IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 51 OF 2020

*(Originating from the District Court of Babati, Criminal Case No. 185 of 2017, (**Kamuzora, SRM**)*

ALLY JUMA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

5th July & 20th August, 2021

Masara, J.

The Appellant was charged and convicted of the offence of Rape, contrary to Sections 130(1) (2) (e) and 131 (1) of the Penal Code, Cap. 16, in the District Court of Babati (the trial court). He was sentenced to serve thirty years imprisonment. The Appellant was aggrieved by both the conviction and sentence imposed on him. In a desire to have the verdict overturned, he has preferred this appeal on the following grounds, reproduced verbatim:

a) *That, the Learned trial Magistrate erred in fact and law hence convicting the Appellant on evidence based on suspicious inconsistent and contradictory adduced by the Prosecution side;*
b) *That, the Learned trial Magistrate erred in fact and law for conducting Criminal Case unprocedurally;*
c) *That, the Learned trial Magistrate erred in law and in fact when he failed to note that the evidence given by PW5 as expert (Third part opinion) was not supposed to be admissible before the Court because the time of occasion to victim alleged to be on 20/6/2017 but the examination was done on 21/6/2017 due to this circumstances we can see the wide gape which it is not easy to determine the truth;*
d) *That, the Learned trial Magistrate erred in fact and law when he failed to note that the evidence of he PW.5 medical Doctor was full of unclear and ambiguous definition to a blunt object which penetrated and caused bruises into the Victim's (PW1) Vagina as that a penis is not a blunt object but a shift soft flash part of the body stiff during Penal ejaculation; and*
e) *That the Prosecution side failed to prove its case beyond reasonable doubt.*

The facts leading to the Appellant's conviction and sentence may be summarized as follows: The victim is the daughter of the Appellant's sister. According to the Prosecution evidence, the Appellant had been living at his sister's home up to the time of the incidence. The Prosecution stated that at around 1700 hours on 20/6/2016, PW1 (the victim) left Mapea Village heading to a market that takes place once in a month (mnadani) at Magugu. On her way, the Appellant appeared riding a bicycle. He offered to take the victim to mnadani, an offer which she accepted. Instead of heading to Mnadani, the Appellant changed directions and headed to the rice farms. He told the victim that he was going to his shamba briefly. He stopped the bicycle in the midst of the farms, pushed the victim to the ground, undressed her and forcefully raped her.

Thereafter, the Appellant carried the victim on his bicycle again and took her back to their home. Before reaching home, the Appellant dropped the victim on the way. She reached home at 2100hrs and the Appellant arrived a while later. She narrated the incident to her mother (PW2). In her testimony, PW2 informed the trial court that on the fateful day she sent the victim to the shop at around 1700hrs to buy a razor blade. She was surprised that the victim did not get back until at 2200hrs while the shop was just nearby. She then noticed something strange with the victim's movements. She inquired what had happened to her whereby the victim narrated to her the whole rape episode. PW2 examined the victim and noticed blood on her private parts and her skin tight. She later took her to the hospital. PW3, the victim's brother, testified that on the fateful day the Appellant asked for PW3's bicycle and headed to Mnadani. The Appellant left with the victim and the next day he was informed that the Appellant had raped the victim.

The other Prosecution witness was the investigator (PW4) who testified that he went to the crime scene on 24/6/2017 with the victim and drew the sketch

map. On 21/6/2017, he received the PF3 from Magugu Health Centre. He went on to say that the Appellant was arrested later for the offence of robbery. PW4 tendered the sketch map and the PF3 of the victim. According to the charge sheet on record, the Appellant was charged for the offence of rape on 13th October, 2017. The last witness for the Prosecution was PW5, the assistant medical officer who examined the victim. He testified that he examined the victim on 21/6/2017 at about 14:00hrs. He discovered that her underwear had blood stains, there were bruises in her lateral vagina canal and that the hymen was perforated.

In his defence, the Appellant denied to have raped the victim stating that the case was framed against him by his sister (the victim's mother) because they had a land dispute. He testified that on 4/12/2016, he went to his farm where he found his sister (PW2) and her son (PW3) fixing demarcations on the Appellant's farm. On asking his sister, she told the Appellant that since she was older and had a bigger family than the Appellant; thus, she would take a bigger portion of the land. She insisted that she would take 1.5 acres and the Appellant would remain with 0.5 acres. The Appellant resisted whereby PW3 attacked him. The Appellant assaulted him back by cutting PW3 with a panga on the neck. Appellant's sister promised to fix in revenge. The Appellant was arrested for the assault. He agreed to compensate PW3 and did in fact pay for his treatment. He continued taking care of PW3 which eventually led to his release. That on 3/3/2017, the Appellant met his sister on her way to the market but she did not greet him. On that day, PW2 threatened him that she was going to fix him. That she was going to report him that he raped the victim and that the government was going to jail him as the victim is a student. In response to a cross examination question, the Appellant stated that he reported the threats from her sister to the village chairman, but when her sister was summoned, she refused to appear before the chairman. He also stated that he was not staying with PW2. That he lived with his wife and his three children.

At the hearing, the Appellant appeared in person, unrepresented, while the Republic was represented by Ms Tusaje Samwel, learned State Attorney. The appeal was heard *viva voce*.

Submitting in support of the grounds of appeal, the Appellant contended that the trial magistrate erred in convicting him on weak evidence which was also contradictory. He specifically faulted the evidence of PW5 who stated that the victim's outer part was not injured. Further, he challenged the evidence of PW4 who stated that he visited the *locus in quo* on 24/6/2017 but he had received the PF3 on 21/6/2017. He also faulted PW4's evidence that the Appellant had a robbery case but could not tender any proof. He insisted that failure to scrutinize the evidence by the trial magistrate should benefit him.

On the third ground of appeal, the Appellant submitted that the evidence of PW5 was not supposed to be admitted as examination of the victim took place a day after the alleged rape. He maintained that the prosecution evidence did not state why the examination was carried on the next day. On the 4th ground, he also faulted the evidence of PW5 stating that it was contradictory because a penis is not a blunt object. Regarding the 5th ground of appeal, it was the Appellant's contention that the trial magistrate erred in convicting him basing on contradictory evidence.

The Appellant added another ground to the effect that the trial magistrate did not consider his evidence which casted doubts on the prosecution evidence. He maintained that he testified that the source of the conflict was land dispute, and he was right to defend his rights when he injured his uncle (PW3). That the trial Court was not justified to ignore that defence.

On her part, Ms Tusaje supported the conviction of the Appellant. She submitted that the evidence of PW5 corroborated the victim's evidence because when he examined her she had bruises and that there was penetration. As to the reasons

why PW4 visited the *locus in quo* on 24/6/2017, the learned State Attorney asserted that it was on evidence that PW4 was assigned the file on 23/6/2017. Regarding the date of PW1's examination, Ms Tusaje contended that the victim returned home at night on the fateful day. She maintained that PW1 was examined on the next day at 14:00hrs, which was within 24 hours of the incident. Regarding the issue of blunt object, Ms Tusaje submitted that PW5 being an expert could not say for certain what penetrated into PW1's private parts but that the description of a blunt object was given by PW5 and it includes a penis.

Responding on the additional ground, Ms Tusaje stated that the evidence of the Appellant was adequately considered by the trial magistrate whereby it was found inadequate to shed doubts on the Prosecution evidence. The learned State Attorney insisted that in sexual offences, the best evidence comes from the victim. She made reference to the case of ***Selemani Makumba Vs. Republic*** [2006] TLR 379. She urged the Court to dismiss the appeal.

A close examination of the grounds of appeal and the submissions made by the Appellant and the learned State Attorney, the determination of this appeal hinges on whether the prosecution proved the charge against the Appellant beyond reasonable doubts. I will first address the complaints raised by the Appellant regarding the trial and will later deal with the legal issues pertinent in statutory rape cases.

The first complaint by the Appellant is that the visiting of the crime scene was done on 24/6/2017 while the incident took place on 20/6/2017. This complaint was properly addressed by the learned State Attorney in her submissions. The evidence that was adduced in the trial court shows that the alleged rape took place on 20/6/2017. The victim was taken to hospital for examination on 21/6/2017. PW4 testified that he was assigned the case file to investigate on

23/6/2017 and that on 24/6/2017 he went to the crime scene. It is obvious that he could not have visited the crime scene earlier than the date the file was assigned to him. In any case, visiting of the crime scene may not be of relevance in sexual offences. What appears to be of substance is the date when PW4 received the PF3. Unless there was a typo error, it cannot be fathomed that PW4 received the PF3 before he was assigned the case to investigate.

The other complaint faults the evidence of PW5, the doctor who examined the victim. The first complaint is on the date the victim was examined. The evidence shows that the alleged rape took place on 20/6/2017 between 1700hrs and 2100hrs. According to PW1, she returned home at 2100hrs. PW2 testified that PW1 returned home at 2200hrs. Obviously, it was already late. PW2 testified that she went to get a PF3 the same night. A PF3 is issued by the police. According to PW5, he attended the victim the next day at around 1400hrs. Unless there is an expert evidence to the contrary, one cannot doubt the results of the examination which was conducted within a day of the event. I do not therefore sustain this complaint.

The Appellant also faulted the evidence of PW5 for stating that what caused the bruises in the victim's vaginal walls and hymen was a blunt object. In his view a penis is not a blunt object. I reproduce what was stated by PW5. He said:

> *"I examined her vagina and discovered that her outer part labia had no big problem but her vagina canal had bruises with reddish. This indicated that a blunt object penetrated her. They were bruises which was (sic) reddish. It may be hand or penis or gunzi. ... the bruises to woman vagina can be caused with forced sex. It is done to a woman who is not ready to perform sexual intercourse."*

From the above, there is no gainsaying that penetration was proved. PW5 was not a witness to the rape so he was not expected to pin point the instrument that penetrated the victim with certainty. His evidence was limited to what he

observed during the examination. Suggesting what can cause bruises in female vagina, PW5 stated precisely that it can be caused by forced sex, when a woman is not ready for the act. Therefore, the Appellant's complaint in this regard is not maintainable.

Further, it should be noted that rape is not proven by medical evidence alone. This fact was stated by the Court of appeal in ***Julius John Shaban Vs. Republic***, Criminal Appeal No. 53 of 2010, ***Lucas Makinga (Maduhu) Vs. Republic***, Criminal Appeal No. 269 of 2009, ***Farao Mchombe Vs. Republic***, Criminal Appeal No. 135 of 2008 and ***Shabani Ng'ombe @Kenyeka Vs. Republic***, Criminal Appeal No. 454 of 2016 (all unreported). In ***Julius John Shaban*** (supra) it was held:

> *"It is true that PF3 (Exhibit. P1) would have supported the commission of the offence.* ***But rape is not proved by medical evidence alone. Some other evidence may also prove it.*** *"*(Emphasis added)

In the added ground of appeal, the Appellant also challenged the finding of the trial magistrate for not according weight to his defence. At the outset, I decline to agree with the Appellant on this complaint. The trial magistrate at page 4 of the typed proceedings analysed the defence evidence. At page 5, the trial magistrate observed the following:

> *"The evidence of defence side appear (sic) to have no any weight as the accused allegations are only mere words without any proof that he had previous conflict with PW2 and PW3. But even if that was the case their conflict cannot in any way resulted (sic) into the victim's rape as apart from the victim, the Doctor also proved that the victim was penetrated. The accused did not establish if he had conflict with PW1, PW4 and PW5 as well."*

Whether the evaluation of the defence evidence was right or wrong, the fact remains that the trial magistrate considered the evidence given by the Appellant.

The Appellant also complained that due to inconsistencies and contradictions on the prosecution evidence, he was supposed to be acquitted. One of the

major contradiction or inconsistencies relates to the evidence of PW4. PW4 stated that he was assigned the case file to investigate on 23/6/2017, but he received the PF3 on 21/6/2017. As earlier pointed out, it is true that the record shows that PW4 received the PF3 that was filled at Magugu Health Centre on 21/6/2017. I am inclined to agree with the Appellant that such contradiction goes to the root of the matter. I hold this view because it was not possible for PW4 to be in possession of the PF3 before he was assigned the case for investigation.

Another contradiction which I find material, although not pointed out by the Appellant, is on the age of the victim. The charge sheet dated 13th October, 2017 shows that the victim was 14 years old. The Appellant was arraigned in court on 20/10/2017. The alleged rape took place on 20/6/2017. The victim (PW1), testified on 22/12/2017, but before giving her testimony it is written that she was 15 years old. It was not disclosed whether the victim attained another year in the pendency of hearing of the case. In the absence of such explanation, the record of the victim's age remains contradictory and inconsistent. Such contradiction is material. The trial court ought to have resolved the contradiction. As will be seen shortly, the Court did not address its mind to the contradiction. If the victim was 14 years old on the day she was giving evidence, then it was wrong for her evidence to be taken by affirmation before the trial magistrate addressed her mind on the requirements of Section 127 (2) of the Evidence Act, Cap. 6 [R.E. 2019].

Subsection 2 of section 127 provides:

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not to tell any lies."*

In assessing whether the victim in the instant appeal falls in the category of a "child of tender age" above provided, the answer is found under subsection 4 of section 127 of the Evidence Act, Cap. 6 [R.E 2019]. That subsection provides:

> *"(4) For the purposes of subsections (2) and (3), the expression "child of tender age" means* ***a child whose apparent age is not more than fourteen years."*** (Emphasis supplied)

As already stated, the age of the victim was not ascertained as required by law. While the charge sheet shows that the victim was 14 years old, the PF3 recorded her age as 15 and likewise the trial Magistrate wrote 15 years before she was affirmed. Incidentally, the victim testified 5 months after the alleged rape. One would have expected oral or documentary evidence to prove that she was 15 years at the time she testified. In the absence of such evidence, one would take (for argument's sake) the charge sheet to be the actual age of the victim. On the premise, the victim was a child of tender age within the meaning of the above subsection. In the situation where a child witness is to give evidence without oath or affirmation, he or she must make a promise to tell the truth and undertake not to tell lies. Section 127 above is, however, silent on the method of determining whether such child may be required to give evidence on oath or affirmation. As to the procedure to be followed, the Court of Appeal has given detailed directives on how that should be undertaken. In the case of ***Issa Salum Nambaluka Vs. Republic***, Criminal Appeal No. 272 of 2018, while making reference to its previous decision in ***Geoffrey Wilson Vs. Republic***, Criminal Appeal No. 168 of 2018 (both unreported), the Court of Appeal observed the following:

> *"We think, the trial magistrate or judge can ask the witness of a tender age such simplified questions/ which may not be exhaustive depending on the circumstances of the case as follows:*
> *1. The age of the child.*
> *2. The religion which the child professes and whether he/she understands the nature of oath.*
> *3. Whether or not the child promises to tell the truth and not to tell lies."*

In the above cited case, the Court of Appeal also referred to its earlier decision in the case of ***Hamisi Issa Vs. Republic***, Criminal Appeal No. 274 of 2018 (unreported), where the Court approved the procedure which the trial court followed before the witness of tender age gave her evidence in accordance with section 127(2) of the Evidence Act. In that case, the trial Magistrate started by asking the child witness whether or not she understood the nature of oath. Having replied to the question in the negative, the child's evidence was taken upon her promise that she would tell the truth and upon her undertaking that she would not tell lies.

Another serious but related legal anomaly pertinent to the trial of the Appellant relates to the charge preferred against him. He was charged with the offence of rape, contrary to sections 130(1)(2)(e) of the Penal Code, which is a statutory rape. A statutory rape offence requires establishment or proof of the age of the victim. The Court of Appeal in ***Andrea Francis Vs. Republic***, Criminal Appeal No. 173 of 2014 (unreported) held the following:

> *"In this case, the particulars of offence in the charge sheet indicated that PW1 was 16 years old. When she testified on 14/2/2006 the Principal District Magistrate, before putting her on oath, also indicated that she was 16 years.* ***With respect, it is trite law that the citation in a charge sheet relating to the age of an accused person is not evidence. Likewise, the citation of age by a magistrate regarding the age of a witness before giving evidence is not evidence of that person's age****. It follows that the evidence in a trial must disclose the person's age."* (Emphasis added)

Likewise in the case of ***Projestus Zacharia Vs. Republic***, Criminal Appeal No. 162 of 2019 (unreported), the Court of Appeal held:

> *"In the case at hand, as earlier indicated in the particulars of the offence, the age of the victim was not stated and* ***neither was it said in the evidence of the victim or her parent as reflected at page 8 to 11 of the record of appeal*** *.....* ***This was a mere citation by a magistrate regarding the age of the witness before giving her evidence and it was not part of the evidence of the victim.***" (Emphasis added)

In the appeal at hand, there was no evidence in the trial court that led to prove the victim's age, which is an important ingredient in the offence the Appellant stood charged. In the absence of such proof, it was unsafe to convict the Appellant. The learned State Attorney tried to justify this omission on the basis that the victim was known to the Appellant and that the Appellant did not cross examine the victim on her age. This argument cannot be sustained in light of the precedents binding in this Court. Unfortunately, most prosecutors and magistrate take the issue of age for granted. Once a decision is made to charge a person for statutory rape, the prosecution should lead evidence to justify the offence. Proof of age is the sole distinction between rape preferred under Section 130 (1) (2) (a) to (d) and the statutory rape. This anomaly alone suffices to dispose the appeal. The age of the victim was not proved, contrary to the dictates of the law. That anomaly leads me to the conclusion that the offence was not proved to the hilt.

In the upshot, the appeal succeeds. The Appellant's conviction is quashed and sentence set aside. I hereby order the Appellant's release from prison unless he is otherwise lawfully held.

Order accordingly.

Y. B. Masara
JUDGE
20th August, 2021.