IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 24 OF 2020
(*Arising from criminal case No. 145 of 2019 of Biharamulo District Court*)

EMMANUEL JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order 03/11/2020
Date of judgment 13/11/2020

Kilekamajenga, J.

The appellant was arraigned before the District Court of Biharamulo for the offence of rape contrary to **section 130(1)(3)(e) and 130 (1) of the Penal Code, Cap. 16 RE 2002**. The appellant was accused of having sexual intercourse with a girl aged 18 years whose name is hereby withheld for privacy reasons. At the trial court, the prosecution had four witnesses. PW1 (victim) testified that on 2nd August 2019, at around 15:00hours while at her working place called Ngara Oil Hotel, the appellant came and ordered food and requested the victim to take it into the room where he (appellant) lodged. When PW1 entered into the room, the appellant locked the door threw the victim on the bed and raped her. The appellant used a cloth to cover the victim's face. The

appellant undressed and finally raped her. As she delayed, her boss followed her into the room. When the boss opened the room, the appellant escape but he was later arrested and taken to the police station.

PW2 who was the police officer, testified that he received the rape complaint on 2nd August 2019 in the evening hours. He interrogated PW1 who named the appellant as the rapist. PW2 searched for the appellant and arrested him the same night. He also went to the crime scene and he met the attendant and he was showed the room where the rape was committed. PW2 drew the sketch map of the scene of the crime. PW3 who was the Guest House attendant where the rape happened testified that she went to the market; upon coming back, the manager of PW1 came asking for her. However, PW3 responded that she did not know where PW1 was. The manager requested PW3 to search for PW1 in the rooms. During the search, they found room No. 1 open; when she entered in, she found PW1 and the appellant standing. She further found the bed in rough condition and she saw a used condom. Thereafter, the appellant went out of the room. She was convinced that the two had sexual intercourse. They managed to arrest him because the manager called the police who immediately responded. PW3 insisted that she never heard any noises from the room though she was content that they had sexual intercourse. PW4 being a medical doctor further

confirmed that, on 2nd August 2019, she examined PW1 and found some bruises and blood in her vagina.

In his defence, the appellant testified that he was arrested on 2nd August 2019 from his home. He was taken to the police station and accused of raping a girl. He consistently told the trial court that he never raped the girl. He went further to challenge the evidence of PW1 and PW3.

At the end, the appellant was convicted and sentenced to serve 30 years in prison. The appellant was aggrieved with the decision of the trial court hence this appeal. In challenging the decision of the trial court, the appellant advanced nine ground of appeal which I do not see the necessity of reproducing them in this judgment.

When the appeal came for hearing, the appellant appeared in person through virtual court from Kigoma whereas the respondent, the republic was represented by the learned State Attorney, Mr. Mwakasege. In his oral submission, on the first ground, the appellant argued that there was no DNA test to show that he raped the victim. On the second ground, the appellant argued that there was contradiction in the victim's evidence. The victim alleged that she raped at 3pm and thereafter went to the police where she was given a PF3 form.

On the other hand, the doctor stated that she received the victim at 2:45 pm. On the third ground, the appellant submitted that PW3 (the guest house attendant) testified that she found a condom in the room and there was nothing else. Therefore, there is contradiction in the evidence of PW1 and PW3 because PW1 alleged that she sent food in the room and she was raped. On the fourth ground, the appellant stated that he was arrested by PW2 while he was at home; PW2 testified that he arrested the appellant at 8 pm. If he raped the victim at 3pm, he could have been arrested during that noon hours and not in the evening.

Furthermore, the guest house register book was not tendered to show that the appellant lodged in the same guest house on that day. The appellant further alleged that PW1 failed to identify him in court. He urged the Court to consider the grounds of appeal and allow the appeal. Finally, the appellant alleged that there was a dispute between him and a militiaman from Nyakahura –Biharamulo. The militiaman wanted to take their land, being a first son, he objected and the rifts arose. As the militiaman promised to take the land by force, the appellant was later arrested and linked to this offence.

When responding to the appellant's submission, the learned State Attorney alleged that the appellant raised new grounds of appeal. However, he was still

willing to respond on each ground. On the first ground, Mr. Mwakasege argued that though there was no evidence of DNA test, the PF3 was enough to prove the offence against the appellant. On the second ground, the discrepancies on the time in the prosecution witnesses has no merit because is not the subject matter of the case. Mr. Mwakasege further stated that a condom was found in the room where the victim was raped. Failure to mention other things which were in the room does not nullify the decision of the trial court. He further assailed the appellant for failing to address the alleged contradictions in the prosecution's evidence. The evidence of the Medical Doctor, especially the presence of bruises in the victim's vagina, does not show that the victim was raped but it is necessary to show that there was sexual intercourse. In rape cases, the evidence of the victim is always the best and trustworthy as it was stated in the case of **Seleman Makumba v. R, Criminal Appeal No. 94 of 1996, CAT at Mbeya** (unreported).

Mr. Mwakasege further submitted that the victim identified the appellant. On the issue of penetration, even a slight penetration is enough to prove rape. Therefore, the PF3 form proved the existence of penetration. When responding to the seventh ground, the learned State Attorney was of the view that every witness deserves to be trusted by the court unless there are reasons to discredit

him/her as it was stated in the case of **Goodluck Kyando v. R [2006] TLR 363.** He further argued that failure to tender the register of guests from the guest house was not in dispute before the trial court. He finally urged the Court to dismiss the appeal and uphold the decision of the trial court.

When rejoining, the appellant insisted that he never committed the alleged offence and he was therefore serving the sentence for the offence he never committed. He urged the Court to allow the appeal.

After considering the grounds of appeal and submission made by the parties, the major point that needs determination is whether the case was proved to the required standard. It is the principle of the law that every criminal case must be proved beyond reasonable doubt. The standard of proof in criminal law is stated under **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019** which provides that:

> *'A fact is said to be proved when–*
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the* ***prosecution beyond reasonable doubt*** *that the fact exists;'*

The above principle of law has been reiterated in several cases including the case of **Hemed v. Republic [1987] TLR 117** where the Court stated that:

> *'...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities.'*

Therefore, an accused may only be convicted if the prosecution has cleared all doubts regarding the commission of the offence. Mere suspicion cannot be relied on for conviction as it was stated in the case of **Nathaniel Alphonce Mapunda and Benjamin Mapunda v. R [2006] TLR 395** thus:

> *'In criminal charge, suspicion alone, however grave it may be is not enough to sustain a conviction, all the more so, in a serious charge of murder.'*

This being the first appellate Court, it has an obligation to revisit the evidence of the trial court and determine whether the case was proved to the required standard. PW1 was the victim, who alleged to have been carnally known by the appellant without her consent. It is pertinent to know that the victim was aged 18 years; therefore her consent or otherwise was significant in proving the offence. However, it may not be easy to know whether she consented to the act of sexual intercourse or not but the circumstances of the case will tell. As earlier stated, when PW3 went to search for the victim in the one of the rooms, she found the victim in the room; there was no any sign to show that the victim was

raped. Though the circumstances show that the appellant and the victim had sexual intercourse, there was no any sign that the victim was forced to have sexual intercourse. The act happened in the guest house and the attendant (PW3) did not know that the victim was in the room and that she was raped. The only person who alleged that the victim was raped was the manager of the victim who however was not summoned to testify in this case. It seems as if this incident was planned by the manager.

Therefore, in absence of the absence of the evidence of the victim, there is no any other piece of evidence suggesting that the appellant raped the victim. On this, I am reminded on the case of **People of the Philippines v. Benjamin A. Elmancil, G. R. No. 234951, dated March 2019** which was quoted with approval in the case of **Mohamed Said v. Republic Criminal Appeal No. 145 of 2017**, CAT at Iringa (unreported), the Court in Philippines stated that:

> *'In reviewing rape cases, this Court has constantly been guided by three principles, to wit: (1) on the accusation of rape can be made with facility; difficult to prove but more difficult for the person accused though innocent, to disprove; (2) in view of intrinsic nature of the crime of rape where only two persons are usually involved, the testimony of the complaint must be scrutinized with extreme caution; and (3) the evidence for the prosecution must stand or fall on its own merits and cannot draw strength from the weakness of the evidence for the defence. And as a*

result of these guiding principles, credibility of the complainant becomes the single most important issue. If the testimony of the victim is credible, convincing and consistent with human nature and the normal course of thing the accused may be convicted solely on the basis thereof.'

In the instant case, the conviction of the appellant entirely depended on the victim's testimony. To satisfy the requirement of the law, proof of absence of consent was therefore vital. However, as earlier stated, the circumstances were wanting on whether the victim was forced to sexual intercourse with the appellant. The case of **Mohamed Said** (*supra*) case provides important information on the need to take care when handling sexual offences because the only significant evidence is either of the accused or victim. In that case the Court of Appeal of Tanzania stated that:

'Given the tricky nature of the circumstances of this case, we have deemed it necessary to make some observations pertaining to the need to exercise care in handling cases of sexual offences.'

The Court went further stating that:

'We think that it was never intended that the word of the victim of sexual offence should be taken as gospel truth but that her or his testimony should pass the test of truthfulness.'

Also, I take the discretion to reproduce the words used by the Lord Chief Justice Mathew Hale in the case **People v. Benson, 6 Cal 221 (1856)** quoted with approval in the case of **Mohamed Said** (*supra*), he said:

> *'...is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never innocent.'*

Based on the above analysis, I find the prosecution failed to prove the case beyond reasonable doubt that the appellant raped the victim. There is doubt whether the victim was real forced to have sexual intercourse. I hereby allow the appeal. The appellant should be released from prison unless held for other lawful reasons. It is so ordered.

Dated at Bukoba this 13th November 2020.

Ntemi N. Kilekamajenga
Judge
13th November 2020

Court:

Judgment delivered this 13th November 2020 in the presence of the appellant present in person through virtual court from Kigoma High Court and the learned State Attorney, Mr. Mwakasege.

Ntemi N. Kilekamajenga
Judge
13th November 2020