IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 217 OF 2019

(Arising from Criminal Case no. 183/2018 in the District Court of Kwimba at Ngudu, before Hon. Musaroche, RM, dated 13th November, 2019.)

STEPHANO SHABI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

29th January, 2019 & 12th February, 2019.

TIGANGA, J.

The above named appellant stood charged with an offence of rape contrary to section 130 (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2002], before the District Court of Kwimba at Ngudu, and after full trial, he was finally found guilty and convicted as charged, he was consequently sentenced to thirty years imprisonment.

Aggrieved by both the conviction and sentence he has filed an appeal to this Honourable Court raising the following grounds;

1. That the Trial Court erred in law and in fact in holding that the prosecution has established its case beyond reasonable doubt.
2. That the Trial Court erred in law and in fact by convicting the appellant while no medical examination was tendered to support the prosecution.

It is the appellant's prayer, as stipulated in his petition of appeal, that this Honourable Court quash the conviction, sets aside the sentence and that he be let free unless otherwise he is lawfully held.

During the hearing of this appeal, the appellant enjoyed the services of Mr. Adam Robert (Advocate) on one hand, while the respondent was represented by Ms. Mary Lazaro (Senior State Attorney) on the other.

Before hearing of the Appeal, counsel for the appellant prayed to firstly consolidate the two grounds into one for they appeared to have the same meaning and base; the prayer which was granted by the court, and in doing so he came up with one ground of appeal;

1. *That the Trial Court erred in law and fact by deciding that the case was proved beyond reasonable doubt.*

Submitting in support of the consolidated ground of Appeal, Mr.Adam Robert learned counsel stated that the prosecution evidence left some doubts that were not cleared so the appellant was not supposed to be convicted basing on that evidence. He argued that the evidence of PW1 who was the victim was so weak for it never revealed to the court what kind of relationship PW1 had with the appellant. The evidence did not establish if at all, there was any relationship between

them and neither did it show whether she knew the appellant before the incident or not. He contended that had the victim explained all that, then it would have justified the story of her going to the said hotel which led to her being raped. Also the fact that she never raised an alarm creates doubt.

Another doubt left un cleared, as stated by Mr. Adam Robert, was the facts that the prosecution did not call an important witnesses who were near the scene of crime when the crime was committed. For instance one Rose, who was named to be the person who accompanied the victim to the said hotel and who was later found in the same room with the victim, was not called to testify and no reason was given for not calling her. Further to that, the mother of the victim who called PW2 to inform him that their daughter had been raped was also not called to testify.

The Counsel further contended that even the leader who was mentioned by PW3 and the medical practitioner who attended the victim were also not called as witnesses with no reasons given. He claimed that the non-calling of these witnesses warrants this Honourable Court to draw an adverse inference as it was in **Aziz Abdallah Versus Republic** [1991] TLR 71.

Finally, the counsel for the Appellant called upon this court to find that owing to the above mention shortcomings, the case was not proved beyond reasonable doubt as required by section 3 (2) (a) of the Evidence Act [Cap 6 R.E 2002], He prayed for the court to quash the conviction and set aside the sentence passed by the trial court.

In her reply to the submission in chief, the Counsel for the respondent conceded to the appeal and in doing so she pointed out the main reasons being that the evidence of the victim was not corroborated. According to her, the victim stated that, she went with one Rose to meet the accused and the two were later found in the hotel room but Rose's evidence was not procured in order to corroborate PW1's evidence. The evidence is silent on how Rose got into the hotel room with the victim while at the same time she doesn't claim to have been raped. Also that the evidence of PW1 and that of PW3 left some doubt on the credibility of the witnesses.

In her submission in support of the Appeal, She cited the case of **Edson Mwombeki versus Republic**, Criminal Appeal no. 94 of 2016 in which the Court of Appeal at Mwanza stated while referring to the case of Shaban Daud that the Appellate court may look into the credibility of the witness by comparing his evidence to that of other witnesses. To conclude her submission, the learned counsel stated that even if there was rape, still it was very important to have the victim taken to hospital and examined. The finally prayed to this Honourable Court to pass through the evidence in total and do justice.

That marked the end of the submissions by the counsel for both parties. After going through the arguments presented by both parties regarding this appeal, I find the only issue for determination which the appellant has invited this court to look at, is whether the evidence before the trial court proved the case beyond reasonable doubt.

In law Sections 111 of the Law of Evidence Act [Cap 6 RE 2002] puts a burden of proof in criminal case to be on the shoulder of the

prosecution and so is the authority in the cases of **Woodimington Vs Dpp (1935) Ac 462, Mwita & Others Vs Republic [1977] LRT 54** as well as **Jonas Nzike Vs Republic [1992] T.L.R 213 HC** (Katiti, J) (as he then was).

Further to that, in discharging such a burden the prosecution is duty bound to prove the two important elements as directed in the case of **Maliki George Ngendakumana Vs Republic, Criminal Appeal No. 353 OF 2014 (CAT) BUKOBA (unreported)** which held *inter alia* that:-

> *"...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it"*

Furthermore, section 114(1) of the same law i.e Evidence Act, sets a standard of proof of these two elements to be beyond reasonable doubts.

To prove that, the prosecution had to prove **first,** that the victim was indeed raped, **second**, that it is the Accused person who raped her. The issue is whether these two elements were proved by the prosecution before the trial court? It was the contention of the counsel for the appellant that it was not proved beyond reasonable doubt. That contention was conceded to by counsel for the respondent who now supports this appeal.

It is the law that the best evidence of sexual offences comes from the victim. See also **Selemani Makunge versus Republic,** Criminal Appeal No. 94 of 1999, **Tatizo Juma Vrs Republic,** Crim. Appeal No.

10 of 2013, and **Abdalla Mohamed Vrs Republic** Crim. Appeal No. of 2009.

However, in the circumstances of this case, the evidence of the victim was not self-sufficient, in my view the evidence needed corroborative evidence which would have otherwise added the value and strength to the victim's evidence to prove the commission of the offence.

It is the law that where the evidence is not self-sufficient, that evidence needs some other evidence to corroborate it, as it was decided in **Godi Kasenegala versus Republic,** Criminal Appeal No.10 of 2008 (un-reported) that;

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

It is from the above case law that the importance of corroborating evidence is derived. What has to be born in mind is that even if the best evidence comes from the victim, it becomes the best if is strong and self-self-sufficient, shot of that, it needs to be corroborated.

Coming back to the matter at hand, the evidence of the victim was not self-sufficient in the followings; **one**, as correctly submitted by the counsel for the appellant, the victim did not narrated how she was related to the accused person before and during the incident, **two,** how she entered in the room in which she was allegedly found already raped and **three**, where was her alleged friend Rose when she was being

raped. Without a sound explanation from her on those issues, it was important for the prosecution to call Rose to corroborate the evidence of the victim.

The other witnesses who were supposed to be called were the mother of the victim who called Pw2 to inform him that their daughter had been raped, this would have explained who told her what she reported to the Pw2, and the local leader who was mentioned by PW3. These witnesses were very important to prove some important facts which otherwise remained un proved, they were not called without any explanation as to whether they were out of reach or are no longer subject to the jurisdiction of the court.

Further to that, it is the law that for the offence of rape to be proved it is necessary to prove penetration. This was stressed in the case of **Sindayigaya Francis versus Republic,** Criminal Appeal No. 128 of 2009 (unreported) where it was held that;

> *"short of evidence that there was penetration, the offence of rape cannot be said to have been proved".*

It was argued that as Pw2 stated in his evidence that he took the victim to the hospital after he was given a PF3 by the police, but neither the doctor who examined the victim was called as witness nor the report as contained in the PF3 was tendered as evidence. That, according to him has shaken the prosecution case. On that while I am aware of the authority in the case of **Prosper Manjoel Kisa Vs. Republic Criminal** Appeal No. 73/2003 (unreported) where it was held *inter alia* that;

"Lack of medical evidence does not necessarily in every case have to mean that rape is not establish where all other evidence points to the facts that it was committed'

In my opinion this principle applies where the evidence of the victim is self-sufficient, it cannot be relevant where the evidence of the victim is wanting and tainted with doubts. As earlier on pointed out, in this case at trial, and given the shortcomings afore pointed out, it was important that the medical doctor who examined the victim and the report as contained in the PF3 were supposed to be included in evidence. The evidence of a medical practitioner who examined the victim was very crucial in proving that the victim was indeed raped, failure to include the said evidence created more doubts in the prosecution case and left very important ingredients of the offence of rape un proved, the absence of which raises a doubt which had to be resolved in favour of the accused person now the appellant.

As submitted by the counsel for the appellant, that the authority in the case of **Azizi Abdalla Vrs Republic [1991] T.L.R. 71 (CAT)** entitles this court to make adverse inference if the important witness who is within reach who would have been otherwise in the position to prove certain facts is not called without explanation. To borrow the words of the Court of Appeal, it was held *inter alia* that;

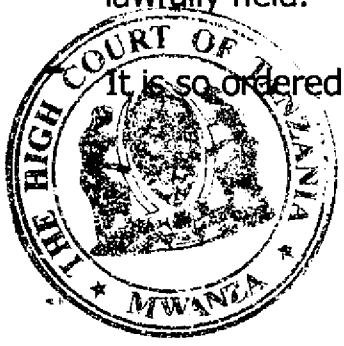
"The general and well known rule is that the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach

but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"

Under the above authority this court makes adverse inference against the prosecution that these witnesses were not called, either they had nothing material to tell the court or that their evidence could have contradicted the evidence of the victim the facts which increase more doubts in the prosecution case.

With all that said and done, I find that the trial magistrate was not justified to hold that the case was proved beyond reasonable doubt. To the contrary, I find that the case was not proved beyond reasonable doubt and I hereby allow the Appeal, quash the conviction and set aside the sentence. The Appellant be set free forthwith unless he is being lawfully held.

It is so ordered



J. C. Tiganga
Judge
12/02/2020

Judgment delivered in open chambers in the presence of the Appellant in person and Miss Sabina Chogogwe learned State Attorney for the Respondent - Republic.

J. C. Tiganga
Judge
12/02/2020

Right of Appeal explained and guaranteed

J. C. Tiganga
Judge
12/02/2020