IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 99 OF 2020

KADILI ALLY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Kalunde, J.)

dated the 23rd day of December, 2019
in
DC Criminal Appeal No. 354 of 2018

JUDGMENT OF THE COURT

14th & 24th February, 2022

KEREFU, J.A.:

In the Resident Magistrate's Court of Morogoro, the appellant, Kadili Ally, was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002], now R.E 2019 (the Penal Code). It was alleged that, on 1st November, 2017 at Vuleni area, Kikundi Ward, Mkuyuni Division within Morogoro District in Morogoro Region, the appellant had carnal knowledge of "AS" a girl aged seventeen (17) years. The appellant denied the charge and as a result, the case proceeded to a full trial. In proving the charge, the prosecution relied on

the evidence of seven witnesses and one documentary evidence (PF3). AS, the victim who testified as PW1 gave an account of how it all started. She testified that, on 1st November, 2017 while going to fetch water in a company of her younger sister one Mwenda Athumani (PW2), she was called by the appellant but she declined and ran away. The appellant chased and caught her and took her to the bush where he raped her. PW1 cried for help but in vain and thereafter the appellant left. PW1 said that her younger sister, PW2 witnessed the entire incident. PW1 went on to state that she reported the ordeal to her grandmother and then to her mother one Rukia Yahaya Salum (PW3) who reported the same to the Village Executive Officer (VEO), the Village Chairman and to the police. The appellant was then arrested by one Athumani Ally (PW4) who was a militia man.

PW1's account was supported by PW2 and PW3. PW2 added that she knew the appellant as they were living in the same village. That, at the scene of crime, she witnessed the appellant put off his clothes and proceeded to rape PW1. She said that, she failed to raise an alarm because she was afraid that the appellant would beat her.

PW4, a militiaman, testified that on 1st November, 2017, he was assigned the task of arresting the appellant by the VEO. He stated further that he managed to arrest the appellant as he was familiar to him because they were living in the same village and the appellant was one of his neighbours. He said that as they were heading to the police, the appellant escaped and ran away but with the support of G.1557 D/C Bakari (PW5) who investigated the case, they managed to rearrest him. PW4's account was also supported by PW1's uncle one Hashimu Selemani (PW7).

A medical examination was conducted by Dr. Elizabeth Thomas (PW6) on 2nd November, 2017 who detected bruises in PW1's vagina and found out that she had lost her virginity. PW6 tendered the PF3 which was admitted in evidence as exhibit P1.

In his defence, although the appellant admitted that he lived at the same village with PW1, he denied any involvement in the commission of the offence. He recounted to have been arrested in November, 2017 at Alcaida Pombe Shop on PW1's alleged rape. He added that he had no any conflict with PW1 but he was implicated with the said offence because they wanted to take his *shamba*. He thus prayed the trial court to dismiss the charge laid against him.

In convicting the appellant, the trial court relied on the testimony of PW1 whose evidence was corroborated by PW2, PW3, PW4, PW6 and PW7. It found the charge proved against the appellant to the hilt. Hence, the appellant was found guilty, convicted and 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 seven grounds which can conveniently be paraphrased into the following grounds of complaints; **first**, that PW1's evidence was ambiguous and shaky and did not prove penetration; **second**, that PW1 failed to testify on how the appellant raped her before she could raise an alarm for help until the appellant escaped from the locus in quo; **third**, that the identification evidence was not watertight; **fourth**, that, the prosecution witnesses were incredible and unreliable and thus, their evidence could not sustain the appellant's conviction for rape; **fifth**, that, the age of the victim was not sufficiently proved; **sixth,** that, the evidence adduced by PW6 could not corroborate PW1's evidence as PW6 failed to state on how she acquired her status of

being a doctor and **seventh,** the prosecution did not establish its case to the required standard.

When the appeal was placed before us for hearing on 14th February, 2022, the appellant appeared in person without legal representation. The respondent Republic was represented by Ms. Mwanaamina Kombakono, learned Senior State Attorney assisted by Ms. Nura Manja, learned State Attorney.

When given an opportunity to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the learned Senior State Attorney to respond first but he reserved his right to rejoin, if need to do so would arise. We respected his choice and we thus invited Ms. Kombakono to commence her submission.

On taking the stage, Ms. Kombakono from the outset, declared their stance that they were opposing the appeal. Nonetheless, before starting to respond to the grounds of appeal, she first pointed out some of the grounds which she termed to be new ones on account that, they concern factual matters which did not feature in the first appeal and hence, not deliberated and determined by the first appellate Judge. These grounds included grounds number 1, 2, 3, 5 and 6. It was her argument that, since the said grounds were not deliberated and decided upon by the first

appellate court, they were improperly before the Court as it lacked the requisite jurisdiction to handle them. She thus urged us not to entertain them because, as a principle, matters which were not dealt with in the first appeal, cannot be canvased in a second appeal unless they involve points of law.

With regard to the fourth ground, Ms. Kombakono disputed the complaint by the appellant that he was not properly identified. She referred us to the testimony of PW1 found at page 15 of the record of appeal and argued that the appellant was properly identified as he was familiar to PW1 because they both reside in the same village. She added that the evidence of PW1 was corroborated by the evidence of PW2, PW3 and PW4 who also stated that they knew the appellant by name as they were living with him in the same village and he was one of their neighbours. It was her further argument that, since the appellant did not cross-examine the said witnesses on that aspect, it was an assurance that he was properly identified. As such, she submitted that all prosecution witnesses were credible and reliable. She thus urged us to dismiss the fourth ground of appeal for lack of merit.

On the seventh ground of appeal, Ms. Kombakono supported the findings of both courts below that the prosecution proved its case against

the appellant to the required standard. She argued that, in convicting the appellant, the trial court relied on the testimony of PW1 whose evidence was corroborated by PW2, PW4, PW5, PW6 and PW7. Relying on the principle established by this Court in proving sexual offences, Ms. Kombakono argued that, the evidence of PW1 was the best evidence which could have been used by the trial court to mount the appellant's conviction even without any corroboration, as long as the court was satisfied that the witness was telling the truth. She insisted further that in its judgment, the first appellate court, though expunged the evidence of PW2 for being unprocedurally received, it was still satisfied with the findings of the trial court and found that PW1 was a reliable and credible witness and that her testimony was corroborated by the evidence of PW6.

Nevertheless, the learned Senior State Attorney pointed out that exhibit P1 (the PF3) was un-procedurally received as it was not read out after its admission in evidence. She argued that the said exhibit deserves to be expunged from the record. She was however quick to remark that, even if the said exhibit is expunged from the record, it would not affect the strength of the prosecution's case because its contents were adequately explained by oral account of PW6 which also corroborated the evidence of PW1. In that regard, Ms. Kombakono 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 urging us to consider his grounds, allow the appeal and set him at liberty.

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; **Mussa Mwaikunda v. The Republic**, [2006] TLR 387 and **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 (unreported). Specifically, in **Wankuru Mwita** (supra) the Court stated that: -

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can*

be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

We shall be guided by the above principle in disposing this appeal.

Moving to the merit of the appeal, we wish to begin with the point raised by Ms. Kombakono pertaining to the first, second, third, fifth and sixth grounds of appeal that the same are new as they were not canvassed by the first appellate court. Having examined the said grounds, we are in agreement with her that the said grounds are new and should not have been raised at this stage. There is a long list of authorities on this point, some of them include, **Abdul Athuman v. Republic** [2004] TLR 151, **Sadick Marwa Kisase v. Republic**, Criminal Appeal No. 83 of 2012 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal Appeal No. 163 of 2017 (both unreported). In **Sadick Marwa Kisase** (supra) the Court emphasized that: -

"The Court has repeatedly held that matters not raised in the first appeal cannot be raised in a second appellate court."

In this regard, this Court will not entertain the said grounds of appeal for lack of jurisdiction. Pursuant to the dictates of the provisions of section 6 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] this Court is empowered to deal with matters which have been determined by the High Court or the subordinate court exercising extended powers - see **George Maili Kemboge v. Republic,** Criminal Appeal No. 327 of 2013 and **Abedi Mponzi v. Republic,** Criminal Appeal No. 476 of 2016 (both unreported). Therefore, we will only consider the fourth and the seventh grounds of appeal.

With regards to the fourth ground, having gone through the evidence on the record and the submissions made by both parties, we are settled that the appellant was properly identified by PW1 as the person who committed the depraved sexual act on her. To arrive to this conclusion, we have taken into account that PW1 and the appellant were familiar with each other as they were living in the same village and neighbourhood. This fact was also admitted by the appellant at page 29 of the record of appeal when he was cross examined by the prosecutor. It was on the record that, there was no dispute that the appellant met PW1 when she was going to fetch water from the river. That, the appellant called PW1 and when she declined, he chased and caught her and then took her to the bush where

he raped her. There is also no doubt that during the commission of the said offence, PW1 and the appellant were in close contact thus allowing PW1 to observe and recognize the appellant properly.

It is most significant that PW1's evidence of identification was not controverted as the appellant shield away from cross-examining her on that aspect. It is trite law that failure to cross-examine a witness on an important matter implies the acceptance of the truthfulness of the witness's evidence – see **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Ismail Seleman Nole v. Republic,** Criminal Appeal No. 117 of 2013 (both unreported).

We are however, mindful of the principle in the celebrated decision of the Court in **Waziri Amani v. Republic** [1980] TLR 250 that visual identification should only be acted upon after all possibilities of mistaken identity have been eliminated. In the instant case, we are satisfied, based on the circumstances, that there was no possibility of a mistaken identification because PW1 and the appellant knew each other prior to the commission of the offence. As such, we agree with Ms. Kombakono that the appellant was properly recognized by the victim as the person who raped her.

In addition, it is also on the record that, immediately after the said incident, PW1 returned home and narrated the incident to her grandmother and also to PW3 naming the appellant as an offender. The fact that PW1 named the appellant at the earliest, lends credibility to her testimony assuring a positive visual identification consistent with our previous decisions including **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39 where we 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." [Emphasis added].*

Being guided by the above authority, it is our considered view that both lower courts were correct to find that PW1 was a truthful and credible witness. Thus, we find no cause of interfering with the concurrent finding of the courts below on this matter. We therefore find the fourth ground of appeal unmerited and we hereby dismiss it.

As regards the seventh ground, it is clear that the appellant's complaint is to the effect that the prosecution case was not proved to the required standard. To ascertain this complaint, we have scanned the entire

record of appeal and we agree with Ms. Kombakono that the first appellate court properly re-evaluated the evidence and was satisfied with the finding of the trial court.

We have also revisited the testimonies of PW1 and there is no doubt that she clearly explained the incident. PW1 in particular at page 15 of the record of appeal testified on how the appellant raped her. Likewise, PW3 at pages 19 to 20 of the same record, testified on how she was informed by PW1 of the ordeal and reported the same to the village authority. In addition, PW4 testified on how he managed to arrest the appellant and take him to police. On her part, PW6 explained on how she examined PW1's vagina and found that she was raped. There is no doubt that PW6's evidence corroborated the evidence of PW1 that she was raped. PW1 the best witness in this case, testified that she was raped by none other than the appellant.

As for the exhibit P1 (PF3), we agree with Ms. Kombakono that the same was unprocedurally admitted in evidence as its content was not read out after its admission. This was contrary to the requirement of the law and we thus find that, the said PF3 is not good evidence and is hereby expunged from the record. Nevertheless, we equally agree with Ms. Kombakono that even if the PF3 is expunged, the available evidence

sufficiently proved the offence against the appellant. This is so because, in rape cases, the PF3 is not the only evidence to prove rape, other evidence on the record can as well prove it. In **Ally Mohamed Mkupa v. The Republic,** Criminal Appeal No. 2 of 2008 (unreported) this Court stated that: -

> *"It is true that PF3 (Exh.P1) would have supported the commission of the offence but rape is not proved by medical evidence alone. Some other evidence may also prove it."*

Similarly, in the case at hand, we hasten to remark that, even without the PF3, the testimony of PW6 is quite sufficient to prove that PW1 was raped. The said witness clearly showed that, when she examined PW1's vagina she discovered that her hymen was torn and there were bruises in the vaginal area. As such, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion. It is therefore, our settled view that there is no fault in the factual findings of the two courts below on this ground for this Court to interfere. In the circumstances, we also find that the seventh ground has no merit.

In conclusion, we do not find any cogent reasons to disturb the concurrent findings of the lower courts, as we are satisfied that the evidence taken as a whole establishes that the prosecution's case against the appellant was proved beyond reasonable doubt. Accordingly, we find the appeal devoid of merit and hereby dismissed it in its entirety.

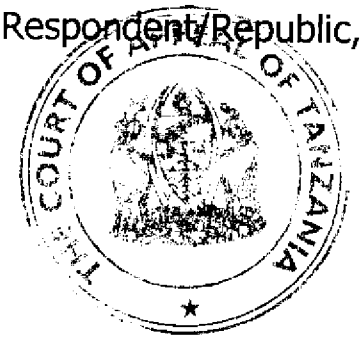
DATED at **DAR ES SALAAM** this 23rd day of February, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2022 in the presence of appellant in person linked via video conference at Ukonga Prison and Ms. Dhamiri Masinde, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL