IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MZIRAY, J.A, MKUYE, J.A And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 161 OF 2017

KARIM SEIF @ SLIM ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 8th day of November, 2016
in
Criminal Appeal No 71 of 2016

JUDGMENT OF THE COURT

1st & 6th November, 2019

MWAMBEGELE, J. A.:

In this second appeal the appellant Karim Seif @ Slim seeks to assail the decision of the High Court (Ngwala, J.) in criminal Appeal No. 71 of 2016 which upheld the decision of the District Court of Chunya at Chunya in Criminal Case No. 59 of 2016. The trial court convicted him of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged in the charge sheet that on 28.01.2016, at Ifuma Village in Chunya District, he had carnal knowledge of a certain KI; a girl aged eight years old. He pleaded not

guilty to the charge after which a full trial ensued. After the full trial in which the respondent Republic fielded four witnesses, he was found guilty, convicted and sentenced to life in prison and twelve strokes of the cane. Aggrieved, he unsuccessfully appealed to the High Court. Undaunted, he has come to this Court still complaining his innocence.

At this juncture, we find it apt to narrate, albeit briefly, the material background facts leading to this appeal before us as can be gleaned in the prosecution's oral and documentary evidence. They go thus: on 28.01.2016 at about 14:00 hours, the victim (PW1), a resident of Lupatingatinga village, was together with others at Gengeni area in the village selling rice buns; otherwise known as *vitumbua* in Kiswahili. While there, the appellant appeared asking the victim to go with him at his residence under the pretext that he wanted to buy all her buns. Unsuspecting, and on the advice of one woman whose name was not disclosed but was also selling buns there, the victim agreed.

Pretending to take the victim to his residence, the appellant lured her to the bush where he forcibly undressed her underpants and started to ravish her. Efforts by the victim to yowl for help proved futile, for, the appellant stifled her mouth. The victim felt pains in her vagina, buttocks

and backbone. She tried to escape once by running away but the appellant ran after her, got hold of her and took her to where they initially were threatening to kill her in the process. The appellant gratified his sexual lust by rape and sodomy and, as if that was not enough, he ate all the remaining 25 rice buns and "stole" Tshs. 3,200/= from the victim, the proceeds of that day's sales.

The second attempt by the victim to escape from the ordeal was successful. She ran away from the appellant and on the way home she met a certain Baba Gayo to whom she narrated what had befallen her. Baba Gayo took the victim to her mother Salma Salum (PW2) where she told her she was sexually assaulted by a person she was familiar with but that she did not know his name, however, she identified the ravisher as a person with an unusually big nose with a pimple on it. She also told them that she used to see him working in a certain salon as a barber. PW2 took the victim to Lupatingatinga Police Post where a PF3 was obtained from G8300 PC Emmanuel (PW3). The victim was taken to Mtanila Health Centre on the same day where Asajile Mkumbwa (PW4); a medical officer, examined her and, *inter alia*, saw simple bruises on her vagina. PW4 tendered the relevant PF3 without any objection from the appellant and was admitted in evidence as Exh. P1.

The appellant was later arrested, arraigned, convicted and sentenced by the District Court and unsuccessfully appealed to the High Court as alluded to at the beginning of this judgment.

When the appeal was placed before us for hearing on 01.11.2019, the appellant appeared in person, unrepresented. The respondent Republic was represented by Mr. Ofmedy Mtenga, learned State Attorney.

We first gave the floor to the appellant to argue his appeal. Fending for himself, the appellant adopted the memorandum of appeal he lodged and asked the learned State Attorney to respond to the grounds in the memorandum after which, need arising, he would make a rejoinder.

Responding, Mr. Mtenga expressed his stance at the very outset of his response that the respondent Republic supported both the conviction and sentence meted out to the appellant. However, the learned State Attorney intimated to the Court that he would address the Court on only the first, second, third and tenth grounds of appeal, because the rest of the grounds were new; not dealt with by the High Court on first appeal. To that course of action, the appellant had no qualms. We thus allowed the learned State Attorney to make a response on only the first, second, third and tenth grounds.

On the first ground which is a complaint that the age of the victim was not proved because no birth certificate was tendered to verify that the victim was aged eight years, Mr. Mtenga submitted that at law, age is not necessarily proved by production of a birth certificate; it may be proved by other means. He added that the charge sheet, the *voire dire* examination and the PF3 which was admitted into evidence as Exh. P1, showed that the victim was eight years of age. The charge sheet, he submitted, was read over and explained to the appellant at the beginning of the trial. The appellant thus knew what charges were facing him. Likewise, he added, the PF3, in which the age of the victim is shown to be eight years, was tendered without any objection from the appellant. Had the appellant doubted the age of the victim he would have cross-examined on it, failure of which it can be presumed that his complaint regarding the age of the victim is but an afterthought. For this proposition, he cited to us **Bakari Abdallah Masudi v. Republic**, Criminal Appeal No. 126 of 2017 (unreported). On proof of age other than birth certificate, Mr. Mtenga referred us to our decision in **Osward Kasunga v. Republic**, Criminal Appeal No. 17 of 2017 (also unreported). The first ground has not merit, he argued, it should be dismissed.

The learned State Attorney consolidated the second and third grounds of appeal in his response. The complaint on the second ground is on identification of the appellant at the scene of crime and the third ground is on the identification of the appellant at the Identification Parade. On the first limb, he argued that the victim testified that she knew the appellant before as she used to see him at a salon at Lupatingatinga and he identified him as a person with an unusually big nose with a pimple on it. The appellant never denied this evidence at the trial. Neither did he cross-examine on them. The second ground, he submitted, also had no merits.

Regarding the second limb, the subject of the third ground, the learned State Attorney submitted that as the appellant was known to the victim, the identification parade was not necessary. For this stance, he cited and supplied to us **Jackson Kihili Luhinda and Another v. Republic**, Criminal Appeal No. 139 of 2007 (unreported). The learned State Attorney found merits in the third ground of appeal.

With regard to the tenth ground which is a general complaint that the charge against the appellant was not proved beyond reasonable doubt, Mr. Mtenga submitted that there was ample evidence from the victim who testified on how the appellant lured her to the bush and ravished her in

broad daylight, ate the rice buns and took the money from her. Immediately after she disentangled herself from the appellant she met Baba Gayo and later PW2 and told them what had befallen her and described the assailant as a person he knew before, except for his name. He described the ravisher as having an unusually big nose with a pimple on it. The same description was made before PW3 at the Police Post. The ability of the victim to name the assailant at the very possible moment, in the light of **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39, depicts her reliability, he argued. He added that the trial court found her as a reliable witness after considering her demeanor and her evidence was coherent. So did the High Court. The learned counsel urged us to follow the judgment of trial court which had the opportunity to see the demeanor of the witness. The learned State Attorney promised to supply us with the authority on the point at a later stage and indeed, he walked the talk by supplying it timely; that is, before finishing composing this judgment. He supplied **Abdallah Mussa Mollel @ Banjoo v. Republic**, Criminal Appeal No. 31 of 2008, (unreported).

Having submitted as above, the learned State Attorney urged us to dismiss the appeal.

Rejoining, the appellant challenged the appellant for not procuring to testify some important witnesses. He submitted that the respondent should have brought to testify those women who were with the victim selling buns. They should also have fielded Baba Gayo who was the first to see the victim after the alleged rape. To the appellant, it was Baba Gayo who raped the victim and that is the reason why the prosecution did not procure him to testify. He stressed that Baba Gayo might have possessed an unusually big nose with a pimple on it, for, he argued, his (appellant's) nose was normal and had no pimple. He denied to have worked in a salon at Lupatingatinga as a barber.

On identification parade, like Mr. Mtenga, the appellant submitted that it was not necessary because the victim allegedly knew him before. After all, the policeman who conducted it, one Bwire; the Officer Commanding Station (OCS), was not called to testify. That evidence, he submitted, should not be considered.

Having provided the material background facts to the appeal before us and having summarized the submissions of the parties, we now are in a position to confront the three grounds of appeal addressed by the parties. Admittedly, the fourth, fifth, sixth, seventh, eighth and ninth grounds of

appeal have surfaced in this Court. They were not decided by the High Court on first appeal. On a plethora of authorities on the point, this Court will not have jurisdiction to entertain them on this second appeal – see: **Sadiki Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012, **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013, **Yusuph Masalu @ Jiduvi v. Republic**, Criminal Appeal No. 163 of 2017, **Abedi Mponzi v. Republic**, Criminal Appeal No. 476 of 2016 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013; all these are unreported decisions of the Court cited in our recent decision in **Rajabu Ponda v. Republic**, Criminal Appeal No. 342 of 2017 (also unreported). Others are **Diha Matofali v. Republic**, Criminal Appeal No. 245 of 2015 and **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 (both unreported) cited therein. Others in the list are **Abdul Athuman v. Republic** [2004] TLR. 151 and **Samwel Sawe v. Republic,** Criminal Appeal No, 135 of 2004 and **Juma Manjano v. Republic,** Criminal Appeal No. 211 of 2009 (both unreported) cited in **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016 (also unreported). In **Samwel Sawe** (supra), for instance, the Court articulated:

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of ***Abdul Athuman vs R*** *[2004] TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

[As cited in **George Mwanyingili** (supra)]

The foregoing explains why we did not allow the parties to address us on the grounds which surfaces before us for the first time.

Adverting to the remaining grounds of appeal we will determine them one after another. The first one being a complaint that the age of the victim was not proved because no birth certificate was brought to prove that the victim was aged eight years. The position of the law in this jurisdiction is as stated by the learned State Attorney; that is, age of a person may be proved by means other than a birth certificate. In **Osward Kasunga** (unreported), the case referred to us by the learned State

Attorney, we observed at p. 13 of the typed judgment that age of the victim could be proved by oral testimony.

Luckily, this is not the first time the courts are faced with the issues. The age of a person was at issue in **Byagonza v. Uganda** [2000] 2 EA 351 in which the Supreme Court of Uganda quoted an excerpt from **Halsbury's Laws of England** (4 Edn) Volume 17, paragraph 42 which the Supreme Court of Uganda agreed to be the correct position of the law on proof of age. It states:

> *"Age may be proved by various means, including the statement by a witness of his own age and the opinion of a witness as to the age of another person, but when age is in issue stricter methods of proofs, may be required. In these cases, age may be proved by the admission of a party; by the evidence of a witness who was present at the birth of the person concerned, by the production of a certificate of adoption or birth, supplemented by evidence of identifying the person whose birth is there certified, by the oral or written declarations of deceased persons, and in civil proceedings, by the statement in writing of a person who could have sworn to the fact. In certain criminal and other cases in which the age of a person is material, the*

age will be presumed or deemed, to be what appears to the court to be his age at the relevant time after considering any available evidence".

We subscribe to the foregoing position as depicting the correct position of the law in our jurisdiction regarding proof of age. In the case at hand PW4 tendered a PF3 which indicated the age of the victim as eight years. Age of the victim was therefore proved by evidence of the witness.

As an extension to the above arguments, the appellant never cross-examined PW4 on the age of the victim. When the witnesses wanted to tender the PF3 as exhibit, the court simply stated:

"Your Honour, I have no objection with the admission of it since what is written in this PF3 is all about this court"

Although this piece of evidence seems inelegantly recorded, we are certain in our mind that the phrase "this PF3 is all about this court" the trial court meant the details in the PF3 were meant for the court. We think, if the appellant had some doubts with regard to the contents of the PF3 especially regarding the age of the victim, he would not have failed to object to its production in evidence or to cross-examine on the same. That was not done and, as rightly submitted by the learned State Attorney, on

the authority of **Bakari Abdallah Masudi** (supra), that amounted to acceptance of the contents thereof. We observed at p. 11 in of **Bakari Abdallah Masudi** (supra):

> *"It is now settled law in this jurisdiction that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence on that aspect - see:* ***Damian Ruhele v. Republic****, Criminal Appeal No. 501 of 2007,* ***Nyerere Nyague v. Republic****, Criminal Appeal No. 67 of 2010 and* ***George Maili Kemboge v. Republic****, Criminal Appeal No. 327 of 2013 (all unreported)."*

In the light of the foregoing authorities, we find the first ground without merits and it is accordingly dismissed.

Next for consideration is the second ground of appeal which is a complaint to the effect that the appellant was not identified at the scene of crime. The star witness for the prosecution in the case at hand is PW1 herself. We have held times and again that in sexual offences, the best evidence is that of the victim – see the oft-cited **Seleman Makumba v. Republic** [2006] TLR 379. In the case at hand the victim testified that she knew the appellant before as he worked as a barber at a salon at

Lupatingatinga. According to her, they walked some distance past houses until they went into the bush where she was ravished. After the appellant gratified his sexual lust, the victim managed to run away. On her way home she met one Baba Gayo who took her to PW2; her mother. She described the appellant whose name was not familiar to her as the person who sexually assaulted her. We think the appellant was adequately recognized by the victim. After all, the appellant was mentioned by the victim at the earliest opportunity before PW2 and Baba Gayo who was not called to testify, by describing him as a person with an unusually big nose with a pimple on it. The same description was maintained before PW3; a policeman who gave them a PF3 to go to PW4 for medical examination. As articulated by this Court in **Marwa Wangiti Mwita** (supra), the ability to name the suspect at the earliest opportune moment is an all-important assurance that the witness is reliable, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. We are satisfied that the star witness in the case at hand was quite reliable and the trial court rightly so found. As it is the trial court which observed the demeanor of the witness and found her credible and reliable as she was consistent and coherent in her testimony, we find ourselves unable to fault its finding. In **Abdallah Mussa Mollel @ Banjoo** (supra), the case

referred to by the learned State Attorney, at pp. 14 – 15, we quoted the following excerpt from **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2000, which quote we think merits recitation here:

> *"Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a 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 that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.*** *Our concern here is the coherence of the evidence of PW1."*

Likewise, we wish to borrow a leaf from our decision in a civil case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and Others** [1994] TLR 132 in which we held, quoting from the headnote, as follows:

> *"Where the decision of a case is wholly based on the credibility of the witnesses then it is the trial court which is better placed to assess their*

credibility than an appellate court which merely reads the transcript of the record".

On the above authorities, we find ourselves loathe to interfere with the assessment of the demeanor of PW1 by the trial court. The second ground of appeal is, therefore without merit.

The third ground of appeal is a complaint about the Identification Parade. This ground will not detain us. At the kernel of this complaint is the argument that as PW1 allegedly knew the appellant before, there was no need to conduct the Identification Parade of the appellant. The learned State Attorney conceded to this ground, which opportunity was also accepted by the appellant. We, like the learned state Attorney, think this complaint is justified. We have pronounced ourselves so in a number of our decisions; one of them being **Jackson Kihili Luhinda** (supra), the case referred to by the learned State Attorney. In that case, at p. 10 thereof, we relied on our previous decision in **Hassan Juma Kanenyera v. Republic** [1992] TLR 106 in which an excerpt from **Sarkar, Law of Evidence**, 13th Edition was quoted to underscore the point. We quoted from p. 99 of that legal work:

"An identification parade is useless if persons put on the parade to be identified are known to the person who is to make the identification."

Guided by the above, we, like the appellant and the learned State Attorney, are of the considered view that, given that the victim knew the appellant before the incident, the identification parade was of no value addition to the prosecution case. It was superfluous. The third ground is meritorious.

Last for consideration is the tenth ground of appeal which is a complaint to the effect that the case against the appellant was not proved beyond reasonable doubt. As already stated above, there is evidence from the prosecutrix that on the material day, at about 14:00 hours, she was at Magengeni area when the appellant appeared and asked her to go with her at his home so that he could buy all the remaining rice buns she was selling. Not knowing that that was the beginning of a very tormenting moment she was going to encounter, and on the advice of one woman there, she agreed. What followed is a tragic story; the appellant led her into the bush where she was ravished, sodomized and robbed with Tshs. 3,200/=. She spent quite some time with the appellant who was known to him as she used to see him at as a barber at one salon at Lupatingatinga.

The ample time the victim spent together with the appellant who was acquainted with her, in our considered view, excludes any possibilities of any mistaken identity. We are of the view that the case against the appellant was proved to the hilt. His conviction was therefore deserved.

The above said, we are unable to fault the concurrent findings of the two courts below. This appeal is dismissed.

Order accordingly.

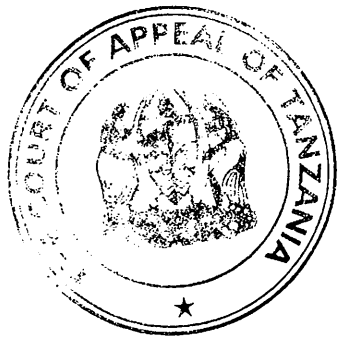
DATED at **MBEYA** this 5th day of November, 2019.

R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of the Appellant in person and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL