IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 248 OF 2017

PASCAL YOYA @ MAGANGA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Moshi, J.)

dated the 2nd day of June, 2017
in
DC Criminal Appeal No. 4 of 2017

JUDGMENT OF THE COURT

19th & 24th February, 2021

KEREFU, J.A.:

In the Resident Magistrate Court of Manyara at Babati, the appellant, Paschal Yoya @ Maganga, was charged with the offence of incest by male contrary to section 158 (1) (a) of the Penal Code, [Cap. 16 R.E. 2002] (the Penal Code). It was alleged that, on 23rd August, 2013 at California Guest House in Ganana Street within Hanang' District in Manyara Region the appellant had carnal knowledge of "SP" a girl aged twelve (12) years while having knowledge that she is his biological daughter. The appellant denied the charge and as a result, the case proceeded to a full trial. In proving the

charge against the appellant, the prosecution relied on the evidence of six witnesses and two documentary evidence. SP, the victim who testified as PW1 gave an account of how it all started. She said that the appellant is her biological father but at the material time she was not living with him. That, PW1 and her two siblings, Gabriel Paschal (PW2) and Michael Paschal were living in the house of their uncle one Joseph Yoya and his wife Yasinta Nachan (PW3) the sister of their late mother. This was after the appellant had killed their biological mother.

PW1 went on to state that, on 23rd August, 2013 the appellant took her and her two siblings to Gisambala Village to visit their uncle one Petro. However, on that date, they did not reach the intended destination as the appellant took them to various places at Nagwa Village where they had breakfast and dinner. PW1 said that in the evening they went to Katesh and spent a night at California Guest House in one room. She stated that the appellant went out several times and later he brought them super. She said that the last time when the appellant went out, PW2 saw him mixing alcohol into pepsi-soda. As such, PW2 cautioned her not to take that drink. When the appellant brought the said drink, PW1 only tested it, but PW2 and Michael drunk it. PW1 said that the appellant told them to undress

because, the condition of that Guest House was for people to sleep naked. Her siblings obeyed but she refused. However, the appellant, after he had undressed himself, forcefully undressed her and penetrated his penis into her vagina and raped her three times. PW1 felt pains and started bleeding in her vagina. She said that her siblings did not witness the incident, as at that time, they were asleep.

PW1 testified further that in the morning, the appellant asked for forgiveness and attempted to commit suicide. Then, he took them to a certain hotel for breakfast and thereafter, he directed them to go to Gisambala to visit their uncle. She said that they left the appellant at Katesh town. At Gisambala they met their uncle Petro and his wife and they stayed there for six days. On 29th August, 2013 they went back to Giting where she revealed the ordeal to her uncle. Then the matter was reported to the elder uncle. The appellant came and warned her not to tell anyone about what transpired between them. She said that he attempted to hurt her, but she ran away into a neighbour house. The matter was then reported to police, the appellant was arrested and PW1 was taken to the hospital for medical examination.

In their testimonies, PW2 and PW3 supported the narration by PW1. PW2 added that on the 24th August, 2013 in the morning, he saw PW1 crying and when he asked her on what had happened, the appellant interfered and said he knew why she was crying. PW3 also added that she examined PW1 and found bruises in her private parts.

PW1's account was also supported by Mateso Silvester (PW5) the watchman at California Guest House. PW5 testified that on 23rd August, 2013 when he reported at work, he was informed by one Martha that there was a guest at room No. E. 1. PW5 said that he found that the said guest was registered in the Guest Register. PW5 tendered the said Register which was admitted in evidence as exhibit P2.

The medical examination was conducted by Dr. Paulo Sarwatti (PW4) on 2nd September, 2013 who detected bruises in PW1's vagina and found out that she had lost her virginity. PW4 tendered the PF3 which was admitted in evidence as exhibit P1. The case was investigated by PF. 19495 ASP Volka Willa (PW6).

In his defence, although, the appellant admitted to have travelled, on 23rd August, 2013, from Waama Village to Katesh and spent a night at California Guest House, he strongly disputed to have travelled with his

children, slept together with them in a single bedroom and raped PW1. He said that the incident was framed up by the deceased's relatives due to the existing grudges between him and them. That, following his release from custody, the deceased's relatives have been pointing fingers at him in relation to the death of his late wife. He stated that on 24th March, 2013, they raised an alarm (*mwangwi*) to inflict anger on the villagers for him to be killed. He reported the matter to the Village Executive Officer (VEO) of Waama Village and the matter was discussed in a clan meeting on 26th March, 2013. The clan elders said that as per Iraqwi's traditions, the appellant was not required to be near the deceased's relatives or even his children until he pays compensation of nine cows and two sheep for the killing of his wife. The appellant tendered the letter from the VEO and the minutes of the said clan meeting which were collectively admitted in evidence as exhibit D1.

At the end of it all, the trial court concluded that the appellant's defence which was based on hatred was weak and did not establish that PW1 could frame evidence that she was raped. Thus, the appellant was sentenced to imprisonment term of thirty years.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of Appeal, the appellant raised three grounds which can conveniently be paraphrased into the following grounds of complaints; **one**, that there were contradictions between the evidence adduced by the prosecution witnesses and exhibit P2; **two**, that his defence was not considered as a whole specifically exhibit D1; and **three**, that the first appellate court failed in its duty of properly re-evaluating the evidence on record.

The hearing of the appeal was conducted through video conference linked to Arusha Central Prison where the appellant appeared in person without legal representation. The respondent Republic was represented by Mr. Mutalemwa Kishenyi, learned Senior State Attorney assisted by Mr. Lameck Mugeta and Mr. Petro Ngassa, both learned State Attorneys.

When given an opportunity to amplify on his grounds of appeal, the appellant adopted all the grounds of appeal and decided to argue the first and second grounds jointly. He did not, however, make any submission in support of the third ground.

Submitting on the first ground, the appellant faulted the lower courts' findings that the prosecution case was proved beyond reasonable doubts while, he said, there are material contradictions between the evidence adduced by the prosecution witnesses and exhibit P2. He clarified that PW1, PW2, PW3 and PW5 testified that he spent a night at the California Guest House with his three children, while exhibit P2, a Guest Register of the said Guest House, indicated that, on that particular date, he slept alone in a single bedroom.

The appellant also questioned the credibility of PW1 that, despite claiming that she was raped on 23rd August, 2013, she did not reveal the ordeal to anyone for about six days. It was his argument that the act of PW1 to remain silent for all those days, raises doubts on her credibility, which should be resolved in his favour.

As regards the second ground, the appellant contended that his defence was not properly considered and evaluated as a whole. He specifically referred to exhibit D1 and argued that, before the trial court he testified that the case was framed up against him due to the existing grudges between him and the deceased's relatives but the said evidence was ignored by both courts below. To buttress his point, he cited the case

of **Abdi Ally v. Republic,** Criminal Appeal No. 398 of 2013 (unreported) and argued that the prosecution case was not proved to the required standard. On that basis, he urged us to allow the appeal and set him free.

In response, Mr. Kishenyi resisted the appeal. On the first ground, he argued that there are no any contradictions between prosecution witnesses and exhibit P2. He said that, all prosecution witnesses testified that, on the fateful date, the appellant and his three children travelled together and spent a night at California Guest House in a single bedroom. He challenged the appellant's analysis of comparing the said evidence with exhibit P2 which, according to him, was for purposes of recording the list of names of people who had secured accommodation and paid for it.

On the delay to report the incident and credibility of PW1, Mr. Kishenyi argued that due to the circumstances of the case and the relationship between PW1 and the appellant, it was not easy for PW1 to report the incident immediately. He as such, submitted that all prosecution witnesses were credible and reliable.

On the second ground, Mr. Kishenyi referred us to page 115 of the record of appeal and argued that, in its judgment, the trial court properly evaluated the defence evidence and found that it was weak. He thus

distinguished the case of **Abdi Ally** (supra) cited by the appellant that it is distinguishable from the case at hand. He said that, in that case the defence was not considered at all, while in this case, the appellant's defence was considered.

On the existing grudges and misunderstanding between the appellant and the deceased's relatives, Mr. Kishenyi argued that the same was settled long time ago in a traditional way and has nothing to do with the current case. It was his further argument that since the incident was reported by Joseph Yoya the brother of the appellant, the appellant is not justified to blame the deceased relatives. In that regard, he stressed that the prosecution case was proved beyond reasonable doubt and urged us to dismiss the appeal in its entirety.

In rejoinder submission, the appellant did not have much to say other than reiterating what he submitted earlier and insisted that the appeal be allowed and he be set free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and the record before us, the main issue for our determination is whether the appellant's conviction was based on strong prosecution case. Since this is a second appeal, we take cognizance

of the settled law that the Court should not interfere with the concurrent findings of facts, unless the courts below have misapprehended the substance, nature and quality of such evidence which resulted into unfair conviction. See **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149.

Starting with the first ground, it is on record that, in convicting the appellant, the trial court relied on the evidence of PW1 and the decision of the Court in **Selemani Makumba v. Republic** [2006] TLR 379. It found that the evidence of PW1, the victim, was reliable and the best evidence in cases of this nature. While we agree that the above is the correct position of the law, we hasten to remark that, the same does not mean that such evidence should be taken wholesome, believed and acted upon to convict the accused person without considering other evidence and the circumstances of the case. See **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported). Therefore, since in the case at hand, apart from the word of PW1 that she was raped by the appellant, there was no other eye witness to the incident of rape, her credibility is crucial in determining her truthfulness. On the authority of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (supra) we are re-evaluating

the evidence because we think the two courts below misapprehended the substance and quality of the evidence.

In her testimony, although, PW1 claimed that she was raped on 23rd August, 2013, she did not tell anyone for about six days. She did not even reveal the ordeal to his maternal uncle Petro and her aunt, when she visited them on 24th August, 2013, the next day after the alleged incident. Submitting on the said delay, Mr. Kishenyi argued that this was due to the existing relationship between PW1 and the appellant. With respect, we find the submission of Mr. Kishenyi unsound. In **Marwa Wangiti Mwita and another v. Republic** [2002] TLR 39, the Court stated that:

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

Worse still, even the testimony of PW1 is not clear on the person she first reported the incident, as her testimony on that aspect is inconsistent with that of PW3. At page 11 of the record, PW1 testified that: -

> *"On 29th August, 2013, we went to our uncle the relative of the accused at Giting. We met our aunt there.* ***I told***

the said uncle that the accused raped me. Aunt told our uncle the same story." *[Emphasis added]*

However, at pages 17 to 18 of the same record, PW3 testified that, "***Sabrina (PW1) told me that ...He forced her to undress her clothes and raped her. I told the same story to his closer brother*** *and my husband reported to the village chairperson."* The fact that, PW3, who is mentioned by PW1, to be the one who reported the incident to the appellant's relatives, raises more doubts, considering that PW3 is the sister of the deceased. With respect, we find the submission by Mr. Kishenyi that the matter was initiated by the appellant's relative, is not supported by the record. We, therefore, agree with the appellant that, given the circumstances of this case, the act of PW1 of remaining silent to report such a serious incident together with the uncertainty as to whom she first reported to, creates doubts on her credibility.

Furthermore, as submitted by the appellant, although in their testimonies, PW1, PW2, PW3 and PW5 testified that on 23rd August, 2013, the appellant travelled and slept together with his three children in a single bedroom, exhibit P2 did not support that allegation. In the said exhibit it was only the name of the appellant which is recorded. In his testimony,

PW5, the watchman of the said Guest House testified, at page 24 of the record of appeal, that: -

> *"On 23rd August, 2013 at about 08:00 pm, I was at California Guest House. I reached the place at 06:00pm. I learnt from one Martha who told me that there is guest at room No. E. 1. I found the guest was registered."*

As per PW5's evidence, it is clear that, given the nature of his position in the said Guest House, he was not the one who received and registered the appellant in exhibit P2. PW5 was only informed by one Martha, who registered the appellant when he went to secure accommodation. We even wonder, why the prosecution did not call Martha, who is the one handling the Guest Register to come and testify before the trial court.

Furthermore, according to PW6 the said single bedroom had one bed of size 3 1/2 X 6 inches. We also wonder, how could a single bedroom with that small size bed be occupied by four people. It is our considered view that, if the said Martha, who was said to have received and registered the appellant in exhibit P2, had been called, she could have shed more lights on these issues. The failure by the prosecution to field such an important witness, without explanation, would have prompted the courts below to

draw an adverse inference against the prosecution. In the case of **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported) when considering a similar matter, the Court stated that: -

> *"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

See also the case of **Aziz Abdallah v. Republic** [1991] T.L.R 71.

There is yet, another noted contradiction, at pages 11 and 16 of the record, PW1 and PW2 testified that after the incident they left the appellant at Katesh town and three of them went to their uncle's house and then, on 29th August, 2013 they went back to Giting. However, PW3 at page 17 of the record, testified that "*The children came back on 29th August, 2013 with the accused.*

In our respectful view, all the above noted contradictions were material and prejudicial to the prosecution case. We are of the settled view that had the trial court and the first appellate court properly considered

and scrutinized the entire evidence on record, they would have found that such evidence was not watertight.

On the second ground, having scanned the record of appeal, we agree with the appellant that the trial court and the first appellate court did not properly consider and evaluate his defence as a whole. In his defence, among others, the appellant complained that this case was framed up by the deceased's relatives due to the existing grudges, which started in 2007 when he killed his late wife who is the sister of PW3. That, on 24th March, 2013, they raised an alarm (*mwangwi*) on him, to inflict anger on the villagers for mob justice to be administered on him. See exhibit D1.

In its judgement, the trial court, apart from briefly summarizing the appellant's evidence, did neither consider nor analyze that part of the evidence. It was simply ignored. Surprisingly, at page 115 of the record, the trial court concluded that: -

> *"**The accused defence based on the hatred is weak and did not establish if the victim could frame evidence that she was raped** by her father and indeed come to be proved that she was really raped." [Emphasis added].*

Moreover, the first appellate court fell into the same trap of not re-evaluating the whole evidence adduced by the appellant at the trial and make its own conclusion. At page 135 of the record, the first appellate court concluded that: -

> *"**I find as the trial court did that defence was weak.** The fact that he intentionally killed his wife is not related to the offence..." [Emphasis added].*

With respect, we find both conclusions by the lower courts unusual. It is a cardinal principle of criminal law in our jurisdiction that, in cases such as the one at hand, it is the prosecution that has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of **Woolmington v. Director of Public Prosecutions** [1935] AC 462; **Abdi Ally** (supra) and **Mohamed Haruna @ Mtupeni & Another v. Republic,** Criminal Appeal No. 25 of 2007 (unreported). In the just cited case of **Mohamed Haruna @ Mtupeni & Another** (supra) the Court stated that: -

> *"Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that*

an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."

Again, in **Mwita and Others v. Republic** [1977] TLR 54 the Court said:

"The appellants' duty was not to prove that their defence was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."

Similarly, in the case at hand, the appellant was not required to prove that his defence was true. He was only supposed to raise a reasonable doubt, which he did. With respect, we find, the conclusion and the findings made by the two courts below to be contrary to the established principle of criminal justice. Consistent with the settled law, the resultant effect is that, such findings cannot be allowed to stand. On the same line, with respect, we find the submission made by Mr. Kishenyi on this aspect to be misconceived. As such, we also find the second ground of appeal to have merit.

Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We, accordingly, order that

the appellant be set at liberty forthwith unless he is held for some other lawful cause.

DATED at **ARUSHA** this 23rd day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2021 in the presence of the Appellant in person through video conferencing facility linked to Arusha Central Prison and Mr. Felix Kwetukia, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL