IN THE HIGH COURT OF TANZANIA

AT MBEYA

DC. CRIMINAL APPEAL NO. 48/2014

(Original Criminal Case No.153/2013 from RM's Court of Mbeya)

NICHOLAUS NGANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 13/07/2015
Date of Judgment: 15/07/2015

A.F. NGWALA, J.

The appellant one, Nicholaus Nganga, was charged and convicted of the offence of rape Contrary to Section 130 and 131(1) of the Penal Code, Cap. 16 R. E. 2002, as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998). He was sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane. Being aggrieved with the decision of Resident Magistrate. He has now appealed to this court, against both conviction and sentence.

The appellant filed four (4) grounds of appeal, namely:-

1. The trial court erred in law and facts when convicted and sentenced the appellant while the prosecution's case was not proved beyond reasonable doubt.

2. The trial court erred in law and facts when it convicted the accused on offence of rape while there was no PF3 tendered in court to prove the said offence.
3. That the trial court erred both in law and facts when convicted and sentenced the appellant basing on the hearsay evidence of PW1.
4. That the trial court erred both in law and facts when it failed to take account the unexplained delays in arresting and arraigning the accused the fact which costs credibility of PW1 and PW2.

At the hearing of the appeal, the Appellant was represented by. Baraka Mbwilo. The Republic was represented by Ms. Mwakilasa learned State Attorney.

Mr. Mbwilo, learned Advocate for the Appellant, argued by consolidating the first and second grounds of appeal, in his submission, he averred that, the trial Magistrate erred in convicting the Appellant and sentencing him, while the prosecution side failed to prove the case beyond reasonable doubt. He submitted that, the prosecution had failed to prove one of the elements of the offence of rape which is provided for under Section 130(4) of the Penal Code, Cap. 16 R. E. 2002. Mr. Baraka, pointed out that, there was no proof of penetration.

In relation to the testimony of PW2 the victim, he submitted that, at page 2 of the judgment, the record shows that, PW2 the victim, went to Uyole Police Station, whereby she was given PF3. And the PF3 report showed that, the girls was pregnant. In the court proceedings, there is nowhere to show that, the Doctor was called to testify before the court of law. Mr. Baraka, further maintained that, failure to call the Doctor and to tender PF3 was fatal, because the Doctor had to prove that, the said offence was committed. He went on to submit that, the said offence was said to have been committed in April, 2013 and the arraignment of the accused person was in October, 2013.

With regard to the age of the said victim, the learned Advocate for the Appellant argued that, the age of PW2 the victim was not approved, because there were mere words of PW2 the victim that her age is 15 year, as she was born in 1998. They also failed to prove any documentary evidence regarding her age. No certificate of birth was tendered.

On the third ground and last ground, the learned Advocate submitted that the Appellant was convicted and sentenced basing on hearsay evidence of PW1. That evidence ought not to have been relied upon by the trial magistrate; he referred this court at page 5 of the typed proceedings. He further submitted that, trial Magistrate failed to take into account the unexplained delays in arresting and arraigning the accused person.

In conclusion, he urged the court to quash the conviction and set aside the sentence on the grounds that, the prosecution side failed to prove their case beyond reasonable doubt.

In reply, Ms. Mwakilasa submitted that, the Appellant has raised new grounds in this appeal; the Appellant had submitted that the case was not proved beyond reasonable doubt, and that the PF3 was not tendered. For the offence of rape to be proved, there are main two things to be proved, that is whether there was penetration and whether there was consent, if the victim is of the age below 18 years, consent is unnecessary. In this matter, the victim is a girl of 15 years that being the case consent is irrelevant and even if, she consented, it was a statutory rape, as provided under Section 130(2) of the Penal Code Cap. 16 R. E. 2002. The learned State Attorney referred this court to the proceedings which shows that PW2 the victim had testified that the Appellant inserted his penis into her vagina, and she felt pains. This means that, there was penetration. Miss Mwakilasa argued that though the PF3 was never tendered in court and doctor was not called, but they have no any effect in the offence of this nature. Section 130(4) of the Penal Code, states that, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. Apart from this, she referred this court to the decision of **Selemani Makumba versus Republic Criminal Appeal No. 379 (TLR) 2006, at page 279**. It provides that:-

"True evidence of rape has to come from the victim, if an adult, that there was penetration and not consent and in the case of any other women that there was penetration".

She went on to insist that, even though the Doctor was not called. PW3 had explained how the appellant had raped her. The evidence of PW2 the victim was not shaken by the appellant who by then was the accused person.

On the third ground of appeal the learned State Attorney, submitted that the conviction of the appellant was not based on PW1's evidence but was purely based on evidence of PW2 the victim. The court record shows the best evidence of the victim. The evidence of PW2 was not shaken by the appellant.

On the last ground of appeal, she agreed that, the appellant was arrested six months later from the date of incident, but this does not exonerate the Appellant from the alleged offence.

As regards the age of PW2 the victim, learned state attorney, agreed that though the age was not proved but the evidence of the victim and charge sheet revealed that, the victim was 15 years. In this regard, she cited Section 130(3) of the Penal Code Cap. 16 R. E. 2002 which provides for the punishment of rape, on the person who is not above 10 years. As the age of the victim was 15 years, the sentence of thirty (30) years imprisonment was property imposed to the Appellant. She therefore, prayed the court to dismiss the appeal.

Having gone through the evidence on record and the submissions made by the learned Advocate of the Appellant and the learned State Attorney the issue for the court's determination at this juncture, is whether or not the Appellant was properly convicted.

In determining whether the conviction of the Appellant was proper or not as set forth in the Petition of Appeal. I shall first deal with the complaint that the prosecution's case was not proved beyond reasonable doubt. That, the trial court, failed to comply with the mandatory provision of section 130(4) of the Penal Code, Cap. 16 R. E. 2002, which provide as follows:-

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence".*

The trial Magistrate convicted the Appellant, on the alleged offence, after properly directing his mind to the guidelines set out by the Court of Appeal of Tanzania, in **Selemani Makumba Versus Republic Criminal Appeal No. 94 of 1999 (Mbeya registry)** (unreported), and in the case of **Mathayo Ngalya @ Shabani versus Republic Criminal Appeal No. 170 of 2006** (unreported).

The trial Magistrate was satisfied that, the offence of rape was committed and that PW2 the victim was credible witness hence her evidence alone was sufficient to sustain the conviction of the appellant. In this regard, I see no point or reason to fault the trial Magistrate findings on this aspect.

Another piece of complaint from the Appellant was the failure to call the Doctor who examined PW2 the victim to testify before the court. It is on record that the Doctor who examined PW2 the victim after being given PF3 from the Uyole Police Station and the report showed that the girl was pregnant. To me, this can be a good reason to doubt or discredit the evidence of PW1 the victim and PW2 Enelia Eliudi. I hold so because there is nothing to indicate that PW2 the victim was pregnant. It may be presumed that the PW2 the victim was pregnant. In my view, the only and reliable scientific proof would be a Medical Report PF3. It is on record that the Medical Report PF3 was never tendered in court during the hearing of the case. Taking the above observation into consideration, I am of the view that failure to produce the PF3 the medical report was fatal. The Doctor too had to be called to prove that PW2 was a pregnant. This would have added more weight to the prosecution case. This is in line with the decision of the Court of Appeal of Tanzania, in **Azizi Abdallah versus Republic (1991) TLR 71**. The decision in the case of **Anyelwisye Mwakapake and Ambrose Nombo @ Zungu versus Republic Criminal Appeal No. 227 of 2011 (Iringa Registry)** (unreported), the court observed inter alia that:-

> "Adverse inference may be made where the person omitted are within reach and not called without sufficient reason being shown by the prosecution".

In the present case, it is apparent from the court record that, the Medical Report (PF3) was not tendered, the Doctor who was examined PW2 the victim and filled PF3 was not called by the prosecution side. The reasons for failure to call the Doctor as the witness at the trial, which were the source of that implicating information, were not given. This is a fatal irregularity especially in criminal cases of this nature. Though the prosecution side enjoys discretion whether to call or tender any witnesses they require to attend, but this discretion must be exercised properly or judiciously in order not to prejudice the prosecution case. The cases of **Soda Busiga @ Sumu ya Mamba Shija versus Republic, Criminal Appeal No. 53 of 2012 and the case of Adel Muhammed El Dabbah versus Attorney General for Palestine (1944) A. C. 156** elaborate clearly on this point.

Another complaint by the Appellant is the long delay to arrest the Appellant. It is no record that, the said offence was committed in April, 2013 but surprisingly according to PW3 E8959 D'CPL, the Appellant was arrested on 12th September, 2013. It is evident that, PW2 testified to have been raped by the Appellant, who was familiar to the victim on April, 2013. PW1 Faustine Mahenge informed the trial court on that date. They reported the matter at the Uyole Police Station whereby they were given PF3 to go to the Metal Hospital for Medical Treatment. PW2 the victim was examined by the Doctor, thereafter, she returned home to rest, subsequently the arrest was made on 12th September, 2013.

In my view, one would expect some explanation as to why, it took such along time before the appellant was arrested, but the record is silent as to why it took about five (5) months before the appellant was arrested. PW1 and PW2 agreed to know the appellant as a person who was driving PW1's husband lorry. In addressing the question of delay in affecting the arrest of the appellant, I would like to borrow the wisdom in the decision of Court of Appeal of Tanzania in **Ibrahim Shabani and Shabani Ally Kalulu versus Republic Criminal Appeal No. 110 of 2002** (unreported). The court inter alia observed that:-

> *"it is our opinion that, the slackness in arresting the appellants was not due to inefficiency but to lack of information as to who they were to arrest".*

Had the trial Magistrate directed his mind to this matter of law that, delay in arresting a suspect casts doubt on the credibility of a witness he would have arrived at a different conclusion. This is a settled principle of law in **Maswed Selemani versus Republic, Criminal Appeal No. 189 of 2007 (Court of Appeal of Tanzania)** (unreported), Court of Appeal citing with the approval the decision in **Kulwa s/o Makwajape and two others versus Republic, Criminal Appeal No. 35 of 2005** (unreported) which held that:-

> *"It is an important aspect which if not resolved casts doubt on the veracity of the witnesses".*

On the foregoing authorities, it is the findings of this court that, this matter has not been proved up, to meet the standard set out in the Criminal Law. The benefits of doubt therefore to the Appellant.

In the final event. This appeal is allowed. Both conviction and sentence are quashed. The appellant is to be released from custody forthwith, unless lawfully held.

A.F. NGWALA

JUDGE

13/07/2015

Date: 15/07/2015

Coram: Hon. A. F. Ngwala, J.

Appellant: Present

For the Republic: Miss Anna Rose Kasambala (State Attorney)

c/c Mihayo

Court: Judgment delivered in court in the presence of parties. Right of appeal to the Court of Appeal of Tanzania explained.

THE HIGH COURT OF TANZANIA

A.F. NGWALA

JUDGE

13/07/2015