

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF TANGA**

**AT TANGA**

**CRIMINAL APPEAL NO 38 OF 2019**

(Appeal against the judgment of the District Court of Tanga at Tanga Kamugisha Esq Resident Magistrate) In criminal Case No 18 of 2019)

**Between**

**SALEHE SAIDI.....APPELLANT**

**Versus**

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

**JUDGMENT**

**MRUMA, J.**

**Salehe Saidi**, the Appellant, was indicted for Rape contrary to section 130(1)(2)(a) and 131(1) of the Penal Code [Cap 16 R.E. 2019]. He was tried by the District Court, convicted and sentenced to 30 years imprisonment. He was aggrieved hence this appeal.

Particulars of the offence charged were that; on 19<sup>th</sup> January, 2019 at Magaoni area within the District City and Region of Tanga the accused did have carnal knowledge of one Leah D/o Juma a woman who is not his wife without her consent.

At the trial, the prosecution called a total of six witnesses. The Defence called one witness, the Appellant himself.

In view of what transpired it is necessary to examine the relationship between the parties along with a summary of contending evidence. The Appellant and the complainant were previously living in one rented house at Magaoni area. On the material day and time, there was flood in the area they were residing and residents of their house were forced to seek refugees in neighbouring area.

The Victim **Leah Juma (PW1)** aged 20 years was a wife of **John Lazaro (PW3)** and a daughter in law to **Agnes Stephano Shangama (PW2)** and lived with the Appellant in the same house in Magaoni area within Tanga City. On 19<sup>th</sup> December, 2018, it was heavily raining around that area. The house where Leah Juma, the Appellant and Agnes Stephano Shangama were living flooded. The residents therein sought refugees in nearby houses. At around 05:00 hours in the morning Agnes Stephano Shangama (PW2) left from where she slept that night but before leaving she directed Leah Juma (PW1) to go back to her room and remove her mattress from the bed and place it on a higher place so that it does not get damaged. PW1 talked to the Appellant's wife who in turn asked her husband to assist her. The appellant went to PW1's room and raped PW1. PW1 first reported to her mother in law PW2 and then through the Appellant's phone to her husband (PW3). The husband reported to the police who came to the Appellant's house and arrested him. They took him to the police station from where he was later on taken to court and indicted for the offence of rape. He was tried in the District Court, convicted and sentenced to 30 years imprisonment.



The appellant was aggrieved and has appealed to this court on only three grounds framed as follows:

1. That the learned trial magistrate erred in law and in fact by convicting him based on incredible and unreliable evidence of the prosecution witnesses;
2. That the learned trial Magistrate erred in law and in fact by failing to notice the contradictions and inconsistencies in the evidence of the prosecution witnesses and failed to give an in depth scrutiny to the evidence of the nature and extent of the evidence adduced before the trial court;
3. That the prosecution did not prove their case beyond reasonable doubt.

The Appellant prayed that this court quash the conviction and sets aside the sentence imposed.

At the hearing of this appeal the Appellant appeared in person and was not represented. Ms Muhangwa State Attorney appeared for the Respondent/Republic. By order of the court, hearing of this appeal was conducted by way of written submissions.

The Appellant submitted that the learned trial magistrate failed in his duty to adequately evaluate the evidence before the court thereby wrongly convicted and sentenced the Appellant. More specifically, the Appellant contended that the court erred in law when it failed to

evaluate the evidence concerning the allegation that the information that the victim had been raped by the Appellant was communicated to the victim's husband (PW3) through the Appellant's phone. He asserted that while PW1, testified that she was raped, Dr. Good luck Yohana Mbwirow (PW4) a Medical Doctor of Tanga Region Referral Hospital who examined her, testified that the victim had no bruises and there were no spermatozoa, which according to the Appellant is an indication that PW1 was not raped. The Appellant contended that this was contradictory and therefore, the learned trial magistrate erred in law when he ruled that the evidence of PW1 alone was sufficient to warrant conviction.

Learned State Attorney for the Respondent/Republic, supported the decision of the District Court. She submitted that the learned trial magistrate did not make any error in finding that the evidence of PW1 alone was suffice to sustain conviction because the best evidence of rape comes from the victim herself as was hold by the Court of Appeal in the case of **Godi Kasengela Vs Republic Criminal Appeal No 10 of 2008**. The Learned State Attorney prayed that this court dismisses the appeal and upholds the conviction and sentence against the Appellant.

This is a first appeal. The duty of a first Appellate Court articulated in **Pandya v. R [1957] EA 336** is to re-appraise and re-evaluate the evidence presented before the trial court and the materials thereto. The Appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it before coming to its own independent conclusion.



I have carefully read the judgment of the District trial court and I have studied the Record of Appeal and the Record of Proceedings including the submissions of the parties. In performing its duty the trial court relied wholly on the evidence of Leah Juma (PW1). In her testimony PW1 had told the court that she is married to John Lazaro (PW3) who was away to Muheza on the material day and time. On the fateful day and time the Appellant had escorted her to her room which is in the house where the Appellant also lives. While inside her room the Appellant forcefully pulled her and covered her mouth with a bed sheet tear her underwear. He then he squeezed her legs by using his legs and her hands by using his hands and was able to rape her.

The learned trial Magistrate also considered the evidence of PW1 together with that of PW2, and he agreed with the Appellant's defence that they were contradicting regarding the time PW2 got back home from the market. However he was of the view that the contradiction was minor and didn't go to the gist of the case. The learned trial magistrate also found that there were "big variation" between PW3 on the one hand and PW1 and PW2 on the other hand regarding the time when PW3 returned home and when the Appellant was arrested, once again he was of the view that the "big variation" doesn't go to the root of the case.

Starting with the contradiction on the evidence of PW1 and PW2 regarding the time which PW2 went back home from the market, the record shows that PW1 told the trial court that after the Appellant had raped her she went out and found that her mother in law (PW2), had already returned from the market. She didn't tell the court about calling

her on phone when she was still in the market. On the other hand PW2 told the trial court that at around 07:00hours while she was still at the market she received a phone call from PW3 complaining that his wife had been raped by the Appellant. On cross-examination PW3 told the trial court that he called the Appellant on phone at around 08:00 hours in the morning. This is the same time PW2 claims that PW3 arrived back home from Muheza. If we take the evidence of PW2 to be true, it means that by the time the victim's husband (PW3) was calling the Appellant he was already at the scene. This contradicts materially the evidence of PW3's which is to the effect that he arrived home (at the scene) at around 12:00hours in the noon. This contradiction cannot be minor.

I have also considered the medical evidence produced by PW5 which was to the effect that PW1's had no indication of being raped. It should be noted that the victim was medically examined one day after the alleged incident. No bruises were seen. High vaginal swab test (which is a medical procedure commonly for testing presence of vaginal thrush) was carried out by Dr. Good Luck Yohana Mbwi (PW4) but nothing positive was found. According to medical information available on line in ***<https://www.webmd.com>*** sperms can live inside a woman's body for five days. It follows therefore that there is a possibility that the complainant had no sexual intercourse one day before examination or that if she had then she went through a process which did remove all sperms (i.e. washing them away). This is doubt on prosecution's case. In case of rape of an adult woman, prosecution must prove the following ingredients of the offence:-



- i. That there was sexual intercourse with a woman capable of giving consent;
- ii. That the sexual intercourse was done without her consent and;
- iii. The accused participated in the commission of the rape.

The prosecution carries the burden of proof. This burden never shifts to the accused to prove his innocence. The accused is presumed innocent until proved guilty or until he pleads guilty. Prosecution must prove its case beyond reasonable doubt. In this case sexual intercourse was not proved let alone that it was done without consent of PW1 and that it was done by the Appellant.

In its judgment, the trial court had no doubt with the credibility of the complainant (PW1). This being an appellate court cannot interfere with this findings as it is the trial court which had an opportunity of seeing the witness testifying therefore better placed in assessing her credibility. An appellate court, unlike the trial court that had no the opportunity to listen to the witnesses, consider their demeanour in court, it has to just to rely on what is on record to come up with its own findings and make its own conclusion. In other words the appellate court is more concerned with the propriety, legality and regularity of the legal process during the trial. I am bound by the legal principles laid down in famous cases of ***R V. Pandya (1957) E.A. 336 and Okena V. Republic (1972) EA 32***. The judicial appellate system is indeed akin to the post mortem process where the pathologists comb the entire body looking for the cause of death. In the judicial process the appellate court combs the lower court record looking for the alleged legal errors and omission that are stated to have caused a miscarriage of justice to the appellant.

The main contention of this appeal is based on the alleged contradictions and inconsistencies of the evidence of the prosecution witnesses. After he analysed the evidence for the prosecution, the learned trial magistrates stated at page 4 of the typed judgment thus:-

*"I however agree with the accused person that there is contradiction among the witnesses about the time when PW2 and PW3 arrived at home after they were informed of the rape and the time when accused person was arrested. According to PW1's evidence in chief PW3 arrived home when she (PW1) was briefing PW2 what accused person did to her. When cross-examined PW1 said that PW3 arrived home at 06:00hours and that when the accused person was arrested. This means PW1 told PW2 of rape on or before 06:00hours"*

This contradicts the evidence of PW2 who told the court that while she was at the market at 07:00 hours she received a call from PW3 informing her that PW1 had been raped by the Appellant. According to PW2, PW3 arrived home from Muheza at around 08:00 hours and accused time was arrested around that time. It also contradicts the evidence of PW3 who told the court that he talked to PW1 through the Appellant's phone at around 08:00 hours. In his findings regarding these inconsistencies, the learned trial magistrate stated thus:-

*"Contradiction by a particular witness or among the witness is unavoidable since witnesses are not expected to remember exactly everything about the event they are testifying about. Contradiction within themselves or with other witnesses is, therefore not always the result of their untrustworthiness. Their*



*memories may have been lowered because of the time which may have been passed since the matter they are testifying on happened. The other reason may be due to their incapacity to make a blow to blow mental recording of what happened especially taking into account that often when they are witnessing the event they are not aware that they will be required to testify on it on future. It is only when the variation is grave and goes to the root of the matter when they have the effect of corroding the credibility of a party's case"*

Citing the decision of the Court of Appeal in the case of **Elijah Bariki V. R.**, the learned trial magistrate held that the contradictions were minor and didn't go the root of the matter and didn't in anyway affect what went on in the room between PW1 and the accused person.

With due respect to the learned trial magistrate I am of the view that he arrived into a wrong conclusion. As the evidence would suggest what happened in the room is privy to PW1 and the Appellant only. No any other person witnessed what went on there. Thus, the evidence on what transpired is one against one. PW1 says that he was raped while the Appellant says that he didn't rape her. In the case of **Hemedi Saidi V. Mohammed Mbilu (1984) T.L.R. 113**, this court (Sisya J, as he then was), held that:-

*"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win"*

In the case at hand having found that only two persons can tell what exactly took place in the room and bearing in mind that in criminal trials the burden of prove lies with the prosecution and it never shifts to the accused, the trial court ought to have considered as to whether there was corroboration evidence to support the victim's testimony. This is so because it is a universal non derogatory right which must be protected by presiding magistrate or judge who sits in at the gate of justice to ensure that all those who enter and come out of court whether as a suspect or victim or parties in the event of a civil suit are treated equally before the law. This equal treatment must be accorded to the suspect during the trial whether at his capacity as a suspect or as a witness. In the circumstances where the victim and the suspect are the only eye witnesses of the alleged crime, it would be of essence to require corroboration of the evidence of the victim before convicting the accused. Corroboration is evidence from other sources which supports the testimony of the complainant and connects or tends to connect the accused person to the commission of the crime. The value of corroboration is rooted in the legal standard (proof beyond reasonable doubt) that must be met by the prosecution in order to secure a conviction. Consequently, the prosecution may find it necessary to adduce evidence from more than one witness in order to prove their case beyond reasonable doubt.

On the evidence available, the evidence of the victim lacks corroboration. As elucidated above medical examinations (Exhibit P1) and the testimony of Dr. Good luck didn't establish rape. No bruises were found on the external part of PW1's vaginal and no spermatozoa



were found when high vagina swab was conducted by a swab being inserted into her vagina and gently rotated.

On the other hand contradictory evidence of PW2 and PW3 who are a mother and son and have interest in the conviction of the appellant cannot corroborate the testimony of PW1 who is the wife of PW3. As I pointed out earlier the contradictions were not minor and they go to the root of the matter. They were not minor because they touch the way the matter was reported and handled immediately after it had occurred. For instance the husband (PW3), told the court that he talked to his wife (PW1) on phone while at Muheza at around 08:00 hours while on cross-examination PW1 told the court that PW3 arrived home from Muheza at 06:00hours (See page 4 paragraph 5 of the typed judgment of the trial court). This is material contradiction and it creates doubts on the prosecution's case because if we take the evidence of PW1 that at 06:00hours PW3 was already at his home at magaoni, he couldn't have made a phone call from Muheza at 08:00hours! This prompts another pertinent question as to whether the incident was reported to PW3 at all! This question is important because according to the evidence of PW3 and PW1 the incident was reported through the Appellant's undisclosed telephone number. Despite the fact that this issue was reported to the police, no investigations were carried out to establish whether it was true or not and if it was true when exactly did PW3 called his wife (PW1) and conversed over the issue? Detective Corporal Maiga PW6 didn't mention anything about investigation of the case. He simply narrated what transpired during the arrest of the Appellant notwithstanding that the arrest of the

Appellant was not disputed therefore it was not an issue before the trial court. He didn't even say anything regarding the issue of time of arrest which apparently was an issue during the trial. From the evidence on record it would appear that no investigation was carried out over the matter. The police didn't visit the scene of the alleged crime and investigate if there were any signs of scramble or struggle between the Appellant and PW1. They didn't investigate on the communications made immediately after the alleged incident to establish whether or not it was really reported to PW2 and PW3 as alleged by PW1 particularly so because it is the prosecution's evidence that PW1 used the Appellant's phone to report to PW3 but it is not disclosed whose phone he used to report to PW2.

On the evidence on record, it may be true that the accused had had sexual intercourse with PW1, but that is far from saying that the prosecution had proved beyond reasonable doubt that the Appellant did rape PW1. The evidence of PW1 on how she was raped leaves a lot to be desired. She stated that on the material date and time the Appellant got hold of her, closed her mouth with a bed sheet, tied her underwear, squeezed her hands with his hands and legs by using his legs and then raped her. The question that one would be tempted to ask is how did the Appellant manage to insert his penis into PW1's vagina in the circumstances where his hands were holding the victim's hands and his legs were squeezing the victim's legs?

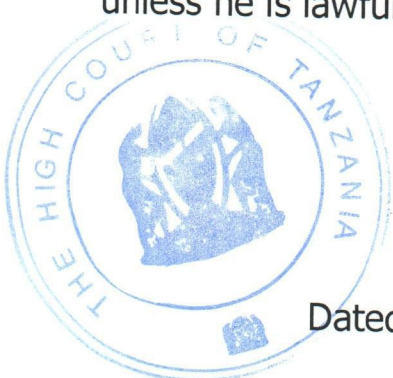
It is common at least to all adult persons and we cannot deny this fact that having sex with another person entails physical connection



of male organ to the female sex organ. This connection cannot be secured without using hands to insert a male organ to a female organ. Thus, unless some better particulars are given, it is hard for the court to believe that sexual intercourse can be secured without using hands in inserting the male organ to the female organ. Under our criminal law, rape is a serious offence. It attracts a severe sentence of not less than 30 years imprisonment. This should not be taken lightly. The burden of proof must be higher than in ordinary crimes which attract less severe sentences. All those who are involved in law enforcement and justice delivery must make sure that they carefully handle rape cases so that justice is done.

In the case at hand I agree with the submission of Appellant that there was contradiction on PW2 PW3 and PW5's evidence and that of PW1. I also find that the contradiction goes to the root of the matter and have the effect of tainting the prosecution's case.

In the result, I allow the appeal. The appellant's conviction and sentence are accordingly quashed. The Appellant shall be set free immediately unless he is lawfully held for any lawful cause.



  
A.R. Mruma,

Judge

Dated at Tanga this...<sup>18<sup>th</sup></sup>...Day of August 2020.