IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.90 OF 2019

(Original Ruangwa District Court Criminal Case No.41/2019 before Hon. R.M. SHEHAGILO-Resident Magistrate)

YORAMU BONIFACE YAKOBO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

15 May, & 16 June 2020

JUDGMENT

DYANSOBERA, J.:

The District Court of Ruangwa sitting at Ruangwa convicted the appellant, Yoramu Boniface Yakobo of rape contrary to sections 130(1) (2) (a) and 131(1) of the Penal Code, Cap. 16 of the Revised Edition, 2002.It was alleged that on 12th day of March 2019 at about 10:30 hours at Ipingo village within Ruangwa District in Lindi Region, the appellant did have carnal knowledge with one AMINA D/O HAMISI HASSANI without her consent. The appellant pleaded not guilty to the charge. After a full trial,

he was found guilty, convicted and sentenced to thirty years prison term.Undeterred; the appellant has come to this court protesting his innocence.

Briefly, the evidence of the prosecution established that Amina Hamisi Hassani (PW 1), the victim of the incident, is an adult. She recalled that on the date she could not mention but at 0700 hrs she went to her farm and was alone. At around 1000 hours a youth appeared, hold her by the neck and fell her down. He undressed her clothes and removed his clothes and inserted his penis into her vagina.In the struggle in protesting, PW 1 managed to remove the youth's hat saw and recognized him. She later went to her grandchild and related what had befallenher and the said grandchild took her to Ruangwa District Hospital. There she met Sarat Mgulo (PW 4), a Medical Doctor. According to PW 4, he, on 12th March, 2019 attended PW 1 who was in company of her grandchild and a police officer. PW 1 was complaining that she was raped. PW 4's medical examination revealed that the victim's vagina had fluid and blood stains. He then filled in the PF 3. (Exhibit P. 1).

Midala Luzilwa Kulolwa (PW2), a Village Executive Officer of Ipingo village testified that on 12th March, 2019 while at his office PW1 went there

and reported to have been raped by a youth. PW 2 convened the Security Committee for purposes of arresting the appellant who was in the bush. According to PW 2, PW1 had informed her that the appellant had a knife with red handle and wore a red pant.PW2 ordered Steven Said Ismail (PW3) a militia man who arrested the appellant in the bush, inspected himand found him with a knife with yellow handle and red pants. PW1 managed to identify the appellant in the presence of PW2 and PW3 before being taken to the police station.

In his defence, the appellant denied to have raped PW1. He admitted that on the material day he was in the bush cutting trees. He then saw some people who asked him if he had seen any person around. The appellant replied in the negative. They took him to PW 1 who told them that she did not recognize him as the person who had raped her. However, those people took the appellant to the Village Executive Officer and later to the police station.

The trial court believed the prosecution evidence, found the appellant guilty and convicted and sentenced him accordingly.

The appellant preferred an appeal which is predicated on seven grounds of appeal which, for ease of reference, I reproduce them as hereunder:-

1. *That, the trial Magistrate erred in law and fact in convicting appellant as the appellant pleaded not guilty when the charge sheet was read over him.*
2. *That, the trial Magistrate erred in law and fact in convicting the appellant as the appellant for the offence of rape c/s 130(1)(2)(e) of the penal code cap 16 R.E. 2002 without considering that none of the prosecution witnesses saw the appellant committing the said offence.*
3. *That, the trial Magistrate erred in law and fact in convicting the appellant for failure to assess the prosecution evidence in reaching the final and just decision as required by the law.*
4. *That, the trial Magistrate erred in law and fact in convicting the appellant without considering that the whole Reasonable doupt sic).*
5. *That, trial Magistrate erred in law and fact in convicting the appellant because no proceedings for this case.*

6. *That, the trial Magistrate erred in law because the evidence of PW1 did not tell the court (sic) the colour and type of clothes which was worn by the accused that is why there is contradiction of statement of the PW2 and PW3.*

7. *That, the trial Magistrate erred in law because the evidence of PW2 who is village Executive Officer of Ipingo Bi Midala Luziliwa Kulolwa on 12/03/2019 she notified the security Committee in the village to trace accused person who had knife with yellow handle, the security committee went to trace accused and found a person who had a knife with red handle whom is not the one notified cause the notified one had a knife with yellow handle.*

At the hearing of the appeal on 15.5.2020, the appellant appeared in person fending himself whereas Mr. Meshack Lyabonga, learned State Attorney, entered appearance for the respondent Republic. At the very outset the appellant opted to have the respondent to make his submissions first before he could make any reply if such need arose.

Resisting the appeal Mr. Meshack Lyabonga supported the conviction and sentence of thirty years on the offence of rape. He argued that the prosecution proved the case as indicated from the 6th page where PW1 was

clear thatthe appellant raped her and she identified the appellant and she mentioned the appellant to PW2.Mr. Lyabonga went on submitting that the incident occurred in broad light and described the appellant who had a yellow knife and red underpants. The evidence of PW3 corroboratedthatevidence. Apart from that the learned State Attorney submitted that the evidence of PW1 proved penetration. In addition to that the element of penetration was proved by PW4 (at Page 11) who stated that he saw blood stains.Mr. Lyabonga argued that PW1 reported the incident on early stage to PW2 and there was proof of consent. The learned State Attorney argued that the rape incidents are committed in secret and PW1 is the best witness as elucidated in the case of **Selemani Makumba** on the best witness being of the victim. Mr. Lyabonga concluded his argument by submitting that the conviction was sound.

When the appellant was called upon to rejoin, he protested his innocence arguing that on that material day, hewoke up and left his wife at home. He then took a bicycle, panga anda knife to cut *mianzi*. He then tied the*mianzi* on the bicycle. He maintained that six youths asked him if he had seen a person with *mzula*, with no shirt and barefooted and replied in the negative. They told him that they suspected him and then took his

bicycle, panga and knife to the victim. He said that they assaulted him while on the way. The VEO who referred him to the WEO who took him to Ruangwa police station whereas the victim was taken to the doctor but they refused to take the appellant to the doctor as well. He said that the evidence of the Dr. did not incriminate him.

In convicting the appellant, the learned Resident Magistrate relied on the provisions of sections 130 (1), (2) (a), 131 (1) and 130 (4) of the Penal Code and argued that the victim was an old woman, not the wife of the appellant and that under the law, in proving the offence of rape, penetration however slight is sufficient to constitute sexual intercourse necessary for the offence. According to the learned Resident Magistrate, in this case penetration was proved by Exhibit P 2 which is a PF 3 and that the victim described the appellant as the one who had raped her, had red pants and a knife with a yellow handle. The learned Magistrate also relied on the case of **Selemani Makumba v. R**, Criminal Apppeal No.94 of 1999.

The pertinent issue for determination in this case, is whether the appellant was amply identified at the crime scene. Since the only witness implicating the appellant with the offence is that of PW 1, the victim of

rape, it is better to let her explain what happened on that day she could not mention so that this court can ascertain on whether or not the appellant trial court was correct to hold that she identified the appellant at the crime scene. At pp. 6 and 7 of the trial court's proceedings, PW 1 testified as follows:

PW 1: Amina Hamis, Adult, Ipingo, Ndaka, Muslim affirms and states:

Examined in Chief:

I am a peasant doing my activities at Luega. I know the accused person. I remember the accused person found me in my shamba. I went there on 0700 hrs he came at about 10000 hrs and I was alone in that shamba and he hold me in my neck and I fall down and he removed my clothes and he also removed his and inserted his penis into my vagina he had a hat I removed it and saw him and recognized him and I went to my grandchild and told him about it and I show where the accused went and I was taken to the hospital and later the accused person was arrested and brought to me. I recognized him and he was taken to the VEO Luchelegwa and latter to police station.

Cross examination:

I did not say you are not the one.

Examination by Court:

The accused person was wearing a hat but I removed it and saw him. I had not seen him before this incidence. I went to m

The appellant concluded his submission by submitting that in court the witnesses testified and he cross examined them, the doctor said the victim had blood stains and he could not tell who raped her. In addition to that the doctor said that he did not see the semen. Thereafter, the appellant was convicted and sentenced.

According to the record, the incident is alleged to have occurred at 1000 hrs, in a broad day light and PW 1 claimed to have identified the appellant at the crime scene. On the evidence of visual identification, courts of law have been warned to be careful before they act on such evidence to convict. It the principle that they must be satisfied that all possibilities of mistaken identity are eliminated and that the evidence before them is absolutely water-tight. This warning was sounded in the case of **Waziri Amani v. R.** [1980] TLR 250). The Court of Appeal emphasized these principles in the case of **Philipo Rukaiza @**

Kitchwechembogo Vs. Republic, Criminal Appeal No. 215 of 1994 CAT (unreported) where it held:- "*The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness.*"

In the case under consideration, PW 1 told the trial court that she recognized the appellant when she removed the hat he wore. Although in cross examination PW 1 said that she knew the appellant, on cross examination, the same PW 1 admitted that she had not seen him before the incident. What a contradiction! There is no dispute that PW 1 did not describe the appellant. The finding by the trial Resident Magistrate that PW 1 recognized the appellant because he had red pants and a knife with a yellow handle was not supported anywhere in PW 1's evidence. Besides, the trial court's reliance on the case of **Selemani Makumba v. R**(supra)was unfortunate because, the general rule that the best evidence

in rape cases comes from the victim was qualified by the same Court of Appeal in the case of **Hamis Halfan Dauda v. R,** Criminal Appeal No. 231 of 2009 where the Court stated as follows:

"On the basis of the foregoing, the evidence of identification wasnot watertight. The same was not enough to ground a conviction.We are alive however to the settled position of law that bestevidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoidthe danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s).In such cases, therefore, the victim's evidence should be considered and treated with great care and caution. It should be subjected and considered in the backdrop of the principles we have endeavored to explain above".

In the instant case, the trial Resident Magistrate accepted andbelieved in wholesale the evidence of PW 1 which was not onlycontradictory but also a suspect. The trial Resident Magistrate also relied on the PF 3 which is exhibit P. 2. According to that exhibit filled in by Said Mgula (PW 3), there was wetness on the rabia (sic) minora, tenderness and pervagina bleeding and blood discharge from the vagina.

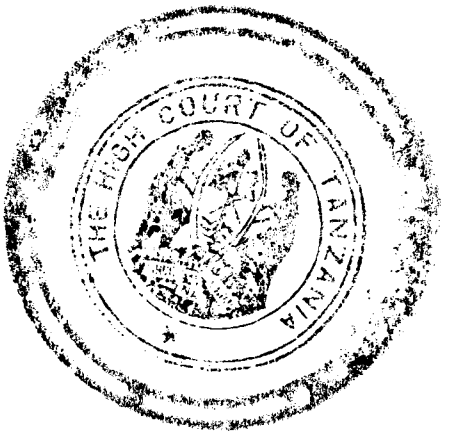
He observed that there was a sign of penetration. Apart from the fact that that alone was not evidence of rape, I agree with the appellant the evidence did not implicate the appellant. This is what PW 3 said when cross examined by the appellant. He said, "I was no there" PW 4 also said that she did not know who raped PW 1.

Indeed, the whole prosecution evidence fell short of proving that the appellant carnally knew PW 1. This being a criminal case, the prosecution bore the burden of proving not only that the offence of rape was committed but also that the appellant was a culprit.

In the final analysis, the appeal is allowed, conviction quashed and sentence set aside.

The appellant should be released from prison forthwith unless his further incarceration is in connection with other lawful causes.

It is so ordered.



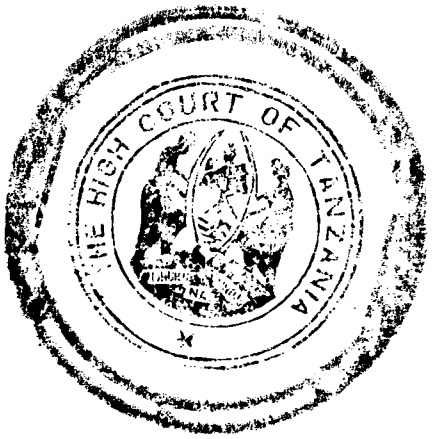
W.P.Dyansobera

JUDGE

16.6.2020

This judgment is delivered under my hand and the seal of this Court on this 16th day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent Republic and in the presence of the appellant (virtually present in court).

Rights of appeal explained



W.P.Dyansobera

JUDGE