IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 35 OF 2021

(Originating from the District Court of Kinondoni, at Kinondoni in Criminal Case No. 316 of 2017 by Hon. Jacob, RM)

KASSIMU NUSURA SIMBA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: ***08/9/2021***

Date of Judgment: ***27/10/2021***

ITEMBA, J;

Before the District Court of Kinondoni, the appellant, Kassim Nusura Simba was charged with the offence of rape contrary to section 130 ((1)(2)(e) and 131 (1) of the Penal Code [Cap 16 R.E 2002], herein the Penal Code. The particulars of the case are that the appellant, on diverse dates between March and May 2017, at Bunju B area within Kinondoni in Dar es salaam, did have carnal knowledge of one NH, a girl of sixteen years. The appellant denied the charges but after the trial, he was found guilty. He was convicted and sentenced to thirty (30) years imprisonment

and to pay the victim a compensation of Tanzanian shillings Five Hundred Thousand (Tshs. 500,000/=).

The facts of the case are brief and are as follows; on unknown date in March 2017 NH who testified as PW1 left her home in Wazo area within Kinondoni in Dar es salaam aiming to search for her boyfriend named Steve. Whilst on her way, she met the appellant. According to PW1, the appellant was her other boyfriend. After the two exchanged some greetings, PW1 informed the appellant that she was looking for Steve, her boyfriend. The appellant told PW1 that he will help her finding Steve but later on that day, he asked PW1 if they can live together. PW1 agreed and she stayed with the appellant at his place at Bunju B within Kindondoni in Dar es salaam, between March and May 2017 where PW1 decided to return home. Thereafter, PW1's family reported the appellant to police and he was arrested and charged with the offence rape.

PW1's mother testified that her daughter went missing for 2 months whereas upon her return she reported the appellant to police. PW3 is a police officer who tendered the appellant's cautioned statement (exhibit P1) of which the appellant admitted to have raped PW1. A medical Dr. one

Sia Minja tendered a PF3 which showed that the victim was not wounded and that she tested negative for sexual transmitted diseases, however the PF3 showed that the victim had no hymen. There was also a statement of Ally Hassan which was tendered by prosecutions as exhibit P3. Ali is said to be the appellant's tenant. The said statement was to the effect that the appellant and PW1 were lovers and the appellant had lived with the victim for about a week.

The appellant in his defence explained that he knows PW1 because she came at his place asking for accommodation, he welcomed her to stay as a tenant for 2 weeks but she overstayed. The appellant added that PW1 did not pay rent. He stated that it was another tenant who introduced PW1 to him. The appellant did not explain how PW1 left from his place but he stated that he was later called to police and was arrested in relation to PW1. The appellant version of testimony was supported by his wife who testified as DW2.

Upon being aggrieved by the conviction and sentence, the appellant filed the present appeal tabling a number of grounds which can be reduced as follows:

1. *That, the learned trial magistrate erred in law and fact in not considering the defence of the appellant's wife which was unchallenged.*
2. *That, the learned trial magistrate erred in law and fact to rely on Exhibit P3, a statement of a person who could not be found, which was illegally admitted in contravention of section 34 B of T.E.A Cap 6 R.E 2002.*
3. *That, the case against the appellant was not proved beyond reasonable doubt.*
4. *That, the learned trial magistrate erred in law and fact to convict and sentence the appellant relying on the cautioned statement of the appellant which was illegally admitted in contravention to the law.*

When the matter was scheduled for hearing, the appellant who was unrepresented, did not seem to have any intention of elaborating his 4 grounds of appeal, until after he had heard the respondent republic.

Representing the republic Ms. Jenifer Masue, submitted that she supports the appeal. She prayed to consolidate the appellants' 4 grounds of appeal into one that is, the trial court failed to make a finding that the prosecution did not prove its case beyond reasonable doubt.

It was her submission that, the appellant is charged with the offence of rape and therefore the elements of rape as per section 130(1)(2)(e) must be proved. In expounding that, she stated that the prosecution must prove that the victim was penetrated.

The learned senior state attorney stated further that based on evidence of PW1 at page 7 of the proceedings; the words "*I agreed and I stayed with him since March to May*" does not show that there was penetration. She added that the remaining evidence is that of PW4, a Medical doctor who at page 47 of proceedings, stated "*there was no bruises and no hymen* and that this evidence does not show there was penetration. She concluded that the key element of penetration was not established.

Ms Masue went on to state that in rape cases the best evidence is that of the victim and in this appeal the victim did not prove penetration

which is key element in proving the offence of rape. She supported her submission with the case of **Hakimizana Syrivester v R** Cr. App No 181 of 2007. She further stated that as she is supporting the appeal, the rest of the grounds are not relevant.

The appellant, for obvious reasons, did not have anything to add apart from asking the court to set him free so that he can rejoin his family and build the nation as he works as a driver.

Having carefully gone through the evidence on record and parties' submissions, the issue is whether the appeal has merit.

I will respond to the single and main ground of appeal as consolidated by the learned senior state attorney, that the trial court failed to make a finding that the prosecution did not prove its case beyond reasonable doubt.

Section 130(1)(2)(e) (4)(a) of the Penal Code, of which the appellant was charged with, reads as follows:

> *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:

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

(4) For the purposes of proving the offence of rape-

*(a**) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence**; (emphasis supplied).*

Therefore, it is a matter of law that as per section 130(4)(a) of the Penal Code, in order to prove the offence of rape, among others, the elements of penetration need be established.

Based on records, the trial magistrate relied on the evidence of PW1 and the appellant's cautioned statement to convict the appellant. (See page 5 of the judgement). I will start evaluating the evidence of PW1.

With regard to PW1's evidence, Ms Masue stated that the victim's word like "*I agreed and I stayed with him since March to May*" does not show that there was penetration. The state attorney added that additional evidence of a medical doctor stating that "there was no bruises, no hymen" does not show that there was penetration. With respect, I will differ with the learned state attorney on the fact that PW1 did not establish penetration. In the present appeal, during her examination in chief, PW1 stated "*later the accused told me he want to live with me I agreed and I had stayed with him since March to May 2017 when I returned home".* Further*,* during cross examination*, PW1 stated further "yes you raped me I went to cell leader"* and in re-examination PW1 stated *"since March to May I was living with the accused person as a husband and wife".*

In a number of its decisions, the Court of Appeal held that the proof of rape comes from the victim herself. See for examples the cases of **Shija Misalaba v Republic,** Criminal Appeal No. 26 of 2011 (unreported).

I am also mindful of the recent decisions of the Court of Appeal of Tanzania which widened the scope of section 130 (4) (a) of the Penal Code when it comes to proving penetration. See also the cases of **Hassan**

Kamunyu v Republic Criminal Appeal, No. 277 of 2016, **Jumanne Shaabani Mrondo v Republic**, Criminal Appeal No. 282 of 2010; and **Hassan Bakari @ Mama Jicho v Republic**, Criminal Appeal No. 103 of 2012 and of **Joseph Leko v Republic**, Criminal Appeal No. 124 of 2013

In the above-mentioned decisions, it was established that in proving whether penetration took place it is not expected for the victim of the alleged rape to be detailed in describing how the male organ was inserted in the female organ. The Court explained different descriptions to from the victims which will be accepted and interpreted as "penetration".

This new development of the interpretation of the provision of section 130(4), (a) of the Penal Code has has been introduced into our jurisdiction in the consideration of our cultural background, religious feelings, the audience listening, upbringing and the age of the person giving evidence.

In **Hassan Kamunyu** (supra), the Court of Appeal referring to various of its own decision it had this to say: "*Thus words like "[he] removed my underwear and started intercoursing me" in* ***Matendele Nchanga @ Awilo*** *(supra), "sexual intercourse" or "have sex" in* ***Hassan***

Bakari @ Mamajicho (supra), *"[he] undressed me and started to have sex with me" in* ***Nkanga Daudi Nkanga*** *(supra), "kanifanyia tabia mbaya" in* ***Athumani Hassan*** *(supra), "alinifanya matusi" in* ***Jumanne Shabani Mrondo*** *(supra) or "he put his dudu in my vagina" in* ***Simon Erro*** *(supra) or "did sex me by force", "this accused raped me without my consent", "While this accused was sexing me I alarmed" and "fortunately one B s/o T came to my home and he found this accused still sexing" in* ***Baha Dagari*** *(supra) were, though not explicitly described, taken by the court to make reference to penetration of the penis of the accused person into the vagina of the victim."*

Therefore, for the purpose of proving penetration, being guided by the above decisions, the words of PW1 explaining that the appellant "raped" her, was satisfactory.

I am aware as well that in this case the victim is 16 years and therefore slightly above tender age, however, as mentioned above considering the Tanzanian culture, it was not necessary for her to give the vivid explanation of sexual intercourse in order to prove penetration. It is

my view therefore based on PW1's wording in her testimony penetration was proved.

Nevertheless, I have considered the cardinal principle in **Selemani Makumba v. Republic,** [2006] TLR 379 that in rape cases the victim's testimony is the best evidence to prove the offence of rape. Similarly, being guided by section 127(7) of the Evidence Act, Cap 6 R.E 2019, in proceedings involving sexual offences, the Court has a duty, among others, to assess the credibility of the victim and to satisfy itself that she is telling nothing but the truth.

That being the case, I have anxiously gone through the testimony of PW1 in its totality to satisfy myself that it is reliable evidence to warrant conviction against the appellant. I must say that despite establishing penetration, I find PW1's evidence to be tainted. Based on her brief testimony in examination in chief, PW1 a girl of 16 years left her home in search of her boyfriend named Steven. While on her way she met the appellant who happened to be her other boyfriend and the appellant convinced her to move inn with him and she agreed. She stayed with the appellant for about 6 weeks and went back home. This story defies logic as

to how would PW1 make a quick decision to live with the appellant for 6 weeks upon meeting him on the street while she was on her way to meet her boyfriend? Upon failure to meet her boyfriend, PW1 still had an option to return to her home instead she chose to stay with the appellant. Further, PW1 did not state what made her leave the said appellant's house in July?

That being said, it was not shown that the victim stated nothing but the truth, hence her evidence remains unreliable.

I am equally very concerned with the appellant's defence and the testimony of DW2 who is stated to be the appellant's wife/girlfriend. DW2 states that she was living with the appellant. She knows the victim and she welcomed the victim at their premises as she needed accommodation. DW1 and DW2 stated that PW1 stayed as a tenant. DW2 was not cross examined on how did she live with the appellant as his wife while at the same time PW1 was living with the appellant?

The prosecution did not clarify the situation of the appellant living with his wife DW1 and the victim the same time in the same house something which leaves reasonable doubts. In his judgement, the trial

magistrate did not accord the deserved weight to this defence. The trial magistrate noted that DW1 and DW2 stated that they gave PW1 a separate room but he does not state why he choose to believe PW1 that she was staying in the appellant's room.

It is unfortunate that the living arrangement at the appellant's premises was not clarified before the trial court. The appellant also stated in his cautioned statement (exhibit P1) that at his premises there is another room which was rented to "Mr. and Mrs. Masha" and that he had built a mud house at the same premises. At the same time there is a statement of one Ali Hassan which was admitted as Exhibit P3. The prosecution stated

that Ali Hassan was the appellant's tenant and his testimony was to the effect that the appellant and PW1 were lovers. Either, it is not clear whether Ally Hassan is the same as Baba Masha?

Furthermore, the appellant raised an issue that the victim was living in a separate room. Looking at the evidence from both the victim and the appellant, from DW2 and the statement of Ali Hassan, it is not established as to what was the total number of rooms in the appellants house? How many tenants were living at the appellant's premises? Could it be that the

victim was actually living in the separate room or at the said mud house? I think prosecution had the duty to establish how the appellant premises looked like, what was its' setting and how many people were the occupiers? The said appellant's premise is the scene of crime therefore it was crucial to have a clear picture of what happened how did it happen and who were involved. Absence of such evidence leaves the prosecution's evidence with shadowy or grey areas which in its totality, highly contradicts PW1's evidence.

Based on the above discussion, I consider that there is a reasonable doubt raised by both the appellant and DW2 and it goes to the root of this case.

In conclusion, I find this appeal to be meritorious. I agree with the appellant's ground of appeal as rightly supported by the respondent, that the trial court failed to make a finding that the prosecution did not prove its case beyond reasonable doubt.

Consequently, I hereby allow the appeal, quash conviction and set aside the sentence. The appellant should be released from custody unless he is held on some other lawful cause.

It is so ordered.

Dated at **Dar es salaam** this day of 27th October, 2021.

L. J. ITEMBA
JUDGE
27/10/2021

Judgement delivered today, this 27th day of October 2021 in the presence of the appellant in person, Ms. Jennifer Masue, learned Senior State Attorney for the Respondent and Ms. Tupokigwe RMA.

L. J. ITEMBA
JUDGE
27/10/2021