 2019

ELIAS MWANGOKA @ KINGLOLI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Ngwembe, J.)

dated the 26th day of November, 2018
in
Criminal Appeal No. 103 of 2018

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JUDGMENT OF THE COURT

26th November, 2021 & 17th February, 202

MWANDAMBO, J.A.:

The facts from which this appeal has arisen present an unusual and sad story. Before the Resident Magistrate's court of Mbeya at Mbeya, the appellant stood charged with rape of a four-year girl contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R.E 2002]. The particulars of the charge alleged that the appellant committed the offence on 30/04/2006 at a village called Muhwela within Mbarali District, Mbeya Region. We shall be referring to the victim of the offence as LC or PW1 in this judgment.

The appellant and Agnes Mwakisyala (CW1) were husband and wife. It turned out that at the time the duo got married, CW1 had a two

months' child girl born from Christopher Mbeyela (PW3). That child was none other than LC who remained in the custody of her mother and the appellant; a stepfather. The prosecution case at the trial was that on 30/04/2006 morning hours, the appellant allegedly had sexual intercourse with LC at their home inserting his penis into her vagina from behind an act which was claimed to have been facilitated by CW1 allegedly holding the victim's legs. The case for the prosecution goes further that after the incident, the appellant and CW1 took LC to a place called Usangu to a witchdoctor who prescribed some medicine which he applied to the victim's vagina. Two days later, CW1 requested the assistance of Neri Ngonya (PW2), a neighbour who had indicated to be going to Mbeya town to take along with her LC to her father (PW3) for medical treatment as she was said to be sick. Apparently, both CW1 and PW2 had a child each with PW3.

It was not disputed that before handing over LC to PW2, CW1 wrapped LC's private parts with a locally made diaper commonly known as *kibwende* to inhibit her uncontrolled urination. Acting on the request, PW2 took LC to PW3 who in turn took LC to his mother, Atatugela Kyando (PW4). Whilst under PW4's care, LC exhibited some unusual and disquieting conduct that is; uncontrolled urination and excretion. This prompted PW4 inspecting LC's private parts which revealed dilated vagina suggesting that LC had been penetrated which necessitated

taking her to Meta Hospital in Mbeya city for medical examination after obtaining a PF3 from the police. At the hospital, Dr. Cosmas Chrisentus Chacha (PW7) examined LC's vagina and anus. Upon examination, PW7 posted his findings in a PF3 showing that LC had lost her virginity which suggested that she had been penetrated. The PF3 was admitted in evidence as exhibit P1. Earlier on, No. WP 3026 D/Cpl Mary Barnabas (PW6) who had been instructed to investigate the case had also inspected the victim's private parts and formed an opinion based on her judgment being an adult woman that she had been raped. All the same, the appellant was not arrested until four years later, on 17/09/2010 to be exact, at the instance of PW3 and his uncle; Bise Sanga (PW5) with the assistance of an anonymous person. In his defence, the appellant denied the allegations by the prosecution.

The trial court formulated two points for determination of the case, to wit; whether there was penetration and whether the prosecution proved its case to the standard required in criminal cases. It (the trial court) determined both of them affirmatively upon being satisfied with the evidence of PW1 and PW7 as well as exhibit P1 showing that there was indeed penetration into PW1's vagina. Similarly, guided by the principle that the best evidence in sexual offences must come from the victim underscored in **Selemani Makumba v. R** [2006] T.L.R 379, the trial court found no difficulty in finding that the evidence

of PW1, proved that it was the appellant and no other person who committed the offence. The appellant's defence was that his arrest related to a revenge by PW3 from whom he snatched CW1 and made her a wife. He claimed that his confession that he raped LC was a result of torture with threat of being killed. The trial court rejected the appellant's evidence in defence as weightless and incapable of displacing the prosecution evidence. It convicted the appellant as charged followed by a mandatory life sentence in prison.

The appellant's appeal to the first appellate court was unsuccessful. The High Court (Ngwembe, J.) concurred with the findings of fact by the trial court and dismissed the appellant's appeal predicated on 13 grounds of appeal. Nevertheless, the first appellate court took the view that determination of the appeal turned on two main complaints namely: whether there was failure to conduct a voire dire test as required by the law and whether the case for the prosecution was proved beyond reasonable doubt.

The instant appeal is predicated on nine grounds plus three additional grounds upon a supplementary memorandum of appeal lodged a few days prior to the hearing of the appeal. However, we are constrained to dispose a few aspects on the grounds of appeal due to the fact that some of them do not qualify for the purpose of the

determination of this appeal. Ms. Sara Annesius, learned State Attorney who appeared with Mr. Saraji Iboru, learned Principal State Attorney, and Baraka Mgaya, learned State Attorney who appeared for the respondent Republic at the hearing of the appeal, singled out grounds four and six in the memorandum of appeal. The essence of the appellant's complaint in the two grounds is that the two courts below erred in concurring on findings of fact based on the evidence of PW1 who was allegedly tutored to lie against the appellant.

We respectfully agree because the two grounds are based on factual complaints which should have been addressed by the first appellate court. It is trite under section 6 (7) (a) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA), that generally, the jurisdiction of this Court in second appeals such as this one is limited to determining appeals raising points of law only. The three grounds do not raise any issue of law for the Court's determination in a second appeal as it were. Similarly, the complaint against the reception and reliance on the evidence of relative witnesses never featured before the first appellate court neither does it raise an issue of law say; competence of the relative witnesses. Since it is settled law that all persons except those prohibited by the law are competent to testify as witnesses, the complaint falls short of qualifying as ground premised on a point of law

for which the Court has jurisdiction to determine in a second appeal in terms of section 6(7)(a) of the AJA.

The law is so settled that it may not be necessary to cite any authority in this regard but if any will be required, the following will be sufficient, to wit; **Mohamed Musero v. R.** [1993] T.L.R 290, **Selemani S/o Mussa @ Vitus v. R.** Criminal Appeal No. 7 of 2019, **Florence Athanas @ Ali and Emmanuel Mwanandenje v. R.** Criminal Appeal No. 438 of 2016 and **Festo Domician v. R.** Criminal Appeal No. 447 of 2016 (all unreported). Consequently, since grounds four and six in the memorandum of appeal and ground two in the supplementary memorandum of appeal have failed to meet the jurisdictional threshold in terms of section 6(7) (a) of the AJA, we decline to entertain them.

Having discarded the three grounds and upon our close scrutiny of the remaining grounds in both memoranda of appeal, the appeal turns for determination on the complaints faulting the first appellate court for sustaining the appellant's conviction on the following abridged grounds:

1. PW1 was an incompetent witness whose evidence was wrongly relied upon because she did not know the meaning of oath;
2. the evidence of PW2 and PW6 was contradictory;
3. wrongful reliance on the evidence of PW7 and PF3 (Exhibit P1) in proving penetration;

4. delayed arrest of the appellant not connected with the charged offence;
5. wrongful reliance on the evidence of PW3, PW4 and PW5 who had interest to serve in the case;
6. failure to consider defence evidence;
7. trial court's failure to explain to the appellant the substance of the charge in a language he understands; and,
8. the case against the appellant was not proved beyond reasonable doubt;

The appellant appeared in person, unrepresented, at the hearing of the appeal. Being a lay person, he had nothing in elaboration of his grounds which he adopted, urging the Court to consider them as sufficient to allow the appeal. Having done so, he let the respondent Republic respond to his grounds reserving his right to re-join should such need arise. As alluded to earlier, Mr. Saraji Iboru learned Principal State Attorney appeared resisting the appeal assisted by Mr. Baraka Mgaya and Ms. Sarah Annesius, both learned State Attorneys.

Mr. Baraka Mgaya kick-started the process in response to the appellant's grounds of appeal. He argued abridged ground one comprising two main aspects, that is to say; competence of PW1 and her credibility. The appellant attacks the first appellate court for sustaining conviction and sentence entered by the trial court based on the unsworn evidence of PW1; a tender age witness who did not understand the meaning of oath. Mr. Mgaya conceded that since PW1

gave an unsworn testimony, her evidence could not be relied upon without corroboration on the authority of the Court's decision in **Nguza Viking @ Babu Seya and 3 others v. R,** Criminal Appeal No. 56 of 2005 (unreported). Placing reliance on that decision, Mr. Mgaya argued that PW1's evidence on penetration was corroborated by her grandmother PW4, who inspected her after PW3 had sent the victim to her. He argued further that ultimately, PW4 took PW1 to Meta Hospital at which PW7 examined her and concluded that PW1's vagina had indeed been penetrated. Even though the contents of exhibit P1 in which PW7 posted his findings were not read out upon being cleared for admission, Mr. Mgaya argued that PW1's oral evidence remained intact relying on our decision in the **Director of Public Prosecutions v. Emanuel Erasto Kibwana & 2 others,** Criminal Appeal No. 576 of 2015 (unreported). Similarly, the learned State Attorney pointed out that PW6 had also inspected the victim and formed an opinion that her vagina was penetrated.

Having examined the evidence on record, we have no lurking in holding, as we do, that the complaints in the first abridged ground are baseless. We do so being alive to the fact that we are sitting on a second appeal in which the Court has a very limited room to interfere with the concurrent findings of fact of the trial and the first appellate

courts unless such findings are a result of misapprehension, misdirection or non-direction of the evidence resulting into miscarriage of justice.

It is plain from the record of appeal that the trial court and the first appellate court concurred on the finding that although PW1 gave an unsworn testimony, her evidence was reliable having been corroborated by other pieces of evidence. In doing so, the first appellate court played its role of evaluating the evidence on record guided by the well-established principle in **Selemani Makumba v. R.** [2006] T.L.R 379; true evidence in sexual offences has to come from the victim. Consistent with that principle, the learned first appellate judge agreed with the trial court that PW1's evidence was reliable and truthful despite being received without an oath. The first appellate court arrived at that conclusion upon being satisfied by PW1's statement during voir dire examination showing that she understood the duty of speaking the truth as against telling lies. Consequently, we find no merit in any of the complaints subject of the first abridged ground and dismiss them.

Ground two faults the first appellate court for failing to hold that there was contradiction in the evidence of PW2 and PW6. According to the appellant, the contradiction relates to the condition in which PW1 was in the hands of PW2 when she took her to PW3 showing that PW1 was talking whilst PW6 stated that she was not able to talk and thus

unable to record a statement from her. Despite the fact that this ground was not canvassed before the first appellate court, Mr. Mgaya addressed the Court. According to Mr. Mgaya, ground two was premised on the credibility of PW1 in narrating the episode to her father (PW3) but failing to do so to PW6; a police officer. All the same, Mr. Mgaya argued that the ground was baseless because PW1 was quite consistent on what befell her at the behest of the appellant who she regarded as her biological father. The learned State Attorney placed his reliance on our decision in **Mawazo Anyandwile Mwaikwaja v. R,** Criminal Appeal No. 455 of 2017 (unreported), for the proposition that apart from demeanour, credibility of a witness may be determined by coherence in his testimony and that of other witnesses. It was Mr. Mgaya's argument that since credibility was the domain of the trial court which found PW1 credible which finding was supported by the first appellate court after the re-evaluation of the evidence on record, the Court cannot interfere with the concurrent factual findings of the two courts below.

We respectfully agree with Mr. Mgaya for two reasons. **One**, as we stated in **Goodluck Kyando v. R** [2006] T.L.R. 363, each witness is entitled to credence and to be believed by the trial court unless there are good reasons to the contrary. **Two**, it is trite that credibility is the domain of a trial court which has the opportunity of observing and hearing a witness in a witness box. See for instance: **Ali Abdallah**

Rajab v. Saada Abdallah Rajabu [1994] T.L.R. 132. As pointed out earlier, the trial court found PW1 as a credible witness. It is thus not open for this Court to interfere with that finding, the more so when that finding was sustained by the first appellate court after its re-evaluation of the evidence on record. Consequently, ground two stands dismissed which takes us to a discussion on the appellant's complaint in abridged ground three.

The appellant's complaint in this ground is that his conviction was grounded on the trial court's reliance on the PF3 (exhibit P1) whose contents were not read out upon being cleared for admission. Mr. Mgaya readily conceded that exhibit P1 was wrongly relied upon in proving penetration. He thus invited us to expunge it from the record. However, he maintained that the expungement of exhibit P1 will have no adverse impact on the oral evidence of PW7 who examined PW1 placing reliance on our decision in **The Director of Public Prosecutions v. Emmanuel Erasto Kibwana & 2 others,** Criminal Appeal No. 576 of 2015 (unreported).

We agree with Mr. Mgaya on the irregularity in relying on exhibit P1. Accordingly, we cannot, but expunge the exhibit as we hereby do, guided by our previous decisions in similar circumstances, notably;

Robinson Mwanjisi & 3 others v. R. [2003] T.L.R. 218 and many others we need not mention here.

Be it as it may as submitted by the learned State Attorney, and guided by our decision in **The DPP v. Emmanuel Erasto Kibwana & 2 Others** (supra), the expungement of exhibit P1 from the record has no adverse effect on PW7's oral evidence on the basis of which the contents of exhibit P1 were prepared. That evidence remains intact proving penetration into PW1's vagina. Accordingly, ground three in the abridged grounds of appeal is allowed to the extent indicated which takes us to ground four in the truncated grounds.

Essentially, the appellant raises an issue against the reception of and reliance on the evidence of PW3, PW4 and PW5 who were all relatives allegedly with interest to serve. Ms. Annesius urged us to dismiss this ground because it is not legally founded. We respectfully agree with her because relatives are competent witnesses to testify and they are entitled to credence if not prohibited by the Evidence Act [Cap. 6 R.E.2002]. The only exception is where there is evidence that the relative witnesses conspired to scheme a plot to promote an untruthful story in line with our decisions in **Mustapha Ramadhani Kihiyo v. R.** [2006] T.L.R. 323 and **Festo Mgimwa v. R,** Criminal Appeal No. 378 of 2016 (unreported) referred in **Jaspini s/o Daniel @ Sikazwe v. The**

Director of Public Prosecutions, Criminal Appeal No. 519 of 2019 (also unreported). There is no suggestion that PW3, PW4 and PW5 who were relatives schemed an untruthful story in this appeal and thus this complaint fails.

Next, Ms. Annesius addressed the Court on ground four whereby the appellant complains against his delayed arrest. Essentially, the appellant suggests that his arrest four years after the incident was not in connection with the offence he was charged and convicted by the trial court and sustained by the first appellate court. Whilst conceding that there was a delay in arresting the appellant, Ms. Annesius pointed out that there was evidence from PW5 proving that the appellant's whereabouts were unknown as, after the commission of the offence he had disappeared from his village to an unknown place.

We need not be detained by this ground. First, as lamented by the first appellate court at page 86 of the record of appeal, the case was poorly investigated by the police in Mbeya District after the incident was reported to it on 05/05/2006. It is not hard to deduce from PW6; the investigating police officer, that there was an inaction in pursuing the culprit partly because the incident took place outside the jurisdiction of Mbeya District Police administration and partly due to absence of PW6 attending a three months' training in Moshi. According to PW5, the

police told them that they could not arrest the culprit outside their jurisdiction. It is for this reason, PW5 and his nephew (PW3), had to travel to Inyala Police station where the police acted on their complaint by providing a motor vehicle to trace the culprit at Muhwela village accompanied with three police officers but in vain, for the appellant took to his heels upon seeing a police car. It is also on record that since the appellant disappeared to an unknown place, his arrest four years later was a result of the efforts deployed by PW5 through an anonymous person who reported his whereabouts by phone which turned out to be true hence, his arrest at Mbarali after abandoning his home. The appellant did not assail the evidence on the place of his arrest in September, 2010. Accordingly, we find no merit in the appellant's complaint in ground four and dismiss it.

Last in the list of the respondent's legal team was Mr. Iboru who addressed the Court on grounds six, seven and eight in the truncated grounds of appeal. Ground six faults the first appellate court allegedly for failure to consider the defence evidence. Mr. Iboru urged us to dismiss this ground for being baseless placing reliance on page 82 of the record of appeal showing that the appellant's defence was considered but rejected. Apparently, this complaint was raised before the first appellate court as one of the grounds of appeal but that court rejected it. As alluded to earlier on, the learned first appellate judge was alive to

the role of a first appellate court of re-evaluating the evidence on record and making its own conclusions. The record shows that the first appellate court re-evaluated the evidence for the prosecution in two aspects; one, proof of penetration and two; whether it was the appellant who had sexual intercourse with the victim PW1. Afterwards, the learned first appellate judge considered the defence and found it too weak to shake the prosecution evidence which proved the case beyond reasonable doubt. In the upshot, we find no merit in this ground and dismiss it.

The appellant's complaint in ground seven relates to the trial court's alleged failure to explain to him the charge in the language he understands as a result of which he was prejudiced in his trial. Mr. Iboru argued that this ground is baseless and we respectfully agree with him.

It is clear from page 3 of the record of appeal that the charge was read and explained to the appellant who replied: 'sio kweli (not true)" resulting into the trial court entering a plea of not guilty. Subsequently, the charge was again read and explained to the appellant at the preliminary hearing during which he made a similar response; "si kweli (not true)". In our view, pleading "not true" to the charge must be taken to be in response to something which was understood to the appellant. The fact this has never been a complaint before the first

appellate court speaks loudly that the complaint is, but an afterthought. At any rate, we find it difficult to make head or tail of this complaint in a case in which he pleaded not guilty to the charge followed by a trial in which he was given opportunity to cross examine witnesses for the prosecution and gave evidence in defence. It would have been a different thing altogether had the trial court convicted the appellant on a plea of guilty. Considering that this was not the case, we dismiss the complaint being satisfied that it was raised as an afterthought as rightly submitted by the learned Principal State Attorney.

Finally, on ground eight dedicated to the issue whether the case against the appellant was proved to the required standard. Mr. Iboru argued that on the basis of the submissions made by his colleagues, the case against the appellant was proved to the hilt warranting an order dismissing the appeal. The appellant contended in rejoinder that the case was poorly investigated to find out whether he committed the offence in collaboration with his wife. He contended further that the case was fabricated by PW3 in retaliation for taking the mother of PW1 from him.

From the evidence on record, it is beyond controversy that the two courts below rightly concurred in finding that the prosecution proved its case against the appellant to the standard required in criminal cases.

Considering that the case involved rape of a girl below 18 years of age, the prosecution was bound to prove two aspects namely; penetration by a male sexual organ into PW1 and whether it was the appellant and no other person who was responsible for that act. It is plain from the record that penetration was sufficiently proved by PW1 and corroborated by the oral medical evidence of PW7 who examined her. Besides, PW4 and PW6 who examined PW1 at different times said as much that PW1's vagina was unusually enlarged which suggested penetration. As to who was responsible for the penetration, both courts below concurred in their findings that it was the appellant who did the act in collaboration with his wife; the mother of the victim.

It is settled law that a second appellate courts as this one should not lightly interfere with the concurrent findings of fact by the two courts below except where it is evident that such concurrent findings of fact, were a result of misapprehension, misdirection or non- direction of the evidence or omission to consider available evidence. We have reiterated this position in the Court's previous decisions including our recent one in **Asajile Henry Katule & Fredy John Mwashuya v. R.,** Criminal Appeal No. 30 of 2019 (unreported) in which we referred to **Felix s/o Kichele and Another v. R.** Criminal Appeal No. 159 of 2005, **Julius Josephat v. R.** Criminal Appeal No. 03 of 2017 and **Juma Mzee**

v. R. Criminal Appeal No. 19 of 2017 (all unreported). There being no suggestion that the concurrent findings of fact were a result of misapprehension, misdirection or non-direction of the evidence occasioning miscarriage of justice, the Court cannot interfere with the findings that the case against the appellant was proved beyond reasonable doubt with the result that ground seven is devoid of merit. It stands dismissed.

In the light of the foregoing, we dismiss the appeal for lack of merit.

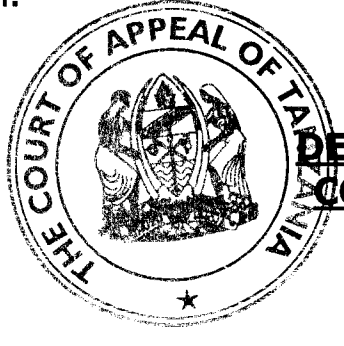
DATED at **DAR ES SALAAM** this 4th day of February, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered on 17th day of February, 2022 in the presence of the appellant in person via video conference from Ruanda Central Prison, and Ms. Nancy Mushumbusi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL