IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 236 OF 2017

PETER KESSY .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of Appeal of Tanzania at Arusha)

(Mwaimu, J.)

Dated 15th day of October, 2015
in
Criminal Appeal No. 39 of 2015

JUDGMENT OF THE COURT

26th & 28th August, 2020

MMILLA, J.A.:

This is a second appeal by Peter Kessy (the appellant). He is contesting the judgment of the High Court of Tanzania, Arusha Registry (the first appellate Court), vide which his conviction and sentence by the District Court of Hanang at Hanang (the trial court), were upheld in Criminal Case No. 85 of 2012. Before the trial court, the appellant was charged with the offence of rape contrary to section 130 and 131 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Penal Code). It was alleged that on 12th August, 2012, the appellant had sexual intercourse with a woman whose identity is withheld who testified as PW1 or rather (**MT**), without her

consent. After a full trial, he was found guilty, convicted and sentenced to thirty (30) years' imprisonment.

The victim woman was a resident of Galangala village within Hanang District and was a teacher by profession. She was then working at Glairo Primary School. On 12.8.2012 at about 19:00 hours, while driving her herds of cattle to the kraal near her house, she met the appellant who greeted her and passed by after exchanging a word or two with her. On her way to the house a short moment after locking in her herds of cattle, once again PW1 encountered the appellant who without a word, grabbed her, threw her down, removed her clothes, tore her underpants, and began raping her amid the alarm she raised to attract the attention of fellow villagers for her rescue. Fortunately, the alarm she raised caught the attention of her son, Thobias Melkiory (PW2), who after rushing to the scene saw the appellant raping his mother. On seeing PW2 come however, the appellant ran away. Incensed, PW2 pursued and apprehended the appellant. He held him securely and took him to the village leadership. The appellant was subsequently taken to Bassotu Police Station at which PW1 was issued with a PF3 with instruction to go to hospital for medical examination and treatment.

The appellant had all through protested his innocence. He denied, and still is, that he did not commit the alleged offence. He maintained that he was arrested at his place of work at CMSC, as opposed to the allegations of PW2 that he apprehended him in the course of running away from the scene of crime. This defence however, was rejected for having been outweighed by the strength of the prosecution evidence.

The appellant filed a five point memorandum of appeal as follows; **one** that, he was not correctly identified; **two** that, his conviction was based on a defective charge; **three** that, both lower courts did not properly analyze the evidence on record; **four** that, the case against him was not proved beyond doubts, especially considering that the village leaders who were crucial witnesses were not called to testify; and **five** that, the trial magistrate did not indicate in his judgment the provision under which he was convicted.

On the date of hearing this appeal on 26.8.2020, the appellant who was at Arusha Central Prison, was linked to the Court through a video conference facility, and was not represented. On the other hand, the respondent/Republic was represented by Ms Agness Hyera, learned Senior State Attorney, who was assisted by Mr. Charles Kagirwa and Ms Blandina

Msawa, both learned State Attorneys. The appellant chose to begin, and we invited him to proceed.

In his brief submission in support of the grounds of appeal, the appellant emphasized that he was not correctly identified, particularly so when it is considered that PW1 and PW2 did give details about the light with the aid of which they identified him. Also, the appellant said that his conviction was based on a defective charge sheet which cited sections 130 and 131 of the Penal Code without showing the appropriate subsections relevant to the kind of victim of the alleged offence. The appellant submitted further that PW1 and PW2 were not credible witnesses, therefore their evidence was unreliable. He urged the Court to uphold his grounds of appeal, quash conviction, set aside the sentence and release him from prison.

On the other hand, Mr. Kagirwa marshaled the respondent's response. He hurried to inform the Court that they were resisting the appeal for reasons he was about to assign.

In the first place, Mr. Kagirwa submitted that the fourth ground of appeal raised by the appellant does not deserve consideration because it is a new one for having been raised before the Court for the first time. In view

of that fact, he said, the Court has no jurisdiction to determine it. He urged us to ignore it.

As regards the first ground in which the appellant complains that he was not correctly identified, Mr. Kagirwa was positive that he was correctly identified by PW1 and PW2, both of whom had testified that the appellant was not a stranger to them as they had known him before the day of the incident. He added that when PW2 rushed to the scene of crime in response to the alarm which was raised by PW1, and upon seeing him come, the appellant ran away but he chased and caught him after which he took him to the offices of their village government. Given this sequence of events, he went on to submit, the complaint that he was not correctly identified is baseless. He relied on the case of **Anthony Jeremia Sorya v. Republic,** Criminal Appeal No. 52 of 2019 and **Ally Ramadhani & Another v. Republic**, Criminal Appeal No. 532 of 2017 (both unreported). He requested the Court to dismiss this ground.

The learned State Attorney admitted however, that the appellant cannot be completely faulted as regards his complaint in the second ground of appeal that his conviction was based on a defective charge because it was not proper to have anchored the offence of rape as it were, on section 130

and 131 of the Penal Code without citing as well the appropriate subsections in relation to the kind of the victim thereof. He hastened to add however, that the defect was not serious and no prejudice was occasioned to the appellant because the particulars of the offence and the evidence which was given in court sufficiently informed the appellant about the nature of the offence he was faced with. He relied on the case of **Ally Ramadhani & Another** (supra). He added that the error was therefore curable under section 388 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA).

Mr. Kagirwa similarly refuted the appellant's complaint in the third ground of appeal that both lower courts did not properly analyze the evidence on record. He was forceful that both lower courts dutifully analyzed the evidence on record and laid down basis for the respective decisions which were reached. He requested us to dismiss this ground too.

Finally is the fifth ground of appeal which alleges that the trial magistrate did not indicate under which provision of law the appellant was convicted. In this regard, Mr. Kagirwa admitted the omission, but was quick to add that it was not a fatal omission because the section creating the

offence was reflected at the beginning of the trial court's judgment, therefore that it carried the day. He urged us to likewise dismiss this ground.

Probed by the Court on whether or not the PF3 was valid evidence in the circumstances of this case, Ms Hyera was unhesitant that it was not good evidence because it was read out before it was cleared for admission. She added that in fact, the evidence of Dr. Kisomo Robert (PW4) who medically examined PW1 was invalid evidence because he did not explain how he discharged the duty of examining the victim woman. She hastened to add however that, the evidence of penetration came from PW1 herself who had testified that after grabbing and throwing her down, the appellant took his male organ and inserted it into her female organ. She referred us to the case of **Ally Ramadhani & Another** (supra).

Over all, except for the second ground of appeal which was partly acceded, we were requested to dismiss the appeal and confirm the sentence which was meted out against the appellant.

In a brief rejoinder, the appellant recapped his concern that he was not correctly identified, also that we accept his submission that his conviction was anchored on a defective charge and subsequently allow the appeal and release him from prison.

We wish to first of all thank the parties for their submissions and useful authorities they have referred us to. We have no doubt that they will assist us in the quest to meet the justice required in the case.

Like Mr. Kagirwa, we desire to begin with the fourth ground of appeal which he has said it does not deserve consideration because it has been raised before the Court for the first time. We read the grounds of appeal which were raised in the High Court appearing at page 41 of the record of Appeal and satisfied ourselves that indeed, the fourth ground is a new one because it was not raised at the first appellate level. As we have repeatedly been saying in cases without number, unless it be a ground based on a legal point, the Court has cannot consider and determine a new ground of appeal because it has no jurisdiction to do so – See the cases of **Abdul Athuman v. Republic** [2004] T.L.R. 151 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009 (unreported). In the circumstances, this ground is ignored.

We now come to address the second ground of appeal alleging that the appellant's conviction was based on a defective charge. Like Mr. Kagirwa, we agree with the appellant that it was improper for the offence of rape in this case to have been based on sections 130 and 131 of the Penal

Code without more. As correctly submitted by the learned State Attorney, the charge ought to have cited as well the appropriate subsection and clause in relation to the category of the victim thereof. In the circumstances of the present case, because the victim of rape was an adult woman, the prosecution ought to have cited sections 130 (1), (2) (a) and 131 (1) of the Penal Code. Thus, the appellant's query is founded.

Notwithstanding what we have just said however, we once again agree with Mr. Kagirwa that the defect in the circumstances of this case was not a serious one because no prejudice was occasioned on the appellant. The reason is clear that the particulars of the offence were very clear in that they conveyed perfect information to him regarding the nature of the offence he was faced with. This was comprehended by the evidence of the prosecution witnesses, particularly PW1 and PW2, who detailed what the appellant did to PW1 to deserve being prosecuted as it was. We are guided in this respect by the case of **Ally Ramadhani & Another** (supra), which followed our previous decision in **Jamali Ally @ Salum v. Republic,** Criminal Appeal No. 52 of 2017 (unreported). We said in **Jamali Ally @ Salum's** case that where the particulars of the offence and the evidence on record might have been so clear as to enable the accused to appreciate the nature and

seriousness of the offence he was facing, thereby eliminating all possible prejudices, the court may be entitled to gauge that the error is minor, thus curable under section 388 (1) of the CPA. Therefore, since the appellant in the present case understood the nature and seriousness of the offence he was faced with, the complained of defect was curable because it did not prejudice him.

We now turn to discuss the first ground of appeal in which the appellant asserts that he was not correctly identified.

To begin with, we take sides with the learned State Attorney that the appellant in this case was correctly identified by the two prosecution eye witnesses; PW1 and PW2. These witnesses testified in common that the appellant was not a stranger to them, but they had known him well before the day of that incident. PW1 said so at page 9, first paragraph of the Record of Appeal, while PW2's account on the point is found at page 10, 5th paragraph from the top of that record. As often stressed by the Court, knowing a person before vouches mistaken identity in so far as it becomes a matter of recognition as distinguished from visual identification – See the cases of **Robert James @ Msabi v. Republic**, Criminal Appeal No. 379 of 2015 and **Ally Rajabu & Others v. Republic**, Criminal Appeal No. 43 of

justification to believe otherwise. Consequently, this ground is likewise baseless and we dismiss it.

In ground No. 5, the appellant alleges that the first appellate court erred in not reversing the decision of the trial magistrate because the judgment of that court did not indicate the provision under which he was convicted. Mr. Kagirwa conceded, and we agree with him that in fact the trial magistrate did not indicate the provision under which he convicted the appellant which was a violation of section 235 (1) of the CPA, nor did the first appellate court address that abnormality.

That notwithstanding however, we go along with Mr. Kagirwa that the omission by the trial magistrate to indicate the section under which the appellant's conviction was based at the end of that judgment did not prejudice the appellant because as shown in the first paragraph of that judgment appearing at page 26 of the Record of Appeal, the section under which the charged offence was based was shown. Indeed, that is evidence that the appellant understood the basis of his conviction. In the circumstances, this ground too is not well founded.

Concerning the question of the status of the PF3 which arose from the Court's probe, we agree with Ms Hyera that it was invalid evidence because

it was read out in court before it was cleared for admission – See the case of **Samwel Henry Juma v. Republic,** Criminal Appeal No. 211 of 2011 (unreported) which relied on **Robinson Mwanjisi & Others v. Republic** [2003] T.L.R. 218 where it was held that:-

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out a document before it is admitted is wrong and prejudicial."*

Since this is what indeed, happened in the present case, it goes without saying that the said document ceased to be useful. Thus, it deserved to, and we hereby expunge it from the record.

Ms Hyera submitted nevertheless that, the absence of the PF3 did not weaken their case as regards proof of penetration which is an essential ingredient in the offence of rape since the evidence of PW1 clearly established that proof. We sincerely agree with her.

As earlier on pointed out, the evidence of PW1 appears at page 9 of the Record of Appeal. In lines 14 to 20 at that page, that witness stated that:-

"I turned back and I identified that he was this accused person who was by then very near to me. He then took his sheet (mgolole) and covered me on my face. He held my throat . . . and one hand covered my mouth. He was struggling to fall me down and in fact at the end he managed to fall me down. He then undressed my clothes. That he forced my underpants until he tore it and proceeded to insert his penis into my vagina."

From the above, it is certain that her account tells it all that penetration was established. As we said in the case of **Selemani Makumba v. Republic** [2006] T.L.R. 379, true evidence of rape comes from the victim, of course, this is subject to the witness being found to be credible, truthful and believable. We particularly said:-

"True 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 that there was penetration."*** [Emphasis supplied].

Having said in the circumstances of the present case that PW1 and PW2 were credible, truthful and believable witnesses, it goes without saying that their evidence was reliable.

For reasons we have assigned, except for the second ground to the extent explained, the appeal lacks merit and is hereby dismissed.

DATED at **ARUSHA** this 27th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 28th day of August, 2020 in the presence of the appellant in person through Video conference facility, and Mr. Charles Kagirwa, State Attorney for the respondent is hereby certified as a true copy of the original.

E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL