IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE, J.A., MGEYEKWA, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 570 OF 2020

TITO PAULO KUCHUNGURA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kente, J.)

dated 30th day of October, 2020

in

DC. Criminal Appeal No. 58 of 2019

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JUDGEMENT OF THE COURT

07 & 13th December, 2023

NGWEMBE, JA.:

The appellant, Tito Paulo Kuchungura, first appeared before the District Court of Mufindi at Mafinga (the trial court) on 18/6/2018, to answer a charge of rape. According to the charge sheet, the victim whose name is withheld due to her age of 9 years old, was alleged to have been raped by the appellant on 15th day of June, 2018 at Ivambinungu area in Mafinga Township within Mufindi District in Iringa Region.

When the charge was read over and explained to him in open court, he unequivocally denied it. Following that denial, a preliminary hearing was held by the court on 9th August, 2018. At that preliminary hearing, the

appellant denied all the allegations save only his personal particulars, that is, his names of Tito Paulo Kuchungura and that he was arrested and now he was in court. On the very day of preliminary hearing, that is, on 9th August, 2018, his trial took off by the prosecution aligning up four witnesses to establish and prove the allegations put forward to him in the charge sheet.

At the conclusion of trial, the learned trial Magistrate found the appellant guilty as charged, convicted him and sentenced him to life imprisonment. Being aggrieved with both conviction and sentence, timely but unsuccessfully, appealed to the High Court sitting at Iringa, hence this appeal.

Before this Court, the appellant lodged his memorandum of appeal grounded by four grievances summarized as follows:

1. *The Hon. Judge erred in law to dismiss the appeal without considering that even the trial court had procedural irregularity in conducting voire dire test and thereafter convicted and sentenced the appellant;*
2. *The Hon. Judge erred in law to dismiss the appellant's appeal basing on the evidence adduced by PW2 and PW3 which were hearsay and not otherwise;*
3. *The Hon. Judge erred in law to dismiss the appellant's appeal based on the evidence of PW4 (doctor) which such evidence has great doubts before the eyes of law;* and

4. *The Hon. Judge erred in law to dismiss the appellant's appeal without considering that prosecution failed to prove the case beyond reasonable doubts.*

On the hearing of this appeal, the appellant appeared in Court unrepresented, while the respondent/Republic was represented by Messrs. Yahya Misango and Sauli Makori, both learned State Attorneys.

When the appellant was invited to elaborate his grounds of appeal, he refrained from doing so. He, instead, opted to make a reply after the learned State Attorney had responded to his complaints.

In perfecting the position of the Republic in this appeal, the learned State Attorney, strongly contested the appeal and at the earliest stage, invited this Court to dismiss it and uphold the decisions of the lower courts. Thereafter, proceeded to argue all four grounds seriatim.

Regarding the first ground on *voire dire,* the learned State Attorney insisted that, the trial court recorded the evidence of PW1 properly. Referring the Court to section 127 (2) of the Evidence Act, Cap 6 R.E. 2019, he contended that, the procedure adopted by the trial court, prior to recording the evidence of a victim was correct because at the end the child witness promised to speak the truth. In supporting his argument, he referred us to our decision in the case of **Godfrey Wilson v. R,** Criminal Appeal No.

168 of 2018 (Unreported). He accordingly urged the Court to disregard ground no. 1, as unmerited.

In ground two (2), the appellant was aggrieved by failure of both courts below to accord due weight to the contradictions of evidence adduced by PW2 and PW3. The learned State Attorney readily admitted that, the two witnesses are family members, PW2 is the elder sister of the victim, while the other (PW3) is their father. However, he submitted that, the two prosecution witnesses were competent and compellable witnesses. Their evidence was in line with section 62 (1) (a) of the Evidence Act. He added that, the evidence of PW2 and PW3 was not hearsay as alleged by the appellant, but was direct evidence.

The learned State Attorney insisted that, in any event, the evidence of the victim (PW1) is capable of standing alone as was so decided by this Court in the case of **Joseph Leko v. R,** Criminal Appeal No. 124 of 2013. In that case, the Court held that, the best evidence on rape cases comes from the victim. He argued further that, the appellant was the one who raped the victim and soon after the incident, the offence was reported to police and the victim mentioned the name of the appellant at the earliest time when she met with PW2. In this regard, he rested his case by urging this Court to disregard the second ground of appeal.

Responding to ground three, related to grievance of the appellant against the evidence of PW4, a medical doctor, that he was not a witness of facts, rather was an expert of what he observed after examining the victim, the learned State Attorney submitted that, the evidence of PW4 corroborated the incidence of rape that occurred to the victim (PW1). Thus, he invited this Court to disregard this ground for being unmerited.

On the last ground of appeal, the learned State Attorney stood firm that the prosecution case was properly established and proved as required by law. He rested his case by inviting this Court to dismiss the appeal because the case against the appellant was well built, properly prosecuted with watertight evidence to find the appellant guilty.

Though the appellant was not represented by an advocate, yet he vehemently argued convincingly his grounds of appeal. In his rejoinder though he did not argue seriatim his grounds of appeal, he strongly disputed his conviction and sentence. He argued that, all four witnesses, save PW4 were family members that is, father and his two daughters. He assailed the prosecution for failure to call the elder daughter named Zawadi Kalinga who was the first person to receive information from PW1 and PW2 and was the one who notified PW3 (her father). He further submitted that, PW3 (father of the victim) had evil intent against him for the two young daughters could not provide security in his house, while he was himself present.

He went on to challenge the victim's evidence that, a nine (9) years old girl, if she was raped by a grown-up man, she could not have been able to walk five (5) kilometers from the appellant's house to her father's house at Ndolezi. He insisted that, the whole event was planned by PW3, but he did not commit the alleged offence.

He attacks the evidence adduced by PW4 and the contents of PF3, that PW4 is alleged to have recorded the contents of PF3 on the very day of the incidence, but its contents indicates that the victim was raped two weeks prior to the alleged incident. He posed a question of who raped her on those two weeks. He added that, the contents of PF3 is contrary to the evidence adduced in court by PW4. Thus, he convinced this Court that the victim was not examined.

The appellant rested his submission by insisting that, the whole case was not proved to the standard required by law, rather the allegations were planned by PW3 with evil intent against him.

We have given deserving consideration to the appellant's grounds of appeal and the submissions by both parties. In determining this appeal, we intent to sound just briefly the intricacies of allegations of rape by tracing the genesis of it. Thereafter, we will proceed to discuss the appellant's grievances seriatim. In simple terms rape is unconsented sexual intercourse

between matured male and matured female or between a matured male and a girl below the age of majority. However slight, the male organ penetrating the female genital organ constitutes rape. See - **Section 130 (4) of the Penal Code** as amplified in the case of **Godi Kasenegala v. R,** Criminal Appeal No. 271 of 2006 (unreported).

At no point in time in our jurisdiction, rape was legalized, all the time rape was/is illegal, unacceptable act and is against our laws. Even before the era of **Sexual Offences Special Provisions Act No. 4 of 1998,** commonly known as **SOSPA**, rape and other related sexual offences were punishable, but the propriety of sentence was left to the discretionary powers of the trial court. Only the maximum sentence was placed in the law. However, at the wake of **SOSPA**, the legislature imposed the minimum sentence while also enhancing punishment of rape up to a minimum sentence of thirty (30) years and in some cases a mandatory life imprisonment. The other aspect was expanding the scope of the offence of rape to include any sexual intercourse with a girl below the age of majority, which in our jurisdiction is 18 years, thus baptized as statutory rape.

Notably, rape cases have exercised the minds of judges and magistrates from time immemorial to date. Undoubtedly it is an enormous crime, even upon enhancing punishment to life imprisonment with minimum of thirty (30) years with or without corporal punishment and compensation

to the victim, yet the offence is still persistent. Even in ancient Babylonian law, rape was considered as a theft of virginity of a girl, whose punishment was by death, yet the offence was not eliminated.

In establishing and proving the offence of rape, certain elements of rape must be established and proved, those include: penetration, however slight; proof of absence of consent to a woman above the age of majority, but same is not applicable to girls below the age of majority; proof of age of the victim; corroboration where possible including, medical report, confession and alike; proper identification of a rapist, if the offence is committed at night and there is no proper light; overall circumstance leading to the offence of rape; use of force to overcome resistance; abduction; threat to death; unlawful detention; and the most important is availability of watertight evidence - See section 130 (2) of the Penal Code.

Those prerequisites are essential to be proved because of the nature of the offence, it is easy to allege and difficulty to raise appropriate defence to the accused. It is difficult to the accused to raise viable and sensible defence, unless the alleged rapist successfully raises the defence of alibi or biological inability to erect or any other incapacity. Such difficulties to defend was observed in the 18th century by **Sir Matthew Hale, Lord Chief Justice** of the King's Bench Court, in his book **The History of The Pleas**

of The Crown, Vol. I (1847) where he discussed the Saxon laws when rape was punishable by death, he observed as follows:

> *"It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is* ***an accusation easily to be made and hard to be proved, and harder to be defended by the party accused****, though never so innocent. I only mention these instances, that we may be more cautious upon trials of offenses of this nature"*

The practical reality of how hard to the accused to defend against the rape charges can be learnt from the old incidences told by Sir. Hale himself. He narrates of a wealthy man of about 63 years old indicted for rape and fully sworn against him by the victim of fourteen years old, corroborated by her mother and father along with other relatives. That, when the accused came to defend, he said it was true the fact was sworn and impossible for him to produce witnesses to the negative. He maintained his innocence and apart from his age, exhibited his biological and physical incapacity to commit the offence and offered to show his health challenge. The Judge stated according to how the court saw the accused condition: -

> *"It was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemed to be fallen down in those*

parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat"

Under the circumstance therefore, it is of utmost importance that before the court convicts an accused person for rape or any other sexual related offence, the court should be assured that, the evidence laid before it, proved all necessary ingredients of rape and the available evidence leaves no reasonable doubt.

Building from the above understanding, this Court being the second appellate Court, generally, should not disturb the concurrent findings of facts by the lower courts, unless it is clearly shown that there has been a misapprehension of the evidence or miscarriage of justice or violation of some basic principles of law or practice – see the case of **Hamisi Mohamed v. R,** Criminal Appeal No. 297 of 2011 (unreported).

However, we have consciously examined the record of appeal including the decisions of the trial and first appellate courts. We have also considered all four grounds of appeal preferred by the appellant in this Court. We find at appropriate time; we will revisit the evidence adduced during trial with a view to ascertain viability of the appellant's complaints.

At the outset, we are determined not to interfere with the concurrent findings of the trial court and the first appellate court on the first ground of

appeal related to *voire dire* of the victim. It is our finding that, prior to recording the evidence of the victim who was a minor of 9 years as per the charge sheet, the trial court properly recorded the promise she made to speak the truth and not to speak lies. There is no basis to depart from the findings of the two courts below. Thus, the first ground is unmerited.

The other complaint made by the appellant which has attracted our attention is on whether the evidence of relatives need to be corroborated by an independent witness before a trial court can rely on it in convicting the accused person. This point was raised by the appellant in his submission that, the key prosecution witnesses were the victim (PW1), a sister of the victim (PW2) and their father (PW3). Apart from the medical doctor (PW4), the whole prosecution witnesses were from one nucleus family, meaning father and his two daughters.

We are alive to the possibility of one family having a conflict with another family member, in turn may agree to lodge allegations related to sexual offences, which attract long imprisonment sentence. Yet our law is settled on competence of witnesses to testify in court. First, it is settled that there is no law which determines a number of witnesses to be called to testify in a given case – See section 143 of the Tanzania Evidence Act, Cap 6 R.E. 2022. Also, see the case of **Yohana Msigwa v. R,** [1990] T.L.R. 148. Second, with regard to witnesses who are relatives, it is equally settled that,

witnesses who are related to each other or the victim are not excluded by the law. They are competent witnesses; hence, it is not legally proper to discard their evidence on that ground. There are good number of precedents on this point including the case of **Samwel Wilfred Mushi v. R**, Criminal Appeal No. 236 of 2007; **Abas Seleman Mbinga v. R,** Criminal Appeal No. 250 of 2008 and **Juma Senga v. R**, Criminal Appeal No. 164 of 2008 (all unreported). However, the crucial legal point is on credibility of those blood related witnesses. If they are credible, they remain competent and compellable witnesses. The issue of credibility of witnesses will be discussed at length in due course of this judgement.

The other complaint by the appellant is related to failure of the prosecution to prove the offence of rape to the required standard and that, the whole case was waged against him by PW3. We had an opportunity to study the court record, we therefore, think that to answer this concern of the appellant we need to revisit though briefly, the proceedings of the trial court. Also, in doing so we will also discuss the credibility of witnesses.

Perusing the trial court's proceedings in line with the charge sheet, it is evident the alleged offence was committed at Ivambinungu area in Mafinga Township. However, PW1 testified confidently that the appellant was living at Nyamalala area, which evidence was corroborated by PW3, while the victim's family was living at Ndolezi village. The distance from

Ndolezi village to where the appellant was living is five (5) kilometers. At the same time the appellant in his defence, alleged to have been living at Boma (Mafinga Township). Therefore, the place where the alleged offence of rape was committed is either in Ivambinungu area or Nyamalala area or Boma area. The prosecution failed to ascertain the place where the offence of rape was committed. Above all, none of the prosecution witnesses mentioned Ivambinungu in the whole evidence save only in the charge sheet.

Another equally important issue, which was raised by the appellant in his submission is the issue of PF3 in relation to the evidence of PW4. Such form (PF3) was tendered in court by PW4 and was admitted as exhibit P1. Perusing the contents of that exhibit, in item (iv) on the general medical history of the victim, it is recorded that, the victim was raped three (3) times in the last two weeks and two times in the last week meaning a week before the alleged incidence of rape with the appellant. Such information was disclosed by PW3 who, according to the proceedings, was the only one who took the victim to police and to hospital leaving behind her elder sisters Zawadi and Jestina and all other relatives. It is on record as quoted hereunder:

> *"When I was at home, my elder daughter (Zawadi), and Jestina (PW2) came and told me that, your*

friend Tito (accused) raped Upendo. I told my elder daughter to remain calm, then I took the victim to police station for further legal steps. I reached at police station and given PF3, then we proceeded to the Hospital ... I was told by doctor that; the victim was raped"

Considering the conduct of PW3 soon after being informed on the offence of rape to her daughter and the reaction thereafter, undoubtedly raise serious doubt. Reasonably PW3 could not leave behind her elder daughter Zawadi, being a matured woman could witness the medical examination of her younger sister and or explain the nature of offence committed to the victim. Therefore, the reaction and behaviour of PW3 raise doubt on his credibility.

By passing, we have noted vividly, that the judgement of the trial magistrate bears improper conviction. He convicted the accused under section 235 (1) of CPA, instead of convicting him under the charging sections of 130 (1) & (2) and 131 (1) of the Penal Code. Even the charging sections did not include subsection 3 of section 131, which provides for an appropriate sentence to an accused person of rape of a girl below the age of ten years. We take it as a non-serious issue because it seems the appellant understood the nature of offence he faced with.

All said and reasoned, we are determined that the shortfalls discussed above, create reasonable doubts, which in law such doubts should benefit the appellant. We find the prosecution failed to prove the offence of rape beyond reasonable doubt. We accordingly allow the appeal, quash the appellant's conviction and set aside the sentence. We further order that the appellant be released from prison forthwith unless held for another lawful cause.

DATED at **IRINGA** this 13th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of the Appellant in person and Messrs. Sauli Makori and Majid Matitu, both learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL