IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 67 OF 2021

(Arising from original economic case no. 48 of 2019 from Serengeti district court at Mugumu)

MWITA MWITA @ KYAMBARA..... APELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

13th September and 18th October, 2021.

F. H. MAHIMBALI, J.:

Mwita Mwita @ Kyambara, the appellant herein was arraigned before the District Court of Serengeti at Mugumu for the offence of rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code [Cap. 16, R.E. 2002], and the offence of preventing a school girl from attending school regularly contrary to sections 4(2) of GN No. 280/ 2002 read together with section 35(3)(4) of the Education Act [cap. 353 R.E. 2019]. It was alleged by the prosecution on the month of September in

the year 2019 at Remng'orori village within Serengeti District in Mara Region, the appellant had carnal knowledge with one XY (name disguised to cover her identity) and also prevented her from attending school.

The material facts leading to this appeal can be summarized as follows; XY a seventeen years old girl, hereinafter referred to as the victim or PW1 resides with her parent at Remngórori village in Serengeti district. She completed her grade seven in the year 2019 at Remngórori primary school and had passed with flying colors and she was expected to start her secondary education at Ring'wani secondary school in the year 2020. However, she had started having an intimacy relationship with the appellant in September, 2019 and they were also having sexual intercourse in the bushes. She testified that they had sexual intercourse three times.On the 13th January, 2020 XY told her mother that she does not want to pursue her secondary education because the appellant had promised to marry her. The victim's mother (PW1) together with the victim went to the Village Executive Officer to report the incident. The next day that was on the 14th of January, 2020 they went to Kenyana police station and gave their statement and they then went to Kenyana dispensary for medical examination . At the dispensary, the victim was

examined by IsayaTirutoza (PW3) a clinical officer. After examining the victim the report revealed that the victim did not have sexual intercourse recently and she was not a virgin. He filled in the PF3 that was tendered in court without any objection, admitted and marked as exhibit P.E.1.

The victim's evidence was also corroborated by the victim's mother (PW1) who testified that her daughter told her on the 13/01/2020 she does not want to pursue her secondary education as she wants to be married. That is when she reported the matter to PW4 and the appellant was arrested on the same day. PW4 the village executive officer also corroborated the testimony of PW1, that she reported the incident to him and the appellant was arrested.

The trial court found him with a case to answer and he fended for himself on oath by stating that he remembers that on the 13/01/2020 he was arrested and charged with the offence of impregnating a school girl who was not pregnant. He alleged there was a land dispute between the complainant and her grandmother that is why he was arrested. As the clinical officer (PW3) stated that there was no evidence of there being a recent sexual intercourse against the victim, thus she was not raped. Hence this case levelled against him is fabricated.

Upon hearing the case both sides, the trial court convicted and sentenced the appellant to serve a jail term of thirty years in respect of the first count and two years jail term in respect of the second count.

This decision did not charm the appellant, he decided to appeal to this court by filing his petition of appeal containing four grounds of appeal, namely;

1. That, the trial magistrate erred in law and fact to conviction and sentence (*sic*) the appellant without giving the right to be heard according to laws.
2. That , the trial magistrate erred in laws and facts to convict and sentence the appellant because the appellant told the court that has quarreled with the victim's mother concerning with land dispute that's why she fabricated the case against him. Also the appellant already told that quarreled (*sic*) has presented to the village executive officer at Kenyana before this case , but the court did not listen to me.
3. That the trial magistrate erred in laws and facts to convict and sentence the appellant without giving a chance for calling key witness especially her mother who knows everything about this quarreled (sic) with victim mother.

4. That the trial magistrate erred in law and fact to convict and sentence the appellant by admitted (*sic*) wrong evidence from PW1, PW2, PW3 AND PW4 which tendered by prosecution side during this case at the trial magistrate.

This appeal came up for hearing on the 13/09/2021 where both, the appellant and the respondent were present. The appellant was unrepresented while the respondent enjoyed the legal services of Mr. Isihaka , State attorney.

Submitting in support of the appeal, the appellant prayed his grounds of appeal be adopted to form part of his submission.

Replying, Mr. Isihaka stated that he supports the conviction and sentence against the appellant in respect of the first offence. However, as regards the conviction and sentence in respect of the second offence, he submitted that the offence was wrongly charged and thus the conviction and sentence are improperly reached. With respect to the conviction and sentence in respect to the first ground of appeal he replied as follows;

With the first ground of appeal , the complaint that the appellant was not accorded a right to be heard is a wrong perception, as from day one when he was arraigned before the court, he was asked to plead

to the charge and he pleaded accordingly. During preliminary hearing, the appellant took an active role. He is recorded to have disputed some facts as well as admitted some facts. During the hearing of the witnesses, the appellant was active in interrogating the prosecution witnesses and also during the tendering of exhibit (PF3). He submitted further that the appellant was well addressed in terms of section 231(2) of the CPA on right to defend himself.

On the second ground of appeal, he objected to the appellant's grief that this was a fabricated case. Going through PW1's testimony, there is nowhere, the appellant cross examined PW1 on the land dispute. Also, when the appellant was defending himself there is no where he mentioned about the land dispute, therefore it is an afterthought issue.

Regarding the third ground of appeal, it is not true that the appellant was denied the right to call his witnesses. The court's record reveals the court dully explained to the appellant his rights including to call witnesses. He is the one who stated that he does not have any witness but later on he said he had a witness but when given the opportunity to bring him he could not and he eventually closed the defense case on 18th December, 2020.Thus, with all these episode of

events, he was not denied his rights to be heard and to call witnesses as propagated.

As regards to the fourth ground of appeal, it is not true that the evidence of PW1- PW4 was unreliable or is wrong evidence. As each had given his/ her testimony under oath (under section 198 (a) CPA), in the absence of clear and cogent proof to the contrary, the reliability of these witnesses is credited as there must be credence to witnesses unless sufficiently disputed. As none of the four witnesses was charged and convicted of perjury contrary to section 102 (1) of Penal Code during court's proceedings, this ground of appeal is meritless as per law.After all, during cross examination he never questioned them to suggest commission of perjury.

Submitting on the question raised by the court, Mr. Isihaka stated that in respect of the manner the testimonies of the witnesses were recorded, it appears not being in narrative form, but he finds it, has not prejudiced the appellant, and if the appellant found it as an issue, he should have raised it in his grounds of appeal. He finally, prayed that this court finds this appeal bankrupt of merits and it be dismissed.

Rejoining, the appellant reiterated his earlier submission and prayed this appeal be allowed.

Having heard the parties' submissions and gone through the court's records, it is up to the court to tackle this appeal and decide whether it is meritorious.

The appellant's first complaint is that he was not given a right to be heard. This ground was vigorously contested by the learned state attorney. I have gone through the court's records and I am at one with the learned state attorney. The appellant was given his right to plead to the charge on 16/01/2020, and during the preliminary hearing on the 04/05/2020 he was given his right to plead and state which facts were disputed and which were not. He fully exercised his right to cross examine all the prosecution witnesses, he had the right to object to tendering and admission of exhibits which he used. Equally, he was dully given his right to defend himself on the 16/11/2020 in terms of section 231 (2) of the Criminal Procedure Act [Cap 20 R.E 2019] where he replied *"I will adduce evidence on oath. No witness to call "*. On the 30/11/2020 the appellant prayed for extension of time to call his witness but he did not bring his witness and on the 18/12/2020 he prayed to close his case. With all this, it is safe to state that the appellant was given a right to be heard and his first ground of appeal is misplaced and bankrupt of merits.

Pertaining to the second grief of the appellant that the trial court erred when it did not take into account the fact he had a quarrel with the victim's mother on land issues and that his case was fabricated. I have meticulously gone through the court's records and found that the appellant stated that the mother of the victim had quarreled with his grandmother concerning land dispute. That is why the case was fabricated against him. Going through the court's record, when PW1 was giving her testimony, the appellant did not cross examine her on the land dispute that led to fabrication of this case as he alleged. He also never brought any witness to corroborate that there was a land dispute that made PW1 to fabricate this case. In that regard, this court finds this ground devoid of merits and dismisses it.

On the third ground of appeal, it was the appellant's grief that he was not given an opportunity to call his key witnesses. As I have already discussed this issue on the first ground, this ground is baseless and it is also dismissed.

The appellant's fourth grumble is that the trial court erred when it considered the evidence of PW1, PW2, PW3 and PW4. The appellant's concern is that the prosecution witnesses had given untruth evidence while under oath. The appellant has not shown this court which

evidence is untruthful.The position of the law is very clear that appellate court can not interfere with the trial court's findings on the credibility of the witness unless there was miscarriage of justice and the trial court is supposed to state the reason for not believing that evidence. The reason of the appellate court not interfering with the evidence and credibility of the witnesses is because the trial court had the advantage of hearing, seeing and assessing the demeanor of the witnesses. There is a plethora of decisions on this matter. Just to mention a few, in the case of **BAKIRI SAIDI MAHURU V. THE REPUBLIC**, Criminal Appeal no. 102 of 2012 at page 6 where it cited the case of **OMARY AHMED V. R (1983) TLR 32 (CAT)** where the court held;

> *"The trial court's findings as to credibility is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for reasement of credibility ".*

In the case at hand, the trial court had the advantage of seeing the demeanor of the victim and other witnesses and it found them to be credible. Having stated the above, this court holds that the fourth ground of appeal is devoid of merit and it fails.

