IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA
(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 02 OF 2021
(Original Criminal Case No. 54/2020 of Kigoma District Court at Kigoma before Hon E.B. Mushi - RM).

ODAS ANDREA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Dated: 27th April & 04th June, 2021

A. MATUMA, J.

The appellant ***Odas Andrea*** stood charged in the District Court of Kigoma at Kigoma for two counts; the first Count being Armed Robbery Contrary to section 287A of the Penal Code, Cap 16 as amended by Act No. 3 of 2011 in which it was alleged that on the 16th day of November, 2019 at Bweru area-Nguruka within Uvinza District in Kigoma region did steal one telephone make Tecno valued at 25,000/=, a piece of kitenge valued Tshs 25,000/= and Tshs. 1,500/= the properties of one Oliva Yohana and

immediately before such stealing did threaten the said Oliva Yohana by using Machete in order to obtain and retain the said properties.

The second count is Rape Contrary to Section 130(1) (2) (a) and 131(1) of the Penal Code [Cap 16 R.E 2019] where it was alleged that on the same day, place and time, did have canal knowledge of the said victim without her consent. The victim is an adult of 47 years old.

After a full trial, the appellant was found guilty in both counts and convicted him accordingly. The appellant was then sentenced for each count to suffer a custodial sentence of thirty (30) years in jail with twelve strokes of cane. The sentences were ordered to run concurrently.

Aggrieved with such conviction and sentence on both counts, the appellant preferred this appeal parading four grounds of appeal whose main complaints are;

i. *that the prosecution evidence did not prove the case against him beyond reasonable doubts.*

ii. *That the conviction in the first count was illegal as it did not state under which provision of the law he was convicted.*

iii. *That the evidence of PW1 and PW2 who were children of tender ages were illegally received on record.*

iv. *That he was convicted on the weakness of his defence.*

At the hearing of this Appeal the Appellant appeared in person while the Respondent had the service of M/s Edna Makala learned State Attorney.

The Appellant preferred the learned State Attorney to start addressing the Court against the grounds of Appeal and him to reply thereafter. The learned State Attorney despite the fact that she supported the second and third grounds of appeal, she maintained that the conviction of the appellant in the circumstances of this case was inevitable.

She submitted that the appellant was not convicted in the first count of Armed Robbery although sentenced of it which is fatally wrong and the effect thereof is for this court to return the records to the trial court to have the appellant properly convicted. That constituted the complaints in the second ground of appeal.

On the third ground of appeal the learned State Attorney conceded that the evidence of PW1 and PW2 who were children aged 12 and 11 years respectively were taken contrary to the requirements of the law as enunciated in the cases of ***Godfrey Wilson Versus Republic,*** *Criminal*

Appeal No. 168 of 2018 and ***Issa Salum Nambaluka Versu Republic,*** *Criminal Appeal No.272 of 2018 .*

Having probed by the court on whether this court being the first appellate court cannot step into the shoes of the trial court and evaluate the evidence in the first count to see whether the same suffices to warrant conviction of the appellant or not so that to come with the appropriate verdict rather than returning the records to the trial court, she readily submitted that this court has such powers and in case it so decides then the first count was as well proved beyond reasonable doubts.

The Appellant on these two grounds had nothing useful to add. My finding on them is that I agree with both the learned State Attorney and the Appellant that indeed the appellant was not properly convicted in the first count although he was sentenced on it. The relevant page in the trial court's judgment is page 15 where the learned trial magistrate held;

> *'I am of the considered opinion that the evidence led by PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW8 against the accused person was water tight to warrant the conviction on the 1st count'.*

In law those words do not suffice to be called as a conviction. In fact, there is no conviction thereat but explanation by the trial magistrate

that she had on record satisfactory evidence to warrant the conviction of the appellant in the first count. Therefrom a conviction ought to follow in accordance to section 235 (1) read together with section 312 (2) of the Criminal Procedure Act, Cap. 20 R.E 2019 which provides as follows;

Section 235 (1);

> *'The court, having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused*** *and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code'*

Section 312 (2);

> *'In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced'*

Section 235 (1) is couched in mandatory terms. Therefore, in terms of sub-section (1) the court must proceed to enter a conviction before proceeding to sentence an accused person.

Section 312 (2) of the CPA provides:-

'In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is ***convicted*** *and the punishment to which he is sentenced'.*

In view of the clear mandatory language under sections 235 (1) and 312 (2) of the CPA, there is no valid judgment when no conviction is entered. A valid judgment must contain a conviction. See – **Shabani Iddi Jololo and Others v. Republic,** Criminal Appeal No. 200 of 2006.

The effect of lacking a conviction in the purported judgment of the trial court as rightly argued by the learned State Attorney would be to return the records to the trial court to remedy the situation. But that has not always been the only remedy. It would depend on the circumstances of each case. Thus, for instance in the case of ***Aloyce Thomas @ Malee versus The Republic, Criminal Appeal no. 8 of 2016*** the Court of Appeal on the same defect, after considering the nature of evidence on record against the appellant refrained to remit such records but ordered for a total acquittal of the appellant. On the basis of that authority, when dealing with the first ground of appeal relating to the weight of the prosecution evidence I will

consider whether the evidence on record suffices to warrant the order of returning the records to the trial court for the purpose.

About the evidence of PW1 and PW2, without much a do I join hands with the learned State Attorney that the same is liable to be expunged for having taken in contravention of the law supra and in accordance to the guidelines in the cited cases supra. I therefore expunge the evidence of PW1 and PW2 from the record and allow the second and third grounds of appeal.

Back to the first ground of appeal, the appellant is faulting the evidence of the prosecution against him. To him, such evidence was fabricated by PW4 the victim after they befallen into grudges as he has worked for the victim in a tobacco farm as a labour for two years without being paid. He was living at the homestead of the victim and even PW1 and PW2 were the victim's own children. When he demanded his payments, he was not paid and therefore decided to quit the job and went to work with other people. That angered the victim who held his bag in an attempt to stop him but the scrambled for it until when people came to turn them apart. He then went to police to report where the victim overtook or surpassed him only to find himself detained into the police lockup for six months for

unknown offence. That he was taken to court after the said six months. The appellant further submitted that the victim PW4 purported to have not known him while he lived with her as her farm laborer for two years and that such is an indication that this case was fabricated.

The learned state attorney on her party was of the view that the evidence on record was overwhelming against the appellant and that there is no evidence on record that the appellant was a workhand of the victim.

She further submitted that; according to the victim PW4, it is in evidence that the appellant raped her and stole her phone make techno valued at Tshs.25,000/=, Tshs 1,500/= and kitenge. That this evidence was corroborated by PW3 who saw the Appellant raping the victim and participated in the arrest of the appellant in which they found him in possession of those stollen properties, and PW7 the doctor who observed that the victim was indeed penetrated into her vagina. She cited to me the case of ***Abdi Julius @Mollel Nyangusi V. Republic,*** *Criminal Appeal No. 107 of 2009* to the effect that, possession of the properties recently stollen is sufficient to find the person guilty of the offence committed in the course of stealing.

The learned State Attorney concluded that this appeal is without any merit and the same be dismissed.

Admittedly, on the face of record, there is direct evidence against the appellant on both counts. There is the evidence of the victim that on 16/06/2016 at noon hours while on her way back home from the stand met the appellant whom she did not known prior. The appellant stopped her demanding the phone and sexual intercourse;

> *'mama naomba unipe simu niwasiliane na majamaa, ... nataka nikutombe nikunyang'anye hela ulizonazo na simu'*

That she replied to the appellant that she has boys of his age but they had never even picked her phone. Soon thereafter she was attacked by the appellant, fallen down, raped and robbed her a tecno phone, Tshs. 1500/= and kitenge.

That evidence of the victim is materially supported by PW3 and PW7 as rightly argued by the learned state attorney. PW3 Venance Kayanda testified that on 16/11/2019 at noon hours, two youths PW1 and PW2 whose evidence have been expunged supra, approached him and informed him that a certain woman was being assaulted at mbugani. He took a stick and run to the crime scene where he saw the appellant having sex with the victim. That the appellant ran away

on seeing them but they succeeded to arrest him hidden in the bush. From him they retrieved the stollen phone and kitenge, exhibits P3 and P1 respectively. That they finally took the appellant to Nguruka Police Station.

PW7 Dr. Ernest Nshumila also testified that on the material date, he attended the victim and upon his examination he found that the victim's vagina was watery which indicated that there was an act of sexual intercourse although there were no sperms. He tendered the PF3 as exhibit P4 to that effect.

With the evidence of these three witnesses which is direct oral evidence and the exhibits tendered if believed the conviction of the appellant on both counts is inevitable as rightly submitted by the learned State Attorney.

It is however, the principle of the law that a conviction cannot be entered merely because the evidence is so direct and attractive. Once the evidence is found overwhelming, the trial court is duty bound to determine whether such evidence is credible and reliable. Failure to do so the conviction would normally be set aside on appeal unless credibility is settled. That is for obvious reason that in life even lying witnesses may give direct attracting testimony which is whole false as it was held in the

case of ***Festo Mawata versus Republic***, *Criminal appeal No. 299 of 2007* that;

> *'A witness might be perfectly honest but mistaken at the same time.* ***On the other hand, it is a fact of life again that even lying witnesses are often impressive and or convincing witnesses'***

The trial court did not doubt the credibility of these witnesses nor of any other who testified for the prosecution. On my side I have a different view, prosecution witnesses whose evidence have been survived ought to have not credited nor relied on the basis of the record at hand.

Starting with the victim PW4, this witness in her testimony sated that she did not know the appellant prior to the date of incident;

> ***'I found one person under the palm tree carrying machete he was short, thin and black, I never know him'***

On the other hand, the appellant is lamenting that he lived with the victim at her home working for her in the tobacco farm for a period of two years but he was not paid his dues. His decision to quit the job and work for other farm owners is what brought all these problems.

The learned state attorney disputed that argument stating that it does not feature in the defence of the appellant at the trial but raised at this appellate stage.

Despite the fact that it is true the appellant's defence was too short without such a defence of grudges, there is connotative evidence similar to that when he was being cross examined by the prosecutor one Hapyness Mayunga learned State Attorney; ***"I know the Victim I lived with her as my boss for two years"*** (page 28 of the proceedings).

Therefore, the argument of the appellant that he worked with the victim and stayed with her at her home for two years working as her farm workhand isn't a new fact at this appellate stage. It is born out of record as herein above reflected. I can only add that the accused appeared to have not known how to defend himself properly nor he was assisted as such. The evidence he gave during defence was only one paragraph which is too short;

> *'The adduced evidence are false I pray the court to disregard the same and discharge me. Idid not have carnal knowledge of the victim as alleged. That is all'.*

The trial court ought to have sought clarification from the appellant as to what he meant by stating that he knew the victim as her boss

whom he had worked for two years while the victim herself stated to have not known him completely. By doing so, the honourable trial magistrate would have executed her judicial duty for the sake of justice as clearly stipulated under section 176(1) of the Evidence Act [Cap 6 R.E 2019] that;

> *'The court may, in order to discover or to obtain proper proof of relevant facts, ask any question it desires, in any form, at any time, of any witness or of the parties about any fact relevant or irrelevant and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.'.*

In the instant matter, the trial magistrate did not bother on the statement of the appellant which was relevant to the fact in issue as it tended to contradict the victim about their familiarity and as such the victim would be found incredible to hide that fact. In the case of ***Mohamed Bakari and & Others V. Republic***, *1989 TLR 134,* it was held that Magistrates and judges have a duty of ensuring that even undefended accused get a fair hearing. This duty if ignored, innocent people who are sometimes titled as **accused persons** or **criminals** might find themselves

incarcerated into prisons just for the weaknesses of their defence which is bad in law as it has been held in untold number of decided cases including that of ***Christian S/O Kale And Rwekaza S/O Benard V Republic*** *(1992) TLR 302* in which it was held: ***"an accused ought not to be convicted on the weakness of his defense but on the strength of the prosecution"***,

Bearing in mind the provisions of section 176 (1) of the Evidence Act supra, I had also in a number of cases considered the role of Magistrates and Judges in the administration of justice. For instance, in the case of ***Patrick s/o Ezron versus Republic,*** *(DC) Criminal Appeal No. 51 of 2020,* High Court at Kigoma I called magistrates to be curious to justice in the course of hearing cases;

> *'I call upon trial magistrates to be curious to justice. They should inquire into whatever fact that transpires to them as a detriment to justice. They should not stand as mere observers but as administrators of justice'.*

Similarly, in the case of ***Angelina Reuben Samson and Another Versus Way Safi Investment Company***, *(DC) Civil Appeal No.4 of 2020,* High Court at Kigoma, I held that;

'Judicial officers who stand as mere observers of trials without reminding the parties to adhere to certain requirements of the law ***for their proper presentations of their respective cases*** *would not be discharging their duties for the administration of justice and* ***if that is to happen then good technical litigants would always be using the courts to win cases to the detriment of justice'.***

In the instant case the appellant's statement that he lived with the victim as her boss was not challenged by the prosecution. I am aware that it was given during cross examination, but if it was not true then the prosecutor ought to have further impeached that statement by further cross examining on it. Failure to do so left the statement of the appellant as a testimony not contravened in his defence and equally carried weight to his defence. In the circumstances, I believe that testimony of the appellant and rule out that the two (the victim and the appellant) are people familiar to each other and had labour relations between them. As such the credibility of the victim PW4 is impeached for her act of hiding this important fact.

Not only that but also the victim PW4 explained the crime to have committed against her on the 16/06/2019 but all other witnesses stated that it was on 16/11/2019. June and November are two different months

which not even consecutive to each other. At first, I thought that it was a mere typing error but I found the same in the original hand written proceedings. The learned State attorney was of the view that it was a mere recording error. It is my firm finding that neither this court nor the learned state attorney can certainly conclude that it was a mere recording error particularly when the trial magistrate repeated the same date when was reviewing the evidence of the victim. If it was a mere recording error she could at least detect it at the time of composing the judgment. The respondent was supplied with the proceeding some time before this appeal came for hearing. As such they could move the trial court to correct the error. They did not do so, perhaps because the proceedings ended in their favour. The evidence of the victim is thus contradictory to that of other witnesses. Those are among good reasons for not believing the victim as it was held in ***Goodluck Kyando versus Republic [2006] TLR 363*** that every witness is entitled to credence and have his testimony accepted **unless there is good and cogent reason for not believing such witness.**

PW7 testified that he examined the victim's vagina and found it watery but no sperms. He did not explain what was the watery if it was not sperms and whether the same could be of a man. He did not even state

the mode of his examination for the court to form its independent opinion on the so called watery. He did not observe any bruises on the vaginal walls or even swellings on that area as he observed on other parts like the neck. His evidence did not thus prove penetration.

PW3 who purported to have responded to the crime scene testified that on his reaching there he saw the appellant on top of the victim having carnal knowledge, saw the appellant inserting his penis to the victim's vagina while the victim was crying for help and that he saw the appellant removing his penis from the vagina and ran away on seeing them. Practically it is impossible for one to see the penis of a man who is on top of the woman. That was blatant lies. Had it been true, that implies that PW3 was not far but just stood by the side of the two when the sexual was going on and took trouble to bend and peep between their bodies to see what was exactly going on with the appellant's penis to the victim's vagina. Again, had it been true they could arrest the appellant on the crime scene. According to the PW3 the appellant on seeing them, he ran away to the extent that they did not see him where he took refuge until when a passerby shown them. That means the appellant did not wait them to reach him at the locus in quo. If so, how did PW3 see the penis

being inserted and removed from the victim's vaginal. I find him incredible as well.

PW5 Mohamed Sabasaba testified that on the material date went at the crime scene where he found the appellant surrounded by people. Thereat the Pastor (Mchungaji) ordered him to go and search for the properties of the victim. He went to look for them and found only the kitenge;

> *'Upon arrival at the scene of crime I found a group of people surrounding the accused person ..... I was ordered by the pastor to go and look for the victim's properties.* ***I found one piece of Kitenge orange and yellow color****'.*

This evidence contradicts that of PW3 that on their arrest of the appellant they found him with the properties and seized them. The evidence of PW5 is very clear that up to the time he was under arrest, the properties alleged stolen were yet recovered. It is him who went to trace them and found only Kitenge. Even the alleged kitenge, the victim herself said it was **red and yellow in colour** at one time during her evidence in chief; *"My phone was Tecno total value of Tshs. 25,000/= Tshs. 1500/= and* ***Kitenge red and yellow"*** but at the time of identifying it for tendering she identified and tendered kitenge which was orange and yellow; *"This is the one with* ***yellow and orange colors****, I pray to be admitted as an*

exhibit", That means what was robbed from her if at all, was not what was tendered in evidence.

Again, while PW3 and PW5 did not talk to have retrieved Tshs. 1500/= as among the properties stolen from the victim, PW6 and PW8 all police officers purported to have received such amount as one of the exhibits found with the appellant. No explanation as from who exactly they received the money. Likewise, the phone allegedly stolen by the appellant. With the evidence of PW5 supra that he found only kitenge, there ought to have been explanation by the police witnesses as from who did they received the phone as exhibit. The identification of stolen properties was thus not cleared well and in the circumstances the doctrine of recent possession cannot apply in this case.

Another problem with this case is the formulation of the charge against the appellant and the period he spent at police lockup prior to his arraignment in Court. The appellant is complaining that he was incarcerated into police lockup for six months as from 16/11/2019 when he was arrested to 28/05/2020. At all this time he did not know his offence. The period he was incarcerated is not disputed as it born out of record as well. The issue is why all this long stay into police lockup if at all the appellant had committed the offence, arrested on the crime scene

and found with the stolen properties. My learned brethren Justice Mugeta had encountered the similar problem in a number of cases. In one of those cases that of ***Raymond John versus Republic, Criminal Appeal no. 5 of 2021 High Court at Kigoma*** in which the appellant was detained for nine months into police lockup before being taken to court he remarked at page 11 of the judgment;

> *'Detaining a suspect without bail or trial from 3/10/2019 to 2/6/2020 is unlawful and may create doubts on the genuineness of the complaint against him'.*

I fully subscribe to such observation, and with leave of my learned brother Justice Mugeta, I take it too, as my observation in the instant case. the complaints against the appellant in this case are doubtful taking the period he was detained without justification into account. It is like the purported victim was negotiating with the police on the appropriate offence to be fabricated. More so when the law dictates the period within which the accused must be arraigned. See section 32 (1) of the CPA supra which dictates that the person arrested of an offence be arraigned within twenty-four hours from the time he was put under restraint unless released on bail. The doubts about the guilty of an accused person when he is held for such longer period into police custody was as well

considered by the Court of Appeal in the case of ***Janta Joseph Komba and others v. Republic***, *Criminal Appeal No. 95 of 2006.*

Back to the charge, after such longer time of detention, the appellant was arraigned in the first instance of Rape and Causing Grievous Bodily Harm. That was the charge signed by the state attorney on 21st May, 2019. On 24/06/2020 about a month later, it is when the charge was substituted to include the offence of Armed Robbery. The question is; since the arrest of the appellant to the time of his first arraignment, was the offence of Armed Robbery not yet detected to have been committed? Why was it not charged in the first instance? Was it forgotten! Or was it not reported! Or was it not committed at all. I could have at least think otherwise had the first charge been drawn by the prosecutor other than a State Attorney. But in the instant matter the first Charge just like the second was drawn by the learned State Attorney. It is expected that the learned State Attorney scrutinized the evidence thoroughly and did not see the offence of Armed Robbery to have been committed. Or else there should have been evidence on record for the reasons of changing charged offences. And that is in fact the law as provided for under section 234 (1) of the Criminal Procedure Act supra, that;

'Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, ***the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge*** *as the court thinks necessary to meet the circumstances of the case* ***unless,*** *having regard to the merits of the case,* ***the required amendments cannot be made without injustice;*** *and all amendments made under the provisions of this subsection* ***shall be made upon such terms as to the court shall seem just'.***

In the circumstances, alteration of the charge by either amendments or substitution cannot be made at the wish of the prosecutor to the detriment of justice. The court must be moved for the intended alteration and be satisfied that the alteration is intended to meet the circumstances of the case and nor for injustice. Section 234 of the CPA supra is there to do away **persecutions** instead of **prosecutions** and the same must be strictly complied with.

In the instance case, the nature of substitution was not disclosed nor the appellant was invited to object the intended substitution. The court was not informed what was it intended in the substitution for it to exercise its duty under section 234 (1) supra and did not even record whether it was satisfied that the intended substitution was not intended to cause

miscarriage of justice. Had it been cautious and curious to justice, the trial court would have detected that the intended substitution was not warranted for the reasons I have earlier on stated herein above.

With the herein above anomalies, I find that the appellant's complaints that this case was fabricated is founded. Even if it was to be taken that there was no fabrication, still the alleged offences were not proved beyond reasonable doubts as I have demonstrated herein above.

I therefore allow the appeal, quash the conviction and set aside the sentence of 30 years and 12 strokes of the cane in each count which was meted against the appellant. I order that the appellant be immediately released from custody unless he is held for some other lawful cause. Right of appeal to the Court of Appeal of Tanzania subject to the guiding laws is explained to either party who is aggrieved with this judgment. It is so ordered.

A. Matuma

Judge

04/06/2021

Court: Judgment delivered this 4th June, 2021 in the presence of the appellant in person and M/S Edna Makala learned State Attorney for the Respondent/Republic

Sgd: A. Matuma

Judge

04/06/2021