IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 2 OF 2020

(Appeal from the judgment in Criminal Case No. 79 of 2019 of the District Court of Tanga at Tanga before Hon. J. C. Bishanga – RM, dated 12/12/2019)

JUMA HAMISI @ JUMA.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order:02/11/2021
Date of judgment:09/11/2021

AGATHO, J.:

The Appellant in this appeal was charged with the offence of ATTEMPTED RAPE; Contrary to Section 132 (1) and (2) of the Penal Code [CAP 16 R.E 2002] hence successfully convicted and sentenced to serve 30 years in jail, having aggrieved with the said findings he appealed to this Court on the following five (5) grounds of appeal:

1) That the learned trial magistrate erred in law and on fact by infringing Section 26 of the Written Laws (Miscellaneous

Amendments) Act No. 2 of 2016 since victim one Masika Kondo was girl of tender age (12 years old).

2) The learned trial magistrate erred in law and in fact by not consider the source of light which enhanced PW4 to identify the Appellant at ground (scene of crime).

3) That the learned trial magistrate erred in law and in fact by failing to see the necessity to summoned Said Baka, a Street Chairman who reported the matter to the Police Station.

4) That the learned trial magistrate erred in law and in fact failing to notice the contradiction and inconsistencies in the evidence of Prosecution witnesses and failed to give in-depth scrutiny to the nature and extent of the adduced evidence that the Appellant was attempted to rape or rape the victim.

5) That prosecution did not prove their case beyond reasonable doubt.

On the date fixed for hearing the Court directed the parties to conduct the appeal by way of written submissions. The schedule was prepared, and the parties submitted their submissions timely. To dispose the appeal the Court examined the grounds of appeal, the submissions of the parties, record of proceedings and the law.

To begin with the first ground of appeal that; the learned trial magistrate erred in law and on fact by infringed Section 26 of the written lows (Miscellaneous Amendments) Act No. 2 of 2016 since victim one MASIKA KONDO was a girl of tender age (12 years old). The position of the law under Section 26 of the written law (Miscellaneous – amendments) Act No. 2 of 2016, it requires the child of tender age to promise to tell the truth and not to tell lies. On page 11 of the typed proceedings, PW1 promised to tell the truth by saying that "For this case I promise to tell the truth and it will not be lies." From that the requirement of the law was complied with. Therefore, the first ground of appeal lacks merit, and it is dismissed.

Regarding the 2nd ground of appeal, that, the learned trial magistrate erred in law and in fact by not considering the source of light which enhanced PW4 to identify the Appellant on the ground (the crime scene), this revolves around visual identification. The issue of visual identification is well demonstrated in **WAZIRI AMANI VERUS REPUBLIC [1980] TLR 250.**

1) That if the accused person is known before the incident by the victim.

2) The light at the crime scene: whether there was enough light to help the victim to identify the accused person.

3) The distance between the accused person and the victim.

4) Time spent at the scene of crime.

The Court observed that in the present case on pages 11 up to 12 of the typed proceedings of the trial Court it is PW1's testimony that she knew the Appellant before the incident date. That on the incident date the Appellant went to the victim's home place around 18:00 hours and he promised to be back around 20:00 hours and before he attempted to have carnal knowledge of the victim (PW1) the Appellant approached her, and she disagreed. This is visible on pages 11-15 especially on page 12 of the typed trial Court proceedings. There could be some questions as to why a child aged 12 years would go out at 20:00 without parents or guardian's permission. But this is not our concern in this case. The PW1 testimony as shown above, the Appellant tried to approach her. She refused and the Appellant decided to attempt to have carnal knowledge of her. Thus, this ground of appeal also lacks merits as the Appellant was well identified by PW1 and in addition it is the Appellant who went to pick the victim at her home place, and they used to watch Television before they left and went to the crime scene.

The issue of identification at the crime scene was crucial but during the hearing of the case at trial Court the Appellant had the right to cross examine the prosecution witnesses. However, he decided not to cross examine on the issue of identification. This is apparent on pages 14 and 15 of trial Court's typed proceedings. In the case of **GEORGE MAILI KEMBOGE VERSUS REPUBLIC, CRIMINAL APPEAL NO. 327 OF 2013 CAT** (Unreported) at page 4 the Court has the following to say;

> ***"It is trite law that failure to cross – examine a witness on an important matter ordinarily implied the acceptance of the truth of the witness evidence"***

According to PW1, immediately after the incident she named the Appellant as the perpetrator as shown on page 12 of the typed proceedings of the trial Court. Hence PW1 complied with the principle provided in the case of **GODFREY GABINUS @ NDIMBA AND 2 OTHERS V R, CAT at Mtwara Criminal Appeal No. 273/2017** (unreported) at page 14 where the Court stated that:

> ***"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability...."***

On identification, I am of the view that indeed identification at the crime scene was crucial, but the Appellant ignored it during cross examination. He is barred from raising it at this appellate stage as it is an afterthought. Nevertheless, the Appellant was well identified by PW1 and PW4. The latter testified that he was about 20 feet from the crime scene, and he saw a man trying to lay on the girl. He thought they were fighting. When he move a little close the man started to run away. At the crime scene he found the girl putting on her clothes and she was crying. That is seen on page 23 of the typed trial Court proceedings. Hence the 2nd ground is baseless.

On the 3rd ground, that the learned trial magistrate erred in law and in fact by failing to see the necessity to summoned Said Baka, a street Chairman who reported the matter to the Police Station. It is a trite principle that there is no specific number of witnesses required to prove the case. Thus, even a single witness may be enough to prove the charge as it is provided for under Section 143 of the Evidence Act [CAP 6 R.E 2019]. This principle was also demonstrated in the case of **GODFREY GABINUS NDIMBA** (supra) at page 12. It is up to the prosecutions to decide who to call as a witness. They are the ones who know their case. And they are at the liberty to produce kind of witness they want. However, the Court can draw

adverse inference where a party (prosecution) deliberately decides not to bring a material witness to testify.

It is a settled principle that in sexual offences cases the best testimony is that of the victim. This was stated in the case of **SELEMANI MAKUMBA VERSUS REPUBLIC [2006] TLR 379**. But I should emphasize that this principle applies where the victim as a witness is credible, reliable, and not contradictory. In the present appeal, PW1 on pages 11 – 15 of the trial Court typed proceedings narrated well how the incident occurred and that pointed to the Appellant as the one who committed the offence. What the Street Chairman did was only to report the incident to the Police Station. The Appellant did not dispute that the matter was reported to the Police Station. For that matter, the Street Chairman had nothing to prove in relation to the allegations.

As for the 4th and 5th grounds of appeal, these are interrelated. That the prosecutions did not prove their case beyond required standard. From the submissions of parties and evidence on record it is apparent that that PW1 on pages 11 – 15 of the typed proceedings of the trial Court narrated well how the incident occurred. That testimony was corroborated by testimonies of PW4 at page 23 of the trial Court's typed proceedings, and PW5 on

pages 27 and 28 of the typed proceedings. Contradictions can hardly be seen in the testimonies of prosecution's witnesses. The Appellant tried to show that PW3 asked him why he raped her granddaughter (PW1), but on pages 19 – 21 of the trial Court's typed proceedings, the testimony of PW3 shows that the Appellant attempted to rape PW1 hence there are not any contradictions. Moreover, PW4 on pages 23-27 of typed trial Court proceedings testified that he saw a man and woman(girl) fighting, and a man was trying to lay on top of the girl. When he moved closer to the crime scene the man (the Accused) started running away, and he found the girl wearing her clothes while crying. That is shown on page 23 of the typed trial Court proceedings. From the above evidence the case was proved beyond reasonable doubt.

In the upshot, the appeal lacks merit, and it is dismissed.

DATED at TANGA this 9th Day of November 2021.

THE HIGH COURT OF TANZANIA

U. J. AGATHO
JUDGE
09/11/2021

Date: **09/11/2021**

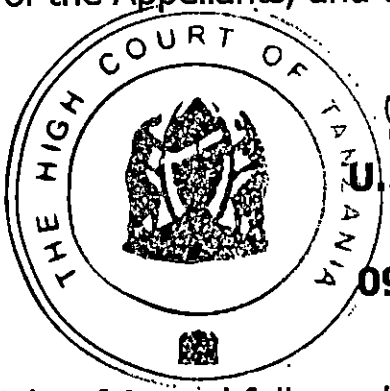
Coram: Hon. Agatho, J

Appellant: Present

Respondent: State Attorney

B/C: Zayumba

Court: Judgment delivered on this 9th day of November, 2021 in the presence of the Appellants, and the Respondent State Attorney.



U. J. AGATHO
JUDGE
09/11/2021

Court: Right of Appeal fully explained.

U. J. AGATHO
JUDGE
09/11/2021