IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 118 OF 2020

(Originating from RM's Court of Arusha, Criminal Case No. 107 of 2019)

ELIAPENDA ZEPHANIA ZAKARIA @ KICHECHE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

24/9/2021 & 29/10/2021

ROBERT, J:-

The Appellant, Eliapenda Zephania Zakaria @ Kicheche, is currently serving thirty (30) years imprisonment upon conviction by the Resident Magistrates' Court of Arusha for the offence of rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap 16 (R.E 2002). The Appellant filed this appeal to challenge the conviction and sentence imposed by the trial court.

Briefly stated, the background of this matter reveals that, on the night of 28 day of January, 2019 at about 22.00 HRS when the victim (PW1) was on her way home from her businesses, she was suddenly strangled by a person from behind. She managed to turn around, faced

her assailant and managed to identify him as the Appellant by the help of some light from a bulb. The Appellant with his fellow, one Kimeleo attacked her and took her down where they undressed her and raped her while throttling her to stop her from shouting. She got assistance from a man who flashed a torch and cried for help from other people as the Appellant and his fellow ran away. Later on, the Appellant was apprehended and charged with rape. After a full trial, he was convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by both conviction and sentence imposed against him by the trial court, the Appellant filed this appeal armed with seven grounds as follows:-

1. *That, the learned trial magistrate grossly erred both in law and fact by holding and making findings to convict the appellant with the offence which was not proved at all.*
2. *That, the learned trial RM erred in law and fact for holding and making finding to convict the appellant without noting that the charge sheet is defective.*
3. *That, the learned trial RM grossly erred in law and fact by failure to warn himself before to convict the appellant through insufficient and contradiction evidence as a basis of convicting the appellant.*
4. *That, the learned trial RM grossly erred in law and fact when he relied on identification to convict the appellant without noting that the condition of identification at scene of crime was not favourable.*
5. *That, the learned trial RM grossly erred both in law and fact by holding and making findings to receive and admit the PF3 as exhibit*

on this case while the procedure of receiving and admitting the exhibit were not followed. The said exhibit P1 was illegally admitted since its content was not read loudly before the court to enable the appellant to understand and challenge it during the cross examination.

6. *That, the learned trial magistrate grossly erred both in law and fact by failing to comply with the mandatory term of law and believed that the appellant understand the contents from P.H which is not true as the appellant said 'I dispute all fact save from P.P'*
7. *That, the learned trial RM erred in law and fact when the considered weak, incredible and unreliable testimonies given by prosecution witnesses as a ground of convicting the appellant.*

At the hearing of the appeal the Appellant appeared in person without representation while the Respondent enjoyed the legal services of Ms. Mary Lucas, learned state attorney.

When probed to argue his appeal, the Appellant prayed for the grounds of appeal to be adopted as they appear in his memorandum of appeal without additional explanation.

Opposing this appeal, counsel for the Respondent decided to argue all the grounds of appeal jointly and agreed with the conviction and sentence passed by the trial court.

It was her submission that, the prosecution's case was proved beyond reasonable doubt. The Applicant was charged under section 130 (1) (2) (a) together with section 131 (1) of Cap. 16 R.E 2002. The said

provisions criminalize a person who is having sexual intercourse with a woman without obtaining her consent. From page 6 to 7 of the trial court proceedings, she explained how the appellant attacked her and had sexual intercourse with her without her consent while he was assisted by another person named Kimirei who strangled the victim. The Appellant was identified by the victim as the person who was residing on the same street with her and popularly known by the name of "Kichele". The victim also testified the act of rape took ten minutes under the light from a bulb.

She submitted further that, the doctor who performed the medical examination to the victim (PW3), testified at page 19 of the trial court proceedings that, he found bruises at the victim which proved that there was penetration with a blunt object. He argued that, the PF3 was admitted as exhibit P1 although it was not read out in court. She maintained that, under section 127 of the Evidence Act, the evidence of the victim of sexual offence may result into conviction if the court is satisfied that the child is telling the truth.

Furthermore, she maintained that, the evidence of PW1 was truthful and ought to be believed because she managed to identify the Appellant at the scene as the person living on the same street as her, she was fought unconscious at the scene of crime by the ten cell leader

(PW3) and Simon Karao (PW2) who is the resident of that area. Further to that, PW2 corroborated her evidence by testifying that he found the Appellant on top of PW1 and when he lighted his torch the Appellant ran away from the scene of crime. She cited the case of **Seleman Makumba vs Republic** (2006) TLR page 200 where the Court held that the best evidence of rape should come from the prosecutrix or victim and prayed for the appeal to be dismissed with costs.

In his brief rejoinder, the appellant told the court that, he was arrested on 29/1/2019 at 16:00 HRS while heading back home and taken to Chekereni police station where he stayed for seven days without his statement being recorded. Thereafter, he was moved to Usa river police station where he stayed for 21 days and his statement was recorded there. He maintained that kicheche is not his name as alleged by the prosecution.

Having given deserving consideration to the grounds of appeal, submissions from parties and records of this matter I will now consider the merits of this appeal in the light of the grounds of appeal filed by the appellant.

Starting with the second ground of appeal, the appellant alleged that the trial court convicted him based on defective charge sheet. The

question for determination by this Court is whether the charge sheet was defective. Since the Appellant prayed for the court to adopt his grounds of appeal as they are, he did not elaborate on the alleged defects in the charge sheet. Similarly, the learned counsel for the Respondent did not touch on this issue in her submissions. Having revisited the records of this matter particularly the charge sheet, this Court finds no defect in the in respect of the charge sheet read to the Appellant by the trial Court. Similarly, the proceedings of the trial court indicates that the question of charge sheet was not raised at the trial Court. I think it could have been more helpful for the Appellant to point out what he considers to be a defect in the charge sheet in order for this Court to make a determination. Unfortunately, that was not done. Consequently, this Court finds no merit on this ground of appeal.

Coming to the third ground of appeal, the Appellant alleged that the evidence by the prosecution witnesses was marred with contradictions. Yet again, as the Appellant failed to seize the opportunity granted to him to address the Court on the alleged contradictions in the prosecution evidence, it is hard to for the court to know and determine on the alleged allegations. However, having looked at the prosecution evidence in totality, this Court could not find any contradictions in the

testimony of witnesses which the trial Court ought to have addressed in its decision. That said, I find no merit on this ground of appeal.

The fourth ground of appeal takes this Court to the question whether the Appellant was properly identified at the scene of crime. The appellant alleged in the ground of appeal that he was not adequately identified at the scene of crime whereas the learned counsel for the Respondent was of the view that the identification of the appellant was watertight based on the evidence of the victim himself corroborated with that of PW2.

The alleged crime took place at around 22:00 HRS and the prosecution, as stated earlier, relies on the evidence of PW1 and PW2 to establish identification of the Appellant. PW1 testified that she identified the Appellant at the scene, there was a light from a bulb, she confronted the Appellant, she knew the Appellant before the incident as they live nearby, the Appellant undressed her, she identified the Appellant by name at the scene of crime, and the incident persisted for about ten minutes. As for PW2, he alleged that having heard a person screaming he left the house and went to the scene with a torch. The scene was about 10 to 20 paces from his house, he saw the Appellant on top of the victim (PW1). He switched on his torch and saw the appellant putting on his trousers. There was a bulb light nearby and light around the scene

though not intensive that's why he went out with his torch. He knew the Appellant as they reside in the same village. Now the question to be asked here is whether the condition was favourable for visual identification of the appellant.

Although PW1 alleged to have identified the appellant via the bulb light, Pw2 testified that the bulb light was not intensive that's why he went out with his torch and he identified the appellant based on the light of the torch. As expressed in the celebrated case of **Waziri Amani vs Republic** (1980) TLR 250, in order to rely on the evidence of visual identification, the court should make sure that all possibilities of mistaken identity are eliminated and be satisfied that the evidence before it is absolutely watertight.

In the case of **Gerald Lucas vs The Republic**, Criminal Appeal No. 220 of 2005, CAT at Mwanza (unreported), on the issue of visual identification, it was held that the court should consider the following before arriving at its decision: -

> *"**First** – how long did the witness had the accused person under his/her observation.*
>
> ***Second** – What was the estimated distance between the two people.*
>
> ***Third** – If it were at night (as in the instant case) which kind of light did exist.*

Fourth *– had the witness seen the accused person before the day and time of crime. If so when and how often.*

Fifth *– the whole evidence before the court considered, are there material impediments or discrepancies affecting the correct identification of the accused by the witness.*

Sixth *- in the course of the observation of the accused by the witness, was there any obstruction experienced by the witness, obstruction which may have interrupted the latter's concentration."*

Considering that the Appellant was well known to both PW1 and PW2 as a neighbour living nearby, PW1 had the Appellant under her observation for almost ten minutes as she was confronting him at no distance during the alleged crime, there was bulb light relied on by PW1 throughout this period and torch light used by PW2 who came from a distance of about 10 to 20 paces, and the fact that there is no evidence of any material impediments or obstruction experienced by the two witnesses which may affect the correct identification of the Appellant, this Court finds that the Appellant was sufficiently identified at the scene of crime.

On the fifth ground, the question for determination is whether exhibit P1 (PF3) was properly admitted. Counsel for the Respondent admitted that the trial court did not cause PF3 to be read over after its admission in order for its contents to be known to the Appellant. This omission is capable of vitiating the weight of evidence attached to

exhibit P1 and therefore capable of justifying expunging the said exhibit from the records of this matter. My views are fortified by the holding in the case of **Ntobangi Keyla and Another vs The Republic**, Criminal Appeal No. 234 of 2015 (unreported), where the Court of Appeal of Tanzania observed that;

> *"It was wrong for the trial court to receive cautioned statement as evidence without ordering the same be read over...."*

In the present case, the PF3 having been admitted as exhibit was not read over in court. Accordingly, this Court has no option but to expunge it from the body of evidence in this case as I hereby do. Nevertheless, this piece of expert evidence is salvaged by oral evidence adduced by medical practitioner (PW5) who testified that the victim went to her office complaining about pains from her genital area and after examination he found bruises which indicated that she was sexually penetrated by a blunt object.

On the sixth ground, the appellant faulted the trial Court for believing that the he understood the contents of preliminary hearing as he disputed all facts save for the P.P. Although counsel for the Respondent did not touch on this issue, having gone through the trial court records especially during the preliminary hearing, it is obvious that the facts were clear and understandable and the Appellant signed the

list of undisputed facts which indicates that the Appellant had disputed all facts save for the PP. Given that, the Appellant had disputed all facts, this court finds that there is nothing in the preliminary hearing which could be taken to have implicated the Appellant unfairly as the prosecution remained with the burden of proving all the allegations levelled against the appellant by adducing evidence in court. Accordingly, the complaints that the appellant did not understand the P.H is a mere afterthought and does not hold any weight at this stage.

On the first and seventh grounds, the central question for determination is whether the prosecution proved their case beyond reasonable doubts. Considering the totality of evidence adduced at the trial Court as discussed here, this Court is convinced, as rightly submitted by the learned counsel for the Respondent, that the prosecution proved their case beyond reasonable doubt. The Applicant was charged and convicted under section 130 (1) (2) (a) together with section 131 (1) of Cap. 16 (R.E 2002) for having sexual intercourse with a woman without obtaining her consent. He was identified at the scene of crime as a person who committed the alleged crime, the Doctor (PW5) established that indeed the victim was sexually penetrated with a blunt object. The prosecution relied heavily on the evidence of

identification which is discussed extensively in the fourth ground of appeal. Thus, I find no merit on these grounds.

Consequently, I hereby dismiss this appeal for lack of merit.

Ordered accordingly.

K.N.ROBERT
JUDGE
29/10/2021