IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.83 OF 2019

(*Originating from Criminal Case No. 434 of 2018 of the Kahama District Court*)

MIHAYO MASHIMBA .... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12th & 30th April, 2021

MKWIZU.J:

At the District Court of Kahama, appellant was charged with an offence of Rape contrary to section 130 (1)(e) and 131(1) of the Penal Code [Cap 16 RE 2002]. The particulars of the offence were that on 13th November, 2017 at 17:00 in the evening hours at Kinegere Village within Kahama District in Shinyanga Region, appellant did unlawfully have sexual intercourse with a victim, a school girl of 6 years old . The evidence brought at the trial court was that appellant approached the victim while fetching firewood with her siblings named Criss, Mwanne and Grey where he told the victim to go inside the sunflower mill to collect firewood. Having entered the Sunflower Mill, appellant closed the room undressed

the victim, he himself undressed and inserted his dudu in the victims vigina. Victim said, she felt pain and therefore she went home without firewood and narrated the ordeal to her mother. The matter was reported to Police and the victim was taken to the hospital. Appellant was later arrested and accordingly charged.

When the charge was read and explained to the accused, he denied to have commit the offence. His defence was that the offence was a frame up after victim's mother failed to pay him Tsh. 230,000/= for furniture's namely a bed, office chairs and table which he had made for her. After a full trial, appellant was convicted and sentenced to 30 years imprisonment. Aggrieved, he lodged this appeal on the following grounds that;

1. *That the Trial court Magistrate erred in law and facts to hold me guilty for the charge which was not proved beyond the shadow of doubt, rather she relied in the words of the mother of the victim; who owe me tshs 160,000/=*
2. *That, learned magistrate erred in law and in facts to rely on the conviction of the offence apart from looking in details the facts of the case, commission of offence, time of commission of offence*

and summoning the key witness like the village leaders, elders and others.

3. *That, the trial magistrate erred in law to agree the evidence adduced by the pw1 which not taken with caution, it needs corroboration, no voire dire done, the case was not heard in camera to allow other children who have been play with pw1 to adduce the evidence but all evidence taken from member of the victim's family; see Republic v Premji kurji (1967) HCD 11*
4. *That, the trial magistrate failed to observe the principles of adducing facts before the court by allowing all the witness to rely on the evidence adduced by pw1's mother, it clearly shows that the witnesses are not credible as well as their evidence.*
5. *That, the trial court denied to produce the documents as an evidence ie. Police form Number 3 (PF 3), summon my witness to testify my demeanor and the time, distance and how arrest was made; it quietly presumption of guilty to me which leaves many things to answer. See NANA DOULEKANJI vrs TANGA TOWNSHIP COUNCIL [1964]*

At the hearing of the appeal, appellant appeared in person unrepresented, whereas the respondent/ Republic, was represented by Mr. Enosh Gabriel Kigoryo, learned State Attorney. On his submissions, appellant insisted on his innocence. He argued that he was convicted without proof.

Mr. Kigoryo for the Republic supported the appeal. His contention was that the offence was not proved beyond reasonable doubt. His support of the appeal relied on three issues. **One**, that there was no proper identification of the appellant by the victim. PW1(Victim) at page 11 of the records testified not to know the person who committed the said offence to her. She mentioned the suspect as one person whom she did not know his name but after they have attended to the hospital on their way back, PW3 and the victim went straight to the appellant's office where PW1 pointed to the appellant as responsible.

The 2nd issue is contradictions between PW1 and PW3's evidence on what was done to the victim (PW1). Mr Kigoryo submitted that while PW1 is silent on whether appellant covered her mouth or not so that she could not shout for help, PW3 at page 17 said appellant covered the victim's mouth.

Again that PW1 evidence was to the effect that she was raped inside the sunflower mill. On the other side PW3 said at page 16 that the offence was committed in an old sunflower Mill. Mr Kigoryo wondered whether what was being refereed as a sunflower mill by PW1 was a working machine or an old one as explained by PW3. His contention was that if it was a working machine, prosecution was expected to explain whether there were people around or not. It was also, on Mr. Kigoryo submissions that PW1 testified that the area had movements of people but no evidence was adduced as to why other people could not notice the commission of the offence.

The last issue by Mr. Kigoryo was the non-calling of the important witnesses as per section 143 of the Law of evidence Act Cap 6 R.E 2019. While acknowledging that no number of witnesses is required to prove a fact and that even a single witness is enough as per the decision in **Yassin Morgwa vs the Republic,** [1990] TLR, 148 , the learned State Attorney submitted that ,in this case PW1 was not alone when appellant instructed her to go into the sunflower machine. She was with other named three children . Unfortunately, the said children were not called to

testify. Mr. Kigoryo was of the view that the mentioned children were material and important witnesses who would have proved whether it was the appellant who took the victim from them on the material date or not. That not done, he invited the court to draw an adverse inference to the prosecution.

I have carefully gone through the trial court records, grounds of appeal and the parties' submissions. My task now is to determine whether the conviction and the sentence by the trial court were defensible.

I propose to determine the appeal generally. As stated earlier, this appeal is not opposed. One of the reasons for supporting the appeal is that there was no clear identification of the appellant. I have perused the records. It is evident from page 11 of the proceedings that while testifying in chief, PW1 categorically stated that he did not know the appellant by name at the time of the commission of the offence. However, his version of evidence changed when she was being cross examined at page 12 where she named Mwanandonya as a person who had raped her to her mother. This piece of evidence was supported by PW3 at page 16 of the records. Again, looking at the prosecutions evidence, after the said rape, PW3 and

PW1 went to the appellant's office where PW1 pointed to the appellant as responsible. On how and why she pointed to him was not disclosed on the records. The offence was committed at 17.00 hours, this is obviously a day time where PW1 is expected to have seen the person who came before her, instructed her to go to the sunflower mill and that they together went in the machine room before the alleged rape,if not by physical appearance, it could be by the clothes that the appellant wore. Nothing was explained by the prosecution witnesses on how the victim (PW1) who was not familiar with the appellant's name, got to know that his name is Mwanandonya and how he managed to identify him as a person who committed the offence to her. In the case of **Shamir s/o John v.R.,** Criminal Appeal No. 166 of 2004 (unreported),' Court of appeal observed that:

> *"It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he*

any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?

... Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

In this case, nothing was said on how appellant was connected with the offence at hand. If the victim had identified the appellant by name, she was expected to have so testified in court. Again, if she had identified the rapist, she was expected to described him to her mother . But the records is silent and the court is not told on why PW3 and Pw1 went to the appellants' office straight and why PW1 believed that it was the appellant who committed the alleged offence.

Another doubt is on why prosecution failed to call Criss, Mwanne and Grey or any one of them to testify in Court. I say so because, PW1 was taken by the appellant while with the named persons above. It is in her evidence

that appellant approached them and sat on the firewood before he instructed her to go inside the sunflower mill to take firewood therein. These children were necessary, they would have told the court on whether it was the appellant who took the victim to the sunflower mill or someone else. Prosecutions choose not to call them and no explanations were given as to why they were not called, I for that reason, inclined to draw an adverse inference against the prosecution as suggested by the learned State Attorney.

That said, I allow the appeal, quash conviction and set aside the sentence of 30 years imprisonment imposed on the appellant. It is further ordered that, appellant is to be released from prison forthwith unless otherwise held therein for other lawful cause.It is so ordered.

DATED at **Shinyanga** this **30th** day of **April,** 2021.

E.Y.MKWIZU
JUDGE
30/04/2021

COURT: Right of appeal explained.

E.Y.MKWIZU
JUDGE
30/04/2021