IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 29/2016

(Arising from Criminal Case No. 223/2015 Ngara District Court)

FRANK KANANI ---------- APPELLANT

VERSUS

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

JUDGMENT

23/8/2018 & 13/9/2018

Kairo, J.

The Appellant Frank Kanani was an accused at the District court of Ngara in Criminal Case No. 223/2015. He was charged and convicted of two offences; first count; rape c/s 130 (1) (2) (e) and 131 of the Penal Code Cap 16 RE 2002 and second count causing grievous harm c/s 225 of the Penal Code. The Appellant was sentenced to serve thirty years imprisonment for the first count and one year imprisonment for the second count. Both sentences

were ordered to run concurrently. He was not satisfied with both conviction and sentence and thus decided to lodge this appeal raising four grounds of appeal. But later when the appeal was scheduled for hearing on 2/3/2017, the Appellant prayed to submit additional ten grounds of appeal which prayer was granted. The filed grounds of appeal are as follows:

1. That, the trial court erred in facts and law by failing to discover the nature of falsified and arranged charge which was the conflict on land between the appellant and his brother.
2. That, the trial court erred in facts and law by convicting and sentencing the appellant without proving its case beyond reasonable doubt. At paragraph one on page 2 of the copy of judgment the court shows that the prosecution filed seven witnesses but on the same page only two witnesses tendered their evidence.
3. That, the trial court erred in facts and law by convicting and sentencing on the base of hearsay evidence adduced by Pw2 Rehema Zacharia and Pw3 Thereza Jason as narrated in paragraph 2 of page two of the copy of Judgment that "Both witnesses on their testimony told this court that it was Pw1 informed them to be raped by Frank Kanani".
4. That, the trial court erred in facts and law by relying on the PF3 and the evidence of Pw1 who is married and whose techniques would have been arranged by her husband so as to defeat his young brother whom they were in land conflict.

Additional petition of appeal filed are:

1. That the Hon. trial magistrate erred when he relied on the evidence adduced by Rehema Zacharia instead of Rehema Ezekiel and Thereza Jason instead of Thereza Justine which contravenes sec. 192 (3) of CPA Cap 20 RE 2002.
2. That the Hon. trial magistrate erred when he failed to evaluate and procuring that Pw7 WP 7871 D/C Martina was not heard among the public witnesses neither a reasonable notice given by the prosecution as to why her evidence wasn't adduced before the trial court.
3. That the Hon. trial magistrate erred when he contravened the mandatory proviso c/s 9 (3) of CPA Cap 20.
4. That the Hon. Magistrate erred when he admitted the caution statement of the appellant which was not listed on the PH.
5. That no credible specimen and understandable reasons was explained or presented by the prosecution side or any tool of law was presented by the prosecution regarding per requirements of law from the prosecution side during the hearing that Pw4 went to Kanazi centre on 08.08.2015 and that day he didn't write his confirmation statement till the 23.09.2015 bringing the fact that these were mere fabrications and maintainable facts together with no grounds of truth towards the appellant or accused.

6. That the Hon. trial magistrate erred when he sustained the conviction and sentence against the appellant both charges relying on the testimony of Pw5 which was out of order having stated that the incident was reported at the police station on 05.08.2015 which contradicted with Pw1 (victim) who testified orally that she had slept and was raped by the appellant at reported police on the next day.
7. That the Hon. trial magistrate erred when he failed to peruse in deep the evidence of Pw1 who claimed to have raised alarm while at tingatinga area and the alarm was not responded too by any person what was the reason of raising the alarm? While the appellant left her alone in his house but failed to inform the neighbors on the said rape allegations against the vicinity of crime before leaving the place.
8. That Hon. trial magistrate erred when he received and admitted the PF3 as it had not passed the qualification of its legality as proof against the charged allegation while referring on the PF3's investigations.
    a. Rules that a professional expert responsible in the requested PF3 filled with the intended claims was expected from his professionalism in the field after verification out his expert research.
    b. That the said clinical officer failed to fulfill his job of investigation out of his professionalism but relied on victim's hearsay that *"The bruise were caused by rape since the victim told me to be raped"*

which proof raise alarm of the failure of breaking the rules governing the research and examination.

c. That the ingredient of rape was not procured before reaching the conviction and sentence against appellant.

9. The Hon. trial magistrate erred he convicted and sentenced the appellant without approving the said testified statement from the victim who claimed that having

a. Met with the appellant in the "Tingatinga" and was undressed she majestically followed the appellant without clothes to his residence and was arraigned at the bed and raped by the appellant whom she followed from tingatinga. And she further testified that she did not raise alarm after the appellant left in order for the neighbors to witness and also had no exhibit to show that she was left at the appellant home, yet the exhibit would have been the witnesses who would have come to her rescue in scene she alarmed.

b. Having reached the appellant's residency together with police and officer's as claimed none of them gave the description of the geographical location proving the said scene allegation attached to the crime including the real picture of the inside room.

10. That the Hon. trial magistrate erred while admitting thing without the date and age of the appellant failing to notice that the said exhibit admitted in the trial did not much with the appellant names as the charge sheet reads but admitted the said evidence

forgetting that in his prior advice from court the magistrate had advised that sec. 113 (1) (2) and (5) of the law children act 200 was to be used to approve the age of the appellant.

The Appellant who is self represented prayed the court to allow his appeal. The Respondent Republic was represented by Mr. Juma Mahona, the Learned State Attorney.

A brief background of this case that can be discerned from the court record is that, it was alleged that on 5/8/2015 around 19:00 hours at Kanazi village within Ngara District in Kagera Region, the Appellant did have canal knowledge with Advera John. It was further alleged that on the same date, time and place, the Appellant did cause grievous harm to Advera John on her head by using a stick. The Appellant pleaded not guilty to both counts and the prosecution paraded seven witnesses and five exhibits to prove its case. The court eventually found the Appellant guilty and accordingly sentenced as afore stated. Being not satisfied, the Appellant preferred to lodge this appeal. The court will discuss the said grounds as were argued.

When the parties were invited for the oral submission, the Appellant told the court that he had nothing substantial to add to his petition of appeal and additional grounds of appeal praying the court to allow his appeal.

In reply, the State Attorney informed the court that, the Respondent supports the conviction of the Ngara District court for all of the two counts that is rape and causing grievous harm. He dismissed the first ground in the

petition of appeal to be an afterthought wherein the Appellant contended that the charge was fabricated as he had land conflict with his brother; the husband of the victim. The State Attorney argued so, as he claimed that the said contention was not raised at the trial court.

I wouldn't want to be detained by the Appellant's contention. Going through the record, it is true that the Appellant never raised that there was land dispute between the victim's husband and himself. As such, I agree that the same is an after though as rightly argued by the Learned State Attorney.

The State Attorney went on and told the court that he would argue the second ground with the 9th additional ground as they are related. He went on that generally the Appellant in the two grounds is arguing that the court erred to convict the Appellant as the prosecution has failed to prove the case as required, which argument the State Attorney refuted. The State Attorney went on replying that at the trial court, Pw1 testified that she met with the Appellant who was his brother in law at *"shamba la mikaritusi"*. That the Appellant arraigned her by force and threatened to beat her. The victim further told the court that, the Appellant took her to his residence and raped her (page 6 proceedings). The State Attorney went on that before raping the victim, the Appellant forced her down and squeezed her neck telling her that he has to sleep with her. That her testimony was confirmed by the tendered PF3 which was filled by Pw6 who medically examined the victim. The victim's examination results showed that her private parts were discharging blood. The State Attorney added that, the said evidence was

corroborated by Pw4 and Pw5 as well. Further to that, the State Attorney argued that the law is settled that in rape cases, it is the victim who is the most reliable prosecution witness. He cited the case of *Selemani Makumba vrs R [2006] TLR 379* wherein the court stated that true evidence in rape cases is to come from the victim; that there was penetration and there was no consent. The State Attorney thus prayed the court to dismiss the 2nd ground of the appeal and the 9th additional ground for want of merit.

In his rejoinder the Applicant has stated that Pw1's (victim) evidence was concocted. In further clarification, the Appellant stated that he is surprised as to why the victim shouted for help at the Tingatinga area where she claimed to have no houses nearby instead of where she said to have been met him when coming from her aunt's house where she would get assistance if at all her testimony was true. He thus concluded that the evidence of Pw1 was not true. The Appellant further in her rejoinder stated that Pw1 in her testimony didn't tell the court as whether she was walking alone or he held her when she claimed to have been taken to the Appellant's house after being undressed and her clothes being held by the Appellant in one arm.

In discussing the said grounds, the issue to be determined is whether the prosecution proved its case to the required standard or in other words whether the Appellant has raped the victim and whether the Appellant has caused grievous harm to the victim. As correctly stated by the Learned State Attorney that true evidence of rape has to come from the victim who is

supposed to tell the court what transpired at the scene of crime [Refer the case of **Selemani Makumba V R** (supra). According to the cited case, the victim in her explanation has to show that there was penetration and there was no consent from her part. In her testimony Pw1 who was a victim testified that when going home from her aunt's house she passed through *shamba la mikaratusi* and was suddenly caught by the Appellant who was her brother in law. That she managed to remove her hand from the accused and ran away, but the accused run after her holding a stick. On reaching her the Appellant assaulted her, and undressed her telling her that she must sleep into his home and forcefully lead her to the Appellant's house. Pw1 went that upon reaching his home, he opened the door, they entered and he closed the door. That the Appellant undressed himself and forced her on the bed. He then took his penis and inserted into Pw1's vagina and raped her. (page 6 proceedings) fell

The testimony of Pw1 who is a victim shows that the Appellant had penetrated Pw1 forcefully. Besides the PF3 tendered as exhibit P2 by Pw6 who medically examined Pw1 stated that there was blood in the private parts of Pw1 and that the private parts had some bruises (page 11 of proceedings 'B' part of the PF3). The observed bruises and blood discharge into the private parts of Pw1, shows that the victim was penetrated forcefully and since there was no consent, it means she was raped. Applying the cited case of **Selemani Makumba** (supra) to the testimony of Pw1, Pw6

and the tendered exhibit Pw3 (PF3) I am convinced that the Appellant has raped Pw1.

With regards to causing grievous harm to Pw1, apart from the testimony of Pw1 the court also went through the statement of Pw1 which was admitted as exhibit P4 wherein Pw1 stated as follows; *"Frank alikata fimbo na kunipiga nayo usoni juu ya jicho la mkono wa kulia. Nilipiga yowe au kelele ili kuomba msaada na baadaye alinipiga fimbo kwenye mkono wa kushoto, niliendelea kupiga kelele bali hakuna mtu yeyote ambaye alitokea"* (page (iii) of the statement) when going through the PF3 2nd page under Part III it stated *"bruises on the face, swollen and tender on the elbow joint, bruises at the back ....."* and it further stated typed of weapon used to be *"Blunt object"*. It goes that the PF3 report is consistent with the testimony of Pw1's. I am thus convinced as well that the Appellant was the one who harmed or injured by the victim with stick (a blunt object) in various parts of the body as above stated. The discussion also serves the 7th additional ground of appeal. The court has therefore found the 2nd 7th and 9th grounds to have no base. The Appellant has also argued that it is surprising as to why the victim shouted for help at the *"tingatinga"* instead of where she found him standing when coming from her aunt's house. However according to Pw1's statement, (exhibit P4), Pw1 stated that when arraigned at *shamba la Mikaratusi* she managed to free herself and started to run while shouting, but the Appellant was running after her, but no one came to her rescue. The Appellant when catched her, closed her mouth, fell her down and squeezed

her neck threatening to kill her if she continues shouting. He then gripped her hand and led her towards tingatinga area. Looking at the statement, Pw1 didn't shout at tingatinga area as the Appellant threatened to kill her if she shouts. I wish to quote the statement of Pw1 which so confirms *"Shemeji Kanani aliniziba mdomo kwa kutumia mkono wake wa kulia. Baada ya kuniziba mdomo aliniangusha chini na kuniniga shingoni kwa kutumia mkono wake wa kushoto. Baadaye aliniambia kuwa nikiendelea kupiga kelele ataniua ..... Niliamua kunyamaza kwa kuhofia kuuwawa. Akanishika mkono wa kulia na kuelekea naye maeneo ya kwenye matingatinga ....."*.

As to why Pw1 failed to inform neighbors while she left the Appellant's house alone, Pw1 while testifying has contended that the Appellant's house was a far from neighboring houses. But further to that the Appellant would have asked Pw1 during cross examination to get clarification. I thus found the same to have no base as well.

In his third ground of appeal the Appellant argued that it was an error for the trial court to convict him basing on the hearsay evidence of Pw2 and Pw3 who were told by Pw1.

It should be understood that courts analyze the evidence holistically or as a whole. But further to that the key witness in rape cases is the victim as earlier stated. Thus in the matter at hand, Pw1 who is the victim is the witness of truth in rape cases, thus Pw2 and Pw3's testimonies were to

support the victim's evidence. On top of that, such an offence is normally committed in hidden places, as such apart from the victim; it is not possible to have another eye witness. In my conviction, the testimony of Pw1 has managed to prove that the Appellant has penetrated her without her consent as above analyzed. In that circumstances therefore, I found the third ground to have no basis.

In his 4th ground which also relates to the 8th additional ground of appeal, the Appellant generally is arguing that the trial court erred to rely on the PF3 and Pw1's evidence which he stated to have been fabricated so as to defeat the Appellant following the land conflict. However, the PF3 in the case at hand had a purpose of proving that Pw1 was penetrated but as to who penetrated her; the evidence was given by Pw1. With regards to the concocted evidence due to land conflict the same was found to be an afterthought. But further to that the said argument is not supported with any evidence with much respect to the Appellant. This ground is thus bound to crumble.

The discussion also serves the 8th ground of additional petition of appeal. The Appellant has also argued in the same ground that ingredient of rape weren't procured before reaching conviction which contention is not true when analyzed vis a vis the testimony of Pw1. This ground therefore has no base.

In his 1st additional grounds of appeal, the Appellant has contended that the court erred to rely on the evidence of Rehema Zacharia instead of Rehema Ezekiel and Thereza Jasson instead of Thereza Justin alleging that to be c/s 192 (3) of CPA Cap 20 RE 2002. In the 2nd additional ground which will be discussed herein together, the Appellant contended that the court erred to entertain Pw7 who wasn't mentioned during PH and that there was no notice that she would testify.

Starting with the 1st additional ground I observed that what has been stated by the Appellant to be true. However I asked whether any injustice has been caused to the Appellant as a result and answered negatively. After all, the Appellant had the opportunity to cross examine the witnesses and in fact did that (Page 7 proceedings). Besides the cited provision 192 (3) of the Criminal Procedure Act (supra) do not require the names of the witnesses to be given during the PH [Refer the case of **Yusuph Nchira vrs DPP Criminal Appeal No. 174/2007 CAT AR** (unreported)].

With regards to allowing Pw7 to testify while he wasn't mentioned during the PH and no notice to that effect was given by the Prosecution, again suffice to state no injustice has been caused for such omission as the Appellant had the opportunity cross examine the witness.

In the third additional ground of appeal, the Appellant has argued that he was not furnished with the statement of Pw1 taken at the police as per section 10 (3) which he argued to be contrary to section 9 (3) of CPA (supra).

I went through the proceedings of the trial court and observed that the Appellant did not object the admission of the caution statement of Pw1. The same was tendered as exhibit P4 (proceeding page 12). Procedurally the documents are admitted after being shown to the other party (Appellant in this respect) for him to object or not and then the one who tendered could be cross examined on it. Though there is no expressive availing the document to the Appellant for examination, but I believe that the said procedure was followed. But even if it wasn't done, Pw1 recapitulated what she has stated in her statement and the Appellant did cross examine her, as such no injustice has been occasioned to him in my view. Besides, the Appellant could have asked for it (the document) if the court omitted to avail the same to him. I thus found this ground to have no base as well.

In his 4th additional ground, the Appellant attacks the action of the trial court to admit the caution statement of the Appellant which was not listed on the PH. I would first wish to put the record clear that, the admitted caution statement was of Pw1; the victim and not the Appellant. Nevertheless I will discuss this ground with an assumption that the caution statement at issue is that of Pw1 tendered as exhibit P4. It is true that the same was not mentioned during the PH. However as above stated the statement is the recapitulation of the testimony of Pw1 who was cross examined by the Appellant. I thus maintain that no injustice has been caused to the Appellant for the said omission. Besides the law is settled that procedural irregularity will not vitiate proceedings if no injustice has been occasioned.

When arguing this ground, the Learned State Attorney has prayed the court to follow the stance of the case of **Jackson Daudi vrs R Criminal Appeal No. 111/2002 CAT Mwanza** (unreported) page 6 – 8 into which the court observed that it was proper for the extra Judicial statement which was not listed as an exhibit at the PH to be produced during the trial. However I find the cited case distinguishable to the facts of the case at hand in the sense that, the extra judicial statement was objected by the accused during the PH. That is why it was tendered during the trial so that its truth can be proved by the prosecution, while in the matter at hand; the tendering of the Pw1's statement was not objected by the Appellant.

For the fourth additional ground, the Appellant contended that no reason was given as to why Pw4 gave his statement on 23/9/2015 while the alleged rape incident occurred on 5/8/2015. Suffice to state that, it's the investigator who decides which person's statement is to be taken after satisfying himself that the witness is relevant. Further to that, the attacked statement was not tendered in court as an exhibit. Besides the Appellant was to cross examine him (Pw4) on the issue if he felt that to be a concern to him. Thus the contention has no base.

The Appellant in the 6th additional ground charged that there was contradiction on the date when the incident was said to have been reported at the police whereby Pw5; the investigator said to be 5/8/2015 while Pw1 testified to be 6/8/2015. Going through the record, the contention is true. The law is settled that once contradictions are noted the court has to

resolve as to whether the said contradiction goes to the root of the case. [Refer the case of **Mohamedi Said Matula vrs [1995] TLR 3**. In the matter at hand, the issue is whether Pw1 was raped and harmed by the Appellant or not and not the date when the matter was reported. Besides the victim who is the witness of truth and the rest of the prosecution witnesses stated the incidence to have been reported on 6/8/2015 including the exhibit P4 which is the statement of Pw1 taken at the Police. I thus consider the contradiction or inconsistent to be minor and doesn't go to the root of the matter. The ground is therefore with no merit.

The Appellant also in the 10th additional ground of appeal argued that, the court erred to admit the exhibit which had no date and further that the court failed to note that the names of the Appellant in the exhibit were different from the charge sheet. He further contended it to be contrary to the Law of the Child's Act as the Act was to be used to prove the Appellant's age. According to record the Appellant stated to be 16 years old. The court decided to make an enquiry *suo mottu*. The court called the VEO who was summoned to testify on the Appellant's age. The record further reveals that the witness came with the Voters Registration Book (VRB) into which it showed that the Appellant who introduced himself by the names of Frank Kanani Zacharia has registered himself as a voter and indicated to have been born on 27/2/1992. The Voters Registration Book was tendered as exhibit P5 and the Appellant didn't object. (Page 17 and 18 of the proceedings).

According to the said proceedings, the court wanted to satisfy itself on the age of the Appellant either using the provision of section 113 (1) (2) and (5) of the Law of the child Act 2009 which entails medical examination or other supporting evidence (page 17 proceedings). In the process, the Voters Registration Book into which the filled information was provided by the Appellant himself was used. Since the same saved the purpose, there was no harm in my view of not using the medical examination to prove his age.

With regards to the names, the VRB shows to be Frank Kanani Zacharia while the charge sheet reads the accused to be Frank Kanani. In my view the names are not distinct only that in the VRB three names were used; which is the requirement while the charge sheet used two names. Regarding the absence of date, I have observed that the disputed document at the left corner down it was written *"daftari la awali August 04, 2015"*, thus the contention is not true. All in all the said ground has no merit as well as per above analysis.

Before ending, the court has observed that the Appellant was charged under Section 130 (2) (e) which concerns under age victims while the victim in this case was an adult. However the observed error has not occasioned failure of justice, as such this court hereby correct the first count to read section 130 (1) (2) (a) and 131 (1) of the CPA (supra) and replace it throughout the proceedings wherever the wrong section appears as per section 388 of the CPA (supra).

All having said and done this court have found that this appeal has no merit and it is accordingly dismissed. I further confirm the conviction and sentence of the trial court after finding both to be proper.

It is so ordered.

R/A explained.

L.G. Kairo

Judge

At Bukoba

13/9/2018

Date: 13/9/2018

Coram: Hon. L.G. Kairo, J.

Appellant: Present in person

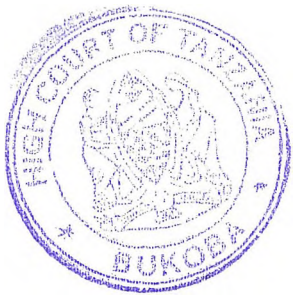
Respondent Mr. Mahona – State Attorney

B/C: Peace M.

State Attorney: The matter is for Judgment. We are ready to receive the same.

Appellant: I am also ready to receive it.

Court: The matter is for Judgment. The same is ready and is read over before the Appellant in person and Mr. Mahona for the Respondent in open court today 13/9/2018.



L.G. Kairo

Judge

13/9/2018