IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 291 OF 2015

AHMED SAID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwingwa, J.)

Dated 12th day of June, 2015
in
DC. Criminal Appeal No. 49 of 2014

JUDGMENT OF THE COURT

26th October & 17th November 2016

MUSSA, J.A.:

In the District Court of Moshi, the appellant was arraigned for two counts of rape and impregnating a school girl, respectively. The statement of the offence of rape, which constituted the first count, was laid under the provisions of sections 130 (1) (2) (e) and 131 of the Penal Code, Chapter 16 of the Revised Laws; whereas the second count was preferred under section 78 of the Education Act, No. 25 of 1978, as well as Regulation 5 of the Education (Imposition of penalties to persons who marry or impregnate a school girl) Regulations which are comprised in Government Notice No. 265 of 2003. The particulars of the first count were that, on divers dates, in February 2013, at Somali street, within

the Municipality of Moshi, in Kilimanjaro Region, the appellant had sexual intercourse with a certain Yusra Issa, who was then aged sixteen (16). As regards the second count, the accusation was that, on a divers date, in January 2013, the appellant impregnated the said Yusra Issa who was then a student of Kaloleni Islamic Secondary School.

The appellant denied both counts on the charge sheet but, at the end of the trial, he was found guilty on the first count, convicted and, accordingly, sentenced to a term of thirty (30) years imprisonment. As regards the second count, the trial court absolved the appellant of responsibility and acquitted him. On appeal to the High Court, the first appellate Judge (Mwingwa, J.) dismissed his appeal in its entirety. Still aggrieved, the appellant has preferred this second appeal. For a better understanding of the salient issues embroiled in the appeal, we deem it necessary to highlight, albeit briefly, the factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

The prosecution version was unfolded by five witnesses but the only eye witness to the occurrence of rape was the alleged victim, namely, Yusra Issa Mosha who was featured as the first prosecution witness (PW1). In the witness box, Yusra introduced herself as a sixteen years old form III pupil of Kaloleni Secondary School, Moshi who resides at Somali Street with her mother, namely, Asina Yusuph (PW 2).

Her material testimony was to the effect that someday in January 2013, she visited the residence of a certain Hamad where she desired to borrow a CD. Upon arrival at the residence, she met the appellant whom, she claimed, was Hamad's friend. The appellant then called and took Yusra aside where he pointedly told her that he adored her and that he wanted to have sexual intercourse with her. The young girl obliged although she, allegedly, declined the sexual intercourse proposal.

A little later, on an undisclosed date in February 2013, Yusra re-visited the Hamad residence where she, once again, met the appellant. This time the appellant picked a key from Hamad, whereupon he took the young girl to the latter's bedroom, undressed her to nakedness and, after doing the same to himself, he forcefully inserted his manhood into her vagina. Yusra, allegedly, felt pains and bled from the sexual encounter which, she said, was her first ever. When all was over, the young girl returned home and, on that particular day, her mother, Asina, had travelled to Singida. She was, however, confronted by her grandmother who wanted to know where she had been and, in response, she actually lied to her that she had gone to collect a CD without disclosing the sexual encounter. A remark is, perhaps, well worth that the grandmother was not featured as a witness.

Yusra further told the trial court that a week later, she had another sexual stunt with the appellant but this time the encounter was not as painful. Back home, her seemingly inquisitive grandmother was at it again as she queried where she had been to which enquiry Yusra replicated the lie about going to collect a CD. What followed next were mobile phone chats between the appellant and Yusra in the course of which, a few days later, the latter informed the former that she had a stomach ache and that she felt like she was pregnant. The appellant told her that they have to abscond to the Republic of Uganda where his mother resides and that she should steal a sum of Shs. 700,000/= from her mother which will help them as fare to the desired destination. A little later, upon being informed by the appellant that the travel arrangements were drawing nigh, Yusra stole a sum of Shs. 700,000/= from her mother's wardrobe and duly stuffed her belongings in a bag in readiness for the journey. Then, around 5:00 a.m. on the following day, as she braced herself for the journey, she was interrupted by her mother who wanted to know where she was going. Yusra lied to her that she was going outside for a short call but, in reality, the appellant was waiting for her outside the house and the two of them went straight to the bus terminal where they boarded a bus going by the name of

Zuberi Luxury Coach which was destined for Mwanza. Going by the bus tickets (exhibit P3), they boarded the bus on the 22nd February, 2013.

Moments later, Asina suspected that her daughter had absconded after she found that her Shs. 700,000/= as well as Yusra's clothes were amiss. She immediately solicited the assistance of her nephew, namely, Hamisi Abubakar Yusuph (PW 5) and, together, they rushed to the Moshi bus terminal. Indeed, upon embarking on Zuberi's coach, PW5 located Yusra on one of the bus' seats. Incidentally, the appellant was occupying a separate seat. Seeing her cousin Hamisi, Yusra retorted angrily with this:-

"Achana na mimi, unanifuatilia nini"

Just then, the bus commenced its journey and, as it departed from the terminal, PW5 was pleading with its driver to stop the bus to enable him retrieve his truant cousin; but he was told to defer his request till when they reached Arusha. And, so both Asina and Hamisi had to travel aboard willy-nilly and, upon reaching Arusha, they sought and obtained police assistance, following which both Yusra and the appellant were apprehended.

Back to Moshi, police investigations were commenced under the supervision of WP No. 2938 Detective Sergeant Prisca (PW4) who

released and referred Yusra to Mawenzi Hospital for examination. The medical examination was performed by Dr. Beatha Minja (PW3) who took a urine test and observed that Yusra was pregnant. In her testimonial account, the medical officer told the trial court that she could not determine the age of the pregnancy since no ultra sound test was taken. Ironically though, in the PF3 in which her findings were summed up and posted, the medical Officer frantically claimed that Yusra's pregnancy was six weeks old. With this detail, so much for the prosecution version as unfolded during the trial.

In reply, the appellant elected to give sworn testimony and indicated that he would feature five witnesses. In effect, however, he enlisted only three witnesses, namely, Halima Said Hamad (DW2), Salim Mohamed Abdullah (DW3) and Billy Jeremia Massawe (DW4). In a nutshell, from his own account as well as that of his witnesses, the appellant completely disassociated himself from the prosecution accusation. He did not, however, refute knowing Yusra whom, he claimed, had an intimate relationship with his friend, namely, Hamad Mushrazi. And, so the appellant told the trial court that he used to see the girl at Hamad's residence where she was a frequent visitor. The appellant further testified that he has a girlfriend (DW2), who was

formerly named Jennifer Reuben Swai but changed her religion and name after she got involved in the relationship with him.

Coming to the fateful day, the appellant told the trial court that he truly boarded Zuberi Luxury Coach on that day. Only, he said, he was not with Yusra, rather, he was travelling with his girlfriend (DW2) and they were destined for Mwanza to visit his sister at St. Augustine College. Thus, at the time of his arrest from the bus, he was with Halima (DW2). In her testimony, the latter confirmed the detail and, indeed, the two tickets (exhibit P3) which were retrieved from the appellant bore the names of Ahmed Said and Halima Said and that concludes the appellant's version.

As hinted upon, on the whole of the evidence, the trial court was impressed by the prosecution witnesses, more particularly, PW1 who was found to be a credible and truthful witness. Nonetheless, in its judgment, aside from making a recital of the account given by the appellant and his witnesses, the convicting magistrate did not, in the least, consider and weigh the defence case as against the prosecution account and determine, if at all, the same created doubts to the prosecution case. Likewise and as, again, already intimated, the first appellate Judge found no cause to vary the verdict of the trial court and dismissed the appeal in its entirety. Discontented, the appellant has

preferred this this second appeal which is predicated upon five points of grievance, namely, that:-

> *"1.That the first appellate court grossly erred in law in upholding the conviction and sentence despite the charge being not proved against the appellant to the standard required by the law;*
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> *2. That the first appellate court grossly erred in law in upholding the conviction and sentence despite it being based on weak, inconsistent, incredible, uncorroborated and unreliable evidence which lacked corroboration and, above all, the court did not warn itself against reliance on the evidence of a single witness;*
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> *3. That the 1st appellate court grossly erred in law by abdicating its duty of subjecting the entire evidence on record to an objective scrutiny and, as a result, it relied on the evidence that was not a basis of the appellant's conviction to sustain the conviction and sentence against the appellant;*
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> *4. That the 1st appellate court grossly erred in law by failing to appreciate that the only point for determination of the trial court was "who was responsible for the victim's pregnancy" yet the victim conceived her pregnancy in JANUARY, prior to the alleged date of rape which was FEBRUARY, hence the trial court's conviction and sentence were unfounded and;*
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> *5.That both the 1st appellate and trial courts grossly erred in law in failing to consider the undisputed and strongly supported*

defence of the appellant by his witnesses and make a reference of it in their judgments which is contrary to natural justice and unsettles the judgment. "

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Ms. Sabina Silayo, learned Senior State Attorney, who was assisted by Ms. Mary Lucas, learned State Attorney. The appellant fully adopted the points of grievance which he raised in the memorandum of appeal and, in his lucid elaboration, he repeatedly insisted that the date of PW1's pregnancy, which the trial court pegged to his conviction, was materially at variance with the date of the alleged occurrence of rape; that PW 1 was an incredible, unreliable and a self-confessed liar unworthy of belief; that there were material contradictions between the testimonial account of the medical officer (PW 3) and the PF3 (exhibit P. 2) which she herself authored and; that both courts below did not consider his defence.

For their part, both Ms. Silayo and Ms. Lucas did not resist the appeal and, in the result, they, in turn, declined to support the conviction and sentence. Briefly stated, in their respective submissions, PW1 was a most unreliable and self-confessed liar who is completely unworthy of belief. They also deplored PW3 for clumsily contradicting

the PF3 which was a document of her own making. In sum, both Law Officers urged the conviction and sentence which were handed down on the appellant cannot be sustained.

With so much for the respective concurrent positions from either side, to begin with, we think that this appeal turns on the credibility and reliability of the evidence of Yusra, the alleged victim, which predicated the appellant's conviction. As we approach the issue, we are verily alive to the fact that the concurrent findings of both courts below were to the effect that PW1 was a credible and truthful witness. We similarly understand that this is a second appeal to which it is well settled that this Court will ordinarily be slow to intervene and overturn the concurrent findings of the two courts below. But this established rule of practice is predicated on the premise that the two courts below did not act upon a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice. Where the concurrent findings are based on such incorrect premises, the Court will certainly interfere on a second appeal to right the injustice (see **DPP vs Jaffari Mfaume Kawawa** [1981] TLR 149).

In this regard, after our objective perusal of the entire evidence on record and the judgments of the two courts below, we have found a compelling need to interfere in the interests of justice. As we shall

shortly demonstrate, in the case under our consideration, both courts below were under a misapprehension on the nature and essence of the testimony of the alleged victim. That would suffice to justify our intervention and take the unusual step of interfering with the concurrent findings of the two courts below, particularly with respect to the credibility and reliability of the testimony of Yusra, the alleged victim.

As we have already intimated, Yusra was the only witness to the occurrence of rape and her account on the occurrence stood uncorroborated. True, on account of section 127 (7) of the Tanzania Evidence Act, Chapter 6 of the Revised Laws Edition of 2002 (TEA), a conviction may be solely grounded on the uncorroborated evidence of a child of tender age or of a victim of a sexual offence, as the case may be. To be precise, the provision stipulates:-

> *"Notwithstanding the preceding provision of this section, where in Criminal Proceedings involving a sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may,* ***after assessing the credibility*** *of the child of tender years or, as the case may be, the victim of the sexual offence, on its own merits, notwithstanding that such evidence is not corroborated* ***and proceed to convict if, for reasons to be recorded in the***

proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but truth." *[Emphasis supplied]*

We have supplied emphasis to underscore the point that the provision imposes two important duties upon a trial court: **First,** upon receipt of the uncorroborated evidence of a victim of a sexual offence, to subject to assessment the credibility of the witness and; **second**, to only proceed with a conviction if, for reasons to be recorded upon record, the convicting court is satisfied that the victim of the sexual offence told nothing short of the truth. We should suppose the court can only arrive to such a conclusion upon a positive assessment of the uncorroborated evidence of the victim and, what is more, the reasons for the satisfaction of the court as to the victim's truthfulness must be apparent on the face of the judgment or record proceedings.

We should pause here to observe that, in the situation at hand, both courts below, without any assessment, unreservedly believed and relied upon the testimony of Yusra in, respectively, entering and sustaining the conviction against the appellant. Furthermore, no reasons whatsoever were assigned by the both courts as to their satisfaction on the credibility and truthfulness of the witness.

Upon our own re-assessment, the record testifies to Yusra's difficulties to make out a coherent and credible story although she gave testimony barely three months or less after the alleged occurrence. She contradicted herself here and there as if she was not seized of the facts of her own predicament. Under cross-examination, for instance, she told thus:-

> *"I don't remember exactly when we made love, but it was February 2013 it was in the middle of February. It was before a week before we made love again. It was 24th February 2013 when we tried to escape to Mwanza. When we went to check pregnancy, I was one month pregnant..."*

Going by her own account, we find it difficult to reconcile her claim that the sexual encounter happened mid-February with her other detail about being found with a month old pregnancy on the 23rd February when the test was performed by PW3. Besides, her claim that it was the 24th February, 2013 when they tried to abscond to Mwanza is not borne out by the bus tickets as well as the undisputed factual setting according to which the attempt to abscond was on February 22nd.

Furthermore, from her own testimony, it is beyond question that Yusra collaborated the sexual occurrence and, as a result, she did not at all disclose the incident to any person. As it turned out, she only did so

for the first time as she was being interviewed by PW4 in the aftermath of the aborted attempt to abscond. Much as we are aware of the timidness, taboo or stigma that may be an associated cause for the late or non-reporting to a person of confidence of an act of sexual violence by a victim, nothing in the record points to that direction. Each case is to be decided by its own set of circumstances and facts. On a failure to name a suspect at the earliest possible opportunity, this court in the unreported Criminal Appeal No. 6 of 1995 **Wangiti Mansa Mwita na Others v. The Republic,** made the following observation:-

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

In our view, the statement of principle equally befalls on a witness in the shoes of Yusra who withheld the details of the sexual occurrence for quite a while. To further complicate her non-disclosure and, as was correctly formulated by the learned Senior State Attorney, Yusra was a self-confessed liar. In this regard, her own account relating to how she lied to her mother and grandmother tells it all.

Thus, it must be obvious from the foregoing that the alleged victim of the sexual assault did not commend herself with such

rationality which could attract the confidence of her testimony to any court of law. On the contrary, she was such an incredible and unreliable witness who could only attract anxiety rather than confidence. It is, we should think, precisely when a witness is unreliable that it becomes desirable if not necessary to look for corroboration. But, as we have already hinted, when we turn to look for corroboration in the matter at hand, it is wholly absent and that alone would suffice to conclude the appeal in favor of the appellant.

For the sake of completeness it is noteworthy, however, that the unreliability of PW1 was not the only disquieting factor in the matter under our consideration. It is, so to speak, elementary and a settled principle that, on any criminal trial, the prosecution is required to prove its case beyond reasonable doubt and that it cannot be said to have discharged its burden unless the evidence given by or on behalf of the accused is put into the balance and weighed against that adduced by the prosecution. We have already expressed the extent to which the learned convicting magistrate in this case did not, as she should have done, take into consideration the defence put up by the appellant and his witnesses. Upon numerous authorities, it has been held that it is so important that the trial court should keep the defence testimony continuously in mind in its verdict. Thus, for example, in **Lockhart-**

Smith v United Republic [1965] 1 EA 211 the High Court of Tanzania (Weston, J.) found it necessary to observe:-

> *"Failure to take into account any defence put up by the accused will vitiate conviction."*

As it were, in that case, the High Court quashed the conviction solely on that ground. Accordingly, on account of the shortcoming as well as the unreliability of PW1, the appellant's conviction cannot be allowed to stand.

In the result, we allow the appeal, quash the conviction and set aside the sentence which was meted against the appellant. He should be released from prison custody forthwith unless he is held there for some other lawful cause. It is so ordered.

DATED at **ARUSHA** this 7th day of November, 2016

M. C. OTHMAN
CHIEF JUSTICE

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

A. K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL