IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 52 OF 2020

(Original Criminal case No. 280 of 2019 of the District Court of Nyamagana at Mwanza)

MAJALIWA JUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 21.05.2020

Judgment: 29.05.2020

A Z. MGEYEKWA, J

Majaliwa Juma was originally charged before the District Court of Nyamagana at Mwanza with the offence of Male c/s 158 (1)(b) and (2) of the Penal Code Cap. 16 [R.E 2019]. After a full trial, he was convicted and sentenced to 20 years imprisonment. Aggrieved, the appellant appealed to this court for both the conviction and sentence. The appellant now seeks to

impugn the decision of the District Court upon a petition of appeal comprised of five grounds. In the meantime, I think it is appropriate to explore, albeit briefly, the factual background giving rise to this appeal.

As I have hinted upon, the case for the prosecution was built around the accusation of incest by male as it was alleged that the accused on 16th day of January 2019 at Capri-point area within Nyamagana District within the City of Mwanza, unlawfully had prohibited sexual Intercourse with one BERTHA NTAKILOWA a girl who is his biological sister. Upon arraignment, before the trial court, the accused entered the plea of not guilty.

The prosecution called five witnesses to prove their case and the accused was also afforded right to defence himself before the trial court. He gave an affirmed reply through which he completely disassociated himself from the prosecution accusation and protested his innocence.

As I have already recounted, the trial court lined out that the prosecution case was established to hilt, hence this conviction and sentence. As I have, again, recited, the appellant appeal before this court with five grounds of appeal as hereunder: -

1. *That, in absence of the victims' evidence and with no concrete approval regarding the victim state of mind cast doubts to the prosecution.*
2. *That the trial magistrate erred both in law and fact by not reckoned and resolved upon the land dispute between the appellant, PW3, and the step farther and instead relied on the unreliable, concocted and framed prosecution case.*
3. *That, neither evidence from the recipient police officer was led to substantiate reasons hidden behind the appellant arrest at his home while letting the victim go free.*
4. *That he learned magistrate erred both in law and fact to the committee the appellant basing on uncorroborated prosecution case which is too shaky as in contrast with the strong defence case.*
5. *That penetration as a crucial ingredient of rape was not established by the victim or PW4 as his qualification as a gynecologist was not proved to the extent of filling PF3 after five days passed.*

The hearing was done via audio teleconference, the appellant defended his appeal for himself, whereas the respondent the Republic had a service of Mr. Ndamugoba Principal State Attorney.

Fending for his appeal the appellant prays this court to adopt his grounds of appeal and set him free.

Mr. Ndamugoba for the Republic supported the conviction and prays to argue the 1st and 2nd grounds separately and combine the 3rd, 4th, and 5th grounds and argue them together. Submitting for the 1st ground of appeal, Mr. Ndamugoba claims that, it is true that the victim did not testify but there is evidence on record that proves that the prosecution case was proved beyond reasonable doubts and the appellant conviction was proper. Asserting, he submitted that PW3 is the mother of the victim, she proved that the victim has a mental illness. PW3 evidence was also collaborated by the evidence of PW1 and PW2 who are her neighbours. He went on to submit that PW1 and PW2 are the ones who caught the appellant in flagrante delicto, his sister who is mentally sick.

Mr. Nyamugoba continued to submit that, the appellant did not cross examine PW1 and PW2, therefore the same means that the appellant admitted committing the offence.

The learned Principal State Attorney opted to combine the 2nd, 3rd, 4th and 5th grounds of appeal and argue them together, Mr. Ndamugoba insisted that the prosecution proved their case beyond reasonable doubts. He went on to argue that, PW1 and PW2 evidence were to the extent that they caught the appellant committing the crime and the appellant confessed to the street Ward Executive leader that he was instructed by a traditional healer. He went on to argue that, PW3 and the Doctor (PW4) examined the victim on the day the act was committed and found that she had sexual intercourse, fresh bruises were observed. He added that PW4 evidence was corroborated by PW1 and PW2 evidence and PW3.

He insisted that PW4 tendered a PF3 which revealed that the victim had sexual intercourse and PW4 evidence was collaborated by PW1 and PW2 evidence to prove that it was the appellant who committed the offence. He avers that there was no need to call the Police Officer who arrested the appellant to testify in court as the act was witnessed by PW1, PW2, and PW3 who testified before the court. He finally asserted that the appellant did not object that the victim had mental illness in his defence case and did not cross-examine PW1, PW2, and PW3 as to the state of mind of the victim.

In conclusion, the Principle State Attorney prays this court to dismiss the appeal.

Rejoining, the appellant claims that, the victim was not mentally ill, and the prosecution did not exhibit to the trial court that the victim was mentally ill. He insisted that he had a dispute with the witnesses over a piece of land and they intended to take his wealth. He denied that he was instructed by a traditional healer to rape the victim.

In conclusion, the appellant prays 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 these grounds, I will be guided by the canon of the criminal cases that onus of proof in criminal cases 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 reasonable doubt.*

This case is brought under section 158 (1),(b), and (2) of the Penal Code Cap.16 [R.E 2019] and is of no doubts from the evidence of PW3 and admission by the appellant, the victim and the appellant are biologically related. What element required to be proved is whether they had sexual intercourse to make the offence stand against the accused.

Addressing the 1st ground of appeal, the appellant claimed that in absence of the victims' evidence and with no concrete approval regarding the victim state of mind cast doubts to the prosecution. In response, it was the prosecution assertion that the accused failed to cross-examine the witness over the state of mind of the accused and therefore the same was an admission by the appellant. I agree with the prosecution assertion as held in several cases that failure to cross-examine on an important matter amounts to admission as it was held in the case of **Damian Ruhele** v **The Republic** Criminal Appeal No. 501 of 2007, **George Maili Kemboge v The Republic** Criminal Appeal No. 327 of 2013 Court of Appeal of Tanzania (unreported), but I am settled that every case is determined according to its circumstances. In the instant case, the victim was not brought before the court and the reason for not been in court edge on the

victim state of mind, and the same was not raised as early as possible to afford the appellant with sentience. I find not appropriate to apply this principle to this matter as to the circumstance of this case.

On the trial court, the appellant claimed that he had no grudges with her sister and insisted on page 29 of the typed proceedings that, her sister (the victim) was of sound mind. This cast doubts to the prosecution side as to why the victim was not brought before the court to testify or to prove to the court that the victim was mentally ill, the prosecution failed equally to exhibit the court with the proof. It is my findings that the victim's mental status could have been corroborated by other evidence; such as an expert or medical report. It is on the trial records that it was PW4 who examined the victim, but he did not describe the state of mind of the victim. It is my findings that in absence of the medical report to exhibit the court over the mental illness of the victim then she was required to be brought before the trial court to enable the court to draw an inference as provided under section 127 (6) of the Evidence Act Cap.6 [R.E 2019]. Therefore, the 1st ground of appeal is demerit and as was observed in the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007, the Court of Appeal observed that penetration is a key aspect in proving rape cases.

In relation to the fourth grounds of appeal that the trial court erred in relying on uncorroborated and disputed evidence of PW4. The prosecution strongly defended that the case was proved to hilt. It is settled that in cases of sexual offence the best evidence in sexual offences emanates from the victim. Failure of the prosecution to bring the victim to the trial court to testify means they depended on other prosecution witnesses to prove the case. Revisiting the typed proceedings specifically page 20, I find that, the appellant objected the tendering of the PF3 (Exhibit P1) because the PF3 contains different names from that of the victim. Unfortunately, the objection was overruled for being on the matter of evidence and not on a matter of law. Revisiting the PF3 (exhibit P1), I find that the appellant allegation holds water and the trial court misdirected itself to dismiss the objection, it was supposed to satisfying itself why the PF3 contains names of another person and the same was relied upon by the trial court to prove a case against the appellant.

I have closely examined the Charge Sheet and found that the name of the victim reads BELTHA D/O NTAKILOWA while on the PF3 Exhibit P1

the name reads BELTA MJAKILWA, the same makes this court to draw an inference that, who was examined by PW4 and found that she was penetrated was a different person not the and a document of another person cannot be used to prove the case against the appellant over the victim.

In the circumstances of this case where the best evidence in rape cases emanates from the victim, as held in the case of **Selemani Makumba v The Republic**, [2006] TLR) 379, and for the reason that I proceed to expunge the evidence of PW4 and the Exhibit P1 from the court records for being unrelated to the matter. Therefore, PW1 and PW2 evidence are not exhibited and their evidence are uncorroborated. PW1 and PW2 evidence were required to be corroborated taking to account that the appellant objected that the victim was not unsound mind and he has not raped her. it is unsafe to base a conviction on uncorroborated as it was held in the case of **Adrian Masongera v The Republic**, Criminal Appeal No. 77 of 1990 and **The Republic v Marwa** (1971) HCD 473. It was the duty of the prosecution to prove beyond reasonable doubt that the accused took part in an act of sexual penetration with the victim. In the instant appeal, none

of the witnesses proved that penetration took place. I find that the trial court is left with no cogent evidence to prove penetration for failure to comply with section 127 (6) of the Evidence Act, Cap.6 [R.E. 2019].

For the aforesaid reasons, the principle of law and authorities, I allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant. I order for an immediate release of the appellant from the prison unless held for other lawful reasons.

Order accordingly.

Dated at Mwanza this 29th May, 2020.

A.Z.MGEYEKWA

JUDGE

29.05.2020

Ruling delivered on 2nd May, 2020 via audio teleconference, and both parties were remotely present.

A.Z.MGEYEKWA

JUDGE

29.05.2020