IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 420 OF 2019

MPEMBA JOSEPH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mwanza)

(Madeha, J.)

Dated the 16th day of August, 2019
in
Criminal Appeal No. 219 of 2018

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JUDGMENT OF THE COURT

16th August & 18th September, 2023

MAKUNGU, J.A.:

The appellant Mpemba Joseph, was charged in the Resident Magistrate's Court of Misungwi at Misungwi with the offence of rape contrary to sections 130(1) (2) (e) and 131(1) of the Penal Code [Cap.16 R.E 2002]. He was also charged with second count of impregnating a school girl contrary to section 60A(3) of the Education Act [Cap. 353 R.E 2002].

After a full trial, the appellant was convicted of both offences and was consequently sentenced to imprisonment terms of thirty years on

each count which were ordered to run concurrently. His appeal to the High Court was dismissed in its entirety. Undaunted, the appellant has filed this second appeal.

The facts in respect of the case as found at the trial court were that, the victim of the offence who was a seventeen - year - old girl who testified during the trial as PW1, was at the material time of the offence a student of Mondo Primary School. She was living with her mother and her father (PW2). On the date when the alleged offence was committed against her, her father was away at Dar es Salaam. Sometimes in July, 2017 PW2 was informed by his wife that, PW1 was sick and on medical examination it was revealed that she was pregnant. Upon that information, PW2 returned immediately and reported the matter to the Head teacher of PW1's School, who advised him to wait until PW1 completed her examinations in September, 2017. Upon completion of PW1's exams, PW2 reported the incident to Village Executive Officer who gave him a letter to take it to police, where PW1 was given a Police form No. 3 (PF.3) so that she could be taken to hospital for medical examination. The medical examination confirmed that, she was pregnant.

It was PW1's evidence at the trial that, in June, 2017 at 17:00 hrs, while at shamba digging sweet potatoes, the appellant found her there.

He got hold the victim, fell her on the ground, undressed her and inserted his penis into her vagina. In the exercise the appellant covered her mouth so as not to shout for help. According to the record of appeal, she neither reported the incident to her mother nor to her teacher until in July 2017 when she fell sick. The matter was reported to police where a PF3 was issued to PW1 to be medically examined. Subsequently, the appellant was arrested and charged in connection with the said offences.

In his defence, the appellant denied to have committed the offence and raised the defence of *alibi* stating that, on the alleged date of the offence, he was in Geita working thereat. He called no other witness to support his defence.

In convicting the appellant, the trial court accepted PW1's account that, it was him who committed the two offences. The trial court's conclusion therefore, was that the appellant was the culprit. The High Court took the same view.

In his memorandum of appeal, the appellant raised six grounds of appeal but the same can be consolidated into five; **firstly** that the appellant was denied opportunity to call his two witnesses, **secondly,** that there was no sufficient proof from scientific evidence for lack of DNA

test; **thirdly,** that the evidence of PW1 was not credible for her failure to report the matter at the earliest opportunity; **fourthly,** that the appellant's defence was not considered; and **fifthly,** that the prosecution did not prove the case against him beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person and was unrepresented. On its part, the respondent Republic was represented by Ms. Martha Mwadenya, learned Senior State Attorney.

When he was called upon to argue his appeal, the appellant asked the Court leave to adopt his memorandum of appeal. He then opted to hear first arguments in reply by the learned Senior State Attorney. Essentially, the complaint of the appellant is that the first appellate court acted wrongly in sustaining the conviction of the appellate on the evidence led before the trial court as it was not sufficient.

Ms. Mwadenya, on her part supported the conviction and sentence meted out to the appellant. On the first ground, she argued that the complaint has no merit. She submitted that, it was on record that the appellant at page 17 of the record of appeal indicated to call two named witnesses. However, during the hearing he decided to abandon them as shown at page 18 of the record of appeal.

In relation to second ground of appeal, the learned Senior State Attorney conceded that, there was no DNA test evidence produced before the trial court to prove allegations, but, argued that the oral evidence of PW1, PW2, PW3 and PW4 was sufficient to prove the offence charged. Relying on the case of **Hamis Shabani @ Hamis Ustadh v. The Republic,** Criminal Appeal No. 259 of 2010 (unreported), she submitted that it is not a legal requirement that DNA test should be provided to prove this offences charged. In relation to the PF3 report, she conceded that section 240(3) of the Criminal Procedure Act was not complied with and it should be expunged from the record.

On the ground no. 3, Ms. Mwadenya submitted that the record clearly shows that, PW1 disclosed the incident of rape after she had become pregnant. She pointed out that, the incident of rape occurred in June, 2017, while PW1 mentioned the appellant as the person who raped her in September, 2017. She admitted that failure of PW1 to mention the appellant at the earliest opportunity raises doubt and the said doubt should benefit the appellant. She added that, this ground has merit.

With regard to the fourth ground, that the appellant's defence was not accorded weight, the learned Senior State Attorney submitted that, the record of appeal shows that the defence evidence was not

considered by both courts below. She submitted further that failure to consider the defence evidence is fatal but this Court has the mandate to re-evaluate the evidence of the case in terms of section 4(2) of the Appellete Jurisdiction Act.

Ms. Mwadenya submitted in response to the last ground that the case against the appellant was proved beyond reasonable doubt. She argued that there was sufficient evidence proving the age of PW1 that is 17 years, an important ingredient of the offence of rape. There was also sufficient evidence proving the age of alleged pregnancy i.e fifteen weeks, and that PW1 was a student at Mondo Primary School. She submitted that the evidence of PW1 proved beyond reasonable doubt that, the offence of rape was committed by the appellant.

The appellant offered no tangible rejoinder except that he reiterated his prayer that his appeal be allowed and that he be released from prison.

We have studiously gone through the record of proceedings on the date the appellant was formally arraigned before the District Court and considered the contending submissions from both sides. In short, we find no merit in the first complaint that the appellant was denied opportunity

to call his two witnesses, because after taking a good look at page 18 of the record of appeal, it is not. We similarly find no merit in arguing that there was no sufficient proof of scientific evidence for lack of DNA test. Ms. Mwandenya is right that the oral evidence of PW1, PW2 and PW4 was sufficient to prove the alleged offences.

We have also considered, the complaint that PW3's evidence was hearsay evidence. We need not mince words; the complaint has merit. In the record of appeal at page 12 shows that PW3 admitted to have obtained the information concerning PW1 from his predecessor Head master through phone communication as PW3 assumed the office in February, 2018.

On the third ground of appeal which the learned Senior State Attorney spent time on is whether the two courts below were correct in relying on the evidence of PW1 to conclude that it is the appellant who committed the offence. It was that evidence which was relied on by the High Court to uphold the appellant's conviction. In his decision, the first appellate Judge relied on the provisions of section 130(2) (e) of the Penal Code and the case of **Robert James v. Republic**, Criminal Appeal No. 247 of 2010. Having considered that evidence, he found that

it sufficiently proved the case against the appellant beyond reasonable doubt.

It is trite law that this being a second appeal the Court can interfere on concurrent finding of fact by two courts below only where there is a sufficient reason to do so. In the case of **Salum Mhando v. Republic,** [1993] TLR 170 the principle was stated as follows:

> *"Where there are mis-directions and non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and makes its own finding of fact."*

The appellant's complaint as regards the evidence of PW1 is that she lied in her testimony and that she delayed to disclose the incident in question. In our considered view, the fact that PW1 in her evidence stated a different date of her medical examination with that of PW4 does not go to the root of her evidence that she was raped by the appellant. We find that defect to be minor. As to the delaying to disclose the incident, Ms. Mwadenya submitted in support of that argument and invited us to disregard the evidence of PW1 because the omission is fatal.

The main issue however, is whether such evidence of PW1 was sufficient to prove the prosecution case beyond reasonable doubt. It is trite law as stated in the case of **Selemani Makumba v. Republic** [2006] TLR 384, that in sexual offences, the evidence of a victim alone, if believed, is sufficient to found conviction. In this case, PW1 mentioned the appellant as the person who raped her. She did so after she had become pregnant. While the offence is alleged to have been committed in June, 2017, she mentioned the appellant as the person who is responsible for the pregnancy in September, 2017. The record bears that, PW1 failed to name the appellant at the earliest point and no justifiable reasons were given for the delay. The evidence of PW1 also shows that there was no threat ever made by the appellant to her to justify her action. On that account, it is our strong view that PW1 was not a credible and reliable witness. We find therefore that had the learned appellate judge considered these factors, he would have found that the evidence of PW1 was doubtfully, the result of which rendered the prosecution case unproved. In **Festo Mawata v. The Republic,** Criminal Appeal No. 229 of 2007 (unreported), it was stated that:

> *"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have*

always had their credibility doubted to the extent of having their evidence discounted."

Moreover, the Court in **Venance Nuba and Tegemeo Paul v. The Republic,** Criminal Appeal No 425 of 2013 (unreported), it was held that:

"... this Court has persistently held that failure on the part of the witness to name of unknown suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."

Furthermore, a similar situation confronted the Court in the case of **Yust Lala v. The Republic,** Criminal Appeal No. 337 of 2015 (unreported), it stated that:

"... In our considered view, the lapse of time between the alleged rape and the time when the appellant was mentioned raises doubt on the credibility of PW1. It was her evidence that she did not mention the appellant for all that period because of his threat that he would slaughter her if she disclosed to anybody that he raped her. Since she was not staying with appellant we find it doubtful that with such a serious offence, she would for all that period fail to tell her mother about it."

For these reasons, we allow the appeal, quash the conviction and set aside the sentences. The appellant shall be released from prison immediately unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 11th day of September, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 18th day of September, 2023 in the presence of Appellant, via video link from Butimba Prison, and in the absence of the Respondent, is hereby certified as a true copy of the original.

C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL