THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY AT MBEYA
CRIMINAL APPEAL NO. 129 OF 2019
(Originating from Kyela District Court at Kyela, Criminal Case No. 36/2018)

ASOBHISYE AMANGISYE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: *17/08/2020*
Date of Judgment: *25/09/2020*

NDUNGURU, J.

The appellant was charged before District Court of Kyela with the offence of Rape contrary to Section 130 (1), (2), (e) and 131 91) and (3) of the Penal Code, Cap 16 of the Laws (Revised Edition 2002). It was alleged that on 23/02/2019 at 14.00 hours at Tenende Village, Kyela District within Mbeya Region, the appellant raped XY (proper name withheld) who was then eight (8) years a pupil of Standard I.

After full trial, the appellant was found guilty, convicted and sentenced to life imprisonment. Dissatisfied, he appealed to this court.

To briefly recap on what was before the trial court is that on 23/02/2019 at about 14.00 hours PW1 (the victim) was left at home

with the appellant who was her step father. Her mother (PW3) went to the burial ceremony and her sister (PW2) was at the shamba. The appellant took the advantage of their absence, he faced the victim who was sitting on the mat at their home. The appellant held the victim and undressed her. When the victim tried to shout/cry she was threatened to be slashed of as he had a knife on his hand. The appellant also threatened to slash her of if she will disclosed to her mother. The appellant then raped/had carnal knowledge to the victim.

On the other hand, suddenly PW2 on arrival back from the shamba abruptly entered the house and found PW1 crying which bleeding, while the appellant was at the process of dressing himself. PW2 rushed the victim to the Police Station were PF3 was issued for medical examination and treatment. That Medical Officer (PW4) upon investigation/examination revealed to her that PW1 had been raped. He completed the PF3 and handed it to PW2.

It was also the assertion of PW3 (the mother of the victim) that on 23/02/2019 while she was attending burial ceremony she was informed of the rape incident by neighbours she left and rushed to the hospital. At the hospital she was told by the Medical Officer that the victim (PW1) had been raped by an adult. That they back to the Police Station to handover the PF3. That when she was back home she never met the

appellant. She further stated that the appellant was arrested a week later.

PW4, the Medical Officer told the court that on 25/02/2019 while at his working place (Kyela District Hospital) received the victim who tooked under agony/depressed. That the victim told him to have raped. PW4 told the court that upon medical examination, he found the victim to have no virginity, it was perforated the victim found with some wats in her vagina. That he administered the victim with antibiotic to treat the swelling vagina. PW4 testified further that the victim had faced physical sexual violence. PW5 WP 3212 DC Coplo Rose, was the investigator of the offence. Her evidence was that she interrogated the child (victim) who told her that she was raped by her step father while her mother was not at home. Pw5 said she interrogated the appellant who denied to have committed the offence.

The appellant's defence constituted a general denial that he did not commit the charged offence. He told the court that he used to quarrel every time with the victim's mother whom they cohabited due to the jealous she had.

The appellant told the court that on 20/02/2019 he was sick. While at home there passed his ex-lover near the house he was cohabiting with PW3. That PW2 when came back from the shamba met the

appellant with his ex-lover. PW2 went to report to PW3 who was at the shamba. PW3 went back hurriedly but did not find the ex-lover. PW3 started shouting/abusing the appellant. The appellant left the place, went to his elder mother where he stayed for three days till when he was arrested by militiamen informing him to have raped PW1. He was taken to Kyela Police Station. He was eventually charged before District Court of Kyela as above mentioned.

The memorandum of appeal filed by the appellant raised five (5) grounds as follows:

1. That the trial Magistrate grossly erred in law and in fact when convicted the appellant relying on the evidence of PW1 and PW3 who were family and they have possibility to plant the case to the appellant.
2. That the trial Magistrate grossly erred in law and in fact when convicted the appellant relying on PF3 (Exhibit – B) adduced by PW4 (doctor) regard that the said exhibit does not show neither bruises nor sperms which are the best signs of rape cases.
3. That the trial Magistrate grossly erred in law and in fact when convicted the appellant by holding that the appellant is the one who raped the victim (PW1) regard that the appellant testified in

the trial court that he is affected with HIV – AIDS whereby the victim is sage according to the PW4.

4. That the trial Magistrate grossly erred in law and in fact when convicted the appellant by ignoring totally the defence of the appellant.

5. That the charge against the appellant was not proved by the prosecution beyond reasonable doubt.

When the appeal came for hearing before me on 17/08/2020, the appellant appeared in person and fended for himself. On the other hand, the respondent/Republic was represented by Ms. Zena James, learned State Attorney. At the outset, she informed the court that she was not supporting the appeal.

Submitting for the 1st ground of appeal, the appellant was of the contention that PW1, PW2 and PW3 being blood related witnesses are prone to conspire and create a case against him.

The appellant submitted that, that can be revealed from the evidence of PW2 what the said witness stated at the Police Station is different from what she testified in court. He said PW2 when reported the matter at the Police Station, said on the fateful date when she came from the farm found the victim sleeping saying she was suffering from stomach ache. PW2 took her to the bathroom when washing her, the

victim complained of pain at the private part. The victim told her (PW2) to have been raped by the appellant. Which in court PW2 said when came from the shamba met the victim crying while bleeding and the appellant was dressing himself then, the appellant escaped. That PW2 took the victim to the Police Station then to the hospital.

It was his further submission that he being HIV positive if used to sex with the victim why she (victim) when examined was not found affected with HIV.

On the second (2nd) ground, the appellant's submission was to the effect that the exhibit (PF3) tendered by the Medical Officer PW4 did not reveal any signs which could suggest that the victim (PW1) was raped. He said taking into account the age of the victim (8 years old) and that she was raped by the adult some signs could have been revealed by the Medical Officer.

On the 4th ground of appeal the appellant was of the submission that he had tendered him clinic card and the statement of the PW2 which she recorded at the Police Station but were not considered.

On the last (5th) ground of appeal the appellant simply submitted that the case against him was not proved beyond reasonable doubt, as the case was a mere concoction against him. Thus prayed his appeal be given weight and be allowed.

Responding, Ms. Zena James strongly contested the appeal. To start with, she submitted that the law does not prohibit the family or blood related members to testify. She said what is looked upon is the credibility of their evidence. Thus prayed the first ground of appeal be dismissed.

Regarding the 2nd ground of appeal she submitted that the evidence of PW4 corroborated the evidence of PW1 who was the best witness in the case she referred the case of **Seleman Makumba vs. Republic [2006] T.L.R 384**. She stressed that the fact that PF3 did not reveal spermatozoa or bruises does not matter because those are not ingredients of rape. She insisted that ingredients of rape are lack of consent and penetration. She emphasized that PW1 gave a straightforward and convincing evidence on how she was raped. Further the appellant never objected the PF3 when tendered.

On the 3rd ground of appeal it was Ms. Zena James argument that the victim being found HIV negative is not the concluding proof or evidence that she was not raped by the appellant.

Ms. Zena James rejected the claim that the appellant's defence was ignored. Referring to the learned trial Resident Magistrate's typed judgment at page 6 and 7 she submitted that the appellant's defence was fully considered but it was rejected.

On the final ground questioning whether there was sufficient proof to sustain conviction against the appellant, in other words whether the case was proved beyond reasonable doubt, the learned State Attorney submitted that the best evidence in rape cases is that of the victim, regardless of it being corroborated or not. She argued, the evidence of PW1 who was 8 years old was credible and reliable because she knew he appellant and pointed out to be the one raped her. Her (PW1) evidence alone is sufficient to warrant conviction.

Stressing, the learned State Attorney submitted that, the evidence of PW1 was corroborated by that of PW2 who found her (PW1) crying while bleeding saying to have been raped by appellant at the same time the appellant was dressing himself and escaped. Further that the only evidence to be acted upon is that was tendered in court. She thus urged the appeal be dismissed.

Rejoining, the appellant still questioned the probity of the victim's claim that she was raped by the HIV positive appellant hen she is revealed not to be infected by HIV.

The appellant further reiterated on the importance of the statement given by the complainant at the Police Station to be the one initiates the case, saying once it is different from the evidence given in

court means the case is a concocted one. He insisted on the credibility of blood related witnesses saying it is prove to be concocted one.

The point of determination before me is whether the appeal is meritorious. I will begin my determination of the appeal by addressing the first complaint. The first complaint (ground) raises the question of the admissibility of the evidence of blood related witnesses.

From the trial court's record it is quite clear that PW1 and PW2 were sisters and PW3 was their biological mother thus from the same family and blood related. I wish to state at the outset that in determining this complaint I will be guided by the Law of Evidence Act and the authorities present. Section 127 (1) of the Evidence Act (Cap 6 Revised Edition 2019) provides for who is a competent witness. The section provides:

> *127 (1) "Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

That being the position of law, without any qualms, I am of the position that PW1, PW2 and PW3 were the competent witnesses. The law qualified them to testify. Their evidence was therefore relevant. Like

that from any other witness (es) such evidence was certainly admissible and could be acted upon if credible. On whether or not their evidence could ground a conviction depends on their credibility and reliability, not whether or not or how they are related to each other. This was the articulation of the Court of Appeal of Tanzania in the case of **Esio Nyamolela and 2 Others vs. Republic**, Criminal Appeal No. 49 of 1995, **Juma Choroka vs. Republic**, Criminal Appeal No. 23 of 1999 and **Khatibu Kanga vs. Republic**, Criminal Appeal No. 290 of 2009 (all unreported). Therefore it is nothing wrong in law, in accepting and relying on the evidence from the family members, to ground a conviction, if it is found credible.

In this case, the trial court addressed itself on the question of credibility of the witnesses and in its judgment at page 8 and 9 it held that PW1, PW2 and PW3's evidence was credible and so rightly relied on their evidence. I so find.

The next complaint is that the conviction was based on PF3 tendered by PW4 that the said exhibit did not show any signs of rape like bruises or remains of sperms. I am persuaded by Ms. Zena James, learned State Attorney that bruises and remains of spermatozoa are not necessary in proving rape. That the ingredients of rape are lack of

consent and penetration. Section 130 (4) (a) of the Penal Code, Cap 16 provides:

Section 130 (4) (a) of the code states as follows:

> *"130 (4) (a) For the purpose of proving the offence of rape-penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence."*

I thus agree the absence of bruises and remains of spermatozoa is immaterial in proving rape offence. On the same footing I agree with the learned State Attorney's position the fact that the victim was not found being infected by HIV is not a ground of disproving to have been raped by the appellant who is asserting to have HIV positive taking into account that there is no evidence on record that he was subjected for test after being alleged to have raped the victim.

But again on whether the victim could have been HIV positive having been raped by the appellant who asserts to be HIV positive, this is a medical and expert evidence. The appellant had ample time to cross examine PW4 (Medical Officer) but never used that opportunity to challenge the prosecution evidence. It was PW4 who was at a position to say whether the victim if raped by HIV positive by an necessity could have been infected or not.

The appellant's complaint that his defence was not considered is just a kick of a dying hose. I wish to recall that when he was put to the defence box, the appellant made a general denial of accusation facing him. He raised what appears to be a long tale suggesting that the case against him was framed up mainly because of PW3's love jealous which was perpetuated by his ex-lover.

As rightly submitted by Ms. Zena James, this defence was considered but rejected by the leaned trial Resident Magistrate. In his typed judgment at page 6 last paragraph the trial Magistrate took into consideration the defence evidence. At page 7 the trial Magistrate rejected the defence in a view of the strength and credibility of the prosecution evidence. I find this complaint too is without substance. It fails.

On whether there was a sufficient proof to sustain conviction against the appellant, in other words on whether the prosecution case was proved beyond reasonable doubt. This issue calles for the court to revisit the whole case that is the prosecution and defence case.

This being the appellate court, the law is settled the duty of the first appellate court such as what I am here now, is to reconsider and evaluate the evidence and come to its own conclusion bearing in mind it never saw the witnesses as testified. (See **Pandya vs. Republic**

(1957) EA 336. In **Hassan Mfaume vs. Republic [1981] T.L.R 167** it was held:

> *"A Judge of the first appeal should reappraised the evidence because an appeal is in effect a re-hearing of the case."*

I will try to re-evaluate the evidence. it is worth mentioning that in the course of evaluating the evidence on record, I am aware that PW1's testimony being unsworn statement acted upon without corroboration in terms of Section 127 (7) of the Evidence Act, (Cap 6 Revised Edition 2002) if the court was satisfied that it was but the truth. Being the child of the tender age (8 years old) the trial court complied with the requirement of Section 127 (2) of the Evidence Act, (Cap 6 Revised Edition 2002) as amended by Written Laws Miscellaneous Amendment) Act No. 4 of 2016. Upon examination the victim was found competent to testify. Upon promising to tell the truth and nothing else as the record reveals she testified.

PW1 testimony was on the fateful date she was left at home with his step father, the appellant. Her mother PW3 was attending burial ceremony and her sister PW2 went to the shamba. The appellant took the absence advantage. While she was in the sitting room, the appellant removed her closes and inserted his penis into the vagina while threatening to slash her off it shouting and not to disclose to her

mother. That she experienced pain and she was bleeding. That when PW2 came from the farm found her stood at the door while crying and she told PW2 to have been raped by the appellant. That the appellant noting the presence of PW2 he put on his clothes and escaped.

Thus piece of evidence was corroborated with the evidence of PW2 who found PW1 crying while bleeding and further was told by PW1 to have been raped by the appellant. Further that it was PW2 who took her to the Police Station issued a statement and then sent the victim to the hospital. The same is corroborated by the PW3 (the mother of the victim) who having received the information rushed to the hospital and met the victim under treatment and that was told by PW4 that PW1 has encountered sexual violence.

The testimony of PW1 was also corroborated with that of PW4 who examined her and found her virginity was perforated, the vagina was swollen and that PW1 was experiencing agony. The trial court found the evidence of PW1 credible. This is revealed by the trial courts records at page 9 of the typed judgment. It is a settled law now that the credibility of the witness is the monopoly of the trial court which is at better place to assess the credibility than an appellate court which merely reads the transcript of the record. See **Shaban Daud vs. Republic**, Criminal Appeal No. 28 of 2000, **Defremas Misungwe @**

Bumbugu vs. The Republic, Criminal Appeal No. 21 of 2010 (both unreported) and **Ally Abdallah Rajab vs. Saada Abdallah Rajab and Another [1994] T.L.R 132**.

That being the appellate court, as far as on assessing the credibility of the witnesses lacks the assess the credibility in relation to the deminour. But, deminour is not the only way of assessing credibility and reliability of the witness. The trite law is that assessing the witness's credibility his or evidence must be looked at in its entirety, to look for inconsistency, contradictions and or implausibility or if it is entirely consistent with the rest of the evidence on record, including the defence evidence. This position was articulated in the case of **Oscar Nzelen vs. Republic**, Criminal Appeal No. 48 of 2013 at page 11 and **Shaban Daud's case (supra)**.

From the record, the PW1's testimony has been consistent, coherent and stable even when cross examined. As related to the testimony of PW2 and PW3 the evidence again has been consistent, that the victim was left with the appellant alone at home while PW2 went to the shamba and PW3 to the burial ceremony. The fact which even the appellant agrees that he was at home saying was sick. Further that the appellant having committed atrocity escaped same was the evidence of PW1, PW2 and that of the appellant as he was not arrested at home of

the PW3 where he was habiting as he escaped. I am also inclined and indeed I do agree that the evidence of PW1 was credible. Being guided by the celebrated case of **Seleman Makumba vs. Republic [2008] T.L.R 336** I hold that the prosecution evidence linked the appellant and the offence committed. See **Nathan Mgunda and Benjamin Alphince Mgunda vs. The Republic [2006] T.L.R 395**.

The trial court records reveal that during defence hearing the appellant tendered the statement offered by PW2 when reporting the matter to the Police Station. The appellant assertion was that the statement which initiated the case is different from the evidence testimony of PW2 in court. I had ample time to throw the eye on it. From the statement what was reported to the Police Station was nothing else but the offence of rape, and what PW2 testified in court is the offence of rape. In all those, the rapist is the appellant and the victim of rape is PW1 and nobody else. But still, the court relies on the sworn evidence testified in court. The tendered statement was only helpful to the appellant in impeaching the credibility of the witness. But the appellant did not make use of it.

From the coherence, consistent and plausibility of the prosecution I could not find any glance which could make me believe that the case

against the appellant was framed as the appellant is trying to convince the court. Accordingly the final ground of appeal is bereft of substance.

That being said and done, I find the appeal is barren to produce fruits. I thus agree with trial court and hold that the appellant was rightly convicted of the charge offence, and the sentence was proper.

In the final analysis, I find the appeal unmerited. It is dismissed in its entirety.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
25/09/2020

Date: 25/09/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Republic: Ms. Rosemary – State Attorney

B/C: M. Mihayo

Ms. Rosemary – State Attorney:

The case is for judgment, we are ready.

Appellant:

I am ready for judgment.

Court: Judgment delivered in the presence of Ms. Rosemary Mgeni State Attorney and the appellant through Video Conference.

D. B. NDUNGURU
JUDGE
25/09/2020

Right of Appeal explained.