IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO.114 OF 2020

(Arising from Ngara District Court Criminal Case No. 255 of 2020)

MUUNGANO FRANK ..... APPPELLANT

Versus

REPUBLIC ..... RESPONDENT

JUDGMENT

22/07/2021 & 27 /07/2021

NGIGWANA, J.

The appellant was arraigned and convicted by the District Court of Ngara sitting at Ngara (the trial court) and convicted of the offence of Rape contrary to sections 130(1) (2) (a) and 131 (1) of the Penal Code Cap 16 R: E 2002 (Now Cap 16 R: E 2019) hence forth the Penal Code). Upon such conviction, he was sentenced to serve a sentence of thirty (30) years in jail. He was also ordered to compensate the victim at the tune of Tshs. 500,000/=.

At the trial court it was alleged that, on 2nd day of February, 2020 during night hours at Mkirehe-Village within Ngara within Ngara District in Kagera Region, the appellant did have carnal knowledge of a woman of 66years. For purposes of hiding her identity, I shall here in after refer to the woman as the victim

What actually transpired is that, on 2nd day of February, 2020 during night hours the victim (PW1) aged 66 years had sexual intercourse with a man without her consent. The matter was reported at Ngara Police Station on 3/02/2020 where PF3 was issued to the victim and then, headed at Murugwanza Hospital for medical examination where the Clinical Officer (PW2) medically examined the victim and found that she had inflamed labia minora .In his remarks/opinion, he stated that he observed supportive features of penetration and inflamed labia minora due to friction. The appellant was apprehended on allegations that he is the one who raped the victim, and stood trial as described above.

Dissatisfied, the appellant seeks to impugn the decision of the trial court in a memorandum of appeal which comprised Two (2) points of grievance that

One, that the trial Magistrate erred in law and fact by convicting and sentencing the appellant which was manufactured against him.

Two, that the trial Magistrate erred in law and fact by convicting and sentencing the appellant basing on the offence which was not proved beyond reasonable doubt.

At the hearing the appellant who was fending for himself, unrepresented fully adopted the memorandum of appeal on the basis of which he asked this court to quash the conviction and set aside the sentence. On the adversary side, the respondent Republic had the services of Mr. Emmanuel Kahigi, learned State Attorney. The learned Senior State Attorney objected the appeal.

Submitting on the first ground of appeal, the learned Senior State Attorney argued that the case was proved beyond reasonable doubt because the appellant was well identified by the victim as the person who raped her on the material night. He further argued that identification was possible by the help of torch light and light from burning fire woods. The learned State Attorney made reference to the case of **Waziri Amani versus R [1980]** TLR 250 to emphasize that the principles of proper identification were met.

As regards the 2nd ground of appeal, Kahigi argued that the victim had no conflict with the appellant, thus, the case was not at all manufactured against him otherwise the conflict would have been reflected in the trial court proceedings. He ended his submission praying for the dismissal of this appeal for want of merit.

Now the relevant question to be answered in this appeal is whether the evidence adduced by the prosecution witnesses in the trial court was sufficient to establish the guilty of the appellant beyond reasonable doubt

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt

Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti, J. (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused 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"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The trial court has done its role whereas the matter is now in this court as the first appellate court. Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No.341 of 2017 CAT (Unreported).

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32***

In this case, the appellant was charged under Section 130 (1), (2) (a) and 131 (1) of the Penal Code.

130 (1) of the penal code Cap 16 R: E 2002 provides

"It is an offence for a male person to rape a girl or woman"

Section 130 (2) of the Penal Code provides;

"A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following
descriptions:
(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse"

Page1 of the typed judgment, likewise handwritten judgment revealed that the prosecution featured four (4) witness to prove their case before the trial court, but the typed proceedings and the ruling on primafacie case revealed that there were three (3) witnesses only; the victim who testified as PW1, the medical expert testified as PW2, and the victim's Street leader who testified as PW3.

Before the trial court, the victim (PW1) testified that on 02/02/2020 during night hours while at home cooking, the appellant arrived and pulled her outside her house to a short distance then undressed himself and undressed her by force and had sexual intercourse with her three times without her consent, and having accomplished his mission, he disappeared. She also said, she reported the incident to the Hamlet leader namely Amos Ruhinzingoma , and on 3/12/2020, she reported the same incident to the chairman (PW3) who gave her a letter and directed her to report the incident at Ngara Police Station where the PF3 was issued to her, and then headed to hospital for medical examination.

On cross-examination, she said she could not shout because the appellant strangled her neck.

It is trite law that, in sexual offences, true evidence must come from the victim. This position was emphasized by the Court of Appeal of Tanzania in its decision; **SELEMAN MAKUBA V.R Criminal Appeal no 94 of 1999 (un-reported)** in these words;

"True evidence of rape has to come from the victim, if an adult, that there was penetration and no consent"

In this case, the evidence of PW1 as demonstrated herein above is to the effect that the appellant had sexual intercourse with her three times without her consent. The question here is why did the victim remained silent without shouting for help before, during and immediately after the incident. The story that she was strangled is not free doubt. The PF3 in the part of general information read" **The patient was mentally good, no any bite to the body** but there are bruises to the vagina". If at all she was strangled on the neck while struggling with the appellant, PW2 would have shown the affected area in PF3.

The Justices of the Court of Appeal of Tanzania, R. E.S Mziray, R.K Mkuye and I.P Kitusi while addressing the evidence of the victim in sexual cases in the case of **MOHAMED SAID V.R, Criminal Appeal No.145 of 2017 (Unreported)** stated that,

"We think that it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness"

The learned Justice Professor Lilian Tibatemwa Ekirikubinza of the Supreme Court of Uganda, in the case of **NTAMBALA FRED V. UGANDA Criminal Appeal No.34 of 2015** referring what Lord Justice Salmon stated in R V. Henry Maning (1969) 53 Criminal Appeal Rep 150,153 observed that;

"In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all"

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the victim has testified is nothing but the truth, because what matters in evidence is not the number of witnesses testified but the quality of the evidence presented before the court. See section 143 of the evidence Act, Cap 6 R: E 2019.It follows therefore that the witness must be a credible witness.

However, it has to be noted that the credibility of witness is the monopoly of the trial court. In **Shabani Daudi v. R. Criminal Appeal No. 28 of 2000** (unreported) the court held: -

"The credibility of witness is the monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can also be determined in two other ways; one, when assessing the coherence of the

testimony of the witness. Two, when the testimony of that witness is considered in relation with the evidence of other witness including the accused person".

In the case at hand, when the evidence of PW1 is considered with the evidence of PW3, it is very easy to doubt the credibility of PW1. The record shows that, on cross-examination, PW3 said, when the victim (PW1) arrived to his home, she narrated that she was raped on the material night by a man known as **Reuben,** as a result, PW3 wrote a letter to Police in relations to the said allegations against Reuben.PW3 added that, later on PW1 changed her mind and told him that the one who should be arrested is the appellant and not Reuben. The Court of Appeal in the case **of Mohamed Said (Supra)** has set a principle that the evidence of the victim of sexual offences should not be taken as a gospel truth, and that shows the trial court has a duty to satisfy itself on the truth of the evidence for the interest of justice. Subjecting the evidence of PW1 into objective and fair scrutiny, it cannot be said that the evidence of PW1 was duly corroborated by the evidence of PW3 and that that PW1 testified nothing more but the truth.

It was held in the case **of Marwa Wangiti Mwita and Another V.R [2002] TLR** 39 that,

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"

In this case, PW1 immediately mentioned **Mr. Reuben** to PW3.No explanation as to why Reuben was later seen by the victim as an innocent person, and from there she mentioned the appellant.

Another piece of evidence adduced in the trial court is the medical evidence. Medical evidence in sexual offences is important in the sense that it can only assist the court in making a finding on the issue by considering that opinion alongside other evidence presented before the court.

In the case at hand, the crux of the matter was the probative value that should have been placed on the testimony of the victim vis- *a-vis* that of the medical expert. In principle, the evidence of a medical officer (PW2) like all expert evidence is opinion evidence, thus it does not decide the issue it is offered to prove. The medical evidence shows that the victim's vagina was penetrated. The same does not go far to answer the questions as to who penetrated the victim's vagina, and whether the victim consented or not.

Before the trial court, the appellant in his defense disputed to have committed the offence, but also raised the defense of ALIBI, though the trial court considered the same but accorded no weight on it. The incident took place during night hours, and mentioning Reuben and later, the appellant, appeared to this court that the appellant was not undoubtedly identified.

Indeed, in absence of any other evidence, it cannot be said that, the prosecution had managed to discharge its duty of proving the case beyond

reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case has been established a long time ago. **See KERSTIN CAMERON V.R [2003] TLR 84, and** JOHN **S/O MAKOLOBELA KULWA MAKOLOBELA AND ERICK JUMA @ TANGANYIKA V.R [2002] TLR 296.**

At this juncture, I am of the strong view that determination of the first ground of appeal will not serve any useful purpose other than being a mere academic exercise. I shall not therefore delve onto it.

In the premise, I am constrained to allow the appeal and, respectively, quash the conviction and set aside the sentence of thirty (30) years meted against the appellant. I also set aside the compensation order. I further order for an immediate release of the appellant from prison custody unless if he is held for some other lawful cause.

Order accordingly.

E.L. NGIGWANA

JUDGE

27/07/2021

Date: 27/7/2021

Coram: Hon. E. Ngigwana, J.

Appellant: Present

Respondent: Veronica Moshi (SA) & Abdala Kilua

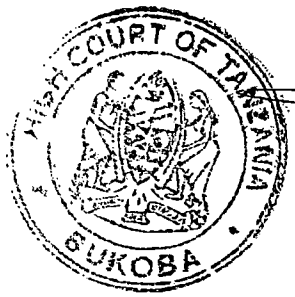
B/C: Gosbert Rugaika

Ms. Veronical Moshi (SA):

My Lord, the matter is coming for judgment. I am with Abdala Kilua, SA. We are ready for the same.

Appellant: I am ready.

Court: Judgment delivered this 27th day of July, 2021 in the presence of the appellant, Ms. Veronica Moshi and Mr. Abdala Kilua learned State Attorneys for the Republic/Respondent.

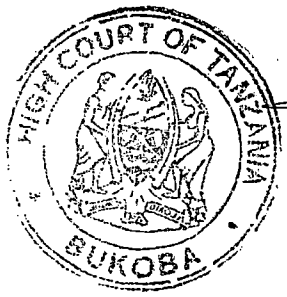


E.L. NGIGWANA

JUDGE

27/07/2021

Right of Appeal explained.



E.L. NGIGWANA

JUDGE

27/07/2021