IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 55 OF 2021

(C/f Criminal Case No. 103 of 2020 of the District Court of Rombo at Mkuu)

JOSEPH DIDAS NGOWI..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

08th November, 2021 & 10th December, 2021

SIMFUKWE, J.

The appellant herein was charged with and convicted of the offence of rape contrary to **section 130 (1) (2) (e) and 131 (1) of the Penal Code Cap 16 R.E. 2002** (now R.E. 2019), before the District Court of Rombo at Mkuu (the trial court), in Criminal Case No. 103 of 2020.

Particulars of the offence show that, on 19th April, 2020 at Makidii Village within Rombo District in Kilimanjaro Region, the appellant had carnal knowledge with one **CWN** (true identity hidden) a woman of 24 years without her consent.

The appellant pleaded not guilty to the above allegations hence, a full trial involving four prosecution witnesses and four defence witnesses was conducted. During trial, the respondent tried to establish that, on 19th

April, 2020, around 09:30hrs the accused went into the victim's grandmother's house, who is his neighbour, forcefully took the victim to the corridor, held hands, tore her underpants, inserted his penis into her vagina and carnally knew her without her consent. According to the victim, she screamed for help but there was rain hence, nobody heard her. She also stated that, after the appellant finished, he went out to wash his penis, it is when she got the chance to lock herself in the house leaving him outside knocking and begging to repeat the act. The victim did not yield until, PW1 the grandmother of the victim went home and found the appellant outside while the victim was inside the house. The victim narrated the ordeal to her and the incident was reported to the authorities and the appellant was arrested and charged with the present case.

In his defence, the appellant denied to have raped the victim and claimed that, the case had been fabricated against him and raised a defence of alibi that he was not present on the day the incident happened. According to him, he was with DW2, DW3 and DW4 working and digging for a water tank. In the end the trial court found the appellant guilty and sentenced him to 30 years imprisonment. Aggrieved, he brought this appeal raising a total of seven (7) grounds as follows:

1. *That, the trial magistrate erred in law and fact in convicting the appellant basing on a wrong provision of section 130 (1) (2) (e) of the Penal Code instead of 130 (1) (2) (a) of the same Act.*
2. *That, the trial magistrate erred in law and fact in failing to note that, the charge sheet against the appellant was not supported by the evidence on record.*

3. *That, the trial magistrate erred in law and fact in failing to note that, the victim, PW2 never proved penetration of the male organ into her woman organ.*
4. *That, the trial magistrate grossly erred in law and fact in failing to note that, PW1 and PW2's evidence was supposed to be approached with great caution.*
5. *That, the trial magistrate grossly erred in law and fact in failing to note that, this case has been concocted against him as he was not identified by the victim in the court during trial.*
6. *That, the trial magistrate grossly erred in law and fact in being adamant that the appellant's strong defence evidence did not raise any doubt to the prosecution case.*
7. *That, the trial magistrate grossly erred in law and fact in convicting and sentencing the appellant while the charge against him was not proved to the required standard of law*

During hearing of this appeal, which was done by way of filing written submissions, the appellant appeared in person and unrepresented while the respondent was represented by Ms. Lilian Kowero, learned State Attorney.

Supporting the appeal, the appellant submitted on the 1st ground that, the victim is a matured woman of 24 years of age and a mother of three, thus, the trial court erred in convicting him under **section 130 (1) (2) (e) and 131 (1) of the Penal Code** which provides for statutory rape. Instead, he argued, the proper section which he was supposed to be charged with was under **section 131 (1) (2) (a)** of the same Law. He cited the case of **Abdallah Ally V Republic, Criminal Appeal No. 253 of 2013** where the Court of Appeal underscored the importance of citing

a proper provision of the law especially if the charge attracts severe punishment to the accused.

On the 2nd ground he argued that, the charge against him was not supported by evidence on record as the charge sheet show that, the alleged incident occurred at Makidii Village while the victim, PW2, testified that she lived in Mangulwa village. Also, PW3 stated that the victim was **CJ** while the charge sheet shows the victim is named **CWN**. He argued that, these defects are not minor and the trial magistrate erred when he did not address them. He cited the case of **Pastory Gervas V. R. [1978] TLR 63** where the Court of Appeal held that, the charge is considered defective if the particulars are not supported with evidence.

The Appellant went on submitting on his 3rd ground that, the trial Magistrate failed to note that the victim did not specifically state whether there was penetration of penis into her vagina as required in sexual offences. He argued that, PW2 just said she was raped but did not give details on whether or not the appellant inserted his male organs into her vagina as it was held in the case of **EX.B. 9690 Daniel Shambala Vs. The Republic, Criminal Appeal No. 183 of 2004 CAT at Mwanza**.

As to the 4th ground of appeal, the appellant submitted that, PW1 and PW2's testimonies were supposed to be approached with caution. He argued that, as it was not logical for this matter to be reported by PW1, victim's grandmother, while the victim was old enough to do so herself.

The appellant submitted on the 5th and 6th grounds to the effect that the trial Magistrate ruled out that defence witnesses failed to state when exactly were they working with the appellant. He argued that, his witnesses clearly stated that they were with him on Sunday and that they

heard that he was arrested on the following day hence it clearly shows they were with him on the day the alleged incident took place. He added, the trial court also failed to note that his defence case casted doubt to the prosecution case as it was clear that, he was not at the victim's place when the alleged incident took place.

He finally submitted that, the case against him was never proved on the required standard, and prayed that this Court should allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

In reply, Ms. Kowero submitted on the 1st and 2nd grounds jointly that, it was true that the charge sheet shows the appellant was charged under **section 130 (1)(2)(e)** instead of **section 130 (1)(2)(a) of the Penal Code**. However, this alone does not render the whole charge defective as the appellant understood the nature of the charge against him and he made his defence thereof. She added that, this is a minor defect that can be cured by **section 388 (1) of the Criminal Procedure Act, Cap 20, R.E. 2019** (CPA). As to the variance on the place where the alleged incidence occurred, as seen in the charge sheet thus, Makidii Village while PW2 testified that the incidence took place at Mangulwa Village, the learned State Attorney argued that, the appellant had opportunity of questioning the same during cross examination. Since he did not, inference is drawn against him that he did not dispute that fact as it was held in the case of **Nyerere Nyague Vs. Republic, Criminal Appeal No. 67 of 2010**.

Ms. Kowero submitted on the 3rd, 4th, 5th, 6th and 7th grounds jointly which the appellant argued that there was no enough evidence to warrant his conviction. She asserted that, the evidence adduced by the prosecution

was heavy and strong enough to warrant appellant's conviction. Starting with the aspect of penetration, Ms. Kowero argued that, the victim testified that the appellant raped her on 19th April 2020 and that she felt bad when he inserted his penis in her vagina. This testimony was unchallenged evidence that proves that penetration occurred.

More so, the appellant decided to rely on the defence of Alibi, however, the same was not tendered as per the requirement of **section 194 of the CPA** and that is why the trial magistrate disregarded it. Regarding the name Christina Joseph instead of Christina William Nyange, Ms. Kowero argued that such contradiction is minor and the same does not go to the root of the case as it was held in the case of **Maramo Slaa Hofu and Three Others V. The Republic, Criminal Appeal No. 246 of 2011, CAT at Arusha** that not every discrepancy in the prosecution will cause it to flop. She finally prayed that the appeal be dismissed, and the trial court's decision be upheld.

In his brief rejoinder, the appellant reiterated his earlier submission and maintained his innocence.

After going through parties' rival submissions and trial courts' proceedings and judgment, the main issue for consideration is **whether the case against the appellant was proved on the required standard**. This will answer the 3rd, 5th, 6th and 7th grounds of appeal.

I will start with the appellant's defence of *alibi*; the appellant challenges the trial court's failure to consider it and whether the same casted doubt on the prosecution case. The appellant relied on the defence of *alibi* to the effect that on 19th April, 2020 from 07:00hrs in the morning till 14:00hrs he was digging a hole for a water tank. In support of his defence

he brought three witnesses who corroborated the fact that they were digging a hole for a water tank. However, the law is very clear that prior notice has to be given before defence of *alibi* is raised as provided under **section 194 (4) of the CPA** that:

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

Section 194 (6) provides that:

> *"Where the accused raises a defence of alibi without having first furnished the prosecution pursuant with this section, the court may in its discretion accord no weight of any kind to the defence."*

In the case of **Director of Public Prosecutions V Nyangeta Somba and Twelve Others** [1992] TZCA 30 the Court of Appeal held that:

> *"Where an accused person intends to rely upon an alibi in his defence, he shall give to the Court and the prosecution notice of his intention to rely on such defence before the hearing of the case."*

In the cited case the Court of Appeal stated the rationale behind giving such notice is to enable the prosecution to verify the truth of the *alibi* particulars and if necessary, assemble evidence in rebuttal and the same should be given before the main hearing. In another case of **Kubezya John V Republic, Criminal Appeal No. 488/2015,** the Court of

Appeal sitting at Tabora, noted the provisions of **subsection 6 of Section 194 of CPA** and said:

> *"Provided that subsection 6 of the provision give the court discretion to accord no weight to such defence if it wishes. It was therefore the duty of the trial court to see whether or not, in its discretion, it should accord no weight to the defence of alibi by the appellant or not."*

According to the above authorities, it is clear that, the court can use its discretion to either accord weight or not to the accused's defence of *alibi*. Looking at his defence, the accused in this case alleged that it was not possible for him to be at the victim's house around 09:30hrs as he was working with DW2, DW3 and DW4. However, as rightly observed by the trial Magistrate, these defence witnesses failed to mention the day month or even year which they claimed to have worked with the appellant. Whether it was the same day that the accused is alleged to have raped the victim or not. In the circumstance, the defence testimony remains an afterthought, it did not cast any doubt at the prosecution case and the trial court did not error in discrediting the same as I hereby do.

Having disregarded the defence testimony in its totality, the remaining evidence is that of the prosecution, whether the same proved the case at the required standard. It is a trite principle that it is the prosecution who has the duty to prove the case against the accused beyond reasonable doubt and whenever there is a doubt, the same should benefits the accused. That position has been underscored in a number of cases

including the case of **Jonas Nkize V R. [1992] TLR 213** where the late Justice Katiti had this to say:

> *"While the trial magistrate has to look at the whole evidence in answering the issue of guilt, such evidence must be there first – including evidence against the accused, adduced by the prosecution which is supposed to prove the case beyond reasonable doubt".*

It is undisputed that none of the prosecution witnesses were present or saw what happened to the victim except the victim herself. This being a sexual offence case, the best evidence must come from her. However, the Court of Appeal in the case of **Mohamed Said V Republic, Criminal Appeal No. 145 of 2017, CAT at Iringa**, insisted that such evidence should not be taken wholly without subjecting the same to scrutiny. The Court held that:

> *"We are aware that in our jurisdiction it is settled that the best evidence of sexual offences 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 sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, we wish to emphasize the need to subject the evidence of such victims to security in order for the courts to be satisfied that what they state contain nothing but the truth."*

At page 15 of the same judgment, the Court of Appeal added that:

> *"We think that it was never intended that the word of the victim of sexual offence should be taken as a gospel truth but*

that her or his testimony should pass the test of truthfulness. We have no doubt that justice in case of sexual offences requires strict compliance with rules of evidence in general, and S. 127 (7) of Cap 6 in particular, and that such compliance will lead to punishing the offenders only in deserving cases."

Having the said position in mind, the victim's evidence in examination-in-chief goes as follows:

"On 19/4/2020 at about 9:30hrs morning I was at home, accused came and hold my hand by force and took me to the corridor, he tore my underpants and raped me, he pushed in and out, I saw something like milk from his penis and my vagina, then he went outside to wash his penis, then he wanted to do that act again, after some minutes Paulina my grandmother came and found accused person outside the house, PW1 asked accused person what are you doing here? I told PW1 accused person raped me, PW1 went to tell accused's father what accused person did to me, later we went to the police station, then we went to the hospital for check-up, thereafter we went back to the police station where we found the accused person already arrested."

According to PW1, she found the accused person standing outside while the victim was inside claiming that she was raped. PW4, the medical doctor, after examining the victim on the same day around 14:20hrs she stated that she never found any bruises or spermatozoa in the victim's genitalia. Relying on the above evidence, it is my considered opinion that

the case against the appellant was never proved at the required standard and the following are my reasons:

Firstly, the victim's narration of the event seems wanting especially on how the alleged act occurred. She stated that the appellant forcefully held her hands in the corridor, tore her underpants and raped her. My assumption is that, the appellant held her both hands with his only one hand and tore her underpants with the other and proceeded to rape her. In that regard, she must have fought hard to release herself and as a 24 years old woman the struggle must have been rampant at least to leave bruises or swelling in her hands. However, this fact was never cleared by the prosecution evidence as no medical report showed bruises or swelling in victim's hands.

Secondly, it is also not clear if the victim was allegedly raped while standing, laid down, bent as her evidence only shows that her hands were held in the corridor, her underpants were torn and she was raped.

Thirdly, regarding the torn underpants, since the victim is an adult who claimed that the sexual act was done to her without her consent and that prior to the forceful entry of the appellant's male parts in her vagina her underpants were torn; It is my considered opinion that, the alleged torn underpants should have been among the key exhibits to be tendered in court as proof of that forceful sexual act that it actually happened.

Fourthly, the alleged rape occurred around 9:30hrs and the medical examination to her private parts was done around 14:20hrs, on the same day but PW4 a medical doctor found nothing in the victim's genitalia. She stated that she observed nothing such as spermatozoa or bruises which

can also be reflected in Exhibit P1, the PF3. Also, there is no evidence on record showing that the victim washed her private parts before going to hospital. As to the bruises, PW4 as a medical expert did not elaborate whether it was okay for the victim of 24 years old and having 3 kids not to have bruises considering the circumstance of this case.

Fifth and Lastly, the fact that the appellant was found standing out of PW1's house, that alone is not sufficient proof that he raped the victim. It rather implies they might have had an ongoing relationship as the appellant did not run away. They even went together to his father who was also the ten-cell leader as the matter was reported to him. It is not very clear what happened there as the said witness was never summoned at the trial court. In the case of **Hemedi Saidi Vs. Mohamed Mbilu**, PC **Civil Appeal 31 (B) of 1984, HC Tanga,** Hon.Sisya, J. as he then was held *inter alia* that:

> *"(i) NA*
>
> *(ii) NA*
>
> *(iii) where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness was called, they would have given evidence contrary to the party's interests.*

Although the said ten-cell leader was appellant's father, he was competent and compellable to testify in court failure of which draws inference that he would have given contradictory evidence. All the above pointed doubts leave a lot to be desired and the same should have been resolved in favour of the appellant as it was held in the case of **Abuhi Omary Abdallah &**

3 Others V Republic Criminal Appeal No. 28 of 2010 CAT at Dar Es Salaam, that:

> *"...where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts"*

On the basis of the above analysis, and as I stated earlier, I am of the firm opinion that the case against the appellant was never proved on the required standard. I thus find this appeal has merit and hence allow it. The trial court's conviction entered against the accused is thus quashed, sentence set aside, and the appellant is ordered to be released forthwith unless held in custody for other lawful reasons.

It is so ordered

Dated and Delivered at Moshi this 10th day of December, 2021.

S.H. SIMFUKWE

JUDGE

10/12/2021