IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CORAM: LILA, J.A., KITUSI, J.A. And KAIRO J.A.

CRIMINAL APPEAL NO. 601 OF 2017

JOHN MGEMA @ SABAGO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Mwanza]

(Ebrahim, J.)

dated the 8th day of December, 2017

in

Criminal Appeal No. 268 of 2016

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JUDGMENT OF THE COURT

26th November & 3rd December, 2021.

KAIRO, J.A.:

In the District Court of Serengeti at Mugumu, the appellant was charged of rape contrary to sections 130 (1) and (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002. It was alleged that, on 13th day of November, 2014 at Singisi Village within Serengeti District in Mara Region, the appellant did unlawfully have sexual intercourse with a girl aged 14 years. To conceal her true identity, we shall refer to her as PW2 or the victim. The appellant denied the charge and the case proceeded to a full trial.

The prosecution side called seven (7) witnesses to prove the case against the appellant. The names of the said witnesses were; Nyakwe Ngoreme (PW1), the victim (PW2), No. D100 SGT Mwita (PW3), Alexander Muhono Chacha (PW4), Machota Ngoreme (PW5), Janeth John (PW6) and WP 6058 DC Mariam (PW7). The prosecution also tendered a Police Form No. 3 (PF3) which was admitted as exhibit P1. On the other hand, the defence part had only one witness who was the appellant (DW1) with no exhibit.

The prosecution case at the trial was to the effect that, on the fateful date around 14.00hrs, the victim and the appellant who was employed by PW1 as a herdsman, were alone at home. The victim entered in one of the rooms to pick-up some maize which were scattered by chicken. The appellant followed her inside the room and dragged her down. He forcefully took off the victim's under pants and undressed himself. While covering her mouth, the appellant inserted his penis into the victim's vagina and raped her. She cried for help and his brother, PW5 came running to her rescue. On arrival, PW5 found the appellant naked on top of the victim, having sexual intercourse with her. He got hold of the accused and raised alarm. People gathered and started to beat the appellant. Among those who went at the scene was PW6 who stated that she found the appellant

naked and the victim without her underpants. According to the victim, the ordeal was so painful as it was her first time to have sexual intercourse with a man.

Later around 16.00hrs PW1 came back home and found many people gathered at her home and the appellant was apprehended. Upon enquiring on what had transpired, she was told that the appellant had raped the victim. They together took the appellant and the victim to the police after being referred there by the village authority. A PF3 was issued for the victim to get medical attention. However, she could not be examined on that day as already it was late and the dispensary was closed. The victim's medical examination was conducted by PW4 on the following morning. In his finding, PW4 stated that PW2 had no hymen, nor bruises or any swelling. Further, he did not find any traces of blood or spermatozoa at the genital area and that the condition of the victim's vagina was normal. He tendered the PF3 which was admitted as exhibit P1.

The appellant was interrogated by PW7 and denied the allegations. When defending himself, the appellant contended that the case was just a fabrication by PW1 after claiming his outstanding salary amounting to TZS. 120,000/=. He further stated that on the fateful date, he arrived at home

around 18.00hrs from grazing the cattle and found PW1 at home. When he claimed his salary from PW1, he was beaten by PW5.

After a full trial, the learned magistrate made a finding that the evidence adduced, particularly the medical one to which he held to have no reason to disbelieve, did not support the offence of rape, but was sufficient to prove an attempted rape, instead. The trial magistrate therefore substituted the charged offence of rape to attempted rape. He accordingly convicted and sentenced the appellant.

The appellant was not amused and decided to appeal to the High Court. Again, luck was not on his part as the first appellate court upheld the trial court's decision basing on the expert evidence of PW4 and credibility of the prosecution witnesses. Still undaunted, the appellant has preferred this second appeal comprised of four grounds of appeal paraphrased as follows:-

1. That the prosecution case was not proved beyond reasonable doubts
2. That the court erred in law to rely on the hearsay evidence of the prosecution witnesses.
3. That the conviction of the appellant was based on the weakness of the appellant's defence.
4. That the age of the accused was not proved

When the appeal was called on for hearing, the appellant appeared in person with no legal representation. He adopted the grounds of appeal and asked the Court to let the respondent submit first subject to his right to make rejoinder where necessary.

It was Ms. Monica Hokororo, the learned Senior State Attorney who responded to the appellants complaints. At the outset, she declared the respondent's position that the offence of rape which the appellant was previously charged with still stands and went on to demonstrate. In her response, she preferred to address the first ground of appeal last, which we think was a more ideal approach.

Responding to the second ground, Ms. Hokororo refuted the appellant's complaint that the lower court relied on hearsay evidence of the prosecution witnesses to convict him, rather it was the direct evidence of PW2, PW5 and PW6 which grounded the conviction. She elaborated that PW2 who was the victim, categorically explained how the appellant followed her inside, dragged her down and raped her. That her evidence was corroborated by PW5 who upon reaching at the scene, found both the appellant and PW2 naked and the appellant was having sexual intercourse with the victim. He grabbed him off the victim while raising alarm. Elaborating further, Ms. Hokororo contended that the raised alarm made

PW6 arrive at the scene and found the appellant naked and the victim without underpants. She referred us to pages 13 – 14 and 17 – 18 where the said witnesses so testified. As an addition, Ms. Hokororo submitted that the appellant did not cross examine PW5 and PW6 with regards to their testimonies which implies his acceptance of the truth of their evidence. She cited the case of **Martin Misara vs Republic,** Criminal Appeal No. 428 of 2016 to back up her argument and concluded that the complaint is without merit.

As for the third ground of appeal whereby the appellant complains that his conviction was based on his weak defence, Ms. Hokororo dismissed the complaint arguing that the basis of the conviction was the strength of the prosecution witnesses' evidence as she stated when responding to the second ground. Reacting on the appellant's defence he posed at the trial court, Ms. Hokororo submitted that, though the trial court did not address the appellant's defence of alibi, the High Court analysed it and found it wanting in merit. She also dismissed his defence that the case was fabricated following his claim of unpaid salary from PW1 arguing that, PW1 was not at the place of incident when the offence was committed and thus, the complaint is equally devoid of merit.

In his fourth ground, the appellant's contention is centered on what he stated to be non-proof of the victim's age to which Ms. Hokororo opposed. She elaborated that the victim presented herself as a person of 14 years of age when testifying, as such, the contention lacks merit.

Reacting to the first ground of appeal, Ms. Hokororo refuted the appellant's complaint that the prosecution did not prove the case against him beyond reasonable doubt and thus he was innocent of the charge. In elaboration she submitted that, the High Court was correct to treat the evidence of PW2 (victim) as unsworn testimony following improper conduct of the *voire dire* test by the trial court which was then a requirement under section 127 (1) and (2) of the Evidence Act Cap. 6 R.E. 2002 for a child whose apparent age is not more than 14 years, as was PW2 in this case. Thus, it needed corroboration. She further elaborated that, the High Court was also correct to find that the victim's evidence was corroborated by PW5 and PW6. These witnesses were found by both lower courts to be consistent as well as reliable, hence credible. She however submitted that, it was an error for the High Court to uphold the decision of the trial court which concluded that the offence proved against the appellant was attempted rape and not rape. Arguing further, Ms. Hokororo contended that, since the first appellate Judge reached to the said finding on the basis

of the credibility of PW2, PW5 and PW6, then she ought to have found that the appellant was guilty of rape and convict him accordingly. This is because the said witnesses' evidence was sufficient to prove the offence of rape and not attempted rape as decided by the High Court. In conclusion, Ms. Hokororo prayed the Court to vary the appellant's conviction from that of attempted rape to rape which he was charged with originally.

In his rejoinder, the appellant repeated his defence that the case against him was a fabrication that is why even PW4 saw nothing suggesting rape when examining the victim. He however left it to the Court to do justice to his appeal.

Basing on the arguments by Ms. Hokororo, it is evident that she is inviting the Court, which is a second appellate court to disturb the concurrent findings of the trial and first appellate courts in this appeal.

It is an established practice of the Court that it rarely interferes with the concurrent findings of fact by the lower courts except where there has been misapprehension of the nature and quality of the evidence and other recognized factors occasioning a miscarriage of justice. In **Wankuru Mwita vs Republic,** Criminal Appeal No. 219 of 2019 (unreported) quoted in **Daniel Matiku vs Republic**, Criminal Appeal No. 450 of 2016 (unreported) the Court held:-

"...The law is well-settled that on second appeal, the Court will not readly disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

See also in **Victory s/o Mganzi @ Mlowe vs Republic,** Criminal Appeal No. 354 of 2019 (unreported).

We are further abreast with the settled principle that the best evidence in sexual offences is the one which comes from the victim. See. **Selemani Makumba vs Republic**, (2006) TLR 379, **Joseph Leko vs Republic**, Criminal Appeal No. 124 of 2013. (both unreported).

In **Selemani Makumba vs Republic** (supra), the Court stated:

"The 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, there was penetration".

We shall be guided by the above stated principles in determining this appeal.

Having heard the rival arguments of the parties and thorough scrutiny of the record of appeal, we think the main issue for determination is whether the prosecution proved its case beyond reasonable doubt. It is imperative to note that the offence which the appellant complains not to have been proved is that of attempted rape which he was convicted of. However, it is the argument of the respondent that the adduced evidence was sufficient to prove the offence of rape which the appellant was originally charged with and thus, it was an error for both the trial and first appellate courts to substitute the offence from rape to attempted rape. In our analysis therefore we are going to discuss whether the evidence adduced proved the offence of rape, attempted rape or neither of them.

Our starting point is the *voire dire* examination in respect of PW2, the interlocutory questions being whether she was of the apparent age of 14 as stated in the charge sheet and if yes whether the *voire dire* conducted was in accordance with the provision of Section 127 (2) of the Evidence Act.

Among the appellant's complaints is that, the age of PW2 was not ascertained. However, it is on record of appeal that PW4, the clinical officer

who examined the victim testified that she was aged 14 years when he attended her. In **Issaya Renatus vs Republic**, Criminal Appeal No. 542 of 2015 (unreported), the Court observed that medical practitioners are among the competent witnesses to prove the age of the victim. On that account, we are convinced that PW2 was 14 years old when she testified and thus it was correct to subject her to *voire dire* examination under section 127 (2) of the Evidence Act before receiving her evidence.

Regarding the next issue, the record of appeal reveals that the trial court only asked the victim if she understood the meaning of taking oath to which she gave an affirmative answer and the court remarked that section 127 (2) of the Evidence Act was complied with. However, the said *voire dire* conducted fell short of the threshold required under the provision. Basing on the position held in **Kimbute Otiniel vs Republic,** Criminal Appeal No. 300 of 2011 (unreported), we agree with the first appellate court's finding that improper conduct of the *voire dire* renders the evidence as unsworn and thus needs corroboration from other witnesses. However, as to whether or not PW2's evidence also deserved the stated treatment, will be discussed in due course.

In the instant case, both the trial and first appellate courts made a common finding that, the evidence adduced at the trial was sufficient to

prove the offence of attempted rape against the appellant and not of rape stated in the charge sheet. Consequently, a conviction on attempted rape was entered. The record of appeal reveals that the basis of such finding hinged on the testimonies of PW2, PW5 and PW6 which were found to be consistent and thus credible to rely on. In other words, PW2, PW5 and PW6 were the witnesses of truth. That aside, both courts also relied on the evidence of PW4, who examined the victim to discount the evidence of PW2. The High Court observed as follows in that regard:-

> *"PW4, clinical officer clearly told the court that there were no signs that PW2 was raped hence the substitution of the offence from rape to attempted rape. Lastly, PW7 recorded the statement of the appellant. Finally, the trial court believed the testimonies of all prosecution witnesses."*
>
> *In terms of the principle held in the cited case of* ***Goodluck Kyando vs. The Republic,*** *I find no reason to fault their credibility ..."*

(Pages 99 line 18 – 100 first paragraph of the record of appeal).

In our interpretation, basing on the quoted passage from the High Court judgment, the testimony of PW4 was reliable, credible and he was considered by both courts to be a witness of truth as well.

At this juncture, we find it imperative to determine whether the findings on credibility of the said witnesses is consistent with the record of appeal. In our critical analysis, the answer is in the negative and we shall herein demonstrate.

According to PW4, his finding concludes that the victim (PW2) was not penetrated, thus not raped. However, PW2 was categorical in her evidence that she was penetrated. Yet, the lower courts made a finding that both PW2 and PW4 are witnesses of truth and reliable despite the obvious unreconcilable contradictions in their testimonies. It is our firm conviction that, the pointed-out contradiction is not minor but goes to the root of the matter having in mind that, penetration is one of the "must prove" ingredient in a rape offence. Consequently, the evidence is rendered doubtful. [See: **Dickson Elia Nsamba Shapwata & Another vs Republic,** Criminal Appeal No. 92 of 2007 (unreported)]. It is our finding therefore that the commission of the offence of rape was not proved against the appellant and we decline Ms. Hokororo's invitation in this aspect.

The next question is whether the offence of attempted rape was proved as per concurrent findings of the trial and first appellate courts.

As intimated earlier, it is a settled principle that the victim is the best witness in sexual offences including rape. In this case, PW2 had testified unequivocally that the appellant had raped her. However, the fact that the High Court sustained the conviction on attempted rape entered by the trial court, shows that PW2's evidence on that aspect was unreliable and thus discredited. This has an adverse result on her credibility. In other words, the High Court did not believe her evidence as far as penetration is concerned. The discounting of her evidence by both lower courts has casted doubt on reliability of her evidence, as such, there is nothing to be corroborated by PW5 and PW6. In fact, the said discounting dented her credence. The law is settled that only credible evidence is worth corroboration. [See: **Azizi Abdallah vs Republic**, (1991) TLR 71]. The credibility of PW2 also suffered on account of the evidence of PW4 which depicted her evidence as untrustworthy, thus doubtful.

We are aware of the principle in **Selemani Makumba's** case, but for it to apply, it presupposes that the victim is credible. Basing on the above analysis, we think PW5 and PW6 cannot corroborate PW2's evidence which was found doubtful. In the circumstances, it was not correct to consider PW2's evidence as unsworn, thus needed corroboration, rather, it ought to be discounted altogether for being unreliable. On that account we

think the appellant's defence on fabrication of the case gains strength and further damage the prosecution case. In our view the said defence raises reasonable doubts regarding the commission of the offence convicted of. It is a well-established principle of law that, doubts where present benefit the accused person who is the appellant in this case as the Court decided in **Jimmy Runangaza vs Republic,** Criminal Appeal No. 159 'B' of 2017 (unreported) among many other cases. In the premises, it is our finding that the offence of attempted rape was not proved to the required standard either.

We are further alive to the general rule that the second appellate court is not required to interfere with the concurrent findings of fact by the lower courts, save in the circumstances explained in **Wankuru Mwita vs Republic** (supra). Nevertheless, in the instant case, we think, the misapprehension of evidence is evident. We are so saying due to the fact that, both lower courts did not believe PW2's evidence thereby discrediting it, but both held that her evidence was corroborated by PW5 and PW6 while the said discredit suggests that she was not believed. As such her evidence ought to be discounted altogether as per **Otiniel Kimbute** (supra). The omission has made the courts to conclude that her evidence needed corroboration which in our view was not correct, with due respect. But

further to that, the evidence of PW2 and PW4 was conflicting in nature and in no way the testimonies could be reconciled as above analysed. In the circumstances, the two witnesses cannot be found credible at the same time. In this way, it is our finding that the evidence was misapprehended and thus the Court's interference is the just cause to take to avoid miscarriage of justice as we hereby do.

In the end, we allow the appeal, quash the conviction and set aside the sentence meted on the appellant and order for his release forthwith unless held for other lawful causes.

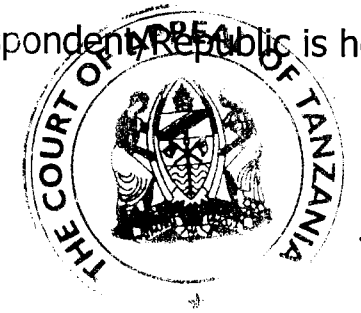
DATED at **MWANZA** this 2nd day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of John Mgema @ Sabago and Ms. Lilian Meli State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL