IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO,J.A. MUGASHA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 196 OF 2015

GALUS KITAYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Sumbawanga)

(Mmilla, J.)

dated 20th day of July, 2007

in

Criminal Appeal No. 22 of 2006

.....

JUDGMENT OF THE COURT

12th & 15th April 2016

KIMARO, J.A.:-

The appellant was charged in the District Court of Sumbawanga with the offence of rape contrary to section 130(1) (2) (e) and 131 of the Penal Code, [CAP 16 R.E. 2002]. He was convicted and sentenced to a thirty years imprisonment. The facts of the offence alleged that the appellant had sexual intercourse with the complainant, one Christina Arusha (PW1) a pupil of Ikozi Primary school who was then aged fifteen years.

At the trial the complainant said that she was seventeen years but she was fifteen when she started having sexual relationship with the appellant. She testified that the appellant was her lover, which relationship started in 2003. By then she was in standard VI. The sexual relationship continued and in 2004 she found out that she was pregnant. Her teacher took her for medical examination. The PF 3 which she was given by the police was tendered in court as exhibit P1 and it showed when she was examined on 19th September, 2004 she had six months pregnancy. Her testimony was taken on 4th May, 2006. By then she had delivered a baby boy in December, 2004. The child's name is Baraka s/o Kitaya.

The complainant said the sexual intercourse she had with the appellant took place at the house of the appellant's brother which was about 45 paces from their home.

Obadia Arusha (PW2) testified that he is the father of the complainant PW1. He corroborated her evidence that she was a student at Ikozi Primary School but she failed to proceed with her studies because she fell pregnant. The witness said that her school teachers discovered that she was pregnant and when she was medically examined by a doctor it was confirmed that that she was pregnant.

In his defence the appellant admitted he had sex with the complainant but he said she was his wife. He said he did not know that she was schooling. He believed that he was charged with this offence because of failing to pay to PW2 an amount of T shillings 400,000/= that was demanded as dowry by the father of the complainant.

The trial magistrate was satisfied that the offence of rape was proved against the appellant beyond doubt. He was convicted and sentenced as aforesaid.

The first appellate court upheld the conviction and the sentence that was imposed on him on the ground that the appellant's defence corroborated the evidence of the complainant. The learned judge on first appeal held:

> *"It is plain and certain that the appellant's evidence corroborated that of PW1 in material particulars. In the circumstances, the allegation that the prosecution did not prove this case against him beyond all reasonable doubt lacks merits and is hereby dismissed."*

Before the Court the appellant has six grounds of appeal. He challenged the evidence on the age of the complainant that there was no birth certificate

that was produced in evidence to prove her age that she was below 18 years. Also challenged by the appellant was the evidence that the complainant was a student while there was no evidence from her teachers or an attendance register to show that she used to go to school. Regarding the child that was born by the complainant, the appellant said there is no evidence of DNA to prove that he is the father of the child. The other ground of complaint by the appellant is that the doctor who filled the PF 3 was not called to give evidence. The appellant also complained about the contradiction concerning the evidence of PW1 and the PF3 on the age of the pregnancy when PW1 was examined. PW1 said in her evidence that she was found with a pregnancy of three months but the PF3 showed that she was six months pregnant. Lastly the appellant's complaint is that the case against him was not proved beyond reasonable doubt.

The appeal was called for hearing on 12th April 2016. The appellant entered appearance in person. He fended himself. Ms. Rhoda Ngole, learned State Attorney entered appearance for the respondent/Republic. In arguing the appeal the appellant said he would let the learned State Attorney reply to his grounds of appeal first.

In reply to the grounds of appeal, the learned State Attorney referred to the grounds of appeal that were filed by the appellant in the first appellate court. She said the appellant filed seven grounds of appeal in the first appellate court. In this Court he filed six grounds of appeal. However, said the learned State Attorney, out of the six grounds of appeal he filed in the Court, the first to the fifth grounds of appeal are new grounds. She referred the Court to the case of **Nurdin Musa Wailu V Republic** Criminal Appeal No. 164 of 2004 (unreported) and asked the Court not to consider the new grounds of appeal. In the case cited the Court held that:

> *"...usually the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."*

The appellant had no useful reply on the issue of raising new ground not raised, discussed and determined by the trial court nor the first appellate court. We have carefully gone through the grounds of appeal which the appellant raised in the first appellate court. In the High Court the grounds of appeal by the appellant were that the trial magistrate did not consider the substantive law related to children, it erred in its evaluation of the evidence,

his defence was not considered, the proceedings were a nullity because he did not say that he married the complainant, that he was young man of age and he attached his birth certificate to prove his age and because of his age he was not supposed to be sentenced to imprisonment.

On comparing the grounds of appeal filed by the appellant in the High Court and in this Court, we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of **Nurdin Musa Wailu V R** supra, the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts. For this reason, we will not consider grounds number one to number five of the appellant's grounds of appeal. This however, does not mean that the Court will not satisfy itself on the fairness of the appellant's trial and his conviction.

Regarding the ground of appeal raised by the appellant that the case was not proved beyond reasonable doubt, the learned State Attorney submitted that PW1 explained her relationship with the appellant. The contradictions in the PF3, said the learned State Attorney, was not used to convict the appellant because the evidence of PW1 was sufficient for the conviction of the appellant. She referred again to the case of **Nurdin Musa Wailu** supra**.** Moreover, said the learned State Attorney, the admission by

the appellant that he had sexual intercourse with the victim, corroborated the evidence of the complainant that the offence of rape was established. She supported her submission by the case of **Niyonzimana Augustine V Republic** Criminal Appeal No. 483 of 2015 (unreported). She prayed that the appeal be dismissed.

The appellant in reply insisted that the age of the complainant that she was seventeen years was not proved and even evidence to support her that she was a student was not brought in court. However, he went further to say that the complainant was his fiancée and he was charged because of failing to pay the father of the complainant the dowry he had asked for. He prayed that his appeal be allowed.

It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika** [2002] T.L.R. 296 the Court held that:

> *"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the*

prosecution evidence against him which establishes his guilt beyond reasonable doubt."

The issue before the Court is whether the appellant's appeal has merit. In the case of **Shabani Daudi V Republic** Criminal Appeal No. 28 of 2000 (unreported) the Court held that:

> *"...the credibility of a witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of the witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses,* ***including the accused.*** *"*(Emphasis ours)

Apart from the evidence of the complainant that the appellant was her lover and she had sex with him which resulted into her becoming pregnant and delivering a baby boy later, the appellant himself admitted that the complainant was his lover. His defence was that the complainant was his wife. But the prosecution evidence was that the complainant was a student and she was under the age of eighteen. When both PW1 and PW2 testified in

court, the appellant did not dispute the age of the complainant nor the fact of her being a schoolgirl then. Even the charge sheet clearly stated that she was fifteen.

The appellant was charged with statutory rape. In his defence the appellant testified that:

> *"I loved PW1. I come to know after I discovered he was pregnant. (sic). I used to take her where I slept. It was secret and my parents would not know our association."*

In the case of **Seleman Makumba V R** [2006] T.L.R 379 at page 384 the Court observed 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 that there was penetration."*

The learned judge on first appeal correctly held that the evidence of the complainant that it was the appellant who raped her was corroborated by that of the appellant who admitted he had love affairs with the complainant. A child was born. Obviously there was penetration. But that was a forbidden

affair by the law. The purpose of enacting section 130(1) and 130(2) (e) of the Penal Code is to protect girls and to assure that their right to education, good health, employment, development opportunity and all other rights available to all other human beings as stipulated in the Constitution and the International Instrument to which the country has ratified are not tampered with. In this case the appellant having admitted involving himself in a forbidden sexual affair by the law, he cannot escape from the consequences of penalties which go with such a breach of the law. The appeal by the appellant is dismissed in its entirety.

DATED at MBEYA this 13th day of April, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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

E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL