IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

DC CRIMINAL APPEAL NO. 15 OF 2019

(C/F Criminal Case No. 108 of 2017 the District Court of Moshi)

D.P.P.....APPELLANT

Versus

STEPHANO CHARLES MWANJEMBA@ BABA ISAKA...RESPONDENT

JUDGMENT

Last Order: 1st June, 2020

Date of Judgment: 6th July, 2020

MWENEMPAZI, J.

Aggrieved by the decision of the District Court of Moshi delivered on 24th October, 2018 in Criminal Case No. 108 of 2017 before Hon. Mwerinde RM that acquitted the respondent after declaring that the prosecution failed to prove their case beyond reasonable doubt the appellant has lodged this appeal stating 2 (two) grounds:

1. That the trial magistrate erred in law and fact when she stated that, the prosecution had failed to prove their case beyond reasonable doubt.

2. That the trial magistrate erred in law and fact when she stated that there is contradiction in prosecution evidence while in fact the said contradiction does not go to the root of the case.

At the hearing, the appellant prayed to submit in writing and the respondent did not object. There after the court granted leave for the parties to dispose the appeal by way of written submission. The appellant's submission was done by Ms. Verediana Mlenza learned State Attorney, while the respondent's submission was prepared by Mr. Honest Thadeus Shio.

Arguing the first ground of appeal Ms. Mlenza submitted that PW2 was able to testify how she was raped and she also identified the respondent very well as the incidence occurred during day time. She argued further that in rape cases penetration is a key element to be proved and it was indeed proved by evidence of PW2 at page 17 of the typed proceedings. Ms. Mlenza was of the view that even though PF3 was expunged from record

the evidence of PW2 was enough to prove the case of rape because in rape cases the best evidence is the one which come from the victim. She cited the case of ***Selemani Mkumba vs. Republic [2006] TLR 380*** to support her point.

With respect to the second ground of appeal Ms. Mlenza submitted that the contradiction that was pointed out by the trial magistrate appearing between the testimonies of PW1 and that of PW2 is very minor as it does not go to the root of the case. She argued that the court of appeal gave directions on how to deal with such contradiction in the case of ***Elia Bariki vs. Republic, Criminal Appeal No.321 of 2016*** at page 14 where the court quoted with authority the case of ***Dickson Elia Nsamba Shapwata and Another vs. Republic, Criminal Appeal No. 92 of 2007*** (unreported). In that case the court held that: -

> *"in evaluating discrepancies, contradictions and omissions it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter."*

Ms. Mlenza further submitted that, the fact that PW1 was taken to the hospital and treated or not is very minor the main issue is whether she was raped by the respondent or not. Finally she prayed for the appeal to be allowed.

Responding to the submission the learned counsel for the respondent submitted by first bringing into attention of this court that the appellant had filed their submission out of time and argued that the failure of filing submission within time prescribed is inexcusable and amounts to failure to prosecute the appeal.

Submitting on the first ground of appeal the respondent stated that the appellant failed to prove its case beyond reasonable doubt for the following reasons: - one is the prosecution had to prove beyond reasonable doubt that penetration did occur. The counsel referred to the victim's testimony (PW2) when she said that, *"Ba Isaka alinivua nguo akaniwekea chululu"*, *"Ba Isaka aliniwekea mate hapa"* to mean there was penetration however the learned counsel argued that the statements are vague and do not at all prove penetration. He argued further that reliability on the victim's statement should also be put to question as she said she did not cry and

she did not feel any pain. It was the counsel's view that if indeed there was penetration as alleged considering the victim's age then pain and crying was inevitable. Therefore, the counsel submitted that such testimony needed corroboration which the appellant did not provide.

The learned counsel submitted further that since PF3 was of no evidential value the remaining evidence which is that of the victim and her mother was full of doubt and characterized with inconsistencies. Referring to the principle as submitted by the appellant that, *"the best evidence is that of the victim"* the learned counsel submitted that not everything that the victim state is the best evidence to be relied upon by the court. He argued that the jurisprudence of the court of appeal behind that statement is centered on coherence of the victim's evidence with facts surrounding the occurrence of events and testimonies of other witnesses during trial. He further cited the case of ***Nelson Onyango vs. the Republic, Criminal Appeal No.49 of 2017 CAT Mwan***za (Unreported) where Ndika J.A stated that in considering the victim's evidence as the best evidence then the victim's testimony must be credible, convincing and consistent with human nature and normal course of things. He argued that in present case

evidence of the victim which allegedly implicates the respondent does not qualify as the best evidence to secure conviction because it stands alone, is unreliable and confusing thus needs corroboration.

Submitting on the second ground of appeal the learned counsel stated that the inconsistencies go to the root of the case. In proving so the counsel referred the inconsistency in relation to what happened at the hospital and noted that the victim's mother (PW1) said that the victim was treated and medicated while the victim (PW2) said that she was neither treated nor medicated. Another inconsistency the counsel pointed out was PW2's testimony that PW1 told her that the appellant undressed and raped her while PW2 when examined in chief she stated several times that she was never undressed. It was the counsel's view that the differences in the victim's testimony tarnishes her credibility and cannot be left unattended as it touches the central issue of whether there was penetration. With such anomaly the counsel argued that no reasonable magistrate would have ignored and convict the accused.

The learned counsel continued submitting that he agrees that not all inconsistence affect the case unless and until they go to the root of the

case. To support this point, the counsel cited the case of ***Procodence Philipo vs. The Republic, Criminal Appeal No. 233 of 2008, CAT at Arusha*** (Unreported) where the court reasoned that the root of the case in rape cases is whether rape occurred. He argued that the inconsistencies in the present case touch the root of the case as they shade a doubt on whether rape occurred. He pointed on the fact that the victim said she was not undressed and the fact that she was never treated or medicated also that she did not cry during what the prosecution termed as rape are grave inconsistencies that cannot be ignored using the cited cases by the appellant.

It was the learned counsel's argument that inconsistencies in evidence are basis of lack of credibility especially when it concerns matters that are relevant to issues upon which the court is called to adjudicate. He further submitted that the trial court is at better position to determine the credibility of the witness compared to the appellate court because at trial is where the witness appears in person therefore the court is able to assess other traits as body language. It was from that reasoning the learned counsel concluded that the trial court was correct to acquit the accused.

After going through the records of the trial court, the petition of appeal and submission by both parties before going to the merits or demerits of this appeal, I find it pertinent to address the issue that was pointed out by the respondent's counsel regarding late filing of submission by the appellant. I have gone through the records of this court, specifically with respect to the order of this court to the parties for filling their respective submissions and noted that the appellant did, in fact, file submission one day after the due date. It is true that failure to file submission on time amounts to failure to prosecute the appeal as submitted by the respondent's counsel. The effect of this would be dismissal of the appeal for lack of prosecution. However, I have also taken into consideration the fact that it is necessary to determine the appeal on merit. The delay was of only one day which if pardoned would not in any way occasion failure of justice to any party than if I choose the other way. I decided to employ the principle of overriding objective so that the matter would be decided on merit. The circumstances of the case would demand that to be done, and I find it compelling as well, for the victim's parents would very much like to see how justice is effected. It was held by the court of appeal in the case of ***Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT***

(unreported). The Court stated as follows at page 13 of the typed judgment:

> *"With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [ACT NO. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice;"*

With that in mind, although irregular; I find the irregularity as among of the technicalities that needed to be condoned for justice to be seen to be done.

Moving on to the grounds of appeal they were all centered on the issue as to whether the prosecution proved their case beyond reasonable doubt. I find the decision by the trial magistrate sensible as she addressed the main issue that determined the case before her which was whether the accused/appellant herein did rape the victim as alleged. I have considered the fact that in rape cases the important elements to be established are consent and penetration. In the present case the only element to be proved was penetration since it was a statutory rape. During trial the prosecution called only two witnesses who included the victim and her

mother. The testimonies of these two witnesses are what lead to the acquittal of the respondent. I will not reproduce what was submitted by the counsel for the respondent but I will just agree with the submission that the testimonies contradicted each other and that left doubt as to whether the offence was actually committed.

It is well settled principle in criminal trials that, the prosecution always bears the burden of proving beyond reasonable doubt every essential ingredient of the offence preferred against an accused. See, **Jonas Nkize V Republic** [1992] TLR 213; **Joseph John Makune V Republic** [1986] TLR 44 and **Luhemeja Buswelu V Republic,** Criminal Appeal No. 164 of 2012, CAT at Mwanza (unreported). In the case of **Jonas Nkize V Republic** [1992] TLR 213 for example, it was held as follows:

"i) *While the trial Magistrate has to look at the whole evidence in answering the issue of guilt, such evidence must be there first, including evidence against the accused, adduced by the prosecution;*

(ii) the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable

doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking;"

Given the doubts left out by the prosecution during trial in the impugned case, I find that the trial magistrate correctly decided to acquit the respondent. I therefore find the appeal lacking merit and thus the same is hereby dismissed entirely. It is so ordered.

T.MWENEMPAZI
JUDGE
6TH JULY, 2020