IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 25 OF 2016

PETER ABEL KIRUMI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwaimu, J.)

Dated 28th day of July, 2015
in
HC. Criminal Appeal No. 18 of 2015

JUDGMENT OF THE COURT

18th & 27th October, 2016

MUSSA, J.A.:

In the Resident Magistrate's Court of Arusha, the appellant was arraigned for two counts of rape, contrary to sections 130 (1) (2) (e) and 131 (2) of the Penal Code, Chapter 16 of the Revised Laws. The particulars of the first count were that on the 9th day of March 2014, at Sekei area, within the City and Region of Arusha, the appellant had sexual intercourse with a certain Nasma Said who was then aged sixteen (16).

As regards the second count, the same accusation was replicated, save for the detail that the alleged incident occurred on the 19th day of March, 2014.

The appellant denied the charge but, at the end of the trial, he was found guilty, convicted and sentenced to a term of thirty (30) years imprisonment. On appeal to the High Court, the first appellate Judge (Mwaimu, J.) dismissed the appellant's appeal in its entirety, save for his appeal against the second count which was allowed. The appellant is still discontented, hence this second appeal which conveniently boils down to three points of grievance to the effect that:-

1. *That the first appellate court failed its duty for not re-evaluating the evidence presented before the trial court;*
2. *That the trial court unjustifiably did not afford the appellant an opportunity to defend himself and;*
3. *That the charge sheet was incurably defective.*

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic has the services of Ms. Eliainenyi Njiro, learned Senior State Attorney who was assisted by Mr. Diaz Makule, learned State Attorney. As it were, the appellant fully adopted the memorandum of appeal but opted to let the learned Senior

State Attorney to submit first. For her part, Ms. Njiro resisted the appeal and fully supported the conviction and sentence. For a better appreciation of the points of contention, it is necessary to highlight the factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant.

The prosecution version was unfolded by two witnesses, namely, Nasma Said (PW1), the alleged victim, and Saida Khalid (PW2), who happens to be Nasma's mother. Incidentally, at the material times Nasma was employed by the appellant as a house girl. Her testimony was to the effect that on the 9th March, 2014 the appellant called and asked her to massage him. The appellant is married but, at that particular time, his wife was seemingly away from home. The young girl obliged but, as she massaged him, the appellant, who was clad in a pair of boxer shorts only, asked her if she had a boy friend and her response was that she had none. The appellant then went out of the house and returned home around 1.00 p.m. or so at a time when Nasma was sitting in the living room. Just then, the appellant pointedly told PW1 that he wanted to have sexual intercourse with her. Next, the appellant undressed her and, after doing the same to himself, he inserted his manhood into her vagina. The girl allegedly felt

pains and bled from the encounter which she, however, did not disclose to anyone.

Nasma further told the trial court that ten days later, more precisely, on the 19th March 2014, around 10.00 p.m. or so, the appellant approached her and again demanded to have sexual intercourse with her. Nasma allegedly refused and, as they argued about, the appellant was called by his wife over his mobile phone. After the telephone call, the appellant allegedly aborted the attempt.

Soon after, Nasma went to PW2's residence around 11.00 p.m. or so where, for the first time, she disclosed the two episodes. The testimony of PW2 was more or less a recital of what she was told by PW1 and after her account, the prosecution closed its case. A remark is, perhaps, well worth that, during the preliminary hearing, the prosecution indicated that it desired to feature, as a witness, a medical Doctor from Mount Meru Hospital as well as producing the victim's PF3 as an exhibit. Nonetheless, for some obscure cause, neither the medical officer nor the PF3 were featured in evidence.

On the strength of the evidence of the two witnesses, on the 2nd day of September, 2014 the trial court found the prosecution to have

established a *prima facie* case and, accordingly, addressed the appellant in terms of section 231 of the Criminal Procedure Act, Chapter 20 of the Revised Laws Edition 2002 (the CPA). The appellant elected to give sworn testimony and indicated that he would feature a single witness in the name of Neema Peter. Hearing of the defence case was then scheduled for a later date but, from then onwards, the appellant jumped bail, whereupon the trial court issued a warrant of arrest against him.

A good deal later, on the 27th November 2014, upon being satisfied that the appellant's attendance could not be secured without undue delay, the trial court fixed a date for pronouncing judgment and, indeed, judgment was delivered on the 10th day of February, 2015 on account of which the appellant was found guilty, convicted and sentenced *in absentia* to the extent we have already indicated. In its judgment, the trial court simply made a recital of the evidence of PW1 and proceeded to convict the appellant. The convicting magistrate observed, though, that the evidence of PW2 was materially hearsay and, as such, it cannot corroborate the testimony of PW1.

A little later, in the aftermath of the judgment, on the 12th February 2015, the appellant was arrested and featured before the learned Resident

Magistrate who convicted him. When asked to explain his absence, the appellant casually related thus:-

> *"We have settled the matter out of court, my fault is to miss the court session, but I was sick, I talked to the victim of this case, they told me the case was closed."*

As it were, the trial court was unimpressed and ordered the sentence to commence from the date of the appellant's apprehension in accordance with the provisions of section 226 (3) of the CPA. As, again, already intimated, the first appellate Judge found no cause to vary the verdict of the trial court and dismissed the appeal despite the fact that the learned State Attorney who appeared before him had declined to support the conviction.

Resisting the appeal, Ms. Njiro submitted that the evidence on record overwhelmingly implicated the appellant on the accusation of rape which he was facing. The learned Senior State Attorney went further to discount the appellant claim to the effect that the first appellate court did not subject the evidence to scrutiny and proper re-evaluation. In her submission, the first appellate court took a proper approach on the evidence and, thus, the concurrent findings of the two courts below were well deserved.

On the grievance about not being given an opportunity to testify in defence, Ms. Njiro countered that the trial court was justified to proceed in the absence of the appellant after he jumped bail and his attendance could not be procured. The learned Senior State Attorney conceded, however, that since the absence of the appellant came after the close of the case for the prosecution, the applicable provision was section 227 and not section 226 of the CPA. Nonetheless, Ms. Njiro was quick to add that the reference by the trial court to section 226 was innocuous particularly since the appellant was afforded an opportunity to express the reasons for his absence.

As regards the charge sheet, the learned Senior State Attorney similarly conceded that the statement of offence erroneously cited subsection 2 instead of subsection 1 with respect to the punishment provision for rape. Ms. Njiro, however, submitted that the irregularity is curable much as the appellant clearly understood the nature of the offence he was facing. In sum, the learned Senior State Attorney urged that the appeal is bereft of merits and that the same should be dismissed in its entirety.

In reply, the appellant reiterated the points raised in the memorandum of appeal and added that the accusation of rape was fabricated on him on account of his being indebted to pay Nasma a two months' salary. The appellant also took pains to explain that he missed some of the court sessions because on those days he was indisposed. Conversely, the appellant prayed that his appeal be allowed with an order for his release from prison custody.

We have passionately weighed and considered the competing claims from either side. To begin with, we accept the formulation of the learned Senior State Attorney to the effect that the misdescription in the statement of the offence with respect to the punishment provision is inconsequential and did not anyhow prejudice the appellant. We similarly entirely subscribe to her submission that the trial court was fully justified to proceed with the case in the absence of the appellant, the more so as his absence was unexplained. But, we think that the crucial issue in this appeal turns on the reliability and sufficiency of the evidence which predicated his conviction.

As we approach the issue, we are verily alive to the well established rule of practice that in the absence of misdirections, non-directions or

misapprehension of the evidence the Court, on a second appeal, should refrain from interfering with the concurrent findings of the two courts below. In this regard, we note that both courts below unreservedly relied upon the testimony of Nasma in, respectively, entering and sustaining the conviction against the appellant. 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 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 reasons for the satisfaction of the trial court must be apparent on the face of the judgment or record proceedings, the more so as, under certain circumstances, corroboration of the evidence of the victim may be called for. No such reasons were availed by the trial court and, as we shall shortly demonstrate, in the circumstances of the case under our consideration, there was need for corroborative independent evidence to support the account told by PW1. That would suffice to justify our intervention and take the unusual step of interfering with the concurrent findings of the two courts below on the reliability and sufficiency of the testimony of Nasma, the alleged victim.

From the evidence of Nasma, it is beyond question that the young girl delayed to disclose the first incident for a good ten days and only did so in the aftermath of the aborted second occurrence. 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 artiest 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 Nasma who withheld the details of the first occurrence for ten days. What is more, going by Saida's account, it seems to us that as her daughter was disclosing to her the second incident, she made an exaggeration and went so far as to claim that the appellant raped her for the second time. More particularly, this is what PW2 told the trial court:-

"I went to one Fatuma who is the one who found a job for her, we together with her asked the daughter, the daughter said she was raped two times, on the first time he had no condom and in the second time he did wear a condom. . . ."

From the foregoing particulars, it is beyond question that Nasma was not quite the salt of the earth in her account on the alleged episode. There was, so to speak, a dire need for an independent account to corroborate her story which, unfortunately, was not featured by the prosecution. As hinted upon, during the initial stages of the trial the prosecution indicated a desire to feature a medical witness as well as a PF3. The medical evidence would have possibly availed the missing corroboration but, as already intimated, such evidence was not featured and, much worse, without any

explanation. In the circumstances, we take the liberty to invoke section 122 of the TEA to adversely infer that the medical evidence was withheld on account that it would have been unfavourable to the prosecution.

To this end, we are of the settled view and, with respect to the learned Senior State Attorney, that the conviction cannot be sustained and, accordingly, 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 24th day of October, 2016

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL