IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM :KILEO,J.A., JUMA, J.A., And MWARIJA,J.A.)

CRIMINAL APPEAL NO. 42 OF 2015

DANIEL ABDUL .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and sentence of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated the 3rd day of March, 2014
In
Criminal Appeal No. 93 of 2013

JUDGMENT OF THE COURT

29thSeptember & 5th October, 2015

MWARIJA, J.A.:

The appellant was charged in the District Court of Arusha with the offence of rape contrary to sections 130(1)(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. It was alleged that on the 19th day of February 2012 at about 17.00 hrs at Kijenge area within Arusha Municipality the appellant raped one Sabrina D/O Mecklaud, a girl aged 12 years. After a full trial, the appellant was convicted and sentenced to 30 years imprisonment term. He was aggrieved and thus appealed to the High Court. His appeal was dismissed hence this second appeal.

The facts giving rise to this appeal are brief and simple. Sabrina Mecklaud, (PW1), a girl who was aged 11 years at the material time of

incident was living with her grandparents at Kijenge area in Arusha town. At the neighbourhood lived the appellant, Daniel Abdul. On 19/12/2012, PW1 was left alone at home. At between 16.00 and 17.00 hrs, Pascal Charles (PW2) who lived in the same house with PW1, which is also the house of his grandparents, returned home from Church. He saw one Neema Benson (PW5) arriving at his grandparents' home. She informed him (PW2) and his grandfather (PW4) that she saw PW1 entering the appellant's house. PW2 decided to go to the said house followed later by his grandfather.

Shortly thereafter, PW5's mother, Sophia Rajabu (PW3) who was passing there, found many people having gathered at the appellant's house. She was told by PW5 and PW2 that PW1 was there inside the appellant's room. She decided to enter into the room and as she was told, she found there the appellant and PW1. She immediately took PW1 and went out with her. The appellant was suspected of raping PW1 and as a result, he was arrested and sent to police station. He was later charged as stated above.

According to PW3's evidence, when she entered into the appellant's room, she found both the appellant and PW1 naked and that the appellant was lying on top of her. It was PW3's evidence also that following her

entrance into the appellant's room, PW1 took her clothes and did quickly wear them before she left with her. The witness stated also that PW1 was bleeding and walked with difficulty.

On her part, PW1 whose evidence was properly taken after a ***voire dire*** examination, testified that on the material date, between 16.00 and 17.00 hrs, the appellant who used to pass near her home called and required her to go with him to his house. While in the house, he undressed her and despite her cry for help, inserted his penis into her vagina. She added during cross examination by the appellant that she bled as a result of being raped by the appellant. The evidence of PW3 was supported by that of PW2 who said that when PW1 was coming out of the appellant's house he saw her having worn her T-shirt inside out.

In his defence, the appellant admitted that he was found with PW1 in his room. He however denied the allegation that he raped her. He said that while in his room, he suddenly saw PW1 entering and when she asked her the purpose of her visit, she replied that she was looking for her comb which had fallen under his door as she was passing. He added that he shortly thereafter heard a person calling her from outside and PW1 responded by saying that she was looking for her comb. When he looked outside however, he noticed that many people had gathered. He was

shortly thereafter arrested and taken to police station. He was later charged, convicted and sentenced as stated above.

In this appeal, the appellant has raised three grounds of appeal as follows:-

> *"1. That the learned first appellate Judge erred in law and in fact by disregarding that the prosecution side failed to prove their case against the appellant beyond reasonable doubt.*
>
> *2. That the learned first appellate Judge erred in law and in fact in ignoring the contradictions in the prosecution evidence.*
>
> *3. That the learned appellate Judge erred in law and in fact when she failed miserably to scrutinize the evidence of PW1 (the victim) and hence she arrived on an erroneous decision."*

At the hearing of the appeal, the appellant appeared in person and unrepresented while the respondent Republic was represented by Ms. Neema Mwanda, learned Principal State Attorney. When he was called upon to argue his grounds of appeal, the appellant preferred to hear first

the learned Principal State Attorney's arguments in reply to the grounds of appeal and then make his response.

Ms. Mwanda made it clear at the outset that the responded resists the appeal. She argued that all the three grounds of appeal are devoid of merit. As to the first ground, she contended that the prosecution proved its case beyond reasonable doubt through the evidence of PW1. She stressed that the evidence of PW1 proved that she was raped by the appellant. According to the learned Principal State Attorney, that evidence was supported by, among other pieces of evidence, the evidence of PW3 and PW5.

On the second ground, Ms. Mwanda argued that there were no apparent contradictions in the evidence of the prosecution witnesses as contended by the appellant. However, citing the case of **Maramo s/o Slaa Hofu v. Republic,** Criminal Appeal No. 246 of 2011 (CA-AR) (unreported), she argued that contradictions in witnesses' evidence are in most cases inevitable. What is important, she argued, is the gravity of the contradictions and whether they adversely affected the prosecution's case. It was her argument that in this case, the evidence of PW1 which was supported by that of the appellant, who admitted that he was found with

PW1 in his room, was sufficient to prove the offence. To substantiate her argument that the evidence of an accused can be used to support the prosecution evidence, she cited the case of **Rungu Juma v. Republic,** [1994] TLR 176. Ms. Mwanda argued further that since the evidence of PW1 was found credible by the two courts below, even if a contradiction exists as regards the evidence of PW3 and other witnesses, such contradiction will not cause the prosecution case to flop.

On the third ground of appeal the learned Principal State Attorney argued that the contention by the appellant that the evidence of PW1 was not properly scrutinized is without merit because the learned appellate judge evaluated that evidence and found the same to be credible.

In response to the submission made by the learned Principal State Attorney, the appellant, who as stated above was not represented by a counsel, prayed to tender a written submission which he had prepared in support of his grounds of appeal. We received and allowed him to rely on the document after we had given time to the learned Principal State Attorney to go through it.

The arguments in his written submission centred mainly on his first ground of appeal, that the prosecution did not prove its case beyond

reasonable doubt. He argued that since, according to the evidence of PW3, when she found PW1 in the appellant's room and asked her what she was doing she remained silent, the logical conclusion is that she was not raped, otherwise she should have stated so. The other factors which, according the appellant, show a weakness in the prosecution case are the failure by PW3 to inspect PW1's private parts to see whether she had been raped and failure by PW3 to state in her evidence the particular part of the body from which PW1 was bleeding.

The appellant argued also that the evidence of PW1 and PW3 was contradictory in that while PW3 stated that when she entered into the appellant's room she found both the appellant and PW1 naked with the appellant lying on top of PW1, on her part, PW1 said that although she was found naked, the appellant was at that moment putting on clothes. He contended thus that from such contradiction, the evidence of the two witnesses ought to have been discredited on the ground that they framed the same against him for the reasons best known to themselves.

It was a further argument by the appellant that the prosecution did not prove the offence against him because of lack of medical evidence linking him with the offence. He contended that he ought to have been medically examined of his sexual organ so as to be established whether or

not he raped PW1. He added on this aspect of his argument, a new ground that although according to the evidence, PW1 was sent to hospital, there was neither a P.F. 3 tendered in evidence nor did the doctor who examined her testify in court. According to him, absence of medical evidence weakened the prosecution case.

From the fact that in his written submission the appellant raised a new ground that failure by the prosecution to tender PW1's medical evidence adversely affected the prosecution's case, we allowed Ms. Mwanda to make a reply to that ground. The learned Principal State Attorney argued that although it is true that such evidence was lacking, the omission did not adversely affect the weight of the prosecution evidence. She argued that in a rape case, the evidence of a victim, if believed, is in itself sufficient to prove the offence. She cited to that effect the decision of this Court in the case of **Godi Kasenegala v. R.,** Criminal Appeal No. 10 of 2008 (unreported).

Having duly considered the arguments made by the appellant and the learned Principal State Attorney, we wish to state that the grounds of appeal raised by the appellant are in essence intertwined. In his first ground, he contends that the evidence tendered by the prosecution did not

prove the case against him beyond reasonable doubt. The second and third grounds form the basis of his complaint in the first ground. We find it appropriate therefore to consider first, the last two grounds of appeal.

In the second ground, the nature of contradiction relied upon by the appellant is that whereas PW3's evidence is to the effect that she found both the appellant and PW1 naked in the appellant's room with the appellant lying on top of her (PW1), on her part, PW1 said in her evidence that the appellant was found putting on clothes. That indeed is a contradiction but since it is not disputed that both the appellant and PW1 were naked hence the reason for the appellant's act of putting on clothes after intrusion by PW3 into the room, the contradiction is, in our considered view minor an of no significance to the gist of the prosecution's evidence that the appellant raped PW1. The gist of the prosecution evidence was not to establish whether the appellant and PW1 were found naked or otherwise.

In the case of **Maramo s/o Slaa Hofu** (*supra*) cited by the learned Principal State Attorney, this Court reiterated the principle as stated in the case of **Said Ally Ismail v. R.,** Criminal appeal No. 249 of 2008 (unreported). In that case, the Court stated that:-

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

Having found that the contradiction did not affect the gist of the evidence implicating the appellant with the offence, we find that ground of appeal to be lacking in merit.

The third ground of appeal is equally, in our considered opinion, devoid of merit. As argued by Ms. Mwanda, the learned appellate judge scrutinized the evidence of PW1 and at the end concluded that her evidence was "very straight forward." The learned appellate judge cannot therefore be faulted on that ground.

That said and done, we turn to consider the appellant's general ground of appeal, the first ground on which he contends that the learned appellate judge erred in failing to find that the prosecution did not prove the case against the appellant beyond reasonable doubt. In this case, what was required of the prosecution was to prove firstly, that PW1 was raped and secondly, that it was the appellant who raped her.

As stated above, the fact that the appellant was found with PW1 in his room was not in dispute. There is also sufficient evidence that when

PW3 entered into the appellant's room PW1 was naked. The issue which arises from the submissions by the appellant and the learned Principal State Attorney is whether the learned appellate judge erred in failing to find that the prosecution has failed to prove that the appellant raped PW1 as contended by the appellant.

In his new ground of appeal the appellant raised an issue that the act of rape was not proved because the prosecution did not tender medical evidence to establish that fact. We wish to state here that where proof of a fact involves, among other pieces of evidence, expert evidence, it is desirable that such evidence should be tendered. In the present case as submitted by the appellant, the prosecution did not produce a medical report to establish that PW1 was raped. The matter for consideration thus is whether the omission has adversely affected the weight of the prosecution evidence.

This matter was considered by the learned appellate judge. Relying on the decision of this Court in the case of **Selemani Mkumba v. R.,** Criminal Appeal No. 94 of 1999 she held that despite the absence of medical evidence, the evidence of PW1 alone sufficiently proved that PW1 was raped. We stated above, that in her evidence, PW1 stated that on the material date after having taken her into his room, the appellant undressed

her and inserted his penis into her vagina. Her evidence was found by the two courts below to be credible. This being the second appellate court, it can only interfere with that finding of the two courts when there is a sufficient reason to do so. As observed in the case of **Felix s/o Kichele v. The Republic**, Criminal Appeal No. 159 of 2005 (CA-MZA) (unreported) a second appellate court can only interfere with a finding of fact if:-

> *"it is evident that the courts below omitted to consider available evidence or have drawn wrong conclusion from the facts or if there have been mis-directions or non-directions on the evidence."*

In this case, we could not find anything which would compel us to fault the finding of the two courts below on the fact that PW1 was raped. We find further, as argued by the learned Principal State Attorney, that the victim's evidence was supported by the evidence of PW3, PW5 and that of the appellant who admitted that he was found with the victim (PW1) in his room. The appellant's argument that PW3 did not state from which part of her body was PW1 bleeding, her silence when she was asked to say what she was doing in the appellant's room and the contention that he was not examined by a doctor to establish whether or not he raped PW1, are, in our considered view, of no relevance in weakening the evidence of the

credible.

On the basis of the above stated reasons, like the other two grounds of appeal, we find the first ground of appeal to be devoid of any merit. In the event the appeal is hereby dismissed.

DATED at **ARUSHA** this 2nd day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL