IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J. A., MAŞHAKA, J. A. And MAKUNGU, J.A.

CRIMINAL APPEAL NO. 454 OF 2022

MAJUMBA BENJAMIN.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Morogoro)

(Ngwembe, J.)

dated the 19th day of September, 2022

in

Criminal Appeal No. 22 of 2022

.....

JUDGMENT OF THE COURT

8th May & 25th October, 2023

MWARIJA, J.A.:

In the District Court of Kilombero at Ifakara, the appellant Majumba Benjamin was charged with the offence of rape contrary to ss. 130 (1), (2) (b) and 131 (1) of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that, on 8/11/2019 at about 19:25 hrs at Nyandeo area in Kidatu Division within Kilombero District, Morogoro Region, the appellant had carnal knowledge of "FJ" (name withheld to protect her dignity), a woman aged 77 years without her consent. The

appellant denied the charge and as a result, the prosecution called three witnesses to give evidence in support of its case. As for the defence case, the appellant gave evidence as the only witness thereto.

The background facts giving rise to the charge and the ultimate trial and conviction of the appellant may be briefly stated as follows: On 8/11/2019 at about 19:00 hrs, Magoso Vilima (PW2), a resident of Nyandeo Village, was going back home from a neighbouring house where he had gone to buy buns. While passing at the village's grave yard area, he noticed the presence of persons therein. He immediately went back to report the matter to the neighbours who accompanied him to the area. With the aid of torchlight, they found there a man and a woman. The man was on top of a woman having sexual intercourse with her. The woman was later identified to be "FJ". She testified at the trial as PW1. The duo were separated and upon the complaint by the woman that, as a result of what had happened between her and the man, she was caused to suffer pains, she was sent to hospital for medical examination while the man was taken to police. According to the prosecution evidence, the appellant was the person who was found in the act of

having carnal knowledge of "FJ". Following PW1's complaint, the appellant was charged as shown above.

In his evidence, PW2 contended that, when he went into the grave yard with the neighbours, he found a man and PW1 in the situation stated above. According to him, the man, who was known to him before the date of the incident because they resided in the same village, was no other than the appellant.

On her part, PW1's testimony was to the effect that, on 8/11/2019 at about 19:00 hrs, she left her home heading to her neighbour to collect some vegetables promised by her in the afternoon of that day. While at the place near the grave yard, she met the appellant who suddenly got hold of her, put her on his shoulders and carried her into the grave yard. At that place, the appellant laid her on one of the graves, undressed her underwear and proceeded to have carnal knowledge of her without her consent. As the appellant was raping her, she said, she shouted while struggling to prevent him from continuing to do so by pulling his penis and testicles. While the appellant was still on

top of her, some people arrived and removed him. She was thereafter taken to hospital while the appellant was taken to police station.

Gabriel Malaika (PW3), a clinical officer who was at the material time working at St. Francis Hospital, appeared in the trial court to tender PW1's medical report. It was his evidence that, from the report contained in the PF3 filled by another medical practitioner who examined PW1, there was evidence that she was carnally known because her vagina had bruises. The witness tendered the PF3 and the same was admitted in evidence as exhibit P1.

In his defence, the appellant admitted that he was known to PW1. According to his evidence, sometime in March 2019, he met her in one of pombe shops in Nyandeo and offered her a drink. He later had a short conversation with her before he left at 17:00 hrs leaving her at the pombe shop. In their conversation, PW1 promised to find him a shamba work from one of her neighbours.

In April 2019, at about 10:00 hrs while at home, he was visited by PW2 who told him that, he was needed by certain people. The appellant went with PW2 and found there PW1 and another woman by the name

of Maria. He was promised to be given work and on that day, he was paid TZS 80,000.00 and required to go for the work after three days. After that period, he was again, taken by PW2 to the said Maria who paid him (the appellant) TZS 70,000.00 for another work. Before he worked for the money however, his sister passed away and had to attend her funeral. After the funeral, he went to his shamba at Kiberege to make charcoal so that he could refund all the money given to him through PW2 by those who wanted him to do the shamba work for them.

In November 2019, at 18:00 hrs while at Nyandeo kwa Mchanga drinking pombe, PW2 saw him and started to question him about his failure to discharge his duty of working for the people who had paid him. He was taken by PW2 to the house of one of those who paid him. The appellant found there a group of people who, according to him, embarked on beating him on allegation that he was a thief. As the number of people had increased, the Village Chairman calmed them down by telling them that, if the appellant was a thief, then he should be taken to police station. His advise was heeded to and the appellant was

taken to Ifakara police station and later on, he said, was surprised to be charged with the offence in this case.

Having considered the tendered evidence, the trial court was satisfied that, the prosecution had proved its case to the required standard. The learned trial Resident Magistrate found that, the evidence of PW1 sufficiently proved the penetration ingredient of the offence as well as lack of consent. It found that, the appellant did have carnal knowledge of PW1 without her consent. It also believed the evidence of PW1 that she was shouting for help thus showing that, she did not consent to have sexual intercourse with the appellant. It found also that, her evidence was supported by the medical report tendered by PW3 indicating that PW1's vagina had bruises and the evidence of PW2, who found the appellant in the act of having carnal knowledge of her. According to the learned trial Resident Magistrate, although in her evidence, PW1 did not identify the appellant at the scene of the incident, from the evidence of PW2, the question of a mistaken identify did not arise. On the basis of those findings, the trial court found the appellant

guilty as charged and proceeded to sentence him to thirty (30) years imprisonment.

Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court. The learned first appellate Judge (Ngwembe, J.) found that, from the evidence of PW2, the identification of the appellant was not at issue because he was found *flagrante delicto* having carnal knowledge of PW1. The learned Judge was also of the view that, PW1's evidence was corroborated by the medical evidence contained in exhibit P1 which was tendered by PW3 under s. 34B of the Evidence Act, Chapter 6 of the Revised Laws. He found it to have been properly tendered by PW3 because its maker had been transferred from St. Francis Hospital where he was working at the time of the incident. In the end, the High Court dismissed the appeal.

Dissatisfied with the decision of the High Court, the appellant preferred this second appeal raising the following four grounds of complaint:

> *"1. That, the learned Judge of the first appellate court erred in law and fact in upholding the decision of*

the trial court based on the evidence of PW3 (the Doctor) who neither examined the victim nor filled the PF3 (exhibit P1).

2. *That, the learned Judge of the first appellate court misdirected himself in holding that, failure by the trial magistrate to comply with s. 210 (3) of the CPA Cap. 20 RE. 2019 is not fatal [while the omission] is against the [procedural] law.*
3. *That, the learned Judge of the High Court and the trial magistrate erred in law and fact to convict and sentence the appellant basing on exhibit P1 (PF3) and PW3's evidence while they failed to properly observe the requirements of section 34B (2) (a) to (f) of the Evidence Act, Cap. 6 R.E. 2019 as:*
    (i) *There was no proof to show that the Doctor who examined the witness (PW1) was called and the summons was endorsed to prove that he could not be found.*
    (ii) *There was no statement of the [maker of the medical report] tendered to support what was filled in the PF3 (exhibit P1).*

4. That, the learned Judge of the first appellate court erred in law and fact in upholding the decision of the trial court based on a case which was not proved to the standard required by the law".

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Chivanenda Luwongo, learned Senior State Attorney assisted by Ms. Aveline Ombock and Mr. John Mkonyi, both learned State Attorneys.

When he was called upon to argue his grounds of appeal, the appellant opted to hear first, the respondent's submissions in reply to his grounds of appeal. He also did not have any response to make after the learned State Attorney's reply submissions. The appellant merely urged us to consider his grounds of appeal and allow the appeal.

In his reply submissions, Mr. Mkonyi began by expressing the respondent's stance that, it was supporting the appellant's conviction. Arguing however, on grounds 1 and 3 of appeal, he agreed with the appellant that the evidence of PW3 was wrongly received and acted upon. According to the learned State Attorney, it was improper for PW3 to testify in the place of the medical practitioner who examined PW1. In

that regard, he went on to argue, s. 34B of the Evidence Act was misapplied. He prayed that, in the circumstances, exhibit P1 be expunged from the record.

With respect, we agree with Mr. Mkonyi, first, that what PW3 did was to testify in the place of the medical practitioner who examined PW1 and secondly, that s. 34B of the Evidence Act was misapplied because, the witness was not called to tender the statement of the intended witness, that is; the medical practitioner who examined PW1 and prepared the medical report (exhibit P1). On that serious anomaly therefore, we hereby expunge that exhibit from the record as prayed by the learned State Attorney. Mr. Mkonyi submitted however, that, notwithstanding his concession to the 1st and 3rd grounds of appeal, the remaining evidence of PW1 and PW2 sufficiently proved the case against the appellant.

The remaining two grounds, that is ground 2 and 4 of the appeal, were argued by Ms. Ombock. Starting with the 2nd ground, she argued that, the failure by the learned trial Resident Magistrate to comply with s. 210 (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws

was not a fatal irregularity because the omission did not prejudice the appellant. To bolster her argument, the learned State Attorney cited the case of **Emmanuel Denis Mosha and Others v. Republic**, Criminal Appeal No. 188 of 2018 (unreported) in which the Court observed as follows on the omission:

> "*Much as this provision is a quality assurance section when it comes to evidence recording, and much as adherence to that provision should be keenly emphasized, we agree with the learned State Attorney that, in the absence of the proof that the omission prejudiced the appellants, the* noncompliance is inconsequential".

In the case at hand, the appellant did not complain that the record does not contain, in substance, the correct statements of the evidence of either the prosecution witnesses or his own defence evidence. We therefore, agree that the omission did not prejudice him. This ground is thus devoid of merit.

With regard to the 4th ground, the learned State Attorney argued that, whereas PW1 testified that the appellant did have carnal knowledge

of her without her will and thus proved penetration and lack of consent, PW2 corroborated that evidence because, according to his evidence, he found the appellant in the act of having carnal knowledge of PW1. Citing the case of **Hando Hau @ Hau Petro v. Republic**, Criminal Appeal No. 453 of 2018 (unreported), Ms. Ombock submitted that, the two ingredients of the offence of rape were established by the evidence of PW1 who was the best witness as far as proof of the charge which involved a sexual offence is concerned. She prayed that the appeal be dismissed.

We have duly considered the submissions of the learned State Attorney on the fourth ground of appeal. We are of the settled mind that, as submitted by her, penetration, which is one of the ingredients of the offence, was proved because the evidence of PW1 as supported by that of PW2, whom the two courts below found to be credible, was cogent on the fact that, the appellant was found in the act of having carnal knowledge of PW1. With respect however, we find that the courts below misapprehended the evidence on the issue of consent.

It is trite principle that, in a second appeal, the court will not usually interfere with the findings of the two courts below on matters of fact unless the courts acted under misdirection or non-directions on evidence, resulting into miscarriage of justice or a violation of some principles of law or practice. The principle was stated in, among others, the cases of the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Salum Mhando v. Republic** [1993] T.L.R. 170 and **Dickson Elia Nsamba and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

In this case, PW1 gave evidence that the appellant carried her on his shoulders and took her into the grave yard where, after lying her down, he proceeded to have carnal knowledge of her without her consent. She testified that, she resisted the appellant's act by shouting for help. At page 10 of the record of appeal, she was recorded to have stated as follows:

> "*He lied me down on the grave, he undressed my underwear, ... 'akaniingizia mboo yake alipotokea yeye wakati wa kuzaliwa' ...* ***I was shouting while I was trying to defend myself by***

holding the accused's penis and testicles. *People came to remove him (the accused) while he was continuing to rape me".*

[Emphasis added]

One of the persons who arrived at the scene and interceded the appellant's act of having carnal knowledge of PW1, was PW2. He testified on what he heard from the grave yard before he went to inform the people in the neighbourhood. He stated as follows at page 16 of the record of appeal:

> *"I heard **noises** in the grave [yard] **I heard the voice of man and woman** but I did not hear the words. It was dark. I listened to that voice for five seconds. I decided to go to the neighbour's house. I told them I heard the voice in the graves but I [did not know what was the voice about]".*
>
> [Emphasis added].

It is certain that, there is contradiction between the evidence of PW1 and PW2. Whereas in her evidence, PW1 said that she was shouting for help when the appellant was having carnal knowledge of

her, PW2's evidence was to the effect that, he heard noise from the grave yard which, he said, was a voice of a man and a woman and despite listening for five seconds, he could not understand what was being said by those two persons.

What is to be gathered from the evidence of PW2 is that, what alarmed him was the voices of a man and woman coming from the graves. It was not that a person was shouting for help from the grave yard. If that was the case, he would have said so. In the circumstances, we find that, the evidence of PW1 that she was shouting for help is doubtful. Since from the evidence of PW2, he heard the voices but could not understand the words spoken, it means that the duo were speaking in a low tone. This shows that, there was no misunderstanding between PW1 and the appellant before PW2 and the neighbours arrived in the grave yard where the duo were found in the act of having sexual intercourse. On the basis of the apparent contradiction between the evidence of PW1 and PW2, we find with respect, that the prosecution failed to prove lack of consent on the part of PW1. The offence was, for that reason, not proved beyond reasonable doubt.

In the event, we allow the appeal. The appellant's conviction is quashed and the sentence imposed on him is set aside. He should be released from prison immediately unless he is otherwise lawfully held.

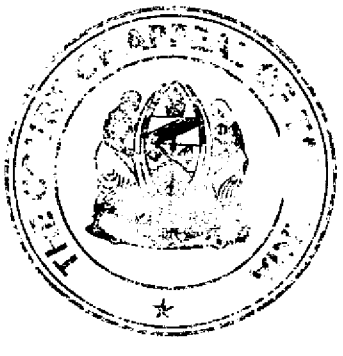
DATED at **DAR ES SALAAM** this 20th day of October, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of October, 2023 in the presence of appellant in person via virtual Court from Mogororo prison and Mr. Shabani Kabelwa, learned State Attorney for the Respondent/Republic via virtual Court from IJC Morogoro, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL