IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 389 OF 2021

ABDULL ALLY...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Simfukwe, J.)

dated the 29th day of June, 2021
in
DC Criminal Case No. 212 of 2016

JUDGMENT OF THE COURT

14th & 22nd February, 2023

KEREFU, J.A.:

This is a second appeal by Abdul Ally, the appellant, who was before the District Court of Iiala at Samora Avenue charged with and convicted of the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002], now R.E 2019 (the Penal Code). It was alleged that, on 10th July, 2016 at Pugu Kona area, within Ilala District in Dar es Salaam Region, the appellant had carnal knowledge of "AM" a girl aged fifteen (15) years.

It is on record that, the appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of four (4) witnesses and two documentary evidence namely, the victim's birth certificate (exhibit P1) and Police Forms No. 3 (the P.F.3) (exhibit P2). The appellant relied on his own evidence as he did not summon any witness.

In a nutshell, the prosecution case as obtained from the record of appeal indicate that, the victim, who testified as PW1 (name withheld) stated that she was a student of Form II at Gongolamboto Secondary School and she was living at Gongolamboto with her mother, one Modesta Edgar (PW2) together with her sibling. To verify her age, PW1 tendered her birth certificate which was received in evidence as exhibit P1. PW1 went on to state that, on 10th July, 2016 she informed PW2 that she was going to the church at Pugu but instead, she went to the homestead of the appellant and returned home late around 19:45 hours. Upon being questioned by PW2 and threatened to be beaten, PW1 decided to go back to the appellant where she spent a night. PW1 went on to state that, at that night, the appellant raped her and, in the morning, she went to her grandmother who was living at Mongolandege in Dar es Salaam.

In her testimony, PW2 supported the narration of PW1 and added that, on that fateful night, when she noted that PW1 was missing, she informed her relatives who assisted to search for her but in vain. That, in the morning she reported the matter to the police. A moment later, around 12:00 hours, PW2 received a phone call from her brother who told her that PW1 was seen at her grandmother's house. They went to the grandmother's house and brought PW1 to the police where she led them to the appellant's home and the appellant was, eventually arrested.

Upon obtaining the P.F.3, PW1 was taken to Pugu Kajiungeni Hospital for medical examination which was conducted by Dr. Honest Lyimo (PW4) who found that PW1 was raped as her hymen was not intact. PW4 recorded his findings in the P.F.3 which was admitted in evidence as exhibit P2.

WP. No. 2240 SGT Bahati (PW3), the investigation officer testified that, she was involved in the investigation of the incident, interviewed the appellant who denied to have committed the offence.

In his defence, appellant denied any involvement in the commission of the offence. He recounted to have been arrested on 10th July, 2016 at home on PW1's alleged rape. He contended that the case was fabricated against him and he denied to know PW1 and to have raped her.

After a full trial, the trial court accepted the version of the prosecution's case and specifically placed much reliance on the direct evidence by PW1, the victim and best witness, whose evidence was found to have been corroborated by the evidence of PW2 and PW4. Thus, the appellant was found guilty, convicted and sentenced to imprisonment term of thirty (30) years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. In addition, the High Court ordered the appellant to pay TZS 300,000.00 to the victim as compensation.

Undaunted and still protesting his innocence, the appellant has approached this Court on a second appeal. Two memoranda of appeal comprising a total of eight grounds were filed. The first one was filed on 6^{th} June, 2022 while the supplementary one was filed on 23^{rd} June, 2022.

We have carefully examined the eight grounds raised and found that they can conveniently be paraphrased and rearranged in the following grounds; **first**, that the charge levelled against the appellant was defective on account of being at variance with the evidence on record; **second**, that PW1 was incredible and unreliable witness and thus, her evidence could not sustain the appellant's conviction for rape; **third**, the first appellate court erred in law for failing to find that the trial court did not comply with the provisions of section 231 (1) (b) of the Criminal Procedure Act [Cap. 20 R.E 2019] (the CPA); **fourth**, failure to consider the issue of conducting the DNA test to establish as whether the appellant was connected with the alleged pregnant as asserted by PW2; **fifth**, that exhibits P1 and P2 were unprocedurally admitted in evidence; **sixth**, that the trial court's judgment is incurably defective for lack of point(s) of determination, evaluation and assessment of evidence contrary to the provisions of section 312 of the CPA; **seventh**, the defence evidence was not considered and instead, shifted the burden of proof to the appellant; and **eighth**, that the prosecution case was not proved to the required standard.

At the hearing of the appeal, the appellant appeared in person without representation. The respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney assisted by Ms. Magdalena Kisoka, learned State Attorney.

When given an opportunity to argue his appeal, the appellant adopted the grounds of appeal and his written submission lodged in Court on 16th September, 2022 to form part of his oral submission. We will therefore determine the grounds of appeal, in the same manner as indicated above and the related grounds will be determined conjointly.

Submitting in support of the first and fourth grounds, the appellant contended that the charge levelled against him was incurably defective on account of being at variance with the evidence which was adduced in its support. He clarified that, while the charge indicated that PW1 was raped on 10th July, 2016, in her evidence, PW1 testified that she was raped on that date and also on other dates. He stressed further that, while the charge alleged that he was charged with the offence of rape, PW2 testified that he raped and impregnated PW1, a school girl. However, in her testimony, PW1 apart from testifying that she was raped by the appellant, she was silent on whether she was pregnant or not and there were no other prosecution witnesses who testified on the existence of the alleged pregnancy. He also faulted the trial court for having ignored the issue of conducting the DNA test to establish as whether he was connected with the alleged pregnant. It was his argument that, since throughout the trial the said charge was not amended, such variance rendered it defective. To support his proposition, he cited the cases of **The Director of Public Prosecutions v. Yusufu Mohamed**, Criminal Appeal No. 331 of 2014 and **Vumi Liapenda Mushi v. Republic**, Criminal Appeal No. 327 of 2016 (both unreported).

On the second ground, the appellant contended that PW1 was incredible and unreliable witness as she lied to her mother that she was going to the church while she went to other places and later to her grandmother's house. However, the said grandmother was not summoned to testify to corroborate the evidence of PW1 on that aspect and no reasons given for such omission. That, PW1's evidence could not have been relied upon by the lower courts to sustain his conviction, he argued.

As for the third ground, the appellant faulted the first appellate court for failure to find that the trial court did not comply with the provisions of section 231 of the CPA as he was not informed his rights under that section after the closure of the prosecution case. That, non-compliance of the said provision which safeguards the rights of the accused persons to a fair trial, is a fatal omission. He thus implored us to find that the omission is incurable and allow this ground.

As for the fifth ground, the appellant contended that exhibits P1 and P2 were unprocedurally admitted in evidence as their contents were not read over after their admission in evidence contrary to the requirement of the law. He therefore urged us to expunge them from the record.

On the sixth ground, the appellant faulted the first appellate court for failure to note that the trial court's judgment is incurably defective for lack of point(s) of determination, evaluation and assessment of evidence contrary to the provisions of section 312 of the CPA. It was his argument that, if the learned trial Magistrate could have properly evaluated the evidence on record, he would not have come to an erroneously finding that he had committed the offence charged. He asserted that the pointed omission had rendered the whole judgment a nullity. To support his proposition, he cited the case of **Ramadhani Aito v. Republic**, Criminal Appeal No. 361 of 2019 (unreported).

As regards the seventh ground, the appellant contended that his defence was not objectively considered by the lower courts. That, instead, the said courts misdirected themselves by shifting the burden of proof to him thus failed to decide the case in his favour. He thus finally, though he did not specifically submit on the eighth ground, he concluded that the prosecution case was not proved to the required standard and urged us to allow the appeal and set him at liberty.

In response, Mr. Kajiru who addressed the Court, at the outset, expressed the stance of the respondent Republic of not supporting the appeal. Starting with the first and fourth grounds, Mr. Kajiru challenged the appellant's complaint by arguing that there was no variance between the charge and the evidence on record. To clarify, Mr. Kajiru referred us to pages 1 and 2 of the record of appeal and argued that the charge clearly indicated the offence of rape and its particulars. That, even the evidence of PW1 was to the effect that she was raped by the appellant. He contended that, the issue of pregnancy which was raised by PW2 was not the basis of the charge laid against the appellant. He thus invited us to find the appellant's complaint unfounded and not supported by the record.

On the second ground concerning the credibility of PW1, Mr. Kajiru argued that PW1, the best witness in this case was credible and reliable witness as she clearly testified on how she was carnally known by the appellant and she led PW2 and the police to the appellant's home where the appellant was arrested. He added that the evidence of PW1 was corroborated by PW2 and PW4. That, all prosecution witnesses were credible and reliable, he argued.

On the third ground, Mr. Kajiru also challenged the appellant's complaint that section 231 (1) (b) of the CPA was not complied with by referring us to page 27 of the record of appeal and argued that the record clearly indicates that the appellant was addressed on those provisions. As such, the learned counsel, equally, invited us to find the appellant's complaint unfounded.

On the fifth ground, Mr. Kajiru readily conceded that exhibits P1 and P2 were unprocedurally admitted in evidence as their contents were not read out after their admission in evidence. He argued that the said exhibits deserves to be expunged from the record. He was however quick to state that, even if the said exhibits are expunged from the record, it would not affect the strength of the prosecution's case because their contents were adequately explained by oral account of PW1, PW2 and PW4. Thus, there is still sufficient evidence to sustain the appellant's conviction.

Mr. Kajiru also challenged the appellant's complaint under ground six of appeal by referring us to pages 35 to 38 of the record of appeal and argued that the record bear it out that section 312 of the CPA was duly complied with as the trial Magistrate clearly indicated the point of determination and sufficiently evaluated and assessed the evidence adduced before him and finally made its finding on the said issue. He as well urged us to find the appellant's complaint untenable as is not supported by the record.

On the seven ground although, Mr. Kajiru conceded that the trial court did not consider the appellant's defence, he was quick to refer us to page 67 of the record of appeal and argued that the said omission was cured by the first appellate court which sufficiently considered the said defence but rejected it for being general denial thus incapable of weakening the prosecution case. He thus also urged us to dismiss the appellant's complaint on this ground.

Lastly, on eighth ground, Mr. Kajiru supported the findings of both courts below that the prosecution proved its case against the appellant to the required standard. He asserted that, in convicting the appellant, the trial court relied on the testimony of PW1 whose evidence was corroborated by PW2 and PW4. Relying on the principle established by this Court in proving sexual offences in **Selemani Makumba v. Republic** [2006] T.L.R 379, Mr. Kajiru argued that, the evidence of PW1 was the best evidence which could have been relied upon by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth. In that regard, Mr. Kajiru stressed that the prosecution case was proved beyond reasonable doubt and urged us to dismiss the appeal in its entirety.

In a brief rejoinder, the appellant did not have much to say other than urging us to consider his grounds, allow the appeal and set him at liberty.

Having carefully considered the grounds of appeal, the submissions made by the parties and after having examined the record, we should now be in a position to determine the grounds of appeal.

We are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum Mhando v. Republic** [1993] TLR 170 and **Mussa Mwaikunda v. The Republic** [2006] TLR 387. We shall be guided by the above principle in disposing this appeal.

We shall start with the first and fourth grounds on the variance between the charge sheet and the evidence on record on the issues of pregnancy. Having revisited the record of appeal and specifically, the impugned charge found at pages 1 and 2, we agree, with Mr. Kajiru that the appellant's complaint on these grounds is misconceived. The said charge, in its statement of the offence and particulars, clearly indicated that the appellant was charged with the offence of rape and not otherwise.

It is also on record that, in her testimony, PW1, the victim and best witness in this case, never testified that she was pregnant. The issue of pregnancy was stated by PW2 during cross examination. In any event, such assertion by any standard, cannot dispute the proposition in the charge that PW1 was raped. It is therefore our considered view that, the alleged existence of variance between the charge and the evidence together with issues of DNA claimed by the appellant are equally farfetched. We therefore dismiss the first and fourth grounds for being devoid of merit.

Moving to the third ground, we find no difficult to agree with the submission of Mr. Kajiru because, it is apparent at page 27 of the record of appeal that, upon closure of the prosecution case, the appellant was addressed in terms of section 231(1) (a) and (b) of the CPA and replied that he will give his evidence on oath, which he did and then at page 28 of the same record, he prayed to close his case. Accordingly, we dismiss the third ground for lack of substance.

As for exhibits P1 and P2, we agree with both parties that the same were unprocedurally admitted in evidence as, indeed, their contents were not read out after admission in evidence. We thus outright discount them. Nevertheless, we equally agree with Mr. Kajiru that, even after discounting the said exhibits, the available oral account of PW1, PW2 and PW4 is quite issue. In the circumstances, we also find that the sixth ground has no merit.

As for the seventh ground, having perused the record of appeal, we agree with Mr. Kajiru that the appellant's complaint under these grounds, clearly flies on the face of record as it is vivid at page 67 of the record of appeal that the first appellate court considered and weighed the appellant's defence against the prosecution case but rejected it. For clarity, we excerpt the relevant part of that court's reasoning and finding thus:

> *"Apart from a mere denial of the offence, the appellant did not give plausible reasons why the case fabricated against him and not another person."*

Having reviewed the above finding and reasoning, we agree with the learned Senior State Attorney that the appellant's complaints under the seventh ground of appeal are baseless and we hereby dismiss them.

As for the second and eighth grounds the appellant's complaints are on the credibility of PW1 and that the prosecution case was not proved to the required standard. To ascertain this complaint, we have scanned the entire record of appeal and we agree with Mr. Kajiru that the first appellate court properly re-evaluated the evidence and was satisfied with the finding of the trial court.

We have also revisited the testimony of PW1 and there is no doubt that she clearly narrated the incident on how the appellant raped her. In particular, at page 16 of the record of appeal, PW1 testified that:

> *"On 10/7/2016, I did tell my mother that I was going to the church at Pugu Secondary school. I did not go to the church rather, I went to abdul who is living at Pugu Kona. I returned home at 19:45 hours. My mother asked where I had been. She wanted to beat me, then, I returned to Abdul. I slept with him and he inter-coursed me. It was not the first time to sex with him. I had never been inter-coursed by anybody apart from the appellant."*

We are mindful that in his submission, the appellant questioned the credibility of PW1 because she lied to her mother and misbehaved. It is our considered view that the act of PW1's lying to her mother does not affect her credibility and dispute the fact that she was raped by the appellant.

In addition, it is also on record that, immediately after the said incident, PW1 returned home and upon being questioned by PW2 and the police she named the appellant as an offender and led them to the appellant's home, where he was arrested. The fact that PW1 named the appellant at the earliest, lends credibility to her testimony. In **Marwa** sufficient to establish the age of PW1 and that she was raped. For instance, at page 16 of the record of appeal, PW1 testified that she was born on 23rd August, 2001 and PW2 at page 18 of the same record stated that PW1 was 17 years old. Although, the testimony of PW1 indicated that by the time she testified in court, after one year, she was aged 16 years old and the testimony of PW2 indicated that she was 17 years old, all these witnesses, in our view, clearly indicated that PW1 was under the age of majority (18 years) provided under the provisions in which the appellant was charged and convicted with. Again, PW4 at page 26 of the same record, clearly explained on how he examined PW1's vagina and discovered that her hymen was not intact as it had been penetrated by a blunt object.

With regards to the sixth ground, having revisited the contents of the impugned judgment, we equally find no difficult to agree with Mr. Kajiru that the appellant's complaint is unfounded. The record bear out at page 37 that section 312 of the CPA was complied with as the learned trial Magistrate, before determining the matter, he clearly indicated that the point/issue for determination was whether the charge which was levelled against the appellant was proved or not. He then evaluated and assessed the evidence adduced before him and finally made his finding on the said

Wangiti Mwita and Another v. Republic [2002] T.L.R. 39, the Court stated that:

> *"**The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability,** in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry." [Emphasis added].*

Being guided by the above authority, it is our considered view that both lower courts were correct to find that PW1 was credible and reliable witness. It is also on record that the evidence of PW1 was corroborated by PW2 and PW4. PW2 at page 18 of the record of appeal testified on how she was involved on the matter and started searching for her daughter who was missing at that fateful night. She then discovered that PW1 spent a night with the appellant and she was raped. PW2 also narrated how she reported the matter to the police and to her relatives. On his part, PW4 explained on how he examined PW1's vagina and found that she had lost her hymen and that there was penetration into her vagina. There is no doubt that PW4's evidence corroborated the evidence of PW1 that she was raped. PW1 the best witness in this case, testified that she was raped by none other than the appellant. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there is no fault in the factual findings of the two courts below on these grounds for this Court to interfere. We thus equally find the second and eighth grounds of appeal with no merit.

In conclusion, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that, the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and hereby dismissed it in its entirety.

DATED at **DAR ES SALAAM** this 20th day of February, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2023 in the presence of Applicant in person via Video link, and Mr. Nassoro Katuga, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL