IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC. CRIMINAL NO. 12 OF 2021

(Originating from Criminal Case No. 07 of 2021 in the District Court of Mbinga at Mbinga)

ENESCO TARSIS NKOLELA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 18/8/2021
Date of Judgement: 23/8/2021
BEFORE: S.C. MOSHI, J.

The appellant Enesco Tarsis Nkolela Juma was arraigned before the District Court of Mbinga for the offence of rape contrary to section 130 (1) (2) (c) and 131 (1) of the Penal Code Cap 16 R.E 2019. The particulars of the offence show that on 2nd day of January 2021 at Ngima Village within Mbinga District in Ruvuma region did have sexual intercourse with one Scholastika D/O Nkolela a girl of 08 years old. After a full trial the appellant was found guilty of the offence charged. Consequently, he was sentenced to serve life imprisonment.

Aggrieved by the conviction and sentence the appellant has filed this appeal on the following grounds; -

1. *That, the trial court erred in law and facts to convict and sentence the appellant on weak and contradictory evidence adduced by respondent's witness.*
2. *That the trial court erred in law and fact by not considering the evidence adduced by doctor while he told the court that his examination to victim found nothing happened.*
3. *That, the prosecution side failed to prove the case beyond reasonable doubt.*

During hearing of the appeal, the appellant appeared in person whereas the respondent was represented by Ms. Generosa Montano, state Attorney.

The appellant had nothing to add to his grounds of appeal and prayed the court to adopt them as they are.

Ms. Generosa opposed the appeal, she started by arguing the second ground, and then submitted on the first and third grounds jointly. On the second ground she said that, the doctor testified that upon examining the victim, the victim had no hymen, had no sexual transmitted diseases and had no bruises. She said that, the fact that she hadn't contracted sexual transmitted diseases did not mean that she wasn't raped. Also, the fact that she had no bruises did not mean that she was not raped. She argued that the victim's testimony indicated that on

2/1/2021 wasn't first time for the appellant to rape her meaning that if the victim had been raped several times before the date of the offence, there is likely hood of having no bruises. She cited the case of **Seleman Makumba V. R.** (2006) TLR, 379 where it was held that the best and true evidence of rape comes from the victim. It was her argument that the trial court was satisfied with the victim's evidence which was sufficient to prove that the appellant did rape the victim even if there was no doctor's testimony.

In regard to the first and third grounds, she argued that prosecution's evidence was heavy and there is no contradiction that goes to the root of the case. The victim identified the appellant to be the rapist who raped her, she knows the appellant because he is her elder uncle. She added that the appellant was arrested at the crime scene, so he did not get a chance to flee.

She said that, PW2, victim's mother testified that she found the appellant and her daughter, the appellant was naked and he covered himself with a blanket while the victim was holding her skirt. Upon being asked, the victim said that the appellant had raped her, and that it was not the first time. The victim explained how the appellant forced her to enter his room, stripped off her clothes and raped her.

It was therefore Ms. Generosa's argument that the prosecution's evidence proved the case against the appellant beyond reasonable doubt.

Upon keen perusal of the trial court's judgment when preparing judgment, I noted that the trial court did not take into consideration the defence evidence at all. The point which was not raised at the hearing of the appeal. It was my view that it was vital to hear the parties before judgment. Therefore, the parties were invited to address the court on it.

Ms. Montana submitted that it is true that the trial Magistrate did not consider the accused's/appellant defence. She said that the Magistrate has obligation to consider both parties evidence when composing judgment. To support her argument, she cited the case of **Hussein Idd and Another vs. R** (1986) T.L.R 166 where it was held that it was serious misdirection on the part of trial judge to deal with the prosecution evidence on its own and arrive at a conclusion that it was true and credible without considering the defence evidence. She added that analysis and evaluation of both sides must be apparent on judgment. However, in this case the trial court did not do that. She proposed that the remedy is for this court to analyze it and come up with its findings. She made reference to the case of **Kaimu Said vs. R,** Criminal Appeal No. 193 of 2019, Court of Appeal sitting at Mtwara (Unreported) where it held that the high court

being first appellate court has power to step up and consider it and come up with its own finding.

She argued that since this is the first appellate court, the court may step into the shoes of trial court and consider the defence and come with its findings.

On his side said, the appellant said that he didn't commit the offence they just implicated him.

Having re visited the judgment of the trial court, it is evident that the trial court did not consider the defence evidence in its judgment.

It is obvious that the trial Magistrate dealt with the prosecution evidence on its own, and arrived at the conclusion that it was true and credible, and as a result, it did not at all throw his eyes at the defence evidence. The trial court Magistrate was duty bound to deal with prosecution's evidence and the defense evidence and come to a proper verdict after analysis of such evidence. In this case the appellant was deprived of having his defense being properly considered by the trial Magistrate. The court of Appeal in **Hussein Idd and another vs. Republic** [1986] TLR 166, held thus: -

> *"It seems clear to us that the Judge dealt with the prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result*

he rejected the alibi put forward as deliberate lie. In our view this is a serious misdirection. The judge should have dealt with the prosecution and defence evidence and after analyzing such evidence the Judge should then reach a conclusion. Here accused was deprived of having his defence properly considered by the Judge. In the circumstances we think it unsafe to let the conviction of the accused stand."

The trial Magistrate believed that evidence of PW1 and Pw2 to be reliable in convicting the appellant. There is no doubt that the trial Magistrate was more focused on the prosecution evidence leaving away the defense evidence. Non consideration of defence evidence is fatal and it vitiates the conviction. See the case of **Adamson Mwaitembo vs. Republic,** Criminal Appeal No. 28 of 2015, Court of Appeal of Tanzania sitting at Mbeya (Unreported) and **Daniel Severine and two others vs. R,** Criminal Appeal No. 431 of 2018 Court of Appeal sitting at Bukoba (Unreported).

However, I agree with Ms. Montano suggestion that this court may step into the shoes of the trial court to consider the defence evidence along with the prosecution evidence and make its own findings. I am alive of the law that being the first appellate court, I am permitted to reevaluate and re analyse the evidence and treat the evidence as fresh and reach

into just conclusion. See the case of **Kaimu Said vs. Republic** (supra). Hence, that is what I undertake to do hereunder.

The canon principle of criminal cases is that; the onus of proof lies with the prosecution to prove that the accused committed the offence which he is charged with. I will consider all grounds of appeal together. The issue at this juncture is whether the prosecution case was proved beyond a reasonable doubt. The appellant's contention is that the prosecution failed to prove their case beyond reasonable doubt. On the other hands the learned State Attorney is of the view that the prosecution discharged the burden of proving their case to the hilt, the victim proved that she was raped. In proving rape cases, the key ingredient is penetration of the accused's male organ into the victim's female organ. The same was held by the Court of Appeal in the case of **Selemani Makumba vs R.** (Supra), where it was held thus: -

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

Invariably, methods of proving rape may involve physical evidence that a forceable sexual encounter occurred, this may be obtained vide doctor's tests and another way is victim's own testimony.

The trial court made a finding that the appellant had sexual intercourse with 8 years old child, PW1 and that the victim's (PW1) evidence was straight forward, clear and was sufficient to sustain a conviction under section 127(6) of the Evidence Act Cap. 6 R.E 2019 which states that: -

> *"Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offences the only independent evidence is that of a child of a tender years or a victim of the sexual offences, the court shall receive the evidence , and may , after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits notwithstanding that such evidence is not corroborated proceed to convict, if for no reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".*

It was the duty of the prosecution to prove beyond a reasonable doubt that there was penetration, that is rape, and that the rape was committed by the appellant. In the instant case, PW1 testimony shows that the appellant undressed her and inserted his penis into her vagina in her words the victims said I quote: -

".... the accused person pulled me inside his room and take off my clothes and aliniwekea mdudu wake kwenye uchi wang una kuniingiza kwa nguvu".

I am alive that, in our jurisdiction the mdudu has been interpreted to mean penis in a number of cases decided by the Court of Appeal to mention but a few, the case of **Haruna Mtasiwa vs. The Republic**, Criminal Appeal No. 206 of 2018 Court of Appeal sitting at Iringa (Unreported) whereby in this case the court echoed its decision in the case of **Simon Erro vs. Republic,** Criminal Appeal No. 85 of 2012 (Unreported) and **Joseph Leko vs. Republic,** Criminal Appeal No. 124 of 2013 (Unreported), where it was held thus: -

"Recent decisions of the court show that what the court has to look at is the circumstances of each case including cultural background, upbring, religious feelings, the audience listening, and the age of the person giving the audience. The reason is obvious. There are instances and they are not few, where a witness and even the court would avoid using direct words of the penis penetrating the vagina. This is because of cultural restrictions mentioned and other related matters...."

Despite the fact that the true evidence of rape comes from the victim, yet the evidence has to be considered as a whole. There has to be evidence proving penetration, similarly there has to be evidence establishing that the accused/appellant raped the victim. In the present case, the first piece of evidence is the victim's own word that she was raped by the appellant and her testimony was supported by PW2, her mother.

The second piece of evidence is doctor's evidence, the doctor made examination on the victim's *genitalia.*

I have carefully scrutinized the prosecution's evidence. Starting with PW3's (doctor's) evidence. The doctor stated that he examined victim's private parts on 3/1/2021. The PF.3 indicates that; he observed that the hymen was not intact, and he opined that, that means that a blunt object had penetrated therein. He also observed that the genitalia were normal and there were no bruises. The examination was conducted one day after the incident.

As indicated earlier, the victim (PW1) said that the accused pulled her into a room, undressed her and inserted his penis into her private parts (vagina). The victim's mother (PW2) supported PW1's testimony. She said that she was called by Aloyce Mbepera who asked her to go to her mother in law's place and witness what was happening to her child.

She went to the place and saw the child (victim) holding a skirt and the accused sitting on a bed; the two were in a room which has its door closed.

Considering PW2's evidence, it is evident that the said Aloyce Mbepera saw what was going on with the child, that's why he called PW2 to come and witness, however, the said Aloyce Mbepera was not called by the prosecution to testify before the court and tell what he saw. It is my view that this witness is an important witness. The prosecution did not say why they did not call him. Failure for a party to call an important witness warrants the court to draw adverse inference against that parties evidence; see the case of **Mashimba Dotto @ Lukubanija V.R,** Criminal Appeal No. 317/2013, Court of Appeal sitting at Mwanza (unreported).

Again, PW2 said that she was told that the appellant had been raping the victim several times but those incidences were not illustrated; again the person who told PW2 so, was not called to testify.

Also the victim (PW1) said that the accused had raped her on three different occasions. However, these previous incidences' were not explained; for instance, when did they happen and where they took place. It is however not revealed why these previous incidences were not reported.

It is my view that, the culmination of all these, raises doubt on prosecution's evidence. Again, there is (PW3's) doctor's evidence which shows that the child was examined one day after the incident; he did not see any bruises and he did not see any spermatozoa. Although he noted that the hymen was not intact, yet the genetalia was normal. It is my view that doctor's observation does not support the theory that the rape occurred on 2nd January, 2021.

Furthermore, the child is eight years old, according to prosecution's evidence she had been repeatedly raped by the accused/appellant several times; according to PW2 the accused was HIV positive, the doctor certified that the child had not contracted any STD. Although, as stated by State Attorney it was not necessary for the child to have contracted STDS but yet for a child of the victim's age it's expected the child could have some kind of damage.

On the other hand, I have considered defence evidence. In his defence the accused said that he was arrested at home where he was with Aloyce Mbepera. His testimony was supported by Aloyce Mathias Mbepera. Aloyce Mathias Mbepera testified that on that fateful date he had visited the accused person. He stayed there with the accused. While there, the accused brother's daughter (niece) came. He saw the child

playing until her mother came to take her; and went away with her. He said that, he was surprised why the accused was arrested.

Considering this piece of evidence, it really raises a gray area. DW2's testimony (Aloyce Mathias Mbepera) is evidently firm to the effect that he was at the crime scene at all time with the accused, that he saw the child coming, playing and being taken away by her mother. This witness did not witness any incident. However, PW2 said that she was called by Aloyce Mbepera and Aloyce Mbepera asked her to come and enter into the house and witness what was going on. This evidence raises doubt. PW2 said that Aloyce Mbepera alerted her of the incident but prosecution did not call him to support her allegation. The same Aloyce Mbepera whom the accused said he was with him stated in court that there was nothing out of the ordinary i.e the child came, played and later her mother took her.

I am of the considered view that there is lot to be desired on the prosecution's evidence; and the defence evidence has casted doubt on the prosecution's evidence. Despite the fact that victim's evidence in rape case is to be believed, yet in view of these doubts, I find that the prosecution has not proved the offence against the accused beyond a reasonable doubt. Consequently, I quash the conviction, set aside the sentence and order that the appellant should be released from prisons forthwith unless he is held therein for any other lawful causes.

In the event, the appeal is allowed.

Right of Appeal is explained.

S.C. MOSHI

JUDGE

23/8/2021