IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CRIMINAL APPEAL NO. 107 OF 2020
(*Originating from Criminal Appeal No. 89/2019 of the Resident Magistrates' Court of Bukoba*)

ELIPIDIUS RWEZAHULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

15th June & 23rd July 2021

Kilekamajenga, J.

The appellant was charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 RE 2002. The charge levelled against the appellant shows that the appellant did rape a girl of 13 years old at Kashai within Bukoba Municipality. It was alleged that, the appellant committed the act of rape on unknown date(s) within the month of February in 2019. The prosecution paraded five witnesses and tendered three exhibits to prove the case to the required standard. The exhibits tendered during the trial were: PW1's clinic card (exhibit P1); a PF3 form (exhibit P2) and a sketch map of the crime scene (exhibit P3).

During the trial, PW1 (victim) testified that she lived in Bukoba in the house of the appellant from the end of 2018 to 2019. She worked as a house maid in the house of the appellant. She further testified that the appellant raped her in February 2019 when the appellant's wife went for delivery. That was the time

when PW1 remained at home with the appellant. On the date when she was raped, she slept in the sitting room and suddenly saw the appellant laying on her. Though she did not know how the appellant went to the sitting room, she saw him (appellant) because there was electricity light illuminating the room. However, she did not raise an alarm because she was threatened. After the rape incident, the appellant covered himself with a towel and went into his room. In the morning, the appellant warned her not to tell anybody about the rape. Later, the appellant's sister noted an odour from PW1 and asked PW1's aunt to talk to PW1. That is when she disclosed about the rape.

PW2 testified that she was the mother of the victim. On 28th March 2019, she received a phone call from Alice and was connected to her daughter for conversation. In the conversation, the victim informed PW2 that she was raped by the appellant. PW2 travelled from Karagwe and reported the incident at Kashai Police Station.

PW3, on the other hand, testified that the victim stayed at the appellant's home from November 2018 to March 2019. Though she noted a problem, PW1 was reluctant to disclose it. At some point, PW1 said that she was warned by the appellant's wife not to say about the problem bothering her. PW3 later informed the victim's mother about the problems that bothered PW1. After a struggle, finally, PW1 agreed to talk to her mother. PW3 did not know what PW1 told her

mother but PW3 heard the victim's mother crying over the phone. When PW3 inquired, the victim's mother revealed that her daughter was raped by the appellant. When the victim's mother came from Karagwe, PW3 accompanied her to the police station. The victim was taken for medical examination and the doctor confirmed that she was infected with syphilis though she was not pregnant.

PW4 who was the medical officer at Kashai Dispensary conducted medical examination on the victim (PW1). The victim tested HIV negative. He was informed by the victim's mother that the victim was raped four weeks ago. However, the medical officer administered some medication to the victim because she seemed to discharge some fluids indicating that she was infected with sexual transmitted infections. PW4 later filled-in the PF3 form which was admitted in Court as exhibit P2. PW5 was the police officer who investigated the case; he received information from PW2 and PW3 about the rape.

The above evidence convinced the trial court that the case was proved beyond reasonable doubt; a conviction and sentence of 30 years in prison was imposed against the appellant. Being unhappy with the decision of the trial court, the appellant approached this Court for the second chance of justice. He was armed with six grounds of appeal thus:

1. That, the honourable Magistrate erred in fact and in law for failure to take into consideration the fact that she (Magistrate) wasn't' in position to ascertain the credibility of the victim as a witness due to the fact that while the victim was testifying in Court the Magistrate who entered judgment wasn't the one who had taken record of the victim's evidence so as to be in a position to ascertain the credibility of such witness.

2. The honourable Magistrate erred in fact and in law for failure to take into consideration the fact that the time taken by the victim in revealing the alleged rape incidence, was very important factor in ascertaining the truthfulness and credibility of the victim's rape allegations against the appellant.

3. That, whereas the honourable Magistrate was not in the position to ascertain the demeanour of PW1, the said Magistrate erred in fact and in law for having convicted the appellant on the basis of the victim's evidence without considering other circumstances of the case as portrayed in the evidence of both the prosecution and the defense before the Court.

4. That, the honourable Magistrate erred in fact and in law for failure to take into consideration of the comparison between the victim's evidence and that of the appellant's witnesses.

5. That, the honourable Magistrate erred in fact and law for not taking into account the fact that since there was no any other witness who alleged to have seen the appellant raping PW1, the victim's evidence ought not to have been taken wholesome, believed and acted on to convict the appellant without considering other circumstances of the case.

6. That, the honourable Magistrate convicted the appellant while there were a lot of doubts within the prosecution's evidence

The appellant, through the legal services of two professional counsels, Messrs Dunstan Mutagahywa and Ibrahim Muswadick appeared to defend the appeal. The learned State Attorney, Mr. Nehemia John appeared for the Republic (respondent). Mr. Mutagahywa for the appellant invited the Court to consider the fact that the conviction in this case was hinged on the evidence of PW1. However, the magistrate who composed the judgment was different from the magistrate that heard the evidence of PW1. Therefore, the magistrate who composed the judgment and finally convicted the appellant had no opportunity of assessing the credibility of the victim of the rape. Though evidence of rape has to come from the victim, the case of **Paschal Sele v. R, Criminal Appeal No. 23 of 2017**, CAT at Tanga (unreported) provides for exceptions. Mr. Mutagahywa argued further that credibility of the witness is always tested by demeanour and coherence of the testimony of the witness. In assessing coherence, the testimony is measured vis-à-vis the evidence of other witnesses.

In this case, the victim alleged to have been raped in February 2019 but she taken for medical examination on 29th March 2019. This piece of evidence is not sufficient to prove the offence of rape.

Furthermore, the trial court failed to compare the evidence of the victim and that of the appellant's witnesses. While the victim alleged to have been raped at the sitting room, the appellant's evidence showed that the victim slept in the room with other children. The victim's evidence was therefore marred with doubts. It is also not clear on who reported the incident at the police between PW2 and PW3 and this incident seems to be a cooked story against the appellant.

Mr. Mswadick for the appellant also argued that the victim failed to reveal the incident of rape as soon as possible and the case was not proved to the required standard. In criminal cases, the prosecution bears the burden of proving the case beyond reasonable doubt. He supported his argument with the case of **Jonas Mkize v. R [1992] TLR 213**. Before basing a conviction on the evidence of the victim, the court must take all possible pre-cautions. He referred the Court to the case of **Mohamed Said v. R, Criminal Appeal No. 145 of 2017**.

The counsel further invited the Court to revisit the evidence and see the contradictions evident in this case because the incidence seemed to have been committed for almost a month before the victim reported it to the police. Failure

to report the incident at an earliest possible opportunity raises further doubts. He referred the Court to the cases of **Chacha Jeremiah Murimi and 3 others v. the Republic, Crimibal Appeal No. 551 of 2015**, CAT at Mwanza (unreported) and **Daniel Severin and Others v. R, Criminal Appeal No. 431 of 2018**, CAT at Bukoba (unreported). He urged the Court to interpret the doubts in favour of the appellant. He cemented the argument with the case of **Jimmy Runangaza v. R, Criminal Appeal No. 159 B of 2017**.

On the other hand, the learned State Attorney objected the appeal arguing that the best evidence of rape always comes from the victim and conviction may be entered even without such evidence being corroborated. The argument that the magistrate who convicted the appellant did not hear the evidence of the victim had no merit. Demeanour is not the only factor in assessing the credibility of the witnesses. In his view, the evidence of PW1 was coherent; the appellant had solicited the victim before the rape and the appellant's wife had gone for delivery at that time. After the rape, the victim was threatened and warned not to inform anybody. As the victim was 14 years old, that means young; she succumbed to the threat. The issue of identification at night had no merit as the victim identified the appellant using a torch light. Furthermore, the appellant's defence was considered but did not shed any doubt on the prosecution's case. Mr. John invited the Court to re-evaluate the evidence of the trial court. He insisted that the victim did not create the rape of story against the appellant and allegation of

grudges between the appellant and the victim was an afterthought. He urged the Court to uphold the decision of the trial court.

When rejoining, Mr. Mutahywa insisted that the victim's evidence was not sufficient to sustain the conviction and the case seemed to be cooked against the appellant. On his part, Mr. Muswadick argued that an uncorroborated circumstantial evidence cannot be used for conviction. The allegation of rape was a mere suspicion which cannot sustain a conviction.

Having considered the submissions from the parties and grounds of appeal advanced by the appellant, the major issue for determination is whether the prosecution proved its case to the required standard. The law requires all criminal cases to be proved beyond reasonable doubt before a person is convicted. See, **section 3(2) (a) of the Evidence Act, Cap. 6 RE 2019**. In proving the case beyond reasonable doubt, the prosecution has an obligation to ensure that the standard required is met. In the case of **Jonas Mkize v. Republic [1992] TLR 213** the Court stated that:

> *'It is the question of burden of proof, and upon whom it lies. The day shall never come, not in my life time, when such highly priced principles of criminal prosecution will be as simplifically thrown into such dirty dust bin of convenience.* ***That, the general rule in criminal prosecution, the onus of proving the charge against the accused beyond reasonable doubt lies to the prosecution, is part of our law, and***

forgetting or ignoring it is unforgivable, and is a peril not worthy taking.' (Emphasis added).

The onus of the accused person is just to raise doubts to the prosecution's case and he/she has no burden of establishing the innocence at the level of beyond reasonable doubt. This position of law was stated in the case of **Said Hemed v. Republic [1987 TLR 117** where the Court of Appeal of Tanzania stated that:

> *'We wonder, though, whether he fully apprehended that the standard of proof applicable* ***in a criminal case of this nature is one beyond all reasonable doubt and that where the evidence burden shifts onto the accused it is sufficiently discharged by the accused by merely adducing evidence that casts a reasonable doubt in the prosecution case****...'* (Emphasis added).

In the instant case, this being the first appellate court, it has an obligation to assess and re-evaluate the evidence before affirming or reversing the decision of the trial court. The obligation to re-evaluate the evidence is stressed in the case of **Martha Michael Wejja v. Attorney General and three others [1982] TLR 35** thus:

> *'We must point out that* ***this is a first appeal and so such this court is entitled to look at and evaluate the evidence afresh and come to its own conclusion*** *particularly where the learned trial judge (court) adopts a wrong approach in evaluating the witnesses or omits to evaluate some of the witnesses or to consider some vital pieces of evidence as is the case here.'* (Emphasis added).

In the case at hand, the evidence of PW3 shows that, when the victim was taken for medical examination, she was found suffering from venereal related deceases called syphilis. This piece of evidence was confirmed by the medical doctor that examined the victim (PW4); he testified to the effect that she administered some medication to the victim because she was found with sexual transmitted infection though not HIV. In my view, this evidence could have prompted further investigation to find out whether the appellant and his wife were also infected by sexual transmitted disease. This piece of information, though vital in the case, lacked. The investigation might have not done its work to the fullest. I find this to be the major doubt in this case. The prosecution failed to clear this doubt and therefore lowering the standard of proof. I therefore find that the case was not proved to the required standard. This point alone is sufficient to dispose of this appeal. However, for the interest of justice and academic purposes, I wish to consider the first ground of appeal advanced by the appellant.

On the first ground, the counsels for the appellant argued that the trial magistrate who composed the judgment did not hear the evidence of the victim. This case, being a rape case, the best evidence always comes from the victim. See, the case of **Selemani Makumba v. Republic [2006] TLR 379**. However such evidence must be treated with caution and the words of the victim should not always be taken as true due to the ramifications involved in rape cases. A similar observation was given by the Court of Appeal of Tanzania in the case of

Mohamed Said v. Republic Criminal Appeal No. 145 of 2017, CAT at Iringa (unreported) thus:

> *'Given the tricky nature of the circumstances of this case, we have deemed it necessary to make some observations pertaining to the need to exercise care in handling cases of sexual offences.'*

The Court went further stating that:

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

Also, I am moved to consider words of his Lordship, the Chief Justice Mathew Hale in the case **People v. Benson, 6 Cal 221 (1856)** quoted with approval in the case of **Mohamed Said** (*supra*), when he remarked concerning rape cases thus:

> *'...is an accusation easily to be made and hard to be proved and harder to be defended by the party accused, though never innocent.'*

Based on the above observations, it is without doubt, the easiest case to frame against a person is a rape case because a victim may easily be coached against an innocent person. Therefore, though it is important to trust the testimony of the victim, the court should always ensure that the demeanour is assessed and all possibilities of fabrication are eliminated. It may only be possible where the

standard of proving the case beyond reasonable doubt is not lowered at any rate.

In the case at hand, during the trial, the victim's evidence was heard before a magistrate different from the one who composed the judgment. The magistrate that heard the victim had an opportunity to assess the evidence and demeanour of the victim. Observing the demeanour of the witness is always enjoyed by the trial magistrate who had an opportunity to hear the evidence by his/her own ears and not otherwise. I understand, a case may shift to another magistrate where there is a good reason, but the magistrate who missed the opportunity to hear the evidence of a key witness, like a victim in a rape case, may not be well positioned to enter an appropriate conviction. In rape cases, apart from the evidence the demeanour of the victim may have a louder message than the words. I take the discretion to consider the guidance given in the case of **Ibrahim Ahmet v. Halima Guleti (1968) HCD 76** that:

> *'The question for a court on appeal is whether the decision below is reasonable and can be affirmed...surely when the issue is entirely one of the credibility of witnesses,* ***the weight of evidence is best judged by the court before which that evidence is given*** *and not by a tribunal which merely reads a transcript of evidence...'* (Emphasis added).

Also, in the case of **Ali Abdallah Rajab v. Saada Abdallah Rajab and others [1994] TLR 132** the Court of Appeal of Tanzania observed that:

'The decision of this case was wholly based on the credibility of the witnesses. ***The learned trial magistrate saw and heard the witnesses as they testified. He was therefore in a better position to assess their credibility than this Court which merely reads the transcript of the record.*** *'* (Emphasis added).

Now, as the evidence of the victim was key in this case, the trial magistrate who convicted the appellant was not better position to assess such evidence because he/she only read in the record just like an appellate court. This ground and the above discussed issue were the anomalies that faulted the case. In find merit in this appeal. I hereby allow the appeal and set aside the conviction and sentence meted against the appellant. The appellant should be set free unless held for other lawful reasons. It is so ordered.

Dated at Bukoba this 23rd July 2021.

Ntemi N. Kilekamajenga
Judge
23rd July 2021

Court

Judgment delivered this 23rd July 2021 in the presence of the appellant and his counsel, Mr. Ibrahim Muswadick and the learned State Attorney, Mr. Mwakasege for the respondent. Right of appeal explained.

Ntemi N. Kilekamajenga
Judge
23rd July 2021