IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

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

CRIMINAL APPEAL NO. 490 OF 2020

SAID PETER @ Ndira @ SAID RAMADHANI .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Decision of the Resident Magistrate Court – Extended Jurisdiction at Kigoma)

(Mariki, PRM Ext. Jurisdiction)

dated the 22nd day of December, 2020
in
Criminal Appeal No. 13 of 2020

JUDGMENT OF THE COURT

8th & 16th June, 2022

KITUSI, J.A:

The appellant is serving a jail term of 30 years having been convicted by the District Court of Kigoma with rape of a twelve-year-old girl (PW2), an offence under sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap 16 R.E. 2002] (the Penal Code).

PW2 the victim, testified that on the fateful day in the morning while on the way to her aunt's residence, she met the appellant. He pretended that he wanted to send her on an errand to a certain girl but when she moved closer to him in order to receive instructions from him, the appellant

seized and took her into a trench. In the trench he removed her underpants while covering her mouth with a piece of cloth and had forced carnal knowledge of her. Immediately after the appellant finished and left, the appellant got out of the trench and hurried to a road block which was being manned by PW3. She told him that somebody had just raped her and she described the person to him as short. PW3 carried PW2 on a motorcycle in a bid to trace the culprit and a short distance thereafter she pointed to a person along the road, who turned out to be the appellant, as her ravisher. PW3 a member of people's militia, told PW2 to go back home as he proceeded to arrest the appellant and turned him over to the police before tracing PW2's father (PW1) and appraising him of what had happened. He left him to pursue the matter and went back to his duty post. Medical examination detected bruises in PW2's vagina confirming penetration by a blunt object.

In defence the appellant denied having raped PW2. He narrated a story of how he had spent the night at a music concert until morning, and that as he was walking home, a person on a motorcycle accosted him. This man (PW3) arrested him allegedly for raping a girl, which he maintained, was not true. Instead, he accused PW3 and PW4 the police investigator for trying to extort bribes from him in order to spare him. On this evidence the

appellant was convicted and sentenced as said. His first appeal to the High Court which was transferred to the Resident Magistrate's Court of Kigoma, was dismissed by Hon. Mariki, PRM with extended jurisdiction.

Before us, the appellant appeared in person to argue four grounds of appeal. Mr. Shaban Juma Massanja, learned Senior State Attorney and Ms. Antia Julius, learned State Attorney represented the respondent Republic. It was Ms. Julius who argued the appeal, the appellant having chosen to let her start.

The learned State Attorney addressed the third ground of appeal first. This ground of appeal reads:

> *"That the Hon. G. E. Mariki. PRM Ext. Jurisdiction erred in law by dismissing the appellant's appeal without determining the appeal on merit."*

Ms. Julius very briefly submitted on this ground simply pointing out that both parties were heard before the learned PRM rendered his decision. She submitted that hearing both sides was proof that the matter was heard and determined on merits. On his part, the appellant did not seem to realize that this was one of the grounds of appeal presented by him, let alone submit on it.

We think the third ground of appeal is a result of a misconception as it hardly makes any sense because the first appeal was determined on the merits, whether wrongly or correctly. This appeal aims at challenging the decision of the first appellate court on the merits with the potential result of allowing it and restoring the appellant's freedom. If the appeal had not been determined on merits, we would possibly order that the matter be remitted to the Resident Magistrate's Court with Extended Jurisdiction for determination by it on merits. Therefore, we dismiss this ground, satisfied that it is misconceived and without merit.

Ms. Julius submitted on the fourth ground of appeal next. This ground faults the two courts below for proceedings to convict the appellant in a case where no parade of identification was conducted to determine the real identity of the person who raped PW2. Ms. Julius submitted that a parade of identification would not have served any useful purpose in a case in which PW2 identified the culprit before and actually participated in his arrest. The appellant did not contribute anything in a form of submission on this ground.

In our determination of this ground of appeal, we take into account the fact that identification parades are meant to serve a purpose if a suspect is not previously known to the victim. [**Siasa Bernard @**

Kasenga v. Republic, Criminal Appeal No. 22 of 2010; **Karim Seif @ Slim v. Republic**, Criminal Appeal No. 161 of 2017 (both unreported)]. In this case PW2 had allegedly seen the appellant during the commission of the alleged offence and a few minutes later she identified him to PW3 before the latter arrested him. In the circumstances, an identification parade was uncalled for. So, for that reason, the fourth ground of appeal has no merit, we dismiss it.

In the second ground of appeal to which Ms. Julius conceded, the complaint is that the two courts below did not consider the defence case. We agree with Ms. Julius' concession because the closest the learned trial magistrate went in considering the defence case was:

> "*Basing on the strength of the prosecution evidence I hereby dismiss the accused defence this because where there is strong identification evidence of an eye witness like in this case then the defence of alibi of the accused that he was (sic) at somewhere else dies a natural death because as I have elaborated above that under the circumstances in which this offence was committed there is no way PW2 could have mistaken him with another person ...*"

In our considered view, not only was this not good enough in terms of consideration of the defence case, but the learned trial magistrate purported to consider it after concluding that the prosecution was sufficient to sustain a conviction. The first appellate court which should have conducted a rehearing, also omitted to consider the defence case, with the end result that the complaint that the defence case was not considered by two courts below is justified.

The learned State Attorney invited us to step into the shoes of the two courts below to evaluate and consider the defence case. We are going to do what Ms. Julius has asked us to do because that is what we have done in numerous previous cases. [**Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 and; **Felix Kichele and Another v. Republic,** Criminal Appeal No. 159 of 2005 (both unreported)]. In the latter case it was held: -

> *"As already pointed out, the fact that both courts below in the present case did not consider the defence case is, in our view, a misapprehension of evidence and entitles us to intervene in an endeavor to put matters in their proper perspective. We have sought guidance from our previous decision on the point in* ***Joseph Leonard Manyota***

v. R, Criminal Appeal No. 485 of 2015 (unreported)".

On that basis, we shall consider the defence case in the course of dealing with the first ground of appeal.

The first ground of appeal alleges that the prosecution case was not proved against the appellant beyond reasonable doubt. Ms. Julius submitted that in statutory rape cases as the instant, the prosecution has a duty to prove, the age of the victim, penetration and identity of the culprit. She then submitted that the evidence of PW2 supported by PW4 proved penetration and proof that she was below 18 years came from PW2 supported by PW1. She relied on the case of **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported), to argue the principle that in sexual offences, the best evidence is that of the victim. As for the identity of the perpetrator, the learned State Attorney submitted that PW2 identified the appellant and named him to PW3 at the earliest opportunity. She went on to invite us to consider the defence of alibi raised by the appellant but urged us to dismiss it because positive identification at the scene of crime renders that defence improbable.

On his part the appellant attacked the PF3 for not bearing the office file number and for not clarifying what could the blunt object that

penetrated PW2 be. He also wondered why was there no demonstration that PW2 bled as a result of the rape considering that her hymen was found to have been perforated. He also described the scene of the crime as a busy road, then wondered how he could have committed rape under such circumstances. He pointed out to a discrepancy in the victim's age arguing that PW1 and PW2 said she was 13 years, while PW4 said she was 12 years.

We have considered the evidence of PW1 and PW2 in relation to the victim's age and we have no hesitation in concluding that she was 13 years. This is because evidence of the age of the victim, when not proved by a birth certificate as in this case, comes from the victim herself or her parents. [**Isaya Renatus v. Republic,** Criminal Appeal No. 542 of 2015 (unreported)]. In this case the victim (PW2) and her father (PW1) sufficiently proved that the victim was 13 years. Next, we have considered PW2's evidence on how she got lured into the hands of the appellant under the pretext that he wanted her to be an emissary to another girl whom he was interested in, and how the appellant's greed got the better of him and he turned the unwilling PW2 into a prey herself. We find her story quite natural and believable. The fact that she disclosed her ordeal to PW3 immediately is supported by PW3. There is also the uncontested fact that the appellant was arrested on the road within the vicinity of the scene of

crime as described by PW2 and PW3. The appellant's defence of alibi was in fact not one, because he just narrated about his previous night's frolics, without the slightest suggestion that he was not at the scene of crime in the morning that followed. Instead, by saying that he was arrested by PW3 in the morning as he was moving along the road, he confirmed that he was around the scene of the crime. The appellant's suggestion that it could not have been possible for him to rape anyone along that busy road, would have been plausible had PW2 not stated that the rape was executed in a trench and her screams were muffled by a piece of cloth the appellant placed on her mouth. The appellant's story that PW3 and PW4 had demanded bribe from him is an afterthought because he did not cross examine them on that. We believe PW2 and PW3 as did the two courts below, and find the arguments by the appellant tenuous.

The appellant's argument that the PF3 should have disclosed what was the blunt object that penetrated PW2, is rather comical in our view, because medical evidence need not go to that length. Neither does the absence of a file number on the PF3 reduce its utility. Even if we were to disregard the PF3, there would still be evidence from PW2 because rape is not proved by medical evidence alone. [**Edson Mwombeki v. Republic**, Criminal Appeal No. 94 of 2016 (unreported)]. As for the absence of blood, we wonder why the appellant brought up such an argument because PW2

did not allude to that fact, nor was she cross examined by him on that. We are not going to guess why there was no blood, but that fact does not affect our finding that PW2 was raped.

All considered, including the defence case, we find no merit in the appellant's complaint in the first ground of appeal, that the prosecution did not prove its case beyond reasonable doubt. We dismiss this ground of appeal, which leads us to the conclusion that this appeal has no merit. We dismiss it entirely.

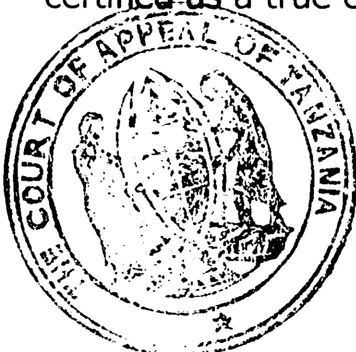
DATED at **KIGOMA** this 15th day of June, 2022.

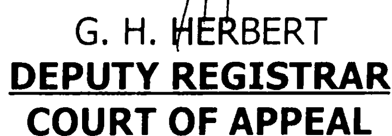
F. L. K. WAMBALI
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 16th day of June, 2022 in the presence of the appellant in person, unrepresented and Mr. Raymond Kimbe, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.





G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL