IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 56 OF 2020

(Originating from Tabora D/C CR Case No. 5/2020

MARTIN S/O JACOB MLILA..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date 14/6/2021 -30/7/2021

BAHATI, J.:

This appeal originates from Tabora District Court in Criminal Case No. 5/2020. **Martin Jacob Mlila** hereinafter referred to as the appellant was convicted and sentenced to serve thirty (30) years in jail for an offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 [R. E 2019].

The appellant pleaded not guilty to the charge, whereupon the prosecution paraded three witnesses and one exhibit.

It is only prudent that the brief background of the event that led to the current appeal is narrated. On a diverse date of October 2019 at night hours in Uledi Street at Mpera Ward within the municipality and

region of Tabora, the accused did have carnal knowledge of a seventeen years girl. That at the early month of June 2019, the accused who is the uncle of the victim started showing affection to his niece by seducing her and entering into her room where he inspected her underpants, peeping her when taking bath, and threatening her not to tell any person otherwise he would hurt her. The victim never informed any person until October 2019 when the accused had sexual intercourse with the victim for four different occasions and dates.

On 01 January 2020, the victim reported the matter to the street chairman who reported the same to the police leading the victim to be sent to the hospital for medical examination. The accused was then arraigned to this court and charged with rape where he distanced himself from the alleged offence. At the end of the day, through the impugned judgment, the trial court found him guilty, convicted and sentenced him to 30 years imprisonment.

Aggrieved by the entire impugned judgment, the appellant preferred the appeal to this court on the following grounds;

1. *The case for the prosecution was not proved against the appellant beyond reasonable doubt.*
2. *The prosecution evidence failed to attribute the loss of virginity of PW2 (as found in exhibit P1, the PF3) to the act of sexual intercourse between PW2 (and the appellant, in light*

of the facts that PW2 told PW3 that the last has sex in November, 2019 with an undisclosed partner and the assertion by DW2 that she (the victim) was stubborn and involved in the sex business.

3. *The learned trial magistrate failed to note that PW2 lied under oath when she said that she did not report the matter to anyone because of the threat allegedly induced by the appellant, while within the same breath, she is on record that she reported the matter to the ten cell leader (who did not testify) who called her aunt and uncle.*
4. *The learned trial magistrate misapprehended the substance, nature, and qualify of the evidence by the defence, in particular, the failure to address his mind to the issue of the case being concocted upon the appellant by the victim (PW2) as aptly put by DW1 and DW2. Failure to consider the defence or a specific point in the defence is fatal and vitiates the conviction. See* ***Elias Steven versus Republic [1982] TLR 313*** *and* ***Hussein Idd and Another versus Republic [1986] TLR 166.***
5. *The learned trial magistrate erred in law and fact to require the appellant to prove his innocence when he held that the appellant was required to bring evidence to prove that he did not rape PW2.*

The appellant prayed to this court to allow the appeal and ultimately quash the sentence and conviction.

During the hearing of this appeal, the appellant was unrepresented, whereas the Republic was represented by Mr.Miraji Kajiru, Senior State Attorney.

Being a layperson, the appellant adopted the petition of appeal to form part of his submissions and had nothing to add.

In his response, the learned Senior State Attorney did not support the appeal and argued that the appellant was properly convicted and sentenced. He submitted that this case was proved beyond reasonable doubts as the victim explained in the proceedings that the appellant started having sexual affairs in 2019 where it was during the night he entered the room of the victim who threatened and raped her. The appellant has been raping the victim repeatedly. The victim reported the matter to the Chairman who also went to report the matter to the police.

He also submitted that PW3, Abas Kapona a doctor examined the victim and tendered the exhibit which was admitted in court. Therefore the evidence of oral and documentary evidence is substantiated. He further submitted that true evidence comes from the victim and in this case, the victim evidence is so direct as per the case of **Seleman**

Makumba versus Republic [2006] TLR 376. Thus the offence against the appellant was proved beyond reasonable doubt.

On the fourth ground of appeal that the trial magistrate *misapprehended the substance, nature, and qualify of the evidence by the defence, in particular, the failure to address his mind to the issue of the case being concocted upon the appellant by the victim (PW2) as aptly put by DW1 and DW2.*

In his submission, the State Attorney argued that it is not true since the evidence of DW2 was considered in the judgment and the evidence of the accused person was not persuasive that is why he was found guilty of the offence.

On the last ground of appeal, he submitted that the court heard both parties and after examined the evidence was of the view that his defence had no weight at all compared to the victim. He contended that the appeal has no merit.

In his rejoinder, the appellant submitted that this case is a fabricated one. He prayed for acquittal.

Having dispassionately examined the matter, the crucial issue to be determined in this appeal is whether the appeal is meritorious.

In this appeal, it is prudent to combine them since they boil into one issue that is whether the prosecution proved the case of rape against the appellant beyond reasonable doubt.

It is a trite law that in criminal proceedings the burden of proof lies on the prosecution as provided for under section 110 of the Evidence Act, Cap.6 [R.E 2019] read together with section 3(2) (a) of the same Act. This position was also held in the case of **Jonas Nkinze V R [1992] TLR 213** that ;

> *"The general rule in a criminal prosecution that the onus of proving the charge against the accused person beyond reasonable doubt lies on the prosecution is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."*

On the first ground of appeal, the main issue is whether the ingredients of rape were proved beyond reasonable doubt.

Section 130(1)(2) (e) and 131(1) of the Penal Code is clear that having sexual intercourse with a girl who is under 18 years old with or without her consent constitutes rape. As aptly stated by the State Attorney, that to prove an offence of rape there must be penetration, however slight the penetration, constitutes the offence of rape. Similarly, Section 130 (4) of the Penal Code, Cap. 16 [R: E. 2019] is to the effect that:-

> *"To prove the offence of rape; penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

This court having perused through the proceedings, noted that the Doctor, who examined the victim told the trial court through the PF3 report which was tendered in court as exhibit P1 indicates that the victim seemed to have sexual intercourse several times as she was not a virgin.

In the case of **Kayoka Charles V R Criminal Appeal No. 325 of 2007** the Court of Appeal held that;

> *"Penetration is the key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ. Failure to that it is not proved."*

In this matter, the court records revealed that the penetration was proved by PW3, the doctor as well as by the victim PW2 who testified to the court that the accused entered her room and touched her and he took off his underpants and inserted his penis into her vagina. Thus the evidence was watertight to convict the appellant.

Also, the victim in her testified to the court that;

> *"Since last year June, he used to take my underpants out and put them in his room. His wife had gone to Kigoma in June, 2019 where she stayed for three months. He started raping me for one night in October, 2019 he entered my room at night where he touched me and I woke, he took off my underpants and inserted*

his penis into my vagina. When he finished he told me "Ukisema nitakuua".He did so four times in different days".

As rightly submitted by the learned counsel in cases of this nature, the best evidence comes from the victim and her evidence can ground a conviction as was held in the case of **Seleman Makumba Vs Republic [2006] TLR 379 at pg 384** that;

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent and in any case of any other woman where consent is irrelevant."

Therefore with this piece of testimony, it goes without a doubt again that the appellant was the one who had carnal knowledge of the victim.

As to the fourth issue that the court examined the defence side and noted that the trial court considered the defence side but its evidence was not convincing as the appellant only stated that he did not rape the victim. Also, DW1, Martin Jacob who testified neither mentioned it nor objected that his wife was not present as stated by the victim for almost 3 months. Again DW3, Emmanuel Nkeyambo who testified that in October, 2019 he sent the accused to Inyonga – Katavi that he left on 5/10/2019 and returned on 28/10/2019 did not convince the court.

It is trite law that failure to object or cross-examine an important point amounted to an admission of fact as in the case of **Hussein Bakari @Kadogo Vs Republic, Criminal Appeal No. 54 of 2006 (Unreported),** also in **Simon Erro V R, Criminal Appeal No. 85 of 2012 (Unreported).**

Having deliberated above, according to the victim's evidence, in the case at hand it is clear how the appellant on several occasions raped her which is corroborated by the evidence of PW3, a medical doctor. It should be noted that the evidence of the victim is very important in proving the offence, since sexual offences are normally committed in privacy. It is therefore hard to get precise information of what transpired from other people than the victim. That is why it is said that the best evidence in rape cases comes from the victim herself as clearly established in the case of **Selemani Makumba V R [2006] T.L.R 92.** I find this ground has no merit.

Concerning the last ground of appeal, the contention is that the court erred to require the appellant to prove his innocence.

As laid down in the case of **Mohamed Haruna @ Mtupeni and another vs. The Republic, Criminal Appeal No. 25 of 2007 (Unreported)** that ;

> *"In cases of this nature, the burden of proof is always on the Prosecution. The standard has always been proved beyond reasonable doubt. It is trite law that an accused person can only*

be convicted on the strength of the prosecution case and not based on the weakness of his defence."

Based on the above authorities, it was the evidence of the PW2 victim who testified in court that she used to have sexual intercourse with the appellant several times. PW1 testified to the chairman to the effect that the accused was arraigned and PW3 corroborated. The conviction by the trial court is founded solely on evidence of PW1 that she was raped.

The court upon perusal has found that it is true that the burden of proof is always on the prosecution. The strength of evidence adduced by the victim as well as the prosecution witnesses, PW1, PW2 and PW3 suffice to convict the appellant as his defence, DW1 and DW2 that was so weak compared to that of the prosecution.

That said and for the foregoing reasons, I do not find any basis for which to fault the findings of the trial court. The appeal is evidently bereft of merit. It is therefore dismissed in its entirety.

Order accordingly.

A. A. BAHATI

JUDGE

30/7/2021

Judgment delivered under my hand and seal of the court in the chamber, this 30th day July, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

30/07/2021

Right of appeal fully explained.

A. A. BAHATI

JUDGE

30/07/2021