IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 71 OF 2020

NEHEMIA RWECHUNGURA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mtulya, J.)

dated the 23rd day of October, 2019
in
Criminal Appeal No. 9 of 2017

.....

JUDGMENT OF THE COURT

29th & 30th November, 2021

KIHWELO, J.A.:

The appellant was arraigned in the District Court of Bukoba at Bukoba for two offences, abduction and rape contrary to section 133 and section 130 (2) (e) and 131 (1) respectively of the Penal Code [Cap. 16 R.E 2002] (now R.E 2019). It was alleged that on 3rd December, 2015 at Kashai area within the Municipality and District of Bukoba in Kagera Region the appellant with the intent to marry a girl who we shall henceforth identify her as PW2, for purposes of concealing her identity did detain her. It was alleged further that the appellant on unknown dates between the year 2012 and 2014 within Bukoba in Kagera Region did rape PW2 aged 15 years.

The trial court upon hearing the prosecution and the defence, believed the prosecution's version that the case against the appellant was proved to the hilt. Accordingly, the trial court found the appellant guilty as charged, convicted him and subsequently sentenced him to serve 4 years imprisonment for abduction and 30 years imprisonment for rape which were to run concurrently.

In protesting his innocence, the appellant filed his first appeal in the High Court in Criminal Appeal No. 9 of 2017 which after being heard on merit on 23rd October, 2019 it was dismissed. Undeterred, the appellant lodged this second appeal.

Before the trial court, the prosecution case was founded on the evidence of seven (7) witnesses namely; Renatus Felix Muganyizi (PW1), the victim PW2, Adventina Felician Mpinzile (PW3), Felician Mpinzile Kamugisha (PW4), WP 5898 Det. Cpl Anita (PW5), MG 62648 Selestine Bakaigwa (PW6) and ASS INSP Christopher Kapera (PW7). On the adversary, the defence had the appellant as the lone witness.

It was the prosecution case that on 8/12/2015 at his home village Kaibanja in Katoro, Bukoba District Kagera Region the appellant was arrested in connection with the offences of abduction and rape of PW2, a girl aged

14 years at the time. According to PW1 and PW3 on 7/11/2015, PW2 a standard seven leaver who had passed her examinations and was about to join secondary school suddenly went missing from her parents' home at Kashai in Bukoba Town and the duo went to the police to file a missing person report where they were given RB and the search for PW2 began. However, efforts to trace PW2 amongst close relatives where ordinarily PW2 would have gone did not bear any fruits as PW2 was nowhere to be seen and the family started to expect for the worst. After a month PW4, informed PW1 that, it was romoured that PW2 was in Katoro living with the appellant and that PW4 took trouble to investigate further and the results of which he came to find that those rumours were actually true and he immediately informed PW1 who along with PW3 went to Katoro Police Station and a raid to the appellant's house was conducted by PW1, PW3, PW4 and PW6, a people militia from Katoro Police Station. The appellant was arrested at his house and PW2 was found holed in the appellant's house. Both were taken to the police station for further processes. The investigation was conducted by PW5 and PW7 took the cautioned statement of the appellant which was admitted in evidence as exhibit P2. The appellant was then charged for the two offences as hinted above.

In his sworn defence testimony, the appellant totally distanced himself from the accusations made against him by the prosecution. He said that on 8/12/2015 at 14:40 Hours while coming back from work heading home for lunch he was arrested by people he did not know, handcuffed and taken to the police station at Katoro where he was informed about the offence he was charged with, but denied any wrong doing. The appellant was tortured in order to confess to committing the crime but did not heed to and thereafter the appellant was taken to Bukoba Police Station where he was detained for 14 days. On 14/12/2015 the appellant was taken to the Justice of Peace at Bukoba Primary Court where he denied to have confessed and was released before he was re-arrested on 17/12/2015 and taken to Bukoba Police Station and on 18/12/2015 was arraigned in court for the offences stated above.

As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the prosecution case was proven to the hilt and therefore, the appellant was convicted and sentenced as stated above.

In this appeal before us, the appellant has amassed seven (7) grounds of grievance, which may be crystalized as follows;

1. *That, the charged offence was not proved beyond any reasonable doubt.*
2. *That, the first appellate court erred in relying upon the cautioned statement which was irregularly obtained to sustain the conviction.*
3. *That, the first appellate court erred in upholding the appellant's conviction based upon PW2's statement made at the police exhibit P1 which was irregularly admitted in evidence.*
4. *That, the first appellate court erred in upholding the appellant's conviction without considering that the whole prosecution evidence based on the offence of abduction and rape.*
5. *That, the first appellate court erred in upholding the appellant's conviction without considering that the appellant's defense was not considered.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Ms. Happiness Makungu and Mr. Juma Mahona both learned State Attorneys stood for the respondent Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned State Attorney, if need would arise.

Ms. Makungu, prefaced her submission by supporting the appeal. She began by arguing that the third, fourth and sixth grounds of appeal were new grounds as they did not feature in the appeal before the first appellate court. However, she quickly pointed out that since the third and sixth

grounds raise important points of law the Court can still entertain them, otherwise the Court ordinarily cannot entertain grounds of appeal which were neither raised nor determined by the first appellate court. Reliance was placed in the case of **Athumani Hassan v. Republic,** Criminal Appeal No. 292 of 2017. On the basis of the foregoing, the learned State Attorney started to argue the third and sixth grounds of appeal.

Submitting on ground three the learned State Attorney admittedly conceded to the fact that the first appellate court erred in convicting the appellant based upon the evidence of PW2 who was declared hostile witness. It was her firm argument that the prosecution did not comply with the procedure for declaring a witness hostile and therefore the evidence of PW2 was irregularly admitted. To bolster her submission, she referred us to the case of **Inspector Baraka Hongoli and Others v. Republic**, Criminal Appeal No. 238 of 2014 (unreported) in which this Court discussed at considerable length the procedure for declaring a witness hostile. When prompted by the Court on the effect of not following the prescribed procedure, the learned State Attorney contended that its effect is to render the testimony of PW2 after she was declared hostile inadmissible and therefore she implored us to ignore that part of the evidence of PW2 from

the record. According to her the remaining evidence of PW2 is contradictory and hence cannot warrant conviction. In that regard, the learned State Attorney, urged us to sustain the third ground of appeal for being meritorious.

Moving to the sixth ground of appeal, the learned State Attorney was fairly brief and submitted that, the trial and the first appellate court did not consider the appellant's defence in which he distanced himself from the offence he was charged with and alleged further that he was tortured in order to confess to the crime. The learned State Attorney submitted that this Court has discretion to step into the shoes of the first appellate court and re-evaluate the evidence in order to come up with its own finding. To fortify her argument, she cited the case of **Athumani Hassan** (supra) and therefore implored us on the strength of the cited case to step into the shoes of the first appellate court and re-evaluate the appellant's defence and having done so find that the appellant's defence shook the prosecution's case.

Arguing in support of the first ground of appeal Mr. Mahona briefly submitted that the case for the prosecution fell short of the requisite proof beyond reasonable doubt. He contended that, in cases of sexual offence the

evidence of a sole witness who is a victim of sexual violence is the best and does not require any corroboration. To facilitate the appreciation of the proposition put forward by the learned State Attorney, he referred us to the celebrated case of **Selemani Makumba v. Republic** [2006] TLR 379 in which the Court stated that true evidence of rape must come from the victim. However, he argued that in the instant appeal the evidence of PW2 was contradictory and there was no any other evidence to prove that the appellant committed the offence. He therefore argued that this ground of appeal has merit too.

Mr. Mahona argued in support of the second ground of appeal that the appellant's cautioned statement exhibit P2 were retracted and repudiated and therefore it was unsafe for the trial court to act on the same in convicting the appellant without warning itself on the danger of doing so in the absence of other corroborating evidence. Reliance was placed in the case of **Muhidini Mohamed Lila @ Emolo and Others v. Republic,** Criminal Appeal No. 443 of 2015 (unreported) in which the Court emphasized that confession evidence which has been retracted or repudiated cannot be acted upon to found conviction unless the same is corroborated by independent evidence. He rounded up by arguing that in the instant case the cautioned

statement was not sufficient to convict the appellant. He finally, argued that in the circumstances the appeal be allowed, the conviction quashed and the appellant be set free.

In rejoinder, given the response of the respondent Republic which supported his appeal, the appellant had nothing to add. He simply prayed that he should be released from prison.

It is now our precious duty to determine the appeal by considering the grounds of complaints raised by the appellant and the supporting submission by the respondent Republic. On our part, we think that this appeal can be conveniently disposed by merely addressing the issue on whether or not the case was proved beyond reasonable doubt.

The duty of the prosecution to prove the case beyond reasonable doubt is universal. In **Woodmington v. DPP** (1935) AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 the Court held that:

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."

We hasten to state at this point that, in seeking to answer the question on whether the prosecution in the instant appeal proved the case beyond reasonable doubt, we think, this should not detain us much as the answer is not far-fetched. The learned State Attorneys have already pointed out infractions in the prosecution's case. The learned State Attorneys were undeniably right to argue that the prosecution did not prove the case beyond reasonable doubt.

We will start with the evidence of PW2 the lone prosecution's star witness whose testimony is discernible from pages 13 to 15 of the record of appeal. We are alive to the timebound principle of law that true evidence of rape has to come from the victim, if an adult, that there was penetration and that there was no consent, and in case of any other woman where consent is irrelevant that there was penetration. See for example, **Dr. Moses Norbert Achiula v. Republic**, Criminal Appeal No. 63 of 2012 (unreported). However, in the instant appeal PW2 did not implicate the appellant since she denied having engaged in sexual relation with the

appellant. For clarity, we wish to let record of appeal at page 13 speak for itself;

> *"XD: While in STD V I met the accused at Katoro he (sic) at the time did not tell me anything (sic) I know the accused as a Pastor that's our relationship. When I lived with him, we slept in different rooms he has never been my guardian there was no agreement between the accused and my parents for me to go and live with him it was between the accused and I my parents knew nothing I never had a sexual relationship with the Pastor/ accused."*

The above excerpt clearly demonstrates that until then PW2 did not implicate the appellant in the contrary her testimony was contradicting the prosecution's case. It is instructive to state that when the prosecution realized that PW2 was not forthcoming in the sense that she was not testifying to the expectation of the prosecution a prayer was made to declare her a hostile witness upon which the prosecution cross examined PW2. However, there were irregularities discernible in the proceedings in declaring PW2 hostile. The procedure for declaring a witness hostile is provided for under section 163 of the Law of Evidence Act, Cap 6 R.E 2002 (now 2019) when a witness gives evidence in court for a party, which differs from a previous statement made by him. The procedure was explained in the case

of **Republic v. Fabian Paul**, Criminal Appeal No. 14 of 1999 (unreported) in which the Court cited with approval the case of **Jumanane Athuman Mketo v R** [1982] TLR 232 in which Samatta, Ag. J. (as he then was) held:

> *"Having made up his mind to treat the witness as "hostile" the party should, after showing a copy of the witnesses' previous statement to the court, formally apply to the court for leave to do so. The court should then hear the opposite party, if he has any objection to the application. Then after comparing and contrasting the evidence of the witness and the contents of his statement, and after considering the witness demeanour in the witness box, as well as the objections, if any, from the opposite party, the court should make its ruling on the application.* ***If the court grants it, the applicant should then proceed to attempt to discredit the evidence of the witness by way of cross- examination."*** *[Emphasis added].*

Clearly, the trial court did not comply to none of the above and therefore the evidence of PW2 from the stage when the prosecution prayed to the court to declare her hostile was irregularly taken and therefore as rightly prayed by the learned State Attorney. It was thus irregular for the

trial court to act on such evidence which ought to have been ignored for lacking evidential value.

With regard to the confession evidence exhibit P2, the appellant has challenged it and the learned State Attorney has conceded and submitted at considerable length the infractions obtaining. It is not in dispute that the appellant retracted and repudiated the cautioned statement. It is a peremptory principle of law that confession evidence which has been retracted or repudiated cannot be acted upon to found a conviction unless it is corroborated by independent evidence and unless the second evidence is found by the court to be truthful upon the court warning itself of the danger to rely on uncorroborated evidence. In this case having disregarded the evidence of PW2, her remaining evidence is contradictory which cannot corroborate the retracted and repudiated confession. In the case of **Ali Salehe Msutu v. Republic** [1980] TLR 1, the Court stated that:

> *"a repudiated confession, though as a matter of law may support a conviction, generally requires as a matter of prudence corroboration as is normally the case where a confession is retracted.*

We have found above that the evidence of PW2 is unworthy of credit and that the cautioned statement cannot safely be relied without

corroboration which would have been offered by PW2 as the lone victim of sexual violence and therefore it suffices to say that, the prosecution did not prove the case beyond reasonable doubt.

On the basis of the above stated reasons, we find merit in the appeal and hereby allow it. In the event, the appellant's conviction is quashed and sentence set aside. We order his immediate release from prison forthwith unless held for other lawful cause.

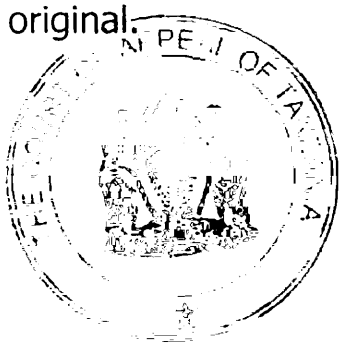
DATED at **BUKOBA** this 29th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 30th day of November, 2021 in the presence of the appellant in person and Mr. Joseph Mwakasege, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL