

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 66 OF 2021
(Arising from Criminal Case No.139 of 2017 in the District Court of
Rungwe at Tukuyu)
Between
COSTA AMBWENE MWAKALINGA APPELLANT
Versus
THE REPUBLIC RESPONDENT

JUDGMENT

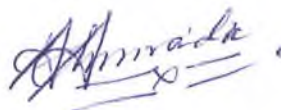
A.A. MBAGWA J.

This is appeal stems from the judgment and sentence of the trial District Court of Rungwe at Tukuyu. The appellant herein was charged with and subsequently convicted of rape contrary to section 130(1) and (2)(a) and 131(1) of the Penal Code. Following his conviction, he was sentenced to thirty (30) years imprisonment.

The evidence which resulted into the appellant's conviction may, in a nutshell, be recounted as follows.

On the 30th day of September, 2017 at Idweli village within the district of Rungwe in Mbeya region the appellant had sexual intercourse with a woman aged 70 years (PW1) without her consent.

It was the evidence of PW1 (the victim) that on the fateful night at around 2:00 hrs the appellant broke into her house and therein the appellant



forcefully had sexual intercourse with her. Also, the appellant robbed the victim her Tanzanian shillings twenty-five thousand (25,000/=). While doing this, the appellant threatened to kill her if she raised alarm. PW1 identified the appellant by the aid of firelight. In addition, PW1 claimed that she identified the appellant by voice as she knew the appellant prior to the incident.

No sooner had the appellant left the scene of crime than the victim raised an alarm. PW2 Moses Jolo and PW3 Edward Moris were among the persons who responded to the alarm raised by the victim. On arriving at the scene of crime, PW1 narrated them her ordeal and mentioned the appellant to be responsible. Thereafter the matter was reported to police and later the victim was taken to Makandana Hospital.

PW4 Dr. Justine Malecela attended the victim and upon examination he observed bruises, redish materials and swelling in the victim's vagina. PW4 concluded that the victim's vagina had been penetrated by a blunt object. The victim was bedridden at the hospital for two days. Dr. Malecela filled PF3 which he tendered in court and the same was admitted and marked as exhibit P1.

It was the evidence PW2 that after the victim had mentioned the appellant, they went to his home but could not find him. As such, the appellant was arrested on the same day along the way.

Further, PW5 WP 3291 DC Bupe tendered the victim's skirt (exhibit P2) which was allegedly torn by the appellant while forcefully undressing the victim.

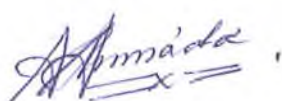
During defence, the appellant made a general denial of the accusations. He called two other witnesses whose evidence had nothing substantial to

exculpate the appellant. Although DW2 said that she lives with the appellant in the same house, she admitted that they live in separate rooms. The appellant also admitted that he and the victim knew each other before the incident.

Upon hearing of the evidence from both sides, the trial District Court was satisfied that the case against the appellant was proved beyond reasonable. It thus, convicted the appellant and sentenced him to thirty-year imprisonment.

Aggrieved with both conviction and sentence, the appellant has come to this Court to assail the decision of the trial court. He filed a petition of appeal containing several complaints which can be reduced in to the following grounds.

1. That the trial court erred in law and fact to convict the appellant based on un corroborated evidence of PW1
2. That the trial court erred in law and fact to rely on the contradictory evidence of PW2 and PW3 in respect of the hospital where the victim was attended.
3. That the trial court erred in law to enter conviction based on weak identification evidence
4. That the trial court erred in law to rely on the evidence of PW4 whilst he did not find spermatozoa in the victim's vagina.
5. That the trial court erred in law and fact to convict the appellant whereas the prosecution case was not proved beyond reasonable doubt



When the appeal was called on for hearing, the appellant appeared in person to defend his appeal whilst the respondent Republic was represented by Rosemary Mgenyi, learned State Attorney.

The appellant adopted his grounds in the petition of appeal and prayed the court to consider them and finally allow his appeal.

Ms Mgenyi, on her part, resisted the appeal. She was opined that the appeal is devoid of merits.

With respect to contradiction on which hospital was the victim taken, the learned State Attorney submitted that the evidence in particular of PW3 at page 7 is clear that first they took the victim to Idweli dispensary where they were referred to Makandana Hospital. She concluded that there was no contradiction between PW2 and PW3 as both said that the victim was attended at Makandana Hospital.

Concerning the complaints that PW1's evidence was relied on without corroboration, Rosemary submitted that PW1's evidence was corroborated by PW4 who examined her and found bruises and swelling in the victim's vagina.

In relation to the attacks against identification evidence, Rosemary argued that PW1, the victim of crime, clearly testified that there was enough light of firewood which was burning. The State Attorney further said that the victim clarified that the appellant had dreadlocks and was wearing a jacket which he was dressed in court on the day PW1 testified. Further, Rosemary said that PW1 identified the appellant by voice as she knew him before the incident. Rosemary continued to submit that immediately after the incident, the victim mentioned the appellant to PW3 and PW2. It was her submission that the victim properly identified the appellant. Rosemary concluded that



early mentioning of the appellant connotes that the PW1 was a credible witness. She cited the case of **Chrizant John vs the Republic, Criminal Appeal No. 313 of 2015, CAT at Bukoba** at page 19 to support her contention.

The learned State Attorney maintained that the prosecution proved its case beyond reasonable doubt and the defence evidence was properly considered. She said that the victim mentioned the appellant as her culprit. She cited the case of **Selemani Makumba vs the Republic [2006] TLR 384** and submitted that it was clearly held that the best evidence in sexual offences comes from the victim.

She concluded that the appeal is devoid of merits hence she prayed the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

To start with the complaints that the trial court erred in law and fact to convict the appellant based on uncorroborated evidence of PW1. The evidence tells it all that the prosecution paraded five (5) witnesses along with two exhibits. PW1 testified that she was invaded by and had forced sexual intercourse with the appellant. Her evidence was corroborated by PW4 who confirmed that the victim's vagina was penetrated by a blunt object as he found bruises and swelling in the victim's vagina. In this regard, I agree with the State Attorney that PW1's evidence was not the sole evidence relied on by the trial court to convict the appellant. This ground therefore is devoid of merits.

Coming to issue of contradictory evidence of PW2 and PW3 in respect of the hospital where the victim was attended, I have keenly gone through the record and found the complaint unfounded. PW2 testified directly that they

took the victim to Makandana hospital whereas PW3 was more detailed as he clarified that they first took the victim to Idweli hospital and thereafter they were referred to Makandana hospital. Thus, upon holistic reading of the evidence, there is no any contradiction.

Furthermore, the appellant challenged the identification evidence claiming that it was weak. In this case PW1 said that she and the appellant knew each other prior to the incident. This fact was also admitted by the appellant during his defence. Besides, PW1 testified that she clearly identified him visually as there was firelight which made the premises lit enough. Also, PW1 identified the appellant by voice when he was ordering her to give him money and not to raise alarm. Significantly, PW1 mentioned the appellant immediately after the arrival of PW2 and PW3 and the race to arrest the appellant started shortly thereafter. All this piece of evidence gives credit to the victim that she properly identified the appellant. In consequence, I find this complaint without basis.

In another lamentation the appellant has challenged the testimony of PW4 on the ground that he did not find spermatozoa in the victim's vagina. PW4 examined the victim and found bruises and swelling in her private parts. He concluded that the victim must have been inserted a blunt object. It has to be noted that ejaculation or spermatozoa is not an ingredient of rape. What is required is penetration. In this case PW4 clearly said it that the victim vagina was penetrated by a blunt object. That was enough to corroborate the victim's testimony. This ground therefore is equally devoid of merits.

The appellant's last attack was directed towards standard of proof. He lamented that the trial court erred in law and fact to convict the appellant the prosecution case was not proved beyond reasonable doubt. He also said that the defence evidence was not considered. At page 5 of the

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judgment, it is crystal that the trial magistrate sufficiently analysed the defence evidence. It reads;


‘During defence, DW1 did not dispute that he was identified by voice and clothes he wore, instead talked of what happened in the morning. Similar testimony was given by DW2 and DW3 who insisted that DW1 was arrested on his way to work forgetting that the offence was committed at night’

From the above extract, it is my considered view that the defence evidence was sufficiently analysed and well considered. Thus, like the trial magistrate, I am of unfeigned findings, on the strength of the prosecution evidence as analysed above, that the prosecution case was proved beyond reasonable doubt.

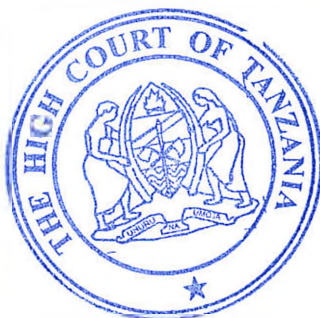
In the result, this appeal is found without merits. Consequently, it is hereby dismissed. The conviction entered and sentence meted out by the trial court are hereby upheld.

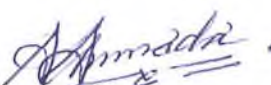
It is so ordered.

Right of appeal is explained.


A.A. Mbagwa
Judge
07/12/2021

The judgment has been delivered in the presence of the appellant and Davis Msanga (SA) for the respondent/ Republic this 7th day of December, 2021




A.A. Mbagwa
Judge
07/12/2021