IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 107 OF 2019

(Original Criminal Case No.107 of 2018 in the Resident Magistrate's Court of Tabora at Tabora)

KADUSHI EDWARD .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

KIHWELO, J.

The judgment in this matter was reserved by my late brother, Bongole, J, who unfortunately did not live to compose this judgment and therefore, the record has now been re-assigned to me.

In the Resident Magistrate's Court of Tabora at Tabora, the appellant stood arraigned for one count which was predicated under section 130(1)(2)(e) and 131(1) of the Penal Code Cap 16 Cap 16 [Henceforth "the Penal Code"]. The particulars were that on the 05th day of October, 2018 during night hours at Igalula Village within Uyui District in Tabora Region, the appellant did rape one **ZY** without her consent. He was convicted as charged and sentenced to a thirty years' term of imprisonment.

Being unhappy with the conviction and sentence of the trial court, the appellant came before this court armed with a seven-point of complaint. I take the liberty to paraphrase his points of complaint thus:

1. *That, the prosecution did not prove the case against the appellant beyond reasonable doubt.*
2. *That, the medical report (PF3) by the victim (exhibit P2) was irregularly received as it was not read out after its admission.*
3. *That, the Extra-Judicial Statement (exhibit P2) was wrongly acted upon by the trial court as the Chief Justice Guidelines for Justice of Peace was not complied with.*
4. *That, the trial court wrongly acted upon an improper charge sheet as the victim (PW1) and the appellant (DW1) were blood relatives the proper offence was Incest by Male contrary to section 158(1) of the Penal Code and not rape.*
5. *That, the trial court erred when it did not properly address itself on the issue of identification.*
6. *That, the Judgment of the trial court was not defective as it lacked proper analysis of each of the prosecution witnesses' testimony.*
7. *That the trial court erred when it ignored the appellant's defence.*

At the hearing of the appeal before this court, the appellant appeared in person fended for himself. He basically adopted his seven grounds of grievance and urged the court to reverse the decision of the trial court that convicted and subsequently sentenced him.

For the respondent Republic, Mr. Miraji Kajiru, learned State Attorney, strongly opposed the appeal. In his submission the learned State

Attorney did not adopt any particular order in terms of responding to the grounds of appeal but he began with the issue of PF3 which he totally refuted the argument that it was not read out in court after its admission in evidence. He however, valiantly argued that, even if the PF3 is expunged still the evidence on record is sufficient enough to sustain the appellant's conviction. He went on to refer to page 13 of the typed proceedings where PW1 (the victim) narrated the ordeal of how the appellant fulfilled his evil act of raping her. He further submitted that in view of section 130(4) of the Penal Code the prosecution sufficiently proved that there was penetration and that in rape case the best witness is the victim. He referred this Court to the landmark case of **Seleman Makumba v Republic** (2006) TLR 379.

In further opposing the appeal the learned State Attorney strenuously argued that the appellant was mentioned by PW2 after PW1 (the victim) informed PW2 at the earliest possible time. To buttress further his argument the learned State Attorney cited the case of **Wangiti Mwita and Another v Republic,** (2002) TLR 39 in which the court emphasized the importance of the culprit being mentioned at the earliest possible time. Furthermore, the learned State Attorney referred to pages 16 and 17 of the typed proceedings where PW3 who inspected the private parts of PW1(the victim) immediately after the rape incidence and witnessed blood and sperms in the victim's vagina which proved that the accused was raped. Finally, the learned State Attorney argued that the victim's father PW4 at page 17 of the typed proceedings testified that the victim was 16 years of age at the time of the incidence. He forcefully argued that the prosecution

proved the case beyond reasonable doubt and therefore the appeal has no merit.

In rebuttal the appellant vehemently refuted any wrong doing by repeatedly arguing in the same line of defence as he did before the trial court. In particular, he submitted that the entire case was fabricated against him in order to deprive him the right to claim and own his father's cows. He valiantly argued that if PW1 was raped by the appellant then how comes PW1 is not HIV positive as PW6 testified while the appellant is HIV positive and both of them were tested for HIV at the same time.

Having anxiously and closely considered the records of the trial court, grounds of grievance as well as rival submission by the parties the issue that clearly emerges and cries for determination is whether the present appeal is meritorious. Before going further, it is crucial to state that, this being a first appeal is in the form of re-hearing. Therefore, as the first appellate court, I have a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at my own conclusion of fact. See-**D.R. Pandya V Republic** (1957) EA 336.

I wish to begin with the second ground of appeal which is a complaint to the effect that exhibit P2 (the PF3) was wrongly admitted in evidence. The appellant's complaint on this ground hinges on the fact it was not read out in court after it was admitted. Admittedly, exhibit P2 was admitted in evidence and the proceedings are conspicuously clear that the same was not read out in court after admission which is fatal. It is instructive to state that the position of the law in this matter is settled and

clear that once a document is cleared for admission, and admitted in evidence, it must be read out in court. This position has been held by the Court of Appeal in the case of **Thomas Pius v Republic**, Criminal Appeal No. 245 of 2012, **Jumanne Mohamed & 2 others v Republic,** Criminal Appeal No.534 of 2015 and **Issa Hassan Uki v Republic**, Criminal Appeal No. 129 of 2017 (both unreported). In all the above cases and the previous ones made by the Court of Appeal which have not been cited here the Court of Appeal held that omission to read them was a fatal irregularity as it deprived the parties to hear what they were all about.

In the case at hand the document complained of is the PF3 (exhibit P2). As already hinted, it was admitted in evidence but was not read out in court after admission.

A cursory perusal of the court records reveals that the same irregularities that occurred in relation to exhibit P2 befell also exhibit P1 (the extra-judicial statement) which though was raised differently in the third ground of appeal which I wish however to address now for the sake of convenience rather than later. Whereas the appellant complained that exhibit P1 was wrongly acted upon by the trial court because the same did not comply with the Chief Justice Guidelines for Justice of Peace. I have a different view thought, that exhibit P1 just like the case for exhibit P2 was admitted in evidence but was not read out in court after admission.

Given a plethora of authorities on the point some of which have been discussed above, I am of the considered opinion that the omission constituted a fatal irregularity. I thus expunge exhibit P1 and exhibit P2 from the record. However, I hasten to remark that even without exhibit P1

and exhibit P2, the testimony of PW1, PW2, PW3, PW5, PW6 and the incriminating testimony of DW1 himself is quite sufficient to warrant conviction. I shall, at a later stage of my judgment, revert to the analysis of the testimonies of these witnesses. I must remark in passing that to my surprise, either by design or sheer oversight, the trial magistrate avoided to refer or directly act upon exhibit P1 and exhibit P2 throughout his judgment.

Next, I will address the complaint on failure to analyze and evaluate the prosecution's witnesses which automatically will address grounds five, six and seven of the grievance. Bearing in mind this ground of complaint, with respect, I wish to observe that much as it is settled law that the evaluation of evidence and the ascription of its probative value hereto primarily rests within the domain of the trial court that saw, heard and assessed the credibility of witnesses, on first appeal an appellant is entitled to expect that the appellate court will subject the entire recorded evidence to a critical analysis and scrutiny. In **Hassan Mfaume v R** (1981) T.L.R 167 the Court religiously held thus;

> *"A judge on first appeal should reappraise the evidence because an appeal is in effect a rehearing of the case."*

A thorough perusal and scrutiny of the judgment of the trial court in particular from page 8 to 20 throughout, the trial magistrate in my view adequately and properly analyzed and evaluated the evidence of all witnesses leave alone the prosecution witnesses and appropriately came to the conclusions that the prosecution proved the case beyond any reasonable doubt to warrant the conviction.

I desire to briefly give a summary of the testimony of witnesses which was the basis of the trial court's analysis and ultimate conviction. PW1 the victim testified by giving details of the ordeal she went through on the fateful day and in particular the way the appellant (DW1) forceful had carnal knowledge of her and that she minutely described how she was tricked to take the bicycle inside, locked inside, thrown on the ben, undressed by the appellant, inserted by the appellant's penis inside her vagina, threatened to be stabbed with knife by the appellant if she dared to scream. She further described how she immediately went to report the incidence to PW2. On his part PW2 testified how he reacted upon PW1's complaint that she was raped by the appellant (DW1). He further described how he instructed PW3 his wife to inspect PW1's private parts in order to ascertain whether she was really raped and the feedback he got from PW3 of the confirmation that PW1 was raped. He further went on to testify how he arrested DW1 and informed the police who came to take DW1 the following day. PW3 on her part also minutely described events on that fateful night starting with how PW1 (the victim) knocked their door and informed them that she was raped by DW1. PW3 went ahead to testify that upon being directed by PW2 her husband, she inspected PW1's private parts and confirmed that PW1 was raped because she witnessed blood flowing into the vagina and she witnessed sperms too. PW3 told her husband what she witnessed. PW4 the father of PW1 (the victim) testified that the appellant (DW1) was his uncle and that he was staying with him (DW1) since DW1's father died in 2018 and that on the fateful day he had

travelled out of the village and DW1 was the older male of the family who was left with his cousins and that by then PW1 was 16 years old. He went further to testify that in the morning following the fateful day he received a phone call from PW2 informing him that DW1 raped PW1 and he informed PW2 to take the matter to the appropriate authorities for justice to take its course. DW5 was the Justice of Peace who took out the Confession Statement of the appellant on 11/10/2018 and that according to PW5 the appellant (DW1) confessed to him having raped the victim (PW1). PW6 on his part testified that he medically examined PW1 and DW1 as well but first of all PW6 conducted a counselling session with the victim (PW1) and DW1. Upon examination PW1 was found to be HIV negative but DW1 was found to be HIV positive. PW1 was given Post Exposure Prevention Drugs (PEP) while DW1 was referred for further medical treatment. As regards to the examination of the rape case PW6 examined the victim's (PW1) vagina and found bruises and seminal fluid. PW6 then through microscopic procedure tested further the seminal fluids and the results indicated that the seminal fluid were sperms and that led him to the conclusion that the victim (PW1) was raped. Upon cross examination DW6 testified that DW1 confessed to him that he raped PW1.

DW1 in his testimony he explained that he started living with his uncle PW4 after the death of his late father and that the entire case was fabricated in order to deprive him the right to inherit his father's cows. He further alleged that he was beaten by PW4 in order to admit having raped PW1. He forcefully challenged the testimony of PW1 who according to DW1 it was strange why PW1 did not scream while she was raped. DW1 further wondered why PW1 did not report the incidence to other family members

where they were staying. DW1 went on to testify that it was surprising as to why PW5 did not explain whose sperms were found in PW1's vagina and worse enough PW5 did not test DW1's sperms to compare with those found in PW'1 vagina. Finally, DW1 wondered why PW1 was not infected with HIV if DW1 was found HIV positive and if sperms found in PW1's vagina was his.

I have dispassionately considered the appellant's complaint in respect of the issue of proper analysis and evaluation of the worth of each of the prosecution witnesses and in my considered opinion the conviction of the appellant was proper on the evidence of PW1, PW2, PW3, PW5 and PW6 which as I hinted above was properly analysed and adequately evaluated. Their testimony had no contradictions and furthermore the evidence of PW5 and PW6 was collaborated by that of DW1 the appellant himself who during cross examination by the learned State Attorney he admittedly testified that he told PW5 and PW6 that he raped PW1.

I have no doubt that the trial court treated very well the testimony of PW1, PW2, PW3, PW4, PW5 and PW6 and furthermore the trial court dully considered the appellant's defence. In particular, I am fortified in this view by the principle that the best evidence of rape is the evidence of the accused herself as it was long settled in the case of **Seleman Makumba v Republic** (2006) TLR 379. In the instant case the accused meticulously and in clear terms testified what transpired and her testimony was consistent to the testimony of other prosecution witnesses. The same applied to the other prosecution's witnesses as analysed by the trial court.

Surprisingly the appellant did not challenge the testimony of the prosecution's witnesses. This connotes that he was comfortable with the contents of the testimony of the prosecution's witnesses. Had he had, any query or doubt as to the veracity of the testimony of PW1, PW2, PW4, PW5 and PW6 as alleged during his defence testimony, he would not have failed to cross -examine on those issues he raised during his defence. The position of the law is very settled and clear that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance of the veracity of the testimony. In the case of **Paul Yusuf Nchia v National Executive Secretary, Chama cha Mapinduzi & Another,** Civil Appeal No. 85 of 2005 (unreported) the Court observed thus:

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

Similarly, in the case of **Damian Ruhele v Republic,** Criminal Appeal No. 501 of 2007 (unreported) the Court of Appeal underlined:

> *"We are aware that there is a useful guidance in law that a person should not cross-examine if he/she cannot contradict. But it is also trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*

I have no hesitation in view of the circumstances above which I have already described to observe that the trial court analysed and evaluated

the testimony of the witnesses and that the trial court rightly found that the prosecution proved its case beyond reasonable doubt.

The last ground for discussion is the fourth ground of appeal. This is a complaint to the effect that the trial court erred in not finding that there was no proper charge as the appellant ought to be charged under section 158 Incest by Males since the appellant (DW1) and the victim (PW1) were blood related relatives. This issue has exercised my mind quite considerably. Section 158(1) of the Penal Code reads in part;

> *"158(1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest,.."*

This issue should not detain me much. According to the testimony of PW2, PW4 and DW1 the appellant and the victim (PW1) are relatives because the appellant is a son of PW4's brother who has since died and PW4 was living with DW1. The question before me is whether PW1 and DW1 falls within the meaning ascribed under section 158(1) of the Penal Code. In my view PW1 and DW1 are first cousins and the drafters of the law I think intentionally did not intend to leave the net too wide and that is why it limited the offence of Incest to those expressly mentioned in the law who are very close and blood relatives while other relatives like nieces, aunts and cousins are left out to be dealt under ordinary penal provisions. I therefore find that there is no merit in this ground of complaint.

The foregoing said and done, I am of the considered opinion that there is no scintilla of merit in the present appeal. It is hereby dismissed in its entirety.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date : 17/12/2020

Coram : Hon. B.R. Nyaki, DR

Appellant : Present in person

Respondent: Absent

Bench Clerk: Grace Mkemwa, RMA

Court: Judgment delivered this 17th day of December, 2020 in the presence of the Appellant but in absence of the Respondent.

Right of appeal explained fully.

B.R. Nyaki

DEPUTY REGISTRAR

HIGH COURT – TABORA