IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

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

CRIMINAL APPEAL NO. 135 OF 2020

OYOMBE OCHIENG' @ JULIUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(M. A. Moyo, SRM – Ext. Juris.)

dated the 6th day of March, 2020
in
Criminal Appeal No. 53 of 2019

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JUDGMENT OF THE COURT

1st & 14th June, 2022

MAKUNGU, J.A.:

The District Court of Tarime convicted OYOMBE OCHIENG' @ JULIUS, the appellant herein, of the offence of rape. He was charged under sections 130(1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002 (the Penal Code) and sentenced to serve thirty (30) years imprisonment. The victim of the offence who was a girl aged fourteen (14) years shall interchangeably be referred to as the 'victim' or 'PW1'. The appellant unsuccessfully appealed to the High Court where his appeal was determined by the Resident Magistrate with extended powers (Hon.

M.A. Moyo, SRM Ext-Juris). This is his second appeal. He is challenging both the conviction and sentence.

The particulars of the offence which informed the appellant the accusation leveled against him stated that: On 16th July 2017 at night time at Kitembe village within Rorya District in Mara Region the appellant unlawfully had sexual intercourse with the victim. The appellant denied the charge.

To prove its case the prosecution paraded four (4) witnesses who are: PW1, PW2 OSORO DANIEL, PW3 WP9433 DC TAUS MOHAMED CHORISE and PW4 YUDITH PAUL MANONGA.

The brief material facts gathered from the trial court record are not complicated. The appellant was at the material time living at Kitembe Village four kilometers from Sakawa Village in which the victim and her parents were living. The victim knows the appellant. Came the incident date that is, on 16/7/2017 the victim was at home, while there her brother (Daniel Osoro) sent her to the appellant to collect a mobile phone battery. According to her, after arriving at the appellant's house she knocked the door and the appellant came out then told her that he has taken the battery for charging. The appellant asked her to escort him to follow the said battery and she complied. On the way, nearby the bushes the appellant held her hand and pulled her into the bushes and laid her down.

As to what exactly happened thereat, this is what she is recorded to have told the trial court:-

> *"After seeing that I started to raise an alarm, the accused person throttled on my neck and later he pulled my skirt and my pant and the accused person took his penis and inserted into my vagina. I struggled against him till I got a relief; nevertheless, the accused person inserted his penis into my vagina two times. Later I ran to home but on the way I encountered two women and I told them what befallen me. I proceeded to home whereupon I told my brother Daniel Osoro about the incident. I returned up to the scene of crime with my brother. Later we went to report the matter to the village chairman and we were given a letter to send to Police station. We went to Police Station Panyakoo and we were given PF3 and we went to Utegi hospital for examination. I was examined by a doctor and treated. I took PF3 and returned to Police Station."*

The above piece of evidence is confirmed by PW4 Yudith Paul a clinical officer, that when she examined the victim on 16/7/2017, she observed presence of dry sperms, bruises and a small cut in her vagina. Her findings in PF3 was tendered in evidence as exhibit P.I. PW3 WP 9433 DC Taus's account is about the investigation of the matter whereby she

interrogated the witnesses and confirmed that on 16/7/2017, PW1 was raped by the appellant. She added that the appellant was arrested on 7/10/2018 after he has absconded for a long time.

In his sworn evidence, the appellant totally denied the allegation and raised an existing conflict with PW1's father as the source of the fabricated accusations against him. Apart from admitting that he was arrested on 7/10/2018 and taken to Police station, he denied the accusation that he absconded for sometime.

In his judgment, the learned trial Resident Magistrate found PW1 to be a credible witness who made a sequential narration of events of how she was raped by the appellant on 16/7/2017. On the strength of her evidence which was supported by the medical evidence, he found the prosecution to have proved the offence of rape against the appellant. He convicted and sentenced him as indicated above.

When this appeal came for hearing, the appellant was unrepresented whereas the respondent Republic had the services of Mr. Tawabu Yahya Issa and Mr. Nico Malekela both learned State Attorneys.

In urging us to quash his conviction and allow this appeal, the appellant relied on six grounds of appeal which we condensed them to five because the first and the sixth grounds of appeal are related. In the first ground 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 first appellate court that misdirected in point of law and facts to dismiss his appeal relying on the evidence of prosecution witnesses and exhibit which was very contradictory and uncorroborated.

In his third ground, the appellant faulted the first appellant court for its failure to discover that the case was planted due to the fact that he had some grudges with the victim's father (PW2). The fourth ground of appeal faults the first appellate court in dismissing his appeal relying on the hearsay evidence of PW2 and PW4. In the fifth and last ground of appeal, the appellant faults the first appellate court for its failure to consider his defence.

When given an opportunity to elaborate 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.

Submitting on behalf of the respondent Mr. Issa resisted the appeal from the beginning. In opposing the appeal, the learned State Attorney chose to argue starting from grounds two, three, four, five and one at last.

Arguing in respect of ground two, Mr. Issa submitted that the evidence by the prosecution side was very strong against the appellant.

He submitted that a careful reading of the victim's account of the incident would clearly show that the first ingredient of the offence i.e penetration was proved. This piece of evidence of PW1 is confirmed by PW4. He pointed out that there were no contradictions in the evidence before the trial court. He told us that the second ingredient of this offence is the age of PW1 which was proved by herself and her father (PW2) that PW1 was 14 years old. He referred us to the case of **Masalu Kayeye V. Republic**, Criminal Appeal No. 120 of 2017 (unreported) to bolster his argument.

Failure by the first appellate court to discover that the case is fabricated because of grudges with PW2 as complained in ground three of appeal was a non-issue to the learned State Attorney. He argued that there was no conflict between the appellant and PW2. If there was any conflict, he would not have borrowed a phone battery from Daniel Osoro, the brother of the victim as his evidence shows at page 21 of the record of appeal.

The learned State Attorney urged us to dismiss the fourth ground which claimed that the evidence of PW2 and PW4 is hearsay and should not be considered. He rejected this line of the appellant's submission. He pointed out that the evidence of PW1 can stand alone to prove the appellant guilty beyond reasonable doubt. He further argued that since the medical evidence does not establish rape but rather the victim whose

evidence is credible PW4 was not a material witness in the present case. Besides, he added that, even if the evidence of PW2 and PW4 were not considered, their evidence could not add value on the prosecution case. He referred us to the case of **Selemani Makumba V. Republic**, Criminal Appeal [2006] TLR 379.

The learned State Attorney, finally submitted on the first ground, wherein the appellant complained that the prosecution did not prove its case against him to the required standard. He submitted that the victim was believed by the trial court. In view of the Court's holding in the case of **Selemani Makumba** (Supra), that the true evidence of rape has to come from the victim, if an adult that there was penetration and no consent, and in case of any other woman where consent is irrelevant. He concluded that penetration was proved and consequently the appellant's guilt was fully proved. He ultimately implored us to dismiss the appeal in its entirety.

The appellant, on his part had very little to say in rejoinder. He simply urged us to allow his appeal and order his release from prison.

In the light of the memorandum of appeal and the submission by the learned State Attorney, we think, the main issue for our determination is whether the appellant's conviction and sentence are maintainable. We wish to point out at the very beginning that we shall deal with the appeal

in the arrangement that was adopted by the learned State Attorney in arguing it.

To begin with, we shall deal with the 2nd ground of appeal which faulted the first appellate court to dismiss his appeal based on the evidence of prosecution witnesses and exhibit which were very contradictory and uncorroborated. It was clear from the record that on first appeal to the first appellate court, the appeal was dismissed. It was found that the victim's evidence was clear, reliable and gave a detailed account of what happened which was corroborated by PW2 and PW4. The first appellate court was satisfied that according to the victim the offence was committed in the morning when she went to the appellant's house to collect a phone battery. Again, she was familiar with the appellant hence he was properly identified by the victim. On the proof of the age of the victim, Mr. Issa submitted that it was proved beyond doubt that PW1 was under 18 years. However, in his rejoinder the appellant complained that there is a contradiction regarding the age of PW1, it was uncertain. He pointed out that in the charge sheet it was 14 years, and PW1 in her evidence testified that she is 15 years. PW2 also confirmed that PW1 is 15 years and in the PF3 (Exhibit P1) it was recorded 16 years. In our view, whatever the case may be still the age of PW1 is under 18 years. We have perused the record and we have seen nothing

contradictory in the evidence of prosecution side. We, therefore, find this ground not merited. We dismiss it.

On complaint number three, the appellant urged the Court to find that there is high possibility for him to be framed with this case because he had some grudges with PW2. This complaint should not take much of our time. We don't see such possibility as complained by the appellant.

We think that this complaint arises due to the fact that PW1 and PW2 were family members. As Mr. Issa pointed out that when weighing the credence of the witnesses, the issue for consideration is not how related or close the witnesses are, but whether the evidence adduced was credible. We agree with Mr. Issa, that these two witnesses are most crucial to prove this case. We find that PW1 managed to prove penetration and PW2 proved the age of PW1. Additionally, the law does not prevent relatives to testify in the same case. We find this complaint without merit.

Regarding the complaint that the testimonies of PW2 and PW4 are purely hearsay and should not be considered. This ground has no merit. We say so because 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 obtained 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:-

> *"Apart 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 PW2 and PW4 testifying believed them to be witnesses of truth. This was the exclusive domain of the trial court.

In our examination of the evidence on record we find nothing suspect in the testimony of PW2 and PW4. 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.

On the issue of failure of the first appellate court to consider his defence raised in the fifth ground of appeal, this ground should fail. The

record shows that the trial court considered and evaluated the defence evidence as shown at page 34 of the record. Again, the first appellate court considered and evaluated the defence evidence. We find nothing to fault the first appellate court as suggested by the appellant.

We now move to the 1st ground of appeal regarding the proof of the case. As regards this offence of rape laid under sections 130 (1) (2) (e) and 131 (1) of the Penal Code, we should at first, state that the prosecution had to establish that the appellant had sexual intercourse with the complainant who was under 18 years. In other words, the prosecution had to establish that there was penetration into the complainant's vagina, who was under 18 years, and that the perpetrator of the sexual act was the appellant. We agree with the learned State Attorney that the available evidence on the record sufficiently proves the case. As we have already stated the appellant was clearly recognized by PW1 at the scene of the crime. PW1 had known the appellant before. PW1 went to the house of the appellant to collect a phone battery the fact which was not disputed by the appellant. PW1 immediately reported the incident to his brother who informed his father, PW2. Subsequently, the matter was reported on the same day to the VEO, then to the police station.

As far as proof of rape is concerned, PW1 gave a graphic and coherent account of what happened after the appellant had taken her at

the bushes and had sexual intercourse with her twice. Settled is the principle that the best proof of rape must come from the complainant whose evidence, if credible, convincing and consistent can be acted upon alone as the basis of conviction- (See, for instance, **Selemani Makumba V. Republic** (Supra). See also section 127(6) of the Evidence Act. In the present case, the courts below appraised PW1's evidence and gave her full weight and credence. Moreover, the medical evidence, adduced by PW4 and supported by report (Exhibit P1) corroborated PW1's testimony.

Of course, we are mindful that in the offence of statutory rape, the victim must be under the age of eighteen years. In which case, the proof of the age of the victim must be given by either the victim, relative, parent, medical practitioner or through proof by a birth certificate, if available. [See **Issaya Renatus V. Republic**, Criminal Appeal No. 542 of 2015 (unreported).]

In this case, the age of the victim as shown in the charge sheet was 14 years. Yet PW1 at page 9 of the record of appeal testified that she was 15 years. And PW2 confirmed the same at page 12 of the record. In the PF3 (Exhibit P1) it was recorded 16 years. In this regard, we entertain no doubt that the age of PW1 was proved beyond reasonable doubt. In this case, PW1 managed to prove penetration and she gave credible

evidence against the appellant. We, therefore, do not see any reason to fault it.

With the foregoing, we find that the case was proved beyond reasonable doubt that the victim was raped by none other than the appellant. In the result, we dismiss the appeal in its entirety.

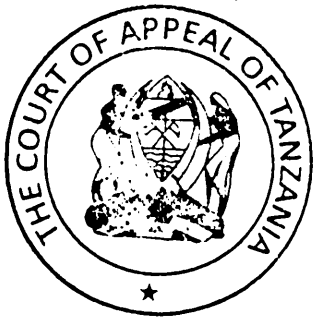
DATED at **MUSOMA** this 13th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2022 in the presence of the Appellants in person and Mr. Isihaka Ibrahim, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL