

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA
(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MWAMPASHI, J.A.)
CRIMINAL APPEAL NO. 216 OF 2020
EDOM JEREMIAH.....APPELLANT

VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mbeya)
(Mongella, J.)
Dated the 20th day of April, 2020
in
Criminal Appeal No. 95 of 2019
.....

JUDGMENT OF THE COURT

2nd November & 7th December, 2022

WAMBALI, J.A.:

The appellant, Edom Jeremiah, appeared before the Resident Magistrate Court of Mbeya at Mbeya where he confronted the charge of rape contrary section 130 (1) (2) (e) of the Penal Code. The allegation that confronted the appellant was to the effect that on divers dates between 2018 and 29th March, 2019 at Airport area within the City of Mbeya, he had sexual intercourse with a girl aged eight (8) years old. For purpose of this judgment, we will refer to the girl as "PW1" or "the victim" to protect her identity.

The allegation was categorially disputed by the appellant; hence a full trial was conducted.

At the conclusion of the trial, the trial court formed the opinion that the prosecution case was fully proved and that the defence of the appellant did not discredit the impeccable evidence of the prosecution. It thus convicted him of the offence charged, and in terms of section 131 (3) of the Penal Code imposed a life sentence, with 24 strokes of the cane. In addition, the appellant was ordered to pay compensation to the victim in the sum of TZS. 2,000,000.00.

Assisted by an advocate, the appellant unsuccessfully appealed to the High Court (the first appellate court) in Criminal Appeal No. 95 of 2019. Still discontented, he has approached the Court on a second appeal through the services of Ms. Irene Joel Mwakyusa, learned advocate. It is noteworthy that initially, the learned advocate lodged a memorandum of appeal comprising five grounds of appeal. However, before the hearing, she abandoned four grounds. The determination of the appeal therefore, rests on the sole ground that:

"The first appellate court erred in law to confirm the findings of the trial court while the prosecution case was not proved beyond reasonable doubt".

The substance of the prosecution case, as per the record of appeal, can be gleaned from the evidence of the following witnesses. It was the testimony of the victim (PW1) that on divers date between 2018 and March, 2019, the appellant raped her in his shop which was within the

compound of the house she lived with her parent as tenants. Particularly, PW1 testified that on 29th March, 2019 at noon, the appellant called her in the shop, stripped her clothes and his, laid her on the mattress and later stepped on top and inserted his penis into her vagina. As a result, when she went out and felt the urge to urinate later in the night, she felt strong pain which prompted her report to her mother, Neema Samwel (PW3) concerning the incident of rape and the involvement of the appellant. After PW3 examined her private parts, she found bruises and blood which connoted the penetration of the victim's vagina. She therefore reported the incident to Mwanjelwa Police Station where the PF3 was issued for medical examination of the victim at the Regional Referral Hospital.

It was the testimony of PW1 that at the Police Station, she mentioned the appellant as responsible for rape and that on all occasions, she was given biscuits, sweets or juice and told to keep quiet about the incidents and threatened that she would have been killed if she revealed the news to any person. PW1 testified that though initially she desisted from disclosing the information for some time, she later told her mother who was usually absent when the offence was committed. She testified that on all occasions, her mother had gone to buy the remains of rice, commonly referred in Kiswahili as "chenga" for making "vitumbua" and her brother was playing with his friends, and therefore she was alone at home, and that the appellant's wife was at home while the incident occurred in the

shop. PW1 described the scene of crime (in the shop) as having cooking oil, eggs, juice which were being sold by the appellant, a bed and a mattress on which she was usually made to lay before she was raped by the appellant.

PW3 confirmed the victim's story that she was informed of the incidences of rape on 29th March, 2019 at 22.00 hrs after her complaint of experiencing pain when she went to urinate. She testified that after she inspected the victim's private parts she noted bruises and the existence of blood. She was informed by the victim concerning the incident of rape and the involvement of the appellant, a neighbour who they stayed together as tenants for four years and that he had a shop and store before he moved to Iyela area. PW3 stated further that she decided to report the matter to Mwanjelwa Police Station where a PF3 was issued and the victim was examined by Dr. Adili Thomas Mzirai (PW4) at the Regional Referral Hospital. According to PW3, the appellant was arrested on 30th March, 2019.

PW4 confirmed that he examined PW1 on 30th March, 2019 and found that she had no hymen, presence of bruises at the left labia majora and an unusual discharge of white fluid from her vagina. Though he did not see the sperms, he observed the vivid penetration of the victim's vagina as it was loose. PW4 filled the PF3 concerning his finding which he tendered at the trial and it was admitted as exhibit PE1. WP 10539 D/C

Elizabeth (PW5), a police officer, who investigated the commission of the crime interrogated PW1 and PW3 who confirmed to her concerning the occurrence of the incident of rape and the involvement of the appellant. She also collected the relevant evidence from PW4. PW6 later interrogate the appellant who denied the allegation. She also tendered the Birth Certificate of the victim which indicates that she was born on 17th January, 2011. It was admitted without objection from the appellant as exhibit PE2.

The evidence of Samwel Kyando (PW2), a grandfather of PW1 was essentially based on what he was told by PW3 concerning the incident.

In his defence, the appellant denied the allegation and stated that he was surprised to be arrested by the police in the presence of PW3 and another man in connection with the offence of rape on 30th March, 2019 at 18.00 hrs when he was called to go out of the shop while his wife was attending to customers. He testified that on that day, he was sick and that though he was later remanded at Mwanjelwa Police Station and told to speak the truth but he denied the allegation of raping PW1. The appellant maintained throughout his defence that he could not have committed rape because he had erectile dysfunction condition and, as a result, his former wife ran away and that the one he stayed with by that time had to tolerate him as she knew his predicament with regard to having sexual intercourse. The appellant, therefore, maintained that he could not have penetrated the vagina of the victim as alleged by the prosecution.

The appellant also summoned two witnesses to support his defence. Rose Simkunda (DW2), his wife, testified that on 30th March, 2019 he heard a girl (PW1) being beaten by her mother (PW3) but she never wanted to know what was wrong. Later, PW3 went to the shop to buy barking powder with PW1 and left. She testified further that later at 16.45 hrs, while in the shop with her husband (the appellant), someone called him and went outside and after a brief conversation; he was taken to the police and did not return. When she followed up to know the cause of the appellant's arrest, she was told that he was accused of raping the girl (PW1) following a complaint of her neighbour, PW3, who she had grudges with and they never talked to each other.

When she was cross-examined, DW2 stated that she had stayed with the appellant as husband and wife since 2015, and that they usually had sexual intercourse without any problem. To confirm her story, she testified that she was in her eighth month of her pregnancy.

The other witness for the appellant was Mwalizi Mwanyeo Mbila (DW3), a ten cell leader. His testimony was essentially premised on the fact that on 18th December, 2018 he tried to reconcile the appellant and PW3 who had a quarrel involving the information disclosed to PW3's husband by the appellant, and that they later agreed to live in harmony. DW3 was therefore surprised when he was told by PW3's husband that the appellant

had raped the victim. DW3 confirmed that the appellant had a shop in the particular area and had no any other activity.

Submitting in support of the sole ground of appeal, though Ms. Mwakyusa conceded that according to the evidence on record there is no doubt that the victim's age and penetration of her vagina was fully proved, she firmly argued that there is no credible evidence that established that it was the appellant who raped the victim.

The learned advocate's thrust of her argument was premised on two matters. First, that though PW1 testified that she was raped several times on divers dates between 2018 and March, 2019, it was surprising that she could only had felt pain after the incident of 29th March, 2019 as if its was the first time. Second, that though the victim alleged to have been raped on various dates; there is no evidence to show why she delayed to report the incident immediately and name the appellant as the suspect since they knew each other and lived in the same house as tenants for sometime. Ms. Mwakyusa, who did not wish to explain further on her contention, basically conceded that the victim's evidence was credible as she was not shaken by the appellant's cross-examination.

Nevertheless, the learned advocate urged us to re-evaluate the evidence and come to the conclusion that the case for the prosecution was not proved beyond reasonable doubt and allow the appeal in its entirety.

On his part, Mr. Davice Msanga, learned State Attorney who appeared at the hearing of the appeal for the respondent Republic, contested the appeal. He submitted that, as conceded by the appellant's counsel, it is not disputed that the age of the victim was fully proved by exhibit PE1, the birth certificate, which shows that the victim who was born on 17th January, 2011 was aged eight (8) years when she was raped. He added that the appellant did not dispute the admission of the said exhibit which was tendered by PW5. Moreover, Mr. Msanga stated that the issue of penetration was proved by the evidence of PW1 who categorially testified on how the appellant inserted his penis into her vagina.

The evidence of the PW1, he argued, was credible because being the victim, she was better placed to state on what really happened during the incident. Besides, he argued, her evidence on the matter was not discredited by the appellant during cross-examination as she consistently emphasized that the appellant raped her on divers dates in the shop. He argued further that the evidence of PW1 on penetration was also supported by PW3 who initially investigated her and found bruises and blood in her vagina and finally confirmed by PW6 who examined her at the hospital and filled the PF3 containing his findings that there was evidence of penetration. The learned State Attorney submitted that the ingredients of the offence of rape as required by section 130 (4) (a) of the Penal Code was proved. He related the circumstances of the case at hand to what

happened in **Menald Wenela v. The Director of Public Prosecutions**, Criminal Appeal No. 336 of 2018 (unreported).

With regard to the involvement of the appellant in committing the offence of rape, the learned State Attorney submitted that the evidence of PW1 sufficiently proved that it was none other than the appellant who raped her on the divers dates.

Mr. Msanga argued further that the argument that PW1 did not explain why she felt pain on the last occasion and not in the previous ones has no basis. In his opinion, the crucial issue remained that the appellant raped her as he did not raise doubt on her testimony that all the incidents occurred in his shop whose setting, including the presence of the mattress was categorically described by the victim.

Responding to the submission of the appellant's counsel that there was delay in reporting the incident and naming the appellant as the suspect, Mr. Msanga argued that, PW1 explained that she was afraid to report the incident as she had been threatened to be killed by the appellant. In his opinion, being a child of tender age and the environment in which they lived in the parents' rented house with the appellant and her parents, she could not have easily reported the incident because of fear caused by the appellant's threat.

In the end, Mr. Msanga urged us to dismiss the appeal in its entirety.

Having heard the submissions of the counsel for the parties and considered the evidence on record, we entirely agree that the age of the victim and the issue of the penetration which are important elements in proving the case at hand require no further argument as the proof is beyond reasonable doubt as conceded by both counsel. In the circumstances of this case, we are satisfied that the requirement of section 130 (4) (a) of the Penal Code has been fully satisfied by the prosecution.

The next question is who committed the offence. Firstly, we take note of the argument of the appellant's counsel with regard to the question on why the victim did not feel the pain in previous occasions but did so in the last. We must state that the argument, with respect, is misplaced. This is because, though it was not raised at the first appellate court by the appellant who was represented by a counsel; it is on record that the testimony with regard to how the sexual intercourse was done in all occasions was not seriously contested by the appellant when he cross-examined PW1. Considering the age of the appellant to that of the victim, we are of the view that the issue whether the victim experienced pain at the beginning or not is immaterial as correctly stated by Mr. Msanga. What is important is that PW1 demonstrated that the appellant penetrated her vagina and this matter was also supported by PW3 who initially inspected her and noted bruises and blood before she reported the incidence to Mwanjelwa police Station where the PF3 was issued for medical

examination. The issue of penetration was further confirmed by the evidence of PW4 who examined PW1 and found that she had lost her hymen and there was also evidence of bruises in her vagina. Thus, so long as penetration, which is an important element of the offence of rape was proved, the issue whether PW1 did not feel pain in the previous occasions is in the circumstances of this case immaterial. It is in this regard that even in rape involving a woman in terms of section 130 (4) (b) of the Penal Code, it is provided that: *"evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent"*. We thus agree with Mr. Msanga that the complaint has no basis.

With regard to the delay in reporting the incident and naming the appellant by PW1, we equally agree with the learned State Attorney that the threat of being killed by the appellant and the environment in which they lived prevented the victim from reporting the incident and naming the appellant early.

Besides, we are satisfied that despite the delay, the substance of PW1's evidence concerning the incident was not challenged by the appellant during the trial. We note that according the record of appeal PW1 testimony on the threat by the appellant did not elicit any question from the appellant during cross-examination. We deem it appropriate to reproduce the relevant part of PW1's testimony on this matter thus:

"The accused was calling me at his store, was telling me to remove my clothes. The store has cooking oil, eggs, juices, a bed and mattress. He was removing his clothes and was later raping me. He threatened to kill me if I dared to tell anyone. Afraid I kept quiet. Having finished, was telling me to keep quiet. He was giving me biscuits, sweets or juice. At the first time, I kept quite but later I told my mother. The accused is Edom@ Baba Rukia. I have no spite with him..."

When the appellant cross examined PW1 she remained firm and stated as follows:

"I know you long ago. You was (sic) raping me when your children were not around. They were at school. You raped me at the store; there is a bed and many other shop goods. You used to give me biscuits, juices and sweets. All the times your wife was at home, she was not at the shop. You used to close the shop during the incident. I was with you only".

Faced with a similar situation concerning delay, in **Francis Paul v. Republic**, Criminal Appeal No. 251 of 2017 (unreported) the Court stated:

"A follow up question may be whether XY can be blamed for not naming the appellant as his ravisher at the earliest opportunity. We think not. As rightly argued by the learned State Attorney

there is ample evidence that the appellant threatened XY not to tell anybody of what was happening lest she would be cut with a knife and even went further to lure her by giving her popcorn, sweets and money. Being a child, she cannot be blamed for not reporting the matter and the appellant as her ravisher much earlier..."

In the case at hand, we are satisfied that considering the age of the victim, threats which were made by the appellant including giving her some gifts like biscuits, sweets and juices necessitated the delay in naming the appellant. That is why soon after he was mentioned by the victim in the night on 29th March, 2019 he was arrested on 30th March, 2019. The date of arrest was not contested by the appellant.

It is also instructive to note that in **Aziz Athuman v. The Republic**, Criminal Appeal No. 22 of 1994 (unreported) the Court stated that:

"While unexplained delay to name the suspect may justify fear on the veracity of a witness, it need not be so where there is a plausible explanation."

In the circumstances of this case, we are settled that the delay by PW1 to name the appellant who was well known to her had plausible explanation as we have observed above.

We further observe that the evidence of the appellant on his inability to rape the victim because of erectile dysfunction for six years and that he could not do sexual intercourse periodically was not supported by DW2, his wife, who categorically testified that they enjoyed sexual intercourse whenever they wished and that she was on her eighth month of pregnancy.

On the other hand, the evidence of DW2 that she had misunderstanding with PW3 and therefore that could have been the source of the appellant's charges, cannot be justified. We say so because the appellant did not state anything to that effect on that issue in his defence and did not cross-examine PW3 concerning the misunderstanding when she testified. Similarly, the testimony of DW3 that before the appellant was charged of the offence of rape, he was involved in reconciliation between him and PW3 concerning family affairs was also not supported by the appellant when he testified in his defence.

In the circumstances, we are of the settled view that the appellant's defence and that of his witnesses did not raise doubt on the prosecution case amid the credible evidence from PW1 which we have taken liberty to reproduce above and supported by PW3 and PW4. As we have demonstrated above, having re-evaluated the evidence on record, particularly of PW3, PW4 and exhibit PE1, we have no hesitation to state that we have no justification to upset the concurrent findings of the two courts below that the appellant is guilty of the offence of rape. Therefore,

he was properly convicted and sentenced in accordance with the law. To this end, since we are satisfied that the prosecution case was proved beyond reasonable doubt, we find the sole ground to have no merit and hereby dismiss it. In the end, we dismiss the appeal.

DATED at **MBEYA** this 6th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of Ms. Irene Buchafwe holding brief for Ms. Irene Mwakyusa, learned counsel for the appellant and Ms. Xaveria Makombe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

