IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MDEMU, J.A.)

CRIMINAL APPEAL NO. 357 OF 2019

VICTOR GOODLUCK MUNUO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkapa, J.)

dated the 30th day of August, 2019

in

(DC) Criminal Appeal No. 38 of 2018

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JUDGMENT OF THE COURT

05th & 12th July, 2023

KWARIKO, J.A.:

In this appeal, Victor Goodluck Munuo, the appellant is appealing against the decision of the High Court of Tanzania at Moshi, which upheld the decision of the District Court of Siha (the trial court). Formerly, the appellant was arraigned before the trial court charged with the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022]. The particulars of the offence were that: On 23rd August, 2016 at Koboko Village within Siha District and Region of Kilimanjaro, the appellant had carnal knowledge of one 'SSS' (name

withheld to protect her dignity), a girl aged eleven years and a primary school pupil. He denied the charge and thus he was fully tried. At the end of the trial, the appellant was convicted and sentenced to thirty years imprisonment. Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court.

The prosecution case was built by the evidence of five witnesses and one documentary exhibit. The facts of the case which arise from the evidence of those witnesses can briefly be stated as follows: The victim of the offence, 'SSS' (PW3) was living with her grandmother one Kanansaria Mmari (PW2). On 23rd August, 2016, PW3 went to school but did not return home as usual. PW2 became suspicious and started looking for her in vain. On the following day, PW2 reported to the police. However, PW3 returned home on 25th August, 2016 and upon inquiry she told PW2 that she had been at the home of her grandfather. Following that information, PW2 made inquiry, from the said grandfather but he denied the said allegations.

Thereafter, PW2 reported that development to the police, following which, PW3 was taken to hospital for medical examination. At the hospital, she was examined by Dr. Christina Guvert (PW1) who discovered that the victim had bruises in the labia majora of her vagina with bad smell,

suggesting that she had been sexually penetrated. PW1's findings were filled in the PF3 which was admitted in evidence as exhibit P1.

In her testimony, PW3 stated that on the material day while on her way to school, she met the appellant whom she knew before by the name of Victor, a motorcyclist ("bodaboda"). He asked her to go to his residence to take some water. When she went there, he locked her inside and left. When he returned in the evening, he forcefully undressed and had sexual intercourse with her. He again left and returned the following day and repeated to have sexual intercourse with her. She narrated further that, although she raised an alarm, no one came to her rescue. On the second time, the appellant told her that PW2 was looking for her and that is when he let her free with a warning that, she should not disclose to anyone where she had been.

In the course of investigation according to the prosecution case, the victim allegedly provided the description of the assailant to the social welfare officer, one Peter Msade (PW4) who assisted the police to arrest the appellant who was at a "bodaboda" stand in Fuka area.

On the other hand, the appellant was the sole witness in his defence. He denied the charge and generally denied to know anything in connection with the allegations levelled against him.

As indicated earlier, the trial court was satisfied that the victim was a credible witness and that her evidence was corroborated by the medical evidence. It therefore found that, the charge against the appellant was proved beyond reasonable doubt. He was convicted and sentenced as indicated earlier.

In the first appeal, the High Court rightly found that the PF3 was erroneously received in evidence as it was not read over after its admission and thus it was forthwith expunged from the record. However, the remaining evidence was found sufficient to ground conviction and therefore it dismissed the appellant's appeal.

Undaunted, the appellant has come before the Court on a second appeal with six grounds which raise the following four points of complaints, that: **one,** the two courts below erred in law and fact to believe the evidence of PW3 whose credibility was questionable; **two,** the appellant was named only by a single name of Victor, hence an identification parade was necessary; **three,** the prosecution evidence was contradicting and insufficient to ground conviction; and **four,** that, penetration being an essential ingredient of rape was not proved. Further, in terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009, the appellant also filed written arguments in support of the grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent Republic was represented by Mr. Juma Sarige, learned Senior State Attorney who was assisted by Mr. Henry Chaula, learned State Attorney.

The appellant only adopted his grounds of appeal and the supporting written arguments and paved the way for the respondent to reply, reserving his right of rejoinder, where necessary.

In response, at the beginning, Mr. Sarige opposed the appeal for the reason that the charge against the appellant was proved beyond reasonable doubt. However, in the course of his arguments, he changed his stance and supported the appeal on the basis of the second ground to the effect that, the appellant was not properly identified as the one who committed the offence. Therefore, he said, in the circumstance, an identification parade was necessary. According to him, since the identification parade was not conducted, it cannot be said with certainty that the appellant was the one who raped PW3. For that reason, it was his stance that, the prosecution did not prove the case against the appellant to the required standard. As a result, he did not find necessity of arguing the remaining grounds of appeal, instead, he implored us to allow the appeal.

Following the stance taken by the respondent, the appellant did not have anything to add; he urged us to allow his appeal and order his release from custody forthwith.

On our part, having considered the second ground, the issue for our determination is whether the appellant was properly identified as the one who committed the offence of rape against PW3. It is trite law that, the charge of rape is proved where penetration of a male organ into the female organ is established and the identity of the perpetrator is proved. In the celebrated case of **Seleman Makumba v. Republic** [2006] T. L. R 379, the Court deliberated on how rape should be established and it held that:

> *"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."*

[See also the case of **Ibrahimu Ibrahimu Dawa v. Republic,** Criminal Appeal No. 260 of 2016 (unreported)].

In the instant case, where the victim was aged below eighteen years at the material time, the issue of consent was irrelevant. What the prosecution ought to have proved is penetration. As regards this issue,

PW3 explained how she was sexually assaulted for two consecutive days. Her evidence was supported by the medical doctor (PW1), who testified that, upon examination, she found bruises in the labia majora of the victim's female organ, painful on touching and had bad smell which connotes that she had been sexually penetrated.

Having established that the victim had been sexually assaulted, the question which follows is whether the appellant was the perpetrator. We have gone through the evidence on record and we are in agreement with both parties that the appellant was not properly identified as the one who had sexual intercourse with PW3. We have the following reasons:

One, even if the victim said she was familiar with her assailant before, she mentioned him only by the name "Victor" who used to ride "bodaboda". It is our considered view that because the appellant was not found committing the alleged offence, his alleged identity is questionable. This is because it was not established that there was only one Victor, a "bodaboda" rider in the victim and/or the appellant's locality. Further, while the victim named his assailant as *Victor,* the charge mentioned the accused as *Victor Goodluck Munuo* and during his defence, the appellant mentioned his name as *Goodluck Munuo.* There was no any witness who came to harmonize these three sets of names.

Two, the victim did not accompany the police officers to arrest the appellant. It was only PW4 who said that he was the one who led the police to arrest the suspect at a "bodaboda" stand following his conversation with PW3. The trial court was not told the form of descriptions provided by the victim in respect of the suspect which led to the arrest of the appellant. **Three,** although the charge named Koboko Village as the material place, none of the witnesses came to prove that allegation. The victim did not mention the location of the assailant's home, where the offence took place and the name of the "bodaboda" stand. In her testimony, PW2 said she was residing at Koboko Village with PW3 but did not say the alleged Victor was their village mate. Whereas, PW5 said the appellant was arrested at Fuka "bodaboda" stand, so do PW4 who said the appellant used to park his "bodaboda" at Fuka, no one stated the residence of the appellant.

Now, following the uncertainties regarding the identity of the suspect, we are in all fours with the appellant and the learned Senior State Attorney that, the evidence on record is not sufficient to prove the identity of the suspect. We therefore find that the doubt should be resolved in favour of the appellant.

The foregoing discussion shows that the prosecution evidence was not sufficient to establish that the appellant was properly identified as the perpetrator of rape. It follows therefore that; the charge was not proved beyond reasonable doubt against the appellant. Since this ground is sufficient to dispose of the appeal, we find it unnecessary to deal with the remaining grounds which were not even argued by the parties.

Consequently, we allow the appeal, quash conviction and set aside the sentence imposed on the appellant. He shall forthwith be released from prison unless he is continually held for other lawful cause.

DATED at **MOSHI** this 11th day of July, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2023 in the presence of the Appellant in person and Mr. Innocent Exavery Ng'assi, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL