IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 82 OF 2019

(C/f Criminal Case No. 96 of 2017 at the District Court of Hanag at Katesh)

MARKO MAIBASI..... APPELANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 6/09/2021.

Date of Judgment: 1/11/2021.

B.K.PHILLIP, J

The appellant was convicted of the offence of rape and sentenced to thirty (30) years imprisonment by the District Court of Hanang at Katesh. Aggrieved by that decision he lodged this appeal on the following grounds;

i) *That, the trial Court erred in law and fact when it relied on dock identification of the appellant.*

ii) *That, the trial Court erred in law and in fact by acting upon a defective charge sheet.*

iii) *That, the trial Court erred in law and in fact when it failed to scrutinize and evaluate the evidence on record.*

iv) *That, the trial Court erred in law and in fact for relying its decision on the purported PF.3*

v) *That, the trial Court erred in law and in fact by neglecting the appellant's defence.*

vi) *That the trial Court erred in law and in fact when it relied on very shaky and unsatisfactory evidence as the Prosecution failed to prove the charge beyond reasonable doubt.*

The prosecution alleged before the trial Court that on 8th day of September 2017 at Gidagamowd Village within Hanang' District in Manyara Region the appellant had carnal knowledge of "WS" (not her true name) a girl aged 15 years. To prove its case against the appellant, the prosecution paraded five witnesses. The testimonies of the prosecution witnesses gave the following story.

That "WS" who testified as PW2 was a standard six pupil at Gidagamowd Primary School. On 8th September 2017 at noon she was seated under a tree looking after cows which were grazing at an area owned by an investor. She was with her young sister, who was six years old. She saw Mr. Tarimo (PW3) who was cultivating his farm talking with the appellant who was a watchman at Katum's farm. After a while, the appellant went where PW2 and her young sister were seated. He accused them that they had let the cows graze in Katum's Farm. PW2 told him that the cows had not grazed at Katum's Farm. Thereafter, the appellant left. PW2 started stoning fruits known as

" Maduguru" from a tree. She had a piece of cloth ("Kitenge") rolled in her neck. Later on, the appellant came to back her and got hold of her "Kitenge" . He pulled her in the bush, lied her down, tore her underwear and forced his penis in her vagina. She felt pains and started bleeding. She could not make noises as the appellant throttled her. After raping her, the appellant left. PW2 manage to go home and told her mother that she had been raped. Her parents raised an alarm for help. In response, many people came to find out what was the matter, among them was Mr Tarmo (PW3). PW2 told PW3 that a person who was with him at his farm is the one who raped her. Then, PW3 informed PW2's parents that the person who was with him at his farm was a watchman working at Katum's farm and confirmed that at the time he was cultivating his farm he saw PW2 and her young sister who were looking after cows. He further explained that while he was cultivating his farm the appellant approached him and requested to be provided with drinking water. He told him that he had no drinking water. Then, the appellant told him that he was going to check if the cows which were being looked after by PW2 had not grazed at Katamu's farm. Thereafter he left. Soon after PW3 left too.

PW2 showed the direction where the appellant headed to after raping her. People who had gathered to assist PW2's parents in looking for the

rapist followed the footsteps towards the direction mentioned by PW2. They managed to find the appellant who was in a company of two people .PW2's father called Mr John Gemoo (PW4), the chairman of Hamlet Area.He informed him all what happened to his daughter and that they had already found the rapist (appellant) who was in a company of two people. PW4 came to assist them in arresting the appellant. Finally, they managed to arrest the appellant together with two people who were with him. PW2 was taken to Kambini area where she was asked to identify the person who raped her among the three people who were arrested. She managed to identify the appellant. Thereafter she was taken to Gidagamowd dispensary for medical examination and PW4 took the appellant to Katesh Police station using his Motor Vehicle. On the way to the police station, the appellant told PW4 that he raped PW2. He requested to settle the case at family level.

At Gidagamowd dispensary PW2 was attended by PW1, Mr Fredynandy Tarimo, a clinical Officer, who upon examining her found out that she was bleeding in her vagina, her clothes had blood stains and she had bruises. PW1's examination included laboratory tests which revealed that PW2's vagina had sperms but was not infected with any disease.

PW5 , H3614, Detective Constable Elias is the one who investigated the case. In his investigation he interrogated PW2 , PW3 and PW4. He visited the scene of the crime and drew the sketch map of the same. He found out that the narrations made by PW2, PW3 and PW4 during the interrogations were dovetail.

PW1 tendered in evidence the Medical Examination Report which he filled after examining the victim (PW2) . The same was admitted in evidence as Exhibit P1. PW2 tendered in court her torn underwear and underskirt which were admitted as exhibit P2 collectively. PW5 tendered in court the sketch map of the scene of the crime which was admitted as Exhibit P3.

On the other hand , the appellant denied to have committed the offence and being identified by the PW2 .He contended that the prosecution side was required to summon in court as witnesses the people who were alleged that they were in the identification parade when he was identified by PW2 .Also, he contended that according to the testimony of PW3 after requesting for drinking water he left from that place.

At the hearing of this appeal the appellant appeared in person, unrepresented whereas the learned State Attorney Diaz Makule appeared for the Respondent.

Submitting for the 1st ground of appeal, the appellant argued that the victim failed to recognize the rapist. She was unable to explain before the police the height and the physical appearance of the person who raped her and the identification parade which was conducted was illegal as it was not conducted at the police station.

Submitting in support of the 2nd ground of appeal, the appellant argued that the charge sheet was defective because there was an omission of the relevant provisions of the law to wit; Section 130 of the Penal Code.He contended that due to the alleged defect in the charge, he was unable to prepare well for his defence.

With regard to 4th ground of appeal, the appellant submitted that the Medical Examination Report (Exhibit P1) was wrongly admitted in evidence as its contents were not read over in court after admitting the same in evidence. He invited this court to expunge the same from the Court's records

The appellant did not make any submission in respect of 3rd, 5th and 6th ground of appeal.

In rebuttal, the learned Sate Attorney, Mr Diaz Makule submitted as follows; That the appellant was sufficiently identified at the identification parade that was conducted immediately after the commitment of the offence. He maintained that the said identification parade was properly conducted. Thus, it was legal.

With regard to the appellant's complaint that the charge sheet was defective, Mr Makule contended that the alleged omission of the provisions of section 130 of the Penal Code in the charge sheet is curable under the provisions of section 388 (1) of the Criminal Procedure Act, ("CPA") which provides that a Court order cannot be altered on account of any error or irregularity in a charge sheet, unless such an omission or error has occasioned injustice. He went on submitting that in this case the appellant understood the charge he was facing and managed to defend himself adequately. In his defence the appellant elaborated a lot on the information concerning the offence he was charged with. That is a proof that no injustice was occasioned to the appellant as far as the non- citation of Section 130 of the Penal Code is concerned, contended Mr Makule.

With regard to the Medical Examination Report Exhibit P1, Mr Makule argued that the proceedings reveal that the Clinical Officer (PW 1) who tendered the Exhibit P1 in Court explained very well what

transpired at the Dispensary during the examination of the Victim (PW2), thus the contents of the Exhibt P1 were made known to the appellant.

With regard to the 5th ground of appeal, referring this Court to page numbers five and six of the lower Court's judgment, Mr Makule contended that the appellant's defence was considered by the lower court. He maintained that the appellant's complaint that his defence was not considered has no merits.

Mr Makule responded to the 3rd and 6th ground of appeal conjointly. He argued strongly that the prosecution proved the offence charged against the appellant beyond reasonable doubts. The testimonies of PW1, PW2, PW3 and PW4 reveal that the appellant was identified by the victim the very day he raped her. The Medical Examination report (Exhibit P1) proved beyond reasonable doubt that the PW 2 was raped. Mr Makule was of a strong view that the evidence adduced by the prosecution left no scintilla of doubts that the appellant is the one who raped PW2.

The appellants' rejoinder was brief. He insisted that it is not true that he was identified by PW2 in the alleged identification parade. He contended that he was arrested alone.

Having analyzed the submission made by the appellant and the learned State Attorney, as well as perused the Court's records, let me embark on the determination of the grounds of appeal.

Starting with the complaint on the identification of the appellant , the testimonies of PW2, PW3 and PW4 proved that the accused person was well identified by PW2.The appellant's argument that he was not properly indentified has no basis. In its decision the lower Court did not rely on the dock identification as alleged by the appellant in 1st ground of appeal but took into consideration the testimonies of PW3 and PW4 who witnessed PW2 identifying the appellant as well as the testimony of PW2 who identified the appellant. In my opinion what matters here is the fact that the appellant was identified by PW2 in the presence of PW3 and PW4. In addition, PW3 knew the appellant.

Let me interpose a brief observation on what was alleged by the appellant in his defence. The fact that people who were with appellant when he was arrested were not summoned in Court to give evidence does not vitiate the identification of the appellant. In fact those people were not necessary witnesses because the issue pertaining to identification was witnessed by PW3 and PW4 who testified in court to that effect.

With regard to appellant's complaint that the charge sheet was defective, the Court's record shows that the appellant was charged under the provisions of section 130(1) (b) (e) and 131(1) of the Penal Code. What I have noted is that the provisions of section 130 (1) of the penal do not have subsections (b) (e).In my opinion what happened was a typing error. Subsection (2) that was supposed to be indicated between subsection (1) and (b) was omitted. The provisions of the law were supposed to read as follows; *"section 130(1) (2) (b) (e) and 131 (1) of the Penal Code"* .I am in agreement with Mr Makule that this is a fit case to invoke the provisions of section 388 (1) of the CPA which provides as follows;

Section 388 (1) " *Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of Justice, the Court may order a retrial or make such other order as it may consider just and equitable.*

I decline to agree with the appellant's argument that the above explained omission affected the appellant in preparation of his defence. As correctly submitted by Mr Makule the court's record shows that the appellant understood very well the charge he was facing. The charge sheet had all necessary information such as the date, place where the offence was alleged to take place which enabled the appellant to defence himself adequately. His defence was quite in line with the offence of rape. This ground of appeal fails to sail through.

Coming to the appellant's complaint on the admission the Medical Examination Report in evidence on the reason that its contents were not read over in Court, upon perusing the lower Court's record, I noted the same does not show that the contents of the PF were read over in Court. The position of the law is very clear that is, failure to read the content of an exhibit is fatal, thus I hereby expunge the Medical Examination Report (Exhibit P1) from the court's record. However, the lower Court's record shows that the Clinical Officer (PW1) who tendered the Exhibit P1 explained very well what transpired at the dispensary during the examination of PW2.In his testimony PW1 said clearly that upon examining PW2 he realized that she was raped and had sperms in her vagina. Not only that, in her testimony PW2 was consistent. I find no reason to doubt the veracity of her testimony as

she explained very well that the person who raped her was the one who was with PW3 at his farm. The testimony of PW2 is corroborated with the testimony of PW3 who confirmed that on the fateful day he was with the appellant at his farm and the same person (appellant) was identified by PW2 the very day he committed the offence. In addition , according to PW4's testimony the appellant admitted that he raped PW2 and asked him to settle the matter at family level.

I have considered the appellant's defence. The appellant made a general denial. He raised legal arguments on the admissibility of the PF3 which I have already dealt with. Most importantly he did not deny that on the fateful date, (8th September 2017) he was with PW3 at his farm.

In short the evidence in the court's records leaves no scintilla of doubts that PW2 was raped and the one who did that bestial act is the appellant. In addition I wish to point out that despite the fact that I have expunged the PF3 from the Court's record, the prosecution case still remains unshaken because in her testimony PW2 managed to explain very well what happened and managed to identify the appellant. It has been held several time by this court and the Court of Appeal that the best evidence in rape cases is from the victim herself. For instance in the case of **Mohamed Said Vs The Republic,**

Criminal Appeal No.145 of 2017, [CA], (unreported) the Court of Appeal said the following;

> *"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [Magai Manyama v. Republic (supra)]. We are also aware that under section 127(7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim..."*

From the foregoing, it is the finding of this Court that the appellant's argument that there was no sufficient evidence to prove the offence of rape has no merits. The prosecution proved the offence of rape against the appellant beyond reasonable doubts. Thus, I do not see any plausible reasons to fault the decision of the lower Court.

In the upshot, this appeal is dismissed in its entirety.

Dated this 1st day of November 2021.

HIGH COURT OF TANZANIA

B.K.PHILLIP

JUDGE.