IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO.55 OF 2019

(Originating from Mufindi District court Criminal case No.127 of 2018)

JOSEPH MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

16/3 & 25/3/2020

MATOGOLO, J.

The appellant Joseph Marwa was arraigned in the District Court of Mufindi of an offence of Rape C/S 130(1) and (2)(e) and 131 (1) of the Penal Code [Cap 16 R.E. 2002]. It was alleged in the particulars of offence that on 20th day of August, 2018 at Luganga area within Mufindi District in Iringa Region did have carnal knowledge of Rose Mathayo a girl aged fourteen years old. He pleaded not guilty. The prosecution paraded four witnesses namely Rose Mathayo (PW1), Mathayo Charles Kiondo (PW2),

Pendo Bruno Mbondelo (PW3) and Lock John Kibasa (PW4). The appellant was found guilty, convicted and sentence to 30 years imprisonment.

Aggrieved with both conviction and sentence the appellant has come to this court with petition of appeal of eight grounds of appeal. At the hearing the appellant appeared in person (unrepresented) while Ms. Veneranda Masai learned State Attorney appeared for the respondent Republic. The appellant adopted his grounds of appeal and he did not add anything and waited to hear from the respondent.

On her part Ms. Veneranda Masai learned State Attorney supported the conviction and sentence against the appellant she thus opposed the appeal.

Ms. Veneranda Masai submitted that although the appellant filed a total of eight grounds of appeal but six of them are about one thing that the prosecution did not prove the case against the appellant beyond reasonable doubt. She said these are grounds 1, 2,3,4,5 and 8 whereby she addressed them jointly and grounds 6 and 7 she replied to them separately.

Regarding whether the prosecution proved the case against the appellant beyond reasonable doubt, Ms. Masai submitted that the duty to establish the case against the acused always lies on the prosecution side, to support her argument she referred to ***Section 3(2)(a) of The Evidence Act***, also she referred a case *of* ***Joseph Nzellu versus Republic [1992] TLR 213.***

Ms. Masai argued that in order to prove a criminal charge there is no specific number of witnesses for purposes of proving a certain criminal offence, even a single witness suffices, and to cement her argument she referred this court to section 143 of The Evidence Act.

Ms. Masai submitted further that the appellant complains that PW2 and PW3 gave hearsay evidence as they were not present at the scene, it is her contention that they view evidence of PW1 as strong, this is because at the commission of the offence only accused and PW1 were in that house.

Ms. Masai submitted further that the victim (PW.1) in her evidence told the court how she went to the appellant's house for prayers. The victim told the court that the appellant pretended to have been praying for her, he intended to rape her although he did not succeed. Ms. Masai submitted further that at page 7 to 8 of the trial court proceedings and at paragraph 7 page 7 the victim explained how she was raped by the appellant, she argued that to her opinion the victim's evidence was strong and sufficient to convict the appellant even if there would be no corroborating evidence. To support her argument she referred this court a case of ***Seleman Makumba vs. Republic [2006] TLR 384*** whereby it was held that the true evidence in sexual offences cases come from the victim of offence.

Ms. Masai submitted that the appellant complaint that the victim did not raise any alarm nor inform DW2 and DW3, it is the argument by Ms.

Veneranda Masai that failure to raise alarm by the victim and her failure to tell DW2 and DW3 does not weaken the strong prosecution evidence.

Ms. Masai submitted that in proving or corroborating the victim's evidence she was examined and Dr. Kibasa (PW4) who examined her his evidence corroborate what the victim told the court. Ms. Masai argued further that the victim's evidence and the medical doctor evidence were sufficient to prove the charge against the appellant.

Regarding ground No.6 on the appellant's complaint that the trial court erred to rely on the fabricated evidence of PW1, PW3 and PW4, Ms. Masai argued that the appellant did not explain how the three witnesses fabricated their evidence, the said witnesses are unrelated as PW1 is the victim of the offence, PW3 is the pharmacy owner to whom PW1 was directed to report the appellant because she is close to her mother and PW4 is the Medical doctor who examined the victim, according to Ms. Masai the victim and prosecution witnesses were not known to each other. She submitted that taking the position the appellant was holding as a priest there is no reason why he could be framed up. She argued that this ground is an afterthought and should not be considered by this court.

On ground No.7 Ms. Masai submitted that the appellant complained that the trial magistrate did not consider evidence of DW1 and DW.2 but she said at page 10 of the trial court judgment paragraph 2 the trial magistrate explained why she did not consider defence evidence. Ms. Masai submitted that the defence witnesses in their evidence were explaining the incident of 24/08/2018 that the victim was given by the

appellant school materials but did not explain what happened on 20/08/2018 the date the victim was raped.

Ms. Masai submitted further that DW2 and DW3 who are children of the appellant did not explain what happened on 20/08/2018 which shows may be they were hiding something or they did not know what their father did on that date even the appellant himself did not explain what he was doing on 20/08/2018 apart from saying that victim was at his home.

It is the submission by Ms. Masai that the evidence of the appellant and that of DW4 contradicts, while DW4 told the court that on 20/08/2018 the appellant was at his home at Ifwagi where he slept, but during cross-examination he stated that on 20/08/2018 he was at his residence. It is the argument by the learned State Attorney that if appellant was at Ifwagi on 20/08/2018 to DW4 how possible the same day he was at his home. She submitted further that the appellant in his defence did not tell the court that he went to Ifwagi on 20/08/2018 and the defence of the appellant has a lot of problems but appears to be lies aimed at exonerating himself from the charged offence.

Ms. Masai concluded by submitting that the prosecution evidence was strong enough to convict the appellant. Although the court cannot convict the accused person on the weakness of his defence but what the appellant told the court and the contradictions of his defence supports the prosecution case. Ms. Masai submitted that there is no merit in this appeal what the appellant told the court is an afterthought and she prayed this court to dismiss this appeal.

In rejoinder the appellant submitted regarding ground No.7 that the victim was sleeping with her colleagues why did not inform them on the incident as DW2 and DW3 were present at the scene.

In regard to ground No.2 the appellant submitted that the court relied on hearsay evidence of Pendo (PW2) and PW3, after all evidence of PW2 and PW3 does support PW1 who said she was raped. It was argued by the appellant that the evidence of 20/08/2018 was not corroborated by any other evidence, if he would have raped PW1 on 20.08.2018 there was no reason why he would not raped her on later date and there is no any evidence by the police that they received complaint and investigated the case.

On ground No.5 the appellant submitted that while the PW2 and PW3 said are the ones who sent the victim to the police station and to the hospital, PW4 said the victim was sent to the hospital by the police from the gender desk. But he also said PW.2 and PW.3 said they sent the victim to the hospital on 26/8/2018 while PW.4 said received the victim on 26/8/2018.

Regarding Ground No.6, the trial court did not consider the evidence of DW2 and DW3.

On ground No 7 the appellant submitted that the trial court did not considered his defence despite the fact that was corroborated by the evidence of DW2, DW3 and DW4. The trial court relied on the prosecution

evidence only and neglected his defence and he was denied his right for not being supplied with the court proceedings.

The appellant prayed to this court to allow his appeal and acquit him.

I have carefully considered the grounds of appeal raised by the appellant, I have also carefully heard what Ms. Veneranda Masai learned State Attorney submitted while replying to grounds of appeal and I have also heard what was submitted by the appellant in his rejoinder. The begging question is whether this appeal has merit. Looking at the grounds of appeal as stated by the learned State Attorney, grounds No.1, 2, 3, 5, and 7 are interrelated.

Regarding ground No.1 that the trial court erred in law and fact to convict the appellant on the wrong belief that PW1 was a credible witness enough to be trusted forgetting that the same failed even to raise an alarm against such oppressive act nor disclose the matter to DW2 and DW3 her fellow home mates even the three mentioned friends at school very immediately after the act of the fateful day. This ground lacks merit for the reason that the credibility of PW1 was determined in relation to the evidence of PW4 the Medical doctor who examined the victim, whereby PW4 testified that upon examining the victim he discovered she has no hymen and when he entered his two fingers in the victim's vagina passed freely showing that a brunt object has entered. It is my considered opinion that PW.1 was a credible witness enough to be trusted. The trial magistrate to whom she appeared while testifying examined her demeanour and was satisfied that she was a credible witness. From page 9

to page 10 of her typed judgment, the trial magistrate explained on the credibility of PW.1 and correctly found that credibility of a witness can be assessed by assessing the coherence of the witness, and by considering that evidence in relation to the evidence of other witnesses including that of the accused. The trial magistrate also considered testimonies of other witnesses including PW.3, PW.4 and the appellant's defence as can be seen at page 10 from paragraph 2 of the typed judgment. She also considered section 127(7) of the evidence Act which empowers the court to convict relying on a single witness in sexual offences if is satisfied that the victim of sexual offence is telling nothing but the truth. The credibility of PW.1 cannot be questioned at this appeal stage, after all the trial court is better placed to assess the witness's credibility than an appellate court which read her evidence through transcript as was held in the case of ***Ali Abdallah Rajabu V. Saada Abdallah Rajabu [1994] TLR 132***

Regarding ground No.2 the appellant complained that the trial magistrate erred both in fact and law when she convicted the appellant basing on the unreliable hearsay evidence by PW2 and PW3 contrary to the law of evidence. It was clearly submitted by Ms. Veneranda Masai the learned State Attorney that the evidence of PW1 is strong, this is because at the commission of the offence only accused and PW1 were present, although there were other people in the house who are appellant's children but PW1 is the one who could explain properly what happened to her, as it is in the court record that PW1 testified that she was raped by the appellant. The victim explained in her evidence that after dinner they left

the appellant at the sitting room at the fire place at the time they went to their room to sleep. Then at 9.00 pm, the appellant called her to the sitting room. She went there hoping that he was going to pray for her. The appellant told PW.1 to raise her hands for a prayer, to her surprise the appellant started to touch her breasts asking her if she had ever had sexual intercourse with anybody before. He dragged her to his bed room and raped her. By letting his children and the victim to go to their respective room to sleep and then call the victim alone to the sitting room where he was, the appellant created favourable environment for him to fulfill his desire. PW.1 was not expected to offer resistance taking into account the position appellant assumed towards her that he was doing healing prayers to her. The trial court had heard all the testimonies of the prosecution witnesses and it was satisfied and attracted by the evidence of the key witness, the victim of the offence (PW.1). The law is settled that in sexual offences cases, the best evidence comes from the victim herself as it was held in a case of ***Ramadhani Sango versus Republic, Criminal Appeal No.30 of 2011,*** (unreported) as well as ***Selemani Makumba case*** (supra). Basing on the above explanation it is not correct for the appellant to argue that he was convicted basing on unreliable hearsay evidence of PW2 and PW3. This ground lacks merit the same is dismissed.

In regard to ground No. 5 the appellant complained that the trial magistrate erred in law and fact when he convicted the appellant basing on contradictory evidence PW1,PW2,PW3 and PW4, This complaints is baseless as the evidence of these witnesses is free of any contradictions. I

have carefully gone through the evidence of PW1, PW2, PW3 and PW4, while PW1 explained how the appellant raped her, PW2 and PW3 told the court the way the victim reported to them the way the appellant raped her. The appellant himself did not explain how their evidence contradicted itself. The variance of their evidence is on when PW.1 was sent to the hospital. While PW.2 and PW.3 said it was on 25/8/2018, the medical doctor, PW.4 said he received her on 26/8/2018 even the PF3 reveals so. However such contradiction in my considered view is minor and does not go to the roots of the case taking into account that the event itself occurred on 20/8/2018 and was reported belatedly. This complaint is baseless.

Regarding ground No.7 in which the appellant complained that the trial court erred in law and fact to completely ignore the defence case. The learned State Attorney has correctly submitted that at page 10 of the trial court judgment paragraph 2, the trial magistrate explained why he did not accord weight to the defence evidence, this is because the defence witnesses in their evidence were explaining the incident of 24/08/2018 that the victim was given school materials by the appellant but they did not explain what happened on 20/08/2018 the date the victim was raped. The trial magistrate therefore considered the defence but did not believe the appellant story and the appellant failed to raise reasonable doubt to the strong prosecution evidence. It is settled law that the accused story does not need to be believed but only to raise a reasonable doubt to the prosecution case. See the case of ***Maruzuku Hamis versus Republic [1997]TLR 1***

In regard to the ground No.3 the appellant complained that the trial magistrate erred in law and fact to believe on a wrong fact that the charge against the accused person was proved beyond reasonable doubt where as PW2 and PW2 evidence is unreliable. It was correctly submitted by the learned State Attorney that the duty to establish the case against an accused person lies on the prosecution side as per section 3(2)(a)of the Evidence Act, the same was held in a case of ***Armand Guehi versus Republic, Criminal Appeal No. 242 of 2010 (CA)*** (Unreported). In this case the prosecution, in my view has managed to prove the case against the appellant beyond reasonable doubt as PW1 as a victim of the offence told the court the way she was raped by the appellant. This evidence was corroborated by the evidence of PW4 the Medical doctor. The evidence of PW1 even without corroboration is enough to sustain the conviction against appellant being the victim of rape whose evidence was believed by the trial magistrate. There is no any misapprehension of her evidence by the trial magistrate.

In his rejoinder, the appellant complained that in this case there is no evidence showing that the case was reported to the police and investigated by the police as there is no any police officer was called to testify. Normally the duty to bring witnesses in court and which witness and how many of them, is of the prosecution who has the burden of proof. The accused duty is just to raise doubt to that prosecution case. But it is in the trial court proceedings that after PW.1 has reported to PW.3 the latter made a call to the victim's father who went there, after the victim has explained to him

what had befallen her, he reported to the police station where they were given PF.3. The victim's father PW.2 stated the same. PW.4 also gave evidence to the effect that the victim was sent to the hospital by WP. Mary of the gender desk, the police officer went there with the PF.3. With such evidence, it is not correct for the appellant to argue that the matter was not reported at the police and the case was not investigated by the police. This complaint is baseless.

I have gone through the trial court proceedings nowhere recorded that the appellant and the respondent were not in a good term in order for this court to believe that this case was planted to him, the appellant himself did not give plausible explanation as to why the case was planted to him and more so being a man of God, a pastor and the victim being his follower. The victim's mother believed the appellant much that is why she trusted him to stay with her daughter for healing prayers.

From the above explanation, it is my considered opinion that the charge against the appellant was proved beyond reasonable doubt and this appeal lacks merit, the same is hereby dismissed.

DATED at **IRINGA** this 25th day of March, 2020.

F.N. MATOGOLO,

JUDGE

25/3/2020.

Date: 25/03/2020

Coram: Hon. F. N. Matogolo - Judge

Appellant: Present

Respondent: Veneranda Masai State Attorney

C/C: Charles

Ms. Veneranda Masai - State Attorney:

My Lord I appear for the Respondent Republic. The appellant is present. The appeal is for judgment we are ready.

COURT: Judgment delivered.

F.N. MATOGOLO,

JUDGE

25/3/2020.

Right of appeal is explained.

F.N. MATOGOLO,

JUDGE

25/3/2020.