THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 130 OF 2016

[Appeal from the decision of the District Court of Masasi (H.S. Ullaya, RM) dated 14th July, 2016, in Criminal Case No. 25 of 2016]

IGNUS ALOYCE IGNUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order: 13/03/2017

Date of judgment: 25/04/2017

JUDGMENT

Twaib, J:

On 9th February 2016, the appellant Ignus Aloyce Ignus was called before the District Court of Masasi, to answer a charge of rape, contrary to section 130 (1), (2) (e) of the Penal Code (Cap. 16, R.E. 2002). The charge alleged that at about 05:45 hours on 1st December, 2015 at Ndanda Village within Masasi District in Mtwara Region, the appellant intentionally and unlawful had carnal knowledge of one Exavery Simon without her consent. He denied the charge and a full trial involving five prosecution witnesses and one defence witness ensured.

The alleged victim of the incident one Exavery Simon (PW1). She told the trial court that at about 5:45 Hrs on the material date she met the appellant on a pathway. The appellant held her by the neck and tried to push her down. She managed to run away, but the appellant chased her and caught up with her. He told her to remove her clothes and then raped her. She was later taken to Ndanda Hospital, where Dr. Oliver Benjamin (PW4) examined her. The doctor told the trial court that the appellant's vagina had some rapture, which indicated penetration. According to PW2, G1476 DC Kea, the appellant was arrested and

taken to Chikundi Primary Court where he confessed to have committed the offence before Christopher Sam (PW5) through an extra-judicial confession (Exhibit P3).

However, in his testimony, a justice of the peace (PW5) told the trial court that the appellant had told him that he approached the victim to have sexual intercourse and promised to pay her TZS 20,000, but failed to pay her after the act. Evidence was also received from PW3, F8964 DC Mohamed, who said that the appellant had confessed to him through a cautioned statement (Exhibit P1) to have committed the offence charged.

In his defence, the appellant simply stated that there was an agreement between him and the victim to indulge in sexual intercourse in return for payment of TZS 20,000. However, he decided to pay her only 5,000 after learning that she was a prostitute.

The appellant's defence did not succeed in convincing the trial District Court to find in his favour. Instead, the court believed the prosecution case and convicted him of rape as charged. It sentenced him to the mandatory sentence of thirty years imprisonment. He is aggrieved, and lodged this appeal. He seeks to quash and set aside the conviction and sentence meted out to him, and has raised nine grounds. These may be summarized into five grounds, as follows:

1. That the trial court erred in convicting the appellant basing on the testimonies of PW2, PW3, PW4 and PW5, who were government employees with common interests to serve.
2. The trial court erred in not drawing an adverse inference on the prosecution case for failure to call as a witness a person whom the victims claimed to have found her naked and offered her some clothes.

3. That the trial court erred in convicting the appellant on the basis of the evidence of PW1 without testing with greater care the testimony of the single witness.
4. The trial court erred in relying on the evidence of the doctors which did not establish beyond reasonable doubt that there was penetration of the victim's vagina.
5. The trial court erred in law and fact when it failed to evaluate the whole case in its totality.

At the hearing of the appeal before me, the appellant appeared in person as he had no legal representation. The Respondent/Republic was represented by Mr. Paul Kimweri, learned Senior State Attorney.

In his brief submissions, the appellant invited the court to consider the evidence of both parties as given at the trial court. He added that after he was arrested he was [illegible] but disputes the offence.

On his part, Mr. Kimweri started his submissions by pointing out that there was a slight defect in the charge sheet. The subsection that was cited was wrong as it concerned statutory rape, while in the case at hand the victim was an adult aged 27 years. But the learned Senior State Attorney was of the view that the accused was not prejudiced because the particulars of the offences charged sufficiently disclosed all its ingredients.

On the merits of the appeal, Mr. Kimweri was convinced of the appellant's guilt. He referred to the evidence of PW4, which indicated that the victim had sustained some bruises in her legs and lips. There was also some rapture in the vagina, which implied the use of force. To Mr. Kimweri, the injuries meant that there was no agreement between the appellant and the alleged victim. Also, the

fact that the victim promptly reported the incident to the Police suggested that the victim was not happy with what had happened, he surmised.

It was the learned State Attorney's further submission that since there was no dispute with regard to sexual intercourse, the highlighted fact shows that force was used and the appellant simply brings in the issue of money as an excuse. The law takes the evidence of the victim as the best evidence, he said, upon which conviction may be based even without any corroboration. For those reasons, it was his opinion that the conviction and sentence imposed on the appellant were proper.

In his rejoinder, the appellant maintained that he did not force PW1 for sex and there is no evidence that she ever shouted for help. He reminded the court that that PW1 had said in her testimony that she was seen by someone while naked and that person helped her and gave her clothing. However, PW1 did not bring that person to court.

From the outset, I agree with Mr. Ramwel that the defect in the charge sheet did not prejudice the appellant because the particulars of the offences sufficiently informed the appellant all the ingredients of the offence.

On the merits of the appeal, there is no dispute that the appellant had sexual intercourse with the victim who was 27 years old at the time. However, the prosecution alleged that the sexual encounter took place without PW1's consent. The appellant, on the other hand, claims that the victim consented to the sexual intercourse, and no force was used. Considering all factors at play, the only issue for determination by this court is whether PW1 consented to the sexual intercourse.

In his defence at the trial, the appellant testified that there was prior agreement between him and the victim to the effect that in return for sex the appellant

would pay her TZS 20,000. He however only paid her TZS 5,000 because he discovered that she was a prostitute. This was the same story that he gave to PW4, the justice of peace, who recorded his extra judicial statement (Exhibit P3). The version is further supported by the testimony of PW3, who recorded and tendered Exhibit P1 (the appellant's cautioned statement). In the cautioned statement, the appellant similarly told PW3 that the victim consented to have paid sex with the appellant.

The testimonies of PW3 and PW4 was part of the prosecution case, but they did not tally with the testimony of PW1 who claimed that she did not consent to the sexual intercourse. Instead, the testimonies of PW3 and PW4 corroborated the appellant's line of defence, which claimed that the victim consented to having sex with him.

Mr. Kimweri's invocation of the best evidence rule (that the best evidence in a sexual offence case is that of the victim and can be relied to found a conviction even without corroboration by law. However such evidence is only credible and reliable as such "best evidence". It is not a rule of thumb that whatever is testified by the victim is the best evidence even in light of more cogent evidence (where available), or at least evidence that throws some doubt on the victim's evidence. The best evidence rule cannot be taken as sacrosanct and must be viewed in light of all circumstances. If one were to rule out the possibility of the victim having made up a story after a disagreement on payment terms, the evidence of PW1 and other prosecution evidence should have been able to counter the defence case.

Mr. Kimweri contended that if force was not used the victim would not have sustained injuries. However, Exhibit P2 (the PF3), does not indicate any injuries on the victim's body that would have suggested that the force was used. It would have added weight to the prosecution case if the person who, according

to the victim, helped him when she was naked by clothing her, would have appeared to give evidence. The record does indicate why the witness was not called. I am inclined to agree with the appellant that the trial court ought to have drawn an adverse inference on the prosecution's failure to produce this crucial witness, or at least give reasons as to why he/she was not called to give evidence.

Having said that, it seems to me that the defence case was able to cast some doubt on the prosecution case, which doubt should be resolved in favour of the appellant. In the circumstances, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. I proceed to order that the appellant should be released from prison, unless held for any other lawful cause.

DATED and DELIVERED at Mtwara this 25th day of April, 2017.

I. A. Twaib

Judge