IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 131 OF 2020

KHALFAN s/o RUNYENYE @ MCHINJIKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma)

(Hon. E. Ngaile, RM – Ext. Juris.)

dated the 3rd day of December, 2019
in
Criminal Appeal No. 83 of 2019

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JUDGMENT OF THE COURT

31st May & 9th June, 2022

MAKUNGU, J.A.:

In the Resident Magistrate Court of Musoma the appellant, KHALFAN S/O RUNYENYE @ MACHINJIKO was charged with two counts. The first count was on the offence of Grave Sexual Abuse and the second count on Abduction contrary to sections 138C (1) (a) and (2) (b) and 133 of the Penal Code, Cap. 16 R.E. 2002 (the Penal Code), respectively. On the first count it was alleged that between 20th and 21st of December, 2018 at Mtuzu area within Butiama District in Mara Region, the appellant, for sexual gratification used his fingers to caress the breasts and vagina of a girl aged twelve (12) years. On the second count it was alleged that

between the same dates at the same place the appellant detained the same girl out of the custody and against the will of her parents. To conceal her identity, we shall refer to her as the "victim" or 'PW4' as she so testified before the trial court.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled four (4) witnesses namely; PW1 (Bururu Zuga), PW2 (Rose Masha Nyangesi), PW3 (James Fundi) and PW4 (Eliza Bururu). On his side, the appellant had three witnesses to wit; DW1 (Khalfan Runyenye), DW2 (Nyamisi Halfan) and DW3 (Haji Halfan).

In a nutshell, the prosecution case as obtained from the record of appeal indicates that, on 20th December, 2018 at about 13:00 hrs, the Victim who was a pupil of Standard V was coming from school, on the way she met the appellant who asked her why she was thin. She answered that her parents are poor, whereupon the appellant told her to go with him at his residence where he will be providing her with enough food and to find a job for her as a house girl in Mwanza City. The appellant managed to take the victim to his residence where she stayed for the whole day.

The prosecution further informed the trial court that, at night the appellant requested the victim to have sex with him but she refused. The

appellant in the alternative decided to use his fingers to touch the victim's breasts and vagina. It appeared that, on 21st December, 2018 after PW1 found the victim was missing at home, he started looking for her and on the same day while at his business he was called by his wife one Deborah d/o Issa who informed him that his daughter was at the house of the appellant. Thereafter PW1 informed the victim's mother that the victim was seen living at the appellant's house. Then they decided to go to the appellant's house without being accompanied with the hamlet chairman because he was indisposed.

According to PW1, upon arrival at the said house, they saw the appellant sleeping with the victim who was naked. PW1 raised an alarm whereupon the appellant ran away and the victim disappeared to her grandmother's house. Then, the matter was reported to Police Station. His testimony was tallied with that of PW2, PW3 and PW4.

When put to his defence, the appellant stoutly denied both offences. He raised the defence of alibi, saying that on that day, he went for burial at Nyamuswa and came back around 16:00 hours and then went direct to the mosque for prayer. He finished his prayer and went back home where, he found many people gathered outside his house including the victim whom he gave shelter. He found the victim crying and he advised her to go back home but she refused claiming that her father (PW1) would

beat her because she lost slasher. When it reached 18:00 hrs the victim's aunt visited the appellant's house but again the victim refused to go back home, therefore the appellant allowed her to sleep in his house, but when it reached around 20:00 hrs PW1 knocked the door and asked where the victim was. He replied that she was inside playing with her fellows. PW1 called the victim and slapped her, the victim then ran away and PW1 started quarrelling with the appellant. As a result, PW1 reported the matter to the police station; Consequently, the appellant was arrested and was placed in custody. The appellant believed that PW1 had merely made up the incident in order to punish him. He maintained his innocence.

After a full trial, the learned trial Magistrate, J.O. Ndira – RM convicted the appellant on the 1st count and sentenced him to serve twenty (20) years in prison and on the 2nd count the appellant was sentenced to serve three (3) years in prison. Both sentences were to run concurrently. In addition, the appellant was ordered to pay the victim TZS. 2,000,000 as compensation.

Aggrieved by the outcome of his trial, the appellant unsuccessfully appealed to the High Court at Musoma but his first appeal was duly transferred and determined by the Resident Magistrate's Court with extended jurisdiction (I.E. Ngaile RM-with Ext. Jurisdiction). Still protesting his innocence, he lodged this appeal.

When this appeal came up for hearing on 31st May 2022, the appellant was unrepresented. In urging us to quash his conviction and allow this appeal, the appellant relied on five grounds of appeal.

In his first ground of appeal, the appellant challenges the prosecution evidence, claiming that it did not prove the case against him beyond reasonable doubt. In his second ground of appeal, the appellant faulted the evidence of PW1, PW2 and PW3. He blamed the trial court and the first appellate court for admitting such evidence which was totally irrelevant.

In his third ground, the appellant blames the two courts below for convicting and sentencing him despite the prosecution's failure to produce witnesses who responded to the victim's alarm at the scene. The fourth ground of appeal faults the two courts below, for convicting him on both offences as there was no evidence which proved that the victim was detained and sexually abused. In his fifth ground of appeal, the appellant faults the two courts below for their failure to analyse and evaluate the evidence on record to discover the truth that the charges against him were fabricated.

When we invited him to address us on his grounds of appeal, he did not seize the moment. He preferred to hear what response the learned State Attorneys had on his grounds of appeal. Learned State Attorneys

Mr. Roosebert Nimrod and Ms. Agma Haule appeared for the respondent Republic.

Submitting for the respondent, Ms. Haule stated at the outset that she was opposing the appeal.

Before embarking upon the grounds of appeal, the learned State Attorney prayed the Court to note that in the second count of abduction in the statement of offence it cited "section 133" of the Penal Code. The victim subject of this offence was a 12 years old girl, she submitted, in that respect the statement of the offence should have cited "section 134" which is the proper section.

The learned State Attorney urged us to find that the appellant was not prejudiced because the particulars of the offence drew the appellant's attention to the identity of the victim, her age and the details of the offence. That the appellant was further not prejudice because he knew what he was facing and he was not in any way distructed by the defective citation of the applicable provisions of law in the statement of offence. In support of this line of argument, she referred us to section 388 of the Criminal Procedure Act Cap. 20 R. E. 2019 (CPA) together with a decision of the Court in **Jamali Ally @ Salum V. The Republic**, Criminal Appeal No. 52 of 2017 (unreported) in which we referred in our earlier decision in **Deus Kayola V. R.,** Criminal Appeal No. 142 of 2012 (unreported)

where the appellant was charged for the rape of a 12 year-old girl and the statement of offence cited "Sections 130 and 131 of the Penal Code" The Court made the following observation which the learned State Attorney before us would like us to regard as illustrative:-

> *"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA, the particulars of offence having sufficiently informed the appellant that he was charged with the offence of raping a girl of 12 years old."*

The learned State Attorney next prayed the Court to quash the conviction and the sentence of 3 years imprisonment and then the appellant to be convicted under section 134 and sentenced accordingly under section 35 of the Penal Code.

The learned State Attorney next submitted, on the first ground of appeal, wherein the appellant complained that the prosecution did not prove its case against him to the required standard. Ms. Haule urged us to dismiss this ground because so far as the prosecution evidence on record is concerned, it proved all the essential ingredients of the offence of Grave Sexual Abuse under section 138 C of the Penal Code and that of

abduction under section 134 of the Penal Code. She referred us to pages 9 to 19 of the record where the evidence of the prosecution witnesses was recorded.

The learned State Counsel urged us to dismiss the second ground of appeal which claimed that the evidence of PW1, PW2 and PW3 were irrelevant. She rejected this line of the appellant's submission. She gave the example of the evidence of PW4 which can stand alone to prove the appellant's guilt beyond reasonable doubt. She referred to a decision of the Court in **Selemani Makumba V.R.** [2006] TLR 379 to reinforce her submission that in sexual offences, the best evidence is that of the victim. She urged us to look at pages 16 and 17 of the record of appeal where PW4 gave a detailed account on how she was detained and sexually abused by the appellant. The victim's detailed account, she submitted, proved both offences beyond reasonable doubt.

On a similar note, the learned State Counsel submitted that the third ground of complaint should be dismissed because, PW3 is the one who responded to the call. Thus she completed her submissions by urging us to dismiss the 4th and 5th grounds of appeal which also claimed that the prosecution did not prove its case beyond reasonable doubt.

In his rejoinder, the appellant had nothing to add to his grounds of appeal. His main complaint was that he had a conflict with PW1 the father of the victim who initiated the incident.

Having carefully considered the argument for and against the appeal and the evidence on record we are alive to the fact that, the conviction of the appellant which was upheld by the first appellate court basically hinges on the credibility of prosecution witnesses. In this regard, this being a second appeal it is trite law that the Court should rarely interfere with the concurrent findings of lower courts on the facts unless it is shown that there has been a misapprehension of the evidence; a miscarriage of justice or violation of a principle of law or procedure. See **Isaya Mohamed Isack V. Republic** Criminal Appeal No. 38 of 2008 (unreported), **DPP V. Jaffar Mfaume Kawawa** (1981) TLR. 149 and **Seif Mohamed E.L Abadan V. Republic**, Criminal Appeal No. 320 of 2009 (unreported).

The record of appeal shows that the trial and the first appellate courts made concurrent findings of fact that the evidence of prosecution witnesses proved the offences beyond reasonable doubt. The first appellate court went on to say:

> *"After going through the trial court record and the evidence tendered by PW1, PW2, PW3 and PW4 I*

find that their testimony are very corroborative in respect of the charges against the appellant...."

Credibility of PW1, PW2 and PW3 forms a subject of serious criticism in the second complaint. The appellant contended that their respective evidence was totally irrelevant. It is now settled law that all witnesses are entitled to credence unless there are good reasons for not doing so, (See **Goodluck Kyando V. Republic** [2006] TLR 363). As to how credibility can be determined the Court pronounced itself in the case of **Yasin Ramadhani Changá V. Republic** [1999] TLR 489 and **Shabani Daudi V. Republic,** Criminal Appeal No. 28 of 2001 (unreported) both quoted in **Nyakuboga Boniface V. Republic**, Criminal Appeal No. 434 of 2017 (unreported), that:

"a witness's credibility basing on demeanor is exclusively measured by the trial court."

The Court further stated that:-

"A part from demeanour... The credibility of a witness can also be determined in other two ways that is, ***One*** *by assessing the coherence of the testimony of the witness, and* ***two****, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

In the instant case, the trial court which had the opportunity to observe PW1, PW2 and PW3 testifying believed them to be witnesses of

truth. This was the exclusive domain of the trial court. For other courts, factors to be considered were explained with lucidity in the case of **Patrick Sanga V. Republic**, Criminal Appeal No. 213 of 2008 (unreported) thus:-

> *"To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve a certain ends, etc."*

In our examination of the evidence on record we find nothing suspect in the testimonies of PW1, PW2 and PW3. Their respective evidence was not only clear but also consistent. Like the first appellate court, we see no reason to discredit them as the appellant suggests.

In view of the aforesaid, we are satisfied that, the charges were proved against the appellant beyond reasonable doubt. We agree with the submissions of the learned State Attorney that this appeal has no merit. We are at one with the learned State Attorney that section 134 read together with section 35 are the proper provisions for the second

offence instead of section 133 of the Penal Code. As a result, we quash the conviction under section 133 and substitute for it with conviction under section 134. Consequently, we set aside the sentence of 3 years imposed by the trial court to that of one year.

In the event this appeal is without merit, save for the adjustment on the conviction and sentence on the second count, the appeal stands dismissed.

DATED at **MUSOMA** this 8th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2022 in the presence of the appellant in person and Mr. Tawabu Yahya Issa learned Senior 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