IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MMILLA, J.A., MZIRAY, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 323 OF 2016

EMMANUEL JOSEPHAT .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)
(Mwingwa, J.)

dated the 23rd day of June, 2016
in
DC Criminal Appeal No. 37 of 2015

....

JUDGMENT OF THE COURT

24th September & 2nd October, 2018

MMILLA, J.A.:

Emmanuel Josephat (the appellant), was charged before the District Court of Moshi in Kilimanjaro Region, with the offence of rape contrary to sections 130 (1), (2) (a) and 131 of the Penal Code Cap. 16 of the Revised Edition, 2002. After full trial, he was found guilty, convicted and sentenced to serve 30 years imprisonment. He unsuccessfully appealed to the High Court of Tanzania, Moshi Registry, hence this second appeal to the Court.

The background facts of this case were briefly that on 7.5.2014, PW1 Felista Martin, who was a resident of Uru within Moshi Rural District, was

at their farm within that locality at which she had gone to cut grasses for feeding goats.

Afterwards the appellant, a person who was very well known to her, arrived at that farm and was armed with a machete. Without uttering a word, he held her by the neck, pulled her to the nearby bush and threatened to kill her by cutting her with that weapon if she raised alarm. He then tore her skirt, the skin tight and the underwear, after which he threw her on the ground and began ravishing her. He released her after he had accomplished his lustful desire. Thereafter, he purported that he was taking her to her grandfather, and that he was desirous to marry her. They left together and headed to the village. Then, PW1 had put on her torn skirt, but was carrying her torn skin tight and the underwear in her hands.

On the way back home however, PW1 and the appellant met two women, PW3 Mary Rogath and one Skolela (the latter was not called as a witness), both of whom were PW1's village mates. PW1 told them that the appellant raped her at the bush near the farm at which she was cutting

grasses. Upon PW1's revelation of that incident to those women, the appellant ran away leaving the prosecutrix in the latters' hands.

On the other hand, PW3 recounted that on 7.5.2014 during evening hours, she and Skolela met PW1 on the way. She was in the company of the appellant and were heading towards the village. She added that the prosecutrix was putting on a torn skit, but was carrying a skin tight and underwear in her hands. She also related that PW1 informed them that the appellant raped her. Upon that information, she and another woman known as Filomena John Njau (PW4) who joined them a little bit latter escorted PW1 home.

On arrival home, the incident was reported to the "Community Police" and the village chairman, and subsequently to the police. The police gave PW1 a PF3 with instructions to proceed to Mawenzi Regional Hospital for medical examination and treatment. Meanwhile, the appellant was arrested and eventually charged with the offence of rape as it were.

The appellant's defence was very brief. In essence he stated that he knew PW1 very well, and that she was his lover whom he knew by the name of Jessica. He also said that he met her on 7.5.2014 and they had

consented sex at the home at which he was staying. He added that he was seen by PW1 and her colleague (Skolela) at the time he escorted her back home. He refuted the allegations that he raped her. He was firm that he was innocent.

As aforesaid however, after a full trial the appellant's defence was rejected. Upon conviction, he was sentenced to serve 30 years imprisonment. He unsuccessfully appealed to the High Court, hence this second appeal to the Court.

The appellant filed a four point memorandum of appeal as follows; **one** that, exhibit P1 was improperly admitted as evidence; **two** that, exhibits P2 which constituted the PF3 was similarly improperly admitted as evidence; **three** that, the evidence of PW1 and PW3 was improperly relied upon because it was loaded with contradictions; and **four** that, other important witnesses, including the victim's mother were not called to testify in the case.

When the appeal came for hearing before us on 24.9.2018, the appellant appeared in person and was not represented; whereas the

respondent/Republic enjoyed the services of Mr. Maternus Marandu, learned Senior State Attorney.

At the commencement of hearing, the appellant requested the Court to adopt his grounds of appeal and chose for the Republic to begin while reserving his right to make a rejoinder if need would arise. On that basis we invited Mr. Marandu to make his submission.

The learned Senior State Attorney asked to discuss together the first, second and fourth grounds of appeal, and then argue the third one separately. He nonetheless, chose to begin with the third ground, which as afore-pointed out, alleges that the evidence of PW1 and PW3 was improperly relied upon because it was loaded with contradictions.

Mr. Marandu's submission on the third ground was brief, strong and focused. He firstly contended that the evidence of PW1 and PW3 was not contradictory, save for one very minor contradiction on the aspect of time which, in his view did not go to the root of the case. He maintained that PW1 had testified that at the time she and the appellant were heading to the village, she was putting on her torn skirt and carried her skintight and the underwear in her hands, which is indeed what PW3 also said. Likewise

both, PW1 and PW3 said that the appellant was carrying a machete (panga), and that he ran away at the time PW1 revealed the awful incident of rape to PW3. He contended that he carefully scanned the evidence of those two witnesses but did not find any single detail which suggested that there were any contradictions.

Besides, Mr. Marandu went on to submit, although the evidence of PW1 could stand alone, it was nevertheless corroborated. Apart from that of PW3, her evidence was similarly corroborated by that of PW2, PW4 and PW5. Mr. Marandu referred also to the PF3, a document which apart from the fact that it was tendered without any objection, the appellant did not cross examine the witness who tendered it. Mr. Marandu maintained that it connoted that he accepted its contents. That document showed that the doctor who medically examined PW1 found some blood and sperms in her female organ, which offered further corroboration that she was raped. In support of this point, Mr. Marandu cited the case of **Robert s/o Faida @ Samora v. Republic,** Criminal Appeal No. 276 of 2016, CAT (unreported). It was expressed in that case that failure to cross examine on any particular point suggest acceptance of that particular piece of evidence. We share that view.

Mr. Marandu submitted as well that the appellant himself admitted that on 7.5.2014 he had sex with PW1 at the house in which he lived, which he falsely claimed was consented to by PW1. The learned Senior State Attorney said that the appellant lied that it was a consented sexual intercourse for two reasons; firstly because the evidence showed that he raped her in the bush near PW1's family farm; and secondly that PW3 supported the testimony of PW1 that in the process, the appellant tore her clothes which she carried in her hands at the time she related the incident to PW3 and Skolela at the place where PW1 and the appellant met them on the way back home from the farm. On the aspect of lying, Mr. Marandu referred us to the case of **Rex v. Eruwasani Sekoni s/o Eria and Kezekia Biboyera** [1947] 14 EACA 74. Overall, he submitted that the third ground of appeal lacks merit and urged us to dismiss it.

As regards the first, second and fourth grounds of appeal, Mr. Marandu contended that after carefully going through the memorandum of appeal which was presented in the High Court, and on the basis of which the decision being impugned was anchored, he found out that all of them are new grounds because they were not raised before that court. In the circumstances, he submitted, the Court has no jurisdiction to consider

them at this level. He relied on the case of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004, CAT (unreported). He urged the Court to ignore them.

For reasons he has assigned, Mr. Marandu has invited the Court to dismiss the appeal in its entirety.

On his part, apart from his request for the Court to allow his appeal, he said he had nothing to add.

We have carefully considered the submission of the learned Senior State Attorney. We think we should likewise start with the third ground of appeal.

The essence of the third ground of appeal is that the evidence of PW1 and PW3 was loaded with serious contradictions; therefore that it was improperly relied upon in founding the appellant's conviction. Unfortunately, the appellant did not shade light on the areas the said witnesses contradicted each other. That leaves us with only one option of keenly examining the evidence of those two witnesses.

The crux of the evidence of PW1 was that on 7.5.2014 at around 11:00 in the morning, the appellant found her at the farm where she was cutting grass and was armed with a machete. Immediately on catching up with her, the former held her by the neck, and that coupled with threats to kill her if she resisted, he drugged her to the nearby bush at which he tore her skirt, the tight-skin and the underwear, after which he set upon her and forcefully raped her. After he was through, he told her that he was contemplating of marrying her and offered to escort her home. PW1 was clear that she had put on her torn skirt, and that during the walk to the village she carried her other torn clothes in her hands. They walked together up to the point at which they met PW3 and the said Skolela, whereupon she divulged the incident to those two women. It was at that point in time that appellant ran away.

On the other hand, PW3 stated that on 7.5.2014 at about 3:00 in the evening, she and one Skolela met PW1 who was in the company of the appellant walking towards the village, and that the latter was holding a panga. She similarly said that the complainant was putting on a skirt which she held with one hand, while the other hand carried her skin-tight and the underwear. PW3 and her colleague asked them where they were coming

from, and that the appellant answered that they were coming from the forest, and that the girl was his wife, a fact which was disputed by Skolela who informed her that the girl was a daughter of a certain teacher in the village. It was then that the complainant asked them to help her because the man in whose company she was raped her. PW3 added that on looking at PW1, she noticed that her legs were smeared with blood. PW3 was joined by another woman (PW4) who was nearly that place. The two escorted the victim home.

We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case - See the cases of **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, and **Lusungu Duwe v. Republic**, Criminal Appeal No. 76 of 2014, CAT (both unreported). In those cases the Court stated commonly that in all trials, normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. It was also emphasized that:-

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter".

As will be observed, the evidence of PW1 and PW3 was similar, and was fundamentally free of contradictions except for the one minor contradiction on the aspect of time. While PW1 said that the complained of incident occurred around 11:00 a.m. in the morning, PW3 was recorded to have said that she met PW1 and the appellant at about 3:00 p.m. in the evening. Basing on the two cases we have cited above, we find that the said contradiction on the aspect of time was very minor and inconsequential as it did not go to the root of the charged matter.

We also agree with Mr. Marandu that in fact, the evidence of PW1 could stand alone. As we had the occasion to state in a number of cases, including that of **Selemani Makumba v. Republic** [2006] T.L.R. 379,

true evidence in a case of rape comes from the victim. In that case the Court 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."*

Of course, that is applicable where the trial court may have found the complainant to be credible, believable and reliable as provided under section 127 (7) of the Evidence Act Cap. 6 of the Revised Edition. That section provides that:-

> *"S. 127 (7): Notwithstanding the preceding provisions of this section, where in criminal proceedings involving 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 evidence of the child of tender years of (sic: or) as the***

case may be the victim of sexual offence on its own merits, *notwithstanding that such evidence is not corroborated, 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 the truth."*

In the present case however, apart from the evidence of PW3, the evidence of PW1 was further corroborated by that of PW2 Dr. Edna Mushi who medically examined the victim. She testified that on examining her female organ she found the presence of bruises, some blood and sperms, a fact which suggested that she was engaged in a sexual intercourse.

It is similarly not irrelevant to point out, as did Mr. Marandu, that the issue whether or not sexual intercourse took place between PW1 and the appellant is not disputed because of the latter's admission in his defence, though he qualified that the complainant consented.

We nonetheless hasten to point out that we are not convinced that PW1 consented to have sex with the appellant. We also find that he lied

when he said that the complained of act took place at his residence. We are saying so for three reasons; one that, the evidence of PW1 that the appellant found her at their family farm was supported by that of PW3 who said that on asking them where they came from, the appellant replied that they were coming from the forest. Also, the fact that the complainant's clothes were torn, which clothes she carried in her hands, negates the purport that it was a consented sex. We hold firm that consensual sex could not have resulted into him tearing her under- clothes. Further, as will be reflected, PW3 said that at the time she met the complainant and the appellant, PW1's legs were smeared with blood, a fact which shows that the act was not decently executed; otherwise she could have hygienically taken care of herself before walking like that in public as she did. Thus, the appellant hugely lied – See the case of **Rex v. Eruwasani Sekoni s/o Eria and Kezekia Biboyera** (supra). It was held in that case that:-

> *"That although lies and evasions on the part of an accused do not in themselves prove the correctness of facts alleged against him, they may if on material issues, be taken in to account along with other*

matters and the evidence as a whole when considering his guilt or innocence."

On the basis of what we have discussed above, we are in full agreement with Mr. Marandu that the third ground of appeal lacks merit, we accordingly dismiss it.

Next for discussion are grounds 1, 2, and 4. We have once again seriously considered Mr. Marandu's submission in that regard. Like him, we traversed the grounds of appeal which were filed in the High Court appearing at pages 35 and 36 of the Record of Appeal. We satisfied ourselves that these grounds were not raised in that court. In other words, they have been raised in this Court for the first time.

There are several cases in which the issue whether or not the Court may decide on a matter which was not raised in and decided by the High Court on first appeal. Such cases include those of **Abdul Athuman v. Republic** [2004] T.L.R.151 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009, CAT (both unreported). In those cases, the Court held commonly that it had no jurisdiction. While relying on the earlier case of **Abdul Athuman v. Republic** (supra), the Court elaborately stated in

the case of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 (unreported) that:-

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the second appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

It follows therefore, that since grounds 1, 2, and 4 were not raised in and decided by the High Court on first appeal, we desist to determine them on account of lack of jurisdiction. Those grounds are consequently struck out.

That said and done, for reasons we have herein assigned, we find and hold that the appeal is devoid of merit, on the basis of which we dismiss it in its entirety.

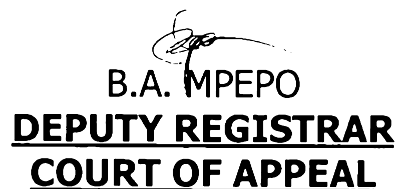
DATED at ARUSHA this 28th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



B.A. MPEPO
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