

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL No. 35 OF 2020**

(C/F Criminal Case No. 37 of 2019 District Court of Siha at Siha)

**GOODLUCK LAZARO BABUU ..... APPLICANT  
VERSUS  
THE REPUBLIC ..... RESPONDENT**

*30<sup>th</sup> November, 2020 & 19<sup>th</sup> February, 2021*

**JUDGMENT**

**MKAPA, J.**

The appellant was arraigned before the District Court of Siha at Siha in Criminal Case No. 37 of 2019 (the trial court) on the offence of Rape contrary to **section 130 (1) (2) (b) and 131 of the Penal Code**, Cap 16, R.E. 2002 (Penal Code). It was alleged that on 8<sup>th</sup> of April, 2019 at Merali area within Siha District in Kiliomanjaro region, the appellant had unlawful carnal knowledge of one "**XH**", the victim (true identity hidden) a woman of 23 years without her consent.



At the trial court, the prosecution called five witnesses, PW1, the victim, PW2, the witness, PW3, a village chairperson, PW4, a Police Officer who tendered a cautioned statement which was admitted as exhibit P1 PW5, a medical, officer who examined the victim as well as prepared the PF3 report which was admitted into evidence as exhibit P2. The defence summoned two witnesses, the appellant as DW1 and DW2, a Prison Officer.

According to PW1, the unfortunate ordeal happened sometimes around 10:00 Hrs, on 8<sup>th</sup> April, 2019 as she was heading home from shamba. The appellant strangled her from behind demanding for some monies, then he pulled her to a nearby bush (kichaka) forcefully undressed her, laid her down and raped her. She cried for help and when people responded, the appellant fled the scene with appellant's phone make Samsung. The matter was reported to the authorities and the appellant was apprehended for this offence.



In his defence, the appellant denied to have committed the offence on the date alleged by the victim. He claimed to have been in prison on such date. At the end of the trial, the trial magistrate was satisfied that the prosecution had proved its case to the required standard, convicted and sentenced the appellant to serve thirty (30) years imprisonment. Aggrieved, the appellant filed this appeal comprised of eight grounds, however they can be summarised into six as follows;

1. That, the trial magistrate erred in law and fact in holding that the charge against the appellant was proved beyond reasonable doubt.
2. That, the trial magistrate grossly erred in law and fact in failing to note that the victim of the alleged crime identified the appellant by his name taking into account that Babuu is a commonly name used by a cross section of people.
3. That, the trial magistrate erred in law and fact in failing to note that PW5's testimony was biased as he concluded that the



victim was raped and he attended her one hour after the incident on 9<sup>th</sup> April, 2019 while the incident is alleged to have occurred on 8<sup>th</sup> April, 2019.

4. That, the trial magistrate erred in law and fact in convicting the appellant based on the contradictory testimonies of PW1 and PW2.
5. That, the trial magistrate erred in law and fact in relying on Exhibit P1 (Cautioned statement) as a basis of convicting the appellant but failed to note that the same was not recorded by a police officer contrary to section 3 (a) of the Evidence Act, Cap 6, R.E. 2002.
6. That, the trial magistrate erred in law and fact in failing to consider the strong defence evidence raised by the appellant and remained adamant that the same did not raise any reasonable doubt against the respondent.



During hearing of the appeal, the appellant appeared in person unrepresented while the respondent was represented by Ms. Lilian Kowero, Learned State Attorney.

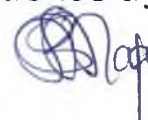
Submitting in support of the appeal, the appellant submitted that, PW1 alleged that the incident took place on 8/4/2019 but the victim reported the matter on the 9th and she claimed that she was given PF3 on the 8<sup>th</sup> but the victim did not tender the same as evidence. PW2 also alleged that on her way to shamba she saw two people standing together and suddenly one of them ran away but PW2 alleged that she could recognize one of them by name as Babuu but could not disclose his surname (Babu's surname). Appellant explained further that on cross examination PW2 did inform the court that when he met the victim she was bleeding over the face, but the victim herself never disclosed the same.

The appellant went on informing the court that PW3 (village chairman) narrated the fact that on the 8<sup>th</sup> of April the victim (PW1) reported the matter to his office and he issued her with a letter and



further advised her to report the matter to the police. The village chairman tendered in court the said letter as evidence, however, PW1 (the victim) failed to tender any material evidence to the effect that on 8<sup>th</sup> April she was given PF3 by the police after she had reported the rape incident as had been advised by the village chairman.

The appellant went on submitting that, PW1 alleged that Babuu was the one who raped her on the date of the ordeal but the appellant denied his name Babuu and informed the court that his name is Goodluck Lazaro Babuu as there could be many people by the name of Babuu thus, he denied to have raped PW1. The appellant finally argued that, PW5 had explained the fact that, the rape incident had occurred on 9<sup>th</sup> April, 2019 and that he conducted the medical examination on the same date. Meanwhile, the victim, PW1 stated that the incidence occurred on 8<sup>th</sup> April, 2019, thus, PW1's contradictory evidence is not credible and so is the evidence of PW2, PW3 and PW4 as they all fabricated their evidence against





him. He finally prayed this honourable court to disregard the evidence adduced in order for justice to be done.

In reply, Ms. Kowero resisted the appeal and fully supported the conviction and sentence by submitting that the respondent had proved its case beyond reasonable doubt. That, at page 7 of the trial court's typed proceedings, PW1 had explained how the appellant grabbed her from the back when she was on her way back from shamba on 8<sup>th</sup> April, 2019 at 10:00 hrs and dragged her to the nearby farm, undressed her, laid her down and inserted his penis into her vagina. PW2 also testified how she had witnessed the appellant running away from the scene of crime on the same day and when she approached the scene of crime she found the victim PW1 injured with bruises over her neck and when asked by PW2 as to what had happened, PW1 mentioned Babuu as the one who raped her and ran away. PW2 advised PW1 to report the incident to village chairman which she did, and later on reported the matter to the police and issued with PF3. PW1 testimony was



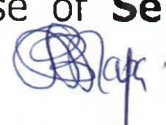
corroborated by PW5 (the doctor) who conducted High Vagina Swab examination/test on the victim's vagina which revealed the existence of live sperms which suggested penetration of a male organ (penis) which is evident that PW1 was raped without her consent.

It was Ms. Kowero's further argument that, PW1's evidence was corroborated by PW2 and PW3's testimonies and they had all been referring the appellant as Babuu throughout the proceedings as they were all staying in the same village and they also made dock identification of the appellant as Babuu; thus the argument by the appellant that Babuu is not his name is just an afterthought as the same has no merit. On his defence that the trial magistrate did not to consider appellant's strong defence evidence the fact that, on 8<sup>th</sup> April, 2019 the appellant was an inmate at Karanga prison, it was the evidence of DW2 A. 8270 Sergeant Martin that, on 8<sup>th</sup> April, 2019 at around 16:00 hours while on a roll call of inmates with short term jail sentence, he discovered the appellant was





indisposed. It was not until 10<sup>th</sup> April, 2019 when he was informed that the appellant had been arrested at Sanya police station. Therefore, this ground of appeal has no merit. Regarding variance between PW1, PW2, PW3 and PW5 testimonies on the exact date of the ordeal as to whether the rape incident occurred on 8<sup>th</sup> April, 2019 or 9<sup>th</sup> April, 2019 Ms. Kowero averred that, it is undisputed that, at page 16 of the trial court's typed proceedings, PW5 testified that, he received PW1 as an outpatient with PF3 form from the police alleged to have been raped on 9/4/2019. That, after examination, he discovered live sperms and bruises in the victim's labia minora and labia majora which suggested that PW1 was raped. Ms. Kowero asserted that, although there is discrepancy on the date which the crime occurred, such discrepancy is minor and does not go to the root of the offence as the best evidence always comes from the victim as was held in the case of **Selemani Makumba V. Republic.**



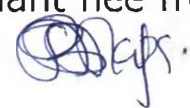
Regarding the cautioned statement being recorded against the requirements of the law, Ms. Kowero argued that, PW4 did adhere to all the requirements of **Section 51 and 53 of the Criminal Procedure Act**, Cap. 20 (R.E. 2019) relating to basic period for interviewing including informing the appellant of his right to communicate with a lawyer relative and friend of his choice. Learned state attorney finally prayed for the court to uphold the conviction and sentence.

I have examined the record of appeal in the light of the submissions of the parties, and in my view the submissions of the parties raises one question for determination namely whether the prosecution case has been proved beyond reasonable doubt against the appellant? To begin with the 2<sup>nd</sup> ground, the appellant alleges there was mistaken identity since the victim, PW1, PW2 and PW4 identified him as Babuu while his real name is Goodluck Lazaro Babuu and that there were many people by the name of Babuu. I do not think this will detain me much since PW1 deposed in a

straight forward manner on what had transpired. The incident took place in broad daylight at 10:00 hours with favourable identification condition. Thus the question of mistaken identity does not arise. The victim (PW1) had all the time available during the incident in identifying the appellant while raping her. The relevant part of PW1's testimony is hereunder;

*"On 8/4/2019 at 10:00hrs I was from the farm to home. On the way I met with Babuu who came from my back he strangled my neck and pull me over the farm (bushes). He told me to give him money. He pull over my dress and undressed my underwear. He lied me down. He insert his penis into my vagina. At the end he took my mobile phone make Samsung and put into his trouser. He heard peoples noise and run away. The people who passed found me crying and asked as to what happened. I told them everything and advised me to go to the chairperson. I was advised to go to police. The one who raped me is b here in court (pointing accused person). That is all."*

PW1's evidence on what had transpired up to the time she reported the matter to the village chairman was consistent with both PW2, an eye witness who witnessed the appellant flee from



the crime scene and PW3 whom the matter was immediately reported to. I find that PW1's testimony deserve credence as was held in the case of **Shaban Daud V Republic Appeal No. 28 of 2000 CAT (unreported)** which emphasized as follows;

*"May we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can be determined in two other ways; One, when assessing the coherence of the testimony of that witness. Two, when the testimony is considered in relation with the evidence of other witness including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

Also in the case of **Crosperry Ntagalinda @ Koro v R, Criminal Appeal No. 312 of 2015, CAT- Bukoba, p. 28 (unreported).p.28**, the Court of Appeal had this to say:

*"Every witness is entitled to credence and his testimony believed unless there are good and sufficient reasons for not believing the witness."*

In the instant case, the appellant was a familiar person to PW1 and she being the victim, her testimony is believed to be true as the



appellant never raised any doubt to the effect that there might be another specific Babuu that PW1 was referring to which would have questioned his identity. This leaves this Court with a considered opinion that, PW1 and PW2 properly identified the appellant. More so, even the victim after the ordeal when he had immediately reported the incident to the village chairman she immediately mentioned the appellant Babuu which is an important assurance of his credibility and reliability as was notified in **Wangiti Mansa Murita and others V. Republic** Cr Appeal No. 6 of 1995 (unreported) the fact that the ability of the witness to name the suspect at the earliest opportunity possible is an all important assurance of his credibility and reliability. This ground is meritless and I disallow it.

As to the 3<sup>rd</sup> ground, the appellant faulted the trial court's decision on the variance of dates when the crime was committed. The respondent alleges that the appellant raped the victim on 9<sup>th</sup> April, 2019 while the victim claimed the incident to have been occurred



on 8<sup>th</sup> April, 2019. On the other hand the appellant was already convicted and serving six months imprisonment, and he admitted that on 8<sup>th</sup> April, 2019, he did escape from prison and that was discovered during the roll call at 16:00 hours on the same day (8<sup>th</sup> April, 2019). This fact is corroborated by DW2. In other words, it is not certain the exact time when the appellant escaped from prison. Considering the fact that the charge sheet, the victim's evidence and that of PW2, PW3 and PW4 together with the cautioned statement all narrate what had transpired on 8<sup>th</sup> April, 2019 save for PW5 alone who testified to the effect that he did examine the victim on 9<sup>th</sup> April, 2019, this minor contradiction does not faulty the whole prosecution case, since the appellant could have escaped from prison and committed the offence on the same day (8<sup>th</sup> April, 2019). This case like any other criminal case is not immune to shortfalls, discrepancies here and there, but that should not outweigh watertight prosecution evidence put forward. As



stated in the case of **Chandrakat Joshbhai Patel V R**, Criminal Appeal No. 13 of 1998, CAT-DSM (unreported), the fact that:

*"... remote possibility in favour of the accused cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they are permitted to displace solid evidence or dislodge irresistible inferences."*

As argued by Ms. Kowero, the best evidence on sexual offences comes from the victim, and the victim has testified to have been raped on 8<sup>th</sup> April, 2019 with corroborative testimonies pointing fingers to none other than the appellant, thus I find no merit in this ground and I hereby disallow it.

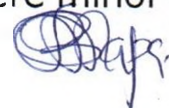
Regarding the 5<sup>th</sup> ground, the appellant had faulted the cautioned statement not to be recorded by the Police Officer contrary to section 3 (a) of the Law of Evidence Act. However, my thorough perusal of the said Act has revealed that the said section is non-existence. Nevertheless, the cautioned statement, exhibit P1 was



recorded by appropriate authority namely, WP 6812 DC. This ground also crumbles.

Turning to the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> grounds of appeal, which I will consider them jointly, it is my considered view that the case against the appellant has been proven at the required standard as the contradictions raised are minor, more so contradictions by any particular witness or among witness cannot be avoided in any particular case. See **Dickson Elia Nsamba Shapwata and another V Republic** Criminal Appeal No. 92 of 2007 (unreported) where the court observed that in variably in all trials normal contradictions and discrepancies occur in testimonies of witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to shock at the time of occurrence of the incident.

The trial court had considered the defence evidence on such contradictions and came to the conclusion that they were minor to



crumble the prosecution case. Thus I find no reason to fault the well-reasoned trial court's decision.

On these circumstances I affirm the conviction as the prosecution has been able to established its case beyond reasonable doubt.

This appeal is dismissed and the trial court's decision is upheld.

It is so ordered.

Dated and delivered at Moshi this 19<sup>th</sup> day of February, 2021.



  
**S.B. MKAPA**  
**JUDGE**  
**19/02/2021**