THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 65 OF 2021
(Arising from the Court of Resident Magistrate of Mbeya at Mbeya in Criminal Case No. 145 of 2019)

ELIAS KANDOMASO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 1st & 15th November, 2021

KARAYEMAHA, J

The Appellant, Elias s/o Kandomaso, was arraigned before the Court of Resident Magistrate of Mbeya at Mbeya for the offence of rape contrary to section 130 (1), (2) (e) and 131 (3) of the Penal Code Cap 16 R.E. 2002. (now 2019). It was alleged that on 11th June, 2019 at Mwasanga area within the City and Region of Mbeya, he had carnal knowledge with a four (4) years girl. To disguise her identity, I shall refer her as 'AS' or as 'PW1'. He was tried, convicted and sentenced to a life imprisonment. The appeal is against both conviction and sentence.

In a bid to support the charge, the prosecution side summoned six (6) witnesses namely, AS (PW1), Kayombo Aneto (PW2), Gido Nchimbi (PW3), Agano Noel Mponde (PW4), WP 10539 D/CPL Elizabeth (PW5) and

Dr. Ngaina Mbiru (PW6). In addition, one exhibit namely the PF3 was tendered and admitted as exhibit P1. In short, the substance of the prosecution evidence upon which the conviction of the appellant was grounded was that on the material date and place alludded to above, AS was playing with her friends Mori and Siku. The appellant (her uncle) appeared and called her. When she refused he forcefully held her hand and took her in his room. No sooner had they entered the room than the appellant undressed her clothes and undressed his. Shortly after, the appellant produced his penis (dudu) and inserted it in her vagina. The pains felt made her cry. As luck had it, PW2 heard the cry which aroused his curiosity. So, he went to the appellant's door and knocked but unfortunately there was no reply except the cries. He resorted to break the door. On shining his mobile phone's torch, Alas! he saw the appellant wearing his clothes and on checking the victim, he saw blood on her thighs. Since the appellant wanted to escape, he got hold of him and beat him. The appellant could not stand the beating. So, he raised an alarm which invited PW3, the ten cell leader and other people to rush to the scene of the crime. On asking, he was told that the appellant raped AS. He confirmed by seeing blood on her thighs. AS narrated the ordeal to all people including PW3 and mentioned the appellant to have raped her. The matter was reported to police and the local leaders. At police, the victim

was given a PF3 (Exhibit P1) that enabled her to undergo medical examination before PW4, the doctor who saw bruises on the victim's vagina and clotted blood stains. She concluded that the victim was forceful sexual intercourse. He then referred her to Meta hospital for stitching. Exhibit P1 revealed that she was sexually assaulted.

The appellant vehemently denied committing the offence both at police before WP 10539 D/CPL Elizabeth (PW5) and the trial court. Posing as DW1, the appellant testified on the contrary that PW1, PW2 and PW3 once threatened to cook a case against him and testify against him in court. The reason was that PW3 wanted to inherit their father's properties. He called Flora Mezita Kandomaso (DW2) who told the trial court that she was not present during the incident but heard that the appellant raped the victim.

Apparently, the trial Magistrate did not buy the appellant's story. He was satisfied that the prosecution proved the case beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to serve life imprisonment. To express his dissatisfaction, the appellant has emerged in this court with a petition of appeal raising six (6) grounds. Having scanned through the evidence, they converge to three main complaints. They are:

1. That the trial court completely ignored the defence evidence.

2. The prosecution case was not proved beyond reasonable doubt.
3. That PW6, the doctor did not swear before testifying.

Let me start with complaint raised by the appellant that his defence was ignored or not considered by the trial court in evaluating the evidence. A settled position is that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives at the conclusion of the case for and against issues framed for determination. Failure to consider the defence is fatal to the trial or proceedings as per the case of ***James Bulow & others v Republic*** [1981] and ***Jonas Bulai v Republic***, Criminal Appeal No.49 of 2006 (unreported) and a score of other decisions have long settled the position in this area. Underscoring further, the Court of Appeal of Tanzania in ***Jonas Bulai case*** (supra) insisted that it is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty. The Court of Appeal of Tanzania gave a solution in case the 1st appellate court faces this situation. It observed in the case *of* ***Nyakwama s/o Ondare @ Okware v The Republic***, Criminal Appeal No. 507 of 2019 at page 16 that:

> *"Indeed, if the task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion; more so where failure to consider the appellant's defence is remarkably an issue in a given appeal."*

In the present case, I have noted from the grounds of appeal that the complaint on the failure of the trial court to consider the appellant's defence was vividly expressed in grounds one and two of the petition of appeal.

In her submission, Ms. Sarah argued that the appellant's defence was considered. Responding to her invitation, I navigated through page 4 and 5 of the trial court's judgment. It is crystal clear that the trial court considered the defence against the prosecution evidence by way of evaluating it. In the end the trial court held as follows:

> *"She (sic) denied to have committed the offence and said that witnesses PW1, PW2 and PW3 had fabricated the case against him. He did not say the source of the conflict which had led to this miserable case though when cross-examined he said that it would be a way to inherit the properties of their late father. No declaration was made. DW2 who seems to be related to the accused only told the court that she had heard (sic) that the accused had raped ABC, she (sic) denied to have been at the scene of the crime.... There is nothing is (sic) defence. There was no proof of fabricating the case against the accused."*

Conceptualizing the whole judgment of the trial court it goes without saying that apart from summarizing the defence evidence the trial Magistrate went further to test it whether it displaced the prosecution case or not. Satisfied that it did not, he concluded that the defence was weak and could not disturb the cogent prosecution evidence. Basing on this

discussion, I find ground one of appeal wanting in merits. It is hereby dismissed.

This conclusion leads me to the second complaint that the prosecution case was not proved beyond doubt. Under this complaint, two important issues will guide me. They are:

1. Whether AS was raped.
2. If the answer in 1 is in affirmative, whether it was the appellant who raped her.

On this, I shall be guided by the evidence of PW1, PW2 and PW4 as well as the PF 3 exhibit P 1 and the law.

The law on rape is very clear. Section 130 (2) of the Penal Code, makes it an offence of rape, for a male person to have sexual intercourse with a girl or woman. The law provides further under subsection (4) that the offence of rape is proved by penetration even if it is slight. It states as follows:

> *(4) For the purposes of proving the offence of rape-*
> *(a) Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

It is now a common principle that true evidence must be given by the victim. This principle was emphasized by the Court of Appeal in cases

of ***Seleman Makumba v Republic*** (supra) and ***Julius John Shabani v The Republic***, Criminal Appeal No. 53/2010 CAT, Mwanza (Unreported)

> *"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 woman where consent is irrelevant that there was penetration."*

It suffices to say at this moment, therefore, guided by the foregoing statutory and case law, that penetration being the necessary ingredient must be proved beyond reasonable doubt not inferred. The evidence must be led to prove every essential ingredient of rape, be it statutory or conventional rape.

In this case, loudly and boldly, the victim narrated to the trial court that after the appellant had taken her in his room he undressed her and himself. He proceeded to insert his *dudu* in her private parts. This means that a penis was inserted in her vagina. PW2, PW3 and PW6 all saw blood on AS' thighs and private parts. Further to that PW6 on examining AS found clotted blood on her vagina area. He also testified that he sent AS to Meta Hospital where she had her vagina stitched. Exhibit P1 also intimates clearly that AS was penetrated by a blunt object. In the premises, I am of the considered view that AS was raped. I am led to this end by the strong evidence produced by the prosecution. This piece of evidence is sufficient to prove that there was penetration and/forceful sexual intercourse in

terms of section in terms of 130 (4) (a) of the Penal Code. The first issue is now answered in affirmative.

The issue that has exercised my mind is who raped her? In rape cases, the prosecution is duty bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of ***Maliki George Ngendakumana v. R,*** Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported) that:

> *"... it is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it.*

In this case the prosecution has strong evidence proving that PW1 was raped. I also agree with Ms. Sarah that it was none other than the appellant who raped AS. The evidence of PW1, PW2 and PW3 destine me to that conclusion.

In examining the evidence in record, it is true beyond doubt that PW1 and the appellant know each other very well and are related. In her evidence PW1 referred the appellant as her uncle. Therefore, there could be no mistake in identifying him. He was arrested at the scene of the crime and so no need of invoking the visual identification principles. However, in the circumstances of this case, PW1 recognized the appellant.

She testified further that it was him who held her hand from the area where she was playing with her friends, namely, Mosi and Siku. On observing the evidence critically, PW1 illuminated further that the appellant took her in his bedroom, undressed her and himself and ultimately inserted his penis in her vagina. PW1 felt severe pains in the process. The pains which made her cry and aroused PW2's attention and curiosity.

In his evidence PW2 clearly enlightened on the incident. In fact, he found the appellant and the PW1 in the same room. By the time he was entering, the appellant was dressing. It was PW2 who got hold of the appellant, beat him and made him (appellant) raise an alarm. The appellant's alarm caused PW3 to converge at the scene of the crime. He heard AS mentioning the appellant as the person who raped her.

I have read the evidence of PW1, PW2 and PW3 line by line. Fortunately, their testimonies are very short. I have noted that after concluding their testimonies, they were not cross-examined on crucial aspects by the appellant on the validity of the contentions that he, he held AS' hand and took her to his room, inserted his dudu in AS' private parts, that was found in the room dressing after raping AS, that he was mentioned before the ten cell leader and PW3. He never cross-examined PW6 on the findings that AS' vagina was torn.

In the premises, I am of the considered view that failure of the appellant to cross-examine the appellant on crucial issues incriminating him is deemed to have accepted the truth what PW1, PW2, PW3 and PW6 told the trial court. This principle was accentuated in ***Nyakwama s/o Ondare @ Okware*** (supra) the CAT relied on the decision of **Nyerere Nyague v R,** Criminal Appeal No. 67 of 2010 (unreported) and ***Cyprian Kibogoyo v R,*** Criminal Appeal No. 88 of 1992 and observed that:

> *"As a matter of principle, a party who fails to cross – examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

Admittedly, in the instant appeal, as the appellant did not cross-examine the prosecution witnesses contentions in their evidence on issues which I find to be crucial in determining the guilty or otherwise, he is estopped to deny that the fact that he did not rape the victim.

Immediately connected to the above conclusion is the victim ability to mention the appellant at the earliest time. She mentioned him immediately after he was arrested at the scene of the crime and at police before PW5. In principle, mentioning the offender at the earliest time adds assurance and credibility to the witnesses' testimony. See the case of ***Marwa Wangiti Marwa & another v. R,*** [2002] TLR 39.

Another appellant's onslaught in the prosecution is the contention that they failed to bring Mosi and Siku to corroborate PW1's evidence. Contemplating on the nature of the offence and circumstances it was committed, I agree with Ms. Sarah that they had no useful evidence. My unfleeting review of the evidence reveals that the appellant took her from where she was playing. Mosi and Siku being children could not make follow up to uncover something they even could not think of. The appellant locked the door behind him to curtail any ingress, intimating ill intention of raping AS. In view of that he could not let anyone read his intentions prior satisfying his lust. More importantly, Mosi and Siku did not witness the rape incident. So they had nothing to offer with regard to proving the ingredient of rape. In fine, therefore, Mosi and Siku had no corroborative evidence with regard to the rape incident.

The final appellant's complaint is that PW6 testified without taking oath. In a bid to stress that PW6 testified under oath, Ms. Sarah was quick to refer this court to page 23 of the typed proceedings. I have respectfully, visited the page and studied PW6's introduction exhaustively. After doing so, I have come out with a conclusion that the appellant's complaint is baseless. Prior testifying, PW6 informed the Court that his religion is Moslem. Then the court caused him to affirm. That being the court's record, I have no flicker of doubt in my mind that PW6 affirmed prior

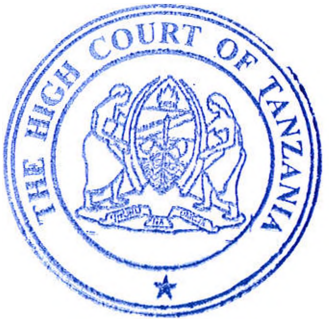
testifying and therefore hold that the appellant's complaint is lacking in merits.

My findings on the whole evidence procured at the trial and persuaded by the submission for the Respondent by Ms. Sarah and grounds of appeal preferred by the appellant destine me to the conclusion that unequivocally, the prosecution proved the charge of rape against the appellant beyond reasonable doubt.

In the final analysis I hold that the appeal is unmeritorious. Consequently it is dismissed in its entirety.

It is accordingly ordered.

DATED at **MBEYA** this 15st day of November, 2021



J. M. KARAYEMAHA

JUDGE