

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY OF ARUSHA]
AT ARUSHA.

CRIMINAL APPEAL NO. 01 OF 2020

*(Appeal from the Resident Magistrate Court of Arusha, Hon. G. A Mwankuga
RM, in Criminal case No. 176/2018)*

RICHARD FILEX @MCHAGAAAPPELLANT

Versus

THE REPUBLIC..... RESPONDENT

JUDGMENT

26th July & 4th September, 2021

MZUNA, J.:

The appellant Richard Filex @ Mchagaa, is challenging the conviction and sentence of 30 years imprisonment imposed on him by the Resident Magistrate Court of Arusha (the trial Court). He was convicted of the offence of Rape contrary to section 130(1)(2)(e),131(1) of the Penal Code [Cap. 16 R.E. 2002]. He was acquitted for the first count of Sexual harassment contrary to section 138(D) (1) of the Penal code.

Briefly stated the said appellant is alleged to have committed this offence on diverse dates of 2017, at Olorien area within Arumeru District in Arusha Region, the appellant is alleged to have sexual intercourse with E d/o E, a girl of fourteen years.

The prosecution relied on the evidence of the victim (PW1). She alleged that when she was in standard seven she used to go to "kwa mchagaa" shop for buying some shop items. That one day the accused grabbed her and took

her to his bed where he inserted "dudu lake" into her vagina. She felt pain and was told not to tell anybody. She further said he used to do so several times but never told anybody including her mother (PW4) Faustine Edward @ Pauline Edward Munisi.

The information leading to the arrest of the appellant according to PW4, was after she was notified by her second born who received the information from Asha, a close friend of the victim, that the victim and the appellant had love relationship. That was in May, 2017. The matter was reported in May, 2018 leading to his arrest.

The PF3 (exhibit P2) which was tendered by PW5 Losimu Lanyumi Lemashoni, revealed that she was negative both in HIV and pregnancy test. She had no bruises but a widened vagina she had sexual relationship or penetrated.

In his defence the appellant said that though the victim resides close to his shop, never had any sexual relationship with her.

The trial Magistrate acting on such evidence, convicted the appellant basing on the well-known case of **Seleman Makumba v. Republic** [2006] TLR 379 which emphasised that *"in sexual offences, the true evidence comes from the victim."*

Undaunted, the appellant has lodged this appeal challenging both the conviction and sentence based on six grounds, which boils down to issues of evaluation of evidence and burden of proof.

During the hearing which proceeded by way of written submissions, Mr. Ombeni Kimaro the learned advocate appeared for the appellant whereas Ms. Akisa Mhando, the learned Senior State Attorney appeared for the respondent. Let me say from the outset that the Republic did not support the conviction and the imposed sentence.

Mr. Kimaro submitted jointly on the 1,2,3,4 and 6 ground of appeal and stated that, the prosecution did not prove the case against the appellant beyond reasonable doubt as required by the law. Comprehending his argument, he stated that the prosecution case solely based on PW1 evidence who is a victim after she alleged that on the day of the incident, she was with PW2 when she was grabbed by the appellant onto his room. That he raped her while PW2 in her entire evidence did not mention to have seen the appellant grabbing PW1 into his shop.

Mr. Kimaro argued that, he is aware of the principle that the best evidence of sexual offence comes from the victim of the alleged offence and insisted that the evidence of the victim should not be taken as a gospel truth and cited the case of **Mohamed Said v The Republic**, Criminal Appeal No. 245 of 2017, CAT at Iringa (unreported).

On the issue of penetration, he submitted that penetration was the only reason used by the trial court to convict the appellant despite the fact that medical examination of PW1 was conducted after one year had passed from the period of the alleged rape, as per the Exhibit P2 which is the PF3. He

stated that for all the year the victim would have had sex with another person rather than the alleged appellant.

He further submitted that, the examination which was conducted, did not prove that the appellant was the one who penetrated the victim neither did the examination reveal bruises or hymen. Similarly, he insisted that there was a delayed arrest which suggest the truthfulness of the prosecution evidence to be doubtful. The learned counsel cited the cases of **Emmanuel Thomas Msemakweli v The Republic**, Criminal Appeal No 91/2019 High court, Mtwara Registry and **Salum Seif Mkandambuli v The Republic**, Criminal Appeal No. 128 of 2019, CAT at Dar es Salaam (all unreported), among others.

It was his view that the trial court failed to examine the evidence and failed to consider the defence evidence. In effect he says, the prosecution failed to discharge their duty to substantiate the accusation against the accused person.

Ms. Mhando on her part said that penetration as a major ingredient of the offence of rape was not proved. That PW1 did not name the accused as the one who penetrated her but rather named one "Mchagaa" and failed to provide a peculiar description that the appellant was the one who raped her. The learned State Attorney cited the case of **Juma Marwa and Others v. Republic**, Criminal Appeal No 91/2006 Court of Appeal at Dar es salaam (unreported) which cited with approval the case of **Raymond Francis v. R**

[1994] TLR 100 which emphasized on the importance of "*a correct identification in unfavorable condition*".

That the victim did not mention the appellant as the suspect at the earliest moment as required, citing the case of **Juma Hamand v the Republic**, Criminal Appeal No. 141/2014 CAT at Dar es Salaam (unreported). She pointed out that since the incident occurred in 2017 and the victim waited until 2018 just to mention the appellant as the suspect this raised doubt.

On the issue of credibility of a witness, Ms. Mhando submitted that the credibility of PW1 was questionable since she earlier stated to have lied to the police. The trial court ought to have assessed her credibility before conviction. She therefore supported the appeal based on the reasons that the prosecution failed to prove its case beyond reasonable doubt.

Reading from the above submissions both for and against this appeal, it is clear, based on the evidence that the incident is alleged to have been committed in May 2017 and the charge was preferred in May, 2018. Similarly, PW4 who reported on the matter acted on the information received from another person who heard from Asha. The Victim never said to her about such relationship. The PF3, exhibit P3 said nothing suggesting proof of rape apart from making a conclusion "*used to sexual intercourse (sic)*".

The question is, does merely a person being used to sexual intercourse or being a 'mchagaa', suggest that it is the appellant who committed it?

Definitely, the evidence of PW1 was crucial to prove the charge. PW1, the victim, is quoted to have said that:-

"I was recorded to the Police Station though I did not state that the accused used to touch my breast and that the accused inserted 'dudu' into my vagina...I lied to the Police."

Again PW3 No. G. 1827 D/C Gilliamama a Policeman said that the victim was taken to the police on 31st may, 2017. That the victim said:

"It was difficult for her to recall, she recalled only a date when she went at shop and bought a pen and on that day she didn't agree to do the act."

Reading from the above evidence, it is plainly clear that the evidence is not watertight and there was a delayed reporting to the Police after almost one year. It was held in the case of **Marwa Wangiti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported), which was cited with approval in the case of **John Gilikola v. The Republic**, Criminal Appeal No. 31 of 1999, CAT at Mwanza (unreported) that:-

"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."

The delayed arrest of the appellant suggest that the credibility of PW1, PW2 and PW3 and their reliability are questionable.

I agree as well submitted by Mr. Kimaro counsel for the appellant and Ms. Mhando, the learned Senior State Attorney for the respondent/ Republic

that the irregularities go to the root of the case as the credibility of PW1 evidence was questionable and therefore unreliable having admitted to have lied to the police. The case of **Mohamed Matula v. The Republic** (supra) emphasized on "...*inconsistence and contradictions*" which goes to "*the root of the matter*" had to be resolved first. Had the trial court addressed her mind to such contradictions, would have come up with a different conclusion. PW2 in her testimony did not testify on the act of PW1 being grabbed by the appellant, but rather she stated that PW1 used to stand at the appellant's shop most of the time. The two witnesses talked something diametrically opposed or contradiction, the contradiction which the trial court ought to have addressed but it did not.

I am aware that the trial court in convicting the appellant, relied on the evidence of PW1 and the decision of the Court in **Selemani Makumba v Republic** (supra) which insisted that evidence of a victim is the best evidence. This should not be taken wholesale as there has been legal development on the matter as it was so held in the case of **Mohamed Said v Republic** (supra). The Court of Appeal held that:-

"We think that it was never intended that the word of the victim of sexual offence be taken as a gospel truth but that her/his testimony should pass the test of faithfulness. We have no doubt that justice in case of sexual offence requires strict compliance with rules of evidence in general and S 127 (7) of Cap 6 in particular and that such compliance will lead to punishing the offender only in deserving cases."

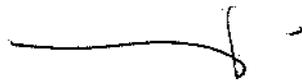
(Emphasis mine).

This case emphasizes the need to subject the evidence of the victim to scrutiny in order for the court to be satisfied that what he/she says contained nothing but the truth. It has to pass "*the test of faithfulness*". This no doubt should also be considered in line with the period the offence was committed vis a vis the date of the arrest of the offender. In our case it was never suggested that the appellant absconded such that his arrest could have taken a delayed arrest of one year. A prudent court must have put such evidence to scrutiny. That was not done.

Since PW1 knew the appellant as Mchagaa it was expected for her to name him in 2017 and not to wait until the year 2018. This raises doubt more so because PW1 declared that previously she lied to the police about the same case when she was interrogated. This casts doubt on the strength of the prosecution evidence.

Based on the above stated reasons, the charge was not proved to the required standard of proof. The conviction and sentence cannot be allowed to stand. The appellant is to be released from prison forthwith unless otherwise legally held.

Appeal allowed.



M. G. MZUNA,

JUDGE.

4th September, 2021