IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 572 OF 2019

SHIMIYU MASUNGA.....1ST APPELLANT

LUBISHA JUMA.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Bongole, J.)

dated the 08th day of November, 2019

in

DC. Criminal Appeal No. 34 of 2019

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JUDGMENT OF THE COURT

14th & 20th March, 2023

MWAMPASHI, J.A.:

Before the District Court of Tabora at Tabora (the trial court), the appellants, Shimiyu Masunga and Lubisha Juma (the 1st and 2nd appellants respectively) were charged and convicted of the offence of gang rape contrary to sections 130 (1), (2) (e) and 131A (1) and (2) of the Penal Code [Cap 16 R.E. 2022] (the Penal Code). It was alleged that on 03.11.2018 in the evening hours at Lutona area, Loya Ward, Igalula within the District of Uyui in Tabora Region, the appellants jointly and together had carnal knowledge of 'P.M" a 14 years old girl who, in order to conceal her identity, we shall hereinafter refer to her, simply as PW1 or the victim. After the conviction, each of the appellants was sentenced to life imprisonment.

The conviction and sentence imposed by the trial court aggrieved the appellants whose appeal to the High Court was dismissed. Still protesting their innocence, the appellants have now come to this Court on a second appeal.

The evidence upon which the appellants' conviction was founded, *albeit* in brief, is as follows: On 03.11.2018, PW1 and one Zakia Mihangwa (PW2) were on their way from Miswaki to Usuri via Lutona when the appellants who were on their bicycles heading on the same direction, met them. The girls were offered a ride by the appellants but they declined and the appellants proceeded ahead. Later, after a certain distance, the girls found the appellants waiting for them at a secluded place in the Utona forest. There was only one house nearby where PW1 went for some drinking water leaving PW2 behind with the appellants. While PW1 was at that house, the 1st appellant took hold of PW2 and started harassing her. Upon getting back and having seen that PW2 was being harassed, PW1 decided to intervene but her bag was grabbed by the 1st appellant who hid it into the forest. At the same moment, the 2nd appellant took hold of PW1 and carried her into the forest.

The evidence is also to the effect that while in the forest the 2nd appellant raped PW1. As regards PW2, it is in evidence that while PW1 was being raped in the forest, the 1st appellant took hold of PW2 and

started beating her. Few minutes later, two motor cyclists including Mustapha Hussein (PW4), appeared and when they inquired on what was going on, PW2 told them that the 1st appellant was about to rape her. At that point, the 2nd appellant emerged from the forest followed by PW1 who complained that she had been raped by the 2nd appellant.

On their part, the appellants claimed that the girls had refused to pay for the bicycle ride they had offered them. PW4 could not buy the appellants' story and he thus called the police. When the police came, the appellants were arrested and the girls together with PW4 and other people who had gathered at the scene including the owner of the nearby house, were taken to the police station where their respective statements were recorded. According to PW1, she was also sent to the hospital for medical examination on the same evening.

There is also brief evidence from PW1's father and a grandfather to PW2, Mr. Muhangwa Nongo (PW3) which is to the effect that PW1 was born in September, 2003 and also that PW2 was 14 years and six months old. Lastly, is the evidence from the clinical officer, Mr. Joseph Muhono (PW5) who testified that he medically examined PW1 on 04.11.2018 and observed that PW1's vagina had bruises and scattered sperms. A PF3 form to that effect was tendered by him in evidence as exhibit P1.

While the 2nd appellant gave his affirmed defence as DW1 with the aid of an interpreter from Sukuma language to Swahili and vice versa, the 1st appellant gave sworn evidence as DW2. Apart from denying to have raped PW1, the appellants' defence was to the effect that the 2nd appellant was arrested and remanded at Loya Police Station on 02.11.2016. It was the defence evidence that it was PW4 who arrested the 2nd appellant following a fight between the 2nd appellant and PW4's young brother, one Lucas Hussein. According to their defence evidence, the 1st appellant was joined with the 2nd appellant on 04.11.2018 when he went at the police station for purposes of bailing out the 2nd appellant who is his brother. It was contended that it was after the 1st appellant had failed to pay Tshs. 500,000/= demanded by PW4 as compensation for the injuries the 2nd appellant had caused to PW4's young brother, when PW4 demanded that the 1st appellant should also be arrested and joined with the 2nd appellant.

The appellants contended further that they were kept in remand for one month till on 05.12.2018 when they were brought before the trial court and surprised by being charged with the offence of gang rape. They maintained that they were framed because of their failure to settle the case between the 2nd appellant and PW4's young brother. To substantiate their claim that they were framed for the offence, they

pointed out some contradictions and gaps in the prosecution evidence including the contradictions on the date PW1 was allegedly raped. It was contended that while PW1 is on evidence stating that it was on 05.11.2018, when she was raped, the evidence from PW4 and according to the charge sheet, the offence was committed on 03.11.2018. It was also pointed out that while PW1 claimed that she was sent to the hospital on the same material evening, according to PW5, it was on 04.11.2018, when he attended and examined PW1 at the hospital. The appellant also complained about the age of PW1, contending that her age was not proved.

As we have alluded to above, basing on the above evidence, the trial court was satisfied that the case against the appellants had been proved to the hilt. The appellants were thus convicted and sentenced as we have earlier indicated. On the first appeal, the findings and judgment by the trial court were confirmed by the High Court hence the instant second appeal. Although, in support of the appeal, each of the appellant filed his own memorandum of appeal, however, the two memoranda contain identical four grounds which can conveniently be paraphrased as follows:

1. *That, there was no fair trial because except for the testimony given by PW1 and the 2nd appellant (DW1) which was given in*

Sukuma language to which the 2nd appellant was conversant, the rest of the witnesses testified in Swahili without the aid of an interpreter.

2. *The two lower courts erred in holding that the 1st appellant committed the offence of gang rape.*
3. *That, the age of both PW1 and PW2 was not certain so much so that at least one of them ought to have been subjected to the requirement under section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019; now R.E. 2022].*
4. *That, PW1 did not promise to tell the truth and not tell any lies before her testimony could be recorded as required by section 127 (2) of the Evidence Act [Cap. 6 R.E. 2019; now R.E. 2022].*

In addition to the above four grounds of appeal, the appellants did on 19.01.2022, file a joint supplementary memorandum of appeal comprised of the following two grounds:

1. *That, the appellants were condemned unheard at the time of the ruling on whether or not the appellant had a case to answer.*
2. *That, the trial court did not comply with the requirement of section 231 (1) (b) of the Criminal Procedure Act [Cap. 20 R.E.2019; now R.E. 2022].*

At the hearing of appeal, whereas the appellants appeared in person unrepresented the respondent Republic enjoyed the services of Ms. Mwamini Yoram Fyeregete, the learned Senior State Attorney.

When invited to argue their appeal, the appellants adopted their grounds of appeal and opted for Ms. Fyeregete to respond to the grounds first. They however reserved their right to rejoin later, if need would arise.

Ms. Fyeregete did not support the appeal. Beginning with the first ground in the substantive memorandum of appeal, she contended that the ground is baseless and an afterthought. It was explained by her that it is not true that the 2nd appellant did not understand Swahili language or that he was not able to follow the proceedings. Ms. Fyeregete argued that, throughout the trial there is no record which is to the effect that the 2nd appellant complained that he could not follow the proceedings due to the language barrier. She argued further that according to the record, the 2nd appellant extensively cross examined the prosecution witnesses and even at the stage when he gave his defence and when an interpreter participated, it was not at his instance that the interpreter acted as an interpreter. It was therefore insisted by Ms. Fyeregete that the appellants were not denied the right to fair trial and that the first ground of appeal is therefore baseless.

There was no rejoinder by the appellants in respect of Ms. Fyeregete's submissions on the first ground of the substantive memorandum of appeal.

The first ground of the substantive memorandum of appeal should not detain us at all. We agree with Ms. Fyeregete that the ground is not only an afterthought but is also baseless. From day one when the 2nd appellant was arraigned before the trial court and when the charge was read over and explained to him, he never complained that he had any problem with the language of the court. The 2nd appellant properly pleaded not guilty to the charge and even when the preliminary hearing was conducted on 03.01.2019, there was no such a complaint from him. Further, as also rightly contended by Ms. Fyeregete, PW2 thoroughly cross examined PW2 and PW4. If he did not understand Swahili, how did he manage to cross examine the witnesses to that extent. We thus find that the 2nd appellant did not encounter any language barrier in the trial, that, as the record show, he actively and fully participated in the trial which was conducted in the language of the court and the complaint that he was denied the right to a fair trial is therefore baseless. The first ground fails.

As regards the second ground on the complaint that there was no evidence proving the participation of the 1st appellant in committing the offence of gang rape, Ms. Fyeregete submitted that according to section 131A (1) of the Penal Code, and basing on the evidence from PW2 that the second appellant held and blocked her when she wanted to go into

the forest to rescue PW1 who had been taken there by the 1st appellant, is enough evidence proving the offence against the 2nd appellant. She contended that the 2nd appellant aided and abetted in the commission of the offence together with the 1st appellant within the meaning of section 131A (1) of the Penal Code.

Ms. Fyeregete combined the 3rd and 4th grounds of appeal and argued them conjointly. On these two grounds, it was submitted by her that the evidence from PW3 is very clear that neither PW1 nor PW2 was below 14 years old. She insisted that both two girls were above 14 years of age and thus not children of tender age. Ms. Fyeregete insisted that the girls could not be subjected to the requirement of section 127 (2) of the Evidence Act of promising to tell the truth to the court and not to tell any lies. She thus urged us to dismiss the two grounds for being baseless.

Regarding the 1st ground in the supplementary memorandum of appeal, Ms. Fyeregete prayed for the ground to be outrightly dismissed because the appellants were not condemned unheard. She explained that after the ruling by the trial court that the appellants had a case to answer, the appellants were accorded their rights in defence and they both expressed their choice to give their respective defence under oath.

Finally, on the 2nd ground in the supplementary memorandum of appeal, Ms. Fyeregete referred us to page 26 of the record of appeal where each of the appellant is on record telling the trial court that he did not intend to call any witness in his defence. She contended that section 231 (1) (b) of the CPA was complied with and the appellants cannot be heard complaining that the provision was not complied with. On the above arguments, Ms. Fyeregete urged us to dismiss the appeal in its entirety for being baseless.

In his rejoinder, the 1st appellant reiterated his earlier prayer for the appeal to be allowed adding that the witnesses for the prosecution gave contradictory evidence on the date the offence was allegedly committed. He complained that while PW1 said it was on 05.11.2018, PW4 said it was on 03.11.2018 and yet according to PW5 it was on 04.11.2018. He insisted that the contradiction proves their claim that the case was framed.

The 2nd appellant urged us to allow the appeal, contending that he did not commit the offence but that he only had a fight with PW4's young brother.

Having already disposed of the 1st ground, our task at this point, is to consider the remaining grounds. In doing so we find it convenient and appropriate to first deliberate on the 3rd and 4th grounds and then

on the two grounds in the supplementary memorandum. The 2nd ground in the substantive memorandum of appeal which questions the sufficiency of the evidence in proving the offence of gang rape against the 1st appellant which appear to be in the nature of the usual general issue of whether the charge was proved beyond reasonable doubt, will be considered last.

Before we embark on the above stated task, we wish to note that we are mindful of a settled principle that this being a second appeal, the Court should rarely interfere with the concurrent findings of facts by the lower courts unless there has been a misapprehension of the substance, nature and quality of such evidence occasioning a miscarriage of justice or resulting into an unfair decision. See- **Director of Public Prosecution v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and **Jacob Mayani v. Republic**, Criminal Appeal No. 558 of 2016, (both unreported).

Regarding the 3rd and 4th grounds, we agree with Ms. Fyeregete that according to the evidence on record, neither PW1 nor PW2 was a child of tender age. PW3, the father of PW1 and the grandfather of PW2 stated that PW2 was 14 years and six months old and further that PW2 was 16 years old. As a parent and grandfather, PW3's evidence on the

age of the two girls is reliable. According to section 127 (4) of the Evidence Act, a child of tender age whose evidence is required to be received under section 127 (2) after it is promised by such a child to tell the truth to the court and not to tell any lies, is a child whose apparent age is not more than 14 years. Since the two girls were of the age of more than 14 years, they were not required to make the promise under section 127 (2). It should also be pointed out that, these two girls testified after being affirmed and their respective evidence was therefore properly received. For these reasons we find the 3rd and 4th grounds of appeal unmerited and we dismiss them accordingly.

As regards to the 1st and 2nd grounds in the supplementary memorandum of appeal, again we share the same view with Ms. Fyeregete that, the grounds are baseless. It cannot be complained that the appellants were condemned unheard after being found with a case to answer because the record of appeal at page 20 show that after the appellants had been found with a case to answer the appellants opted that they would give their respective defence evidence under oath. It is therefore obvious that the appellants were informed of their rights under section 231 (1) of the CPA. In the same breath, the appellants complaint that section 231 (1) (b) of the CPA was not complied with lacks substance because at page 26 of the record of appeal, the

appellants are on the record stating that they did not intend to call any witness. The appellants were therefore informed of their right to call witnesses in their defence. The 1st and 2nd grounds in the supplementary memorandum of appeal are therefore dismissed for being baseless.

Turning to the last ground of appeal on whether the charge against the appellants was proved to the required standard, we firstly would like to restate the cardinal principle in criminal justice that the onus of proving a case against an accused is upon the prosecution and the standard of proof is strictly beyond any reasonable doubt. It is also settled that the all what an accused is required is to raise doubts in the prosecution case. See- **Thobias Michael Kitavi v. Republic**, Criminal Appeal No. 31 of 2017 (unreported).

Guided by the above principles and being mindful that we are sitting in the second appeal, we have very carefully scrutinized and examined the evidence on record and observed that the two lower courts did not properly apprehend the substance, quality and nature of evidence which was led in the trial court. It is our considered view that had the two lower courts properly apprehended the evidence, it would have been clearly seen that in their defence, the appellants managed to raise reasonable doubts in the prosecution evidence which ought to have been resolved in their favour.

Firstly, the appellants' denial to have committed the offence and their defence evidence that they were arrested and remanded in police custody for a month on a different case involving PW4, before being brought to the trial court where they were surprised when the instant charge was read to them, cast a lot of doubts on the prosecution case against the appellants. The appellants' claim that they were remanded in custody for a different case and before the gang rape offence had allegedly been committed cannot, under the circumstances of this case, be disregarded because despite the seriousness of the offence, the police were not paraded as prosecution witnesses. The failure by the prosecution to call as a witness any police officer, preferably the investigation officer, who would have explained, where, how and for what reason were the appellants arrested, makes the appellants' defence believable. It should also be pointed out that under the circumstances of this case, the police officer who PW4 allegedly called and who arrested the appellants from the scene of crime and also those other people who it is said gathered at the scene of crime including the owner of the alleged nearby house, were material witnesses who ought to be called as witnesses. The above persons were within reach and no reason was given why they could not be called. And adverse inference is thus drawn against the prosecution. See- **Azizi Abdallah v. Republic**

[1994] T.L.R. 71 and **Kobelo Mwaha v. Republic**, Appeal No. 173 of 2008 (unreported. In the latter case, the Court stated that:

> *"Inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution".*

It is on record that the appellants' defence was not believed by the two lower courts for being an afterthought and on account that it was not earlier raised during the cross-examination of PW4. While we agree that the appellants were supposed to raise it in that manner, we however also wonder why, if the defence was not credible, did the prosecution fail cross-examine the appellants when the said defence was raised by them in their respective defence evidence. The record is clear at page 23 of the record of appeal that after the 2nd appellant had raised such a defence in his defence evidence the prosecutor cross-examined him on other aspects and not on the defence that he was arrested for a different case. The same happened when the 1st appellant raised the same defence in his defence evidence. It should be reminded that just as it is for an accused person who is supposed to cross-examine a prosecution witness in order to impeach the truthfulness of the evidence of such a witness, the prosecution has the same duty. The failure by the

prosecution to cross-examine the appellants on that aspect imply that the appellants' evidence was true and acceptable.

The above pointed out doubts in the prosecution case that was raised by the appellants on whether the appellants really committed the offence in question, is cemented by the fact that the evidence by PW1 in regard to the date she was allegedly raped by the appellants was at the variance with the particulars of the charge. As rightly argued by the appellants, while PW1 stated that she was raped on 05.11.2018, the particulars of the charge are to the effect that the rape was committed on 03.11.2018. There is also contradictory evidence from PW5 who claimed to have medically examined PW1 04.11.2018, a day before PW1 was raped. This presupposes the medical examination was performed before the alleged rape was committed, which leaves a lot to be desired

For the above reasons we find that through their defence evidence, the appellants managed to raise a reasonable doubt in the prosecution case. There was no sufficient evidence to support the prosecution case against the appellants and the case against the appellants was thus not proved to the hilt as required by the law. The 2nd ground of appeal is thus meritorious.

In the event and for the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentences meted out on the

appellants. We order that the appellants be released forthwith from prison unless they are otherwise lawfully held.

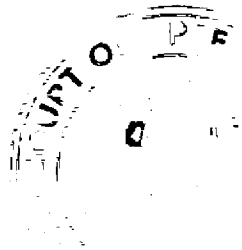
DATED at **TABORA** this 20th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2023 in the presence of the Appellants in person and Ms. Tunosia John Luketa, 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