IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 22 OF 2021

(C/F Criminal Case No. 195 of 2019, in the District Court of Karatu at Karatu)

SALIM JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

18/08/2021 & 22/09/2021

GWAE, J

On 16/10/2019 the appellant herein was arraigned before the Karatu District Court charged with an offence of rape contrary to sections 130 (1), (2) (a) and 131 (1) of the Penal Code Cap 16 R.E 16. According to the charge sheet it was alleged that on 13/10/2019 during night hours at Karatu Township area – Malindi guest house the appellant had sexual intercourse with a girl of twenty (20) years old, (her name is hidden for protection of her dignity, she shall therefore be referred as Victim or E. J)), the act which is contrary to the provisions of the law. The appellant pleaded not guilty to the charge.

In proving the charge against the appellant, the respondent paraded a total of three witnesses while the appellant was the only witness in defence.

The respondent's case, in brief was that the appellant is a driver of min buses commonly known as "Noah" making its route from Arusha to Karatu. On 13/10/2020 the appellant while on his daily routine at Arusha he received a passenger (victim) from one Edward with instructions to make communications to her employer (PW1) who was to receiver her at the bus stand at Karatu. According to PW1 she had communication with the appellant and the last information she got from the appellant was that they had reached at Manyara and that was around 22:00 hrs, from there PW1 did not get reach of the appellant as his phone went off. On the next morning at around 05:00, the appellant phoned PW1 and informed her that his phone had no charge and that is why it was off, however he told her that she should not be worried as the victim was safe and he would send her through a bodaboda.

When the victim arrived to PW1 upon interview as to where she had spent the night, the victim informed PW1 that she slept at a guest house and the driver/appellant raped her. From there, PW1 sent the victim to Karatu Police Station where they were issued with a PF3 and subsequently went to the hospital for checkup and according to PW3, doctor who attended the victim, she testified to have found bruises in the victim's vagina together with sperms. PW2- WP 7096

Pc Angel recorded the appellant's cautioned statement which was admitted as exhibit P1, PW2 went further to state that according to the appellant's cautioned statement he admitted to have carnal knowledge with the victim, PW2 also tendered two statements; the statement of the victim (PE2) and the statement of the guest house attendants (PE5). The statements were tendered under the provisions of section 34B of the Evidence Act, as the two were nowhere to be found for testimony purposes.

In defending his case, the appellant during cross examination admitted to have sexual intercourse with the victim however he denied to have forced her and that the victim consented to have sex with him.

After full hearing of the case, the trial court's findings were that the prosecution had proved its case beyond reasonable doubt and went on to convict the appellant and sentenced him to the term of thirty (30) years imprisonment. More so, the trial court gave an order of payment of compensation of Tshs. 1,000,000/= by the appellant to the victim as loss of income as the incident frustrated her and thus, she failed to work.

Dissatisfied with both conviction and sentence, the appellant has filed this appeal with a total of three grounds of appeal namely;

i. That, the trial Senior Resident Magistrate erred in law and in fact when he convicted the appellant without the evidence of the complainant and thus rendering the whole decision a nullity.

ii. That, the trial Senior Resident Magistrate erred in law and in fact in basing his decision on the statement of the complainant without giving reasons for the failure of the complainant to enter appearance before trial.

iii. That, the trial Senior Resident Magistrate erred in law and in fact when he failed to properly evaluate the evidence tendered before him and thus reached to a wrong conclusion of the matter.

When the matter came for hearing the parties were represented by Mr. Severin Lawena, the learned advocate and Ms. Mary Lucas, learned State Attorney. With leave of the court the appeal was disposed of by way of written submissions.

The first and second grounds of appeal shall be argued together on the basis that the appellant is challenging the decision of the trial Magistrate which solely based on the complainant/victim's statement which was tendered under section 34B (2) (a)-f) of the Evidence Act while the victim did not enter appearance to give her testimony. The appellant went on challenging the fulfillment of the requirements of section 34B on reasons that the prosecution did not give proof that the victim could not be procured, there was no proof that she might be liable

to perjury if she makes false statement and also there was no proof of a declaration that the statement was read to her. In support of his arguments the appellant's counsel invited me to the following cases **Director of Public Prosecution vs. Ophant Monyancha** [1985] TLR 127 and **Republic vs. Hassan Jumanne** [1983] TLR 432. In both cases it was stated that in order for a statement to be admitted under section 34B (2) (a) – (f) all conditions laid down in paragraphs (a) to (f) must be fulfilled/satisfied.

On the third ground of appeal, the appellant complaint is on the evaluation of the evidence by the trial court. According to him the trial court Magistrate did not evaluate the evidence properly especially the evidence in proving the ingredients of the offence to which he was charged with. According to him there was no enough evidence to prove that the victim did not consent to have sexual intercourse with the appellant.

The respondent, on the other hand, supported the appeal in its entirely on the following reasons; **firstly**, that the trial magistrate misdirected himself to convict the appellant without calling the victim to testify. According to him the best evidence in rape cases is that from the victim unless the victim is unable to give evidence, according to her it was therefore very crucial for the prosecution to have brought the victim to testify especially under the circumstances of this case where the issue of consent was questionable.

Secondly, that, the learned State Attorney submitted that the appellant was convicted basing on uncorroborated and unreliable evidence of PW1 PW2 and PW3 whose testimonies were mere hearsay and had no evidential value in law adding that PW3's testimonies failed to demonstrate whether the victim's vagina was penetrated and what were the causes of the bruises that were found in her vagina. It was her firm view that in order to prove the offence of rape the ingredient that there was penetration ought to have been established.

Thirdly, that, it was improper for the trial court to have convicted the appellant basing on the victim's statement that was tendered under section 34B of the Evidence Act as there was no proof by the prosecution that the victim could not be found. According to her, the prosecution did not make sufficient efforts to find the witness/victim. More so, the learned State Attorney submitted that section 34B provides for conditional requirement to be followed before the statement is tendered. Among others is the requirement of a ten (10) days' notice to the adverse part which was not complied with, also it was the prosecutor who tendered the said the statement while he was neither the custodian of the said document nor the author. Basing on the above explanation the learned State Attorney was of the view that the prosecution case was not proved beyond reasonable doubt.

Having considered the grounds of appeal, submission by the parties and in particular the fact that the respondent supports the appeal I wish to make the

following remarks as far as this appeal is conserved; It is the position of the law taken by the court in the case of **Selemani Makumba vs Republic,** [2006] TLR 384 that best evidence in sexual offences comes from the prosecutrix (the victim). No doubt, in the case at hand, the victim was not brought to court to tell on what befell on her. Looking at the evidence from both prosecution and defence side it is undisputed fact that the appellant and the victim had sexual intercourse, however according to the victim's statement she alleged that the appellant had forced her to have sexual intercourse while the appellant in his defence stated that the sexual intercourse was consented by the victim and therefore he did not rape her. It is at this juncture that this court is of the view that the main issue that was to be resolved by the trial court was whether the sexual intercourse was consented by the victim or not.

As already alluded above the best evidence in rape cases is that from the victim, nevertheless in the present matter it was not the case as looking at the proceedings at page 12 the prosecution informed the court of their intention to tender the statement of the victim under section 34B of the Evidence Act as the victim was no where to be found. The prosecution also served the appellant the said statement as required by the law.

I have keenly gone through section 34B (a) – (e) of the Evidence Act and for the purpose of this appeal the section is hereunder reproduced in extenso;

"34B (2) A written or electronic statement may only be admissible under this section-

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being

so tendered in evidence: Provided that, the court shall determine the relevance of any objection;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

According to this section, it is vividly that pursuant to this section, before a statement is admitted in evidence certain requirements must be fulfilled. In the cited case of **Republic vs Hassan Jumanne** (supra), Lugakingira J, as he then was stated that;

"The provisions of s.34B (2) are cumulative and all the paragraphs (a) to (f) have to be satisfied. Hence, to admit the statement, it must be reasonably impracticable to call the deponent; the statement must have been signed by him; it must contain a declaration on liability for perjury; a copy must have been previously served on the accused; the accused must have failed to serve a notice of objection within ten days; and where the deponent cannot read, it must be accompanied by a declaration of the person who read it to the effect that it was so read."

In the case at hand, as correctly submitted by both parties the prosecution did not fulfill the first requirement that they had made all efforts to procure the witness/victim. The prosecution merely stated that the victim was not found without proving as to the impracticability in finding the victim. As suggested by

the appellant's counsel in his written submission, PW1 who was the victim's employer was in a very good position to assist the prosecution in procuring the victim as she has been communicating with the her throughout, however nothing has been stated.

Furthermore, I have also gone through the complainant/victim statement, I have noted that the requirement that the statement must contain a declaration on liability for perjury was not fulfilled. As it is a conditional precedent that all the conditions stipulated in this sub-section are cumulative, therefore, the same must be satisfied by the prosecution before the statement is admitted in evidence, two conditions in this case were not complied with and therefore the statement of the victim, was improperly admitted in evidence and ought to be discounted.

In the absence of the evidence of the victim nor her statement it is clearly that the prosecution case apparently becomes weak as the remaining evidence of PW1 PW2 and PW3 is on more hearsay and does not connect the appellant with the offence charged.

Before concluding, I would also wish to hold that even the charge sheet presented for filing was seriously defective for lack of necessary ingredient that is the words "without her consent as envisaged by section 130 (1) (2) (a) which reads "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;" were glaringly

missing. I am of that view that for pertinent reason that the offence of rape in question was not that of statutory rape as it is exhibited in the charge that the victim was aged 20 years that means was it was not a statutory rape. The noted defect goes to the root of the case. Thus, not curable.

That deliberated, this appeal is hereby allowed, I quash the conviction and set aside both the sentence of imprisonment and an order of payment of compensation. I further order an immediate release of the appellant from prison unless he is held therein for any other justifiable cause.

It is so ordered.

M. R. GWAE
JUDGE
22/09/2021