IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 55 OF 2020

(Arising from Judgment of the Resident Magistrates' Court of Geita at Geita before Hon. Katemana, RM in Criminal Case No.197 of 2019)

JOVIN S/O DAUD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 28.07.2020

Judgment Date: 29.07.2020

A.Z.MGEYEKWA, J

The appellant was arraigned by the Resident Magistrates' Court of Geita at Geita and stand charged with an offense of rape contrary to sections 130 (1) & (2) (e) and 131 (2) (e) of the Penal Code Cap.16 [2019].

The prosecution alleged that on the 9th day of June 2019 at 18:00 hours at Nyaruyeye Village within the District and Region of Geita the appellant had carnal knowledge with Suzana D/O James, a girl aged 16 years old.

Having, accepted the prosecution's version to be true the trial court convicted the appellant and was sentenced to serve 30 years imprisonment. Undaunted, the appellant has preferred this appeal. In the petition of appeal, he has raised seven grounds of appeal as follows:-

1. *That, the evidence of PW1 and PW2 was doubtful and untruthful which cannot assist the court to convict the appellant.*
2. *That, the court erred in law and fact to convict the appellant without considering that the case against the appellant was framed by Mwanagalula, PW2's grandmother, and PW2 himself due to the Tshs. 100,000 which she owed him and she did not want to pay him.*

3. *That, the evidence of Suzanna James (PW1) and Benjamin Shaban did not implicate the appellant in raping the victim.*
4. *That, PW1 told the court that she made noise but did not get help from anyone including Benjamin Shaban (PW2), this evidence raises doubt whether PW2 was telling the truth.*
5. *That, in the absence of the Kitongoji chairman, militia who arrested the appellant, Police of Nyaragusu, and Mwanagalula renders the alleged evidence untrustworthy.*
6. *That, the evidence of PW3 and PW4 contains nothing to involve the appellant as a sole person in committing the offense so the trial court erred in law and fact convicting the appellant.*
7. *That, the prosecution case was not proved beyond a reasonable doubt, the appellant was entitled to the benefit of the doubt of the prosecution.*

When the matter was called for hearing, the appellants were remotely present while the respondent had a service of Mr. Ndamgoba, learned Principal State Attorney who was also remotely present.

The appellant had no much to say and prays this court to adopt his grounds of appeal and set him free.

On his part, Mr. Ndamgoba supported the conviction and sentence, he submitted that the appellant's grounds of appeal number 2, 3, 4, 5, 6 and 7 are related to one issue that the prosecution failed to prove the case.

Concerning the first ground, he submitted that PW1 and PW2 evidence are credible. PW1 narrated the whole event of rape and thereafter she reported to the appellant's parents. Mr. Ndamgoba went on to state that the victim's evidence is credible and reliable and is supported by evidence of PW2, an eyewitness. He added that even without depending on PW2 evidence, PW1 evidence could suffice to prove the case. The learned Principal State Attorney continued to submit that the prosecution witnesses are credible unless there are factors to prove otherwise in which in this case there are not.

In respect to the second ground of appeal, Mr. Ndamgoba refuted that this is not a planted case thus he urged this court to disregard the second ground of appeal.

On the rest of the grounds, he argued that the case can be proved without doubt. PW1 narrated the whole event even the insertion during the rape. She was also proved by PW3 who is the father to be underage and there was no consent as testified by PW2 and PW1. He added that in a rape case the victim is a fundamental witness to prove the rape and her testimony is not necessarily collaborated in which in this case it is, making it even more credible.

He also added that PW4, the expert evidence is supplementary and he said that the victim had an experience however this does not vitiate the truth that the appellant was guilty. Therefore, he prays this court to dismiss this appeal as the case was proved beyond a reasonable doubt.

In his brief rejoinder, the appellant urged this court to set him free because he was demanding his outstanding amount from the employee and so they planted this case against him.

After careful perusal of the record of the case, the testimonies adduced by the appellants and Mr. Ndamgoba learned Principal State

Attorney. I should state at the outset that in the course of determining this case, I will be guided by the canon of the criminal cases which places on the shoulders of the prosecution, the burden of proving the guilt of the appellant beyond all reasonable doubt. The question, in this case, will be *"whether the evidence adduced by the prosecution was strong enough to ground a conviction for the offense of rape".*

Addressing the first and third grounds of appeal, which relates to PW1 and PW2 evidence that they were not testifying the truth. I agree with the learned Principal State Attorney that it was amply proved that PW1 was raped by the appellant. There are a plethora of decisions by the Court of Appeal of Tanzania as what constitutes the offense of rape. It is trite law that the best evidence of rape comes from the victim herself as it was held in the case of **Selemani Makumba v Repiblic**, (2006) TLR 384 and in the case of **Tatizo Juma v Republic**, Criminal Appeal No. 10 of 2013 (unreported). In the case of **Godi Kasenegala v Republic**, Criminal Appeal No. 10 of 2008 (unreported) the court held that:-

" It is now settled law that the proof of rape comes from prosecutrix herself, Other witnesses if they never actually witness the incident such as doctors may give corroborative evidence."

In the record, the victim herself narrated how she was raped. PW1 narrated how the incident occurred, she said that it was 16:00 hours she was in the forest collecting firewood then over suddenly the appellant attached her, laid her down and forced her to have intercourse with him. The appellant pulled her underwear then he inserted his penis into her vagina and PW2 was watching. PW1 evidence was corroborated by PW2 evidence who testified to the effect that he was standing behind and the appellant was talking to PW1 and he heard PW1 shouting and crying and when he was cross examined PW2 told the appellant that he is in court to tell the court that the appellant raped PW1. In my view, PW1 was a credible witness and her evidence was unshakable thus the victim evidence sufficiently proved that she was raped by the appellant.

Additionally, it has been settled in our jurisdiction that for the offense of rape to be established there must be proof of penetration

as it was held in the case of **Barton Mwipabilege v Republic,** Criminal Appeal No. 200 of 2009 (unreported) the court held that:-

> *" Time and again, it has been said by this court that, it is not enough for the victim of rape to say that she was raped. She must also further allege that there was penetration however slight."*

Similarly, in the case of **Ex. 8 9690 SSGT Daniel Mshambala v Republic,** Criminal Appeal No. 183 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

> *" PW1 ought to have gone further to explain whether or not the appellant inserted his penis into her vagina, whether or not the penetration was slight."*

In the instant appeal, the victim explained clearly how penetration took place. PW1 testified that the appellant undressed her and inserted his male organ in her female organ. In the case of **Kayoka Charles v R**, Criminal Appeal No. 325 of 2007, the Court of Appeal of Tanzania held that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ as stated by PW1. The same

was supported by the evidence of an eyewitness PW2 during cross-examination PW2 confirmed that the appellant raped the victim.

It is trite law that for the "offense of rape "*...there must be unshakeable evidence of penetration.*" In the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal considered whether or not the complainant had been raped by the appellant and observed: -

> " *True evidence of rape has to come from the victim, of an adult, that there were penetration and no consent, and* ***in the case of any other woman where consent is irrelevant, that there was penetration****..." [Emphasis added].*

Based on the above authorities, I have to say that there is no doubt that penetration was proved and PW1 named the appellant the person who raped her immediately. Therefore, PW1 evidence was watertight to render conviction upon the appellant for an offense of rape.

Concerning the second ground of appeal that the case is planted I have perused the court record and found that the appellant had an opportunity to cross-examine all prosecution witnesses but the

appellant did not cross-examine them on the issue of gauges or ill motives. As rightly pointed out that there was no evidence on records which show that the appellant complained that they were not in good terms with PW2 grandfather/grandmother. However, in his testimony, the appellant insisted that the case was planted because he owed PW2's grandmother, but in the instant case, the one who was raped was PW1 therefore he wants to inform this court that he has gauges with PW1 too while the same is not proved?

This court cannot rely on alleges which are not proved. It was upon the appellant to cross-examine the prosecution witnesses' failure to cross-examine is merely a consideration to be weighed up with all other factors. The same was held in the case of **Cyprian Kibogoyo v Republic**, Criminal Appeal No. 88 of 1992 and **Paulo Antony v Republic**, Criminal Appeal No. 189 of 2014, Court of Appeal of Tanzania (unreported), it was held that:-

> *" As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".*

The fourth ground of appeal, should not take much time of this court, I am saying because failure for PW2 to help PW1 does not vitiate the truth that the victim was raped and PW1 also testified that PW2 did not offer any help. Therefore this ground is demerit.

Addressing the fifth ground of appeal, the appellant complained that the independents' witnesses were not called to testify in court. I am mindful of the fact that in terms of section 143 of the Evidence Act, Cap.16 [R.E 2019] which provides that:-

> " *143. Subject to the provisions of any other written law, no particular number of witnesses shall, in any case, be required for the proof of any fact.*

Based on the above provision of law, there is no number of witnesses to testify in court even a single witness can testify and prove the case. In the instant appeal, the prosecution witnesses; PW1, PW2, and PW3 were competent and reliable thus there was no need to call other witnesses.

As to the 6th ground of appeal, the appellant is complaining that PW3 and PW4 evidence contain nothing to involve the appellant as a

sole person in committing the said offence. It is true that PW3 and PW4 evidence does not prove rape. However, the best evidence is the credible evidence of the victim who is better positioned to explain how she was raped and the person responsible as it was stated in the case of **Isaya John v The Republic**, Criminal Appeal No. 167 of 2018, Court of Appeal at Bukoba (unreported) [08th May, 2019 TANZLII]. Therefore, the evidence of PW3 and PW4 corroborated PW1 evidence and as rightly stated by the learned Principal State Attorney that PW1 evidence alone suffice to ground conviction upon the appellant because she was a credible and reliable witness.

Regarding the last ground of appeal, I have to say that having revisited the evidence on record I have found that the prosecution proved the case beyond reasonable doubt, I am satisfied that, the victim (PW1) was a credible witness who testified how she was ravished by the appellant. Moreover, the victim named the appellant at the earliest opportunity to PW3 and the appellant's employer. In this regard, in my considered view, the case was proved to the standard required by the law.

In the upshot, I am of the view that the cumulative effect of the prosecution evidence fully proved the guilty of the appellant. I find the appeal devoid of merit and hereby dismiss it in its entirety.

Order accordingly.

Dated at Mwanza this date 29th day of July 2020.

A.Z.MGEYEKWA

JUDGE

29.07.2020

Judgment delivered on 29th day of July 2020 in the presence of Mr. Ndamugoba, Principal State Attorney, and the appellant was remotely present.

A.Z.MGEYEKWA

JUDGE

29.07.2020

Right to appeal fully explained.