THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 130 OF 2019
(Originating from Criminal Case No. 45/2018
Ileje District Court at Itumba)

MESHACK MASHAKA @ KALENGE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: *14/07/2020*
Date of Judgment: *28/09/2020*

NDUNGURU, J.

The appellant Meshacki Mashaka Kalenge was charged with and convicted by the District Court of Ileje with the offence of Rape contrary to Section 130 (1) (2) (e) and Section 131 of the Penal Code (Cap 16 Revised Edition 2002). It was alleged by the prosecution that on 08th September, 2018 at night hours at Ngulugulu Village within Ileje District Songwe Region, the appellant did have carnal knowledge to G.GL (PW1) he was sentenced to 30 (thirty) years imprisonment and 6 strokes of the case.

Being aggrieved with the decision of the trial court, the appellant has lodged this appeal impugning both conviction and sentence. In his memorandum of appeal, the appellant has raised nine (9) grounds of appeal as hereunder:

1. That the learned trial Magistrate was erred in law point and fact when he admitted the evidence of PW1 child of tender age without conducting voire dire test in order to ensure that PW1 knows the meaning of oath and telling truth as directs by the law Section 127 (2) of TEA Cap 6 Revised Edition 2002 and the age of PW1 was not proved by her birth certificate.
2. That the learned trial Magistrate was erred in law point and fact when he convicted the appellant relying on single witness (PW1 only) without any corroboration from other witness.
3. That at the trial court PW1 contended that at the fateful day she was alone at her grandmother's home. And she reported the said allegation to her grandmother the next day. But for an amazement the said grandmother was not called to testify as a witness to support the story of PW1.
4. That the said crime was occurred on the 08/09/2018 and was reported to the VEO and to her teacher but for unknown reasons

from the prosecution side these witnesses was not called at the trial court to prove the said allegation.

5. That PW3 was issued PF3 to PW1 on 13/09/2018 six days over and PW2 was examined PW1 and observed nothing except the perforation of the hymen of PW1.
6. That failure to call her grandmother, VEO, the Head teacher and the nearby leaders of Ngulugulu Village makes this case to be the framed one against the appellant.
7. The Hon. Judge was true that her grandmother of PW1 her teacher and the village leaders was refused to go testify at the trial court because they know the whole situation of the said crime that was framed only by PW1 as liar girl and they do not want to support a framed case against the appellant.
8. That PW3 was failed to make a good investigation of this case which results the bad decision from a trial Magistrate.
9. That the case against the appellant was not proved and the defence of the appellant was not considered by the trial Magistrate.

Briefly, the events providing the background of this appeal took place on 08th September, 2018 at night hours at Ngulugulu Village Ileje District. The prosecution is based on the evidence of three witnesses, 12 years old girl (GGL) I have initialized her name to protect her identity,

PW2 the Medical Officer and PW3 a Police Officer who investigated the case.

PW1 testified that on the fateful date on the way back from Katengele Village where she went to witness inauguration/opening function of the market met the appellant, by then it was around 18.00 hours. Having arrived at home she did not meet her grandmother whom was living with. The appellant who was walking after (behind) her called her to get out the appellant dragged her to the bush undressed her and himself and lied on top of her and made sexual intercourse. She said she felt pain. That she cried but the appellant rebuked her. That having dressed his clothes, the appellant left her at the bush. PW1 told the court that she dressed and went back home. At home she could not find her grandmother. She slept till morning. In the morning she told her grandmother the episode who subsequently informed VEO (Village Executive Officer) and her teacher.

PW2 is the clinician (Medical Officer) who medically examined PW1. He testified that on 03/09/2018 at about 09.05 hours while at his working station he medically examined PW1 who was suspected to have been raped. He said it was six days from the date the alleged rape was committed. The witness said upon examination, the victim was revealed

to have no hymen, there was no bruises but there were signs to the effect that the blunt object penetrated through the vagina of the victim.

PW3 is the investigator of the case. Her evidence was that on 13/09/2018 she was assigned to investigate the rape of offence, that she recorded the statement of the victim and having collected the evidence she referred the appellant to the court for the offence of rape.

When called for to his defence, the appellant denied committing the offence.

At the hearing on 14th July, 2020 the appellant appeared in person fending his appeal, while the respondent/Republic was represented by Ms. Prosista Paul the learned State Attorney who strongly resisted the appeal. She staked a position that the trial court was right to conclude that the prosecution had proved its case against the appellant beyond reasonable doubt.

Given the opportunity to submit on his grounds of appeal, the appellant submitted on the first (1st) ground only and requested the court to adopt the rest of the grounds of appeal. I could understand it, because being a layman and coming from the prison, he had nothing at hand that he could make reference to, that is why he got stranded having submitted on the first ground.

On the first complaint, the appellant was of the submission that, the evidence PW1 was not properly taken. He said PW1 being the child of the tender age, it was not clear if she knew the meaning of oath and further that her evidence was taken contrary to the requirements of Section 127 (2) of the Evidence Act (Cap 6 Revised Edition 2002) as amended by Act. No. 4 of 2016.

Ms. Prosista Paul the learned State Attorney, submitting for the first ground, urged that when the offence was committed and when PW1 testified Section 127 (2) of the Evidence Act was already amended by Act No. 4 of 2016. Following the amendment, there was no need to conduct voire dire test but the witness of the tender age was either required to testify on oath if he/she knows the meaning of oath or just to promise to tell the truth. That the record reveals that PW1 testified having promised to tell the truth.

On the question of age of the victim, the learned State Attorney submitted that age of PW1 was certain as she had stated her age like what was revealed in the charge sheet.

Submitting on the 2nd, 3rd, 4th and 6th complaints, the learned State Attorney was of the argument that under the law no specific number of the witness is required. The State Attorney referred to Section 143 of the Evidence Act (Cap 6 Revised Edition 2019). She further said, the

absence of Village Executive Officer, the victims grandmother and the teacher is immaterial what is required is the credibility of the witnesses testified. She referred the case **of Goodluck Kyando vs. Republic [2006] T. L. R 367** and that of **Seleman Makumba vs. Republic [2006] T. L. R 379** saying the best evidence in sexual offences comes from the victim herself/himself. The learned State Attorney urged the 2, 3, 4 and 6 complaints be dismissed.

Ms. Prosista Paul, the learned State Attorney submitted that, though medical examination was conducted six days after the event, what is important is that the victim was found with no hymen which is good evidence that there was penetration.

Submitting on the 7th ground of appeal the learned State Attorney was of the short argument that the victim's evidence alone is sufficient to ground conviction. On the 8th complaint she also shortly submitted that PW3 played her investigation role.

On the 9th ground of appeal, Ms. Prosista Paul was of the contention that, the appellant's defence was considered, but the defence it was weak to shake prosecution evidence thus rejected. She further stated that the case was proved beyond reasonable doubt. PW1 told the court the way the appellant took her to the bush at that very night and raped her. Likewise PW2 who examined her told the court that the

victim was found hymen missing. The learned State Attorney prayed the appeal be dismissed for being devoid of merit.

Rejoining, the appellant reiterated his complaint that the case was not proved beyond reasonable doubt. He added that the victim did not explain why she failed to report the incident to the Police once it happened. He prayed his appeal be allowed.

I begin my determination of this appeal by stating at the outset this being the first appeal, this court has a duty to re-evaluated/revisit the evidence on record and come to its conclusion but being warned that it did not see the witnesses when testifying.

Addressing the first complaint, which raises the issue whether the evidence of PW1 (victim) was properly taken. I am persuaded by Ms. Prosista Paul that when the offence was committed and particularly when PW1 testified the said Section 127 (2) was already amended by Act No. 4 of 2016 which took away the requirement of voire dire test. Thus I am in line with the learned State Attorney that voire dire test with the advent of Act No. 4 of 2016 is no longer a requirement.

In connection with the above discussed issue the appellant has also raised a question of age of the victim. Responding on the issue the learned State Attorney submitted that the victim before making testimony mentioned her age to be 12 years old. That was enough for

ascertaining the age of the victim. I agree with the learned State Attorney and the record of the trial court at page 5 of the typed proceedings, the victim mentioned to be 12 years old. The question is whether by so mentioning the age of the victim was ascertained. It is settled that the preliminary answers and particulars given prior to the evidence are not part of evidence. See **Simba Nyangaru vs. Republic**, Criminal Appeal No. 144 of 2008 (unreported). I thus agree the age of PW1 was not ascertained.

On the complaint number 2, 3, 4, 6 and 7 the learned State Attorney submitted that the law of evidence does not provide a specific number of the witnesses in proving a fact. She submitted that the absence of the Village Executive Officer, the grandmother of the victim and the teacher is immaterial what is needed is the credibility of the witness. The learned State Attorney relied on Section 143 of TEA.

On my part, with respect, I do not agree with the learned State Attorney's stance. Much as under Section 143 of the TEA no specific number of witnesses is required in order to prove a fact, I think each case must be considered according to its circumstances in view of dispensing justice. See the case of **Boniphas Kunda Kira Tarimo vs. Republic**, Criminal Appeal No. 351 of 2008 (Unreported).

In this case, it is clear in the record that the victim was raped at night. That she slept till morning where she told her grandmother whom lived together the incident of rape. That the said grandmother having received such information reported to Village Executive Officer and the victim teacher. This is the testimony of the victim. The evidence of PW2 is to the effect that he received PW2 on 13/09/2018 six days from when rape occurred. It is not certain as to when the event was reported to the Police Station and who reported it. The fact that the grandmother was the first person to be narrated the episode, to me was a very important prosecution witness. Further it is the grandmother who could tell why delayed to go to the hospital as she was the one living with the victim (PW1).

To my opinion such circumstances demanded the need for those witnesses to meet the end of justice. I am saying so because, as it is, the evidence that PW1 was raped by the appellant came from PW1 alone. This evidence is against the evidence of the appellant who denied to have raped her. I am aware that every witness is entitled to credence and has to be believed unless there are good reasons for not believing such witness. (See **Goodluck Kyando vs. Republic [2006] T.L.R 367**. It is clear that the trial court was attracted by the evidence of PW1 as shown at page 4 of the typed judgment.

I appreciate from the judgment of the trial court that the conviction of the appellant was based on the evidence of PW1 and PW2. The court relied on principle articulated in the famous case of **Seleman Makumba vs. Republic (2006) T.L.R 379**. The trial court found the evidence of PW1, the victim; was crucial and was clear on what transpired on the fateful night.

According to the charge, the offence was committed at night. PW1 was the victim of the alleged rape. Her evidence is crucial to prove the case basing on the principle enunciated in the case of **Seleman Makumba (supra)** and followed in the case of **Ndikumana Philipo vs. Republic**, Criminal Appeal No. 276 of 2009 (unreported) where the court stated:

> *"True evidence of rape has to come from the victim, if an adult there was penetration and no consent and is irrelevant that there was penetration."*

While I agree that the above is correct position of law, I hasten to say that it does not mean that such evidence should wholesome, believed and acted upon to convict the accused person without considering other circumstances of the case. I am so saying because; accusation of rape can be made with facility, though somehow difficult to prove but more difficult for the person accused though innocent, to disprove.

In the present case, apart from PW1, the victim, there was no eye witness to the incident of rape. So while PW1 claims to have been raped by the appellant denied committing the offence. Therefore, it is word of one against the other. In the circumstances, the credibility of PW1 was and is still very crucial in determining her truthfulness.

It is the settled law that the trial court is placed at the best position to assess the credibility of the witness on the dock, to due the fact that it can observe the deminour of the witness at dock, other than the appellate court which merely relies on reading the script of the record. See **Ally Abdallah Rajab vs. Saada Abdallah Rajab & Another [1994] T.L.R 132**. Unfortunately, it is not reflected in the record that the trial court which had the opportunity to observe the deminour of PW1 at the dock did so and reached at a conclusion that she was credible witness. The record ought to reflect the observation done (see **Yusuph Simon vs. Republic**, Criminal Appeal No. 240 0f 2008 (unreported).

Apart from deminour, which the appellate court cannot use, witness's credibility can be assessed through other ways. One is by assessing the coherence of the testimony of such witness. Two when testimony of that witness is considered in relation with other witnesses, including that of the accused. Three, whether such testimony is

reasonable and consistent with other evidence and many others. The above ways are appropriate to the appellate court when assessing credibility of the witnesses. Those ways are best articulated in the case of **Rashid Shaban vs. Republic**, Criminal Appeal No. 310 of 2015, **Shabani Daud vs. Republic**, Criminal Appeal No. 28 of 2001 (both unreported).

Given the circumstances of this case, closely examining the evidence of PW1, the victim, it can be discernible; the evidence in chief raises may doubts. One that being night while PW1 was inside the house what made her get out as she said to had denied when called first. Two, when dragged to the bush why did she not shouted for help. How far was the bush from home.

During cross examination, PW1 gave a new story which is quite inconsistent with what she had said in chief though at the end she said to have been raped by the appellant. Putting her testimony under scrutiny, I am inclined to as I hereby do hold that PW1's evidence was incredible and doubtful.

I did not end there, I visited the testimony of PW4, the Medical Officer, though his testimony being expert opinion which is not binding, but when it is convincing adds value to the prosecution case. In his evidence PW2 said the victim had no hymen. He went on saying,

"though there were no bruises in her vagina but there were signs with the effect that blunt object penetrated through the vagina of the victim". The witness did not disclose the signs apart from saying that the victim had no hymen. The question is whether the absence of hymen implies that the victim was raped, taking into account that the victim was 12 years old. But looking at the PF3 (exhibit P1). PW2, (at part IV B where he has to describe physical state of and any injuries to genital to establish the evidence of penetration) states: labla majora and minora are intact, vagina opening is narrow no bruises no hymen. No bleeding. In his remarks PW2 states *"Since the hymen is not there and the vagina opening is narrow these implies there is previous penetration per vagina".*

As it can be noted, the findings of the Medical Officer are also very contradictory to corroborate the evidence of PW1, the victim which I have discredited to.

As it can be seen in the charge sheet and the testimony of PW1, the victim, the alleged rape happened at night. The law of evidence on the offences happening at night is very clear. The famous case of **Waziri Aman vs. Republic [1980] T.L.R** 250 has set a foundation to that effect. The whole of PW1 testimony has not endervoured to explain on how she identified the appellant at that night. Though PW1 she said

to had met the appellant when coming from Katengele Village, but in her evidence in chief she said *"before the event I was not used to see this person"* referring the appellant.

The above being the circumstances, in the absence of watertight explanation on how she identified the appellant, I hold the chances of mistake identity is there.

In the final event, I find merit on this appeal. I allow the appeal. The appellant's conviction is hereby quashed and sentence meted upon is set aside.

Further, I order that the appellant be released from the prison forthwith unless otherwise held therein for any other lawful cause.

Order accordingly.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
28/09/2020

Date: 28/09/2020

Coram: D. B. Ndunguru, J

Appellant: Present

For the Republic: Ms. Hannarose Kasambala – State Attorney

B/C: M. Mihayo

Ms. Kasambala – State Attorney:

We are ready for judgment.

Appellant:

I am ready.

Court: Judgment delivered in the presence of Ms. Kasambala State Attorney and the respondent through Video Conference.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
25/09/2020

Right of Appeal explained.