IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 163 OF 2020

(Originating from Criminal Case No. 153 of 2020 of the District Court of Geita at Geita)

FIKILA ENOS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 05.11.2020

Judgment: 16.11.2020

A Z. MGEYEKWA, J

In the District Court of Geita at Geita, the appellant was arraigned and convicted of Rape contrary to sections 130 (1),(2) (b), and 131 (1) of the Penal Code Cap. 16. [R.E 2019]. Upon conviction, he was sentenced to serve 30 years imprisonment. Aggrieved, the appellant appealed to this court for both the conviction and sentence. As I have hinted upon, the case for the

prosecution was built around the accusation of rape. It was alleged that Fikila Enos was charged on 10th April, 2019 at evening hours within Geita Region, unlawful had canal knowledge with one Tabitha Elias without her consent. Upon arraignment, before the trial court, the accused entered the plea of not guilty.

From the testimony of three prosecution witnesses, the accused was also afforded his defence before the trial. The appellant now seeks to impugn the decision of the District Court upon a petition of appeal comprised of six grounds of appeal as follows:-

1. *That the prosecution witness failed to prove the offence of rape beyond reasonable doubt against the appellant.*
2. *That the trial magistrate erred in law and fact to attach much weight of the evidence of PW1 which cooked up fabricated and that lack cogent support and could not considered and not be trusted in court to rely on convicting the appellant.*
3. *That the evidence of PW2 Tumaini Musa was not straight, Insufgicient also doubtful to implicate the appellant in the offence of rape worse enough the ingredient of the identification made by PW2 against the appellant were not meet as law required.*

4. *That the exhibit P1 togethe r with the evidence of PW3 contained nothing to put the appellant as the one who raped the victim.*
5. *That the trial magistrate erred both in law and fact to convict the appellant based on the fabricated evidence of PW1 without considering that it is difficult for a normal person with two hands invaded PW1 assaulted her and laid the victim down undresses PW1 underpants took his penis injected into PW1 vagina.*
6. *That in the absence of the victim leaders i.e the village executive officer, ten cell leader, or even parent to be amongst of the witness in court render the evidence of the prosecution in question with no legs to stand in the eye of the law.*

When the matter was called for hearing, the appellant fended for himself while the respondent the Republic had the service of Ms. Gisela Alex, learned State Attorney.

Submitting first, the appellant avers that he is dissatisfied by the decision of the lower court and urged this court to adopt his grounds of appeal.

Responding, Ms. Gisela, supported both the conviction and the sentence. Submitting on the first ground, she stated that the prosecution proved the case beyond reasonable doubt. To support her submission she referred this

court to page 16 of the trial court proceedings. She went on to argue that the victim and the appellant were in a farm and the victim (PW1) requested the appellant to help her searching her bicycle, instead, the appellant used force, undressed her and raped her without her consent. Ms. Gisela stated that the best evidence comes from the victim. To bolster her submission she cited the case of **Shija Msalaba v the Republic**, Criminal Appeal No. 226 of 2011.

On the second ground, it was her submissions that the evidence of PW1 was not cooked since the incident occurred at a farm and they were only two of them. She isubmitted that the lower court believed the same to be credible.

With regard to the third ground, she referred this court to page 19 of the trial court proceedings and stated that PW2 arrived at the scene of the crime and saw the appellant running away while the victim was dressing up. She went on that to state that PW2 was 7 meters away from the place were the incident occurred and it was around 16.00 hrs, therefore PW2 was able to identify the appellant.

Arguing for the 4th ground, she submitted that the ground is irrelevant as Emmy was an investigator and tendered an exhibit P1.

Reacting to the fabricated evidence, the learned State Attorney insisted that the prosecution relied on PW1 and the Village Executive Officer evidence whereas, PW1 testified to the extent that she was able to prove the case beyond reasonable doubts. Ms. Gisela insisted that in accordance with section 143 of the Evidence Act, the prosecution is not subjected to call many witnesses, only important witnesses are called to prove the case.

On the strength of the above submissions, Ms. Gisela beckoned this court to dismiss the appeal.

Rejoining, the appellant had not much to say, he to urge this court to allow the appeal and set him free.

Having heard the submissions for both sides, I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the onus of proof lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, the issue is *whether the prosecution case was proved beyond a reasonable doubt.*

With respect to the first ground of appeal, the contention is that the prosecution witnesses failed to prove the offence of rape beyond reasonable doubt against the appellant. The learned State Attorney contention is that the prosecution discharged the burden of proving the case and that this being a rape case, evidence of the victim is the best evidence.

Before I analyse the above grounds. Let me, start to state that in rape cases involving a victim who is below 18 years old and in cases where consent is not an issue, the key ingredient is penetration of the accused's male organ into the victim female organ. The same was held in the cases of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal observed that: -

> " ***True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent****, and in the case of any other woman where consent is irrelevant, that there was penetration..."* *[Emphasis added].*

Based on the above authorities, I will analyse the evidence of PW1 on record to find out whether she proved the case. It was the evidence of the victim (PW1) that she did not consent to have sex with the appellant rather the appellant used force, threat, and assaulted PW1. The conviction by the

trial court is founded solely on the evidence of the victim (PW1) that she was raped, that the appellant inserted his male organ into her female organ until the appellant ejaculated without her consent. Although the best evidence comes from the victim, but the principle is best depending on the circumstance of every case. In the case of **Mathayo Ngalya @ Shaban v Republic**, Criminal Appeal No. 170 of 2006 (Unreported) the Court of Appeal of Tanzania held that:-

> *"...For the offence of rape it is of utmost important to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the court to ensure that the witness gives the relevant evidence which proves the offence"*

In the case of PW1, her testimony was to the effect that the appellant raped her, the fact which was denied by the appellant. She stated that she reported the incident to the Police Station. PW3 a Police Officer testified to the effect that she was assigned the case on 15th April, 2019. PW3 and PW1 went to the place where the incident occurred and the Police Officer took the underpants which was tendered in court as an exhibit P1. Reading closely

the evidence on record I have noted that the Exh. P1 was collected by the Police Officer after 4 days past the incident of rape.

It was not shown where the exhibit was kept all those days before it was seized by the Police Officer on 15th April, 2019 while the alleged incident occurred on 10th April, 2019. Again, it was not known where the Exh. P1 was kept from the date when PW3 seized it to the date when PW3 was called to testify in court on 06th April, 2020. The Court of Appeal in the case of **Onesmo S/O Mlwilo v R**, Criminal Appeal No. 213 of 2010 held that:-

> " *...without such proper explanation of the custody of those exhibits, there would be cogent evidence to prove the authenticity of such evidence."*

Based on the above authorities and in view of those missing links in the instant case, I am of the considered opinion that the improper or absence of a proper account of the chain of custody of Exh.P1 leaves open the possibility of those exhibits being concocted or planted in the house of the appellant. Examining closer the evidence on record, I am of the considered opinion that the chronological documentation and/or paper trail, custody, control and, transfer of the exhibit was not established.

Moreover, PW1 claimed that the Police Officer issued her with a PF3 and PW1 claimed that she was medically examined by the Doctor. However, the prosecution could not tender the expert opinion to corroborate PW1 evidence that it was with no doubt at a material time alleged the victim was raped. The medical examination report could be a good evidence to clear doubt and corroborate her evidence due to the fact that, PW2 who went to the scene of the crime did not testify to have seen the appellant rapping the victim but he saw someone running from the scene of the crime. Again, the prosecution were able to parade PW3 who was an investigator to this case but failed to produce the PF3 entrusted to her custody as claimed by PW1. In my respectful opinion, the circumstances of the case do not point towards the appellant.

With the above findings, I am in my considered view that in the instant case, there are doubts that were left unsolved and therefore cautious to rely on PW1 evidence. PW3 tendered an Exh.P1 which was obtained in the cause of her investigation but it was not indicated in her evidence when it was recovered and no map of the scene of the crime to co-relate the exhibit with the crime.

Nevertheless, this court *suo motto* noted that the charge sheet is defective, the learned State Attorney supported the same that section 130 (1) (2) (c) (a) was canceled and inserted subparagraphs (b) without undersigning or acknowledging the changes made thereto. Section 130 (1) and (2) (c) of the Penal Code, Cap.16 [R.E 2019] reads:-

> *"130.-(1) It is an offence for a male person to rape a girl or a woman. (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> *(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two."*

Reading the particulars of the offence the appellant is alleged to have raped the victim without her consent but the charge sheet lacks a specific section that was required to be supported by the particulars of the offence. Therefore, it is not known if the victim consented to have sexual intercourse with the appellant or not. In my firm view, for the sake of completeness, the charge sheet involving the offense of rape was required to be cited under

the relevant subsection and subparagraphs creating an actual offence of rape without consent. Taking to account that a relevant section prescribing the appropriate sentence to be meted out against the accused in case of conviction.

Based on the charge sheet at hand, and the submission by the learned State Attorney these qualities are lacking in the present case because the cited section is indicated without disclosing the essential elements of an offense as PW1 testified that the appellant used forced, threatened her and assaulted her. Thus, the prosecution prevented the appellant from knowing what offense he was being charged with and which provision he contravened and prevented him from entering his proper defense.

As it was expressed in the case of **Makoye S/O Masanya & 3 others v Republic**, Criminal Appeal No. 29 of 2014, (unreported), the Court of Appeal of Tanzania expressed that one of the principles of a fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him and that this can only be achieved if the preferred charge discloses the essential elements of an offense.

With the above observations, it suffices to hold that the trial court's conviction against the appellant was not proper and occasioned to failure of justice on the part of the appellant. The first ground of appeal suffices to dispose of this appeal. In the premises, I refrain from determining the remaining grounds of appeal, the same will not safe useful purpose now.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from prison unless he is lawfully held.

Order accordingly.

DATED at Mwanza this 16th November, 2020.

A.Z.MGEYEKWA

JUDGE

16.11.2020

Judgment delivered on 16th November, 2020 in the presence of the appellant, and Ms. Gisela Alex, learned State Attorney for the respondent.

THE HIGH COURT OF TANZANIA MWANZA

A.Z.MGEYEKWA

JUDGE

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Right to appeal fully explained.