IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY]

AT ARUSHA

CRIMINAL APPEAL NO. 64 OF 2019

(C/F Criminal Case Number 10 of 2019 Ngorongoro District Court at Loliondo)

RAMADHANI KASIMU..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

10/06 & 10/07/2020

MZUNA, J.:

The appellant is challenging both the conviction and sentence for the offence of rape contrary to section 130 (1), (2) (e) and 131 (1) of the Penal Code. It was alleged that on 27Th March, 2019, during evening time at Magongo Village within Ngorongoro District Arusha Region, the appellant did unlawfully rape a girl (name withheld) aged six years.

Briefly stated the facts being that PW4 the victim and also a key witness said resides close to the appellant's house. On the material date the appellant sent the victim to buy him cigarettes. When she came back he undressed and raped her while threatening her not to tell any person or else would be killed. The matter was reported to the relevant authorities (PW2). She identified the appellant by name and his residence. She explained the circumstances leading to her rape by the appellant. The PF3 report was tendered.

Based on such evidence, the trial court found that the prosecution proved the charge beyond reasonable doubts and proceeded to convict the accused as charged. The appellant was sentenced to life term imprisonment. He was aggrieved, hence this appeal. He has lodged six grounds of appeal namely:-

1. *That the trial Magistrate erred in law and fact for convicting and sentencing the appellant while the charge sheet was defective.*
2. *That the trial Magistrate erred in law and fact for convicting and sentencing the appellant while the evidence on identification was not watertight to mount conviction.*
3. *That the trial Magistrate erroneously admitted exhibit P1 as the same was not read over in court after being admitted.*
4. *That the trial Magistrate erred in law by not complying with the mandatory provision of section 127 (2) of the Evidence Act.*
5. *That the trial Magistrate erred in law and fact for contravening the mandatory rules of procedure and law.*
6. *That the trial Magistrate erred in law and fact in his judgment when he held that the prosecution has proved its case beyond reasonable doubt.*

Hearing was conducted through video conference in which both the appellant who was undefended and Ms. Alice Mtenga, the learned State Attorney for the Republic were successfully connected and argued this appeal.

The first ground of appeal centers on the issue as to whether the appellant was prejudiced by the non-citation of the applicable law. The appellant submitted that there was non citation of sub section 3 of section 131 of the Penal Code. To him this makes the charge defective. To oppose this

argument, Ms. Mtenga submitted that the omission to include the sub section aforesaid did not in any way occasion injustice to the appellant. He held the view that the same is curable under section 388 (1) of the Criminal Procedure Act Cap 20. The learned State Attorney referred the court to the case of **Jamali Ally @ Salum v. The Republic,** Criminal Appeal No. 52 of 2017 where the complaint was similar to that of the first ground in this appeal.

Having read the submissions and the authority cited I am in agreement with the learned State Attorney, Ms. Mtenga that the irregularity is curable under section 388 of the Criminal Procedure Act. I say so because the Court of Appeal in the case of **Deus Kayola v. R.,** Criminal Appeal No. 142 of 2012 cited in the case of **Jamali Ally @ Salum** (supra) at page 9 held that:-

> *"We have taken note of the fact that the charge against the appellant was preferred under sections 130 and 131 of the Penal Code instead of sections 130 (2) (e) and 131 (1). However, we are of the firm view that the irregularity is curable under section 388 of the CPA..."*

In view of that I hereby find that the complaint by the appellant in the first ground of appeal does not hold water. The same is dismissed.

The second ground of appeal touches on issue of identification as to whether the accused was properly and correctly identified? Connected to this is ground No.3 on the issue of PF3, whether it was properly admitted?

The evidence as they stand, shows PW2 Patrick Giledi the Village Chairman received a complaint. The victim mentioned that appellant as the one who raped her. He was then arrested and reported to the police station.

PW3 Saverina Kamega is the one who was the first to raise doubt after seeing the victim walking while limping. Upon inquiring from PW4 the victim, she said that someone did bad thing to her. She mentioned the appellant. He was also identified among three people who were arrested. The abnormal limping walk, was seen on the second day after the alleged incident. The victim PW4 in almost half page evidence said the appellant whom she identified as Ras **"alinifanya tabia mbaya"**. This was done at the appellant's home. She was told not to tell anyone at home despite the fact that she was feeling some pain and was covered her mouth with his hands. He took out all her clothes. There was also the medical report (PF3) conducted by Dr. Angela Meipuki PW5. She noted bruises and fungus in the vagina though there were no spermatozoa seen. Further that there was *"whitish discharge"* and *"perforated hypera"* (sic).

On his part the appellant said during his defence that the whole case was cooked up due to the reasons that he had some misunderstanding with some people who are neighbours to the victim.

In dealing with this issue the trial court found that the appellant was mentioned the first day the victim was discovered to have been raped. That the appellant never mentioned the kind of problems he had with the victim's guardian and or neighbours. He relied on the case of **Ndikumana Philip v. Republic,** Criminal Appeal case No. 276 (unreported) to cement the proposition that:

> *"True evidence of rape comes from the victim...in a case of any other woman where consent is irrelevant that there was penetration."*

The trial court went further to say that the appellant's style of hair was just "rasta". The only person with such style in the village they came from.

The appellant has faulted that finding for the reasons that the victim failed to say the shape and physique of the one who raped her. In his submission he said that the victim (PW4) did not explain both his shape and physique. He is of the view that the court should not rely on dock identification. That the proceedings never showed if the victim knew the suspect. That there was need for identification parade to be conducted in order to clear the doubts as distinguished from dock identification.

That even the PF3 which was used to ground a conviction against him was not read to him, which is relevant for the third ground.

On her part Ms. Mtenga, learned State Attorney, was of the view that the appellant was properly identified by the victim by mentioning his name immediately after that incident. She premised her submission on the evidence of both PW2 and PW3. The latter said that the victim and the appellant are neighbours. She further argued that the offence was committed at day time. That since he sent her to buy cigarettes and then when she came back she then raped her, that means she had ample time to identify him.

As for the PF3 which was admitted without its contents being read to the victim, she said that the same should be expunged. However, even if the same is expunged still the evidence of PW2, PW3 and PW4 are enough to ground the conviction. She further relied on the case of **Selemani Makumba v. Republic** [2006] TLR 379 to bolster her argument that the

evidence of the victim alone can sustain a conviction. That the charge was proved beyond all reasonable doubt.

In criminal trial, the prosecution has the duty to prove its case and such proof must be beyond all reasonable doubt. On the other hand, the accused's duty is only to raise a reasonable doubt on the prosecution evidence. Reading from the record and the adduced evidence, I should make it clear that issue of the appellant having rasta hair style as the only person in the village did not feature in the record. The trial Magistrate just invented it. PW3 said the appellant and the victim are neighbours. The offence was committed at day time. I am satisfied she knew her well even without describing his physique and attire.

I say so because, as well submitted by the learned State Attorney, PW4, the victim, identified the appellant as the person who did bad thing to her after she was sent to buy him cigarettes. She even mentioned the place where the incident happened, that is the appellant's home. Such questions to verify if the victim knew his home ought to have been asked but was not raised. Even the argument that the victim never knew him did not feature at the trial court. It is too late over the day to raise it on appeal.

I have taken note of the fact that that there were arrested three persons but the victim identified the appellant as the one who raped her. The record is silent who monitored such identification. This defect however does not create any doubt such that the need for conducting the identification parade should be relevant in a situation where identification was not at issue. The victim testified that she was the only person with the appellant in his house and she was covered her mouth with the appellant's

hands. There was therefore proximity and the time spent to identify him from when he sent her to buy cigarettes, when she came back and then covering her mouth no doubt was enough time, though there was no mention of exact time spent during the alleged incident of doing bad thing on her.

This incident is more of evidence of recognition. I see no possibility of any mistaken identification as there was aids for unmistaken identification for someone he knew even before. The case of **Waziri Amani v. R** (1980) TLR 250 held among others that:-

> *"...all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight..."*

I am aware, as it was held in the case of **Mussa Hassan Barie & Another v. The Republic,** Criminal Appeal No. 292 of 2011, CAT Arusha (unreported) citing with approval the case of **Jaribu Abdallah v. R,** Criminal Appeal No. 220 of 1994 cited in the case of **Republic v. Shamte Hassan & Another (supra)** at page 13 that:-

> *"In matters of identifications favourable conditions alone are not enough.* ***The credibility of witnesses is also important..."***
> [Emphasis added].

PW4 who is the key witness identified the appellant at day time by name and his residence. She explained the circumstances leading to her rape by the appellant. That she was sent to buy him cigarettes. When she came back he undressed and raped her while threatening her not to tell any person or

else would be killed. The PW3 reported immediately after noticing the abnormal limping. The arrest was also done without delay.

The manner on how credibility can be determined was stated by the Court of Appeal in the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported) that:-

> *"The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person..."*

Assessing the coherence of the testimony of PW4, it is clear that her story has been coherently put forward in such a way that she managed to tell in clear cut terms who and where she was raped. In the case of **Selemani Makumba v. Republic** (supra) at page 384 it was held that the best evidence of rape comes from the victim herself. In view of this therefore I find the evidence of PW4, the victim to be credible and water tight. Thus, the second ground of appeal is dismissed.

Turning to the third ground of appeal, the appellant argued that he did not know the contents of exhibit P1 as it was not read in court, a fact which was conceded by Ms. Mtenga. She urged the court to expunge the exhibit from the record.

The position of the law is now clear that where a document is admitted but is not read to the accused the same may be expunged. In the case of **Nkolozi Sawa and Another v. Republic,** Criminal Appeal No. 574 of 2016

(unreported), the Court of Appeal was dealing with a situation where the postmortem report and sketch map were admitted but not read to the accused, the Court of Appeal made it clear that the logic is "to make informed defence" and that "failure to read it "was irregular." Surely there was an irregularity for failure to read the PF3 to the appellant. That defect, notwithstanding as well submitted by the learned State Attorney, the remaining evidence of PW4 is enough to find a conviction.

In the case of **Mbaga Julius v. R,** Criminal Appeal No. 131 of 2015, the Court of Appeal, cited with approval the case of **Seleman Mkumba** (supra) in line with section 127 (7) of the Evidence Act (supra) which states:

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence, the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence, on its own merits, not withstanding that such evidence is not corroborated, proceed to convict, if for reason to be recorded in the proceedings the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".* (Emphasis original).

The credibility of the witness was unquestionably good as well found by the trial Magistrate. He even recorded that she (PW4) promised to tell the truth. There was therefore compliance with Section 127 (2) of the Tanzania Evidence Act, Cap 6 RE 2002 not as alleged by the appellant in his 4th ground of appeal that there was noncompliance of the law.

Lastly on ground No. 5 and 6 of appeal. The question is whether the words "alinifanyia tabia mbaya" could prove a rape charge?

The appellant's argument is that there was no proof of penetration. That the word "tabia mbaya" is too broad to cover anything. The learned State Attorney said that the customs of our people made her to say the inner circle words in relation to rape. That even if the PF3 is expunged still the evidence of the Doctor still remains as she said that she saw some bruises though there was no sperms. She formed the conclusion that the victim was raped. That the appellant did not even raise the issue of penetration before the trial court. That it is an afterthought.

May be I should say that even if the appellant never questioned issue of penetration, still this court must determine whether the offence of rape was proved to the required standard of proof. In a rape charge, proof of penetration however slight it might be is a matter of requirement of the law.

The point as raised is that saying **"alinifanyia tabia mbaya"** could not prove penetration or that there was such sexual offence. This court would agree with the learned State Attorney that the customs of the community sometimes shows some shyness where a child of six years as in this case is giving evidence connected with a rape charge. In the case of **Hassan Kamunyu v. The Republic,** Criminal Appeal No. 277 of 2016 (unreported) the Court of Appeal was dealing with rape charge where the victim of rape said *"anaingiza dudu lake kwenye mkundu wangu..."* The

Court observed citing a number of cases including that of **Baha Dagari v. Republic,** Criminal Appeal No. 39 of 2014 (unreported) that:-

> *"...Several decisions of this Court have expounded the scope of section 130 (4) (a) in so far as proof of penetration in sexual offence is concerned. This scope is now settled that in proving that there was penetration it does not in all cases expect the victim of alleged rape to graphically describe how he male organ was inserted into her female organ."*

The court further said that "cultural background, upbringing, religious feelings, the audience listening, and the age of the person giving the evidence" as matters to take into consideration. The case of **Joseph Leko v. Republic,** Criminal Appeal No. 124 of 2013, CAT (unreported) was followed and applied. This case does not fall in the exception taking into account of the age of the victim being six years.

In conclusion therefore, even if the PF3 is expunged still the evidence of the victim PW4 and that of the Doctor PW5 proves such rape for someone the victim knew as the appellant resided at the neighbouring house to that of the victim. Failure to disclose issue of penetration in clear cut words is based on cultural background and age of the victim, the defect is minor. That said, the charge of rape was proved beyond all reasonable doubt. The appeal stands dismissed.

HIGH COURT OF TANZANIA

M. G. MZUNA,
JUDGE.
10. 07. 2020