THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 61 OF 2020
(Originating from Criminal Case No. 77 of 2018 in the Resident Magistrate's Court of Mbeya at Mbeya)

BARAKA CHARLES.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: *16/10/2020*
Date of Judgment: *19/10/2020*

NDUNGURU, J.

The appellant, one Baraka s/o Charles, was charged with and convicted of Rape contrary to Section 130 (1) and (2) (e) and 131 (1) of the Penal Code, (Cap 16 Revised Edition 2002). The trial court, the Resident Magistrates' Court of Mbeya at Mbeya being satisfied that the prosecution has discharged its duty and the case has been proved to the standard required to wit beyond reasonable doubt sentenced to 30 (thirty) years imprisonment.

Before the trial court, the prosecution alleged that on 08th day of March, 2018 at Mpoja area within the City and Region of Mbeya, the

appellant did carnal knowledge to GG a girl of 15 years old. (The names initialized to hide her identity).

Briefly the prosecution case while gave rise to this appeal can re recapped as follows; it was established that on the fateful day PW1, the victim was on the way back to their home from fetching potatoes. On the way at about 20.00 hours she met the appellant who stopped her saying *"twende tukaelewane bei ya viazi"*. The appellant pulled her to unfinished house. As she (PW1) tried to release herself the appellant told her *"usijali mpenzi" nakupenda*. The appellant covered her mount by his hand. That having succeeded to pull her into unfinished building he forced her to undress the skirt and pant. That the appellant forcefully pushed her penis into PW1's vagina. PW1 testified that having accomplished his deal, the appellant told her that he is willing to give her anything. He loved her. PW1 said further that, the appellant having left the scene, she dressed herself and left the scene while crying. On the way home she met her mother and told her to have been raped by the appellant, her mother told her to go home. She told her to put school uniform so that they may go to Police but as it was at night they did not manage to go to the Police. That the next day PW1 and her mother reported to Mtaa (Cell) chairperson and then to Police Station where she was given PF3 for medical examination.

PW2 is the mother of PW1. Her evidence was to the effect that the victim was 15 years old as she was borne in 2003. That on 08/03/2018 at about 18.00 hours she was from the shamba. Having bathed she went to her neighbour. While on the way she met PW1, the victim with her fellow who were coming from collecting sweet potatoes. That she told the victim to go home to prepare dinner, which she (PW1) would be back sometime. That suddenly the victim ran from behind while crying saying Baraka (the appellant) had done something bad to her in the unfinished house is near to their home. That she could not report to the Police at that night they afraid the guys who are killing people with iron bars. That the matter was reported to the Police Station next date. PW2 told the court that the inspected the victim, she was dirty. The clothes had dust the private part of the victim was wet.

PW3 is the Clinician (Medical Officer) who medically examined PW1. His testimony was that on 09/03/2018 he attended PW1, who complained to have been raped the previous day on 08/03/2018 at 20.00 hours. PW3 said he examined PW1 but she had **nor** bruises no discharge. But the hymen was perforated. It is the witness who tendered Exhibit P1 (PF3). That PW1 said she was raped when she was coming from tuition.

PW4 is the Police Investigator. Her testimony was that she wrote the statement of victim. That the victim told her that she was raped by one

Baraka Charles. That PW1 was from the shop when heading home, she met Baraka Charles who called her to unfinished house and raped her. PW4 said after the arrest she interrogated Baraka Charles who denied to have committed the said offence.

When called for defence the appellant made a total denial. Further that she was not at the scene during the alleged date.

Being aggrieved with the trial court's decision, the appellant has lodged this appeal impugning both conviction and sentence. In his memorandum of appeal the appellant has raised five grounds of appeal as reproduced hereunder:

(1) That the Honourable Court erred in law and fats when convicted the accused basing on unsufficient prosecution evidences.

(2) That the Honourable trial court erred both in points of law and facts when convicted the accused basing on contradictory evidences on the part of the prosecution.

(3) That, the Honourable trial court erred both in points of law when he convicted and sentenced the appellant on the offence of rape which was not proved beyond reasonable doubt.

(4) That the trial court erred both in points of law and facts for failure to draw adverse inference for failure to call key witness by the respondent.

(5) That the trial court wrongly relied on Exhibit "P1".

At the hearing on 08/06/2020, the appellant was represented by Ms. Ezelina Mahenge learned advocate, while Ms. Zena James learned State Attorney appeared for the respondent/Republic. Upon request and by the consent of the court, the appeal was disposed by way of written submission.

Submitting for the 1st and 4th complainants together, Ms. Mahenge was of the argument that, the evidence before the trial court was not sufficient to warrant conviction. That there was no proof of the quarrel between PW2 and the victim's father which made the incident not to be reported to the police at that night. That PW1 could not disclose to PW2 what faced her. That when faced with her mother while crying, PW1 told her mother that the appellant has done to her something bad. It was the contention of the counsel that such a statement is ambiguous. It can entail anything not necessarily that she was raped. Ms. Mahenge learned counsel was of the argument that PW1 being a girl of 14 years could easily explain what happened to her in the language which is clear to avoid doubts.

The counsel for the appellant went o submitting that, the evidence of PW1 was to the effect that during the fateful day she was with her fellow girls coming from collecting potatoes. It is not clear as at what time she parted with her fellows or where were her follows when she met the

appellant and has conversation and ultimately raped her. Again those girls were not called to testify. The counsel urged the court to draw inference because if those witnesses were to be called they would have given contrary evidence to the party's interest. The counsel referred the case of **Hemedi Said v. Mohamed Mbilu [1984] T.L.R 113** and **Aziz Abdallah vs. Republic [1991] T.L.R 71**.

Submitting on the question of the credibility of the evidence of PW1 who is a very important witness in the matter at hand,(**see Seleman Makumba vs. Republic [2006] T.L.R 379**) the counsel of the appellant was of the argument that PW1's testimony is tainted with contradictions. In her testimony she said on the fateful date she was coming from collecting potatoes with her fellows. To PW3, the medical officer PW1 said on the fateful date and time she was coming from tuition, and when interrogated by PW4, the investigator of the case PW1 told her she was coming from the shops. The counsel was of the position that such contradictions shake the credibility of PW1 who is the key witness.

It was the submission of the counsel that taking into account the whole circumstances and the evidence tendered before the trial court ii is clear that the case against the appellant was not proved beyond reasonable doubts. The counsel urged the court to allow the appellant's

appeal by quashing conviction and set aside sentence imposed to the appellant.

Resisting appeal, the respondent/Republic submission is to the effect that the case was proved beyond reasonable doubts. The respondent submitted that the best evidence in sexual offences comes from the victim notwithstanding that the said evidence is corroborated or not. Reference was made to **Section 127 (7) of the Evidence Act** [Cap 6 R.E 2002] and the case of **Seleman Makumba** (supra).

It was a further argument of the respondent that section 143 of the Evidence Act has no provided for a specific number of witnesses required to prove a fact. That what is important is the weight of the evidence adduced. In that aspect it was the respondent's submission that what is to be proved in rape cases is penetration. That PW1, victim, stated clearly that the appellant took her to unfinished house undressed her and inserted his penis into her vagina, saying the evidence which was corroborated by PW3, the medical officer who examined her and found hymen was perforated. Finally the respondent urged the appeal be dismissed for being devoid of merits.

In her rejoinder, counsel for the appellant reiterated her submission in chief adding that there is no dispute that the evidence tendered by the prosecution is tainted with contradictions regarding where the victim was

coming immediately before facing the tragedy. Further that even if no number of witnesses is required to prove the fact but the fact that the appellant said to have been with her follow girls those girls were important witnesses to be called. She further said the evidence of a medical officer is not a conclusive proof.

Having gone through the submission of the counsels and records which are before me in the light of the grounds of appeal set forth in the memorandum of appeal I find the whole appeal is centered on the question as to whether the prosecution case was proved beyond reasonable doubt.

I appreciate that the conviction of the appellant by trial court was based on the evidence of PW1, PW2, PW3 and PW4. The trial court relying on the case of **Selemani Makumba vs. Republic (2006) T.L.R 379** found the evidence of PW1, the victim was crucial credible and clear on what transpired on the fateful night.

From the evidence on record, the said rape was committed at night at about 20.00 hours. PW1 was the victim of the alleged rape. Her evidence is very crucial to prove the case basing on the principle that in rape cases, the true and best evidence comes from the victim. That principle was enunciated in the case of **Selemani Makumba** (supra) and

followed in many other cases including **Ndikumana Philipo vs. Republic**, Criminal No. 276 of 2009 (unreported).

While I agree that the above is the correct position of the law, I hasten to say that that does not mean that such evidence should be taken healthfully/wholesome, believed and acted upon to convict the accused without subjecting it under scrutiny of testing its credibility and considering the circumstances of the case.

In the present case apart from the word of PW1, the victim, there was no any eye witness to the incident of rape. Neither of the prosecution witnesses claimed to have witnessed the appellant carnally knowing PW1. While PW1 claims to have been raped with the appellant, the appellant denied committing the offence. It is a word against the other. In such a competing situation credibility of PW1 was therefore very essential in determining her truthfulness. Unfortunately, the record does not depict on how the trial court which had an opportunity to observe PW1 on the dock reached at a conclusion that she was a credible witness. The record ought to reflect the observation done instead of simply taking into granted that the witness is credible.(See **Yusufu Simon vs. Republic**, Criminal Appeal No. 240 of 2008 (unreported) This is because accusation of rape is easier to be made by the accuser to the accused but most difficult for accused to disprove while once convicted it carries an alarming sentence.

Even though the evidence of PW1 is to the effect that she knew the appellant before the fateful date that cannot be taken for granted that PW1 correctly identified the appellant. There was a need for the PW1 when testified eliminate all possibilities of mistaken identity. Even if PW1 alleged to know the appellant before but the offence being committed at night chances of mistaken identity are always there. See **Waziri Aman vs. Republic [1980] T.L.R 250**.

It is the evidence of PW1 that he met the appellant on the way while going home and the people were passing but did not know what was going on between her and the appellant. The victim has not stated why she did ask assistance to those people who were passing thereby while she was under the hands of appellant while knowing the ill will of him. It is further the testimony of PW1 that she was with her friend when they come from collecting potatoes. It is know at what juncture she parted with her friend.

Further, it is the evidence of PW1 that she met her mother and having told her to have been raped, PW2, the mother told her to go home and wear uniforms so that they may go to the Police Station. While the evidence of PW2 is that having met the victim on the way, she told her to go home to prepare dinner, and thereafter, PW1 ran from behind telling her to have been raped. It is not certain as to who is telling the truth.

From the versions of PW1 and PW2 this court finds that PW1 is not a credible witness.

Further to the above, PW1 testimony was that she met the appellant while coming from collecting potatoes but when interrogated by PW4, investigator of the case said she was coming from the shops and to PW3, medical officer who examined her, she said she was coming from tuition.it is apparent that the trial court did not consider these inconsistences which I think were crucial. Had it done so, to my view no doubts it would have found that PW1 was not truthful witness. Her evidence ought not to have been relied on.

Since the evidence of PW1 was pivotal, as per dictate of **Selemani Makumba's case** then there is no other evidence on which the offence of rape could be founded.

In the end I find merit in the appeal and I hereby allow it. The appellant conviction is quashed and sentence meted upon him is set aside. I further order the appellant be released from the prison forthwith unless otherwise lawfully held therein for any other lawful cause.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
19/10/2020

Date: 19/10/2020

Coram: D. B. Ndunguru, J

Applicant: Present (through Video Conference)

For the Appellant: Ms. Mahenge - Advocate

For Republic: Ms. Kasambala – State Attorney

B/C: M. Mihayo

Ms. Kasambala – State Attorney:

The case is for judgment we are ready.

Ms. Mahenge – Advocate:

I am ready for hearing.

Court: Judgment delivered in the presence of Ms. Kasambala State Attorney, Ms. Mahenge advocate for the appellant and the appellant through Video Conference.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
19/10/2020

Right of Appeal explained.