IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A.,ORIYO, J.A., And MUSSA,J.A.)

CRIMINAL APPEAL NO. 190 OF 2012

PAULO NURU MGONJA .....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Mzuna, J.)

dated the 31st day of August, 2012
in
Criminal Appeal No. 47 of 2009

JUDGMENT OF THE COURT

18th & 20th June, 2013

MSOFFE, J. A.:

The High Court of Tanzania (Mzuna , J.) sitting at Moshi upheld the conviction of the appellant for rape contrary to section 130 (1) and (2) (a) of the Penal Code entered by the District Court of Rombo (Lusewa, RM.) upon being satisfied that the evidence on record established that on 30/03/2005 at about 16.00 hours the appellant raped the complainant PW1 Ester Leonard aged 9½ years at the material time. PW1 testified and told the trial District Court that on the material date and time she and one Miriam Kilonzo went for prayers at the appellant's house. Apparently the

appellant was a pastor with the SDA Church near Mabatini, Kinamfua, Rombo. While in the house there was a time when Miriam went out with one Emanuel leaving behind the appellant and PW1. That was the time when, according to PW1, the appellant:-

> *...told me to lie on the coach and took out my pant and pushed my skirt up then he took petroleum baby care jelly and put/applied on my private parts, on my vagina. Then lied on top of me and put his private part in my vagina then to my anus. I felt pain and screamed but no one came. Thereafter he took my underskirt and rub off the blood...*

On arrival at home PW1 narrated the ordeal to her mother PW2 Frida Jackson. PW2 *"opened her skirt and found her underskirt dirtened with blood and some discharges..."* PW2 alerted her neighbour PW3 Clara Kessy and both decided to report the incident to the police. The police issued a PF3 to PW1. According to the record before us, on 18/09/2008 PW4 Dr. Wilbrod Kejo produced in court the PF3 showing that upon examination PW_1's vagina had bruises and pus oozing therefrom. Apparently the observations in the PF3 were made by Sr. Dr. Salesia

Safari. So, when the appeal came before the High Court for the first time an order was made to the District court to record the evidence of Dr. Safari. On 14/2/2011 the latter's evidence was recorded as ordered. In her testimony Dr. Safari, who also testified as PW4, confirmed her observations as reflected in the PF3.

In both his memorandum of appeal and in his oral submissions before us the appellant has essentially canvassed two grounds of complaint. **One**, the prosecution witnesses were not credible. **Two**, there were material contradictions in the prosecution case against him.

We propose to begin with the first complaint. Ms. Lilian Mmassy, learned State Attorney for the respondent Republic, contended that given the sequence of events as narrated by the prosecution witnesses there is no basis for saying that the prosecution witnesses were not credible. With respect, we agree with her.

Our starting point will be section 6(7)(a) of the Appellate Jurisdiction (CAP 141 R.E. 2002) under which we are mandated to deal with matters of law(not including severity of sentence) but not matters of fact. In a second

appeal we can only interfere with findings of fact by the courts below if they are perverse, or the courts below misapprehended the evidence, or where there were misdirections or non-directions on the evidence, etc. The issue is whether there is basis for us to interfere with the concurrent findings of fact by the courts below that the appellant committed the offence on the material day and time.

As shown above, PW1 narrated the events of the day in such manner that, like the courts below, there is no reason for us to fault her. In our view, a look at her evidence in its entirety shows that she was testifying on an incident she properly knew and had proper grasp of what it was all about. Her evidence was to an extent supported by her mother PW2 who upon examining PW1, saw the blood stained shirt and some "discharges." The testimony of PW1 was also supported by the doctor's observation in the vagina i.e. that it had bruises and pus oozing out. In the totality of the above evidence, we too are satisfied that the prosecution witnesses were credible.

In the second complaint, the appellant argued before us that there were contradictions in the evidence on the time(s) the said PW1 was

referred to and examined in hospital. Fortunately, the judge on first appeal addressed this issue thus:-

> *...there is the issue of the PF.3, Exhibit P.1. The appellant has argued that PW.1 said they went to the Hospital on 30th March, 2005 that is on the same day of the incident while PW4 said she received them on the following day. This, according to him, shows some contradictions in the evidence. This, argument, with due respect, does not match up with the evidence. True, PW.1 was taken for medical examination on 30th March, 2005. PW.4 said received them on that day at evening time but she filled the PF.3 on the following day. At no point in time did she say she was brought to her on 31st March, 2005 as alleged. This is a mere conjecture having no support from the evidence...*

With respect, we agree with the learned judge in his findings and conclusions on the above point and we propose to say no more on it.

In law, the essence of rape is (a) lack of consent in the case of an adult or with or without consent in the case of a victim below the age of

18 years of age, and (b) penetration. In this case PW1's given age was below 10 years so whether or not there was consent was immaterial. On the aspect of penetration, her evidence above is clear testimony to the fact that there was penetration.

The issue of sentence has exercised our minds to a certain extent. The District court sentenced the appellant to a term of 30 years imprisonment. The High Court enhanced it to life imprisonment because section 131(3) of the Penal Code provides for such sentence. We note that the age of PW1 given in the charge sheet was 9½ years. In her testimony PW2 said PW1 was born in 1996, without more. We think that in the justice of this case which attracts a severe sentence PW2 ought to have been more forthcoming and thereby state exactly on which date and month PW1 was actually born. By so doing, the sentencing court would have been in a better position to know whether or not PW1 was 9½ years old at the material time.

For the above reason, we have decided to give the appellant the benefit of doubt on the aspect of sentence and accordingly restore the

sentence of 30 years imprisonment meted by the trial District Court. Except for the above variation, the appeal against conviction is dismissed.

DATED at ARUSHA this 19th day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Malewo, M.A
DEPUTY REGISTRAR
COURT OF APPEAL