IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 56 OF 2021

(From the decision of the Resident Magistrates' Court of Songwe at Vwawa in Criminal Case No. 49 of 2020)

CHRISPIN CHARLES MWAVILUNDO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 04/10/2021
Date of Judgement: 08/11/2021

MONGELLA, J.

Chrispine son of Charles Mwavilundo, the appellant herein, was charged with the offence of rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap 16 R.E. 2019. He was arraigned in the Resident Magistrates' court of Songwe at Vwawa, (the trial court).

The facts as laid out in the charge are to the effect that on 25th February 2020 at about 00:30hours at Ilasilo 'A' village, in the district and region of Songwe, the appellant unlawfully had carnal knowledge of a woman (hereinafter referred to as the victim) aged 85 years. Following being

satisfied that the prosecution had proved the case beyond reasonable doubt, it proceeded to convict the appellant and sentenced him to 30 years imprisonment. Aggrieved by the decision he preferred this appeal on five grounds.

During the hearing of the case, the appellant fended for himself. He prayed for his grounds of appeal to be adopted as his submission in chief and to hear first from the respondent. I shall therefore summarise his grounds of appeal as his submission.

On the first ground, the appellant faults the decision of the RM's court on the ground that the decision relied on the evidence of PW1 which was doubtful as PW1 did not identify the appellant through her eyes, but through his voice.

On the second ground, the appellant claims that the Hon. trial Magistrate erred in law and facts by believing the testimony of PW4, a medical doctor, who examined the victim, but could not state the time and date the incident occurred and who did the act.

With regard to the third ground, the appellant challenges the trial court decision on the ground that his evidence and that of PW3 was not considered as required under the law.

Concerning the fourth ground, the appellant claims that the Hon. trial magistrate erred by convicting him relying on the prosecution evidence

which was doubtful and did not prove the case beyond reasonable doubt.

On the last ground, the appellant faults the trial court's decision on the ground that it failed to evaluate the evidence of prosecution witnesses as there was no one who saw the appellant committing the offence.

The respondent was represented by Ms. Xaveria Makombe, learned state attorney. Ms. Makombe opposed all grounds of appeal. Replying on the first ground, which is on identification, Ms. Makombe argued that the victim identified the appellant through solar energy lights. Referring to the testimony of the victim as seen at page 10 of the proceedings, she submitted that the victim testified that the appellant, who is her tenant, knocked her door at 00:00hours while she was sleeping. She added that the victim testified further that upon recognizing his voice, the victim opened the door and saw it was really the appellant at the door. The appellant entered her house, grabbed her and took her to bed whereby he raped her. The appellant left her bleeding on her private parts and feces came out. Her daughter then came and cleaned her. She added that the victim said that there were solar energy lights in her bedroom and living room, which enabled her to see the appellant clearly.

Ms. Makombe further argued that the testimony of PW1 was corroborated by that of PW2 and PW3, who testified to have seen the appellant coming from the victim's house with his chest naked and blue shorts. She added that PW2 and PW3 also managed to see the appellant through solar energy lights.

Considering the testimonies of the witnesses as above; she argued that the identification of the appellant was therefore not of voice, but visual identification. She added that since the victim knew the appellant from before, the identification was that of recognition, thus more credible. She referred the Court to the case of ***Nebson Tete vs. The Republic***, Criminal Appeal No. 419 of 2013 (CAT at Mbeya, unreported).

Replying to the second ground, Ms. Makombe contended that PW4 testified on what he did in the course of examining the victim, who went with the PF3. That, PW4 testified that he noted that the victim had bruises and blood in her private parts and thus raped. He tendered the PF3 as exhibit to that effect. She contended further that the doctor could not tell when the incident occurred and who did it. He only testified on the examination he conducted and the results he found.

With regard to the third ground, Ms. Makombe challenged the appellant's claim that his evidence and that of PW3 were not considered. Starting with the appellant's evidence, she referred the Court to page 9 of the trial court's judgment contending that it is clear on that page that the appellant's evidence was considered.

With regard to the evidence of PW3 she argued that PW3 testified to have heard an alarm from the victim's house and decided to go there. On the way he saw the appellant coming from the victim's house with naked chest and blue shorts. She added that PW3 further testified that he found the victim bleeding in her private parts with feces whereby her daughter

came and cleaned her. She argued that the evidence of PW3 corroborated that of the victim.

On the fourth ground, Ms. Makombe argued that the appellant was charged with rape of an 85 years old woman. That, since the victim was an adult, the prosecution had a duty to prove that there was penetration with no consent. She argued further that the victim, PW1, proved that there was no consent as she testified that the appellant took her by force and as a result blood oozed from her private parts. She added that PW2 and PW3 who saw the appellant coming from the victim's house with naked chest and also saw the victim bleeding from her private parts corroborated the victim's testify. She contended further that the testimony of PW4, the medical doctor, and PF3 tendered as exhibit proved further that there was no consent as the victim was found with bruises and blood on her private parts. She further referred to the testimony of PW4 who interrogated the appellant and tendered exhibit P2, the cautioned statement of the appellant showing that he confessed to the crime. Considering the evidence as a whole, Ms. Makombe concluded that the case was proved beyond reasonable doubt.

On the last ground, Ms. Makombe conceded that from PW2 to PW5, there was no eye witness to the rape. However, she contended that the appellant as the best witnesses identified the appellant through the solar energy light. She referred the Court to the case of ***Selemani Makumba vs. Republic*** [2006] TLR 386.

Ms. Makombe concluded her submission by supporting the conviction and sentence of the trial court. She prayed for the same to be upheld by this Court.

In rejoinder, the appellant denied to have committed the offence. He argued that on the material date the incident really occurred, but the victim claimed to have been penetrated through witchcraft. He added that the victim's testimony that he knocked the door and she opened was doubtful as the victim never took any precautions to know who it was before opening the door. He faulted the testimonies of the neighbours who claimed to have heard an alarm from the victim's house arguing that the victim testified that she did not raise any alarm as the appellant strangled her on the neck. He as well argued that there were no electric lights outside the victim's house, thus wondered how the neighbours could see him coming out of the victim's house as they claimed. He added that the doctor also testified that he found the victim with bruises, but was not raped. He prayed for the Court to acquit him.

After considering the arguments by both parties, I find that the grounds of appeal can be condensed into one major ground being that "*whether the prosecution proved its case beyond reasonable doubt*." In the course of deliberating on this ground, I shall re-evaluate the evidence on record, being a first appellate court, thus empowered to do so. See: See: ***Musa Jumanne Mtandika v. The Republic***, Criminal Appeal No. 349 of 2018 (CAT at Dodoma, unreported); ***Yasin Mwakapala v. Republic***, Criminal Appeal No. 604 of 2015 (CAT, unreported); and ***Prince Charles Junior v. Republic***, Criminal Appeal No. 250 of 2014 (CAT at Mbeya, unreported).

In the matter at hand, it is clear that the victim of the rape incident is an adult; a woman aged 85 years by then. Under the premises, two main ingredients had to be proved for a conviction to be entered. These are penetration and lack of consent. See: **Section 130 (2) (a) of the Penal Code, Cap 16 R.E. 2019**. Considering the testimony of the victim, PW1, and the medical report, in exhibit P1 (PF3), it is undisputed that the victim was penetrated without her consent. The victim testified that she was grabbed, taken to bed by force and raped. As a result she suffered bruises and blood came out of her private parts, something which was confirmed by PW4, a medical doctor who attended her.

In convicting the appellant, who was the accused in the trial court, the prosecution had the duty to prove beyond reasonable doubt that it was really the appellant who committed the offence. It should be noted, as testified by prosecution witnesses, that the offence occurred at night at around 00:30hours. In the premises, the question of identification becomes paramount.

It was testified by PW1, PW2, and PW3 that the appellant was the tenant of the victim in a room adjacent to the victim's house. In his defence, the appellant denied to have rented a room at the victim's house. He, in fact, denied even knowing the victim. I however, do not agree with his testimony simply because, as testified by PW3, the appellant was arrested on 08th March 2020, in his room at the victim's compound, preparing to escape. PW3 testified that they were informed on that day that the appellant had come back to collect his properties in that room. This fact was not denied by the appellant in his defence nor cross examined by

him when PW3 adduced the evidence. The law is trite that failure to cross examine a witness on a certain fact entails acceptance of the facts adduced by that witness. See: See: ***Martin Misara v. Republic***, Criminal Appeal No. 428 of 2016 (CAT at Mbeya, unreported); ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported) and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017.

The appellant in his defence at trial and in his submission in the appeal at hand challenged the testimony of PW1 on the ground that PW1 identified him by his voice which was unreliable. In my considered view however, and considering the argument by Ms. Makombe, to which I subscribe, PW1 did not only identify the appellant by voice, but visually as well. PW1, specifically testified that on the fateful date, the appellant knocked his door asking for food as he usually did. Having recognised his voice, she opened the door for him and found that the person knocking her door was in fact the appellant.

In the premises, her identification did not end with recognition of the appellant's voice, but she saw the appellant after opening the door. The court is required to be careful in admitting evidence of visual identification, particularly when the same was done at night. In doing so all possibilities of mistaken identity must be ruled out and the evidence must appear to be watertight. The CAT in ***Waziri Amani (supra)*** ruled that:

> *"No court should act on evidence of visual identification unless, all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight."*

In ***Mwalimu Ally & Another v. Republic***, Criminal Appeal no. 39 of 1991 (unreported), the CAT also stated:

> *"Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."*

Having known the appellant from before the rape incident, PW1 in addition, identified the appellant by recognition. This is regarded as the strongest and the witnesses might not need to thoroughly provide details of the accused person in identifying him. See: ***Jumapili Msyete v. Republic***, Criminal Appeal No. 110 of 2014, (CAT at Mbeya, unreported) and ***Jackson Kihili Ruhanda and Another v. Republic***, Criminal Appeal No. 139 of 2007 (CAT, unreported). However, even in identification by recognition, the law still insists that the witness must provide a description of the accused, particularly where the incident occurred at night. See: ***Issa S/O Mgara @ Shuka v. Republic***, Criminal Appeal No. 37 of 2005 (unreported); and ***Kamuri Mashamba v. Republic***, Criminal Appeal No. 325 of 2013 (CAT, unreported).

Explaining how she managed to identify her assailant, PW1 stated that her house has solar energy lights which enabled her to see clearly. She described the appellant's clothes as being a pair of blue shorts. PW2 and PW3 also testified to have seen the appellant coming from the victim's

house wearing blue shorts. They both rushed the victim's house after hearing an alarm calling for help. They also testified that they managed to see the appellant through aid of solar energy lights at the victim's house. The evidence of PW2 and PW3 corroborated that of PW1.

In his defence, the appellant raised doubts as to how PW2 and PW3 managed to see him while PW1 testified that the lights outside her house were switched off. I have gone through the testimony of PW1 time and time again and have not found such testimony. The appellant must have imagined the facts.

Further, in proving the charge against the appellant, PW5, a police officer who interrogated the appellant, testified that the appellant confessed into committing the offence. To that effect he tendered the cautioned statement by the appellant. However, as evidenced at page 17 of the trial court's typed proceedings as well as in the handwritten proceedings, PW5, when tendering the document, identified the same as "PF3" and not "cautioned statement." He specifically stated that: *"I know the document. It is the said PF3 I pay to tender it as exhibit."* I find the same being irregular rendering its evidential value affected. The cautioned statement is therefore expunged from the record.

Nevertheless, the law is trite that the best evidence in rape cases comes from the victim. See: ***Shabani Said Likubu vs. The Republic***, Criminal Appeal No. 228 of 2020. ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported). The trial court found the

testimony of PW1 credible enough to warrant conviction against the appellant.

Having gone through the testimonies of the prosecution witnesses, I find no reason to interfere with the findings of the trial court in convicting the appellant. PW1 clearly narrated the ordeal that she endured. Her testimony was corroborated by that of PW2, PW3 and PW4. I therefore find that the prosecution proved its case beyond reasonable doubt.

In the circumstances, I find the appeal devoid of merits and uphold the conviction and sentence by the trial court. The appeal is dismissed in its entirety.

Dated at Mbeya on this 08th day of November 2021.

L. M. MONGELLA

JUDGE

Court: Ruling delivered at Mbeya in chambers on this 08th day of November 2021 in the presence of the appellant appearing in person and Mr. Baraka Mgaya, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE

Court: Right of appeal to the Court of Appeal duly explained.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE