

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

HIGH COURT CRIMINAL APPEAL NO. 80 OF 2020

*(Original Criminal Case No. 134 of 2018 from the decision of the District Court of Kibaha
at Kibaha dated 29th July, 2019)*

SADICK S/O HASSAN ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGEMENT

Date of Last Order: 27.11.2020

Date of Judgement: 20.11.2020

Ebrahim, J.:

The appellant herein, was convicted and sentenced to thirty (30) years imprisonment for the offence of rape **c/s 130 (1), (2) (e) and section 131 (1) of the Penal Code, Cap 16 RE 2002.**

The brief facts of the case that led to the conviction and sentence of the appellant mainly came from the evidence of PW1, the victim herself. PW1, a 14 years old ex-student testified before the trial court that the accused is her father's friend, whom they were in a sexual relationship since April 2018 to September, 2018. She said they used to have sexual intercourse at a guest in Kongowe Kibaha and that she had never had carnal knowledge with any other man apart from the Appellant. She

confirmed also that the Appellant is the one who impregnated her. PW2, a step mother of PW1 conducted Urinary Pregnancy Test for PW1 on 13.09.2018 and discovered that she was four months pregnant. PW2 testified that PW1 told her the father of the baby is the Appellant. PW3 is a medical doctor who found out that PW1 was pregnant. He tendered PF3 which was admitted as Exhibit "P2". PW4 is the investigation officer who said that PW1 mentioned the Appellant as the only men she had sexual intercourse with on April 2018. He said PW1 said they visited two guest houses and among them was Ishoz Guest House which is situated at Kongowe Kibaha. PW4 said also that he interviewed the Guest House attendant who admitted to service PW1 and the Appellant as part time clients who did not sign in the register.

On his side, the Appellant adduced evidence as DW1. DW1 vigorously disassociated himself to be involved with PW1. He testified that he never knew PW1 and he only heard her name through her parents. He asked for DNA test since PW1 claimed that he is the only man she has ever slept with. The court granted the prayer. DNA test was conducted and the result was 99.9% that, the Appellant is not the biological father of the baby. Another witness on defence side was DW2. He only testified on how and when DW1 was arrested as they were co-workers.

After considering the evidence from both sides, the trial magistrate relied on the testimony of PW1 as a credible witness despite the fact that DNA proved that the Appellant was not the father of the baby. The Trial Magistrate gave reason for his decision that since penetration was proved, prosecution had no duty to prove who is the father of the baby. Answering why PW1 said she never slept with another man, the trial Magistrate justified that it might have been because her parents were present and also that she believed the Appellant was the father. Ultimately, the trial court proceeded to convict and sentence the Appellant.

Aggrieved, the Appellant preferred the instant appeal raising 10 grounds of appeal which in essence and from the relevance of it can be grouped into 5 grounds. The Appellant is faulting the defective charge; failure to consider DNA results; exhibits P1 and P2 were not read in court after admission; reliance of the testimony of PW1 which she lied while promising to tell the truth; and that generally prosecution failed to prove the case beyond reasonable doubt.

In this appeal, the Appellant was represented by advocate M. Mutalemwa and Ms. I. Mushi, State Attorney appeared for the Respondent. The Appeal was argued by way of written submission.

Arguing the first ground of appeal, Counsel for the Appellant elaborated that the charge sheet is defective as it does not disclose the provision of the enactment to which punishment is created; that the particulars of the offence differs with PW1; and that the particulars of the offence did not disclose whether she had canal knowledge with the Appellant. He referred to the case of **Kibazo vs Uganda [1965] EA 507** on the need to prove non-consent.

He consolidated the 2nd, 3rd and 4th grounds together that in terms of **section 110(1) and (2) of the Evidence Act, Cap 6 RE 2002** which states that, PW1 failed to prove the case as she failed to speak the truth as promised. He said that PW1 said she never had sexual relationship with any other man while in cross examination she said she started having boyfriends after her relationship with the accused. He also pointed out that the trial court erred in ignoring expert opinion on DNA under section 47 of the Evidence Act. He further submitted that the trial magistrate raised extraneous matter contrary to the provisions of section 127(7) of the Evidence Act when the court held that PW1 mentioned DW1 which could be due to the fact that her parent PW2 was present at the trial.

Arguing the 9th ground of appeal, Counsel for the Appellant stated that the evidence of PW1 was weak and not corroborated by any

prosecution witness. Hence the case was not proved beyond reasonable doubt.

On their part, the Republic supported the appeal on grounds 1,2,4,9 and 10 of the appeal.

Submitting generally on the defective charge sheet, Counsel for the Respondent referred to the case of *Mussa Mwaikunda V R* [2006] TLR 387 where the Court of Appeal insisted on the requirement for the accused to know the nature of the case. She stated therefore that, the Appellant understood the offence he was charged with and the absence to cite the provision creating the punishment could be cured under section 388 of the Criminal Procedure Act, Cap 20 RE 2002.

Submitting further, the learned State Attorney referring to section 127(2) of the Evidence Act, submitted that it is the established principle of the law that in sexual offence cases, the evidence of the victim may amount to conviction without corroboration. However, the said evidence should be reliable and credible. Counsel for the Republic referred to the case of *Dickson Malekera V R*, Criminal Appeal No. 13 of 2010 (unreported) which cited with authority the case of *Shaban Daud V R*, Criminal Appeal No. 28 of 2000(unreported) on the principle that the credibility of the witness can as well be assessed from the coherence of the testimony of

the witness; and in considering with the evidence of the accused. I must register my concern and disappointment here that neither of the cited cases were appended with the submissions being that they are unreported cases. This shows slothness by the learned State Attorney.

The State Attorney argued therefore that, the fact that PW1 said she never had relationship with any other man but DW1; but DNA results suggested otherwise, her testimony needs corroboration. She submitted that since the Appellant denied to have carnal knowledge with PW1 and prosecution failed to prove that DW1 was the father of the baby, it is clear that PW1 was not telling the truth. She concluded therefore that the testimony of PW1 was not credible enough to amount to conviction of the Appellant.

In rejoinder, Counsel for the Appellant stressed on the concession by the Republic that the case was not proved beyond reasonable doubt and prayed for the appeal to be allowed.

This is the first appeal. The first appellate court is obliged without fail to subject the *"entire evidence to an objective scrutiny and arrive to its own findings of facts"*. See the case of Charles Mato Isangala and 2 Others V The Republic, Criminal Appeal No. 308 of 2013.

In determining this appeal, I shall straight ahead begin with the issue of credibility of PW1 which was heavily relied upon by the trial Magistrate in convicting the Appellant.

PW1 in adducing her evidence told the court that the Appellant was the only man she had ever had sexual relationship with and they used to go at the Guest House at Kongowe Kibaha. She firmly told the court that since she had never had relationship with any other man, the father of the baby is the Appellant.

In his defence, the Appellant in denying to be involved with the commission of the charged offence, prayed for DNA test. The result of which showed that the Appellant was not biological father of the baby. This clearly shows that PW1 was involved with other men. It could be immaterial to the Appellant's involvement with PW1 even if PW1 was involved with other men. However, what caught the attention of this court, is the credibility of PW1.

I am abreast to the established principle of the law that in sexual offence cases, the best evidence is of the victim as illustrated in the case of *Selemani Makumba VR [2006] TLR 379*.

Again, the law i.e., **section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002** allows reception and reliance of the evidence of the child of

tender years or a victim of sexual offences after assessing the credibility on its merits without corroboration. The law provides as follows:

*"S.127 (7) Notwithstanding the preceding provisions of this section, where in criminal proceedings **involving sexual offence the only independent evidence is that of a child of tender years** or of a victim of the sexual offence, the court shall receive the evidence, and may, **after assessing the credibility of the evidence of the child of tender years** or as the case may be the victim of sexual offence on its own merits, **notwithstanding that such evidence is not corroborated, proceed to convict**, if for reasons to be recorded in the proceedings, the court **is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth**". (Emphasis supplied).*

More – so, I am also aware that credibility of a witness is a monopoly of a trial court. However, the appellate court can determine the credibility of a witness by considering the testimony of the witness in relation with evidence of other witnesses including that of the accused person; and when examining the coherence of the testimony of the said witness. This

principle was well illustrated in the case of **Siza Patrice V R**, Criminal Appeal No. 19 of 2010.

Tailoring the above cardinal principles of the law with our instant case, it is obvious that the underlying principle is that firstly, the reliance of the evidence depends on the credibility of the witness that she is telling the truth; which brings to the ultimate goal that, still the case must be proved beyond reasonable doubt.

Coming to the facts of this case, as alluded earlier PW1 while saying that she has never had sexual encounter with any other man; DNA results shows that the Appellant is not the biological father of the baby. It is clear that PW1 was laying, hence not a truthful witness. The trial court went to justify the untruthfulness of PW1 by saying that it is immaterial PW1 said that she never had relationship with any other man. The trial court went further to contradict itself when it based its decision on assumption that PW1 lied because of the presence of her parent (PW2). That was wrong. It clearly shows that the court went ahead to rely on the evidence which itself believed that the witness was not telling the truth. At this juncture, I agree with the learned State Attorney that relying on the testimony of a witness who is conspicuously lying, would be setting a bad precedent and condoning incredible lying witnesses.

Further-more even if we were to say that we should look for corroboration, neither of the prosecution evidence could corroborate the other part of the testimony of PW1. PW2 merely conducted the pregnancy test and so did PW3, the doctor. As for PW4, the investigator, his testimony is mainly hearsay because he said he went to the Guest House and was told that PW1 and Appellant used to go to the said Guest House. Nevertheless, if there was a witness who saw PW1 and the Appellant at the Guest House, why wasn't he brought to adduce evidence so that there could be a direct witness? More – so the court was not told if PW4 went together with the Appellant whom the said attendant recognised or simply mentioned the names because according to PW4's own testimony, the said attendant did not record the names.

It follows therefore that, indeed, the trial court relied on the testimony of a witness who is not credible or we can say her evidence needed corroboration whilst there was none. The fact that she was lying is so vivid and yet it was the testimony that mounted the conviction and sentencing of the Appellant.

In the upshot, I find that the Republic case was not proved to the required standard and I allow the appeal in its entirety. I further order that

the Appellant be released from prison forthwith unless otherwise held for other lawful cause.

Ordered accordingly.




R. A. EBRAHIM

JUDGE

Dar es Salaam

18.12.2020