IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

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

CRIMINAL APPEAL NO. 54 OF 2019

GODSON DAN KIMARO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 21st day of December, 2018
in
DC. Criminal Appeal No. 76 of 2017

JUDGMENT OF THE COURT

30th September & 7th October, 2022

MAKUNGU, J.A.:

Before the District Court of Moshi at Moshi, the appellant stood charged with rape of an eleven-year girl contrary to sections 130(1)(2)(e) and 131 (1) the Penal Code [Cap. 16 R.E. 2002]. The particulars of the charge alleged that the appellant committed the offence on 23/09/2016 at a village called Mwika within the District of Moshi in Kilimanjaro Region. We shall be referring to the victim of the offence as RN or PW1 in this judgment.

The prosecution case at the trial was that on 23/09/2016, the appellant allegedly had sexual intercourse with RN at a cowshed inserting his penis into her vagina and gave her shillings five hundred (500/=). Three days later on 26/9/2016 the appellant went again to RN's house and took her to an unfinished house and had sexual intercourse with her and gave her shillings one thousand (1000/=).

On 29/9/2016 around 21:00 hours the appellant went again to the house where RN was sleeping and while seducing her to have sexual intercourse with the RN's uncle (PW3) arrived and the appellant ran away, leaving behind his one shoe, a mobile phone (Nokia) and a hat. The incident was reported to police station at HIMO and RN was taken to Mawenzi Hospital for medical examination after obtaining a PF3 from the police. At the hospital Dr. Ndenisaria Shedrack Lema (PW5) examined RN's vagina. Upon examination PW5 posted his findings in a PF3 showing that RN had lost her virginity which suggested that she had been penetrated. The PF3 was admitted in evidence as exhibit P1. Earlier on, E. G548 Detective Cpl. Rick (PW4) who had been instructed to investigate the case managed to interrogate three witnesses and the appellant and on the basis of the evidence took the appellant to court. In his defence, the appellant denied the allegations by the prosecution.

The trial court essentially formulated only one issue for determination of the case, whether the prosecution proved its case to the standard required in criminal cases. It (the trial court) determined affirmatively upon being satisfied with the evidence of PW1 and PW5 as well as exhibit P1 showing that there was indeed penetration into PW1's vagina. Similarly, guided by the principle that the best evidence in sexual offences must come from the victim underscored in **Selemani Makumba v. R,** [2006] T. L.R 379, the trial court found no difficulty in finding that the evidence of PW1 proved that it was the appellant and no other person who committed the offence. The appellant associated his arrest and arraignment with grudges of PW3 had against him. The trial court rejected the appellant's evidence in defence as weightless and incapable of displacing the prosecution evidence. It convicted the appellant as charged followed by a mandatory thirty years imprisonment.

The appellant's appeal to the first appellate court was unsuccessful. The High Court Fikirini, J. (as she then was) concurred with the findings of fact by the trial court and dismissed the appellant's appeal predicated on six grounds of appeal. Nevertheless, the first appellate court took the view that determination of the appeal turned on

one main complaint whether the case for the prosecution was proved beyond reasonable doubt.

The instant appeal is predicated on six grounds in the memorandum of appeal plus four additional grounds upon two supplementary memoranda of appeal lodged a few days prior to the hearing of the appeal, each comprising two grounds of appeal. We have carefully examined the ten grounds of appeal raised and found that the grounds can conveniently be paraphrased as follows: **One**, that PW1's evidence was received in violation of section 127(2) and (3) of the Evidence Act [Cap 6 R.E 2019] (the E.A), **two**, credibility and truthfulness of PW1; **three**, failure by PW1 to report the incident on time; and **four**, that the prosecution case was founded on contradictory evidence, hence the charge was not proved beyond reasonable doubt.

The appellant began by adopting the three memoranda of appeal and then briefly raised issues on grounds 1 and 4. He did not specifically submit on other grounds though, having adopted all grounds of appeal and left the matter for our consideration.

Ms. Verediana Mlenza, learned Senior State Attorney, who was assisted by Ms. Sabitina Mcharo, learned State Attorney representing the respondent Republic submitted on all grounds referred to above. Ms.

Mlenza submitted on the first two grounds while Ms. Mcharo submitted on the last two grounds.

We start our attention to the complaint in the first ground; that PW1's evidence was wrongly received. The appellant claimed that the testimony of PW1, a child of tender age, was received in contravention of section 127(2) of E.A as amended by the Written Laws (Misc. Amendment) (No. 2) Act, 2016, Act No. 9 of 2016. The trial court, he argued, did not inquire into the intelligence of the witness and her understanding of the duty to speak the truth before she took the witness stand. Relying upon our decisions in **John Mkorongo James v. The Republic**, Criminal Appeal No. 498 of 2020 and **Mussa Ali Ramadhani v. Director of Public Prosecutions**, Criminal Appeal No. 426 of 2021 (both unreported), he claimed that the omission was fatal to the prosecution case and urged us expunge the PW1's evidence. Ms Mlenza disagreed with the appellant's argument. Citing **Wambura Kiginga v. The Republic**, Criminal Appeal No. 301 of 2018 (unreported), she argued that a witness of tender age is permitted under section 127 (2) of the EA to give evidence on oath or affirmation or without oath or affirmation but that if evidence is given without oath or affirmation the witness must promise to tell the truth and undertake to tell no lies. Referring to page 10 of the record of appeal, she

submitted that the trial court received the PW1's testimony on oath after it had satisfied itself that the said witness understood the nature of oath.

Section 127 (2) of the EA, provides as follows:

> *" A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

As we stated in **Issa Salum Nambaluka v. Republic**, Criminal Appeal No. 426 of 2021 (unreported) the above provision permits a child of tender age, that is, a child whose apparent age is not more than fourteen years, to give evidence on oath or affirmation or to testify without oath or affirmation but upon promising to tell the truth, not lies. More significantly we held thus:

> *"It is for this reason that in the case of* ***Godfrey Wilson v. Republic,*** *Criminal Appeal No. 168 of 2018 (unreported) we stated that, where a witness is a child of tender age, a trial court should at the foremost,* ***ask a few pertinent questions so as to determine whether or not the child witness understands the nature of oath. If he replies in the affirmative, then he or she can proceed to give evidence on oath or affirmation depending on the religion professed by such child witness.***

If such child does not understand the nature of oath, he should, before giving evidence, be required to promise to tell the truth and not to tell lies." [Emphasis added].

It is evident from the record that the trial court tested PW1's understanding of the nature of oath by putting to her a few simple questions. The Court was satisfied that the witness understood the nature of oath and the duty to speak the truth. In our view the trial court applied the procedure correctly. We have no doubt that PW1's testimony was properly received on oath. Consequently, this ground of appeal fails.

Ms. Mlenza was brief in respect of the second ground of appeal which was a complaint on the credibility and truthfulness of PW1. She contended that the allegation has no merit because credibility of a witness is, by and large, the domain of the trial court. She submitted that credibility of PW1 was not at all questionable because at page 10 of the record of appeal, she explained each and every detail of how she was raped by the appellant.

We agree with Ms. Mlenza's argument on this ground. To consider this ground we will be guided by three principles which are now deep-

rooted in our courts such that it has since become part and parcel of our jurisdiction.

One, that the best court for assessing credibility is the trial court and that this Court can rarely interfere with concurrent findings of two lower courts on an issue of credibility. The rationale being that this second appellate court does not have the advantage that the trial court enjoys, that of seeing, hearing and assessing the demeanour of witnesses. On this principle see this Court's decision in **Seif Mohamed E. L. Abadan v. R,** Criminal Appeal No. 320 of 2009, **Aloyce Maridadi v. R,** Criminal Appeal No. 208 of 2016 and **Ayoub Adimile @ Mwakipesile v. R,** Criminal Appeal No. 503 of 2017 (all unreported), among many other decisions.

Two, the other principle relevant to us is that, in sexual offences the best evidence is that of the victim, see **Selemani Makumba v. R,** (supra)in line with section 127(6) of the EA and **three,** that every witness is entitled to credence and belief to his evidence unless there are good and cogent reasons to hold otherwise. This is one of the principles of the law of evidence as per the case of **Goodluck Kyando v. R** [2006] TLR 363 where this Court held that:

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

According to **Aloyce Maridadi** (supra), good and cogent reasons for not believing a witness include the fact that the witness has given improbable and implausible evidence or that the evidence has materially contradicted any other witness or witnesses.

The first appellate court agreed with the trial court and dismissed the appeal having agreed that the evidence of PW1 was credible. Likewise, we must observe at this juncture that, the cross examination of the appellant to PW1 did not shake the girl's truth. Her evidence remained the best, for she was the victim of the crime and the appellant, her aggressor. We find no good reasons for questioning her credibility. In the circumstances, the second ground of appeal has no merit and we dismiss it.

The next ground under consideration is ground three where the appellant is attacking PW1 for her failure to report the incident on time. He submitted that he could not have raped her on 23/9/2016 as per charge sheet, without such child reporting to anybody until on

29/9/2016. He contended that the case against him was cooked up by PW3.

In reply to this ground of appeal, Ms. Mcharo submitted that the ground has no merit and urged us to dismiss it. She submitted that PW1 delayed to disclose the illegal act on time due to her immaturity and money consideration given to her by the appellant. She submitted that in the circumstances, the delay to report was justified.

As clearly submitted by learned State Attorney, we agree that considering the immaturity of PW1 and the fear of a reprisal from the appellant should she spill the beans, the delay is quite understandable. It does not affect the prosecution case. We are of the considered view that the appellant's complaint in this ground of appeal has no merit and we dismiss it.

We are enjoined by the fourth ground under consideration to interrogate the contention that the charge was not proven beyond reasonable doubt.

The appellant's argument on this ground was that: first, the prosecution failed to produce as evidence items claimed to be left behind by the appellant on the scene of crime. He argued that the prosecution should have tendered the alleged items, which they did not.

Secondly, that there was a material variance between charge sheet and the evidence on the date of the alleged incident. That, while the charge sheet cited 23/9/2016, PW1 and PW2 in their testimonies mentioned 26/9/2016. That is contradiction, he argued.

Ms. Mcharo had a different position. She submitted that the prosecution sufficiently established, upon the testimonies of PW1 and PW2 as well as the medical evidence adduced by PW5, that PW1 was raped and she named the appellant as the culprit. She also submitted that the said items were found on 29/9/2016 were irrelevant to this case. On the issue of different dates, she submitted that the charge sheet cited 23/9/2019 but the evidence shows that the appellant has committed the offence more than once. Therefore, there is no contradiction at all, she replied.

As to whether the charged offence was proved to the required standard, we would, at first, underline that the prosecution had to establish that there was penetration into the PW1's vagina and that the perpetrator of that illegal act was the appellant.

Having examined the testimonies of PW1 and PW5 in the light of the concurrent findings of the courts below, we are satisfied that it was sufficiently proven that PW1 was raped on the material day. Apart from

her evidence having not been controverted by the appellant in cross-examination, it was supported by the impeccable evidence of PW5.

The courts below found PW1's evidence unassailable believable, and reliable. They were both satisfied, upon that evidence, that the appellant was the culprit who sexually abused her. We see no good reason, on our part, for the little girl lying against the appellant, who was her neighbour. Admittedly, there was a delay for about a week by PW1 in reporting the incident. But the delay is attributable to immaturity of PW1 and fear of reprisal from the appellant. As we held in **Selemani Hassan v. Republic,** Criminal Appeal No. 203 of 2021 (unreported), delay in reporting an incident of sexual offence due to fear of reprisal or shame does not affect the credibility of the victim. The charge of a sexual offence is not undermined by the silence of the victim if such silence is fully explained.

As indicated earlier, the appellant interjected the defence of general denial and suggested that the charge might have been a result of the grudges PW3 has against him. Apart from this line of defence being general; self-serving and weak, the claim that the charge was fabricated was not raised in cross-examination of PW1 and PW3. The claim was plainly an afterthought. The courts below rightly rejected the

defence upon due consideration. Consequently, we find the fourth ground of appeal unjustified as we are satisfied that the charged offence was proven beyond reasonable doubt.

It is apparent from the above discussion that all the grounds of appeal fronted by the appellant have failed for wants of merits. In the end result, this appeal also fails. It stands dismissed entirely.

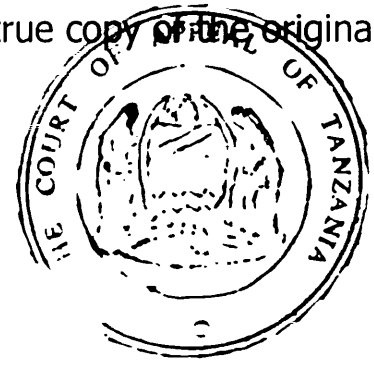
DATED at **MOSHI** this 7th day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 7th day of October, 2022 in the presence of the Appellant in person and Ms. Sabitina Mcharo, 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