IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 64 OF 2016

(Original Criminal Case No. 44 of 2015 of the District Court of Singida District at Singida)

PETER ONESMO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11/10 & 18/11/2016

KWARIKO, J;

Before the District Court of Singida appellant herein stood charged with the offence of Rape contrary to *section 130 (1) & (2) (e) of the Penal Code [CAP 16 R.E. 2002]*. The appellant was accused that on the 30th day of March, 2015 at 21.00hours at Ng'aidaKisaki area Unyamikumbi Ward, within Singida District and Region of Singida did have sexual intercourse with VIVIAN D/O AFTANDI a girl aged below eighteen years.

When the appellant denied the charge the prosecution fielded in a total of six witnesses to prove the same. The evidence by the prosecution can be summarized as hereunder.

On the material night the complainant VIVIAN AFTANDI together with her twin sister LILIAN AFTANDI, PW1 and PW2 respectively aged thirteen and who testified on oath after *voire dire* examination, retired to sleep in their room in a house shared with the appellant. No sooner had the two retired than the appellant, being their uncle entered inside and threatened to stab them with knife if they raised alarm. The appellant was identified through his voice as the room was in darkness. The appellant undressed himself and PW1 and inserted his penis into her vagina and ejaculated. Soon thereafter one EMMANUEL also complainant's uncle shone a torch in that room which prompted the appellant to flee from the scene.

Later, another uncle of the complainant by the name of SAMWEL ONESMO, PW3 came and was informed of the rape before he informed his wife. MUSA and BARAKA who also lived in that house were summoned where appellant was found hiding in the toilet and was apprehended. Local area leader RAMADHANI MAKITA, PW5 was informed of the rape andreport wasconveyed tothe police who came to the scene whereappellant was arrested and taken to police station together with PW1. A PF3 was issued to PW1 who went to hospital where her mother PENDO ONESMO, PW4 found her there and asked PW6, DR DAVID JACKSON MWASOTA to treat the girl after he demanded to be given Tshs. 10,000/=. It was reported by PW6 that PW1 was found with bruises in the vagina which was found to have been caused by a hard object. And that the vagina had been penetrated. That, PW1's pant was torn out and had blood stains. PW6 also found PW1's vagina actively bleeding. The PF3 was admitted in court as exhibit P1.

Moreover, at the police station the appellant was interrogated by No. G 1792 DC BAHATI, PW7 where he admitted the rape allegations.

In his defence the appellant denied the allegations and said that he was arrested on the road by seven people and sent to court. He did not call any other witness.

In its judgment the trial court was of the view that the evidence from same family members supported by the PF3 left no doubt that PW1 was raped. And that it was not possible that this case was fabricated against the appellant as there was no evidence of old grudges between him and witnesses. For that the appellant was convicted and sentenced to thirty (30) years imprisonment.

On being aggrieved by the trial court's decision the appellant filed this appeal upon six (6) grounds of appeal which in totality complain that the prosecution case was not proved against him beyond reasonable doubt.

When the appeal was called for hearing the appellant adopted his grounds of appeal and left to the respondent Republic to respond to them.

On its part the respondent through Mr. Sarara learned State Attorney did not oppose this appeal for the following reasons.

Firstly, that identification of the appellant as the assailant was not sufficient as the room in question was in darkness and that the alleged voice identification was not enough for easy of being imitated.

Secondly, as the appellant was apprehended in the toilet the prosecution ought to prove that he was hiding there since he was living in that house.

Thirdly, PW3 said PW1 and PW2 did not say one of them was raped but only said the appellant was only touching them without further explanation.

Lastly, the PF3 (exhibit P1) did not link with the evidence from PW1 and PW2.

At this juncture this court is required to decide whether this appeal has merit. In the course of answering this issue this court being first appellate court will go through the evidence on record, analyse it and make out its own conclusion (see also **SILVERY ADRIANO VR, Criminal Appeal No. 582 of 2015, Court of Appeal of Tanzania at Dodoma** (unreported).

Upon consideration of the evidence on record this court agrees with both parties that the charge against the appellant was not proved beyond reasonable doubt. The following reasons support the foregoing stance:

Firstly, identification of the appellant at the scene was not water tight. This is so because as the incident allegedly occurred at night in a dark room the complainant and PW2 ought to say how they identified the assailant to be the appellant herein. Their evidence to that is that they identified the appellant through his voice when he threatened them to keep quite otherwise he could stab them with knife. However, the law says that voice identification is not reliable because of the ease with which it can be disguised. I get support in the foregoing stance in the ease of **JAMES CHILONJI VR, Criminal Appeal No. 101 of 2003, and Court of Appeal of Tanzania at Mbeya**, (unreported).

Therefore, since voice identification is not reliable there ought to be other evidence against the appellant in that respect. This brings us to the second point which show that the prosecution case was not water right against the appellant.

Whilst it was alleged that the appellant was responsible with alleged rape but the prosecution witnesses contradicted on material facts as to his involvement. On one hand PW1 and PW2 said when one EMMANUEL shone torch into the material room the appellant dashed out and ran away, PW3 said that upon his return he found PW1 and PW2 talking with his wife in the sitting room while the appellant was at the veranda.

Further, PW3 said that after he was informed by PW1 & PW2 that the appellant was touching them he followed him outside and found him hiding in the toilet. As rightly submitted by Mr. Sarara learned State Attorney since the appellant lived in the same house with these witnesses there

ought to be proof that his being found in the toilet was connected with guilt mind rather than him using it as one of the residents there.

Moreover, while identification of the appellant was not water tight, the alleged rape also was not proved as required in law. This is so because of the following reasons;

One, while PW1 did not say she bled following the intercourse, PW4 and PW6 said PW1 was actively bleeding when she got at the hospital.

Two, while PW1 said the rapist simply undressed her clothes, PW6 said he found PW1's underpant torn apart and blood stained. No any underpant was tendered in court to prove the alleged finding.

Three, while PW3 said he found PW1 and PW2 talking with his wife in the sitting room, PW5 said he found the victim crying when he was summoned.

Four, while PW1 and PW2 said the appellant raped PW1, PW3 said when he got home PW1 and PW2 told him that the appellant was only touching them.

Five, while PW1 said the appellant ejaculated into her PW6 did not say any sperms were found into PW1's private parts upon examination.

Hence, the trial court ought to see these contradictions and address them to see whether they go into the root of the case (see also **ALAWIA HALIFA VR, Criminal Appeal No. 585 of 2015, Court of Appeal of Tanzania at Dodoma** (unreported).

Thus, it is this court's considered view that, the contradictions highlighted above go to the root of the case and create doubt on the prosecution case.

Also, in this case crucial witnesses were not called to testify in the bid to prove the appellant's identity at the scene or the rape itself. First, the alleged EMMANUEL who allegedly shone his torch into the material room ought to testify to clear doubts on what he saw there, if at all. He would have testified if at all he met anyone coming from the material room at that particular moment. Other residents in the material house namely MUSA and BARAKA were important witnesses to clear doubt on the alleged appellant's hiding in the toilet after the alleged incident.

And crucially, is PW3's wife who was said to be found talking to PW1 and PW2 in the sitting room when PW3 got home. This woman would have told court the whole scenario including what PW1 and PW2 said in connection with the rape,what PW1's condition were at the time PW3 found them and whether the appellant's involvement in this crime fitted the explanation given by PW1, PW2 and PW3 who all lived together. It is the law that failure to call important witnesses draws adverse inference on the prosecution case (see also **SILVERY ADRIANO V R** (supra)). Therefore, this court draws adverse inference on the prosecution for failure to call these mentioned crucial witnesses.

I have found another shortcoming by the trial court. That court placed too much trust on the fact that a number of prosecution witnesses

related to the appellant hence removing all possibilities of fabricating the case against him. In fact the trial magistrate did not critically analyse the prosecution evidence in the name of believing that blood relatives were very reliable witnesses. There is no law which say that blood relatives cannot fabricate a case against fellow relative. Hence, the trial court ought to closely analyse the evidence against the appellant before it convicted him.

Lastly, this court have found that the appellant was convicted without his defence being considered. It is one of the principles of natural justice that one should not be condemned unheard and it is a constitutional right for anyone to be sufficiently heard before a court of law (see *Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977*). Thus, defence evidence however flimsy,it may seem, should be considered along side prosecution evidence before decision is made. Therefore, failure to consider defence evidence vitiated the trial court's decision.

Conclusively, be as it may be, in this case not only that there is no conclusive proof of rape on the part of PW1 but also it has not been proved that the appellant was responsible with any sexual involvement with her. Henceforth, the prosecution case was not proved as required in law againstthe appellant and thus the appeal has merit and is allowed, conviction quashed and sentence imposed on the appellant is set aside.

It is thus ordered that the appellant be released from prison unless he is lawfully held there for another cause.

Order accordingly.

M.A. KWARIKO

JUDGE

18/11/2016

Judgment delivered in court today in the presence of the Appellant,Ms. Kezilahabi learned State Attorney for the Respondent Republic and Mr. Nyembe Court Clerk.

M.A. KWARIKO

JUDGE

18/11/2016