IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 391 of 2016

CHARLES JUMA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tanga)

(Aboud, J.)

dated 5th day of August, 2016

In

Criminal Appeal No. 56 of 2016

JUDGMENT OF THE COURT

19th & 27th April, 2018

MWARIJA, J.A:.

The appellant was charged in the District Court of Handeni with the offence of incest by male contrary to section 158 (1) (a) of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 22/12/2013 in the night at Msangazini Chogo village in Handeni district, Tanga region, the appellant did have carnal knowledge of Magreth Charles while he had knowledge that she is her daughter. The appellant denied the charge.

The case for the prosecution in the trial court was dependent on the evidence of three witnesses who included the person on whom the offence was allegedly committed, the said Magreth Charles who was at the material time of the offence, aged 14 years. On his part, the appellant was the only witness for the defence.

The facts giving to rise the arraignment and conviction of the appellant are not complicated. It was not disputed that the appellant is biological father of Magreth (PW1). Apart from PW1, the appellant had other three children including Anna who was at the material time, aged 11 years. The appellant was the only parent living with his children at home because their mother had passed away.

In her evidence, which she gave after *voire dire* examination had been conducted on her, PW1 testified on oath that the appellant used to undress her on several occasions and had carnal knowledge of her, the act which caused her to suffer pain in her vagina. According to her, on 22/12/2013 when the appellant continued with the behaviour of raping her, she decided to report him to one Asha Ally (PW3) who owned a restaurant at a nearby place known as Kwedichele. On her part, when

testifying in the trial court, PW3 supported the evidence of PW1, that the matter was reported to her on 22/12/2013. The said witness took action by taking PW1 to Chogo Police station where she was issued with a P.F. 3 so that she could be taken to hospital for medical examination. PW3 returned the PF3 to the police and subsequently, the appellant was charged.

The prosecution relied also on the evidence of PW1's younger sister, Anna Charles (PW2). She also gave her evidence on oath after *voire dire* examination was conducted on her. It was her testimony that the appellant used to sexually molest PW1 during night times when they had gone to sleep. According to her evidence, she used to witness the appellant undressing PW1, lie on top of her and sexuality molested her, the acts which made PW1 to cry for pain. She said that, the appellant used to order her to get out before he started raping PW1.

In his defence, the appellant testified that on 21/12/2014, three persons, a boy and two girls arrived at his home at 5:00 p.m. Those persons asked him to permit them to take his children to a restaurant. They took them there and stayed until 8:00 p.m. When the children

returned home, they told him that they were offered tea at the restaurant. On the next day, he saw certain cows which were about to stray into his farm. He directed his children to look after the cows while he went to inform their owner. Incidentally he said, one of the cows died. It was then that he was arrested on allegation that he raped his children.

Having considered the prosecution and the defence evidence, the learned trial Resident Magistrate found that the case against the appellant had been proved beyond reasonable doubt. The appellant was accordingly convicted and sentenced to 30 years imprisonment.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. His appeal was dismissed hence this second appeal. His memorandum of appeal, consists of six grounds which boil down to two main grounds as follows:-

1. That the learned High Court judge erred in upholding the decision of the trial court which was based on the evidence fabricated by PW3 through PW1 and PW2.

2. That the learned High Court judge erred in upholding the appellant's conviction while the prosecution did not prove the charge beyond reasonable doubt as the evidence was lacking in the following material aspects:

(i) Both the arresting and the investigating officers were not called to testify.

(ii) After the medical report (Exh.P3) had been expunged, the remaining evidence was insufficient to warrant the appellant's conviction.

(iii) The failure by PW2 to describe the source of light which enabled her to see the appellant committing the offence rendered her evidence unreliable.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms Rebecca Msalangi, learned State Attorney. In arguing his appeal, the appellant opted to hear first, the learned State Attorney's reply submission and that he would, if the need arose, make a rejoinder.

Ms Msalangi started with the stance that she supported conviction. With regard to the paraphrased first ground of appeal, it was the learned State Attorney's submission that the ground has been raised for the first time in this Court. Since that ground was not argued in the trial court or the High Court, she submitted the same should not be entertained. To bolster her argument, she cited the case of **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013 (unreported).

As for the 2nd paraphrased ground of appeal, Ms Msalangi argued that the charge against the appellant was proved beyond reasonable doubt. According to her, the evidence of PW1, PW2 and PW3 sufficiently proved the charge against the appellant even without medical report or corroborating evidence. Relying on the provisions of S. 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] and the case of **Selemani Makumba v. Republic;** Criminal Appeal No. 94 of 1999 (unreported) she argued that the evidence of PW1 which was found to be credible as the same was not shaken; proved the case against the appellant. She added however, that even if corroboration would be required, the evidence of

PW2 which proves that she used to be ordered to get out whenever the appellant raped PW1, is sufficient for that purpose.

In his rejoinder, the appellant insisted on denying the offence. He stressed that the case against him was framed up by PW3 after the appellant had refused her request to allow his children to work in PW3's restaurant. It was for this reason, he argued, PW3 influenced PW1 and PW2 to give fabricated evidence against him.

Having considered the submissions made by the learned State Attorney and the appellant, we outrightly agree with Ms Msalangi that the first ground of appeal is devoid of merit. That ground was raised for the first time in the appellant's memorandum of appeal. It was not canvassed and determined in the trial court or the High Court. As correctly argued by the learned State Attorney therefore, it cannot be entertained at this appellate stage of the proceedings. In the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 416 of 2013 (unreported), cited in the case of **Hussein Ramadhani v. The Republic,** Criminal Appeal No. 195 of 2015 (unreported), the Court stated as follows on that position:

"It is now settled as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; and not on new matters which were not raised nor decided by either the trial court or the High Court on appeal."

Given the position of the law as stated above, the first ground of appeal fails.

Turning to the second paraphrased ground of appeal, that ground is essentially hinged on the sufficiency or otherwise of the evidence. We wish to state here that this being a second appeal, the Court cannot interfere with the concurrent findings of the courts below on matters of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principles of law or procedure – See the cases of **DPP v. Jafari Mfaume Kawawa** [1981] TLR 149; the **DPP v. ACP Abdallah Zombe & 8 others,** Criminal Appeal No. 358 of 2013 and **Akiba Daudi v. Republic,** Criminal Appeal No. 81 of 2004 (both unreported).

In convicting the appellant, the trial court believed the evidence of PW1 and PW2. As submitted by Ms Msalangi, the position of the law is that in criminal proceedings involving sexual offences the true evidence of its commission has to come from the victim. In the case of **Selemani Makumba** (supra) cited by the learned State Attorney, the Court stated 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."*

Furthermore, according to S. 127 (7) of the Evidence Act which was also cited by the learned State Attorney, the same provides as follows:

> *"127 (1) – (6) ....N/A*
>
> *(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years*

or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

In this case, both the trial court and the High Court found the evidence of PW1 to be credible. As argued by Ms. Msalangi, that evidence was not shaken. As observed by the learned first appellate judge, when she was cross-examined by the appellant, PW1 stated as follows:-

"When you sexed with me it was daily even [God] knows."

Having carefully scrutinized the prosecution evidence particularly of PW1's, testimony, we agree that the case was sufficiently proved. The

evidence of PW1 to which we have no reason to doubt its credibility was sufficient to base the appellant's conviction.

As submitted by the learned State Attorney however, there was also the evidence of PW2 who used to witness the appellant's act of raping PW1. Whenever he wanted to do so, he ordered PW2 to get out of the room. We find the appellant's defence that PW2's evidence should not be believed because she did not describe the source of light which enabled her to witness the incidences of rape, is an afterthought. In the first place, he did not raise that point in the trial court. Secondly, it was PW2's evidence that her sister (PW1) used to cry for pain whenever the appellant raped her. That proves that the appellant did have a carnal knowledge

of PW1 whenever he ordered PW2 to get out of the room.

On the basis of the reasons stated above, we find the other aspects in the appellant's second ground of appeal untenable. The fact that the arresting and the investigating officers did not testify, did not have any adverse effect on the prosecution evidence.

In the event, like the first appellate court, we find that there was watertight evidence proving the offence against the appellant. The appellant's conviction was well founded. As a consequence the appeal is hereby dismissed.

DATED at **TANGA** this 27th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL