IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 408 OF 2020

EFESO WASITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mongella, J.)

dated 2nd day of June, 2020,

in

Criminal Appeal No. 127 of 2019

JUDGMENT OF THE COURT

14th & 22nd February, 2023

LILA, J.A:

Efeso Wasita, the appellant, is now languishing in prison serving a thirty years' imprisonment term after he was convicted by the Resident Magistrates' Court of Mbeya (the trial court) of the offence of rape contrary to sections 130 (l), (2) (a) and 131 (1) of the Penal Code. He was also ordered to pay the victim TZs 500,000.00 as compensation. He unsuccessfully challenged both conviction and sentence before the High Court hence this appeal.

We, at the outset, take note that before the trial court, the charge was predicated under sections 130 (1) (2) (e) and 131 (1) of the Penal Code and the accusation was that the appellant had carnal knowledge of a girl who we shall be referring to as simply PW1 or the victim on 26th day of October, 2017 at Itagano area within the City and Region of Mbeya without her consent. The charge did not disclose the age of the victim. It, however, transpired in the course of trial that the victim was nineteen (19) years old when the offence was committed. Having realised that the victim was not a child, the trial court, after satisfying itself that there was no consensual sexual intercourse, convicted the appellant of committing rape contrary to section 130 (1), (2) (a) and 131 (1) of the Penal Code applicable to adults. The change, it seems to us, did not come to the attention of the learned judge and consequently prefaced her judgment that the appellant was charged and convicted under sections 130 (l) (2) (e) and 131 (1) of the Penal Code and, at the end, upheld the trial court's conviction and sentence.

Central to the appellant's conviction is the story told by the victim (PW1) who testified that she was nineteen (19) years old on the date of the ordeal. It runs thus; on the evening of 26/9/2017 she was sent by her mother to the market which was just 400 meters away from their residence. As she was on her way back home, a certain person riding a

motorcycle came from behind and stopped, greeted her and offered her a lift back home as he was going to Mali Asili which is in the same direction. She resisted but upon realizing that he was Efeso, the appellant, a person she knew and lived at Itagano, she accepted the offer and boarded the motorcycle and they left. On the way, two other persons were carried on the same motorcycle who, before reaching at the victim's home, one of those persons held her mouth closed and the other held her by her hands. The volume of the radio was increased and the motorcycle passed by the victim's residence at high speed. At the Mali Asili forest, the two other persons who were not familiar to the victim, left and she remained with the appellant who told her that "*I have caught you because you have troubled me for a long time*", whatever that meant. The appellant's attempt to strip off her clothes was not a success as she ran away but fell down a little while. She collected herself and, again, took to her heels but was caught and sent back to where the motorcycle was parked, stripped off her clothes and inserted his male organ into her female organ without her consent. After satisfying his libido, he left her there after warning her not to disclose the incident lest she "*will see fire*". The incident happened at around 19:00hrs and took about half an hour. The victim returned home while limping and with dirty clothes where she found her father one Sylvester

Mwanjala (PW2) to whom she narrated the ordeal naming the appellant as her ravisher. She similarly disclosed it to her mother upon return from the church. She was then taken to police station at 23:00hrs where they were issued with a PF3 and went to hospital on 27/10/2017, put on examination and returned home on 28/10/2017. The fact that on that day PW1 returned home from the market at around 08:00PM, narrating the ordeal and naming the appellant as the culprit was corroborated by PW2. He further told the trial court that he and the victim's mother reported the matter to the hamlet chairman and later reported the matter to the police station and took the victim to Kiwanja Mpaka Hospital the next day because it was night time. After treatment, he said, they returned home and laid a trap and the appellant was arrested by one Jonas Kovel (PW3), a militiaman at his house after five days because he was not sleeping at home.

Dr. Stella Moses (PW4), a doctor at Kiwanja Mpaka Hospital, examined the victim and revealed that there were bruises and the vagina was open but the hymen was not removed that day which finding she endorsed on the PF3 (exhibit P1). The case was investigated by F 7892 O/C Wera (PW5) and on 30/9/2017, he went to collect the appellant who was arrested and locked in the Village Executive Officer's Office and the appellant admitted knowing the victim and her parents

but denied committing the offence. One Sekela Sanda (PW6), a teacher at Sinai Secondary School where the victim was schooling in Form V, testified that the victim did not attend school on 25/9/2017 because she had no school fees and she reported at school on 2/10/2017. He tendered in court a Class Attendance Register which was admitted as exhibit P2.

The appellant's defence was a flat denial. Explaining on how he spent the fateful day, he said he went to his farm and returned at 06:00pm and slept. The following day, he met people going to fetch some water who asked him "ha! you are still here?" and informed him that he was being accused of committing rape and was a wanted person but he ignored them and he went to his farm. He claimed that on 28/9/2017 he returned from shamba work at 03:00pm and was arrested by a militiaman when playing pool table.

As hinted above, the trial court found the appellant guilty and sentenced him accordingly. As is the case in this appeal, his appeal to the High Court challenged his conviction and sentence relying on the prosecution evidence which fell short of proving the charge. His other ground was that the court heavily relied on the prosecution evidence

which implied that his defence which amounted to an *alibi*, was not considered.

Given the relevance of the judge's finding on the first complaint after she had appraised herself of the legal position and citing case laws in respect of the best evidence rule in sexual offences that it is that which comes from the victim, in the determination of this appeal, we are compelled to recite a relevant part of that decision as reflected on page 90 of the record of appeal. She stated that:

> *" PW1 testified without contradictions how the incident occurred. Her evidence was corroborated by that of other witnesses, especially the medical doctor who examined her and the PF3 tendered as exhibit without objection from the appellant. The trial court is always at a better place of assessing the credibility of a witness compared to an appellate court. The trial court in its assessment found the evidence of PW1 as being credible and this court as an appellate court cannot interfere with that finding in the absence of compelling reasons. This position was set in the case of* ***Goodluck Kyando v. the Republic****, Criminal Appeal No. 118 of 2003 (CAT, unreported) whereby it was held:*
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> > *"... It is trite law that every witness is entitled to credence and must be believed and his testimony*

accepted unless there are good and cogent reasons for not believing a witness."

On the basis of that analysis, the learned judge concurred with the trial court finding that the prosecution proved the charge beyond reasonable doubt and dismissed that complaint.

On the other ground that his defence was not considered, the learned judge was satisfied that the defence of *alibi* was sufficiently considered and dismissed by the trial magistrate and relying on the case of **Kubezya John v. Republic**, Criminal Appeal No. 488 of 2015 (CAT-Tabora, unreported) which propounded a position that although not required to prove an alibi beyond reasonable doubt, an accused is enjoined to demonstrate his *alibi* on the balance of probabilities, she found that the appellant did not discharge his duty and dismissed it. In sum, the High Court found no reason to disturb the trial court findings. The appellant's appeal was therefore unsuccessful.

In this appeal, the appellant has raised these grounds of complaint:

1. *That, the Hon judge erred in points of law and facts for confirming the conviction and sentence to the appellant while the evidence adduced by prosecution side did not prove the case beyond all reasonable doubt.*

2. *That, the Hon. Judge erred in points of law and facts for dismissing the appeal of the appellant while the prosecution did not prove the charge.*

3. *That the Hon. judge erred in points of law and facts for not considering that the provisions used to charge the appellant are not the same ones used to convict him.*

The appellant was not represented when he appeared before us. He appeared in person. On the rival side, Mr. Deusdedit Rwegira, learned Senior State Attorney who was assisted by Ms. Rosemary Mgenyi, learned State Attorney, represented the respondent Republic. They resisted the appeal.

The appellant holistically relied on his grounds of appeal without more and urged the Court to consider them and set him at liberty.

On his part, in resisting grounds one (1) and two (2) of appeal which he argued conjointly and which raised a common issue whether the prosecution proved the charge beyond reasonable doubt, Mr. Rwegira submitted along almost the same line taken by the learned judge to arrive at the conclusion that the charge was proved. We need not recite it again herein. He added that the victim's evidence was clear, straight and not capable of double interpretation and even the

appellant's cross-examination did not contradict the prosecution evidence sufficient to cast doubt.

Submitting on the ground three of appeal, Mr. Rwegira had no qualm with the fact that the appellant was convicted by the trial magistrate under section 130 (1) (2) (a) and 131 (1) of the Penal Code which were different from those cited in the charge. He argued that such course was taken after he had learnt from the evidence that the victim was 19 years old against whom rape can only be committed if there is no consent. It was his assertion that it was not fatal hence not prejudicial to the appellant.

As our starting point in addressing grounds one (1) and two (2) of appeal, we entertain no scintilla of doubt that the victim was raped. Her narration of the ordeal coupled with the doctor's (PW4) testimony and findings as noted in his medical report (exhibit P1) which indicated the status of the victim's private parts that it had bruises and that she had bruises on her right leg have no other interpretation than that something entered or penetrated her forcefully. The victim's appearance when she was reporting the incident to her father (PW2) is, too, corroborative of the occurrence of a nonconsensual sexual intercourse. She was limping, crying and her clothes were full of dust. Like both

courts below, we hold that the prosecution proved that the victim was subjected to a forced sexual association.

Immediately knocking at the door calling for an answer is a question who raped the victim. The victim said it was the appellant and according to PW2, the victim named to him the appellant as her ravisher. The appellant, on the other hand, completely disassociated himself with the complained act. Besides the parting arguments, both courts below were of a concurrent finding that, on the basis of the evidence, it was the appellant who raped the victim. Trite law is that our interference is justified where the findings are manifestly unreasonable, there is misapprehension of the evidence or misdirection or non-directions on the evidence (See **DPP vs. Jaffari Mfaume Kawawa** [1981] TLR 149, **Issa Kumbukeni vs. Republic** [2006] TLR 277 and **Maneno Daudi vs. Republic**, Criminal Appeal No. 165 of 2013 (unreported). We shall therefore consider if we are justified to fault the finding of the courts below on those basis.

We take note that the incident is alleged to have occurred at Mali Asili forest and there was no any other person other than the victim and the culprit. No other person eye-witnessed the incident. It was the evidence of the victim against that of the appellant. A fair finding,

therefore, depends on credibility. Much as we acknowledge the settled law that best evidence in sexual offences must come from the victim (See **Selemani Makumba vs Republic,** [2006] TLR 379) but, again, our stance echoed in **Goodluck Kyando vs Republic** (supra) provides a guide that every witness, obviously including the appellant, is entitled to credence unless there are cogent reasons to hold otherwise. Reliance on the victim's evidence depends, therefore on her being credible. Unfortunately, we have no advantage of reading on the record the trial court's remark on the witnesses' conduct or demeanour whilst under examination during trial in terms of section 212 of the Criminal Procedure Act (the CPA) which would bind us it being its exclusive domain it having had the privilege to witness and hear the witnesses testify at the dock (See **Ali Abdallah Rajab vs Saada Abdallah Rajab and Others** [1994] TLR 132). That lapse is however saved by the fact that credibility may be determined or assessed by a second appellate court by looking at the consistence and coherence of the testimony of the witness (See **Sokoine Range @ Chacha and Another vs. Republic,** Criminal Appeal No. 198 of 2010 (unreported).

In our own objective re-evaluation of the evidence of PW1 (the victim) we find no any convincing reasons to doubt her. As was rightly submitted by Mr. Rwegira, she was very clear and consistent in her

testimony when she testified. Neither was she shaken when she was cross-examined by the appellant. In support of our finding there are three pieces of evidence which in fact strengthen her credibility. She was familiar to the appellant and was able to tell that they lived in the same area and actually it was out of that confidence that she agreed to board the motorcycle ridden by the appellant. That apart, she named the appellant as her ravisher at the earliest opportunity, that is, just as she arrived at home. She named the appellant to PW2 and the later reported it to the police resulting in the appellant's arrest. The court has taken this as an indication of reliability. In **Marwa Wangiti Mwita and Another vs. Republic,** Criminal Appeal No. 6 of 1995 (unreported) the Court categorically stated that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry."*

We have applied our minds to the appellant's defence evidence which as stated earlier tried to delink him from the offence on allegation that he was in his farm during the incident. The alibi defence he relied on was properly dealt with and dismissed. There remained no other

appellant's defence which could cast doubt on the credibility of the victim and the prosecution evidence as a whole. Otherwise, our examination of the judgments of both courts below have shown that the appellant's conviction was grounded on solid evidence particularly that of the victim which placed him at the crime scene and that of the doctor who examined her. The circumstances herein do not meet the test justifying this court's interference of the lower courts' concurrent findings. We dismiss both grounds of appeal and agree with the courts below that the appellant's involvement in the commission of the offence was impeccably established.

In ground three (3) of appeal the complaint by the appellant is founded on being convicted under a provision he was not charged with. As demonstrated above, the charge cited sections 130 (1) (2) (e) and 131 (1) of the Penal Code and the first appellate court sustained so, but the trial court judgment indicated that he was convicted under sections 130 (1) (2) (a) and 131 (1) of the Penal Code.

To begin with, it is common ground that the complaint is valid and is supported by the record of appeal. The trial court had opportunity to explain why it took that course at page 62 of the record and stated:

"The accused is charged under section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002. The particulars of the offence states inter alia that the accused Efeso Wasita did have carnal knowledge of Tumaini D/O Mwanjala without her consent, it is my considered view that if the accused person is alleged to have carnal knowledge of the victim without her consent then it is obvious that the victim was eighteen or over eighteen years old and she was in a position to give consent or not. Further on the evidence on record shows that the victim is 19 years old. That being the position therefore the accused was supposed to be charged under section 130 (1), (2) (a) and 131 (1) of the Penal Code Cap 16 R.E. 2002. And not under section 130 (1) (2) (e) as wrongly done by the prosecution side..."

Save for the lapse in citing the provisions under which the appellant was convicted of which we have explained earlier in this judgment, the matter escaped the learned judge's eye for an obvious reason that it was not a ground of appeal hence it was not convassed.

With respect to the appellant, it is obvious from the trial magistrate's observation that the anomaly in the charging provisions which presupposed that the victim was below eighteen years was cured

by both the particulars of the offence and the evidence on record specifically stating that she was 19 years and did not consent to the sexual intercourse. To clear the doubt, the particulars of the offence were that:

> ***" PARTICULARS OF OFFENCE***
>
> *EFESO S/O WASITA on 26th day of October, 2017 at Itagano area within the city and Region of Mbeya* ***had carnal knowledge of one TUMAINI D/O MWANJALA without her consent.*** *"* (Emphasis added).

The victim (PW1) and PW2, the victim's father, led evidence in court that the victim was nineteen (19) years old when she was raped. The appellant was in court and heard both the particulars of the offence being read out and heard the two witnesses testify on the age of the victim. He was therefore made aware that the victim was an adult and the accusation was that he had carnal knowledge of her without her consent. He was not thereby prejudiced which stance was well articulated by the Court in **Jamali Ally @ Salum vs. Republic**, Criminal Appeal No. 52 of 2017 (unreported) that where the charging provisions are problematic, the particulars of the offence and the evidence adduced in court suffice to inform the appellant the offence he

is charged with to make him align his defence properly. We are, therefore, of a decided view that the appellant's conviction under sections 130 (1) (2) (a) and 131 (1) of the Penal Code did not prejudice him and is therefore sound in law. We dismiss this complaint too.

For the foregoing reasons, this appeal is without merit. We dismiss it in its entirety.

DATED at **MBEYA** this 22nd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2023 in the presence of the Appellant in person and Ms. Mwajabu Tengeneza, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL