IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 225 OF 2017

MARIKO THOMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Makani, J.)

dated the 23rd day of December, 2016
in
DC Criminal Appeal No. 91 of 2016

JUDGMENT OF THE COURT

24th & 27th August, 2020

KEREFU, J.A.:

In the Resident Magistrate Court of Shinyanga, the appellant, Mariko Thomas was charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged that on 9th day of September, 2013 at Wella Village within Kishapu District in Shinyanga Region the appellant had carnal knowledge of a girl aged thirteen (13) years old. To conceal her identity, we shall refer to her as 'XYZ' or simply 'PW2'.

Upon a full trial, the appellant was found guilty, convicted and sentenced to a prison term of thirty years, twelve strokes of the cane and to pay fine at the tune of TZS 100,000.00. In addition, the appellant was ordered to pay a compensation of TZS 500,000.00.

The material facts leading to the appellant's arrest as obtained from the record of the appeal indicate that, on 9th September, 2013, PW2 was grazing goats. The appellant came and seated nearby under a mango tree. Thereafter, he called PW2 and by using his legs he tripped her and PW2 fell down. The appellant undressed her, took off her pants and raped her. PW2 screamed for help. Elizabeth Tagala (PW1) PW2's mother saw the goats coming home without PW2. She made a follow-up and that is when she heard someone screaming for help. She went to where the sound was coming from and found the appellant under trees on top of PW2, raping her. PW1 called one Charles Mashibe PW2's father. The appellant ran away and PW1 took PW2 home and narrated the incident to PW2's father, hence a search for the appellant was mounted. He was arrested and taken to the police. PW2 after obtaining a PF3 from the police, was taken to the hospital for medical examination, where Mbonge Peter Kaijunga, a clinical officer (PW3),

conducted an examination and found that she had bruises in the '*labium minora*' parts of her vagina. PW3 filled the PF3 to that effect and the same was tendered in evidence as exhibit P1.

In his defence, the appellant denied involvement in the commission of the offence. He challenged the evidence of PW1, PW2 and PW3 that they gave untrue story before the trial court. He, in particular asserted that, he was framed up by PW1 who wanted to have a love affair with him but he refused. At the end of it all, the trial court found the charge proved against the appellant to the hilt. Hence, the appellant was found guilty, convicted and sentenced as indicated above.

The appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still protesting his innocence, he has preferred an appeal to this Court. In the Memorandum of Appeal, the appellant raised four grounds of appeal based on the following complaints: **one,** that the first appellate court erred in law by relying on the evidence of PW2 who was 13 years old which was recoded without subjecting her to a *voire dire* test; **two,** that PW3, was not qualified to fill the PF3 as he was a clinical officer;

three, that, the prosecution case was not proved beyond reasonable doubt and **four,** that both lower courts erred in law and fact by relying on uncorroborated evidence of PW1.

At the hearing of the appeal, the appellant appeared remotely in person without legal representation through a video conference facility linked to Shinyanga District Prison. The respondent Republic was represented by Mr. Tumaini Kweka, Principal State Attorney assisted by Ms. Wampumbulya Shani, learned State Attorney.

When invited to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the respondent respond first but he reserved his right to rejoin, if need to do so would arise.

It was Ms. Shani who responded to the appellant's ground of appeal, who at the outset, declared the respondent's stance that it was resisting the appeal. In her response to the first ground, Ms. Shani referred us to page 50 of the record of appeal and argued that the record of appeal shows that the evidence of PW2 was discounted by the first appellate court. She said that in its decision, the first appellate court relied on the evidence of PW1 and PW3 who, she said, were

independent witnesses whose testimony proved the case against the appellant. She elaborated that, PW1 proved that PW2 was raped and the evidence of PW1 was corroborated by PW3 who tendered exhibit P1 (the PF3). To bolster her proposition, she cited to us the case of **Kimbute Otiniel v. Republic,** Criminal Appeal No. 300 of 2011 (unreported).

As regards the second ground of appeal, Ms. Shani argued that the appellant's complaint that PW3 was unqualified person to conduct medical examination to PW2 and fill the PF3 has no legal basis. To justify her proposition, she cited to us section 3 of the Medical, Dental and Allied Health Professionals Act, No. 11 of 2017 and argued that PW3, a clinical officer, was a qualified medical practitioner competent to conduct medical examination on PW2, as he did. She thus invited us to dismiss the second ground of appeal for lack of merit.

Finally, on the third and fourth grounds of appeal, Ms. Shani submitted that the first appellate court properly relied on the evidence of PW1 as she went to the scene of crime and saw the appellant on top of PW2. Ms. Shani added that the evidence of PW1 was corroborated by PW3 who examined the victim and proved that she was raped. It

was her strong argument that the prosecution case against the appellant was proved beyond reasonable doubt and she thus prayed that the entire appeal be dismissed for lack of merit.

In rejoinder, the appellant still disassociated himself from the accusations. He contended that the entire incident was framed up by PW1. He reiterated what he said in his defence that PW1 wanted to have love affairs with him and when he refused, she decided to come up with this fictitious case against him. He strongly disputed the evidence of PW1, PW2 and PW3 that they gave untrue story before the trial court. He thus urged us to consider the grounds of appeal, allow the appeal and set him free as he said, he had been in prison for eight (8) years for an offence which he did not commit.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, the main issue for our consideration is whether the prosecution proved its case beyond reasonable doubt.

We wish to begin with the second ground of appeal which is a complaint on the qualifications of PW3 the clinical officer who examined

PW2 and filled the PF3. We hasten to remark that, we are in agreement with Ms. Shani that PW3, a clinical officer was a qualified medical practitioner competent to conduct medical examination on PW2. We find support in our previous decisions in the cases of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 and **Julius Kandonga v. Republic,** Criminal Appeal No. 77 of 2017 (both unreported) where we considered a similar issue and found that a clinical officer is a qualified and authorized medical practitioner to conduct medical examinations, as he did on PW2. In this regard, we find that PW3's evidence on that aspect cannot be faulted. Thus, the second ground of appeal is devoid of merit.

As already pointed out, the first ground of appeal alleges that the evidence of PW2 was improperly relied upon because the trial court recorded it without conducting a *voire dire* test as mandated by the law.

Our starting point on this issue, is section 127 (2) of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the Evidence Act) which was the law applicable then prior to the 2016 amendment vide The Written

Laws (Miscellaneous Amendments) (No. 2) Act, 2016. Subsection (2), as it stood then, read: -

> *"Where in any criminal cause or matter* ***a child of tender age called as a witness*** *does not, in the opinion of the court, understand the nature of an oath, his evidence may be received though not given upon oath or affirmation,* ***if in the opinion of the court, which opinion shall be recorded in the proceedings,*** *he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth." [Emphasis added].*

The expression '*a child of tender age'* is defined under subsection (5) of the same section before being renumbered by the amending Act, as: -

> *"For the purposes of subsections (2), (3) and (4) the expression 'child of tender age' means* ***a child whose apparent age is not more than fourteen years."***

In the instant case, the evidence of PW2 was recorded on 9th June, 2014 when PW2 was fourteen (14) years old. So, her evidence ought to have been recorded after complying with the requirements of

section 127 (2) of the Evidence Act, but that was not the case as a *voire dire* test was not conducted at all. In the case of **Kimbute Otiniel** (supra) cited to us by Ms. Shani, the Court considered the consequences of the misapplication of or non-direction in the conduct of a *voire dire* test by a trial court under section 127 (1) and (2) of the Evidence Act and stated that: -

> *"Where there is a **complete omission by the trial court** to correctly and properly address itself on sections 127 (1) and 127 (2) governing the competency of a child of tender years, **the resulting testimony is to be discounted.**" [Emphasis supplied].*

Therefore, since in this case, the said section was not complied with, it goes without saying that the evidence of PW2 was worthless and it was improper for the trial court and the first appellate court to rely on such evidence. After the omission by the trial court to conduct the *voire dire* test to PW2, the first appellate court ought not to have left that evidence to stand.

We are mindful of the fact that in her submission, Ms. Shani, while arguing on this issue she referred us to page 50 of the record of

appeal and submitted that the first appellate court discounted the evidence of PW2 and relied only on the evidence of PW1 and PW3. With great respect, we do not agree with her, because her assertion is not supported by the record of the appeal, as we shall demonstrate. The first appellate court at page 50 after considering the authority of **Kimbute Otiniel** (supra), stated that: -

> *"In similar vein, I will endeavor, in the absence of the voire dire test, to proceed to determine the case on its own merit taking into account the independent evidence of PW1 and PW3 and also the rights of the accused. I will consider the grounds together."*

However, in its final decision found at page 51 of the record, the first appellate court concluded that: -

> *"As established hereinabove, penetration was proved by PW1, **PW2** and PW3 hence the offence of rape was committed." [Emphasis added].*

It is our considered view that, it was improper for the first appellate court to base its decision on the evidence of PW2 which in terms of section 127 (2) of the Evidence Act and **Kimbute Otiniel** (supra), such evidence was required to be discounted from the record. Now, since that was not done and for the reasons we have just

assigned, we are constrained to discount that evidence and expunge it from the record of this appeal. In the event, we find the first ground of appeal to have merit.

Now, after expunging the evidence of PW2 from the record of appeal, then, the immediate crucial issue which has exercised our mind, is whether the remaining evidence on record is sufficient to sustain the appellant's conviction. Anyhow, this issue brings us to the third and fourth grounds of appeal where the appellant's complaint is to the effect that the prosecution case was not proved beyond reasonable doubt.

In her submission, in an attempt to address the third and fourth grounds of appeal, Ms. Shani argued that even after discounting the evidence of PW2 the remaining evidence of PW1 and PW3 is adequate and sufficient to prove the case against the appellant. With due respect, we are unable to agree with Ms. Shani on this point as it is clear that the trial court and even the first appellate court sustained the appellant's conviction after being satisfied that the offence of rape was proved by PW1, PW2 and PW3. Thus, the evidence of PW1 and PW3

corroborated the evidence of PW2 the victim and the best witness in this case.

We thus wish to restate at this juncture the well-established principle by this Court that the best evidence in sexual offences, like the one at hand, comes from the victim herself as she is the one to express her sufferings during the incident. See the cases of **Selemani Mkumba v. Republic** [2006] T.L.R. 379, **Hamis Mkumbo v Republic,** Criminal Appeal No. 124 of 2007 and **Rashidi Abdallah Mtungwa v. Republic,** Criminal Appeal No. 91 of 2011 (both unreported), among others.

We are also mindful that, pursuant to section 130 (4) of the Penal Code for the offence of rape to be proved, one of the ingredients that must be established is, penetration. The said section provides that: -

"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 to the body is Not necessary to prove that sexual intercourse took Place without consent."

Therefore, the victim of rape, among other things, is expected to be more specific in her evidence and clearly point out what the accused person actually did to her. Now, in the case at hand, after discounting the evidence of PW2, the remaining evidence of PW1 found at page 19 of the record of appeal reads as follows: -

> *"I reached where the voice is coming from and under trees, I found Mariko raping my daughter his penis entered into my daughter's vagina undressed their clothes while PW2 is crying, I called the father of PW2 one Charles Mashibe, Mariko run away."*

In our considered view, the extracted piece of PW1's evidence, explains the circumstances on how she found PW2 with the appellant. At any rate, in our view, PW1 cannot be said have proved penetration. The record is silent on the distance from where she observed the appellant raping PW2 and managed to establish penetration, before the appellant took to his heels. It is also on record that PW1 did not even inspect PW2 at least to establish that she was really raped. In our considered view, PW1's evidence could only serve as corroboration evidence of rape, if PW2 had actually first established that ingredient of

the offence. If that was not established, then PW1's evidence could not corroborate the offence of rape.

The other evidence on record is that of PW3 together with the PF3. This kind of evidence was to prove that PW2 was raped but not the evidence to the effect that she was raped by the appellant. See the case of **Parasidi Michael Makulla v. Republic,** Criminal Appeal No. 27 of 2008 (unreported).

In the circumstances, we are satisfied that after expunging the evidence of PW2 there is no evidence on record which could safely be concluded that the appellant raped PW2. It is our further view that had the learned Judge expunged the evidence of PW2 from the record and considered the above aspects, we think, she would have come to the inevitable finding that it was not safe to sustain the appellant's conviction.

In view of what we have demonstrated above, we find merit in the appeal. The guilt of the appellant was not established beyond reasonable doubt. In the event, we allow the appeal and accordingly

quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

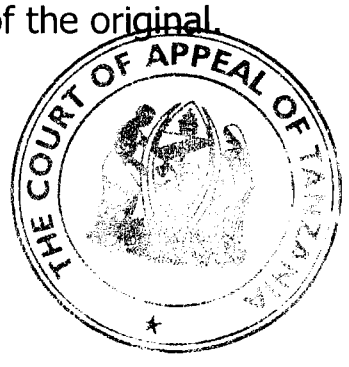
DATED at **SHINYANGA** this 27th day of August, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2020 in presence of the Appellant via Video link and Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL