IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 21/2017

(Arising from Criminal Case No. 277/2015 at the District Court of Biharamulo)

MACHUMU TIMO ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

24/5/2018 & 12/7/2018

Kairo, J.

The Appellant, one Machumu Timo was charged and convicted by the District court of Biharamulo for the offence of rape c/s 130 (1) and 2 (e) of the Penal Code Cap 16 of the law RE 2002.

He was sentenced to serve a life imprisonment. He was not satisfied with both conviction and sentence, thus decided to institute this appeal raising a

total of eight grounds of appeal which I shall reproduce them in the course of analysis in this Judgment. The Appellant who is self represented therefore prayed the court to allow his appeal.

The Respondent who was represented by the Learned State Attorney Mr. Njoka opted to reply to the grounds of appeal during the oral submission.

The Appellant was present when the date scheduled for hearing, but he appeared to be unhealthy and unable to amplify the grounds of appeal he has raised. The court then ordered the State Attorney to answer the grounds of appeal which were raised descriptively and the court would give its judgment relying on the same, the reply and evidence on record.

The State Attorney submitted that they went through the grounds of appeal and, evidence on record and the judgment of the trial court and wish to point out that, they generally object the appeal. He started with the first ground wherein the Appellant argued that the trial court didn't give regard to section 127 (2) and (7) of the Evidence Act Cap 6 RE 2002 which argument was refuted by the State Attorney. He went on that according to the proceedings of 20th June, 2016, the record reveals that a *voire dire* test was conducted to Pw4 who was a victim but failed. However the trial court resolved that, Pw4 had a sufficient knowledge and understands the duty to speak the truth, as such she would not testify under oath. He concluded that in that respect therefore, the argument that the court did not comply with section 127 of TEA (supra) doesn't hold water. The State Attorney cited the

case of *Ramadhani Shekika vr R Criminal Appeal No. 330/2009 CAT Tanga* (unreported) to support his contention.

The State Attorney went on that; in the case at hand the trial court complied as the court recorded that the child will be in a position to answer the questions to be asked. In further attack to the Appellant's argument, the State Attorney stated that to his opinion, section 127 (7) was not relevant to the case at there was also other evidence to corroborate Pw4's evidence.

As a reply to the 2nd ground of appeal whereby the Appellant contended that the court acted on flimsy hearsay evidence of Pw1, Pw2, Pw3 and Pw5 which was not corroborated as Pw4 evidence was unsworn hence couldn't corroborate other evidence. The State Attorney contended that the said ground relates to the 1st ground and thus prayed the court to adopt the argument submitted for the 1st ground.

With regards to the 3rd ground the Appellant argued that the court allowed defeat of the course of justice by letting the case against the Appellant to unlawfully remain pending in court so as to pave way to the victim to get older enough and attain sufficient ability of being instilled with the fabricated evidence which he argued to be contrary to section 225 (4) (a) of Cap 20 RE 2002. Mr. Njoka in reply contended that the said argument would have been relevant if given during the trial or at the trial court and not during the appeal. He insisted that, currently the said argument cannot nullify the proceedings despite having no base.

In the 4th ground of appeal, the Appellant faulted the trial court for failure to observe section 186 (3) of the CPA Cap 20 RE 2002. He contended that the video record under the said section would have shown the shortcomings or flaws of the prosecution case which he mentioned to be leading questions to Pw4 (victim) c/s 151 (1) of the Evidence Act (supra) ,unstable prosecution witnesses when testifying which shows that testimonies were told lies, that Pw2 was a witness with an interest to serve, non-recording of most of the cross examination questions asked by the Appellant to prosecution witnesses among others.

As a reply the State Attorney argued that the ground was an afterthought. He went on that, there are specific procedures in conducting criminal cases and that what is relied on is the record of the court on which the State Attorney contended to have seen nothing to fault it. He further argued that if the Appellant had any complaint against the trial court, he would have requested the trial magistrate to withdraw from presiding over the matter and that's the reason why the Respondent argues that the ground was an afterthought.

In his 5th ground of appeal, the Appellant stated that, it was a gross error for the trial court to make a finding that the prosecution witnesses were credible and ground its conviction basing on the contradictions or inconsistencies testimonies of these witnesses, whose evidence he argued to be weak and unreliable. He cited the two cases of *Kibwana Salehe V R (1968) HCD 391 and Michael Haishi VR (1992) TLR 92*. The State Attorney

refuted this ground and contended the same to have no base. He further argued that the evidence was strong enough to prove the case and even if there were some contradictions, the same didn't go to the root of the case. Mr. Njoka narrated what has been testified by the prosecution witnesses starting by Pw4 whom he said to be the best evidence legally, being the victim. He went on that, Pw4 gave all of the ingredients of the rape offence when testifying as depicted on page 7 of the proceedings. He went on that Pw4 first identified the accused and she testified with regards to penetration which is the necessary ingredient of the rape offence. He added that the other evidence that corroborate Pw4's evidence was the evidence of Pw2 who was a land lady of the Appellant and the victim's mother who testified that, after checking the victim's private parts they found sperms and blood (page 14 of the proceedings).

Another corroborative evidence was that of the VEO (PW3) who echoed what has been stated by Pw2. Pw3 added that he interrogated the Appellant who confessed but said he doesn't know what happened and how he reached at the stage of raping Pw4. The Appellant wanted to run away but Pw3 started to shout, the action which stopped the Appellant from running away (page 16 proceedings). The State Attorney also reproduced the testimony of Pw6 who was a Doctor that examined Pw4. Pw6 stated that he found blood, bruises and further confirmed that the child was raped (page 21 – 22 proceedings). The State Attorney concluded that all of the above

witnesses' testimony confirmed that the victim was raped thus it was not true that the evidence didn't prove the case.

With regards to the 6th ground, the Appellant argued that the prosecution failed to prove the case to the required standard as per the requirement given in the case of *Smith vrs Desmond (1965) ALLER page 766*. The State Attorney on his part refuted the argument and prayed the court to adopt the reply to the 5th ground of appeal insisting that the prosecution proved the case beyond reasonable doubt that Pw4 was raped by the Appellant.

In the 7th ground, the Appellant stated that the court failed to consider his defense that he had grudges with Pw2 and that he (the Appellant) had a prostate healthy problem which makes him unable to have normal sex let alone committing rape. He further argued that, he explained to the trial Magistrate how Pw4 was fed or instilled with fabricated evidence which evidence the Appellant argued to raise reasonable doubts against the prosecution case. Yet the trial court didn't listen. In his reply, Mr. Njoka argued that his defence of enmity between the land lady and his alleged ailment was considered on page 8 of the judgment. He further insisted his rebuttal by citing the case of *Ramadhani Shekika (supra)* into which the Appellant pleaded impotence and the court observed that, *penetration however slight was enough to prove rape as per section 130 (4) of the Penal Code (supra).* He thus concluded that the defence has no merit.

As for the 8th ground, the Appellant stated that the evidence of Pw5 failed to disclose the size of the private part's of Pw4. He argued that if disclosed, the information would have contradicted with the perforation size written on exhibit P2 as well as the actual size of Dw1's (Appellant's) male organ. The Appellant also added that exhibit P2 doesn't state what has been done to Pw4's private parts to prove penetration.

In replying to this ground, Mr. Njoka submitted that, the ground has no merit as well. He argued that the Doctor's report (Pw5) was to find whether there was penetration or not and thus even if the private parts of the victim and/ or that of the Appellant would have been described, it wouldn't have changed what the report has described.

After listening to the Respondent's reply to the grounds of appeal, the court decided to proceed with writing the judgment as the Appellant wasn't in position to make a rejoinder due to his health state. As earlier stated, the court will rely on the grounds of appeal, the reply thereto and the evidence on record. I will start with the 1st and 2nd grounds of appeal as are related. The Appellant argued that the trial court didn't comply with the requirement of the provisions of section 127 (2) and (7) of TEA (supra) and further that the court didn't ascertain as to whether Pw4 knew the duty of speaking the truth before giving her evidence as per section 127 (2) of TEA (supra) and thus Pw4's evidence couldn't be used to corroborate the rest of the evidence. This argument was refuted by the State Attorney. According to section 127 (2) which is alleged not to have been complied with by the trial

court, the same allows a child of tender age who has been called as a witness to proceed testifying not under oath if the court will form an opinion that the said child doesn't understand the nature of an oath. Provided the child possess sufficient intelligence to justify the reception of his/her evidence and that he or she understands the duty of speaking the truth. The provision also put a requirement on the trial court to accordingly record such an opinion in the proceedings.

Going through the record, the trial magistrate conducted a *voire dire* test on Pw4 and went on to give her opinion. (proceedings page 16 17).

In this regard therefore, I find that the trial magistrate did abide with the requirement of section 127 (2) as the *voire dire* test was conducted and her opinion was accordingly recorded.

The Appellant also faulted the court for not abiding with the provision of section 127 (7) of TEA. But with due respect, the said provision is not relevant to the case at hand. The cited provision allows the court to ground conviction relying only on the victim's evidence even if uncorroborated if the court is of the opinion that the victim is speaking nothing but the truth. However in the matter at hand the victim's evidence (Pw4) was also corroborated by other prosecution witnesses (Pw2, Pw3, Pw5 and Pw6) despite the opinion that she was speaking the truth. As such, the provision is irrelevant to the case at hand. In the final analysis, I found the 1st and 2nd ground of appeal to have no merit.

In his 3rd ground of appeal, the Appellant contended that the prosecution delayed the proceedings of the case deliberately to enable Pw4 to get older enough to be instilled with the fabricated evidence c/s 225 (4) (a) of the CPA Cap 20 RE 2002, thereby defeat the course of justice. Going through the record I observed that the matter was being adjourned for valid reason like incompleteness of the investigation, and further to that the accused was brought to court to answer the charge on 16/12/2015 and the hearing started on 28/4/2016 (4 months) which time doesn't support the Appellant's allegation that the delay has the aim of allowing the Pw4 to get old enough to have the ability to testify what he called fabricated facts. After all the allegation was to be raised at the trial court. On top of that the consistency of Pw4 when testifying defeats what has been contended by the Appellant that her evidence was instilled. I thus found the 3rd ground to have no base as well.

As for the 4th ground, the Appellant stated that the court failed to observe the mandatory provision of section 186 (3) of the CPA (supra) arguing that the video record under the said provision would have proved various shortcomings on the proceedings on the part of the prosecution case. First I should point out that the cited provision stipulates or gives an exception to sexual offences from being tried in open court, as such the understanding by the Appellant that the trial was to be video recorded was a misconception. In trying to show the flaws on the prosecution side, the Appellant complained that Pw4 was asked leading questions but going through the

record, I didn't find any with much respect to the Appellant. If the Appellant meant the questioning during the *voire dire* test, suffice to say that those were only to test the IQ of Pw4 and had nothing to do with her testimony on the offence committed. Regarding other listed flaws, suffice to state that, the law has put specific procedures in conducting criminal trials as rightly submitted by the State Attorney. Nevertheless this court has observed nothing to fault the trial court in the conduct of this case, instead the court has regarded the complaints in this ground as an afterthought.

I will address the 5th and the 6th grounds of appeal together as they are related as well. In the 5th ground, the Appellant contended that there were inconsistencies or contradictions in the evidences of the prosecution witnesses and that it was a gross error on the part of the trial court to ground the conviction basing on the weak and unreliable evidence. As for the 6th ground of appeal; the Appellant argued that the case was not proved to the required standard. According to his narration to the alleged contradictions, the Appellant submitted that comparing the size difference of the genital organs (between the victim and the Appellant) due to age difference, it was impractical for the Appellant's penis to penetrate Pw4's vagina without causing serious maim to Pw4's body and intensive bleeding. However the law is settled that the best evidence in rape offence is that of the victim **[Refer the case of Seleman Makuba vrs R: Criminal Appeal No. 94/1999 (unreported).** In the matter at hand Pw4 who was a victim clearly

stated when testifying that the Appellant has put his *"dudu"* in her vagina (page 17 proceedings) and that she cried and blood came out.

Her testimony was corroborated by Pw3; the land lady of both the victim's mother and the Appellant who inspected Pw4's private parts and found that she had bruises, she was bleeding and sperms were oozing from her private parts. The mother of the victim (Pw1) who wasn't at home when her child was raped echoed the findings of the bruises on Pw4's private parts. Further to that the Doctor who examined her (Pw6) observed blood stains, bruises and that her hymen was perforated.

Pw3 who was the village chairman (VEO) went to the SDA church to arrest the Appellant after being told of the incidence and they brought him to his house. According to his testimony, the Appellant confessed to have committed the offence adding that he didn't know what happened but found himself to have raped the child. The Appellant wanted to run away but stopped after hearing the shout. Looking at the testimonies of the prosecution witnesses, they show no inconsistencies, nor chain break as argued by the Appellant.

The Appellant further attacked the testified time when the victim is alleged to have been raped (14:00hours) arguing that it's the same time when it was testified that he left the SDA church and it's the same time when Pw2 alleged to have received the information from Jesca concerning the raping of Pw4 arguing that it was impossible for all the three incidences to take

place simultaneously. According to Dw2 testimony, the SDA church congregation had a break at 14:00hours on the incident date. It should be noted that, this is the time when the offence was testified to have been occurred and the said information relayed to Pw2. In the case of **Tununtu Mnyasule vrs R [1980] TLR 2014,** the Court of Appeal on the issue of being exact on time observed that *"a rural country girl cannot be expected to tell the exact hour on an incident occurred"* I should hasten to add that even the witnesses in this case are not expected to be exact on the time but what they stated was an estimation. However what is certain is the church break time which was 14:00hours and it was around the said hour when PW4 was raped. The Appellant also stated that among all of the witnesses (the doctor inclusive) only Pw2 (who had grudges with the Appellant) testified to have seen the sperms. The evidence on record reveals that the victim was received at the hospital for examination 4 hours later according to PF3 which was tendered as exhibit P2; the mother of the victim examined the child around 18:00 after returning from the farm and found bruises on her private parts. However Pw2 received the information on the incidence around 14:00 hours and that's when she examined Pw4 and found the sperms.

In my view, by the time Pw2 was examining Pw4 the incident was so fresh that one cannot rule out the possibility of presence of the sperms. As such I found the argument to have no base. When analyzing in totality the evidence as above narrated, I am convinced that there was no

inconsistencies and even if there was any, I found then to be minor and don't go to the root of the evidence **[Refer the case of Dimitrive Kosya Koff and Another vrs R. Criminal Application No. 1/2002 (CAT) Zanzibar (unreported).** Further to that, it is the finding of this court that the said evidence managed to prove the commission of the offence by the Appellant to the required standard. As such the 5th and 6th grounds of appeal cannot stand as well.

The Appellant also in his 7th ground of appeal contended that the trial court failed to consider that there was enmity between his land lady and the Appellant and further that he had prostate healthy problem which made him unable to have normal sex and thus he can't commit rape. However going through the judgment I observed that the same were considered by the trial magistrate and gave reasons why she rejected them (page 8 of the judgment). But further to that, the law has clearly stipulated in section 130 (4) of the Penal Code (supra) that penetration however slight is enough to prove rape. According to what has been stated by Pw4 when testifying that the Appellant put his *dudu* into his vagina together with corroboration from other witnesses as analyzed above, this court is convinced that the Appellant has raped Pw4 and that his defence was simply to exonerate himself from liability. On the allegation that Pw4 was instilled with fabricated evidence, suffice to state that, the court agree with the trial's court's observation with regards to the credibility of Pw4 and even going

through the proceedings, I have found nothing to fault the same. Thus the 7th ground has no base.

With regards to the 8th ground that Pw5 report (Doctor) failed to disclose the size of Pw4's vagina and the actual size of Dw1's (Appellant) male organ. Suffice to state that neither the size of the private part of the victim nor that of the assailant who in this case is the Appellant are necessary to prove rape as per section 130 (4) of the Penal Code. In other words even if the said size would have been described in the report, the outcome of the said report would have changed. The Appellant also argued that exhibit P2 (PF3) didn't state that there had been same activities inside Pw4's parts which would proved penetration. But going through the Pf3 under the heading "**Medical Practitioner remarks"** it was stated *"History of suspected sexual abuse, admitted to the hospital due to bleeding and wounds 4 hours after the incident. Examination revealed bleeding, swollen, ruptured hymen, penetration by a blunt tool'"* (emphasis mine). In my understanding, the above explanation depicts that Pw4 was penetrated into her private parts. Thus the 8th ground of appeal has no merit as well.

All having said and done I find the conviction and sentence of the trial court to be proper and I uphold it. This appeal is therefore dismissed in it's entirely. It is so ordered.

R/A Explained.

L.G. Kairo

Judge

12/07/2018