IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., ORIYO, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 316 OF 2013

NKANGA DAUDI NKANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

dated 26th day of August, 2013
in
Criminal Appeal No. 134 of 2012

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JUDGMENT OF THE COURT

17th & 21st October, 2014

MMILLA, J. A.:

Nkanga Daudi Nkanga is currently behind bars serving a sentence of 30 years following his conviction on the charge of rape contrary to sections 130(1),(2) and 131(1) of the Penal Code Cap 16 of the Revised Edition, 2002 by the District Court of Bunda District in Mara Region. His first appeal to the High Court at Mwanza was not successful; undaunted, he preferred the present appeal which is against both conviction and sentence.

The facts of the case revealed that on 26.7.2009 at about 2.00 hours, PW1 Ghati Mwita Ryoba was awakened from sleep in her matrimonial home by the appellant who, on knocking the door identified himself by his name and purported that he was accompanied by her husband who was on that night absent from home. According to PW1, her husband one Mwita Ryoba (PW3) was on safari to Gusuhi village since the previous day where he had gone to buy rice for business. Believing on what she heard, and because she recognized that it was the voice of Nkanga Daudi Nkanga who was a close friend of her husband, she opened the door. To her surprise she saw the appellant alone. On gaining entry into the house, the latter grabbed and held her firmly, threw her down, forcefully undressed her and began raping her. Simultaneous to staging a struggle, she raised alarm which attracted the attention of PW2 Pili Ryoba, her mother in law. Meanwhile, worried that the alarm was going to attract his victim's neighbours, the appellant struggled to set himself free to avoid peoples' wrath. Although he managed, he nevertheless left behind his T-shirt having it been firmly held by the complainant. That T - shirt was tendered in court as Exhibit P1.

On the other hand, at the time she rushed to her daughter in law's house, PW2 armed herself with a flashlight or torch. On seeing a person emerge from

the house where she was destined, she lit the torch while directed to the intruder and identified that person to be Nkanga Daudi Nkanga (the appellant) who was their neighbour and a close friend of her son. She did not apprehend him because he was armed with a panga. She entered in the house and found PW1 down on the floor, and besides her was a T-shirt written Jamaica. She resolved to report the incident to the sub-village chairman on that very night. Unfortunately however, she did not find him at his home. They had no better option but to wait until morning.

In the morning, the matter was reported to the village authority after which the Village Executive Officer (VEO) instructed militia men to trace and arrest the appellant. Also, accompanied by PW1 and her husband who had returned from safari, the VEO reported the incident to the police at Mugeta Police Post. PW1 was issued with a PF3 and headed to a dispensary in their village for medical examination and treatment. She was attended to by PW4 Raymond Nzugu, then a clinical officer of Mugeta Health Centre. After examining her, he found, as quipped in the PF3 he filled, that PW1 had bruises in her female organ. The PF3 was tendered and received as Exhibit P2.

According to PW1, PW2 and PW3, the appellant disappeared from the village after committing the charged incident. He reappeared on 5.8.2009 and

was arrested on 6.8.2009, subsequent to which he was charged in court, as it were.

The appellant's defence before the trial court consisted of general denials that he did not commit the alleged rape. He contended that he was arrested on allegations that he had committed a robbery, only to find that he was charged with the offence of rape. He lamented that the charged crime was cooked up by his own father who feared that his mother (appellant's mother) was going to claim a share out of the former's properties on the appellant's advice in a divorce wrangle. As aforesaid, his defence was rejected by both courts below.

Before us, the appellant appeared in person and was not represented. On the other hand, Mr. Victor Karumuna, learned State Attorney represented the Republic. He hastened to inform the Court that he was opposing the appeal.

The memorandum of appeal filed by the appellant raised four grounds of appeal. While he alleged in ground No. 1 that the prosecution did not prove penetration which is a vital ingredient of the offence of rape, he alleged in ground No. 2 that there was variance between evidence and the charge sheet as far as dates were concerned. Also, while he complained in ground No. 3 under 5 subheadings that the prosecution did not prove the case against him beyond

reasonable doubt, his complaint in ground No. 4 was that the lower courts wrongly shifted the burden of proof to him. When he was invited to elaborate on them, he elected for the Republic to begin.

Mr. Karumuna sought to begin with ground No. 3 which as aforesaid, was subdivided into 5 complaints. In the first place, the appellant wondered why the village leaders as well as the militia men who were alleged to have facilitated his arrest were not called as witnesses. Mr. Karumuna submitted that this complaint was baseless because in terms of section 143 of the Evidence Act Cap.6 of the Revised Edition, 2002 no particular number of witnesses is required in any case for the proof of any fact. We hasten to say that we agree with him.

It is incontrovertible that in terms of section 143 of the Evidence Act, no particular number of witnesses is required in any particular case for the proof of any fact. This has been stressed in a range of cases including those of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148, **Gabriel Simon Mnyele v. Republic,** Criminal Appeal No. 437 of 2007 CAT, and **Nicodemus Awe and 2 Others v. Republic**, Criminal Appeal No. 155 of 2014, CAT (both unreported). In the case of **Gabriel Simon Mnyele v. Republic**, the court emphasized that:-

"... under section 143 of the Evidence Act (Cap 6-RE 2002) no amount of witnesses is required to prove a fact ***- See Yohanis Msigwa v. Republic,*** *(1990) T.L.R. 148. But it is also the law* ***(section 122 of the Evidence Act)*** *that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons - See* ***Aziz Abdaila v. Republic*** *(1991) T.L.R. 71."*

In our present case, the persons named by the appellant as prospective witnesses were not at all necessary witnesses in the circumstances of the case because they were not eye witnesses to the incident of rape. At most their evidence on the point would have been hearsay. As such, there are no compelling reasons to make us think of drawing adverse inference. Thus, this ground is devoid of merit and we dismiss it.

In the second sub complaint, the appellant is saying that he was not identified by PW1 and PW2. Mr. Karumuna has submitted in this regard that the appellant was sufficiently identified by both those witnesses for reasons he assigned. Once again, we agree with him.

Beginning with PW1, it is on record that earlier on the appellant, a neighbour and a close friend of her husband as already pointed out, had gone to

her house on 25.7.2009 at around 21.00 and asked her the whereabouts of her husband. She told him that he was on safari. He stayed for a while and left, only to return at around 2.00 hours when he knocked the door and identified himself by name and represented that he was accompanied by her husband. It is certain therefore that PW1 could not have failed to identify a person who was that familiar to her and had identified himself.

Apart from that, the incident took some time. Also, when the appellant was done with his quest to rape her and decided to flee, PW1 firmly held his T-shirt which the appellant left behind (Exhibit P1). It is important to point out here that the appellant admitted that the said cloth was his. As to how it found its way into the complainant's house, the appellant had two versions. While he said at the time it was tendered in court that he had given it to the complainant's husband (PW3), he changed his version in his defence and claimed that it was stolen from his house. The complainant's husband (PW3) however, denied to have taken the T-shirt or any other cloth from the appellant.

In our firm view, the fact that the appellant had two versions in this regard shows that he did not tell the truth. We have reasons to believe that PW3 told the truth that he did not take that T-shirt from the appellant. As the rule goes, we wish to point out that lies of an accused person may corroborate the

prosecution case as we think it has – See the case of **Felix Lucas Kisinyila v. Republic**, Criminal Appeal No. 129 of 2002, CAT (unreported).

On the other hand, at the time PW2 was heading to the house of PW1, she saw the appellant emerging from that house and lit the torch she had directly in that direction targeting the intruder. She comprehended that the person she was seeing was their neighbour, Nkanga Daudi Nkanga. So, it is beyond certainty that she too clearly identified the appellant.

On the basis of the evidence of these two witnesses, we have no hesitation to find and hold that both the trial court and the first appellate court properly found that the appellant was correctly identified. In the circumstances, this sub complaint too is baseless.

The appellant complained similarly that there were contradictions in the evidence of PW1 and PW2. Mr. Karumuna submitted that this allegation as well is unfounded for the evidence of those two witnesses was free of any contradictions. Once more, we agree with him.

We have carefully gone through the evidence of PW1 and PW2. Honestly, we have found no any contradictions. Both, PW1 and PW2 said that it was PW2 who had the torch with the aid of which she identified the appellant after she lit

it and directed it at him. Of course, PW3 said it was PW1 who had the torch, but we are alive that he was not an eye witness or rather that his evidence on that point was hearsay. As such, we are satisfied that this complaint as well is devoid of merit.

We now go back to the first ground of appeal which alleges that the prosecution did not prove penetration which is a vital ingredient of the offence of rape. Mr. Karumuna has submitted that this ground too is baseless because PW1 was express that the appellant forcefully had sex with her. Besides, he submitted, the evidence of PW4 was clear that on examining the female organ of PW1, he found that she had bruises thereat; a fact which suggested that it was tampered with.

We appreciate, as dictated by section 130(4) of the Penal Code, that penetration is a vital ingredient of the offence of rape. That section provides that:-

"(4) For the purposes of proving the offence of rape–

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent."

In our present case, PW1 was recorded on page 7 of the court record to have told the trial court that:-

*"...**Nkanga tightly hold (sic: held) me and took (sic: threw) me down, undressed me and started to have sex with me.** ..."*

The inference of the words **"sexual intercourse"** or **"have sex"** and the like were explicated in the case of **Hassan Bakari @ Mamajicho v. Republic,** Criminal Appeal No. 103 of 2012, CAT (unreported) in which the Court said that:-

*"...it is common knowledge that when people speak of **sexual intercourse** they mean the penetration of the penis of a male into the vagina of a female. It is now and then read in court records that trial courts just make reference to such words as **sexual intercourse** or **male/female organs** or simply to have **sex,** and the like. **Whenever such words are used or a witness in open court simply refers to such words, in our considered view, they are or should be taken to mean the penis penetrating the vagina ..."*** [Emphasis added).

On the basis of the above, it is clear that by saying that the appellant had sex with her, she was unambiguous that his penis was **inserted into her female organ**, therefore this ground also lacks merit and is dismissed.

The appellant's complaint in ground No. 2 is that there was variance between the evidence and the charge sheet. His concern is that comparing the particulars of the charge and the evidence on record, there is inconsistency as to the date on which the alleged rape was committed. While admitting such fact, Mr. Karumuna submitted however that the mix up of dates was caused by the fact that the incident occurred deep in the night. We share his view.

As will be reckoned, the incident occurred at 2.00 hours after 25.7.2009 had just changed to 26.7.2009 which Mr. Karumuna refers to as **"deep in the night".** In our view, that is not at all a big deal because after all, such a variance was curable under section 234 (3) of the CPA. That section provides that:-

> *"(3) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time, if any, limited by law for the institution thereof."*

Thus, this complaint is similarly baseless; we accordingly dismiss it.

Last but not least is the complaint in ground No.4 that the lower courts shifted the burden of proof to the defence. Mr. Karumuna contended that this ground as well is baseless because the case against the appellant was decided on the strength of the evidence of the prosecution witnesses. We subscribe to his view.

It is the principle of law that the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs, and that the accused has no duty of proving his innocence – See **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010, CAT (unreported). It is important to underscore, as we stated in the case of **Nyeura Patrick v. Republic**, Criminal Appeal No. 73 of 2013, CAT (unreported), that the burden of proof placed on the prosecution arises from the presumption of innocence in favour of the accused that no less than the **Constitution of the United Republic of Tanzania, 1977** as amended from time to time, has guaranteed- See Article 13 (6) (b) thereof.

We have carefully gone through the judgments of both the trial and first appellate court in an attempt to authenticate the appellant's complaint. We have

found nothing to suggest that any of the two courts below shifted the burden of proof to him. To the contrary, we are satisfied, as demonstrated in this judgment, that the case against him was decided on the weight of evidence on record. As such, this ground too lacks merit and we dismiss it.

In the event, this appeal has no merit. We hereby dismiss it.

DATED at MWANZA this 20th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

I. P. KITUSI
CHIEF REGISTRAR
COURT OF APPEAL