IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 225 OF 2018

MOHAMED HAJI ALI.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the decision of the High Court of Zanzibar, at Vuga)

(Issa, J.)

dated the 11th day of December, 2017
in
Criminal Appeal No. 26 of 2017

JUDGMENT OF THE COURT

30th November & 13th December 2018

MKUYE, J.A.:

This is a second appeal. It arises from the decision of the Regional Magistrate's Court of Zanzibar at Vuga. The appellant was charged with an offence of rape contrary to sections 125(1) and (2) (e) and 126(1) of the Penal Act 2004, (No. 6 of 2004) of the Laws of Zanzibar. The charge against the appellant was that, on 25th day of June, 2014 at about 5.00 p.m. at Taveta in West "B" District in the Region of Mjini Magharibi Unguja, without consent did have carnal knowledge of Rukaiya Abdalla

Abdalla, a girl of 16 years old, an act which was contrary to the law.

Upon full trial, the trial court found him not guilty. He was acquitted and set free. Aggrieved, the Director of Public Prosecutions successfully appealed to the High Court whereby the appellant was found guilty, convicted and sentenced to imprisonment for a term of 10 years. Dissatisfied by the High Court's decision, the appellant has brought this appeal on five grounds of appeal as hereunder:

> *"1. The High Court erred in law to convict the appellant relying on the evidence of PW2 which was insufficient to prove the offence beyond reasonable doubt.*
>
> *2. The High Court erred in law in holding thus (sic) the Resident Magistrate erred in analysis and evaluation of the evidence before him.*
>
> *3. The High Court erred in law in holding that the inconsistence of testimonial evidence of PW2 was a slip of pen or human error.*

4. *The High Court erred in law in finding that the respondent had proved their case beyond reasonable doubt.*

5. *The High Court erred in law in finding that it was the appellant who raped the victim contrary to the evidence adduced during the trial."*

When the appeal was called on for hearing, the appellant was represented by Mr. Rajab Abdalla Rajab learned counsel; whereas the respondent/Director of Public Prosecutions was represented by Mr. Mohamed Saleh Iddi who was assisted by Mr. Suleiman Mohamed Maulid and Mr. Ali Yusufu Ali, all learned State Attorneys.

In support of the appeal, Mr. Rajab in the first place sought to argue grounds 1, 4 and 5 together. Submitting in support of the said grounds, Mr. Rajab basically complained on the inconsistencies in the evidence of Asma Abass Haji (PW1) and Rukaiya Abdalla Abdalla (PW2). Of importance, the learned advocate for the appellant assailed the credibility of PW1 and PW2 in that though PW1 at page 8 of the record of appeal testified to have gone together with Rukaiya (victim) and her

sister to Mwanakwerekwe Police Station where they were issued with a PF3 and went to Mnazimmoja Hospital to check if Rukaiya was raped, at page 9 of the record of appeal while on cross examination she said, PW2 was sent at Mnazimmoja by Nassra Abass Haji (PW1's sister) and Khadija Abdalla. On the other hand, Mr. Rajab argued, PW2 said she went to Mwanakwerekwe and to the hospital with Nassra Abass Haji and her young mother Khadija Abdallah Abass without mentioning PW1. Mr. Rajab argued further that, though PW2 at pages 10-11 of the record of appeal said she used to have sex with the appellant in a motor vehicle make Costa, the appellant at page 28 said he never used to drive a Costa bus but a Rosa bus. He went on to assail the credibility of PW2 in that as the incident happened at night in a motor vehicle which was at a dark place at Taveta, it was not explained by PW2 as to how she was able to identify the appellant. According to him, under those circumstances, there were possibilities of mistaken identity. As regards the PF3, he contended that, since the medical examination to PW2 was conducted long after the date when the offence was allegedly committed, it could not have revealed a proper analysis. He said,

according to the record, the rape, as per charge sheet was committed on 25/6/2014 and the matter was reported to the police as per the PF3 on 23/9/2015 when the victim was also examined by Dr. Jasmin Paulinus Maokola (PW4). He did not argue the remaining grounds of appeal since he said he has already covered them. Lastly, he urged the Court to allow the appeal.

Responding to the appellant's arguments, Mr. Iddi prefaced by declaring their stance of not supporting the appeal. With regard to who escorted Rukaiya to Mwanakwerekwe Police Station and Mnazimoja Hospital, he said, PW1 could have been forgotten as was revealed at page 9 of the record of appeal when under cross examination by Musa Shaali, she said that she had forgotten. However, Mr Iddi was quick to argue that whether PW1 went to the hospital or not, it cannot render her evidence incredible.

As to whether the motor vehicle driven by the appellant was a Costa bus or Rosa, he submitted that it was possible for PW1 not to know the exact model of the vehicle. At any rate he said, the inconsistencies did not go to the root of the matter.

On the complaint relating the circumstances of the place where the incident took place, Mr. Iddi argued that PW2 explained clearly that rape was committed on 25/6/2014. She explained on how she was carnally known by the appellant by inserting his penis into her vagina. He added that, since PW2 knew the appellant as her paternal uncle for having married to her aunt; the fact that they lived in the same street of Meli Nne; and her narration of the sequence of events which led to her being raped, there were no possibilities of mistaken identity of the appellant.

Mr. Iddi further stressed that, PW2 was able to prove that she was carnally known by the appellant. While relying on the case of **Selemani Makumba v. Republic** [2006] TLR 379 at page 384, he said, the best evidence of rape comes from the victim herself. He was of the view that, even if the PF 3 examination report which was taken long after the commission of the offence is expunged, the evidence of the victim can still sustain the conviction. He elaborated further that as the appellant was charged with an offence under section 125(1) and (2) (e) of the Penal Act, connoting that the issue of consent was

immaterial, but PW2 proved both her age at that time she was raped to be 16 years and the offence of rape. PW1 also corroborated her evidence on age.

In the whole, he supported the first appellate Court's finding that the prosecution side proved her case beyond reasonable doubt and implored the Court to sustain the conviction and enhance the sentence from 10 years imprisonment to 15 years imprisonment on account that the appellant, being related to the victim was a person expected to guard moral conduct to children but he violated them.

In rejoinder, Mr. Rajab resisted the respondent's prayer for enhancement of sentence and he stressed that the appeal be allowed, the conviction be quashed, sentence set aside and the appellant be released forthwith from prison unless held for other lawful reason(s).

Mr. Rajabu argued that the evidence of PW1 and PW2 had contradictions and inconsistences which made their evidence unreliable and incredible. We would in a way agree that there were such inconsistences as Mr. Iddi rightly conceded. For instance, PW1 at page 8 of record of appeal said that she

together with Rukaiya and her sister, the victim's mother, went to Mwanakwerekwe Police Station where they were issued with a PF3 and went to Mnazimmoja Hospital for examination if she was raped. At page 9 of the record of appeal she said that she did not go to Mnazimmoja Hospital and mentioned her sister and the victim who went there. Then at the same page on cross examination, she said, she forgot. On re-examination, PW1 said at Mnazimmoja Rukaiya was sent by her sister Nassra Abass Haji and Khadija Abdalla. As it can be seen, PW1 gave three different versions as to who went to Mwanakwerekwe Police Station and Mnazimmoja Hospital. On the other hand, on the same aspect PW2 at page 11 said she went at Mwanakwerekwe Police Station together with her elder mother (aunt) Nassra Abass Haji and her young mother Khadija Abdalla Abasi whom she also went with to Mnazimmoja Hospital. She did not mention PW1. Indeed, those are remarkable inconsistences involved in the evidence of PW1 and PW2 which was incidentally relied upon by the appellate court to convict the appellant and sentence him. In evaluating the evidence of the two witnesses the appellate judge observed that the inconsistence were a slip of the pen or human error and

accepted the evidence of two witnesses as credible. However, it is our view that the first appellate court ought to have gone a step further and decide whether such inconsistences and contradictions were minor or that they did go to the root of the matter.

This Court when faced with a similar situation in the case of **Dickson Elia Nsamba Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported) at page 7 while quoting with approval the authors of Sarkar, The Law of Evidence, 16th Edition, 2007 had this to say:

> *"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies*

do not corrode the credibility of a parties case, material discrepancies do."

In this case, we are in agreement with Mr. Iddi that the alleged inconsistencies and contradictions in PW1 and PW2's evidence are minor as they did not go to the root of the matter so as to discredit the prosecution case. We are increasingly of the view that, taking the totality of their testimonials, PW1 and PW2 were credible witnesses.

On the issue of how the victim could have identified the appellant at night in the motor vehicle which was at a dark place, we think, it does not hold water. This is so because, PW2 had clearly explained the sequence of events which eventually led to her predicament of being raped. PW2, being honest as she was, narrated on how on 19/6/2014 at around 8.00 p.m. while passing at Taveta on her way to the tuition saw the appellant Mohamed Haji in his motor vehicle. As to whether the motor vehicle was a Costa or Rosa bus, we think, is immaterial because PW2 being not conversant with models of motor vehicle could not know the exact model of the said motor vehicle. Most importantly she mentioned a bus which is not denied by the

appellant. PW2 narrated further that the said appellant called her and told her of his desire to be her lover but she refused. After some days had passed, that is on 25/6/2014 at around the same time of 8.00 p.m. while she was on her way to the tuition, he again called her to his motor vehicle and told her the similar issue of having sex with him but again she refused. As she started to leave or get out of the motor vehicle, he pulled her clothes, felled her down inside the motor vehicle and he slept on her chest and that is when he inserted his penis in her vagina. PW2 told the trial court that she felt pain in her vagina. She also explained on how she continued to have sexual intercourse with him later on.

Perhaps, it is noteworthy at this juncture that the appellant was not a stranger to PW2. PW2 explained how she knew him. At page 10 of the record of appeal, PW2 explained that she knew Mohamed Haji (appellant) as her father (uncle) by virtue of being a husband of her young mother (aunt) Mwanakheri Mohamed Marijani. On top of that, the appellant lived at Meli Nne Uzi where they also resided. Given the fact that it was not a sudden attack and coupled with the time they had spent when

the offence was committed, it cannot be any person other than the appellant. In our view, the appellant's claim that the PW2's recognition of the appellant on the fateful could be mistakenly done is without substance in the circumstances of the case. We, are of a settled mind, that PW2 properly identified the appellant as her rapist.

As regards to the evidence of rape, it came from PW2 who explained how it was committed to her and PW4 from Mnazimmoja Hospital. PW2 explained how the appellant felled her inside the motor vehicle, slept on her chest and inserted his penis in her vagina and how she felt painful. PW4's evidence was to the effect that she examined PW2 on 23/9/2015 whereby she found her in her menstruation period and after rubbing her vaginal part to remove the blood, she found her (PW2) to have no hymen and her cervix was open due to menses. She also observed an old tear which suggested that she had been raped some days before. In her testimony PW4 made suggestions that such state of affair (hymen removal) could have been caused by riding a bicycle, insertion of a blunt object like bilinganya, banana or erected penis.

Of course, we have also taken into consideration the fact that the medical examination was conducted after a period of one year and three months had lapsed. This could lead to a concern raised by Mr. Rajab or his assumption that it might have led to an improper analysis of the episode. However, we are in agreement with Mr. Iddi that the best proof of rape comes from the victim herself. On this we are guided by the case of **Selemani Makumba** *(supra)* where the Court held as follows:

> *"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, that there was penetration."*

Yet in a later case of **Godi Kasenegala v. Republic**, Criminal Appeal No. 10 of 2008 (unreported) the Court stated as follows:

> *"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence. See, for instance,* ***Selemani Makumba v. Republic****, Criminal Appeal No. 94 of 1994;* ***Alfeo Valentino v.***

> ***Republic**, Criminal Appeal No. 459 and 494 of 2002 (all unreported). **Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so**. See **C.D de Souza v. B.R. Sharma**, (1953) EACA 41".*
>
> [Emphasis added]

[See also **Julius John Shabani v. Republic**, Criminal Appeal No. 53 of 2010 (unreported)].

Even in this case, the PF3 examination which was conducted after a period of one year and three months, cannot reflect a true picture of what happened on such a long period before.

However, we are settled in our mind that, even if the PF3 is disregarded, still there is ample evidence from PW2 that she was raped and the person who raped her is the appellant.

Consequently, we agree with both learned counsel that in criminal cases, the burden of proof is always on the prosecution to prove the case against the appellant beyond reasonable doubt and the burden never shifts. (See – **Nung'uniko Gidule v.**

Republic, Criminal Appeal No. 223 of 2008 (unreported)). On our part, like the first appellate court, we are satisfied that the prosecution proved the case against the appellant beyond reasonable doubt.

In the final event, we dismiss the appeal in its entirety.

We now turn to the prayer of enhancement of sentence from imprisonment for a term of 10 years to 12 years. We have considered that the appellant was related to the victim (PW2) as her uncle by virtue of being married to the victim's aunt. Ordinarily, the appellant who was aged 41 years old was expected to be a person responsible for guarding and promoting adherence to morals to children not only to those related to him but also those in his surrounding society. Unfortunately, he spear-headed the brokage of such morals to an innocent PW2. We think, a severe punishment is required in the circumstances so as to deter even others with similar attitude. Considering that under section 126(1) of the Penal Act the offence of rape is punishable by imprisonment for life and, in any case, for imprisonment for 30 years, we enhance the sentence against

the appellant from 10 years imprisonment to 12 years imprisonment.

It is so ordered.

DATED at **ZANZIBAR** this 12th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL