IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 454 OF 2019

YUSTUS AIDAN .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Arusha)

(Mzuna, J.)

dated the 26th day of October, 2018
in
Criminal Appeal No. 130 of 2017

....

JUDGMENT OF THE COURT

28th September & 6th October, 2022

MWANDAMBO, J.A.:

The District Court of Monduli tried and convicted Yustus s/o Aidan, the appellant herein, for the offence of rape of a 12 years girl predicated upon section 130 (1) (2) (e) and 131 (1) of the Penal Code earning him a sentence of 30 years' imprisonment. The appellant's appeal to the High Court at Arusha was barren of fruit, hence the instant appeal before the Court.

The facts which resulted into the appellant's conviction before the trial court are fairly easy to tell. On 02/04/2014, the victim of the

offence whose name is concealed to be referred to as PW1, visited a place called Kigongoni at Mto wa Mbu in Monduli upon the instructions of her sister to Mama Romana who could not be found which necessitated PW1 deciding to return home. PW1 could not easily secure transport by Bajaj before she pounced on a person she happened to be familiar with; Yustus Aidan in the company of two other people including Athumani who offered an assistance to her. That was around 1900 hours. That time appeared to have been too late for PW1 returning to her home at Mnadani.

Finding herself in that situation, PW1 accepted the appellant's offer to have her taken to a local street chairman for accommodation that night. However, contrary to her expectations, the appellant did not take PW1 to the street chairman allegedly because the Chairman advised him to take the victim to a ten-cell leader as he was away. Nonetheless, the appellant did not make it to the ten-cell leader, instead, the appellant led the victim somewhere in a mud grass house where he was alleged to have had sexual intercourse with her during that night. News reached PW2 through her brother of what had befallen of PW1 and afterwards, on 04/04/2014 in the morning, to be exact, she proceeded to the scene of crime where she found PW1 in a bad

condition complaining of being raped by someone she mentioned to be the appellant.

Even though there is some contradiction regarding the date the victim was taken to hospital for examination and the date a PF3 was issued, Dr. Emma Augustino Msoffe (PW5) recounted that she examined her on 04/04/2014. Upon examination, PW5 found swelling of both labia of the victim and lost hymen with bleeding in her vagina which suggested that she had sexual intercourse. It was not until 22/02/2016 when the appellant was apprehended and arraigned before the trial court for the offence of rape to which he denied any involvement. According to E. 8773 DCPL Gasto (PW4), the police investigator, the appellant had disappeared to Moshi after the incident, hence the delayed arrest and arraignment.

In his defence, the appellant admitted knowing the victim but denied having committed the offence. It was his case that his arrest was in connection with allegation of loitering neither did he escape to Moshi as claimed by the prosecution.

The trial court found the prosecution evidence proved the charge on the standard required in criminal cases finding the appellant guilty as

charged followed by conviction and sentence. Its conclusion was influenced by the prosecution evidence which established that the victim who was 12 years old on the testimony of her mother, Theresia Itambo (PW6) had been penetrated by a man who happened to be the appellant.

On appeal to the High Court at Arusha, the appellant challenged his conviction on three complaints. Firstly, he complained that the prosecution did not prove the case against him beyond reasonable doubt. His second complaint was that he was wrongfully convicted relying on the medical evidence through PW5 as conclusive proof of rape in the absence of explanation of the object causing bruises on the victim's private parts. Lastly, failure by the trial court to analyse and evaluate evidence on record.

As any other first appellate court would be expected to do, the High Court made fresh evaluation of the evidence on record and upon such evaluation, it concurred with the trial court that the appellant was convicted on the weight of evidence and thus his complaints were all unfounded. It dismissed the appeal resulting in the instant appeal faulting the first appellate court for sustaining conviction and sentence.

The five grounds of appeal raise the following issues; **one**, failure by the first appellate court to scrutinize and evaluate the evidence which did not prove the case against him beyond reasonable doubt, **two**, sustaining conviction in a case predicated upon a defective charge; and **three**, wrongful conviction on account of failure to consider defence evidence.

The appellant who was unrepresented during the hearing of the appeal, made fairly long submissions in support of his grounds of appeal. In relation to ground one the appellant attacked the first appellate court for failing to hold that PW1, the victim of the offence was not a credible witness who could not have been believed by the two courts below. The appellant pointed out several aspects in PW1's evidence which, according to him, would have resulted in finding that her evidence left a number of doubts which could have been resolved in his favour resulting into his acquittal. Firstly, the appellant punched holes in the victim's evidence claiming that she was threatened with death if she dared raising an alarm and yet managed to sneak out to a neighbouring house in search for water to quench her thirst and come back to the room in such circumstances. Secondly, failure to name him

to the person who gave PW1 water was inconsistent with what a credible witness would be expected to do.

Relying on our decisions in **Marwa Wangiti Mwita v. Republic** [2002] T.L.R. 39, **Augustino Mihayo v. Republic** [1993] T.L.R. 117, **Jaribu Abdallah v. Republic** [2003] T.L.R. 271 and **Simon Makende v. Republic**, Criminal Appeal No. 412 of 2019 (unreported), the appellant invited the Court to hold that, failure by the victim to name him to the next person she came into encounter dented her credibility and reliability. He concluded on this ground with the contention that PW1's evidence fell short of a proper identification in line with our decision in **Raymond Francis v. Republic** [1994] T.L.R. 100.

Next, the appellant argued ground two which faults the first appellate court allegedly for failure to evaluate the evidence on record. According to the appellant, had the High Court performed its role properly as a first appellate court, it should not have failed to find contradictions in the prosecution evidence. He unveiled at least two of such contradictions which he claimed to be material to the prosecution case to wit; variance in the date shown in the PF3 (exhibit P1) showing that it was filled on 03/04/2014 compared with PW2's testimony stating

that she took the victim to hospital on 04/04/2014 where PW5 attended her. The other contradiction was in relation to the person who took PW1 out of the mud grass house between her sister; PW2 and PW1's brother as claimed by PW1.

Ms. Janeth Sekule, learned Senior State Attorney assisted by Ms. Lilian Kowero and Upendo Shemkole, both learned State Attorneys, represented the respondent Republic, resisting the appeal.

To start with, the learned Senior State Attorney pointed out that since the charge involved rape of a girl below 18 years, the prosecution was bound to prove three elements, to wit; penetration of a male sexual organ into the victim's vagina, age of the victim and identity of the person responsible for the awful act.

Submitting in reply to ground one, Ms. Sekule argued that contrary to the appellant's contention, the prosecution adduced sufficient evidence establishing all elements for which it was bound to prove to sustain the charge as found by both the trial and first appellate court. From our own examination of the evidence on record, it is our firm view that the appellant's attack on ground one is misconceived. We say so alive to the fact that there was no dispute that the victim was a girl

below the age of 18 years. PW1 said as much in her testimony as the first appellate court found in its judgment.

Likewise, the first appellate court concurred with the trial court that PW1 was raped relying on her own testimony found at page 9 of the record corroborated by PW5. The first appellate judge was justified in his conclusion regard being had to the well-established principle that the best evidence in sexual offences must come from the victim. See for instance: **Selemani Makumba v. Republic** [2006] T.L.R 379 reinforcing the spirit under section 127 (6) of the Evidence Act. Apparently, the appellant had no qualms with these two ingredients in the prosecution case and thus we need not belabour anymore on them.

Regarding proof of the identity of the person responsible for the rape, Ms. Sekule pointed out the circumstances resulting into the awful act. Firstly, the victim's familiarity with the appellant who also stated in his evidence that he knew PW1 as a resident of Kigongoni, Mto wa Mbu. Secondly, the time PW1 spent with the culprit considering that the appellant admitted having bumped on the victim at 1900 hours. Ms. Sekule argued that not only PW1 knew the appellant, but also spent long time with him right from the place they met to the scene of crime.

Thirdly, contrary to the appellant, the victim mentioned him to the people who came to her rescue particularly; PW2 and her brother which lent credibility to her evidence consistent with the decisions cited by the appellant attacking PW'1's credibility.

It is common ground that the complaint against the sufficiency of PW1's evidence was dealt with by the first appellate court in its judgment. Upon evaluation of the evidence on record, the first appellate court concurred with the trial court that the appellant was sufficiently identified by the victim considering that she knew him before since she used to be in the same school with his sister. The High Court also considered the evidence that it is the appellant who proposed to PW1 to take her to a street chairman for accommodation but changed the plan a little later and took her to a mud grass house where he had carnal knowledge of the victim. That was notwithstanding PW1 suggesting to the appellant to be taken to his brother's place somewhere on the way to which he turned down. The High Court discounted the omission to describe the appellant's physique as minor given the familiarity between him and the victim. Upon consideration of the prevailing circumstances coupled with the lengthy conversation the appellant had with the victim and the finding that PW1 was a credible witness, it rejected the

appellant's complaint distancing him from the commission of the offence on the material date. As urged by Ms. Sekule, we have found no compelling reason to disturb the concurrent findings of fact by the two courts below on the credibility of PW1 and her ability to identify the appellant as the person who ravished her. Besides, the appellant admitted in his defence being familiar to PW1. It will be recalled that, in its judgment, the trial court remarked on the appellant's demeanor which it found to be pointing to his guilt as she could not look at PW1 when she was testifying.

We could only interfere with the concurrent findings by the two courts below had we found that such concurrent findings of fact resulted from misapprehension or non-direction of the evidence on record causing injustice in line with the Court's previous decisions particularly; **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149**, Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015and **Karim Jaffary v. Republic,** Criminal Appeal No. 412 of 2018 (both unreported) to mention just a few of them. Accordingly, we dismiss ground one for being devoid of merit.

In view of our determination in ground one, we need not be unduly detained by the complaints in ground two and three regarding the date PW2 and his brother visited the scene of crime; 3/04/2014 or 04/04/2014 according to PW2. This complaint did not feature before the first appellate court but from our own evaluation of the evidence, we are of the firm view that the variance in the dates had no bearing on the prosecution case. This is so because it is true that PW2 received a call from her brother who happened to be an assistant ten cell leader in the neighborhood where the offence was committed. That was 06.00 hours on 04/04/2014. For his part, PW4 stated that PW1 went missing from 03/04/2014 and, on 04/04/2014 in the morning, received a call from Yakobo Faustin that PW1 had been found and that they were taking her to police. PW1's evidence was that she spent a night at the scene of crime but did not mention any date. Be it as it may, if there was any such contradiction in the dates, it did not affect the central story of the prosecution that the appellant met victim on the night of 02/04/2014 and was taken to hospital on 04/04/2014 where PW5 attended her. Similarly, the variance regarding the person who took PW1 out of the mud house in which she was raped had no bearing on the prosecution's evidence. Neither did it dent PW1's credibility. Furthermore, the

appellant's query that how could the victim manage to sneak out to a neighbouring house to quench her thirst and return to the room which she was threatened with death may be a possibility but quite a remote and a fanciful one considering the age of the victim. At best, and quite unfortunate to him, it serves to suggest that the appellant had a prohibited consensual sexual intercourse with a girl of tender age. On the overall, we do not see any merit in ground two and three and dismiss them.

The appellant's complaint in ground four is that his conviction was based on a defective charge which rendered the trial a nullity. Ms. Sekule appeared to concede that the charge did not state the time the offence was committed. However, she argued that the charge was framed in accordance with the requirements under section 132 of the Criminal Procedure Act (the CPA) which does not include time. Otherwise, the learned Senior State Attorney contended that the omission was a minor irregularity which was curable under section 388 of the CPA.

We agree with Ms. Sekule's submission that showing time in the charge sheet is not a legal requirement but, in terms of section 234 (3)

of the CPA and as we said in **John Stephano & Others v. Republic**, Criminal Appeal No. 257 of 2021 (unreported), specifying time in a charge sheet can only be necessary where time is of the essence in proving the offence. As there was no suggestion that time was of the essence in proving rape in the instant appeal, we find no merit in the complaint. In any case, as we stressed in **John Stephano** (supra), if there was any variance between the charge and evidence in relation to time on which the offence was committed, such variance would be immaterial and the charge need not be amended.

Lastly, on ground five on the failure to consider defence evidence. The first appellate court was satisfied that the defence was considered and rightly so in our view. The appellant's defence appearing at page 16 and 17 of the record raises peripheral aspects none of which punched holes on the central story of the prosecution case. It was not denied that the appellant met the victim on the material date and offered a help to take her to the street chairman and later changed the plan by leading her to a mud grass house where he had carnal knowledge of her. It is plain from our reading of the trial court's judgment at pages 67 and 68, the learned trial Resident Magistrate had regard to the appellant's defence but rejected it having been satisfied that it raised no reasonable

doubt to displace the case for the prosecution. In the upshot we find no merit in this ground and dismiss it.

For reasons stated, this appeal lacks merit and we hereby dismiss it.

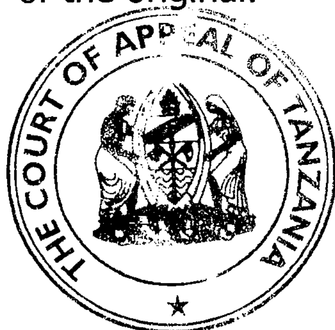
DATED at **ARUSHA** this 6th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2022 in the presence of the Appellant in person – linked through Video Conference, Ms. Upendo Shemkole and Mr. Tonny Kilomo both learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL