IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK,J.A.,MMILLA,J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 101 OF 2013

JOHN MAPUNDA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Songea)

(Fikirini, J.)

date 11th day of March, 2015
in
DC. Criminal Appeal No. 37 of 2015

JUDGMENT OF THE COURT

14th & 24th August,t2015

MWARIJA, J. A.:

The appellant was charged in the District Court of Songea with unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code, Cap.16 of the Revised Edition, 2002. He was found guilty and convicted as charged. Since the offence was committed against a child aged below 10 years, the appellant was sentenced to mandatory life imprisonment term together with corporal punishment of 12 strokes of the cane. He was aggrieved by conviction and sentence and thus appealed to the High Court. His appeal was dismissed hence this appeal.

At the hearing of the appeal, the appellant appeared in person and unrepresented while the respondent Republic had the services of Mr. Renatus Mkude, learned Senior State Attorney. Mr. Mkude addressed the Court first because the appellant opted to respond to what would be submitted by the learned Senior State Attorney in relation to the appeal.

Before we consider the arguments made by the learned Senior State Attorney and the appellant, it is appropriate to give, albeit briefly, the facts which gave rise to the appeal. On 16th October, 2013 which was an Eid day, Lui Rashidi (PW1) who was at the material time aged 9 years, decided to celebrate the Eid holiday by going to watch video at a place described shortly as a Centre in Songea town. After that event she left for home. At about 17:00 hrs while on her way, she met one person who lured her that he required her assistance. He asked her to accompany him so that she could assist to carry some pillows for him. PW1 agreed and accompanied him to where she believed the pillows were to be collected.

While on the way and after they had arrived at Ruvuma Street, that person turned against her and after treating her in a

cruel manner by tying her legs apart, he sexually abused her by having a carnal knowledge of her against the order of nature. When that was happening to her, her mother, Mariam Mpunga (PW3) who was away from her home, returned home and found that one of her children (PW1) was not at home.PW3 decided to look for her said child in the neighborhood. While in the process of doing so, she met her with three youths who included Juma Said (PW2). They told her that the child was handed over to them by Mosque leaders to take her home. After being informed by PW1 about what had happened to her, PW3 inspected her and found that despite looking tired, had sperms-like substance in her anus. She then took her to police and on the next day, to hospital.

At the hospital, PW1 was examined by Dr. Exavery Mbawala (PW5) who found her with bruises in her inner anus. He also noticed the presence of sperms in her anus. In order to ascertain that it was a man's sperms, PW5 extracted that substance and sent it for laboratory test. The test confirmed that it was really a man's sperms.

On 25/10/2013 while she was at police station, PW1 saw the appellant and identified him as being the very person who sexually

abused her on 16/10/2013. The appellant was arrested and thereafter the police recorded his statement. The appellant was later charged in court.

In defence, he denied the offence contending that he was not properly identified as the person who committed it against PW1. He also denied that he admitted the offence in his statement which was recorded at the police station. He claimed that he was framed–up by the police for unknown reasons.

In his memorandum of appeal before this Court, the appellant raised five grounds. As correctly submitted by Mr. Mkude however, the appellant's complaint hinges on the issue whether or not he was properly identified as the person who committed the offence. In his grounds of appeal he is challenging the evidence on his identification as being insufficient and contradictory.

In his submission, Mr. Mkude submitted firstly, that the fact that PW1 was sodomized was sufficiently proved by the evidence of PW1, PW3 and PW5. We respectfully agree with Mr. Mkude that there is sufficient evidence on record showing that PW1 was

molested. In fact the evidence of PW1 herself, her mother, PW3 and that of PW5, the Doctor who conducted medical examination on PW1, was not seriously controverted by the appellant on that aspect.

PW1 who, after a **voire dire**, was found to possess sufficient intelligence and who understood the duty of telling the truth proved before the trial court that she was sodomized. It was also the evidence of her mother (PW3) that she inspected the victim and saw injuries in her anus as well as sperms-like substance in it. PW5 confirmed that PW1 was sodomized. The evidence of PW3 and PW5 therefore supported that of PW1. But even without that supporting evidence, the evidence of PW1 which was found to be credible was by itself sufficient. It is a trite principle that the true evidence of rape must come from the victim of the offence. Relying on this principle in the case of **John s/o Kashindye v R,** Cr. Appeal No. 180 of 2013, this Court stated as follows:

> *"On our part, we fully agree with the learned State Attorney that it is immaterial to find corroborative evidence to the PW1 as by itself has sufficiently*

proved the offence of rape against the appellant. ***After all, the true evidence of rape comes from the victim herself*** *– see the decision of this court in the case of* ***Selemani Makumba v. The Republic,*** *Criminal Appeal No. 94 of 1999* (unreported)".(Emphasis added)

Although the principle refers to the offence of rape, since that offence and unnatural offence are both sexual offences and thus **sui generis** offences, the principle is equally applicable to this case. Since it was established that PW1 was sodomized,it is not necessary to consider the arguments raised by the appellant that PW1 was examined by a doctor one day after the date of the incident. In the first place, the appellant did not raise it as a ground of appeal to the High Court. But even if we were to consider that ground there is sufficient evidence from PW3 that PW1 could not be taken to hospital on the material date of the offence because it took her time to look for PW1 and later went with her to police. Until they returned from police it was already in the night. As to the technical effect of a delay of one day in conducting medical examination on PW1, the appellant did not, in cross-examination, ask such question to the Doctor (PW5) and

cannot therefore raise it in this appeal. In any case, the appellant did not raise that point in his appeal to the High Court.

Having found that PW1 was sexually abused as stated above, we now turn to consider the appellant's complaint that he was not properly identified. Mr. Mkude argued that the identification evidence was watertight. Starting with the evidence of PW1, he argued that from the **voire dire** examination, which he said, was properly conducted by observing the conditions stated in the case of **Kimbute Otiniel v. R.** Criminal Appeal No. 300 of 2011 (CA) (unreported), the evidence of the witness was found to be credible by both the trial court and the High Court. He submitted therefore that as stated in the case of **Omari Ahmed v. R** (1983) TLR 52, the finding on her credibility cannot be interfered unless there are circumstances which call for its reassessment.

The learned Senior State Attorney argued further that PW1's evidence is supported by that of PW3 and PW4 who testified that when PW1 saw the appellant at police station, she started to scream and cry, pointing the appellant as the person who molested her on the material date of the offence. Citing the case

(CA) (unreported), Mr. Mkude argued further that since according to the evidence of PW1, the appellant spent a reasonable time with her, that is, from 17:00 hrs when he met her on the way, to 18:00 hrs when he sexually abused her at the scene of crime, she properly identified him and therefore there was no possibility of a mistaken identify. Mr. Mkude relied also on the cautioned statement of the appellant. According to the learned Senior State Attorney, the appellant confessed to have committed the offence.

In response, the appellant did not have useful arguments to make. He amplified the denials which he made in his defence at the trial. He added that since no identification parade was conducted, the identification made by PW1 at the police station was not proper. On the cautioned statement, he said that although he admits that he was not beaten or tortured, his statement as recorded by PW4 contained matters which he did not admit including the statement that he confessed to have committed the offence. What he admitted, according to his submission, is only his particulars including his name, his age and place of residence.

As stated by Mr. Mkude, the evidence on the identification of the appellant was tendered by PW1, PW3 and PW4. According to PW3, she was told by PW1 that the person who molested her was tall and black. When she saw the appellant who had those descriptions and who was in the same attire which he wore on the date of the offence, she identified him and started to cry. As submitted by the learned Senior State Attorney, PW1 spent a reasonably sufficient time with the appellant on 16/10/2013 before, and at the time of molesting her. It was in the day light and given the cruel manner in which he treated her, her memories of him could not fade up easily. It was only a period of 9 days from the date of incident when she came to identify the appellant. At the police station, PW1 identified the appellant in the presence of PW3 and PW4. The two witnesses supported PW1's evidence on that aspect.

The appellant's contention that according to PW3, she was called to police to identify the appellant is a misconception because her evidence was that she went there with PW1 so as to inquire about the progress of the case. Similarly, the appellant's contention that the evidence of PW1 and PW4 was contradictory

as regards the particular moment at which he was identified at the police station is, in our view without merit. We agree with the learned appellate Judge that what was stated by PW1 is that when the appellant was taken to the office where he recorded his statement, she was watching television. We find however that according her evidence it was at that moment that she saw the appellant and started to cry. Although the evidence of PW4 appears to be contradictory on that aspect, in view of the evidence of PW1 which we have found to be credible, we are of the view that the trial magistrate did not properly apprehend what was said by PW4. We therefore find that contradiction to be minor. As to the issue of identification parade, we agree with the learned appellate Judge that an identification parade could serve no useful purpose because the appellant was already identified by PW1 at police station when she coincidentally met him.

Both the trial court and the High Court concurrently found that the appellant was properly identified. It arrived at that conclusion on the basis of credible evidence of PW1, PW3 and PW4 which was found to be credible together with the appellant's cautioned statement. It is a trite principle that where two courts

arrive at concurrent finding of fact, an appellate court will not always interfere easily with that finding. Citing the cases of **Amratlal D. M. t/a Zanzibar Silk Stores v. A. H. Jariwala t/a Zanzibar Hotel** (1980) TLR 31 (CA**), DPP v. J. M. Kawawa (1981)** TLR 143 and **Musa Mwaikunda v. R** Cr. Appeal No. 174 of 2006, this court stated as follows in the case of **Alfeo Valentine v. R,** Criminal Appeal No. 92 of 2006 (both unreported):

> *"We understand that this is a second appeal. The law on the duty of this Court in an appeal of this nature is well settled. It is now well established that the Court rarely interferes with concurrent finding of fact. An appellate court can only interfere with finding of fact by a trial court where it is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises; see* ***Salum, Bungu v Marian Kibwana,*** *Cr. App No. 29 of 1992 (unreported). On a second appeal this Court will not interfere unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of the law or practice."*

In this case, the basis of the finding by both the trial court and the High Court that the appellant was properly identified was credibility of witnesses particularly PW1 and the circumstances leading to his identification as stated above. Upon our scrutiny of the evidence as stated above, we could not find any sound reason upon which we may interfere with the concurrent finding of the two courts below.

Before we conclude, we wish to comment briefly on the appellant's contention that he did not confess before PW4. In the first place, in his memorandum of appeal, the appellant did not raise that ground. But if we were to consider it as a ground of appeal, we would still find no merit in it. Firstly, the appellant stated clearly that he was not beaten or tortured when his statement was taken by PW4. His complaint is only that he was not allowed to have his relative or advocate at the time of recording the statement. That contention was however, countered by PW4 who told the trial court that the appellant did not want to exercise his right of having his relative or an advocate at the time of recording his statement. The trial court found that

the procedure was followed and as stated above, the appellant did not appeal against that finding.

The trial court found also that although the appellant retracted his statement, the same was true. Relaying on the case of **Tuwamoi v Uganda** (1967) EA 84, it acted on the appellant's statement.Having read the statement, we agree that it contains a true account of how the offence was committed. It does not only support PW1's evidence but gives the details beyond her evidence. The appellant states, for example, that when he failed to insert his penis into PW1's anus, he smeared saliva on his sexual organ for that purpose. He stated also that when PW1 started to cry as a result of pain caused by the appellant's act of sexually molesting her, he covered her mouth by using his hand. He added that this was not his first time to commit such offences. In his own words he said that: "*Makosa haya nimeyatenda mara kwa mara. Nimetenda kosa kweli nililoshtakiwa au ninalotuhumiwa nalo...*" Literally translated this means that: "*I have committed these offences from time to time. I really committed the offence with which I have been charged or suspected of having committed...*" Clearly therefore, the appellant's statement added details on how

found to have injuries and presence of sperms on her anus. For these reasons, the complaint by the appellant that he did not confess to the offence would be devoid of merit.

In view of the above stated reasons, we find that this appeal lacks merit. We thus hereby dismiss it in its entirety.

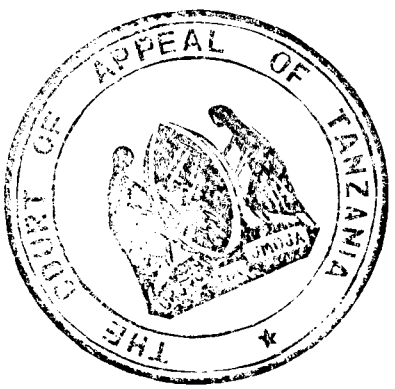
DATED at **IRINGA** this day 21st of August, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL