IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MJASIRI, J.A., MMILLA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 213 OF 2016

ALLY MPALAGANA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mzuna, J.)

dated 18th day of September, 2015
in
Criminal Appeal No. 8 of 2015

JUDGMENT OF THE COURT

4th & 8th May, 2018

MJASIRI, J.A.:

This is a case of statutory rape. The victim was a 15 years old girl.

In the District Court of Liwale District in Lindi Region, the appellant Ally Mpalagana was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131(1) of the Penal Code, [Cap. 16, R.E. 2002], (the Penal Code). He was convicted as charged and was sentenced to thirty (30) years imprisonment. Being dissatisfied with the decision of the trial

court, he appealed to the High Court. His appeal was unsuccessful, hence his second appeal to this Court.

It was the prosecution case that on June 27, 2014 at around 21:00 hours at Mngurumo Village within Liwale District in Lindi Region the appellant did have carnal knowledge of a 15 years old girl. The prosecution called four (4) witnesses to prove its case, the victim of rape (PW1), the father of PW1, one Mohamed Nassoro (PW2), Theodosia Mtepeka, the Clinical Officer of the District Hospital, Liwale (PW3) and the Police Officer G. 1549 D/C Omar.

The prosecution relied on the evidence of PW1, who gave a detailed account of how she was sneaking from her parents' house to spend the nights with the appellant and admitted to have sexual intercourse with him. According to PW2's testimony after discovering that his fifteen (15) year old daughter had disappeared from the house during the night, he waited for her return. She came back home early in the morning, after spending the night with the appellant and had sexual intercourse with him. The appellant in his cautioned statement and in his defence basically admitted to the offence save for stating that there was an element of consent from PW1.

The appellant presented a four-point memorandum of appeal which is summarized as follows:-

> *"1. The trial magistrate and the High Court Judge erred in law and fact in holding that the prosecution proved its case beyond reasonable doubt.*
>
> *2. The first appellate court misdirected itself in failing to address non-compliance with the provisions of the law.*
>
> *3. The first appellate Judge erred in law in failing to evaluate the evidence as a whole.*
>
> *4. The first appellate Judge erred in fact and law in failing to consider the defence case."*

At the hearing of the appeal, the appellant appeared in person, was unrepresented and therefore without the benefit of counsel. The respondent Republic had the services of Mr. Kauli Makasi, learned State Attorney. When called upon to argue his appeal the appellant asked the Court to adopt his memorandum of appeal, and to let the learned State

Attorney submit first, so that he would present his arguments after hearing the submissions of the learned State Attorney.

Mr. Makasi, on his part, supported the conviction of the appellant. In relation to ground No. 1, he submitted that there was enormous evidence against the appellant, namely the evidence of PW1 who clearly stated that she had sex with the appellant more than once, the evidence of PW1's father who caught her daughter returning home very early in the morning after spending the night at the appellant's house where they had sex. There is also the evidence of PW3, a Clinical Officer who examined PW1 and found that her hymen was perforated. She tendered a Medical Examination Report in court which was admitted as Exhibit P1. The appellant also confessed before a police officer, PW4 that he had sex with PW1, Exhibit P2.

The learned State Attorney submitted further that the evidence of PW1, and PW2 was not challenged by the appellant. They were not cross examined by the appellant. According to him the appellant's conduct implied that what was stated by PW1 and PW2 was correct. He made reference to the case of **Mohamed Hamis v. Republic**, Criminal Appeal No. 114 of 2013 (unreported).

He also submitted that the best evidence of rape is that of the victim. He relied on the case of **Selemani Makumba v. Republic** [2006] TLR 379. He also argued that the issue of consent did not arise. The age of the victim provided the criterion for statutory rape. He cited the case of **Andrea Francis v. Republic,** Criminal Appeal No. 173 of 2014 (unreported).

In relation to the cautioned statement of the appellant, Mr. Makasi conceded that, though the appellant did not object to it's admission, the same was not read to the appellant in court. He stated that this was contrary to the requirements of the law. He submitted that this Court has stated on several occasions that a statement has to be read over to the appellant. He therefore asked the Court to expunge the cautioned statement from the record.

The cautioned statement was therefore expunged, for depriving the appellant of his inherent right to know the contents of the document. Failure to read the contents is fatal. See – **Lack s/o Kiringani v. Republic,** Criminal Appeal No. 181 of 2006 (unreported).

Mr. Makasi however argued that even if the cautioned statement is expunged, there is sufficient evidence to prove the case against the appellant beyond reasonable doubt.

In relation to ground No. 2, Mr. Makasi submitted that apart from the fact that the cautioned statement was not read to the appellant, there is no non-compliance with any provision of the law.

With regards to grounds No. 3 and 4, Mr. Makasi submitted that there is no basis for this complaint. He stated that it is evident from the record that both the trial court and the High Court properly evaluated the evidence. He submitted further that it is clear from the record that the defence case was also considered. He brought to the attention of the Court pages 22-23 and 38 of the record, where the two courts below, respectively made reference to the appellant's defence.

Mr. Makasi concluded that the appeal had no merit, and urged the Court to uphold the conviction and to dismiss the appeal.

The appellant did not have much to say in reply, not having the benefit of counsel. All he did was to put up a general denial. In the interest of justice there is need for parties appearing before the Court

which is the highest and final Court of the Land to have legal representation, especially in relation to offences which attract long prison sentences.

We on our part, after a careful review of the record, the memorandum of appeal and the submissions by counsel, we are of the considered view that the main issue for consideration and determination is whether or not the appellant committed the rape.

Indeed the evidence against the appellant is overwhelming and leads to no other conclusion than the fact that the appellant committed the act of rape. As rightly stated by the learned State Attorney, the evidence of PW1 and PW2 clearly establish that the appellant committed the offence. The appellant did not deny committing the rape. This is evident from his defence and the fact that he did not cross examine PW1 and PW2 when they testified in court. As this Court has stated on various occasions, failure to cross examine, leaves the evidence unchallenged.

In **Mohamed Hamis v. Republic** (supra), It was stated thus:-

"It is settled law that failure to cross-examine a witness on a particular point/issue, leaves his evidence to stand unchallenged."

See also **Goodluck Kyando v Republic,** Criminal Appeal No. 118 of 2003 and **Khaji Manelo Bonye v. Republic**, Criminal Appeal No. 338 of 2008 both unreported.

In a case of rape, the best evidence is that of a victim. See **Selemani Makumba v. Republic** (supra). Therefore the account given by PW1 as to what had transpired, both in her testimony and what she stated to PW2, demonstrates that she was raped.

We are also inclined to agree with the learned State Attorney that even though we have expunged the cautioned statement, the position does not change as there is sufficient evidence to prove the guilt of the appellant. Apart from the evidence of PW1 and PW2, we also have the evidence of PW3 who established that PW1 was raped and Exhibit P.1 which was not objected to by the appellant.

In order for the offence of rape to be established under section 130(1) (2) (e) and 131 (1) of the Penal Code when a male person has

sexual intercourse with a girl or woman, with or without consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and not separated from the man. As PW1 was under 18 years, the element of consent did not arise as this constituted statutory rape.

In the instant case both the High Court and the District Court found PW1 and PW2 to be credible witnesses and relied on their testimony. This Court has stated time and again that except on points of law, it would not readily interfere with concurrent finding of facts by courts below unless there are serious mis-directions, non-directions, mis-apprehensions or a miscarriage of justice. See - **Jaffari Mfaume Kawawa v. Republic** [1981] TLR 149, **Mussa Mwaikunda v. Republic,** Criminal Appeal No. 174 of 2006 and **Michael Elias v. Republic,** Criminal Appeal No. 243 of 2009 (both unreported).

In **Omary Mohamed v. Republic** [1983] TLR 52 it was held that the trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances which call for re-assessment of their credibility. See **Dickson Elia Shapwata and**

Another v Republic, Criminal Appeal No. 92 of 2007 (unreported). There are no such circumstances in the instant case.

In the result, we find the appeal devoid of merit and we hereby dismiss it.

Order accordingly.

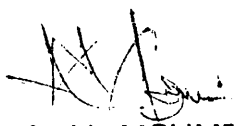
DATED at **MTWARA** this 7th day of May, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURTR OF APPEAL