IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 33 OF 2019

(C/F Criminal Case No. 310 of 2017 District Court of Moshi at Moshi)

RASHID MOHAMED @ BABU PIPI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

26TH MAY 2020 & 19TH JUNE 2020

JUDGMENT

MKAPA, J:

This appeal is against the decision of Moshi District Court in **Criminal Case No. 310 of 2017** in which the appellant was charged with and convicted of the offence of Rape c/s **130 (1) (2) (e)** and **131 (1)** of the Penal Code, Cap 16 [R.E. 2002]

Brief facts leading up to this appeal is to the effect that, on diverse dates between February and May, 2017 at Bomambuzi area Hai district the appellant did have carnal knowledge of an 11 years old girl, PW2 (hereinafter referred to as "Prem") for the purpose of hiding the identity of the victim. It was alleged that on different occasions PW2 visited the appellant's house with one Martin to collect "ukili". When they reached the appellant's house the appellant had the habit of sending Martin to a shop to buy some sweets and biscuits while PW2 always remained behind

and the appellant sexually abused her and offered her some sweets "pipi", money and "Juzuu" (Islamic religious book). At the preliminary hearing, the appellant admitted to have known PW2 and Martin, and the fact that he had been offering them some sweets "pipi" money and "Juzuu" between February and May as sacrificial act according to his religious faith.

The detailed account of the ordeal came into light on 13th May 2017 when PW2 disappeared from home for almost the whole day. When one Mama Shadya (landlady to victim's parents) was looking for her she was told by her friends that PW2 had gone to "babu pipi" to collect some sweets "pipi". When PW2 was asked, she narrated to mama Shadya that the appellant used to give her money and "pipi". Mama Shadya informed PW2's parents and when they confronted PW2 she confessed to have been raped often times by the appellant and offered "pipi" and some money. PW's parents reported the matter to police. The appellant denied the allegations claiming that the case had been framed against him. However, the trial court found the appellant guilty, and convicted him of the offence of rape and sentenced him to thirty (30) years imprisonment.

Aggrieved by the judgment and sentence, he has appealed to this court praying that the judgment and sentence be quashed and set aside by advancing a total of seven (7) grounds.

However, I found all the grounds have the same character thus can be summarized into five (5) as follows;

1. That, the case against the appellant was not proved beyond reasonable doubt.
2. That, the trial magistrate erred in law and fact in giving weight on the PF3 (Exhibit P1) which was not read over during the trial.
3. That, the trial magistrate erred in law and fact in giving weight on the victim's testimony without conducting the *voire dire* test properly.
4. That, the trial magistrate erred in law and fact in failing to summon Martin who was a crucial witness to the case.
5. That, the trial magistrate erred in law and fact in failing to give legal reasons as to why she never believed the true testimony of the appellant.

At the hearing of the appeal the appellant was represented by Mr. Gwakisa Kakusilo Sambo learned advocate while the respondent was represented by Ms. Grace Kabu learned state attorney.

Arguing in support of the appeal, Mr. Sambo submitted that the respondent failed to prove beyond reasonable doubt the case against the accused as per **section 110 (2) of the Tanzania Evidence Act**, Cap 6 [R.E. 2002] which provides that;

"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies to that person"

To support his argument Mr. Sambo cited a number of cases among them the case of **Nathaniel Alponce Mapunda and Benjamin Alphonce Mapunda V Republic (2006) TLR CA** where the court emphasized that in criminal trial the burden of proof always lies on the prosecution. Mr. Sambo contended further that, the respondent summoned three witnesses during the trial but failed to summon Martin a key witness who was said to have accompanied PW2 to the appellant's house more than 27 times. It was Mr. Sambo's argument that failure by the respondent to summon the said key witness makes adverse inference against prosecution that he either had nothing material to testify or would give contradicting evidence to the case as it was held in the case of **Stephano Shabi V Republic, Criminal Appeal No. 217 of 2019 HC Mwanza** (unreported).

Mr. Sambo went on explaining that, PW1's testimony (PW2's father) was a hearsay since he did not witness the crime being committed by the appellant while PW3's testimony was too professional and did not corroborate PW2's testimony on what transpired on the material dates. It was Mr. Sambo's further submission that the trial magistrate failed to assess the victim and record in the proceeding reasons as to why she was satisfied

that the victim was telling nothing but the truth as per the requirement of **section 127 (7) of the Evidence Act**. It was Mr. Sambo's views that, PW2's testimony is questionable and framed to the effect that she did not bleed when the appellant raped her for the first time and the fact that the appellant always undress her skin tight and pants before raping her and no different type of clothes were mentioned.

It was Mr. Sambo's argument that appellant was arrested few days later in the neighbourhood, therefore if he really had committed the alleged crime he would have been arrested sooner. He further argued that the victim's PF3 was not read aloud before the trial court while it is trite principle of the law that once a document is tendered in court it has to be read out and explained to the accused person as it was held in the case of **MT 7479 Sgt Benjamin V Republic** (1992) TLR. He therefore prayed for this Court to revisit the evidence of the trial court and expunge the PF3 from the record.

It was Mr. Sambo's further submission that the trial magistrate did not give reason as to why she discredited appellant's testimony and sided with prosecution testimony only. He finally prayed that this appeal be allowed as the case was never proven at the required standard and the appellant set free.

In reply, Ms. Kabu submitted that, the grounds of appeal raised by the appellant are meritless since it is trite law that the best

evidence of rape offence comes from the victim herself and PW2 did testify how the appellant raped her. Ms Kabu argued further that, PW2's evidence was corroborated by PW1 and PW3 which was coherent and free from any contradictions. Regarding the PF3 tendered but not read aloud, Ms Kabu submitted that, such omission is curable even if such evidence will be excluded as was held in the case of **Shaban Ng'ombe @ Kenyeka V The Republic, Criminal Appeal No. 454 of 2016** (unreported) and the case **of Selemani Makumba V Republic, [2006] TLR 380.** Finally, she submitted that, the *voire dire* test which is no longer a requirement of the law was conducted and complied with by the trial magistrate. She thus prayed that the appeal be dismissed. There was no rejoinder.

Having considered both arguments for and against this appeal, to begin with I am alive to the principle of law that first appeal is in the form of re-hearing. Therefore the first appellate court has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to critical scrutiny and if warranted arrive at its own conclusion of facts. [**See D.R.Pandya (1957) EA 336 and Iddi dhaban " Amasi Vs, Republic, Criminal Appeal No 111 of 2006 (unreported).** On the strength of the above position I will address each ground of appeal.

On the first ground of appeal, the law is settled to the effect that, the essential ingredient to be proven in rape offence is **"penetration".** This position has been fortified in a number of cases including the case of **Ally Mkombozi V. R, Criminal Appeal No. 227 of 2007, CAT (unreported)** in which the Court of Appeal had this to say:

> *"The essence of rape is penetration, however slight is sufficient to constitute sexual intercourse necessary to the offence"*

In her evidence at page 15 of the trial court's typed proceeding PW2 the victim testified the appellant raped her when she said;

"He removed the khanga he was wearing akawa ananinyonya sehemu za siri.....he took dudu lake akaniingizia sehemu za siri alizokuwa ananinyonya ni sehemu za kukojolea akachukua dudu lake akaniingizia, lidudu lake linakaa sehemu za siri..... I do not know the other name of "lidudu" lidudu is located there (ponting at the accused's private parts) (penis) ***aiiniingizia lidudu lake hapa chini ya kiuno) (touching her vagina) akaanza kunifanya mapenzi alikuwa anaingiza tu lile dudu lake".***

It is plain clear the above testimony has established penetration whereby PW2 had graphically described how the appellant had inserted his penis into her vagina.

It is noteworthy at this juncture the fact that, the scope is now settled through a number of Court of Appeal decisions that, in proving there was penetration it does not in all cases expected the victim of the alleged rape to graphically describe how the male organ was inserted in the female organ. Thus the words like *"he removed my underwear and started "intercousing me"* in **Matendele Nchanga @ Amilo V. Republic Criminal Appeal No 108 of 2010;** *"Alinifanyia matusi"* in **Jumanne Shaaban Mrondo V. Republic Criminal No. 282 of 2010;** *and "he puts his dudu in my vagina"* in **Simon Error V. R Criminal Appeal No of 2012** though not explicitly described, have been taken by the court to make reference to penetration of the penis of the accused person in the vagina of the victim. The above developments have been necessitated by among other things, cultural background, upbringing religious feelings, the audience listening and the age of the person giving evidence.

It is also trite principle the fact that the best evidence in rape case comes from the victim herself as the act itself is normally conducted in secrecy. In the case of **Mohamed Said V Republic,** Criminal Appeal No. 145 of 2017, CAT at Iringa held *inter alia* at page 14 that;

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences comes from the victim [**Magai Manyama v. Republic***

(supra)]. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for sexual offence may be grounded solely on the uncorroborated evidence of the victim.

However we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for the courts to be satisfied that what they state contain nothing but the truth."

I fully subscribe to the above position especially on the truthfulness of the PW2's testimony as I am unable to understand why PW2 should not be believed as record has not reveal any material contradiction on her part. I thus found her evidence good and trust worthy and sufficient to prove the case beyond doubt. Hence the first ground of appeal is dismissed for lack of merit.

On the second ground of appeal it is undisputed that the PF3 was never read aloud after being tendered before the court. I therefore expunge it from the record. Having expunged the PF3 the question is whether or not the prosecution case can stand. In **Salu Sosoma V R,** Criminal Appeal No.4 of 2006 CAT-MWZ (Unreported) the Court of Appeal, had this to say;

"...likewise, it has been held by this court that lack of medical evidence does not necessarily in

every case have to mean that rape is not established where all other evidence point to the fact that it was committed."

The above position is further affirmed in **Kassim Ali V. Republic Appeal No 84 (Mombasa) (Unreported)** where the court held that:

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape.....

In the present case, the trial court did not rely solely on PF3 evidence in reaching its decision. PW2's evidence was sufficient to prove the charge of rape against the appellant. This ground of appeal lacks merit, I proceed to dismiss it.

Turning to the third ground of appeal, the appellant complained the fact that the trial magistrate did not thoroughly conduct *voire dire* test as required under section 127 (2) of the Evidence Act which provides that;-

(2) A child of tender age may give evidence without taking an oath or making an affirmation ***but shall, before giving evidence, promise to tell the truth to court and not lies.***

It on record at page 13 of the trial court's proceeding, the trial magistrate did ask PW2 the following;

*"**Court**: The witness is a child of tender years, she has been told by the court to promise that she will tell the truth in court while testifying and not to tell lies, she is what she says;*

***PW2** - I promise to tell the truth, I promise to tell the whole truth, I tell no lies."*

***Court** – Section 127 (2) of the TEA as amended by section 26 (2) of the Written Laws (Misc Amendment) Act No. 2/2016 complied with"*

Thereafter, PW2 went on testifying without oath.

From the foregoing paragraph, in my view the trial magistrate did comply with the standard test on whether PW2 was telling truth and not to tell lies. Although the citation of the amendment was wrong, I find the same as a minor omission that did not go the root of the case nor occasion any injustice to the appellant. This ground of appeal is dismissed forthwith.

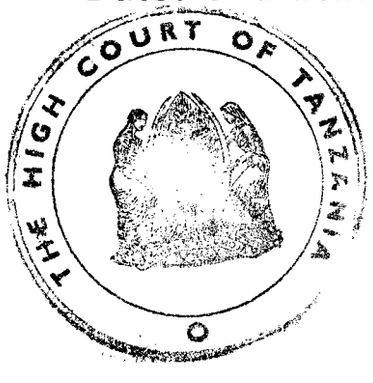
Regarding the fourth ground in which the appellant challenges the prosecution for not summoning Martin to testify, this argument should not detain me much, as it is a rule of practice that court can sustain conviction on the evidence of a single witness if it is fully satisfied that the witness is telling the truth. More so, at page 38 of the trial court typed proceeding the appellant did testify to the effect that, he happened to know PW2

and Martin and the fact that he used to offer them some sweet "pipi" and some monies and further he admitted to have come into contact with Martin and PW2 in a number of occasions and offer them sweets and money.

Lastly, on the complaint that the trial magistrate disregarded appellant's testimony, it on record the trial magistrate at page 7 to 8 of the typed judgment thoroughly gave her reasons that the appellant to a large extent supported PW2's evidence by admitting to have known PW2 and Martin and to have given them sweets, money and "Juzuu". Therefore appellant's testimony was never disregarded, but rather it just incriminated himself.

Based on the above analysis and reasoning, I find all grounds of appeal lack merit and consequently proceed to dismiss the appeal in its entirety.

Dated and delivered at Moshi this 19th June 2020



S. B. MKAPA

JUDGE

19/06/2020