IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO, J.A, LUANDA, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO.124 OF 2013

JOSEPH LEKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 30th day of April, 2009
in
Criminal Appeal No.35 of 2006
.....

JUDGMENT OF THE COURT

25th November & 6th December, 2013

KIMARO, J.A.:-

Joseph Leko, the appellant, was convicted by the District Court of Monduli for the offence of rape contrary to section 130(1), (2) (b) and 131 of the Penal Code, [CAP 16 R.E.2002]. A sentence of thirty years imprisonment was imposed on him. He appealed to the High Court of

Tanzania at Arusha but his appeal was dismissed. He is now before the Court with a second appeal.

He filed four grounds of appeal challenging the first appellate court for upholding his conviction and the sentence. The first ground is his identification and the credibility of the prosecution witnesses. He contended that he was not identified and the prosecution witnesses were not credible. The second ground faults the learned judge for upholding the admission of the PF3 while there was non- compliance with the law. In the third ground the complaint is on his defence that it was not considered. Lastly, the appellant contends that the evidence of the prosecution considered in its totality did not prove the offence of rape against him.

This is a second appeal. A rule of practice established by case law in respect of second appeals is that an appellate court should not interfere with findings of facts by the courts below unless the evaluation of evidence was not done properly hence resulting in a miscarriage of justice to the accused person or there occurred a violation of principle of law or

procedure. For an elaboration on this position see the cases of **DPP V JAFARI MFAUME KAWAWA** [1981] T.L.R.149, **DR PANDYA V R,** (1957) EA.336, **SALUM MHANDO V R** [1993] T.L.R.170 and **BENJAMIN NZIKU V R** (Criminal Appeal No.151 of 2010 (unreported).

The foundation of this rule of practice comes from the assessment of the credibility of the witnesses. It is the trial court which sees the witnesses. The trial judge or the magistrate is the one having an opportunity to see the witnesses as they give evidence. He/she is better placed in terms of assessment of their demeanour. See the case of **Shabani Daudi V R** Criminal Appeal No.28 of 2001 (unreported). From the established rule of practice, an appellate court may interfere with findings of facts made by the lower court in limited circumstances as was stated by the Privy Council in the case of **Antimodias Caldera V Fredrick Auofus** (1936) All ER. (PC) that:

> *"Where the trial judge has come to a conclusion upon a pure question of fact, the appellate tribunal cannot , merely ...because the question is one of fact it has*

been decided in one way by the trial judge, abdicate their duty to review his decision and to re-evaluate if they deem it to be wrong, but the functions of the appellate tribunal when dealing with pure questions of fact on which questions of credibility are involved are limited in their scope and character."

The issue before the Court is whether the courts below erred in the assessment of the evidence of the witnesses so as to entitle the Court to interfere with their finding of facts.

To answer the question we find it pertinent to first revisit the evidence upon which the appellant's conviction was founded.

Dorothea Raphael (PW1), a girl aged 11 years testified on oath that on 25th July, 2001 after school she went to an area known as Tindigani to collect good soil for planting flowers. The witness was staying at Magomeni Mtowambu where the soil is unsuitable for that purpose. On arrival at the place she met the appellant whom she knew before by appearance only. She did not know his name. The witness told the trial

court that the appellant asked her whether she was the one who was stealing sugar cane and bananas from that "*shamba*". PW1 refuted being a thief. The appellant then told her that they should go to see the owner of the "*shamba*" of which PW1 declined. According to PW1 the appellant got hold of her, and pulled her into the bush. He then removed her under pants by force and threatened to cut her with a knife if she shouted or raised an alarm. The appellant had a knife. He then fell her down. PW1 slept on her back. The appellant covered her mouth with a "*shuka*" to prevent her from shouting and he then raped her until he satisfied his desire. PW1 said while the rape was taking place she felt serious pains. When her sister followed her, the appellant ran away. She reported to her sister what the appellant did to her.

The matter was reported to the ten cell leader of the area and to Ramadhani Hamisi (PW2) the Village Chairman. With the assistance of militiamen, the appellant was arrested and was found with a knife. PW2 also issued a letter to the complainant which she took to the police. At the

police station PW1 was issued with a PF3 and she went to hospital for medical check up.

The last prosecution witness was No.D.4612 D.Cpl Samwel (PW3). He was the one who attended PW1 when she reported the incident at the police station. He issued her a PF3 which was admitted in court as exhibit P1. He also visited the scene of crime and drew a sketch plan of the area which was admitted as exhibit P2. He recovered the knife which was alleged to be in possession of the appellant at the time of the commission of the offence and was admitted in court as exhibit P3. According to the testimony of PW3 the sketch map showed that the grass at the scene of crime indicated that something laid on it. In substance that was the prosecution evidence adduced to support its case.

The appellant in his sworn defence denied the commission of the offence and raised the defence of alibi which was rejected by the trial court. He told the trial court that at the time the offence was alleged to have been committed he was at Mtowambu township where he went with

Mzee Iddi Mohamed (DW2). He admitted having a knife but he said the knife was the property of DW2 who gave it to him for preparation of cabbage. DW2 corroborated the evidence of the appellant. They went together with him to Mama Zainabu at Mtowambu town to collect their money and they parted at 5.00 p.m. DW2 also admitted having given the appellant the knife for preparing cabbage.

With this evidence the trial court was satisfied that the appellant was guilty and convicted him. As already stated the first appellate court sustained the conviction and the sentence.

Before us the appellant appeared in person. He was not defended. The respondent/Republic was represented by Mr. Zakaria Elisaria learned Senior State Attorney. The appellant felt more comfortable to elaborate on his grounds of appeal after the learned State Attorney had replied to his ground of appeal.

On his part the learned State Attorney supported the appeal. He opted to support the first and fourth grounds of appeal by the appellant. The learned State Attorney attacked the first court on appeal for not making a finding that the evidence to support the prosecution case was not properly analyzed. He said that the evidence of PW1 was wrongly accepted because there was no compliance with section 127(2) of the Law of Evidence Act, [CAP 6 R.E.2002]. He said PW1 was a child witness of 11 years old. The law required the trial magistrate to conduct a "*voire dire examination*" in order to ascertain whether the witness knew the meaning of oath and her capacity to testify. He said the trial magistrate did not conduct the examination properly as the questions the trial court put to PW1 were not reflected on the record. His opinion was that the recorded answers of PW1 in the "*voire dire examination*" were not indicative of whether the witness knew the meaning of oath and the duty to speak the truth. The learned State Attorney said the evidence of PW1 should not have been accepted. He requested the Court to discount the evidence of PW1.

He said even the sister of PW1 who was mentioned by PW1 to have gone to the scene of crime and saw the appellant running, and assisted her to have the matter reported to the police station was not summoned to testify. The learned State Attorney said there was no sufficient evidence to sustain the conviction. He prayed that the appeal be allowed, the conviction quashed and the sentence be set aside.

The appellant was contented with the positive submissions made by the learned State Attorney to support his appeal. He prayed that the Court determines the appeal justiciably.

Coming to the question we paused concerning the right of the Court to interfere with the findings of fact by the courts below we will start with the first ground of appeal on the "*voire dire examination*" of PW1. The complaint in this case is that it was not conducted properly in that there was omission by the trial court to show the questions that were put to the child witness. The record of appeal at page 7 supports the learned Senior State Attorney. The trial court did not record the questions that were put

to PW1 in the" *voire dore examination*". Apparently this ground was not raised in the High Court. It is a new ground. The Court has on several occasions held that a ground of appeal not raised in first appeal cannot be raised in a second appeal. See the case of **SELEMAN RASHID @ DAHA V R** Criminal Appeal No. 190 of 2010 and **BIHANI NYANNKONGO &ANOTHER V R** Criminal Appeal No.182 of 2101(both unreported) among others.

But did the omission to record the questions put to the child witness vitiate the finding of the trial court on the competence of the witness to testify? Our answer is no. From the "*voire dire examination*" that was conducted, PW1 answered as follows:

> ***"I am in STD IV Shule ya Msingi Mtowambu I am a Christian. I am a Catholic. I normally go to Church. God stays in heaven. If one speaks lies he gets sin. If you are a sinner you go to hell. It is required for a man to speak the truth. We normally do examinations. We are thirty in our***

class. I normally hold the 5th position in my class.

<u>Order:</u> - It appears that, the child is very intelligent. He knows the meaning of speaking the truth as well as the meaning of oath. So, let her give evidence on oath."

The answers PW1 gave to the questions that were put to her shows that she knew the meaning of oath as well as the duty to speak the truth. Black's Law Dictionary ABRIDGED SIXTH EDITION at page 739 defines **oath** as

> *"Any form of attestation by which a person signifies that he will be bound in conscience to perform an act faithfully and truthfully... "*

Rule 2 of The Oaths and Statutory Rules (made under section 8 of The Oath and Statutory Declarations Act) the first schedule, sub- rule 1 of Rule 2 describes how an oath by Christian witness should be taken. The sub-rule says that a Christian shall, subject to paragraph 4, be required

either to hold the New Testament in his right hand or to hold the right hand uplifted and in either case repeat the following:-

> *"I swear that what I shall state shall be the truth, the whole truth and nothing but the truth; so help me God."*

Taking the meaning of oath as defined in the Black's Law Dictionary and how an oath is administered in Judicial Proceedings, the answer by PW1 that if one tell lies he gets sin and if you are a sinner you go to hell and that it is required of a man to speak the truth is a clear indication that PW1 knew the meaning of oath and the duty to speak the truth. In the case of **MOHAMED SAINYENYE V R** Criminal Appeal No. 57 of 2010 (unreported) the Court showed the kind of questions which should be put to the witness so as to ascertain whether the witness knows the meaning of oath and the duty to speak the truth. Such questions would include the age of the child witness, his/her religion and his /her understanding of the nature of oath and its obligation based on his/her religious belief. From what was recorded, the trial magistrate asked all the questions required to ascertain whether PW1 knew the meaning of oath and the duty to speak

the truth. PW1 rightly answered the questions. Regarding her age, PW1 said she was 11 years. Under the circumstances we do not agree with the learned State Attorney that the evidence of PW1 should be expunged from the record for failure by the trial court to conduct "*voire dire examination*" properly. On the contrary we hold that the "*voire dire examination*" was properly conducted and the trial magistrate correctly made a finding that PW1 was an intelligent child who knew the meaning of oath and the duty to speak the truth and allowed her to testify on oath. However, we wish to emphasize that in future the questions put to the witness should be recorded.

The learned State Attorney said there was no evidence to show that penetration did take place simply because PW1 did not say that the appellant inserted his penis in his vagina. He cited to us the cases of **GODI KASENEGALE V R** Criminal Appeal No.10 of 2008 and **HAMISI SHABANI V R** Criminal Appeal No.452 of 2007 (both unreported) to augment his submission. With respect to the learned State Attorney we disagree with him on this aspect. As we will show later in this judgment

the circumstances under which the offence was committed in the cases cited by the learned State Attorney can be distinguished from the circumstances of this case. Recent decisions of the Court show that what the court has to look at is the circumstances of each case including cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence. The reason is obvious. There are instances, and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters. The cases of **MINANI EVARISTI V R** Criminal Appeal No. 124 of 2007 and **HASSANI BAKARI V R** Criminal appeal No.103 of 2012 (both unreported) decided by this Court in February and June 2012 respectively are some of the recent development in the interpretation of section 130(4) (a) of the Penal Code. The cases cited by the learned State Attorney were decided earlier, in September, 2010 and July, 2009.

We agree that PW1 did not say that the appellant took his penis and inserted it in her vagina. However, our firm stand is that the evidence of

PW1 narrating on how the offence was committed clearly established that the offence of rape was committed.

Her testimony was to the following effect:-

> *"As I arrived at Tindigani, I saw the accused this Baba here. He called me. From here-outside-distance of 4 to 5 paces. I went. He asked me! Are you the one who steals sugar cane, and bananas? I told him that I am not a thief for I came to collect soil. He told me Let us go to the owner of the shamba. I did not like to go. He then got hold of my right arm and pulled me into the bush. He started removing my underpants by force. He told me that if I shout or raise an alarm I shall cut you. He had a knife. He fell me down. I slept with my back. As I fell down he covered my mouth with his "shuka" to protect (sic) me to shout. He then raped me. I felt much pain. He accomplished his desire."*

In the case of **SELEMAN MKUMBA V R** Criminal Appeal No.94 of 1999 (unreported), the Court held that:-

"True evidence of rape has to come from the victim if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant there was penetration."

Our considered opinion is that the evidence of PW1 who was a witness aged 11 years that the appellant approached her first by threats that she was a thief and would take her to the owner of the "*shamba*" was aimed at scaring the witness. Followed by those threats the appellant actually held her arm and pulled her to the bush. The undesired part of what the appellant did thereafter was to forcefully remove PW1's underpants, pull her down, making her lie in a suitable position for the rape to take place because PW1 lay on her back. To satisfy his sexual desire, the appellant then covered her mouth with his "*shuka*" to prevent her shouting or raise an alarm by threatening her with a knife. He then proceeded to rape the helpless little girl to his satisfaction. PW1 said she felt much pain as the sexual intercourse was taking place. At the time the offence was committed the appellant was aged 36 years.

With that explanation from PW1, can a reasonable person properly directing his mind and giving a truthful inference to the evidence of PW1 say that the offence of rape was not committed? With respect to the learned State Attorney we cannot succumb to his thinking. First, we have taken note that the trial took place in the District Court. The language the witnesses use in giving their evidence is Kiswahili. According to TUKI ENGLISH –SWAHILI DICTIONARY SECOND EDITION page 649 the word rape in Kiswahili means "*ubakaji*". Although section 13 (2) of the Magisrates Courts [CAP 11 R.E.2002] allows the District Court to use either Kiswahili or English language in recording the evidence, the trial magistrate recorded the evidence of PW1 in English language. The word rape used in the proceedings means *"kubaka"* which does not differ with that given in the **TUKI DICTIONARY**.

Second, PW1 said she felt pain as the act of rape was committed. If the appellant's penis was not inserted in the vagina of PW1 why did she suffer pains? Logically she suffered the pains because the penis of the

appellant was inserted in her vagina and as PW1 said it was in the process of the commission of the rape that she suffered the pains.

The record of appeal at page 7 shows that the trial was conducted by a male magistrate and the prosecutor was also a man. The appellant in this case is a man. At that time he was 36 years. PW1, the victim of the offence was 11 years. The trial magistrate raised concern about the young age of the victim of the offence under the circumstances. Bearing in mind the African tradition or customs, that PW1 would be scared to testify, he required the presence of her mother in the court room. On our side we appreciate the fact that the complainant (PW1) was young and it would have been difficult for PW1 to say straight away in that audience that the appellant inserted his penis in her vagina.

We are mindful that the evidence of PF3 admitted in court as exhibit P1 was relied upon to sustain the conviction. We agree with the appellant that it was erroneously admitted in evidence because there was non-compliance with the procedure. Section 240(3) of the Criminal Procedure

Act was not complied with in that the appellant was not informed of his right to have the doctor summoned for cross examination. That omission was fatal. See the case of **JUMA MASUDI V R @ DEFAO V R** Criminal Appeal No. 164 of 2005 (unreported) among other cases. The PF3 was also admitted in evidence without the appellant been afforded any opportunity to comment on it before its admission. The same mistake was also committed in respect of the knife, admitted in court as exhibit P2. The courts below are reminded that an accused person has to be treated fairly in all stages of the proceedings filed in court. He/she has a right to be shown all the exhibits which are sought to be relied upon in proof of the case against him/her and say whether or not he/she has any objection to their admissibility. In other words trial courts have a legal and moral obligation of always conducting the trials before the courts fairly. This has always been the procedure prescribed by the law. We fault the learned judge on first appeal for the omission made in correcting the mistakes made by the trial court on this aspect. Exhibits P1 and P2 are expunged from the record for having been unlawfully admitted. Third, the appellant said that he was not identified. We disagree with him on his identification.

The question of identification was thoroughly dealt with by the learned judge on first appeal. PW1 said in her evidence that she used to see the appellant for a long period before the offence was committed and she repeated that in her cross examination by the appellant. Although PW1 did not mention the time when the offence was committed, the evidence of PW2 was that the matter was reported to him at 6.30 p.m. The charge sheet shows that it was committed at 18.00 hours. We see no reason for faulting the learned judge's finding on this ground. The question of the mistaken identification of the appellant does not arise in this case.

We also note a defect in the charge sheet in that the appellant was charged under section 130(2) (b) which talks of commission of rape without consent. In this case the question of consent was immaterial as the victim of the offence (PW1) was aged 11 years hence she was under the age of 18 years. An offence committed to a woman falling in this category does not require consent of the victim. The appellant ought to have been charged under section 130 (2) (e) of the Penal Code. See the case of **MUSA MWAIKUNDA V R** [2006] T.L.R. 387. The learned judge

on first appeal ought to have corrected the mistake made by the trial court. The defect in the charge sheet however, did not occasion any miscarriage of justice on the part of the appellant because when PW1 testified she mentioned her age to be 11 years and the appellant did not raise any question on this aspect. This omission on the part of the prosecution is curable under section 388(1) of the Criminal Procedure Act, [CAP 20 R.E.2002].

Lastly is the complaint by the appellant that his defence was not considered. This complaint is not supported by the record of appeal. At page 18 of the record of appeal it is clearly indicated that his defence was considered but the trial court found that it failed to raise any doubt to the prosecution case. We do not see any merit in this complaint.

Having thoroughly gone through the grounds of appeal, the record of appeal and the submissions made by the learned State Attorney and the appellant in support of the appeal respectively, we entirely disagree with them that the offence of rape against the appellant was not satisfactorily

proved. According to section 127(7) and 143 of the Evidence Act, and the case of **SELEMANI MAKUMBA** (supra) the prosecution sufficiently proved the offence against the appellant. The offence was proved on the standard required, namely beyond reasonable doubt. Eventually we find the appeal by the appellant lacking merit and we dismiss it in its entirety.

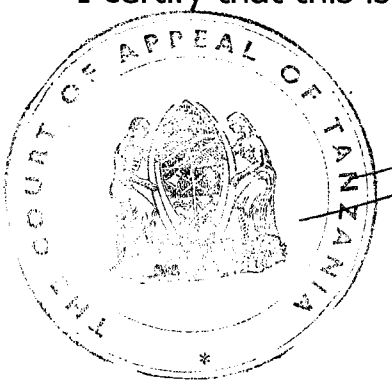
DATED at **ARUSHA** this 4th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. Mkwizu
DEPUTY REGISTRAR
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