IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 60 OF 2020

(Appeal from the decision of the District Court of Moshi at Moshi in Criminal Case No. 57 of 2020 dated 15th July, 2020 by Hon. P. S. Mazengo - PRM)

EDWARD JOSEPH KWAY @ BABU KWAY.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

MUTUNGI .J.

Before the Moshi District Court, the appellant Edward Joseph Kwayu @ Babu Kwayu was charged with one count of rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E. 2002**. He was convicted and sentenced to thirty (30) years imprisonment.

Before canvassing further, let me give a brief account of the case before the lower court. It was the prosecution case that on unknown date October, 2019 at Mrokora

within the District of Moshi in Kilimanjaro Region, the accused did have carnal knowledge of one Queen Innocent a girl aged 12 years.

What then did transpire? It was the victim's grandmother's (PW1) version of the story that she left for Dar-es-Salaam living behind her grandchildren including the victim (PW2) with her co-wives. Upon her return she learnt from PW2 that she had been raped by the appellant. The rapist was well known in the surrounding area as a shoe shiner. PW2 narrated the whole episode to her grandmother that, on the material day she had gone to fetch water. On the way while carrying a bucket on her head, she was suddenly dragged by the appellant to the maize plantation where he undressed her, covered her mouth and proceeded to rape her. In the process of the rape she started bleeding.

After the commission of the rape, the appellant immediately left. The victim only managed to tell one Mary (a girl of ten years) who kept the story to herself. She (the victim) decided to remain silent waiting for her grandmother to come back. Incidentally, PW4 a twelve years girl did manage to witness the appellant raping PW2 on the same day. This was after she heard noise coming from the maize plantation. As she hide behind a tree, she

could clearly see the appellant on top of the victim raping her, while the victim lay on the ground. PW4 then saw the appellant dressing up and quickly leaving the scene of crime. The victim put on her clothes and she also went away. PW4 kept all this to herself without telling anyone until when the school was opened, is when she got an opportunity to tell the teachers.

Having gathered what had happened, PW1 (the victim's grandmother) reported the matter to the police, the victim was taken for medical examination. PW3 (the Medical Officer) after examining her was convinced that indeed PW2 was raped and issued a PF3 (Exhibit "P1") in support thereof. The Investigator (PW5) did gather evidence including a sketch map of the scene of crime (Exhibit"P1") and the appellant's statement, ultimately concluding the appellant was dully involved in the rape and he was in due thereof charged accordingly.

In his defence the appellant vehemently denied having raped PW2. To the contrary he craved for sympathy in that, he was too old and very weak to manage sleeping with a woman let alone the victim. In the end the appellant was found guilty and sentenced as observed earlier in the judgment.

Aggrieved, the appellant has appealed to this court on two (2) grounds which are reproduced as hereunder: -

1. *That the learned trial Magistrate erred in law and fact by deciding that the prosecution proved its case against the accused-Appellant herein above beyond reasonable doubt.*
2. *That the learned trial Magistrate erred in law and fact by failure to evaluate properly evidence on record and convicted and sentenced the appellant.*

At the hearing, the appellant was represented by Mr. Julius Semali learned advocate and Respondent was represented by Mr. Mwinuka learned State Attorney.

On the 1st ground of Appeal Mr. Semali submitted, it is on record that PW1 (the victim's grandmother) had travelled to Dar-es-Salaam and left the victim in the hands of her co-wives. Yet after the alleged rape PW1 did not notify the co-wives nor did she cry out for help. Be as it may, despite the allegations that PW1 ultimately had returned back to Moshi but there is no evidence as to when she returned. The trial Magistrate had noted these anomalies but simply ignored them.

The learned advocate quarried the meaning of the word

"chululu" which PW2 claimed had been inserted in her vagina. If no meaning is given to the word "chululu" then it creates a doubt as to what PW2 really meant when she stated "alinifanyia tabia mbaya, aliniingizia chululu".

Mr. Semali further pointed out, the trial Magistrate stated the appellant had undressed himself while there is no such evidence adduced in the trial court. It was the learned counsel's settled view that there was an allegation that PW4 had witnessed the whole episode but for some unknown reasons had kept quiet. The learned advocate further contended PW4 is alledged to have disclosed the ordeal to the teacher yet no steps were taken neither was the teacher's name disclosed.

The appellant's advocate called upon the court to find, there were glaring discrepancies in the evidence adduced before the trial court. To this he referred to the evidence of the Medical Officer who had attended the victim on 9.1.2020 but concluded had been raped two months back, while the charge sheet stated it was in October 2020. It follows then it is not certain when the offence was committed.

In support thereof he cited the case of **D.P.P vs Anna Tegemea Kipiki, Criminal Appeal No. 51/2018 (DSM-Registry)**.

In response thereto, Mr. Mwinuka (State Attorney) submitted, the case was proved beyond reasonable doubt. In this case the evidence of the victim was enough to prove the same. He referred the court to the case of **Republic vs Seleman Makumba [2000] TLR** which laid down the principle that, in sexual offences the victim's evidence by itself suffices to prove the offence. More so in this case PW4 had witnessed the incidence and went on to report the same to the school. The evidence as a whole was collaborated by the Medical Officer.

As regards the controversy of the word "chululu" he explained, a victim in sexual offences is not expected to name or elaborate how the penis entered the vagina given various circumstances including the age and tradition of the victim. In that regard he cited the case of **Hassan Kamunyi vs Republic, Criminal Appeal No. 277/2016** (Tanzlii). In view of what he had submitted he prayed the appeal be dismissed.

In re-joinder the appellant's counsel reiterated what he had submitted in chief.

After painstakingly passing through the submissions by the parties, I am settled the grounds are centered on the issue, whether the prosecution proved their case beyond reasonable doubt. To this, the Appellant has raised his concern on the discrepancies in the evidence, failure by the victim to report at the earliest possible time, and the meaning of the word "chululu".

Starting with the issue of discrepancies as submitted by the learned advocate, he noted there were contradictions in the evidence especially on the time the offence was committed. The trial Magistrate noted at page 9 of the typed judgment that: -

> *"The two witnesses however, the PW2 and PW4 differ in their testimony in relation to time the offence is alleged to have taken place. While the victim says it was around 16:00hours, the PW4 said it was around 12:00hours. In my view this contradiction is minor, am saying so because for the reason of their age, accessibility of watch to cross check, their understanding that they were supposed to check time etc., they would not mention the actual time. One thing they had in common is this, it was during the day."*

Such discrepancies have been dealt with by the Highest Court of this land. In the case of **Alex Ndendya vs Republic Criminal Appeal, No. 207 of 2018** the Court of Appeal discussed in details on the normal and material discrepancy. It was observed that normal discrepancy do not go to the root of the case. The court further quoted the words in the case of **Evarist Kachembeho & others vs Republic,1978 LRT 70** which I find worth citing herein: -

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story"'*

Coming to the case at hand, I find the discrepancy in time does not go to the root of the case. These are normal when one is referring to minute details. The bottom line is that the offence was committed during day time as observed and rightly so by the trial Magistrate.

The other discrepancy brought to the attention of the court is the period in the charge sheet which states was unknown date of October, 2019. It would seem the appellant was convinced that the period was uncertain. The evidence of the Medical Doctor was clear that it was about two months back when attending the victim on 9.1.2020 after interrogating the victim. The fact that PW1 (the victim's

grandmother) date of return was not stated, it does not take away the truth, the victim was raped during PW1's absence. Be as it may, the discrepancy is not fatal to impact the prosecution case and the evidence so adduced.

On the issue of PW2's failure to report, the trial Magistrate had this to say at page 7 of the judgment: -

> *"There is also evidence of PWI, the victim's grandmother explaining what the PW2 told her after she had returned from safari. Although it is not clear from the evidence when did the PWI returned from safari but it is crystal clear that she was the person apart from her young sister that the victim reported about the ordeal."*

The court is alive with the principle laid down by the Supreme Court of this land In the case of **Yadunia Nicodem vs Republic, Criminal Appeal No 177 of 2007, CAT at Mwanza (unreported)** that,

> *"It is settled that mentioning the name of the attacker at such and early time following the commission of the offence, adds credence to the evidence of the witness"*

In the case at hand, the **earliest time** in the circumstance of the case was when PWI returned from Dar-es-Salaam and the victim named the accused, as the culprit. The same was reported to her younger sister apparently residing together. This report was also given to PW2's teachers after opening of the school by PW4. In the scenario at hand this was the earliest possible time the victim could have reported and mentioned the appellant's name. The same goes to PW4 who reported immediately after the school was opened.

As to the contention what *chululu* really meant, several decisions of the Court of Appeal have discussed in detail the scope of **section 130 (4) (a)** concerning the proof of penetration in sexual offence. See the cases of **Matendele Nchanga @ Amilo V. Republic Criminal Appeal No. 108 of 2010; Nkenga Daudi Nkya V. Republic Criminal Appeal No. 84 of 2013** and **Minani S/O Selestin V. Republic Crim. Appeal No 66 of 2013.**

The above cases support the submission by the learned State Attorney that, in proving there was penetration it is not in all cases that the victim is expected to graphically describe how the male organ was inserted in the female

organ. In the case of **Joseph Leko V. Republic Criminal Appeal No.124 of 2013** the court *inter alia* stated: -

> *"Recent decision of the court show that, what the court has to look at, is the circumstances of each case including* ***cultural background upbringing religious,*** *feelings, the audience listening and the age of the person giving evidence. There are instance and they are not few,* ***where a witness and even the court would avoid using direct words of penis penetrating the vagina this is because of cultural restriction mentioned and related matters".*** *(Emphasis mine)*

Equating the foregoing authority to the present case, I find this was very well addressed by the trial Magistrate. Since this was a statutory rape the only proof needed was "penetration". The victim uttered the words "*alinifanyia tabia mbaya, aliniingizia chululu*" to proof penetration. The trial Magistrate considered the words and concluded the victim was influenced by traditional restrictions. Moreover the trial Magistrate found her evidence was corroborated by that of the PW3 Medical Doctor and PW4. The victim while testifying was pointing at her vagina area in court.

To put salt to the wound, the credibility of the victim and that of PW4 was well observed by the trial Magistrate at page 8 of the judgment': -

> *"I also had time to observe the PW2 and PW4 when testifying in court, they were composed and I find them credible and witness of truth, there is nothing to fault their demeanor."*

To this I am fortified by the decision of the Court of Appeal in the case of **Shaban Daud v. The Republic, Criminal Appeal No. 28 of 2000 (unreported)** which states;

> "... ***Credibility o f a witness is the monopoly of the trial court*** *only in so far as 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 of that witness is considered in relation with the evidence of other witnesses, including that of the accused person."*

Since the credibility is the monopoly of the trial court and the trial Magistrate in this case tested the credibility of the witnesses and further there was sufficient proof of the

offence, I find the case had been proved beyond reasonable doubt and the trial Magistrate correctly convicted the appellant. It could not have been a sheer coincidence that the two witnesses had witnessed the offence of the same nature, at the same time and in the same manner. The answer to this is that, the commission of the offence did take place and the appellant was the offender as properly analyzed and evaluated by the trial Magistrate.

For the reasons mentioned, I therefore find the appeal lacking in merit and thus the same is hereby dismissed in entirety. It is so ordered.

B. R. MUTUNGI
JUDGE
29/4/2021

Judgment read this day of 29/4/2021 in presence of appellant, Mr. Samweli Julius for the appellant and Mr. Kassim Nassir (S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
29/4/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
29/4/2021