However, considering the fact that in rape cases the best evidence comes from the prosecutrix herself, this being a statutory rape, two

ingredients have to be proved. That is age and penetration. This principle was stated in **Selemani Makumba v Republic**, [2003] TLR 203 when the Court of Appeal held:

> "***True evidence of rape has to come from the victim*** *if an adult, that there was penetration and no consent, and* ***in case of any other women where consent is irrelevant that there was penetration***" [Emphasis supplied]

Similar stance was stated in **Godi Kasenegala vs R,** Criminal Appeal No. 10 of 2008 (unreported). In that case, the Court of Appeal held:

> *'It is now settled law that proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors may give corroborative evidence; see for instance,* ***Selemani Makumba vs Republic****,..,* ***Alfao Valentino Vs Republic****, Criminal Appeal No. 459 and 494 of 2002 (unreported). Since experts only give opinions, courts are not bound to accept them if they have good reasons for doing so. See C.D Desouza Vs B.R Sharma (1953) EAC4 41"*

In the case at hand, XY being 17 years old is a minor as per section 130(2)e of the penal code. As per testimony of PW1, it is sufficient to hold that the victim – PW2 is a minor. Thus, ingredient one of being a

minor has been established. However, as regards the second ingredient of rape which is penetration, the evidence is wanting. I say so because as per PW2's testimony, it is not clear that there was any penetration as asserted. The evidence of PW2 is this, I quote:

> *"We started the relationship in September, 2019 having sexual intercourse in the bushes. We did three times. On 13th January, 2020 I decided to tell my mother that I didn't want to go to school as I had promised to be married by the accused person MwitaMwita@ Kyambara....."*

In my considered view the words *"we had been having sexual intercourse in the bushes"* and *"promise to marry"* do not amount to penetration in the purview of section 130(2)e of the penal code, Cap 16 R.E 2019. Words such as taking *"his man hood and inserted into the victim's vagina"* or *"taking his dudu and put it into one's private parts while pointing the zone of it"* have been considered by Courts as amounting to penetration. The legal stand has been this, penetration however minor is sufficient to prove rape. In this case, a mere word such as *"having sexual intercourse"* without stating the manner it was executed is insufficient to prove penetration. Considering further that the PF3 (exhibit PE1) didn't establish penetration as per PW3's testimony, the proof of rape offence on the important ingredient is

wanting. In the absence of penetration, rape offence is not committed as per law.

From this I take the stand that the prosecution case was not proved beyond reasonable doubt. In fact, I am aware that the position in Selemani Makumba's case (supra) is not a suggestion that whatever a victim of rape testifies be taken as gospel truth but rather when the victim's sole testimony is absolutely trustworthy, unblemished and of sterling quality, conviction is based. In the case at hand, I am satisfied that ordinarily, victim's testimony was not enough to convict the accused person of rape because it was absolutely untrustworthy, blemished and not of sterling quality evidence in which conviction is safely based. This is because the ingredient of penetration is legally wanting.

On the issue raised by the court that the testimonies of the witnesses were not recorded in narrative form contrary to section 210 of the CPA, the law is settled that evidence not recorded in narrative form is no evidence and should be expunged. This was held in the case of **MabulaDamalu and Another v. The Republic,** Criminal Appeal No. 160 of 2015 where it was held

> "*However, we agree with Mr. Mukandara that in the present case, to let free the appellants on account of the judge's misfeasance would lead to a miscarriage of justice. In the*

peculiar circumstances of this case, including the little that could be gathered from the record, we exercise our revisional jurisdiction, quash all the proceedings, beginning from the recording of the testimony of PW1, the judgment and sentence and order a retrial of the appellants as soon as possible before a different judge and a different set of assessors. Meanwhile the appellants are to remain in remand prison to await the new trial.

The magistrate's failure to record the evidence in a narrative way, is unlawful as per law.

In totality of the trial court's evidence in record, the appeal is meritorious. Conviction and sentence meted out are quashed and set aside. In its place I order release of the accused person from prison unless lawfully held by other causes.

It is so ordered.

DATED at MUSOMA this 18th day of October, 2021.

F. H. Mahimbali

JUDGE

18/10/2021