IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 226 OF 2021

JULY JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania At Kigoma)

(Mugeta, J.)

Dated the 27th day of April, 2021
in
DC. Criminal Appeal No. 1 of 2021

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JUDGMENT OF THE COURT

31st May & 8th June, 2022

KITUSI, J.A.:

The District Court of Kibondo convicted the appellant with rape and sentenced him to a jail term for 30 years. It was alleged that the appellant contravened section 130(1) and (2) (a) and 131 (1) of the Penal Code Cap 16 R.E 2019 (the Penal Code) by having carnal knowledge of a girl aged 18 years (PW1) without her consent. The appellant's appeal to the High Court was unsuccessful, hence this second appeal.

The main story is told by PW1, the alleged victim of the offence. She stated that on 28th August, 2020 at Kikulazo Village, Kobondo District within Kigoma Region, she was walking to her aunt's home to get her mobile phone charged. She ran into the appellant who called her and she obliged by going over to where he was. She said she knew the appellant because not only did he live in the same village with her, but they went to the same school and he had previously expressed interest in her being his girlfriend, which she said she declined.

So, after PW1 had moved to where the appellant was, he asked her the question "*what is going on*" to which PW1 replied that there was nothing between the two of them. That is when the appellant allegedly forced her down, tore of her under pants and had sex with her without her consent. She testified that she could not raise alarm to seek help because her predator's hand was firmly placed on her mouth to stop any possible attempt to call for help.

When the appellant had finished with her and let her go, she walked on towards the residence of her aunt (PW2) in soiled clothes, crying. She

immediately told PW2 what had befallen her and that the appellant was the perpetrator.

Invariably, all other witnesses testified in support of PW1's account. PW2 confirmed that PW1 went to her home in dirty clothes, crying and told her about being raped by the appellant. She checked PW1's private parts and satisfied herself that indeed someone had had sex with her. She led PW1 to her father. PW4, the said father of PW1 testified that his daughter was brought home by PW2 and they told him that the appellant had raped her. He reported the matter to PW5 the Village Executive Officer in the same night.

PW5 confirmed receiving the complaint from PW4 and that he immediately ordered PW1 be taken for medical examination and the appellant be arrested. That the appellant was arrested in the afternoon of the following day and he admitted having raped PW1 but pleaded for forgiveness. According to PW5, the appellant was arrested by PW6, a militiaman just as he was selling off his personal holdings with the view of escaping from the village.

It was Dr. Jackline Avelin (PW7) who attended to PW1 at Kakonko Hospital. Central in her testimony was her observation that PW1's vagina was bloody and bruised from which she concluded that a blunt object must have penetrated into it.

In defence, the appellant took his time to narrate how he was arrested and interrogated on the alleged rape and how he denied involvement.. He alluded to alleged demands for bribes made by PW5 and PW7 for them to get him off the hook, and that he resisted those demands wondering how those government officials could dare do so.

The appellant also raised an *alibi*, giving an account of how he spent the *day* on the material date. That he was at his farm the whole day up to 16:30, then went to choir rehearsals up to 18:30. At 19:40 he returned to his home where he stayed with DW2 up to 20:30. When DW2 left, the appellant retired to bed. DW2 testified in support of the fact that he was with the appellant during church choir rehearsals and accompanied him to his home. One Jonas Jackob (DW3), appellant's elder brother, testified in support of the allegations of demand of bribes by PW5 and PW7.

The District Court was satisfied that PW1 was raped and that the appellant was the culprit. It rejected the defence of alibi for the reason that it was raised without prior notice, in terms of section 194 (6) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA). It also concluded that given the timing, it was still possible for the appellant to be at the scene of crime after the choir rehearsals. Applying the principle that the victim of sexual offence provides the best evidence [**Selemani Makumba v. Republic** [2006] T. L. R 379] and that every witness is entitled to credence [**Goodluck Kyando v. Republic** [2006] T. L. R 363], the District Court found the appellant guilty and convicted him as earlier indicated.

On appeal to the High Court, the appellant raised four issues for consideration. The first was that the case was born out of the grudge PW1 had on him for expressing love to her friend ignoring her while she was also interested in him. The High Court dismissed this argument as an afterthought. The second point was that there was no eye witness to the alleged rape other than the victim. On this the learned High Court judge concluded that the evidence of the said victim was sufficient because he found her to be credible. The third complaint was that the delay in arresting him was unexplained. The learned High Court judge took the view

that it matters not how long it takes to arrest the culprit so long as the victim named him at the earliest opportunity. The fourth point was that the description given by PW1 that the appellant called her, undressed her, took a condom from his pocket, put it on before proceeding to rape her, was improbable. The learned judge did not accept this argument. In the end he dismissed the appeal.

Before us the appellant has not raised issue with the judge's determination on those points. Instead he has come up with four other grounds, the first ground challenging the judge for limiting his determination of the appeal only on the grounds of appeal that had been raised by the appellant without considering other errors.

The second ground of appeal raises issue with the PF3 not bearing the hospital file number. The third ground is on the contradiction regarding the date the victim's clothes were received at the police gender desk. The fourth ground attacks the conviction that was entered against the appellant in disregard of the fact that medical examination on the victim was conducted on 30/8/2020 two days from the alleged rape on 28/8/2020. In the fifth ground the complaint is that there was no evidence to link the

appellant with the alleged bruises on the victim's face and vagina considering the delayed medical examination. The sixth ground challenges the sentence as being too stiff.

Ms. Happiness Ezekiel Mayunga, learned State Attorney who was appearing along with Ms. Antia Julius, also learned State Attorney, argued for the respondent Republic that the Court should desist from determining the first to fifth grounds of appeal on the strength of the settled law that we are barred from determining grounds of appeal that were not first raised and determined by the High Court. She cited **Halid Maulid v. Republic,** Criminal Appeal No. 94 of 2021 and **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (both unreported).

It is true that the first to fifth grounds of appeal are new and do not raise points of law, so ordinarily we would desist from considering them. On reflection however, we took all those grounds of appeal from the first to the fifth, as generally challenging the two courts bellow for convicting and sentencing the appellant in a case that was not proved beyond reasonable doubt. We directed the appellant and learned State Attorneys to address that all-encompassing ground of appeal. We also prompted them to

address whether the fourth point that had been raised by the appellant before the High Court as one of the four grounds, was adequately resolved.

If we may repeat for clarity, during the trial PW1 stated that after causing her to *lie* down, the appellant undressed her then took a condom from his pocket, put it on and inserted his penis into her vagina. Before the High Court the appellant argued that what PW1 suggested in her testimony was improbable. In his judgment the learned judge stated:

> *"On the use of condom, the appellant advances possibilities which cannot be said are improbable."*

At the instance of the appellant, Ms. Mayunga, learned State Attorney addressed us first submitting that since the alleged victim was an adult, the prosecution needed to prove three elements, that is, penetration, lack of consent and the appellant's involvement. The learned State Attorney went on to argue that the victim's evidence established that there was penetration, a fact that was supported by PW2 who checked her private parts immediately and PW7 the medical practitioner who examined her later. She cited **Selemani Makumba v. Republic** (supra) to support her argument that PW1 provided the best evidence on this issue.

As for consent, Ms. Mayunga submitted that the fact that the victim's clothes were torn, and she had bruises on her body as established by PW7, indicate that there was none. Regarding the identity of the perpetrator, Ms. Mayunga submitted that PW1 identified him as there was conversation before the rape and she immediately named him to PW2. **Halid Maulid v. Republic** (supra) on credibility of witnesses was cited by the learned State Attorney.

On the other hand, the appellant submitted that there were quite a few discrepancies in the prosecution case. He wondered for instance, how PW1 could have been raped at 20:00 hours yet arrive at PW2's place at the same time, that is, 20:00 hours. He also picked on the contradiction as to when PW1's clothes were received by PW3 whether it was on 29/8/2020 as testified by PW1 or on 2/9/2020 as stated by PW3. The other point he raised was why did PW7 examine PW1 on 30/8/2020 in the evening while it is in evidence that she was at the hospital as early as 29/8/2020. On the victim's age, he submitted that the victim's age was not proved with certainty, whether she was 18 years according to her, or 19 years according to (PW4) her father, or 17 years going by the PF3. Lastly, on the point which we invited the parties to address on the manner the appellant is

alleged to have raped PW1 after putting on a condom, he submitted that it was impossible.

In our deliberations we are satisfied from PW1's evidence and that of PW4 her father, that she was of the age above 18 years. Proof of age by the victim of rape and/or her parents, has been held to be sufficient. [See **Isaya Renatus v. Republic**, Criminal Appeal No. 542 of 2015 and; **Athanas Ngomai v. Republic**, Criminal Appeal No. 57 of 2018 (both unreported)]. Besides, if we are to hold PW1 to be 17 years as a possibility suggested by the appellant, it will do him more harm because there will then be no discussion of whether PW1 consented or not.

Now on the merits of the case, we go along with Ms. Mayunga that since the victim of the alleged rape was an adult, the prosecution had a duty to prove sexual intercourse, lack of consent and that the appellant was the perpetrator. To begin, with there is no doubt that PW1 and the appellant were acquaintances, being members of the same village, school mates and that one of them had intimate interest on the other.

Next is the question whether or not somebody had sex with PW1 on the material evening. On the strength of evidence of PW1 herself supported

by that of PW2 and PW7 the two courts below concluded that PW1 had sex on the material evening. The nearest the appellant went in challenging this fact is the attack on the PF3 not bearing the hospital file number, a new ground as we said earlier but which strikes us as very trivial also. And the other issue the appellant raised was the unexplained delay in conducting medical examination on PW1. We are aware that proof of rape need not be by medical evidence [See **Edson Simon Mwombeki v. Republic,** Criminal Appeal No. 94 of 2016 (unreported)]. In this case we are satisfied, as were the two courts below, that on the evidence of PW1, supported by PW2 who checked the victim's private parts immediately, somebody had carnal knowledge of her. PW1 named the appellant as the perpetrator of the sexual intercourse. This finding is not dependent on the medical evidence.

The appellant had two stories as regards his alleged perpetration of the rape. During the trial, he raised an *alibi* which was ruled out by the learned trial Magistrate considering the possibility of his being at the scene of crime at the material time. But, at the High Court, the appellant alleged concoction of the case allegedly prompted by PW1 being jealousy of the

appellant's choice of PW1's friend for a lover instead of her. The High Court ruled out the allegation of grudge for being an afterthought.

It is common ground that the appellant is under no duty to prove his innocence, but that does not mean he can have his way and be as inconsistent in his story as he likes. We have previously stated that the accused has a duty to have the theme of his defence known [see **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported)]. We have given this matter considerable thought and in the end we are inclined to agree with the learned High Court judge that the appellant's story of grudge is an afterthought. If it were true that PW1 was a go - between the appellant and another girl he loved, and that PW1 was jealousy and she fabricated this case as a revenge, it would have been in the best interest of the said appellant to put that fact to PW1 in a form of cross-examination. But we know that the appellant raised this fact when PW1 was not there to confirm or rebut it. In **John Madata v. Republic** (supra), we said: -

> *"It is common knowledge that although the accused has no duty to prove his innocence, he is expected to make the theme of his defence known so as to make the trial*

fair even to the prosecution, and we think this theme may be deduced from the line of cross examinations or notices such as when the said accused intends to raise a defence of alibi".

The above reasoning will also apply in respect of the appellant's allegation that PW5 and PW7 demanded bribes from him and his brother. He never cross examined on that.

We therefore endorse the concurrent findings of the two courts below on PW1 as a candid and credible witness and on her evidence, we find that it was the appellant who had carnal knowledge of her. The appellant's defence during the trial, and his change of goal posts by submitting on a totally new area on first appeal, were rightly rejected by the two courts below.

The last point for our consideration is whether PW1 consented to the sex. PW1 testified that she did not consent to the sex but that the appellant forced himself into her. The learned State Attorney submitted that lack of consent is evident in the torn clothes and PW1's physical injury. On the other hand, the appellant brought up the improbability of executing

rape of PW1 after fetching and wearing a condom. We think this argument could only have been raised in relation to consent.

We note that only PW7 alluded to physical injuries on PW1, but no such testimony came from PW1 herself or PW2. Having decided not to consider the medical evidence because of the unexplained delay in examining PW1, there is no evidence on physical injuries. But we do not think in this contemporary world, evidence of an adult victim of unconsented sex is not plausible enough merely for the reason that she has no physical injuries to demonstrate. We have already agreed with the finding of the two courts below on the credibility of PW1, so we have no reason to disbelieve her evidence that she did not consent. It is on record that when PW1 approached the appellant and he asked her what was going on, she told him there was nothing between them. This was a clear statement to the effect that there was no relationship between the two. Even the appellant's suggestion that it was impossible to make all those preparations and rape PW1, does not hold because under the law there is only consent or none. That is why, under section 130 (1) and (2) (a) of the Penal Code, under which the appellant was charged, there can be rape even between married people if they are separated, and the woman does

not consent to sex. In this case there was no consent according to PW1, which explains her going to PW2 crying and in soiled clothes.

As we are about to conclude, we wish to address briefly the appellant's complaint that the High Court judge only considered the grounds of appeal before him in determining the appeal. With respect, the complaint would have made sense if the learned judge had not considered some of the grounds of appeal, but considering the grounds of appeal was the judge's role under section 366 (1) of CPA and should not be a subject of complaint. We should end by reproducing the following paragraph from **Chandrakant Joshbhai Patel v. Republic,** Criminal Appeal No. 13 of 1998 reproduced in **Kubaja Omary v. Republic**, Criminal Appeal No. 6 of 2017 (both unreported):-

> *"As this court said in **Magendo Paul and Another v. Republic** [1993] TLR 2, 9...remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add, fanciful possibilities are limitless, and it would be disastrous for the administration of justice if they were permitted to displace solid evidence or dislodge irresistible inference".*

For all those reasons, we find the appeal to be devoid of merits, and we dismiss it. The sentence that was imposed on the appellant is the statutory minimum, so we leave it undisturbed.

DATED at **KIGOMA** this 6th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of June, 2022 in the presence of the Appellant in person, unrepresented and Ms. Antia Julius, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL