IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 125 OF 2020

(Appeal from the decision of the District Court of Rungwe at Tukuyu in Criminal Case No. 130 of 2017)

JONAS S/O JACKSON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 07/12/2020
Date of Judgement: 16/02/2021

MONGELLA, J.

Through legal representation of Mr. Justinian Mushokorwa, senior learned counsel, the appellant preferred this appeal on four grounds, to wit;

1. *That there was no credible evidence of sexual intercourse by the appellant to PW2.*

2. *The appellant having disputed the age of the victim during preliminary hearing, the age of the victim was not sufficiently proved.*

3. *That the doubtful conduct of the victim demanded, as a matter of prudence, corroboration, more so because she is dumb, and PW1 was not reliable to afford corroboration.*

4. *That the defence case was not properly considered, or not at all.*

The brief facts of the case are as follows: the appellant was charged with the offence of rape contrary to section 130 (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002. In the District court of Rungwe sitting at Tukuyu it was alleged that on 3rd September 2017 at about 09:30 hours at Kyobo village the appellant did have carnal knowledge of a girl aged 16 years. In accordance with the findings of the trial court, the prosecution proved its case beyond reasonable doubt. Consequently, the appellant was convicted of the offence charged and sentenced to serve 30 years imprisonment. Disgruntled by this decision, he is in this court seeking for his freedom. The appeal was argued orally by counsels for both sides.

Arguing on the first ground, Mr. Mushokorwa submitted that in rape cases where the victim is an adult, the basic element is penetration. To this effect, he said, the only evidence was that given by PW3, a medical doctor who examined the victim. Referring to page 12 of the trial court typed proceedings, Mr. Mushokorwa argued that PW3 testified that his examination did not show if the victim had bruises or was infected with any sexually transmitted disease. PW3 only stated that he found watery substance in the victim's private parts and concluded that there was penetration. He argued that this piece of evidence is insufficient as PW3

did not examine the watery substance to establish the victim being raped.

Mr. Mushokorwa added that the evidence of PW3 lacked corroborating evidence. He referred to the testimony of PW1 and argued that PW1 did not testify to witness the offence being committed, but only saw the appellant running and the victim crying. He urged the court to take judicial notice that it is a normal thing for a woman to be found with watery substance in her private parts. He as well referred to the testimony of PW3 and PW2, the victim, to the effect that the victim had had sexual intercourse before. On this he argued that the victim could as well have slept with another person. He urged the court to find the evidence doubtful.

On the second ground, Mr. Mushokorwa argued that the age of the victim was not proved. He argued that PW1 stated that the victim's age was 16 years, but she could not state the date and month of birth. He added that PW3 also stated the age of the victim to be 16 years, but did not state how he arrived to that conclusion. Considering the fact that the appellant disputed the age of the victim during preliminary hearing, he was of the view that it was unsafe for PW1 to only state that the victim is 16 years. The age ought to have been proven beyond doubt.

With regard to the third ground, Mr. Mushokorwa questioned the character of the victim. He argued that the victim was not credible because she never reported initially being raped with the appellant. The victim is dumb and she never said she was induced in any way by the

appellant. Mr. Mushokorwa also urged the court to find the evidence of PW1 not credible. He argued that PW1 stated that on the material date they were on their way to church. On the way the victim diverted into the bush to get a toothbrush, but PW1 did not notice. After walking for 20 minutes she realised that the victim was not with her. PW1 went back to look for her and found her crying in the bush.

Mr. Mushokorwa further argued that the testimony of PW1 is contradicted by that of the victim who, on the other hand, testified that she was pulled to the bush by the appellant. He pointed another contradiction arguing that while PW1 stated that she found the victim crying, the victim never testified to this fact. She stated that she never felt any pains and never cried. Mr. Mushokorwa was of the stance that these contradictions are material and ought to be considered by the court. Referring to the case of ***Musa Mwandi v. Republic*** [2006] TLR 387 and that of ***Mkumbwa Said v. SMZ*** [1992] TLR 365 he argued that the contradictions between PW1 and the victim are enough to shake the credibility of their evidence.

Further, Mr. Mushokorwa challenged the visual identification made by PW1. He argued that PW1 stated that he saw the appellant running to the bush, but did not explain how she identified the appellant in the bush. He was of the view that the visual identification is very weak and does not meet the criteria set in the case of ***Waziri Amani v. Republic***. He was of the view that PW1 went to the house of the appellant because it was the only nearest house in that area.

With regard to the appellant's phone that was used as part of the evidence, Mr. Mushokorwa referred to the testimony of PW1 who admitted to have invaded the appellant's house and the two fought. He said that the appellant also admitted that the phone was his but stated in defence that PW1 grabbed it from him during the fight and bite his ear. On the other hand, he pointed that the victim never mentioned anything regarding the phone. Under the circumstances, he argued that the statement of the appellant regarding how his phone was obtained should be considered credible.

On the fourth ground, Mr. Mushokorwa argued shortly that the trial court did not consider the appellant's evidence. He referred the court to page 4 of the typed judgment for perusal. He invited the court to be guided by the decision in ***Hussein Iddi v. Republic*** [1996] TLR 166 and that of ***John Makorobela v. Republic*** [2002] TLR 296 in which it was ruled that even if the accused tells lies in his evidence, the same should not be taken as the basis to convict him.

Mr. Baraka Mgaya, learned State Attorney, appeared for the respondent. In reply to Mr. Mushokorwa's submission on the first ground he submitted that in arguing that there was no enough evidence, the learned counsel spent time analysing the evidence of PW3 which is an expert opinion. Referring to the case of ***Edward Nzabuga v. Republic***, Criminal Appeal No. 136 of 2008 (CAT at Mbeya, unreported) he argued that what matters most is the evidence of the victim herself because true evidence on rape cases comes from the victim. With regard to the evidence of PW3, he was of the stance that it being an expert opinion, the said opinion cannot be

taken to oust the evidence of the victim. He invited the court to consider the decision of the Court of Appeal in ***Mawazo Anyandwile Mwaikwaja v. Director of Public Prosecutions***, Criminal Appeal No. 455 of 2017 (CAT at Mbeya, unreported), which settled the position that expert opinion is not a legal requirement in proving rape cases.

He further referred to the testimony of PW2, the victim, as seen at page 10 of the proceedings whereby she stated what the appellant did to her. He countered the argument by Mr. Mushokorwa that the victim said she did not feel any pains. On this, he argued that the act of not feeling pains does not conclude that the victim was not raped. He added that PW2's evidence is supported by that of PW3 who stated that the victim was found to have done sexual acts before.

He also challenged Mr. Mushokorwa's argument that since the victim was found to have done the act before then it is possible that she could have been raped by other men. Mr. Mgaya argued that the argument is based on speculation and should not be entertained by this court. He added that PW2 was very specific that she was raped by the appellant. He contended that even if the victim had slept with other men before, the incident that brought the appellant to court was stated by PW2 to have been committed by the appellant. He prayed for the court to dismiss this ground for lack of merit.

Replying to the second ground, Mr. Mgaya was of the firm view that the age of the victim was proved. Referring to section 114 of the Law of the Child Act of 2009 he submitted that the age of the child can be proved

by the child, parent, relative or guardian. He as well referred to the case of ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (CAT at Mwanza, unreported) in which the Court ruled that the parent is better positioned to know the age of the victim. Basing on these authorities, he referred to the testimony of PW1, the victim's mother who stated that the victim was born in 2001 and at the time of testifying she was 16 years old. He also referred to the testimony of PW2 who also stated that she was born in 2001 and was 16 years old.

Mr. Mgaya further argued that the appellant never cross examined PW1 on the issue of age. Referring to the case of ***Martin Misara v. Republic***, Criminal Appeal No. 428 of 2016 (CAT at Mbeya, unreported), he argued that failure to examine on the facts presented by PW1 and PW2 regarding the age of the victim entailed acceptance of the facts.

Regarding the third ground, Mr. Mgaya argued in reply saying that the arguments by Mr. Mushokorwa on this point lack merit. He argued that failure to report on previous incidents does not discredit subsequent events. Referring to the prosecution evidence he contended that PW2 is dumb and therefore the non-reporting of previous events could be caused by a number of things. He argued further that the appellant was however, not charged on previous incidences. He was charged on the offence committed on the date named in the charge.

Concerning the contradictions between the testimony of PW1 and PW2 raised by Mr. Mushokorwa, Mr. Mgaya first of all conceded to the existence of the contradictions. However, he contended that the said

contradictions are minor not going to the root of the matter, which is "*the appellant raping PW2.*" To this effect he referred the court to the case of ***Dickson Anyosisye v. Republic***, Criminal Appeal No. 155 of 2017 (CAT at Mbeya, unreported).

He as well addressed the issue of visual identification raised by Mr. Mushokorwa. He said that PW1 clearly stated how she saw the appellant running form the scene to his house and followed him. He challenged Mr. Mushokorwa's argument that PW1 did not state how she identified the appellant, failed to prove the distance in which the appellant ran, and that the underpants of the victim was not brought to court, as being baseless and immaterial to the matter. In addition, he argued that the appellant never cross examined on the question of identification. He distinguished the case of ***Musa Mwandi*** (supra) cited by Mr. Mushokorwa saying that there is no any doubt in the case at hand.

With regard to the appellant's phone, Mr. Mgaya argued that PW1 stated that she found the phone at the crime scene and took it together with the underpants to the appellant's house. The appellant however, did not object to the phone being admitted and never cross examined on this fact. He concluded that the prosecution witnesses were reliable and there is no argument presented that can shake their credibility. He prayed for this ground to be dismissed as well.

In reply to the fourth ground, Mr. Mgaya first invited the court to read page 4 to 5 of the trial court's judgment. He argued that in these pages the trial Magistrate evaluated and considered the defence evidence and

found it did not shake the prosecution case. The trial court discredited the evidence of DW2 because he was neither at the scene nor at the appellant's house. He was of the view that the trial court took into account the strength of the prosecution case and found that the case was proved beyond reasonable doubt. Nevertheless, he concluded that this being the first appellate court, it can re-evaluate the evidence and come up with decision.

Mr. Mushokorwa made a brief rejoinder on some arguments advanced by Mr. Mgaya. First he rejoined on the question of penetration. He conceded to the plethora of decisions by the CAT settling the position that true evidence in rape cases comes from the victim. However, he argued that it is not correct to take every testimony of a victim witness blindly. He was of the stance that each case has to be treated according to its own merits whereby the court has to consider the character and credibility of the particular witness.

He then moved to the question of contradictions between PW1 and PW2. On this, he first agreed to Mr. Mgaya's contention that it is normal for witnesses to contradict. However, he argued that the contradictions they pointed out in the matter at hand are not minor and they go to the root of the matter. He urged the court to keenly consider the witnesses' contradictions.

Concerning Mr. Mgaya's argument on matters that were not cross examined, Mr. Mushokorwa sought for the sympathy of the court. He argued that the appellant is a layman and was unrepresented in the trial

court. He thus could not know which questions to ask, so the omission should not be interpreted to his detriment. Specifically on the question of the appellant's phone, Mr. Mushokorwa urged the court to consider the appellants version of the story keenly.

Regarding the question of age of the victim, Mr. Mushokorwa insisted that it was not thoroughly proven as it was disputed during preliminary hearing.

On the issue of visual identification, Mr. Mushokorwa rejoined that the scene had bushes and PW1 was standing far. Under the circumstances, he was of the view that PW1 ought to have explained how she identified the appellant in the middle of the bushes.

Lastly, he insisted that the defence case was not evaluated and considered. He referred to the trial Magistrate's comment that the evidence is not worth considering and argued that these words proves how he disregarded the defence evidence which carried weight.

After considering the arguments by both counsels, I wish to start with the last ground on evaluation and consideration of the defence evidence. I have taken trouble to thoroughly read the trial court judgment. Considering the judgment, it appears that the Hon. Magistrate only analysed the defence evidence by considering the evidence of DW2 who was not an eye witness. From there he made a conclusion that the defence evidence is worthless. He did not in fact analyse the evidence of DW1, the appellant. This being the first appellate court, it has powers to analyse and re-consider the evidence as I shall hereafter do. See: ***Prince***

Charles Junior v. Republic, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported) However, I prefer to analyse the evidence while disposing the third ground of appeal.

On the first ground the appellant claims that there was no credible evidence of sexual intercourse. He bases this ground on two major arguments. First, he claims that there were no bruises or sexually transmitted diseases as per the medical report. Second, he says that the prosecution evidence had it that the victim had had sexual intercourse before, thus there is a possibility that she could have been raped by another man. In my considered view, the presence of bruises or sexually transmitted diseases is not material in rape case.

It is not necessary that the woman raped must have sexually transmitted diseases. With regard to bruises, the law is very clear that penetration however slight suffices to commission of rape. Therefore, the issue of bruises is no longer material. See: Section 130(4)(a) of the Penal Code [Cap 16, R.E. 2002] which provides that "*penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.*" This position has also been reiterated in a number of cases by the Court. See for instance: ***Nasibu Ramadhani v. The Republic***, Criminal Appeal No. 310 of 2017 (CAT at Mbeya, unreported); ***Nyeka Kou v. Republic***, Criminal Appeal No. 103 of 2006 (unreported). The arguments by Mr. Mushokorwa therefore lack merit.

On the second ground, the appellant claims that the age of the victim was not proved while the same was disputed during preliminary hearing. It

is the position of the law that in statutory rape, the age of the victim must be proved before a conviction is grounded. See: **section 113 (1) of the Law of the Child Act, 2009**. See also: ***Robert Andondile Komba v. D. P. P.***, Criminal Appeal No. 465 of 2017 (CAT at Mbeya, unreported); ***Solomon Mazala v. Republic***, Criminal Appeal No. 136 of 2012 (unreported). As argued by the learned State Attorney, Mr. Mgaya, proof of age under the law can be done by the victim herself, her parent of guardian. In ***Isaya Renatus v. Republic***, Criminal Appeal No. 542 of 2015 (CAT, unreported) it was held that proof of age can be done by the victim, relative, parent, medical practitioner or where available by the production of birth certificate.

Mr. Mushokorwa argued that the appellant disputed the age of the victim during preliminary hearing. I have gone through the proceedings and found that during preliminary hearing the appellant disputed generally to the fact that "he raped the victim aged 16 years." However, it should be noted that preliminary hearing does not constitute trial. Thus the prosecution had a duty to prove the age during trial.

It is clear on record that PW1, the victim's mother, proved the age of the victim whereby she stated that the victim was by then 16 years having been born in 2001. In accordance with the law the testimony of PW1 as the victim's mother sufficed to prove the age. Further proof would have been necessary if the appellant had disputed PW1's testimony regarding the victim's age. To the contrary, as rightly argued by Mr. Mgaya, the record shows that the appellant never cross-examined PW1 on the issue of age testified by her. It is settled under the law that failure to cross-examine

entails acceptance of the facts presented. In the case of ***Ismail Ally v. Republic***, Criminal Appeal No. 212 of 2016 (CAT, unreported) it was held:

> *"The complainant age was not raised during trial. It is also glaringly clear that the applicant did not cross-examine PW1, PW2 and PW3 on that point. Therefore raising it at the level of appeal is an afterthought."*

Mr. Mushokorwa argued that the appellant should not be condemned for failure to cross-examine on the issue because he is a layman and was unrepresented. In my settled view, apart from the rule that ignorance of the rules is not a defence, the argument by Mr. Mushokorwa cannot be entertained. This is simply because it does not take a legal mind to understand that one needs to oppose to the facts considered untrue. This ground thus lacks merit and is dismissed.

With regard to the third and fourth grounds of appeal, the appellant claims that the evidence of PW2, the victim needed corroboration as she was dumb and there was no reliable evidence to offer corroboration. In the fourth ground he claims that the trial court did not consider the defence evidence. With regard to corroboration the law does not require evidence of a dumb witness to be corroborated. **Section 128 of the Evidence Act, Cap 6 R.E. 2019** only requires such evidence to be in writing or by signs made in open court. Mr. Mushokorwa's argument is thus misconceived.

Mr. Mushokorwa found the evidence of PW1 doubtful as it contradicted that adduced by PW2. He urged the court not to accord it credence. On

the other hand, Mr. Mgaya urged the court to consider the evidence of PW2, the victim, on the ground that true evidence comes from the victim. I am alive at the settled legal position that true evidence in rape cases comes from the victim. See: ***Selemani Makumba v. Republic*** [2006] TLR 379. However, the court has to be keen in admitting the evidence wholesale. The court still has the duty to scrutinize the evidence and assess the credibility of the witness before admitting the evidence. In the case of ***Hamisi Halfan Dauda v. Republic***, Criminal Appeal No. 231 of 2019 (CAT unreported) the Court of Appeal held:

> *"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s)."*

The evidence of PW3, the medical practitioner who examined PW2, did not reveal the victim being raped on that material day where the offence is alleged to have occurred. It however revealed that the victim had had sexual intercourse before and was used to the act. PW2 stated that the material incident that brought the appellant to court was the third time. Her statement is not supported by that of PW3 which indicated no intercourse to have happened on that material day. Besides, she never reported the previous incidents and did not state what prevented her from reporting. She did not say whether she was threatened or induced in any way.

Further, as pointed out by Mr. Mushokorwa, the testimony of PW1 and PW2 contradicted. Though Mr. Mgaya found the contradictions minor, I find them going to the root of the matter as they regard the environment in which the alleged rape occurred. While PW1 stated that while on their way to church PW2 went to the bush to get a local tooth brush and there she was raped by the appellant; PW2 on the other hand, stated that while on their way to church the appellant pulled her into the bush and raped her. She never mentioned anything about going into the bush to get the local toothbrush, thus it is not known if she was pulled while her mother, PW1 was near or while she was all alone. This would have helped in scrutinizing the distance and time on which PW1 stated to have noted PW2 not in her company and later found her crying in the bush, so as to ascertain credibility of PW1's testimony.

Another contradiction I find serious regards the mobile phone which was among the crucial pieces of evidence considered by the trial court in reaching conviction. While PW1 stated that she found at the crime scene the victim's underpants and the appellant's mobile phone, PW2 never mentioned anything regarding the mobile phone. She only mentioned the underpants. The two seemed to contradict on the presence of the mobile phone at the supposedly crime scene. This leads me into believing the appellant's version on how the mobile phone landed in the hands of PW1. Both, the appellant and PW1 testified as to the fight they had at the appellant's house. The appellant stated that during the fight, PW1 took his mobile phone.

Lastly on the question of identification raised by Mr. Mushokorwa in his arguments. Despite the fact that the incident occurred during daylight, it was still important for PW1 to describe the environment and how she managed to spot the appellant. She claimed that she saw the appellant running in the bush towards his house and followed him. However, she did not describe how thick or light the bush was to enable her identify the appellant. In circumstances where the environment is not friendly in enabling clear view, it becomes imperative for the witness to describe how he/she managed to identify the culprit under such environment. The lack of clear explanation on the environment by PW1 lowers down the weight of her testimony.

In addition, the incident is alleged to have happened at 09:00 hours whereby PW1 claimed to have followed the appellant to his house which was the near the crime scene while he was running to his house. On the other hand, the appellant stated that PW1 and the victim went to his house at 11:00 hours and started attacking him. Given the interval of two hours, I find it difficult to subscribe to PW1's assertion that he ran after the appellant to his home after seeing him running from the bush where the offence is alleged to have occurred. The question of time was not cross-examined by either of the parties thus it remains PW1's word against that of the appellant. However, considering other factors as I have observed above I find the credibility of PW1 and PW2's testimony doubtful.

From the above observation, I find the offence not proven beyond reasonable doubt by the prosecution. I therefore quash the conviction

and sentence of the trial court and order the immediate release of the appellant from prison custody unless held for some other lawful cause.

Dated at Mbeya on this 16th day of February 2021

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya through video conference on this 16th day of February 2021 in the presence of the appellant, and Ms. Mwajabu Tengeneza, learned State Attorney for the respondent.

L. M. MONGELLA

JUDGE