

**IN THE HIGH COURT OF TANZANIA**

**(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 2 OF 2020**

(Original Ruangwa District Court Criminal Case No. 30 of 2018)

**JUMA S/o KINDAMBA @ NDEDE..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

15<sup>th</sup> & 25<sup>th</sup> June, 2020

**JUDGMENT**

**DYANSOBERA, J.:**

In this appeal filed on 20<sup>th</sup> September, 2018, the appellant Juma Kindamba Ndende seeks to impugn the decision of the trial District Court. Before that court, the charge against the appellant which was initiated by the prosecution had three counts. In the first count, the appellant was charged with burglary c/s 294 (1) (a) and (b) and (2) of the Penal Code [Cap. 16 R.E.2002]. The allegations in the count were that on 8<sup>th</sup> December, 2017 at about 2100 hrs, at Namichiga village within Ruangwa District in Lindi Region, did break and enter into the dwelling house of one Somoe d/o Omar Mkuwile, with intent to commit an offence therein. In the second count, the appellant was charged with rape c/ss 130 (1), (2) (e) and 131 (1) of the same Code whereby the prosecution alleged that on 8<sup>th</sup> December, 2017 at about 2100 hrs, at Namichiga village within Ruangwa District in Lindi Region the appellant, after breaking and entering into the

dwelling house, did have carnal knowledge of Somoe d/o Omar Mkuwile without her consent. The same appellant was charged in the 3<sup>rd</sup> count with stealing c/ss 258 and 265 of the Penal Code in that on 8<sup>th</sup> December, 2017 at about 2100 hrs at Namichiga village within Ruangwa District in Lindi Region did steal cash money Tshs. 250,000/= the property of one Somoe d/o Omar Mkuwile.

While the trial court found the appellant not guilty in the 3<sup>rd</sup>, count, it however found him guilty in the 1<sup>st</sup> and 2<sup>nd</sup> counts. Accordingly, it sentenced him to one year term of imprisonment in the 1<sup>st</sup> count of burglary and thirty years prison term in the 2<sup>nd</sup> count of rape. The sentences were ordered to run concurrently.

The appellant thought that the decision robbed him of justice hence this appeal in which a total of six grounds of appeal were preferred.

Briefly, the prosecution case established that on 8<sup>th</sup> December, 2017, the appellant, according to Somoe Omary (PW 1), entered her house uninvited and by breaking the door. He then held PW 1's neck, threw her down, undressed her and himself, inserted his penis and took PW 1's money (Tshs.250,000/=) and made away with it. PW 1 then went to sleep in the house of Selemani Mohamed Nang'olonda (PW 4) and told him what had befallen her. She was accorded accommodation and the following morning she reported to the police who gave her a PF 3. She then went to the hospital for treatment. PW 1 swore that she knew the appellant as she used to seeing him and therefore, recognized him in that night. PW 1 admitted to have not shouted and argued that the appellant held her mouth.

PW 2 alleged to have inspected the crime scene where he discovered that there were no neighbours around as the house was in the farmland. He also discovered that the shutters to the door were removed and formed an opinion that the appellant had entered by force. According to him, it was possible for the offence to be committed. On cross examination, PW 2 said that he could not tell if the appellant did the complained of acts. He could not also recall the appellant's name.

Hamis Selemani (PW 3), a medical doctor at Ruangwa Government Hospital, on 10<sup>th</sup> December, 2017 received PW 1 who was complaining to have been raped. Upon observing her private parts, she was in pain, the cervix, labia minora and labia majora had bruises meaning that there was penetration. PW 3 filled in PF 3 (exhibit P. 1).

In his evidence, PW 4 said that on 8<sup>th</sup> December, 2017 at 2200 hrs she received PW 1 who was complaining that she was raped. PW 1 told PW 4 that she did not know who had raped her.

When called to enter his defence, the appellant denied to have raped the victim and said that he was surprised to be apprehended as he had committed no offence. This evidence was supported by his wife one Awesa Muhidin (DW 2) who affirmed that on that night she prepared food and ate with the appellant. They then slept together. The following day they went to the farm and went back home. At the time she was preparing food, two militiamen arrived and apprehended the appellant.

In convicting the appellant in the first count, the learned Resident Magistrate believed PW 1 and PW 2. She also argued that PW 1 identified the appellant by the torch light. As to the second count of rape, the trial Magistrate relied on the case of **Selemani Makumba v. R**, Criminal Appeal No. 94 of 1999 on the authority that true evidence has to come from the victim. She argued that the element of penetration was proved in the light of section 140 (1) of the Penal Code and the PF 3.

Having considered the grounds of appeal, it is my finding that although the appellant filed a total of six grounds of appeal, the 2<sup>nd</sup> ground of appeal will suffice to dispose the whole appeal. In that ground of appeal, the appellant's complaint is that:-

*"2. That the trial Magistrate erred in law and fact for convicting the appellant with no basis for such conviction". In other words, the appellant is complaining that there was no basis upon which a conviction could be grounded".*

On 15<sup>th</sup> June, 2020 when this appeal was called on for hearing, the appellant fended for himself. The respondent enjoyed the services of Mr. Paul Kimweri, the learned Senior State Attorney. The appellant opted for the respondent to start responding. Mr. Paul Kimweri supported the appeal and expounded the reasons in support of his argument.

With due respect to the learned Senior State Attorney, I agree. According to the evidence on record, the victim (PW1) Somoe Omari Mkuwele told the trial court that on 8.12.2017 at night she was invaded by the appellant who raped her and robbed her of cash 250,000/=. She did not describe him. It was her further testimony that after the incident she

went to PW4 one Selemani Mohamed Nang'olonda and related the incident and slept there. The same PW 1 did not mention to PW 4 the appellant as the person who had raped and robbed her. This means that she did not identify him. PW4 admitted to have received PW1 who told him that she was invaded and raped but when PW4 asked the victim if she knew the person who had done it to her, the latter replied that she did not know the person who did it to her. It was expected that PW1 could mention to PW 4 who exactly did the complained of act. The failure shows that the victim did not identify her invader. The court of Appeal in the case of **Yasiri Ayubu Jafari v.R** Criminal Appeal No. 386 of 2017 CAT at Mtwara at page 9, said:

***"Failure of PW1 to describe and name the appellant properly implies that it might have been any other person who was involved in raping her".***

In the present case, the possibility that any person other than the appellant might have invaded her and commit the complained acts, if at all such acts were ever committed, was not ruled out.

Besides, it is not clear which evidence was used to apprehend the appellant. This is particularly so because, PW 2, in his evidence told the trial court that he discovered that it is possible for the offence to be committed and affirmed that he was not sure if it is the appellant who had done it. PW 2 was the investigating officer.

Furthermore, the PW 1's failure to describe the appellant and mention him to PW 4 dented her credibility. The credibility of a witness can be measured on two facts: one, coherence of the testimony of the witness and two, the relationship between his/her evidence and that of other

witnesses. A case in point is that of **Galus Kitaya v.R**, Criminal Appeal No.196 of 2015 CAT Mbeya cited to me by Mr. Kimweri. As rightly pointed out by learned Senior State Attorney, these factors are lacking in this case.

The evidence of PW1 was not reliable. Indeed, there was no cogent evidence upon which the conviction against the appellant could be grounded. It is for these reasons that the respondent did support the appeal.

I agree that the case against the appellant was not proved beyond reasonable doubt.

Consequently, I allow the appeal, quash conviction and set aside the sentences. I order that, unless lawfully held for other causes, the appellant should be set at liberty forthwith.



W.P. Dyansobera

JUDGE

25.6.2020

Dated and delivered at Mtwara this 25<sup>th</sup> day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent and in the presence of the appellant, virtually.



W.P. Dyansobera

JUDGE

25.6.2020

