IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 167 OF 2020

MOHAMED SAID RAIS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu)

(Chaba, SRM-Ext. Juris.)

dated the 2nd day of March, 2020
in
Extended Criminal Appeal No. 230 of 2019

.....

JUDGMENT OF THE COURT

6th & 20th July, 2022

MWANDAMBO, J.A.:

On 14/05/2018 the police station at Maturubai, Temeke District received a complaint of a sexual offence allegedly committed in the evening of that day at a place called Mbagala Kilungule. The complainant who was a girl aged 16 years mentioned the appellant Mohamed Said Rais as the perpetrator of the crime. Ultimately, the appellant was arraigned before the District Court of Temeke on two counts, namely; statutory rape and unnatural offence contrary to the relevant provisions of the Penal Code.

The particulars of the charge on both counts were similar except for the nature of the offences. It was alleged that on 14/05/2018 at Mbagala Kilungule area, the appellant had vaginal and anal intercourse with a sixteen years girl whom we shall henceforth be referring to as the victim or PW1. The appellant denied the accusations resulting into a trial whose verdict has given rise to the instant appeal.

The case for the prosecution which the trial court found to have been sufficiently proved was built on the testimonies of five witnesses. The evidence depicts that, on the evening of 14/05/2018 PW1 was accompanying a friend (PW2) who had earlier on visited her home. At some point they met the appellant who was well known to both of them. At the appellant's request, PW1 parted company with PW2 and left with him. PW2 had a similar account on this aspect. As PW1 and the appellant reached near a certain house, the appellant is said to have started touching the victim's hands in a manner which she suspected to be worrisome but she could not make noise for help due to appellant's threat to kill her if she dared doing so. PW1's account portrays further that the appellant dragged her to a bedroom in an unspecified house in which he attempted to undress her and have sexual intercourse but in vain which necessitated enlisting assistance from a friend who readily responded. With the help of that friend, the appellant is said to have had sexual

intercourse with PW1 and thereafter, had his friend do alike before both of them sodomised the victim in turns. After the awful act, PW1 left and reported the incident to her mother (PW3) who confronted the appellant later at his home but he denied the accusations. Afterwards, PW3 accompanied PW1 to Maturubai Police Station where they obtained a PF3 before proceeding to Mbagala Rangi Tatu Hospital for medical examination. Doctor Davis Magesa (PW4) who examined the victim observed that she had lost hymen by reason of sexual intercourse way before the incident. On the other hand, PW4's examination on the anus revealed existence of bruises on the victim's anal orifice caused by forceful entry of a blunt object. PW4 posted his medical examination findings in the PF3 which was admitted at the trial as exhibit P1. The evidence of WP No. 5150 Det. Cpl Nangejwa (PW5) was limited to her investigation of the offence before the appellant's arrest and arraignment.

In defence, the appellant called two more witnesses; his mother (DW2) and a Street Chairman (DW3) to disprove the accusations against him. His defence was that the case against him was fabricated by the victim's mother in retaliation after marrying another woman in lieu of PW1 allegedly his girlfriend. He denied having met PW1 that evening as he was busy in a communal work with DW3.

At the end of it all, the trial court satisfied itself that the prosecution had proved that the appellant committed the offences and hence a finding of guilt followed by conviction and sentence of 30 years imprisonment on each court running concurrently.

The appellant's appeal before the Resident Magistrate's Court of Dar es Salaam at Kisutu presided over by M.J. Chaba, SRM-Extended jurisdiction (as he then was) did not see its day. The first appellate court dismissed it having been satisfied that the findings of the trial court on the guilt of the appellant were supported by the evidence adduced by the prosecution which proved the charge to the required standard. As he was still aggrieved, the appellant has preferred this second and final appeal before this Court.

The appellant's original memorandum of appeal raises 11 grounds out of which, 10 are directed against procedural aberrations in the proceedings before the trial court. The last ground relates to failure to consider his defence. Subsequently, he filed a supplementary memorandum consisting of three grounds. The first ground alleges that conviction was not justified because penetration as an essential ingredient in both counts was not proved. In ground two, the appellant contends he was not properly identified as the perpetrator of the crimes. Ground three

is predicated on the complaint against the courts below for failure to consider his defence of *alibi*.

Ahead of the hearing, the appellant had filed in Court a written statement of arguments in support of the appeal in terms of rule 74 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). Mr. Nehemia Nkoko, learned advocate who represented the appellant at the hearing of the appeal stood by the statement. He only made a few additions by way of emphasis on the first ground in the supplementary memorandum directed against reliance on insufficiency of evidence which did not prove penetration. Similarly, the learned advocate faulted the first appellate court for invoking the overriding principle in acting on the evidence of a tender age witness (PW2), in violation of section 127 (2) of the Evidence Act. Finally, Mr. Nkoko criticised the first appellate court's judgment branding it as problematic for holding that the appellant's defence was considered by the trial court when it was not the case.

Resisting the appeal, the respondent Republic was represented by Ms. Christine Joas, learned Senior State Attorney assisted by Monica Ndakidemi, learned State Attorney who made her submissions in reply largely on the grounds in the memorandum of appeal. Even though the appellant has raised a number of complaints on the alleged procedural violations, we have not found it necessary to deal with them having

agreed with the learned State Attorney and taken the view that none of them has any bearing on the sanctity of the trial which could have vitiated the appellant's conviction. All the same, we find constrained to say that that we agree with the learned advocate for the appellant that the first appellate court strayed into error in justifying the reception of the evidence of PW2 by the overriding objective. As we said in **Mondorosi Village Council and Two Others v. Tanzania Breweries, Ltd and Four Others**, Civil Appeal No. 66 of 2017 and **Njake Enterprises Limited v. Blue Rock Led and Rock and Venture Co. Ltd**. Civil Appeal No. 69 of 2017 (both unreported), the overriding objective principle was introduced for use in fitting cases and not to be applied blindly in disregard of the rules of procedure and evidence couched in mandatory terms. All factors being equal, the evidence of PW2 was irregularly received and ought to have been expunged. However, subject to our discussion on the merits of the appeal, that would have no effect on the appellant's conviction.

The only complaint worth our consideration in the memorandum of appeal relates to the appellant's complaint against the trial court's failure to consider defence evidence which is repeated in the supplementary memorandum as ground three. The substantive issues arising from the supplementary memorandum can be conveniently dealt with conjointly.

As consent was irrelevant to establish the commission of statutory rape, the prosecution was only required to prove penetration of a male sexual organ into the girl's vagina whereas unnatural offence entailed penetration of a male sexual organ into the victim's anal orifice.

The appellant's complaint is that contrary to the trial court's findings sustained by the first appellate court, PW4's evidence did not establish that there was any penetration into the victim's vagina neither was it established that the bruises seen in her anal orifice were fresh ones which created doubt on the prosecution case. Mr. Nkoko urged the Court to hold that the appellant's conviction was against the weight of evidence proving the offences thus warranting its interference with the concurrent findings of facts by the two courts below. It has also been contended that PW1's evidence fell short of the essential particulars of the house in which the offence was allegedly committed let alone giving descriptive particulars of the culprit. Apparently, the learned State Attorney who argued against the appeal, did not have specific arguments on this apart from opposing it and urging the Court to dismiss it.

The appellant's complaint on insufficient proof of penetration and identification seeks to fault the concurrent findings of facts by the two courts below in a second appeal. It is trite law for which no authority is necessary to underscore that a second appellate court has limited power

to disturb the concurrent findings of fact by the trial court and first appellate court except in rare cases where it is plain that such courts misapprehended the evidence or failed to consider some evidence on record. Failure to consider evidence on record, subject of the appellant's complaint in ground ten in the memorandum of appeal denotes omission to subject the entire prosecution evidence to scrutiny with the defence evidence. Apparently, Ms. Monica Ndakidemi, conceded such failure but invited the Court to invoke its power under section 4 (2) of the Appellate Jurisdiction Act by stepping into the shoes of the first appellate court and do what it failed to do. Mr. Nkoko had similar view with which we entirely agree and accept the invitation.

We shall begin our discussion with the question whether the offence of statutory rape was proved. In doing so, we are alive to the principle that the best evidence in sexual offences must come from the victim. See: **Selemani Makumba v. R** [2006] T.L.R 379 reinforcing the spirit under section 127 (6) of the Evidence Act. That principle must be weighed in the light of another yet another important principle developed by Lord Chief Justice of the King's Bench Sir Mathew Hale, an English jurist that rape is an accusation which is easily made, hard to be proved and harder to be defended by the party accused, though never so innocent.

The Court has had occasions to refer to the above in its various decisions including; **Mohamed Said v. R**, Criminal Appeal No. 145 of 2017 Unreported). What is gathered from the above is that such evidence from the victim of a sexual offence can ground conviction if it is beyond reproach by itself which boils down to credibility.

The victim's evidence was that initially, the appellant attempted to undress her in a room to procure sexual intercourse by force but since he did not succeed, he enlisted assistance of a friend who readily responded and provided the required assistance by holding her legs whilst the appellant inserted his penis before the friend had his turn. By PW1's own evidence, after the act, she did not wash her private parts because she felt a lot of pains. Her evidence and that of her mother reveals that, the medical examination was conducted by PW4 within hours after the incident. However, PW4's medical examination, revealed that PW1 had lost her hymen longer than he examined her neither did he observe any bruises on her vagina. Like Mr. Nkoko, we have not been spared from wondering how could the victim's vagina get penetrated forcefully by two men and nothing unusual be seen from it through PW4's examination within few hours. Logic and common sense would suggest otherwise.

In regard to sodomy, there was evidence through PW4 of existence of bruises due to forceful entry of a blunt object but such evidence fell

short of any explanation if the bruises were fresh from a recent forceful penetration. Neither was it suggested that such bruises must have resulted from forceful penetration of a male sexual organ to the exclusion of any other blunt object. That aside, PW4 did not explain if in his examination he was able to see anything else such as semen or any discharge or at least relaxed sphincter muscles resulting from forceful penetration involving two men in turn.

The cumulative effect of the foregoing coupled with PW1's failure to give particulars of the house where the offences were committed raises some doubts on the commission of the offences which has a bearing on her credibility.

Worse still, PW1 did not tell the trial court whether the house in which she was made to succumb to rape and sodomy at the hands of two men had other occupants from whom she could have run for help the moment the culprit is alleged to have asked for a help from a friend. There is no explanation either why she could keep quiet from such a fateful event after she had been freed by the assailants without asking for help from the people nearby the house with a view to apprehending the culprits immediately thereafter. In our view, had the trial court directed its mind to these lingering doubts, it should not have entered a verdict of guilt.

It will now be clear that the first appellate court's concurrence with the trial court on findings of fact resulting into the appellant's conviction was but, erroneous. It was a result of misapprehension of the evidence and non-direction. The position was made worse by the failure to consider the appellant's defence an aspect which was glossed over by the first appellate court. Briefly, the appellant's defence evidence through his own testimony and DW2 was to the effect that the case was fabricated by PW3 in retaliation after the appellant had married another girl in lieu of PW1 who was allegedly his girlfriend. The events that followed after the alleged incident indicate that after the alleged incident PW3 confronted the appellant and had an encounter with the appellant's mother on the same issue. That was followed by her incarceration in connection with her son's alleged involvement in the offences.

It will be recalled that the appellant had told the trial court that the time PW1 claimed that she was raped, he was somewhere else with the street chairman (DW3) on some other communal activities returning home around 22:00 hours. Again, according to DW1 and DW2, PW1's mother had accused the appellant for deflowering PW1 and hence the fracas that ensued. This version of the defence was not considered by the trial court before making a finding of guilt. Contrary to the first appellate court, it was glaring that the defence evidence was not considered and had it been

considered, the trial court should have found that such evidence lent credence to the appellant's claim on being framed up. It punched several holes in the prosecution evidence raising reasonable doubt enough to benefit the appellant.

In the event, we find merit in the grounds in the supplementary memorandum of appeal and allow the appeal. The appellant's convictions are hereby quashed and sentences set aside with an order that the appellant shall be released from custody forthwith unless lawfully held therein.

DATED at **DAR ES SALAAM** this 25th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 26th day of July, 2022 in the presence of the Appellant in person via video conference and Ms. Monica Ndakidemi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL