IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

DC CRIMINAL APPEAL NO. 52 OF 2021

(From the decision of the District Court of Rungwe at Tukuyu in Criminal Case No. 106 of 2020, A.E. Lugome, RM.)

ELIYA S/O JORODAN SANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 30/08/2021
Date of Judgement: 06/09/2021

MONGELLA, J.

Eliya son of Jorodan Sanga, the appellant herein, was arraigned in the district court of Rungwe for the offence of rape contrary to section 130 (1) and (2) and 131 (1) and (3) of the Penal Code Cap. 16, R.E. 2019. He was convicted of the offence charged and consequently sentenced to serve 30 years imprisonment.

Dissatisfied with the conviction and sentence he filed this appeal containing eight grounds. The grounds however, can conveniently be condensed into one ground being: "*that the prosecution failed to prove the offence charged beyond reasonable doubt.*"

During the hearing, Eliya appeared in person. He had nothing much to present before the court. He only submitted that he did not commit the offence charged. He prayed for the court to adopt and consider his grounds of appeal as his submission and set him free so that he could go back home and take care of his family.

The respondent on the other hand was represented by Mr. Hebel Kihaka, learned state attorney. Mr. Kihaka supported the appeal on the ground that the offence was not proved beyond reasonable doubt by the prosecution. Just like the appellant, he also faulted the conviction entered by the trial court. Referring to page 6 of the trial court judgment, he submitted that the conviction was highly based on the victim's evidence, as the best evidence. Scrutinizing the evidence of the victim, Mr. Kihaka argued that the victim in her testimony did not state if it was the appellant who committed the offence. She as well did not state the period in which the offence was committed. He said that the evidence by the victim given in three lines was used to convict the appellant. He was concerned with the lack of details in the victim's testimony describing the person who raped her.

Mr. Kihaka also challenged the testimony of PW3 who said that the appellant and the victim live in the same village. He was of the view that, if that was the fact, then one would expect the victim to have explained that it was the appellant who raped her. He as well referred to the testimony of PW2 who stated that the victim told him that "*somebody injured her while at the river.*" He was of the stance that this statement is so doubtful in proving that the victim really identified the appellant at the

scene. He concluded that, considering the witnesses' testimonies, it is clear that the offence was not proved as to comply with the case of ***Selemani Makumba v. Republic*** [2006] TLR 379. There was no sufficient evidence to convict the appellant on the offence charged. He prayed for the court to quash the conviction and sentence by the trial court.

I have considered the submission by both parties and the appellant's ground of appeal. I have as well gone through the trial court record. I agree with Mr. Kihaka that the conviction against the appellant was based highly on the victim's evidence. Under the law, each victim is entitled to credence and his/her evidence believed and accepted uncles where there are good and cogent reasons for not believing the witness. See: ***Goodluck Kyando v. Republic*** [2006] TLR 363. Good and cogent reasons could be where in the eyes of the court the evidence appears to be improbable, implausible or where there are material contradictions. See: ***Aloyce Maridadi v. Republic***, Criminal Appeal No. 208 of 2016 (CAT, unreported).

Banking on the CAT decision in the case of ***Godi Kasenegala v. Republic***, Criminal Appeal No. 10 of 2008 (unreported) and ***Selelmani Makumba*** (supra), the Hon. trial Magistrate considered the evidence of PW1, the victim as the best evidence in proving the offence. It is true that the law, as provided in the above cases, is settled to the effect that the best evidence in rape cases comes from the victim. See also: ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported). However, the courts as well are warned from taking

the victim's evidence wholesale. Before acting on such evidence, the court has to satisfy itself on the credibility of the witness and the reliability of the evidence. See: ***Majaliwa Ihemo v. The Republic***, Criminal Appeal No. 197 of 2020 (CAT at Kigoma, unreported); ***Paschal Yoya @ Maganga v. The Republic***, Criminal Appeal No. 248 of 2017; and ***Shabani Daudi v. Republic***, Criminal Appeal No. 28 of 2000 (CAT, unreported).

Going through the testimony of the witnesses, I find it pertinent to assess the credibility of the prosecution witnesses to ascertain whether the evidence proved the offence the appellant was charged with. With regard to the testimony of PW1, the victim, I agree with Mr. Kihaka that PW1 did not give sufficient detail of the person allegedly raped her. During examination in chief, she briefly said that the accused raped her while taking bath at Ukuka river. That the accused took her under pants and raped her. She felt bad as blood came out. She told her uncle who took her to the hospital. As argued by Mr. Kihaka, PW1 did not mention the name of the appellant and whether the two knew each other from before. She did not explain how she identified the appellant and at what time did the rape occur. It is on cross examination where she stated that she knows the appellant and his name is Eliya.

PW2, the victim's brother testified that the victim came back home injured on the leg and mouth. When he asked her as to what had happened, she told him that "*someone injured her while at the river.*" It is clear that the victim did not mention the appellant as her assailant to PW2 whom she met immediately after the incident. It is provided under the law that naming the suspect at the earliest possible opportunity is an important

assurance of the reliability of the witness. Likewise, failure to mention the suspect at the earliest possible opportunity may put the credibility of the witness in question. See: ***Marwa Wangiti Mwita & Another v. Republic*** [2002] TLR 39; ***Bakari Abdallah Masudi v. Republic***, Criminal Appeal no. 126 of 2017 (CAT, unreported); ***Jaribu Abdallah v. Republic*** [2003] TLR 271.

As I pointed out, during cross examination PW1 stated that he knows the appellant and that his name is Eliya, considering the fact that she failed to mention his name before PW2 at the earliest possible opportunity and even during her examination in chief, I believe that she came to learn of the appellant's name later. Thus, not being familiar with her assailant, it was important for her to describe the assailant in detail so that it could be ascertained that it was indeed the appellant. Failure of that the credibility of her evidence remains questionable.

In consideration of this observation, I agree with Mr. Kihaka and the appellant that the prosecution did not prove the offence beyond reasonable doubt. The conviction and sentence entered by the district court against the appellant is therefore quashed. I order for the immediate release of the appellant from prison custody unless held for some other lawful cause.

Dated at Mbeya on this 06th day of September 2021.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in Chambers on this 06th day of September 2021 in the presence of the appellant, appearing in person, and Ms. Xaveria Makombe, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE