IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 432 OF 2021

MALIGILE MAINGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Kigoma

(Matuma, J.)

dated the 2nd day of July, 2021

in

Criminal Appeal No. 11 of 2021

.....

JUDGMENT OF THE COURT

31st May & 5th June, 2023

MUGASHA, J.A.:

The appellant herein **Maligile s/o Maingu** has lodged an appeal against the decision of the High Court of Tanzania which overturned the decision of the District Court of Kasulu in which the appellant was charged for Rape Contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, [CAP 16 R.E.2022]. It was alleged that on 16/7/ 2020 during morning hours, at Hwazi Street within Kasulu District in Kigoma Region, the appellant had carnal knowledge of a girl aged 15 years old. For the purposes of concealing

her identity the girl shall be referred to as the victim or PW1. He denied the charge and in order to prove its case, the prosecution paraded four witnesses and tendered two documentary and physical exhibits (P1 and P2). The appellant had one witness and tendered one documentary exhibit (D1),

A brief factual account underlying the appeal is to the effect that, the victim, the appellant and his wife together with a seven years' old child, all resided in the same house. The victim was a house maid in the said household. According to the evidence of the victim, 0n 16/7/2020at about 06.00 hours in the morning while at the workplace in the appellant's house, the appellant accessed her room and asked her to wake up and drink juice. She obliged and as she attempted to sip the juice she spat and as a result, she was slapped by the appellant three times who forcefully held her mouth and she was forced to drink the alcohol. She was drunk and became unconscious, lost consciousness and she eventually fell asleep. The appellant utilised the opportunity to rape her while asleep as she was not aware of what was going on.

Having regained consciousness, she experienced pains in the genital area and gathered that her blood stained underpants thrown down and by then, the appellant was beside the bed and on seeing her awake, he left.

According to the victim, when she woke up the child was not there and because of pains she could not on her own rise from the bed. She also testified that, the appellant who had previously attempted to rape her, managed to accomplish the awful act in the absence of his wife whom he had chased away. Shortly thereafter, her mother Constancia Raphael (PW2) made a call and the victim narrated her ordeal mentioning the appellant to be the culprit. According to the victim's mother, on the fateful day the appellant had called her claiming that he just wanted to greet her. Since the appellant was not used to calling her, she lost peace of mind and decided to call the victim who wept to the extent that she couldn't speak properly but managed to narrate what had befallen her and mentioned the appellant to be the assailant. As PW2 inquired from the appellant as to what had happened to her daughter, he pleaded for mercy and asked to be forgiven. PW2 decided to call the appellant's wife to whom she broke the bad news and asked her to take the victim to the hospital which she obliged. At about 3:00 hours, Jackeline Emmanuel the appellant's wife surfaced and took the victim to the police and later to the hospital.

The victim was bleeding profusely and she could not walk properly because of pains and she cried when urinating and as such, on arrival at the

hospital she was put on a wheel chair. Alphonce Gabriel Lutumo (PW3) is the doctor who examined the victim. He testified that, upon examination, the victim had blood clots in the vagina and thighs, bruises in the outer space of the vagina and lacerations in the inner and out space of the vagina. She was also bleeding in her genital part and a gauze had to be fixed in the vagina to stop more bleeding. She was treated, stitched her and admitted at the hospital for one week. At the hospital, the victim was also accompanied by WP 9163 Detective Constable Eva (PW4) who also witnessed the victim bleeding profusely, crying in agony complaining of pains and stomach ache and her clothes were blood stained. The victim narrated to PW4 her encounter of being raped by the appellant. Then, PW4 retrieved the blood-stained clothes from the victim and led by the appellant's wife, went at the appellant's residence and retrieved the victim's undergarments which were blood stained. The retrieved clothes were all taken to the police station. Subsequently, the appellant was arraigned for the charged offence of rape.

In the defence, the appellant denied the prosecution assertions. He testified that, on 15/7/202 in the evening, he was at the business place of his wife and later went at a certain place and had drinks. However, on the way back home, a quarrel ensued between them and there was an exchange of

bitter words as each accused another for having an extramarital affair. Thereafter, the wife left and she did not sleep at the matrimonial home. According to the appellant, at about 11:00 hours the children including the victim were asleep and he as well, went to sleep. In the morning at about 5:00 hours, he woke up, and at 5.52 he was already at work. He thus faulted the prosecution account on the rape allegations to be false because he was not at the scene of crime. Further, he told the trial court that, the case was fabricated by his wife who had earlier promised to teach him a lesson. The appellant also stated that since the victim was drunk, she could not see the person who raped her. She also faulted the evidence of PW2 on ground that, she did not produce at the trial a voice message to prove that they had communicated on the fateful day. Yet, he faulted the assertions by PW4 as untrue and that the exhibit tendered was fabricated whereas the evidence by the doctor fell short of showing the cause of the bruises on the victim's vagina.

After a full trial, the trial court was satisfied that PW1 was sexually assaulted, penetrated into her vagina and seriously injured as per evidence of the doctor (PW3). The learned trial magistrate doubted as to whether PW1's vagina was by penis because during such penetration, she was

unconscious and could not see that it was actually the respondent's penis which had penetrated into her vagina. The trial magistrate also rejected the appellant's defence of alibi and the allegation on the fabrication of the charges by his wife. In other words, although he was satisfied that the respondent was responsible with what had befallen the victim, however he concluded that it did not amount to rape because besides the victim being unconscious because of intoxication there was no person who witnessed the occurrence of the rape incident. Thus, the appellant was acquitted.

The respondent was aggrieved by the decision of the trial Court. As a result, the respondent successfully preferred an appeal before the High Court. The decision of the trial court was reversed and the appellant was convicted and sentenced to serve a jail term of 30 years and in addition, the he was ordered to compensate the victim a sum of TZS. 5,000, 000.00. Undaunted, the appellant has preferred this appeal challenging the decision of the High Court. In the Memorandum of Appeal dated 24/9/2021, the appellant presented the following grounds of complaint:

1. *That, the 1st appellate Court Judge erred in law and fact for considering that, the prosecution side proved penetration through the evidence adduced by PW1, PW3 and exhibit P1.*

2. *That, the 1st appellate Court Judge erred in law and fact in deciding that, the prosecution side managed to prove their case against the appellant beyond reasonable doubt.*

On 25/5/2, through his advocate, the appellant filed a Supplementary Memorandum of Appeal which comprised eight grounds as follows:

1. *That, the 1st appellate Court erred in law to entertain and determine the appeal which was filed out of time.*
2. *That, the first appellate Court erred in law and fact to determine the appeal while the ruling for prima facie case in the trial Court was not issued to warrant the appellant to defend.*
3. *That, the first appellate Court erred in law and fact in not considering the defence of alibi raised by the appellant at the prosecution case before defending.*
4. *That, the first appellate Court erred in law and fact to convict the appellant while the respondent did not establish the chains and custody of exhibits collected from the scene of the crime.*
5. *That, the first appellate Court erred in law and fact to convict the appellant while all exhibits (P1 and P2) were tendered by the public prosecutor, and exhibit P1 has a different name which is not the appellant's name.*
6. *That, the first appellate Court erred in law and fact to rely on exhibit P2 without the certificate of seizure being tendered in Court.*

7. *That, the first appellate Court erred in law to impose exorbitant compensation and string orders without affording the right to be heard.*

8. *That, the first appellate Court erred in law and fact to convict the appellant without causing the sperms found in the appellant found on the complainants with the appellant and medically examine.*

At the hearing, in appearance was learned advocate Innocent John Kisigiro for the appellant and Ms. Sabina Silayo, learned Senior State Attorney for the Respondent Republic. Before the hearing commenced, Mr. Kisigiro abandoned the first two grounds in the Supplementary Memorandum and the first ground in the Memorandum of Appeal. Then, he opted to initially argue the grounds of complaint in the Supplementary Memorandum of Appeal.

In arguing the 3rd ground Mr. Kisigiro submitted that, the appellant's defence of alibi was wrongly rejected because on the fateful day he was on duty at 06.00 hours and as such, he could not be at the scene of crime. This evidence he argued, was substantiated by the duty roaster (Exhibit D1) and supported by Naftari Remweli Mgana (DW2) who told the trial court that he is the one who on 16/7/2020 handed over the gun to the appellant who proceeded to guard the armory. Thus, it was submitted that, in the wake of

his absence at the crime of scene on the fateful day, the appellant is not responsible with the rape of the victim at his house.

In relation to grounds 4 and 6, the complaint is that, the chain of custody on the exhibits allegedly retrieved at the rape incident such as, the victim's underpants and Kitenge was compromised. On this, the appellant's counsel argued that in the absence of the certificate of search and seizure the exhibits were illegally procured and thus wrongly relied upon to ground the conviction of the appellant. Thus, he urged us to expunge them from the record.

In the 5th ground of appeal, it was submitted that, since the PF3 (exhibit P1) and the under garments of the appellants were tendered by the prosecutor who was not a competent witness, the exhibits were wrongly procured and acted upon to convict the appellant. He thus urged us to expunge them from the record.

Finally, in the 7th ground of appeal, the appellant faulted the quantum of compensation to the victim as excessive and the mode of recovery propounded by the High Court Judge to be contrary to the dictates of the law. On this, it was pointed out that, besides imposing compensation at the tune of TZS. 5,000,000.00 the first appellate court ordered the amount to be

recovered by attachment and sale of the appellant's movable and immovable property including his pension contributions. He thus, implored on the Court to reverse the order of the first appellate court.

The appellant further challenged the High Court decision arguing that, it convicted him in the absence of watertight evidence to establish the charge of rape beyond reasonable doubt against him. This is the gist of the appellant's complaint in in ground 1 in the Memorandum of Appeal and ground 8 in the Supplementary Memoranda of Appeal. On this, it was Mr. Kisigiro's argument that, since no spermatozoa was found in the victim's vagina, penetration was not proved and as such, Alphonce Gabriel Lutomo (PW3) who examined the victim gave a contradictory account on the findings he made. When probed by the Court as to what could be the probable cause of tear, bruises and profuse bleeding on the victim's vagina he was of the view that probably, the victim was in her menses. The appellant's counsel also raised a query on the delayed arraignment of the appellant after he was arrested viewing this to have prejudiced the appellant without stating how considering that the appellant was acquitted by the trial court. Ultimately, Mr. Kisigiro urged us to allow the appeal, reverse the decision of the High Court and set the appellant at liberty.

On the other, the leaned Senior State Attorney strongly opposed the appeal. She advanced the following submissions. Besides, challenging the appellant's complaint on the defence of *alibi*; he argued that exhibit D1 is not authentic because it does not show if on the fateful day and time, the appellant was on duty and secondly, though the exhibit appears to have been authored by Commander, it is not stamped and it cannot be ruled out that it was picked in the street. In this regard, it was argued, the appellant's defence of *alibi* was properly rejected and as such, that the appellant was at the scene of crime and he did rape the victim on the fateful day and time.

The learned Senior State Attorney conceded that, the chain of custody on the storage and custody of exhibit P2 from retrieval up to its tendering at the trial was compromised due to unknown person who received the exhibit and stored the same before it was entrusted to the prosecutor for tendering at the trial. She thus urged us to expunge the exhibit from the record as it was wrongly acted upon to ground the conviction of the appellant.

It was the submission of Ms. Silayo that, the doctor did establish that there was penetration having concluded that there was forceful entry into the vagina of the victim. That apart, it was argued that, since the doctor was not cross-examined by the appellant, the appellant had acknowledged the

doctor's account on the extent of injury suffered by the victim for reason of forceful entry into her vagina. To support this proposition, she cited to us the case of **MARTIN MASARA VS. REPUBLIC,** Criminal Appeal No. 428 of 2016.

While the learned State Attorney opposed the complaint on the quantam of the compensation awarded, she conceded that the mode of recovery was wrongly invoked by the learned High Court Judge because that is the domain of the civil courts as per the dictates of the provisions of section 248 of the Criminal Procedure Act [CAP 20 R.E.2022] (the CPA). As such, like her counterpart, she urged us to reverse the mode of recovery of compensation which was ordered by the High Court Judge and instead, direct the recovery process to be conducted by way of a civil suit.

Finally, it was submitted that the charge was proved to the hilt against the appellant on account of credible testimony of the victim which is supported by other prosecution witnesses considering that, **one,** the victim who was a housemaid narrated as to how the appellant accessed into her room and raped her after forcefully intoxicating her; and **two,** besides disclosing what had befallen her to PW2 and PW4, she mentioned the appellant to be the one who raped her. **Three,** mentioning the appellant at

the earliest, rendered the victim's account reliable and credible and thus, she is entitled to credence and her evidence is worthy belief.

As to the delayed arraignment, it was submitted to have been caused by the appellant's restraint in the lockup of the army. However, it was argued that the appellant was not prejudiced anyhow. Finally, the leaned Senior State Attorney urged us to dismiss the appeal and sustain the conviction of the appellant as grounded by the High Court.

In rejoinder, besides repeating his earlier submission, Mr. Kisigiro urged the Court not to consider the doctor's account if it expunges the PF3. The other limb of his submissions basically constituted statements from the bar not supported by the record and as such, we decline to make any judicial pronouncements on the same.

Having carefully considered the contending arguments, the grounds of appeal and the record before us, the major issues for determination in the disposition of this appeal mainly hinge on the following: **one**, whether the trial was flawed with procedural irregularities; (Grounds 4 and 5). **Two**, whether the charge of rape was proved beyond reasonable doubt against the respondent. **Three**, the propriety or otherwise of the mode of compensation and its recover.

The complaint on the procedural irregularities hinges on the manner in which the exhibits were handled from retrieval at the scene of crime up to when tendered at the trial. The chain of custody has to be demonstrated throughout the process from the seizure up to when it is tendered in court. The significance of the chain of custody is to give integrity to the exhibits involved to ensure reliability. In the case of **ZAINAB NASSOR @ ZENA VS. REPUBLIC,** Criminal Appeal No. 348 of 2015 the Court cited the case of **PAULO MADUKA & 4 OTHERS VS. REPUBLIC**, Criminal Appeal No. 100 of 2007, the Court stated that:

> *"... to show to a reasonable possibility that the item that is finally exhibited in court as evidence has not been tempered with along its way to the court".*

The scrutiny of the evidence on record shows that, whereas on 16/7/2020 PW4 took the clothes from the victim to the police station it is not known as to who was entrusted the exhibits at the police. Although PW4 claimed to have been led by the appellant's wife, there is no documentation on how PW4 took those exhibits and it is not certain if the exhibits retrieved by PW4 were the same which were kept at the police station and later exhibited in Court. Besides, the name of the exhibit keeper who was

entrusted the exhibit for safe custody is not known. Thus, the complaint is merited and as such, we expunge exhibit P2 from the record. In that, regard, having expunged exhibit P2 it is inconsequential to determine the complaint on the propriety or otherwise of the prosecutor to tender the respective exhibit P2 in the evidence. Thus, grounds 4, 5 and 6 in the Supplementary Memorandum are merited.

The complaint on the delayed arraignment need not detain us as it has been addressed in the testimony of the appellant at page 33 of the record of appeal whereby as he told the trial court that being under restraint he could not visit the victim when she was hospitalised. We found this to be a probable reason for delayed arraignment but all the same, the appellant was not prejudiced in any manner and he was accorded a fair trial.

Next is the complaint on the alleged contradictory account of the Doctor who besides, finding that there were no spermatozoa, yet concluded that the victim was actually raped. The findings of the Doctor can be discerned in his oral account as reflected at page 21 of the record of appeal in the following terms:

> *"At the time she arrived she was in pains. She was pushed on a wheel chair. She was bleeding in her*

female reproductive organ. As I examined her we saw bruises in the outer space of the vagina. But also there were lacerations in the inner and outer space of the vagina. And in the area between vagina and anus also was lacerated. We stitched her in the vagina and outside of the vagina. We put to her the gauze to stop bleeding..."

With the said account, it is glaringly clear that the doctor established that there was penetration which is a crucial element in the offence of rape. In this regard, Mr. Kisigiro was of the view that if the PF3 is expunged then the Doctor's evidence should follow suit and it should not be considered. We do not agree with Mr. Kisigiro because it is settled law that, the credible oral account of a witness shall not fail the test of admission merely because the corresponding documentary account has been expunged. See: **ABAS KONDO GEDE VS. REPUBLIC,** Criminal Appeal No. 472 of 2017 and **SIMON SHAURI AWAKI @ DAWI VS. REPUBLIC,** Criminal Appeal No. 62 of 2020 (both unreported). That said, the complaint that no penetration was established because there were no spermatozoa, is neither here nor there. We are fortified in that regard because section 130(4) (a) and (b) of the Penal Code [CAP 16 R.E 2022] stipulates as follows:

"130 (4) For the purposes of proving the offence of rape–

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.

In terms of the cited provision, to prove the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. The basic element to be proved is the penetration of the victim's vagina and there is no need of proving the existence of sperms in the victim's vagina because penetration however slight is sufficient to establish rape. See the case of **GEORGE MWANYINGILI VS. REPUBLIC** Criminal Appeal No. 335 of 2016. In this case, the Court held that:

"Once again, we agree with Mr. Mtenga that what is important is the fact that there were bruises in the victim girl's female organ, an aspect which was indicative of the fact that there was penetration which is a crucial ingredient of the offence of rape.

We similarly agree with Mr. Mtenga that for the same reasons that penetration was vindicated/the absence of sperms in PW3 female organ is not something material in the case".

In the premises, although the first appellate Court did not cause the sperms found in the appellant and those found on the complainants to be medically examined, this did not vitiate the fact that the victim was actually raped.

Finally, we have to determine if the victim was raped by the appellant. The first appellate court having subjected the victim's account to scrutiny, it was satisfied that her testimony was credible. As a second appellate having subjected the prosecution account, we are satisfied that she gave a consistent and coherent account as to how she was forced to be under the influence of alcohol and raped by the appellant. On this, and from the victim's account it can be discerned how the appellant accessed the victim's room, forced her to drink alcohol and when she was drunk, he proceeded to rape her. The appellant's argument that, since the victim was unconscious, she could not know who raped her is neither here nor there because before being forced to take alcohol; the victim was sober and she managed to see the appellant who requested her to drink alcohol and when she refused, she

was slapped on the face, beaten and forced to take alcohol before she was raped while unconscious. Yet when she woke up upon regaining consciousness, she found the appellant aside her bed. That apart, on the fateful day the appellant was the only male adult person who slept in the house and as such, the victim was raped by the appellant and none other. That aside, on the same day which was the earliest opportunity the victim mentioned to her mother and later to the police that it is the appellant who raped her. See: **MARWA WANGITI MWITA AND ANOTHER VS. REPUBLIC** [2002] TLR 39 as the Court held:

> *"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 explained delay or complete failure to do so should put a prudent court to inquiry".*

In the circumstances ground 8 in the Supplementary Memorandum is not merited as it was proved beyond doubt that it is the appellant who raped the victim.

On account of credible and reliable evidence of the victim which placed the victim at the scene of crime, we reject the appellant's defence *alibi.* That apart, exhibit D1 a duty roaster from the army does not indicate that at

06:00 hours the appellant was at the armoury. Moreover, contrary to the suggestion by Mr. Kisigiro, the shortfall cannot be supplemented by the evidence of DW2 because section 103 of the Evidence Act [CAP 6 R.E.2022] excludes evidence against application of document to existing facts as it stipulates as follows:

> *"When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such fact".*

That said, the appellant's defence of alibi fails the test and as such it was properly rejected by both courts below. Thus, the complaint in ground three is not merited.

On the quantum of compensation, we think it is not on the high side. However, the mode of recovery is illegal and we thus, quash and set aside the High Court order and direct the victim to invoke civil jurisdiction to recover the compensation as per the dictates of section 248 of the CPA. Thus, ground 7 in the Supplementary Memorandum is partly merited.

In the premises, besides, the victim's credible account as flanked by the evidence of PW2, PW3 and PW4, taken in totality, we are satisfied that

the cumulative prosecution account points to the guilt of the appellant. In the circumstances, we are satisfied that in the light of foregoing evidence, the prosecution proved the charge of rape beyond reasonable doubt against the appellant. Thus, we do not find any cogent reason to reverse the verdict of the first appellant Court. That said the appeal is without merit and save for grounds 5 and 6 of appeal, it is hereby dismissed.

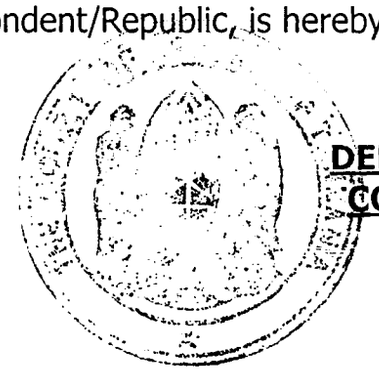
DATED at **KIGOMA** this 3rd day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2023 in the presence of Mr. Sylvester Damasi Sogomba holding brief for Mr. Innocent John Kisigiro, learned counsel for the Appellant and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Amina Mawoko, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL