IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 50 OF 2022

(From the decision of the District Court of Kyela at Kyela (Hon. J. C. Msafiri, RM) in Criminal Case No. 125 of 2018)

COSTA NGIMBUCHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 06/06/2022
Date of Judgement: 28/06/2022

MONGELLA, J.

The appellant was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2019. The facts as laid down in the charge are to the effect that on 17th November 2018 at about 08:00hours at Lukama village within Kyela district in Mbeya region, he raped a girl aged 11 years (hereinafter referred to as the victim or PW2). The victim was a standard III pupil at Lukwego primary school.

During trial, it was testified by the victim that, on the fateful date, she went down the river to wash her clothes. While washing her clothes, the appellant emerged and threatened her not to shout less he would cut her neck with a sickle. He then grabbed her neck, undressed her clothes,

pressed her down and raped her. PW2 said that she felt severe pains and cried for help. Later she managed to go home and reported the incident to her grandmother. She described her assailant as a person she was familiar with as she used to see him cutting grass. PW2 was taken to hospital for examination whereby it was established by PW1, a medical doctor who examined her, that she was penetrated by a blunt object. The appellant was then arrested.

On his part, the appellant denied the charges. He challenged the victim's evidence on the ground that the victim failed to describe her assailant thereby blaming him. He said that there was nothing proving that he committed the offence and that if he really raped her, she could not endure the pain given her age.

The trial court found him guilty of the offence charged and sentenced him to serve thirty (30) years imprisonment. Aggrieved by the decision he preferred the appeal at hand on seven grounds as listed hereunder:

1. *That the trial magistrate grossly erred in both point of law and fact when he convicted and sentenced the appellant by just basing on the cites law and the status of the offence c/s 130 (1) (2) (e) and 131 (1) of the Penal Code to serve 30 years imprisonment hence the charge defective.* (sic)

2. *That the trial magistrates grossly erred in both points of law and in fact when he convicted and sentenced the appellant by mere believing only into the evidence of PW2 (victim) and that of PW1*

(doctor) mean while both of them had failed to mention at what day and date the rapist used, due to the fact the said allegation occurred there at unknown live time, day and date as while they had no any proof beyond reasonable doubts. (sic)

3. *That the trial magistrates grossly erred in both point of law and fact when he convicting the appellant only without taking into consideration that her defence evidence was not being considered.* (sic)

4. *That the trial magistrates grossly erred in both point of law and in fact when he convicted and sentenced the appellant by merely basing into prosecution evidences only without taking into account that at the said area/village where incidence seemed to occur no any local leader who was being called in court for proof of the said allegation even that Mgambo arrested the appellant to prove the same.* (sic)

5. *That the trial magistrates grossly erred in both point of law and in fact when she convicted and sentenced the appellant without considered that since the arrested of the appellant have not cautioned nor interrogated within 12 days at police lock-up without taken to court that's leaves doubts beyond reasonable doubts as it required by laws.* (sic)

6. *That the trial magistrates grossly erred in both points of law and in fact in replying into a contradictory, insufficient and inconsistent prosecution evidences as a basis of the appellant conviction.* (sic)

7. *My lord the appellant was not convicted according to the law in fact.* (sic)

The appeal was argued orally whereby the appellant fended for himself. The respondent on his part was represented by Mr. Saraji Ibolu, learned Principal State Attorney, In-charge. The appellant in his submission in chief prayed to hear first from the learned Principal State Attorney.

From the outset, Mr. Ibolu informed the Court that the appeal was opposed. Replying to the 1st ground, he submitted that the accused was charged under section 130 (1) (2) (e) and 131 (1) of the Penal Code which is a correct provision. He found the provision correct as the offence committed involved a victim below 18 years of age and the charge specifically stated that the victim was a primary school girl aged 11 years. In the premises he argued that the charge involved statutory rape whereby the victim cannot legally consent to sexual act. He added that the charge was read to the appellant and understood by him. Under the circumstances, he found the ground of appeal baseless and prayed for its dismissal.

The 2nd and 6th grounds were replied collectively. He argued that the prosecution called two witnesses, that is, PW2, the victim, and the PW1, the doctor. Referring to the testimony of PW1, he said that PW1 received PW2 and examined her whereby he discovered that she had no hymen and had bruises in her private parts, though she was not pregnant and had no venereal diseases. He argued further that the testimony of PW1 was corroborated by that of PW2 who explained that the incident

occurred on 17th November 2018 and that it was the appellant who penetrated her by force while she was at the river washing clothes.

Considering the testimonies of PW1 and PW2, Mr. Ibolu had the stance that the witnesses were credible and believed by the trial court. He thus found the allegation that the witnesses never mentioned the date being false and baseless. He further disputed the allegation that there were contradictions between the witnesses on the ground that PW2 maintained her story even during cross examination.

On the 3rd ground, he argued that the defence evidence was considered thus the ground lacks base. He specifically referred the Court to page 8 of the trial court judgment whereby he found the defence case being considered. On the other hand, he argued that if this Court finds the evidence not being considered it should invoke its powers as a first appellate court and consider the evidence and make decision.

Regarding the 4th ground, Mr. Ibolu contended that the incident occurred while the appellant and the victim were alone. He said that in the premises, the village leaders or militiamen would have given hearsay evidence if summoned to testify, which is inadmissible. He further urged the Court to consider the principle settled in the case of ***Selamani Makumba vs. Republic***, Criminal Appeal No. 94 of 1999, which provides for the best evidence in rape cases.

Replying to the 5th ground, Mr. Ibolu found no base in it. He argued that no caution statement was tendered in court and no statement was

recorded. He was of the view that the non-recording did not prejudice the appellant and he did not state how his rights were prejudiced. He added that since there is no evidence on record regarding the appellant being in custody for a long time, it means the trial court never considered that.

On the last ground, Mr. Ibolu disputed the claim that the appellant was not convicted according to the law. Referring to page 9 of the judgement by the trial court, he submitted that the trial court convicted the appellant by stating the offence and section, thus properly convicting him. He prayed for the Court to dismiss the appeal and uphold the conviction and sentence by the trial court.

In rejoinder, the appellant prayed for the Court to consider his grounds of appeal, especially from the 2nd to the 6th grounds. He concurred with Mr. Ibolu's submission on the 1st and 7th grounds.

I have considered the grounds of appeal by the appellant, the submission by Mr. Ibolu, and thoroughly gone through the trial court record. I prefer to start with the 1st and 7th grounds of appeal under which the appellant asserted that the charge was defective and that he was not convicted in accordance with the law. I shall not belabor much on these grounds. As argued by Mr. Ibolu and conceded by the appellant, the charge is not defective. The offence charged is on statutory rape under section 130 (1) (2) (e) of the Penal Code, Cap 16 R.E. 2002, which was the correct provision for the offence. The particulars of the offence have as well been clearly explained. The conviction as seen at page 9 of the trial court

judgment is also correct. The trial court stated the offence the appellant was convicted of, being the offence of rape. It also stated the provision of the law under which the offence is provided.

I shall as well collectively deliberate the 2nd and the 6th grounds of appeal under which the appellant faults the trial court for relying on the evidence of PW1 and PW2 while they failed to state the date of occurrence of the offence. He also found the testimonies of these witnesses contradictory, inconsistent and insufficient. With regard to the date of occurrence of the offence, it was the victim who testified that it was on 17th November 2018. This date is the same as the one stated in the charge. Thus it is not true that the date was never mentioned. PW1, the medical doctor who examined the victim, testified to have received the victim on 21st November 2018 at morning hours.

Under the law, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believe the said witness. The good reasons that can be considered include the fact that the witness had given improbable or implausible evidence, or the evidence has been materially contradicted by another witness or witnesses. See: ***Goodluck Kyando vs. Republic*** [2006] TLR 363; ***Mathias Bundala vs. Republic***, Criminal Appeal No. 62 of 2004 (CAT, unreported); and ***Shaban Daudi vs. Republic***, Criminal Appeal No. 28 of 2001 (unreported).

It is also a settled legal position that the first appeal is in form of re-hearing therefore empowering the first appellate court to re-evaluate and re-

consider the entire evidence on record and arrive at its own conclusion. This was decided by the Court of Appeal in a number of its decisions. See for instance, the case of ***Mkaima Mabagala vs. The Republic***, Criminal Appeal No. 267 of 2006, in which while reverting to the decision made in ***D. R. Pandya vs. Republic*** (1957) E.A. 336 and in ***Iddi Shaban @ Amasi vs. Republic***, Criminal Appeal No. 2006, the Court held:

> *"First appeal is in form of re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a crucial scrutiny and if warranted arrive at its own conclusion of fact."*

On the strength of the above decision I shall re-evaluate and re-examine the evidence on record. Upon careful consideration of the dates of events after the rape incident, I find there are material inconsistencies which plant doubts in the prosecution case. The victim stated that the offence occurred on 17th November 2018. Though never stated the exact date on which she obtained the PF3 and taken to hospital, her general testimony insinuates that she was taken to the police and to the hospital on the same date of the event.

However, I have gone through the PF3 and noted that the same was issued on 20th November 2018. The evidence of PW1 and the date he signed in the PW3 shows that the victim was received at the hospital and examined on 21st November 2018. The victim testified that she was in severe pains after the rape incident to the extent of failing to walk properly. Considering the situation, one would expect the victim to have

been rushed to the hospital on the same date, but that was not the case. There is also no explanation as to why the rape incident was reported to the police three days after the incident and the victim taken to hospital on the next day despite being in severe pains. This whole situation, in considered my view, casts serious doubts in the prosecution evidence.

It is trite law that in rape cases the best evidence is that of the victim. See: ***Selemani Makumba v. Republic***, (2006) TLR 386; and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported). It is however, also, the position of the law that the court should be careful not to take the victim's testimony wholesale. The court therefore is obliged to critically analyse the victim's testimony to ascertain its credibility, reliability and sufficiency to avoid punishing innocent persons. See: ***Majaliwa Ihemo v. The Republic***, Criminal Appeal No. 197 of 2020 (CAT at Kigoma, unreported); ***Paschal Yoya @ Maganga v. The Republic***, Criminal Appeal No. 248 of 2017; and ***Shabani Daudi v. Republic***, Criminal Appeal No. 28 of 2000 (CAT, unreported).

The appellant claimed that there are contradictions on the testimony of PW1 and PW2 who were the only prosecution witnesses. Though Mr. Ibolu found no material contradictions, I am of a different opinion. The victim stated that after the occurrence of the rape incident, she ran straightaway to her grandmother whom she lived with. That, it was her grandmother who took her to the police and later to the hospital whereby she was examined and given medicine. PW1, the medical doctor, on the other hand, testified that the victim was brought to the hospital by her mother who explained to him that the victim had ran away from her

grandmother as she was raped by a person who cuts grass. I find this a serious contradiction regarding the handling of the victim after the alleged rape incident. It diminishes the credibility of the prosecution witnesses.

In addition, the appellant claimed that the victim failed to describe her properly and that material witnesses, especially the militiaman who arrested him were never brought to court. As much as I am alive at the legal position that the prosecution is not compelled to present a specific number of witnesses, I am also alive at the legal position that failure to present a material witness without explanation can be adversely interpreted against the party who ought to have called such witness. See: ***Aziz Abdalah v. Republic*** [1991] TLR 71.

It should be noted that the victim testified that the appellant was arrested by one Mawazo, a militiaman. That after he was arrested at a club, the victim went to identify him. She said that she identified the appellant as a person who cuts grass. She did not state his name showing that she never knew him by name, but by face. The appellant on his part, denied to have been arrested at a club, but at his home and taken to the police whereby he was kept for 12 days before being interrogated. He as well denied to have been identified by the victim at the police station or anywhere. He also denied to have been cutting grass whereby he stated that he is a street vendor "*machinga*" who previously worked as a shopkeeper at one named Ngwale.

In the circumstances, I find it that it was important for the prosecution to first lead the victim to provide evidence as to how she described the appellant to the person who arrested him. The evidence should have also been corroborated by the militiaman who arrested the appellant by showing the features described to him by the victim that led him to arrest the appellant and not another person. In this view, I find the militiaman a material witness to the case. The fact that he was not presented in court to testify diminishes the strength of the prosecution case.

Having observed as hereinabove, I am of the finding that the offence against the appellant was not proved by the prosecution beyond reasonable doubt. I find these grounds sufficient to dispose the entire appeal and therefore shall not deliberate on the remaining grounds of appeal. I therefore quash the conviction and sentence by the trial court and order for the immediate release of the appellant from prison custody, unless held for some other lawful cause.

Dated at Mbeya on this 28th day of June 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in chambers on this 28th day of June 2022 in the presence of the appellant and Ms. Zena James, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE