

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

DC, CRIMINAL APPEAL NO. 34 OF 2020

(C/O Criminal Case No. 24 of 2020 Sumbawanga District Court)

**SAMSON S/O VENANCE @ PETER APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

10 & 23/08/2021

JUDGMENT

Nkwabi, J.:

The appellant preferred the appeal to this court. The petition of appeal comprises 13 grounds of appeal. The appellant was found guilty and convicted by the district court of Sumbawanga for rape contrary to section 130 (1) and (2)(e) of the Penal Code Cap 16 R.E. 2002. He was sentenced to 30 years imprisonment and was ordered to compensate PW1 at T.shs 3,000,000/= for injuries and humiliation caused upon her.

The offence was claimed to have happened on the 17th day of January 2020 at Kizitwe area within Sumbawanga Municipality – Rukwa region. That the appellant had sexual intercourse with PW1 a woman aged 18 without her

1 

consent. According to PW1, she was sent an errand on the material day at 10:00 am by her boss PW2 to send Tshs 12,000/= to labourers at the farm. She found the labourers working on the shamba and gave them the money. When coming back she discovered she had lost her phone, she started asking persons she met on the way if they had seen it and eventually, she met the appellant and asked him if he had seen her phone. The appellant denied and told her that she should not go back home because she may get lost. He asked her to go to sleep at his home. It was at 18:00 hrs. She stayed where he was working until he closed his office. After that they went to his home She further told the trial court in testimony that:

"I did not consent to have sexual intercourse with him, after he finished we slept during the morning I told him that I wanted to go at home but he told me not to go at home"

In his defence the appellant denied having committed the offence and raised a defence of alibi. He said he knew PW1 in court. In cross-examination, two persons were arrested, himself and Atanas Msalanji but did not know why Atanas was not charged. DW2 also indicated that the appellant was arrested together with Atanas on 22nd day of January 2020. DW4 the wife of the

appellant confirmed the alibi of the appellant while DW3 confirmed that they were arrested together and stayed in police custody for a week's time.

After evaluating the evidence of both parties, the learned trial magistrate decided as follows:

....., in present case the fact victim meet the accused at 18:00 hours which to the circumstances of Sumbawanga region there was a sun shine, the evidence that incidence also took long time also the time taken by the accused to accomplish the incidence which is over thirteen hours and most important which add value to the victim testimony is the fact that accused told her to wait for him until he close his milling machine so that they can go to his home, ...


Having concluded as above, the learned trial magistrate convicted and sentenced the appellant to the mandatory thirty years imprisonment. He also ordered for compensation of PW1 at the tune of T.shs 3,000,000/=.

Annoyed by the decision of the district court of Sumbawanga in Criminal Case No. 24 of 2020, the appellant lodged a petition of appeal to this court.

The petition of appeal has 13 grounds of appeal which however I will ground my decision only on three of them as hereunder:

- 1. That the learned trial magistrate erred in law and in fact to convict the appellant for the offence of rape based on insufficient and un-reliable evidence of PW1 the alleged victim of crime regarding to the nature of the alleged offence.*
- 2. That the learned trial magistrate erred in law and in fact to believe the testimonies of PW1 which was not satisfactory on account of PW1 did not report the incident soon after the alleged rape and that it was unusual if she raised an alarm that no one comes to help her. (4th ground on the petition of appeal).*
- 3. That the learned trial magistrate erred in law and fact to convict the appellant based on the prosecution witnesses without rule out the possibility of fabricating this case. (Ground number 7th on the petition of appeal).*

The hearing of this appeal was carried out by way of oral submissions. The appellant appeared in person while the Respondent was competently represented by Ms. Marietha Maguta, learned State Attorney. In his

4. 

submission, the appellant prayed his grounds of appeal be adopted as his submissions.

I will also start examining the 1st and 7th grounds of appeal in conjunction where the 1st ground of appeal goes, *that the learned trial magistrate erred in law and in fact to convict the appellant for the offence of rape based on insufficient and un-reliable evidence of PW1 the alleged victim of crime regarding to the nature of the alleged offence.*

I should point out on the outset that this court being the first appellate court has mandate to evaluate the evidence that is on the record in respect of the grounds of appeal. See **Emmanuel Lyabonga V Republic Criminal Appeal No. 257 of 2019** (CAT) Iringa (Unreported).

On these grounds of appeal, for the Respondent, Ms. Marieta Maguta learned State Attorney, resisting the appeal, and briskly argued that on proceedings at page 8 where PW1 (the victim) started giving her evidence, she told the court clearly how the offence of rape happened. That she lost her phone and when looking for it she met the appellant.

5 

The appellant told her if she goes home at that time, she would get lost so she has to go to his home for safety then the next day he will send her to her home. PW1 is a credible witness **see Goodluck Kiando V.R, [2006] TLR 367**. *"All witnesses are credible unless the court states otherwise"*

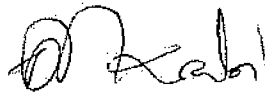
In all rape case, the best evidence comes from the evidence of the victim. **See Seleman Mkumba V.R. [2006] TLR 384**. So, the 1st & 7th grounds of appeal are baseless, Ms. Maguta added.

With the greatest respect to the trial magistrate and the learned State Attorney for the respondent, I am not persuaded that PW1 is a credible witness. To me, her testimony conveys an impression that she cooked up the story of being raped after she slept over at the room of the appellant and when asked by her boss, her boss told her she has to say that she was raped. It appears that she consented to having sex with the appellant. If that was not the case, why would she wait at the work place of the appellant until he completed work and closed business?

The trial magistrate himself observed that at 18:00 hrs. in Sumbawanga, there is clear day light. Why then was she afraid that she would get lost?

She is a grown-up person, how could she get lost, that was not explained and benefits the appellant. She resides with her boss in Sumbawanga Municipality presumably it is not far. In totality, her story does not add up. Even the facts narrated on the preliminary hearing are as if the prosecuting attorney looked down at the case. In the circumstances, was she a witness of truth? I doubt it and the doubt goes to benefit the appellant.

There is a grave contradiction in respect of the time PW1 was sent an errand by her boss. PW2 Sara, her boss, said she sent her an errand at 06:50 hrs and went for work while PW1 said it was 10:00am. This contradiction cannot go unnoticed and it water downs the prosecution case. They, too do not speak of the distance from home to the shamba, whether it was short or long, if it was short, PW1 ought to have returned home earlier than the time she was at the work place of the appellant. This lack of clarity as well goes to benefit the appellant to the effect that PW1 returned from the shamba earlier and just willingly spent good time with consensual sex with appellant only to oversleep at the appellant's room.

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It appears that there is something the prosecution witnesses are hiding which makes especially PW1 and PW2 to be unreliable witnesses. In criminal case, it is better to acquit a hundred criminals than convicting and sentencing one innocent person. It appears PW1 and the appellant knew each other well prior to the incidence, else how could she accept going to sleep at the appellants home just like that?

No police officer especially the investigator came to testify coupled with baseless arrest of Atanas (DW3) which was not explained by the police, makes me accord adverse inference that they knew the case was baseless. True, the prosecution is not bound to bring a certain number of witnesses see **R v. Gokaldas Kanji and another (1949) EACA 116** but where an important witness is not brought, adverse inference ought to be accorded and an advantage to the accused person or appellant, see **Aziz Abdalla v. Republic [1991] TLR 71 (CAT)**:

"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution.

Courts, in criminal cases, are prohibited from convicting on the weakness of the defence be it on alibi or otherwise. I base my view on **Christian Kale and Another v. Republic [1992] TLR 302** (CAT).

"... An accused ought not to be convicted on the weakness of his defence but on the strength of the prosecution case"

The evidence of PW3 is expert evidence and it is not binding to the court in proper circumstances just like in this case as the testimony of PW1 is found to be unreliable. See for instance **Agness Liundi v. Republic [1980] TLR 46 CAT**

"The court is not bound to accept medical testimony if there is good reason for not doing so. At the end of the day, it remains the duty of the trial court to make a finding and in so doing, it is incumbent upon it to look at and assess, the totality of the evidence before it including that of medical experts."

These gaps in the testimony of PW1 raise a reasonable doubt. For the above reasons I hold that the 1st ground of appeal is justified.

Convicting the appellant in the circumstances of this case amounts to convicting on speculation which is prohibited in criminal law. See for instance



Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006 (C.A.T.)

"We think that a lot of what is stated as above by the learned trial Principal Resident Magistrate with Extended Jurisdiction was speculation. There was no basis for thinking as she did, that the injury, which was sustained by the appellant could as well have occurred after he recorded his statement or that it was a move taken for precautionary purposes. Conviction in a criminal matter must be based on good ground and speculation has no room. The burden is on the prosecution to prove beyond reasonable doubt, that the accused committed the offence with which he is charged.

The judgment of the trial court is therefore tainted with misdirection on crucial pieces of evidence of PW1 and PW2 and non-direction on very crucial legal aspects such as expert evidence is not binding to the court and there is no onus put to the defence even his alibi. Had the trial magistrate not fallen in these misdirection and non-direction, I think that the judgment and

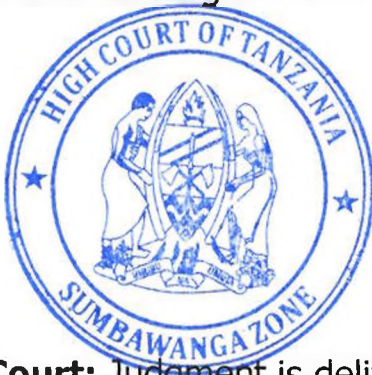


the result in this case in the trial court would have been different. The decision of the trial court cannot therefore be endorsed by this court.

Finally, having deliberate this appeal as I have shown above, I do not see the need to discuss the rest of grounds of appeal. I endorse the appeal preferred to this court by the appellant. Conviction is therefore quashed and sentence and order for compensation against the appellant are set aside. The appellant is to be set free from prison unless held there for other lawful cause(s).

It is so ordered.

DATED and signed at SUMBAWANGA this 23rd day of August 2021.

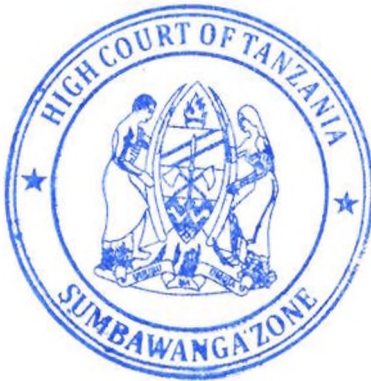



J. F. Nkwabi
Judge

Court: Judgment is delivered in open court this 23rd day of August, 2021 in the presence of Mr. Simon Peres, learned State Attorney for the respondent via video link and the appellant present in person through video link.

J. F. Nkwabi
Judge

Court: Right of appeal is explained.




J. F. Nkwabi
Judge
23/08/2011