IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 38 OF 2021

(Arising from Criminal Case no. 48/2020 in the District Court of Sengerema at Sengrema, before Hon. Barnabas, T.G, RM, dated 31st December, 2019.)

TINGINYA KASHIMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

21st June & 16th July 2021

TIGANGA, J.

The above named appellant stood charged with an offence of rape contrary to section 130 (2) (e) and 131(1) of the Penal Code [Cap 16 RE 2002], before the District Court of Sengerema at Sengerema. The particulars of the offence were that on 11th day of March 2020 at about 23.00 hrs at Ilunda village within Sengerema District in Mwanza Region the appellant had carnal knowledge of N d/o J a girl aged 9 years old a

pupil of Ilunda primary school and after full trial, he was finally found guilty and convicted as charged, he was consequently sentenced to thirty years imprisonment.

Aggrieved by both the conviction and sentence he has filed an appeal to this Court raising the following five grounds;

1. That the appellant was unfairly convicted and sentenced upon reliance on prosecution evidence which was rerecorded in a serious contravention of section 210(1)(a) and (b) Criminal Procedure Act [Cap 20 R.E 2019]
2. That the trial court erred both in law and in fact by failure to cast doubt on the PW4 testimony on the discharge of pus just seven hrs after the incident which doubt should be resolved in favour of the accused person/ the appellant.
3. That the trial magistrate erred both in law and facts by failure to cast doubt on the contradictory, incredible, too shaky un cogent and untruth worth evidence of the PW2 and PW1 on the fact that the victim was oozing blood which as un corroborated by neither PW2, PW1 nor any exhibit tendered to prove the offence of rape making the verdict against the appellant a unirateral skewed project full of bias.

4. That the trial court's decision facts short of a standard i.e defective, judgment in the eyes of the law as it lacks proper analysis evaluation and consideration of the whole evidence to wit ignore isolate the defence appellant's evidence resulting in serious miscarriage of justice.
5. That, the trial Magistrate unfairly disallowed the defence of ALIBI to the (accused) appellant, who was in his fishing activities at the time alleged offence was committed.

It is the appellant's prayer, as stipulated in his petition of appeal, that this Court allow the appeal, quash the conviction, and sets aside the sentence. He also wished to be present and attend the hearing of his appeal.

During the hearing of this appeal, the appellant appeared in person and unrepresented, while the respondent was represented by Ms. Rehema Mbuya - Senior State Attorney.

The appellant asked the court to adopt his grounds of appeal, as his arguments and proceed to make the judgment basing on his grounds of appeal. He however reserved his right to rejoinder depending on the submission made by the learned State Attorney.

In the reply to the petition of appeal, the learned Senior State Attorney opposed the appeal. Regarding the first ground of appeal, she submitted that, passing through the proceedings, she said the ground has no merits as the provision of section 210 of the Criminal Procedure Act, [Cap 20 R.E 2019] that the magistrate signed all the evidence he recorded.

On the second ground of appeal, she submitted that it was based on the evidence of the medical Doctor, she referred the court at page 21 of the proceedings where the doctor discovered that on 13/03/2020 while at Kamanga health centre after examination he found that the victim was discharging pus, she submitted that the doctor said what he found in his examination.

Regarding the third ground of appeal, she submitted that PW3 was the one who informed PW1, what he was informed by PW2, the victim. According to her, the evidence is very clear that PW1 was informed as a parent, but PW2 who is the victim could prove how he was raped and who raped her, something which he has done.

Regarding the fourth and fifth grounds which were argued together, she indeed agree that the judgment did not consider the defence of alibi, however, although there was non consideration of such

defence she asked this court being the first appellate court, to step into shoes of the trial court and analyse the evidence and in her opinion even after analysing the evidence, the court will find that under section 230 and 231 of the Criminal Procedure Act, that the case was proved beyond reasonable doubt. He prayed the court to use section 360 of the same law to re evaluate the evidence and come up with the conclusion and findings of its own.

In rejoinder, the appellant asked the court to disregard the submission made by the Senior State Attorney, instead, it acquit him from the charge by quashing the judgment and set aside the imposed sentence.

That marked the end of the submissions for both parties. After going through the arguments presented by both parties regarding this appeal, although the main issue for determination is whether the evidence before the trial court proved the case beyond reasonable doubt, I will, in resolving this issue address the grounds of appeal in the manner adopted by the learned Senior State Attorney.

The first ground of appeal raised the complaint that, the appellant was unfairly convicted and sentenced upon reliance on prosecution

evidence which was rerecorded in a serious contravention of section 210(1)(a) and (b) Criminal Procedure Act [Cap 20 R.E 2019].

Now what does section 210(1)(a) and (b), for easy reference I hereby quote the said provision as follows;

> *210.-(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner–*
>
> > *(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and* ***shall be signed by him and shall form part of the record; and***
> >
> > *(b) the evidence shall not ordinarily be taken down in the form of question and answer but, subject to subsection (2), in the form of a narrative.*

Now the issue is whether the trial court complied with this provision. The answer to this issue can be ascertained by perusing the record of the trial court which upon perusal, I have found that the trial magistrate signed the evidence of all witnesses who testified in court. As correctly submitted by the learned State Attorney, the ground of appeal has no merits, it therefore fails for the reasons given.

Regarding the second ground of appeal which raised the complaint to the effects that, the trial court erred both in law and in fact by failure to cast doubt on the PW4 testimony on the discharge of pus just seven hours after the incident which doubt should be resolved in favour of the accused person who is the appellant in this appeal, the learned Senior State Attorney submitted that, the doctor was a person who examined the patient and reported what he observed in his examination, he referred this court to page 21 of the proceedings, where the evidence of PW4 was recorded. I have passed through the evidence of the PW4, I find what the ground of appeal has raised is a misconception as the evidence by PW4 did not say that he examined the victim after seven hours, instead he said he examined the victim after seven days. Pus is a natural result of a body fighting infection; it is a result of the body natural immune system automatically responding to an infection usually caused by bacteria or fungi. If it is a result of wound or any other injury, it is normally after the white blood cell had detected the infection, fights against the infection, and it is after at least two or more days, the dead cell decomposes and results into pus. *See:* ***Medical News Today, online, By Suzanne Falck. M.D, By Adam Felman, on June, 21, 2017***

From the above extract, discovering the pus on the seventh day or thereafter is a natural phenomenon for person who has been injured but not treated. The second ground also fails for want of merits.

Regarding the third ground of appeal, which raised the complaint that, the trial magistrate erred both in law and facts by failure to cast doubt on the contradictory, incredible, too shaky un cogent and untruth worth evidence of the PW2 and PW1 on the fact that the victim was oozing blood which as un corroborated by neither PW2, PW1 nor any exhibit tendered to prove the offence of rape making the verdict against the appellant a unilateral skewed project full of bias. The counsel for the respondent submitted that, PW3 was the one who informed PW1, what he was informed by PW2, the victim. According to her, the evidence is very clear that PW1 was informed as a parent, but PW2 who is the victim could prove how he was raped and who raped her, something which he has done. There is no doubt that the contradiction, incredible, shaky and uncogent evidence is unworthy of belief. The stand of the law as stipulated in the case **of Mohamed Mustafa Rajabu & 2 others vrs The Republic,** Criminal Appeal No.25 of 2017, CAT- Tanga, is that

> *"We are alive of the legal position that normal discrepancies in the witness's testimony do not corrode the credibility of a witness while material discrepancies do. Normal*

discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of the occurrence of the event. Material ones are those going to the root of the matter and/or are not expected of a normal person. [See ***Bahati Makeja Vs. Republic,*** *Criminal Appeal No. 118 of 2006 and* ***Dickson Elian samba Shapwata and Another Vs. Republic,*** *Criminal Appeal No. 92 of 2007 (both unreported)].*

The Court of Appeal went on to hold on what the court should do in case it encounter discrepancies that while relying on the authority in the case of **Mohamed Said Matula Vs. R** [1995] TLR. 3 that:

> *"Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

And in that case upon careful examination of the record the Court of Appeal agreed with the appellants and the learned State Attorney that the discrepancy existed but they were minor.

The issue is whether in this case the contradictions do exists, and if they do are they material or minor? As indicated by the appellant in the third ground of appeal, the evidence alleged to contradictory is that

of the PW1 and PW3 in respect of oozing blood from the vagina of the victim. To appreciate on whether there is such a contradiction or not, it is important to restate what the said witness testified in court on the aspect complained of.

The evidence is to the effect that, on 11/03/2020 at 23.00hrs PW3 Rebeca Lucas, who happened to be the aunt of the victim and the sister of PW1, was at his brothers home where she was also a tenant. While there the victim told her that she was sick and was feeling pain in her vagina, she asked her what had happened to her, in reply she told her that she was taken by the appellant who found her playing and taken to his house where he ordered her to remove her clothes, lie down before he inserted his "dudu" which the magistrate interpreted to be penis in her vagina. Having so told, PW3 inspected the victim's vagina and found bruises and blood oozing therefrom.

After such findings, she in the next morning, that is on 12/03/2020 informed PW1, who after being so informed, PW1 reported the matter to the Busenye Hamlet Chairman who caused the appellant arrested. When the appellant was interrogated he admitted the allegations to be true and he was thereafter taken to Kamanga Police Station, where he was issued with the PF3 and later was taken to Kamanga Health Centre.

The evidence of PW2 who is the victim, is that on the fateful day, she was found by the appellant playing, the appellant called her and instructed her to go in his company to go to his house to give her money to go buy her Boflo.

According to her, when he reached at the appellants place the appellant undressed her and ordered her to lie down before he inserted his penis in her vagina, and caused pain to her. She is also the one who informed PW3 that the appellant did that to her.

Although the appellant did not point out the details of the alleged discrepancy, I find from the third ground of appeal that, while PW3 said that he found the victim oozing blood from the victim's vagina, but PW1 did not say so and PW2 as well. It should be noted from the evidence that the only witness who examined the vagina of the victim is PW3 and she is the one who informed the PW1 that she was told by the victims that she was raped and that she inspected the victim and found that she was raped. It should also be noted that the victim, at her age was not expected to give the details in which she was.

It is also the fact that, as PW1 did not inspects the victim, any evidence regarding the oozing of blood or not from the victim's vagina would be as good as a hearsay which is inadmissible in evidence. From the testimonies of the witnesses, I find no any contradiction whether

minor or material, which affect the credibility of the evidence from the prosecution side.

Regarding the fourth and fifth grounds of appeal, which are to the effect that, the trial court's decision facts short of a standard in the eyes of the law as it lacks proper analysis evaluation and consideration of the whole evidence to wit ignore isolate the defence appellant's which included the alibi which was unfairly disallowed in favour of the appellant who was in his fishing activities at the time alleged offence was committed, thus resulting in serious miscarriage of justice.

On these two grounds although the learned Senior State Attorney did not concede that the judgment was short of standard, she conceded that the same did not consider the defence of alibi advanced by the respondent. However, although she so conceded, she asked this court being the first appellate court, to step into shoes of the trial court and analyse the evidence and come up with its own findings and conclusion.

In her opinion even after analysing the evidence, the court will find that under section 230 and 231 of the Criminal Procedure Act, that the case was proved beyond reasonable doubt. She prayed the court to use section 360 of the same law to re evaluate the evidence and come up with the conclusion and findings of its own.

Now looking at the impugned judgment, I entirely agree with the appellant that, though the trial court analysed the evidence in its judgment, the analysis was not sufficiently done and that was greatly caused by the non consideration of the defence of alibi raised by the defence as pointed out by the learned Senior State Attorney.

As requested by the state counsel that, I use my powers under section 360 to step into shoes of the trial court and analyse evidence. In the case of **Deemay Daati & 2 Other vs The Republic**, Crim. Appeal No. 80 1994, it was held while relying on the authority in the case of **Peters V. Sunday Post Ltd.** (1958) E.A. 424, the Court of Appeal for East Africa;

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

Also see **Salum Mhando V. Republic** (1993) T.L.R. 170**.**

In the case before the trial Court, the appellant relied on two types of defences, one, that the case was framed up by the father of the victim basing on the land or rather farm dispute which they had before, two, the defence of alibi that at 23.00hrs when the offence was

allegedly committed, he was in lake in his fishing activities. Looking at the judgment of the trial court, there is non consideration of the defence advanced by the appellant. This is both misdirection and a non direction on the part of the trial court which in terms of the authority cited above entitles this court to re evaluate the evidence and come up with the findings:

In my consideration of the appellant evidence at trial, the defence that this a framed up case simply because that the appellant was in conflict with the father of the victim, PW1, was not indicated in the cross examination when the father of the victim was testifying. There was also no such indication when the victim herself was also testifying. When the appellant was cross examined as to why he did not cross examine PW1 on that aspect, he said it was his first time to stand charged that is why he failed to ask PW1 in order for the court to know that, they had a farm dispute. He also said that he failed to call the ten cell leader as a witness because he was in lock up.

In my evaluation of evidence, I find that there is no evidence to support the allegations that the appellant and PW1 had a farm dispute, and that the said dispute was the root cause of the case at hand. Although the accused person who is the appellant, had no duty to prove that he is innocent, but by the principle that he who alleges must prove

require him to prove that he had the farm dispute with PW1 and that the said dispute, led to the PW3 framing the case against him. Even if for the sake of argument, we take the allegation that there was a farm dispute between the two to be true, yet, there is no evidence on how the same, involved PW3, who is just a sister to PW1, and PW2 who is a minor daughter of PW1.

There is also no explanation as how if the offence was not committed PW4 found and filled in the PF3 as he did showing that the victim was carnally known and that she was discharging pus from her vagina. All these question un answered, I find that defence to have no merits and therefore could not rescue or exonerate the appellant from the liability in this case.

Regarding the defence of alibi, the accused the appellant said that he was not at the place when and where the offence is alleged to have been committed that is on 11/03/2020 at 23.00hrs.

It is a law under section 194(4) of the Criminal Procedure Act (supra) that an accused person who intends to rely upon an alibi in his defence, should give notice to the court and the prosecution of his intention to rely on such defence before the hearing of the case.

Under sub section (5) if he fails to give such a notice before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.

These provisions have been interpreted in the of **Hamis Bakari Lambani vs The Republic,** Criminal Appeal No. 108 of 2012, CAT

> *"First, the law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case, section 194(4) of the Criminal Procedure Act, Cap 20. If the said notice cannot be given at that early stage, the said person is under obligation, then, under subsection 5, to furnish the prosecution with the particulars of alibi at any time before the prosecutions closes its case. Should the accused person raise the alibi much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence, section 194 (6)."*

It is the principle in the case **Richard Wambura vs The Republic**, Criminal Appeal No. 167 of 2012 CAT- Mwanza, that,

> *"It is established law that when the Accused raise an alibi he does not assume the duty of proving it, it will be sufficient to earn him an acquittal when compared to the prosecution evidence"*

Ordinarily the principle governing the defence of alibi was designed to enhance the rule of disclosure. It intended to disclose the defence to the investigator and the prosecutor, for them to investigate on the truthfulness of the defence and take appropriate action or prepare to counter it. Failure to give notice at the appropriate stage denies the prosecution the opportunity to prepare to challenge it.

In this case, the alibi was raised at the defence stage without first giving notice in terms of section 194(4) and (5) of the Criminal Procedure Act. Even after raising it, the accused person did not call any witness to support it. Having considered all these factors and the weakness of the alibi, I decide to accord in no wait in terms of section 194(6) of the Criminal Procedure Act (supra), and find that even if the trial court would have considered it, it would have accorded it no weight as I have just done.

In law sections 111 of the Law of Evidence Act [Cap 6 RE 2002] puts a burden of proof in criminal case to be on the shoulder of the prosecution and so is the authority in the cases of **Woodimington Vs DPP** (1935) Ac 462, **Mwita & Others vs Republic** [1977] L.R.T 54 as well as **Jonas Nzike vs Republic** [1992] T.L.R 213 HC (Katiti, J) (as he then was).

Further to that, in discharging such a burden the prosecution is duty bound to prove the two important elements as directed in the case of **Maliki George Ngendakumana Vs Republic, Criminal Appeal No. 353 OF 2014 (CAT) BUKOBA (unreported)** which held *inter alia* that:-

> *"...it is the principal of law that in criminal cases, the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it is the accused person who committed it"*

Furthermore, section 114(1) of the same law i.e Evidence Act, sets a standard of proof of these two elements to be beyond reasonable doubts. To prove that, the prosecution had to prove **first,** that the victim was indeed raped, **second**, that it is the Accused person who raped her.

The issue is whether these two elements were proved by the prosecution before the trial court? It was the contention of the appellant that it was not proved beyond reasonable doubt, while the respondent contends that the two elements were proved to the required standard.

It is the law that the best evidence of sexual offences comes from the victim. See also **Selemani Makumba versus Republic,** Criminal Appeal No. 94 of 1999, **Tatizo Juma Vrs Republic,** Crim. Appeal No. 10 of 2013, and **Abdalla Mohamed Vrs Republic** Crim. Appeal No. of

2009. In this case, the evidence of the victim proved that she was carnally known by being penetrated into by a man.

That evidence was supported by PW3 who upon receiving the information inspected the victim and found bruises and blood oozing from the victim's vagina. The same was also supported by the evidence of PW4 a Medical Doctor who examined the victim and found the discharge of pus from the vagina of the victim which means the victims was penetrated into.

It is also the evidence of the victim that she was so penetrated into by the accused who is now the appellant.

In the case of **Godi Kasenegala versus Republic,** Criminal Appeal No.10 of 2008 (un-reported) that;

> *"it is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident such as doctors may give corroborative evidence."*

I am aware in our jurisdiction there are numerous decisions some of them being, in **Marwa W. Mwita & Another vs. The Republic, Criminal Application No. 6/1995 Mwanza HC (Unreported)** in which it was held inter alia that;

"The ability of a witness to name a suspect at the earliest opportunity possible is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry (emphasis supplied)".

In this case PW2, mentioned the appellants soon after she was asked by PW3 that imputes the reliability of his evidence.

I have already pointed out that the law requires the criminal cases to be proved to the standard of beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but cases laws have defined it, in the case of **Magendo Paul & Another vs The Republic (1993) T.L.R. 219 (CAT).** It was held *inter alia* that;

"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the Accused person as to leave a remote possibility in his favour which can easily be dismissed."

The same court was loud enough to expand the principle in the case of **Chadrankat Joshubhai Patel vs Republic, Criminal Appeal No. 13 of 1998 (CAT-DSM)** in which it held *inter alia* that:

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

In the line of the holding of the Court of Appeal in these two authorities above, I find that, the evidence brought by the prosecution before the trial court was sufficient to warrant the findings that, the prosecution proved the case at hand beyond reasonable doubt.

The trial court was therefore justified, to find that the evidence against the appellant was so strong; the same left no any possibilities in the favour of the appellant. The appeal is therefore dismissed for want of merits.

It is so ordered

DATED at **MWANZA** this 16th day of July 2021

J. C. Tiganga
Judge
16/07/2021