IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 181 OF 2020
(Originating from Criminal Case No. 102 of 2020 in the District Court of Chunya)

Between

FADHILI MWAMBAPA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

A.A MBAGWA, J.

The appellant Fadhili Mwambapa was charged with and subsequently convicted of rape contrary to sections130(1)(2)(e) and 131(1) both of the Penal Code [Cap. 16 R.E. 2019], and sentenced to thirty(30) years imprisonment. In addition, the appellant was ordered to pay a fine of 2,000,000/=. Dissatisfied with the judgment he has appealed to this court against conviction and sentence.

It was alleged that on 17/4/2020 the appellant had carnal knowledge with PW1(name withheld) a school girl of 14 years old. It was the prosecution case that on 17/4/2020 around 16:00hrs PW1 was sent to milling machine where she meet the appellant and went to his saloon, at 00:00hrs PW1 was forcefully undressed and had sexual intercourse with the appellant until in the morning on 18/4/2020at around 06:00hrrs when

she was woken up and told to go home. Upon arriving home, she was asked by Zawadi Watson(PW2) where she slept. PW2 was dissatisfied with the answer and sent PW1 to Agripina Paulo Mahenge(PW3) who interrogated and PW1 narrated to have slept at the appellant and had sexual intercourse. Then the matter was reported to Sidney Mkuva (PW4) and Madawa Mwanahawa(PW6) who apprehended the appellant and interrogated him about the incident, the matter was then taken to police who issued PF3 and Frank Andongolile Ngalla(PW5) examined PW1 and found her hymen perforated. PW5 further observed that and the vagina had whitish discharge implying that the victim was penetrated by a blunt object and filled PF3(Exhibit PE3).

On part of the appellant, his evidence was that at 17:00hrs PW1 went to watch television in his barbershop and thereafter departed at around 19:00hrs. He knew PW1 as his client who used to go there to charge her cellular phone. He said that on 18/4/2020 he was arrested by WEO on allegation of raping PW1.

Upon hearing the case the trial magistrate disbelieved the defence evidence thereby convicted and sentenced the appellant thirty years imprisonment, it is against that decision the appellant filed this appeal.

The appellant through Alfred Chapa, learned advocate filed two sets of grounds of appeal one filed on 24/12/2020 containing six grounds and

the other additional ground filed on 5/7/2021. When the appeal was called for hearing, the appellant enjoyed the service of Mr. Alfred Chapa, the learned advocate, while respondent. Republic was represented by Hannarose Kasambala, learned state attorney. Advocate Chapa informed the court to abandon 1 and 3 grounds of appeal and said nothing about additional ground of appeal, which this court took the view to have been impliedly abandoned.

The first ground of appeal was on identification of the appellant. The appellant's counsel submitted that, the offence was committed at 00:00hrs night but PW1 did not state the source and intensity of light and cited the case of **Waziri Amani v. R** [1980] TLR 250, to support his argument. Mr. Chapa added that PW1 did not state if she knew the appellant before and was not named at the earliest possible opportunity. He further submitted that it was evidence of PW1 that in the saloon there were other people, hence it could be another person who returned. He referred to the case of **Khalid Mohamed Kiwanga vs Republic**, Criminal Appeal No. 223 of 2019 CAT at DSM.

Regarding fourth ground, Mr. Chapa briefly submitted that the trial court did not analyse defence evidence as compared to prosecution evidence. He referred to page 11 and 12 of the judgment to cement on his argument.

On sixth ground, Chapa the learned advocate submitted that the prosecution had not proved the case beyond reasonable doubts as the appellant was not identified.

Responding to first ground, Ms. Hannarose for the Republic had opposite view she submitted that the appellant was identified as they spent time together from the time appellant followed her to the milling machine, the time spent together until the following morning. She referred to page 10 of typed proceedings and added that it was the appellant who woke the victim in the morning as reflected at page 11.

Regarding second ground Ms. Hannarose replied that defence evidence was considered. She was however, quick to point that if this court finds otherwise, as the first appellate court has duty to re-evaluate evidence afresh. On this she relied on the case of **Prince Charles Junior versus Republic**, Criminal Appeal No. 250 of 2014, CAT at Mbeya.

Responding to the sixth ground, Ms. Hannarose held the view that the case was proved beyond reasonable doubts as per section 130(1)(2)(e) of the Penal Code. She said that it was proved that the victim(PW1) was below 18 years, there was penetration and the person who raped was not other than the appellant. Also, that PW1 stated it was the appellant who undressed her and inserted his penis in her vagina and that in rape cases the best evidence comes from the victim. The learned State

Attorney cited the case of **Selemani Makumba vs. Republic** [2006] TLR 379. Ms Kasambala continued to submit that the evidence of PW5, PW2 and PW3 corroborated that of PW1. She further told the court that in many aspects the appellant did not cross examine the prosecution witnesses, hence he is taken to have admitted them. She referred to the case of **George Maili Kemboge vs the Republic**, Criminal Case No. 327 of 2017, CAT at Mwanza.

I have had occasion for perusal of the record of the trial court, petition of appeal and submissions made by learned counsels from both sides and found three pertinent issues for determination of the appeal namely;

One, *whether the appellant was properly identified on the fateful date;*

Two, *whether the defence evidence was considered by the trial magistrate; and*

Three*, whether the prosecution case was proved beyond reasonable doubts.*

In dealing with the first ground, I agree with the correct position of law that identification of the accused is of paramount important as stated in the recent case of **Maganga s/o Udugali versus the Republic,** Criminal Appeal No. 144 of 2017, CAT at Tabora(Unreported) where the court held that;

*'Is a settled law on visual identification evidence that such evidence is of the weakest kind which in order to found conviction must be absolutely watertight - see **Waziri Amani (supra**). Factors that should be considered in determining whether visual identification evidence is water tight or not include; the time the witness had the accused under observation, the distance at which he observed the accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before.'*

The principle of visual identification applies also in cases of recognition as was settled in the case of **Philimon Jumanne Agala @ J4 v. Republic,** Criminal Appeal No. 187 of 2015 (unreported) that;

'Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made.'

In this appeal, PW1 testified that at around 16:00hrs she met with the appellant and stayed with him in his saloon up to 21:00hrs, sometimes later the appellant closed the saloon while PW1 inside. The appellant escorted his friends and at about 00:00hrs he returned back, woke up PW1 and had sexual intercourse with PW1. On his part the appellant testified that PW1 went to his saloon at 17:00hrs to watch television and departed at 19:00hrs and that PW1 was his client who used to go to charge cellular phone. Basically, the above evidence leads to three

aspects of identification, one time spent together at the appellant's saloon, from 16:00hrs/17:00hrs to 19:00hrs/21:00hrs which was three hours in the broad day light and three hours in the night which implies they spent long time together. Second recognition, PW1 and the appellant knew each other before the fateful day and the appellant himself in the trial court testified that he knew PW1 as his client who went to his salon to charge her cellular phone. Three at 00:00hrs PW1 narrated how the appellant undressed her and sexual intercourse was done, the aspect which was never cross examined. Here the appellant's counsel suggested that, there was possibility of another person entering the room while the respondent's counsel took the view that that chance was very minimal. The court of Appeal in the case of **Khalid Mohamed Kiwanga(Supra)** was clear that the mentioned tests are some of the most dominant feature that one is bound to encounter when dealing with evidence of identification and the particular circumstances obtaining in each case would dictate which test or tests to apply, hence they are not inclusively applied and depends on circumstance of the case.

I agree with the respondent's line of argument because, evidence of PW1 was very clear on how appellant opened the door, woke up her, requested for sexual intercourse and forcefully undressed PW1. Further she explained how the act its self was done and they fell asleep until

morning. All this important evidence was never cross examined by the appellant. Again at 06:00hrs the appellant woke up PW1 all these incidents clearly proves that the appellant was identified by PW1. Mr. Chapa took only the aspect of 00:00hrs leaving behind evidence of PW1 and appellant himself that from day hours around 17:00hrs to 19:00hrs where together at his saloon.

The more similar circumstances occurred in the case of **Maganga Udugali(Supra)** but still is distinguished in many aspects with the appeal at hand, one time spent during day time almost three hours, two time spent at appellant's saloon during night from 19:00hrs to 21:00hrs, three time taken during night from 00:00hrs. Here PW1 well narrated how she was requested for sexual intercourse, how she was undressed, how sexual intercourse was done and repeatedly, and fourth at 06:00hrs how PW1 was woken up and told to go home. All this is crucial evidence to remove all possibility of mistaken identity. In addition, PW1 mentioned the appellant to PW3 and PW6 in the very morning. On that account the issue of identification lacks merits.

The second complaint with respect to consideration of defence evidence, it is settled law that failure to consider and analyse defence evidence is fatal. This has been propounded in a number of cases includings **Leonard Mwanashoka vs. Republic**, Criminal appeal No.

226 of 2014 (unreported) where the court held that failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriage of justice.

It is one thing to summarize evidence of both sides and to analyse it in context of the issue before the court, on the case at hand the trial magistrate referred defence evidence as reflected at page 11-12 and 14. On my part, I agree with the appellant counsel that the defence evidence was not properly subjected to proper analysis as compared how the trial magistrate dwelled on discussing the prosecution evidence. I entirely also agree with the correct position of the law that this being the first appellate court has duty to evaluate and analyse the entire evidence and arrive to its own findings. This is as per the decision in the case of **Michael s/o Joseph versus Republic**, Criminal Appeal No. 506 of 2016, CAT Tabora (Unreported).

In this appeal, I have gone through records of the trial court and found that PW1 testified that at 16:00hrs met the appellant and went to his saloon where she stayed until 20:00hrs. Then at 00:00hrs the appellant forcefully undressed PW1 and had sexual intercourse repeatedly until 06:00hrs when PW1 was woken up and told to go home. On his part the appellant stated that at 17:00hrs PW1 went to his saloon to watch television until 19:00hrs. Further, PW1 stated from around 16:00hrs to

06:00hrs in the morning she was with the appellant. The appellant himself agrees that he was with PW1 from 17:00hrs to 19:000hrs. He went further that PW1 was his client who used to charge her cellular phone at his saloon. Here the defence evidence is furthering prosecution evidence on the issue of identification which was settled in the case of **David Gamata and Another v. Republic,** Criminal Appeal No. 216 of 2014, CAT at Mwanza (unreported

The court has also revisited evidence of PW3 to whom PW1 stated she slept to the accused and had sexual intercourse and PW6 the Ward Executive Officer who arrested the appellant and interrogated about the incident of rape where the appellant agreed, here evidence of PW3 and PW6 was not cross examined by the appellant. The appellant evidence was total denial and did not challenge the chronological sequence of events as narrated by PW1, much as the evidence from both sides are in record the prosecution case against the appellant was watertight and defence evidence did not raise any doubts.

On last ground proof of case beyond reasonable doubt, the appellant counsel did not explain how the case was not proved, he rather repeated the issue of identifying the appellant while the learned advocate for the respondent submitted on the input of section 130(1)(2)(e) of the Penal Code and age of PW1 and how rape was committed, he further

submitted that the best evidence came form the victim and corroborated by PW5, PW2, PW3 and PW6.

On my part, I entirely agree with the position of the law that the best evidence in rape cases comes from the victim. See the case of **Abiola Mohamed @ Simba versus the Republic,** Criminal Appeal No. 291 of 2017 CAT at Arusha.

The appellant was charged with statutory rape under section 130(1)(2)(e) of the Penal Code Cap. 16 R:E 2019 as PW1 was under the age of eighteen years, I also take cognisance that the age of PW1 was never contested by the appellant in the trial court even in this court. To prove offence of rape penetration is a necessary element, in this appeal PW1 when giving her evidence did not mince words, she explained in detail how the appellant inserted his penis into her vagina went up down several times, she felt pain although not bleeding but whitish material was discharging, this evidence was corroborated by PW5 the doctor who examined PW1 and found hymen removed and whitish discharges to PW1 vagina. This all evidence proves that there was penetration and indeed PW1 was raped. As to who raped PW1, there is enough evidence from PW1, PW3 and PW6 that it was the appellant. The appellant's defence was general denial but did not dispute the fact that on the fateful date he was with PW1 at his saloon. One more point is

that PW1 testified that she was requested by the appellant to go to his saloon.

This court, upon reviewing and analysing evidence as a whole, is of the firm view that PW1 was a trustworthy witness considering the way she narrated the event which, to a certain extent, was furthered by the defence evidence to wit, being together on 17/4/2020 at the appellant's salon and that PW1 was his client. Here the chronological occurrence of events was never cross examined by the appellant. In the end, the court finds that PW1 was raised on the night of 18/4/2020 by the appellant. Therefore this grounds too lacks merits.

On that basis, I am of the considered findings that the prosecution side proved its case beyond reasonable doubts as the defence did not raise reasonable doubts to shake the prosecution case. Therefore, the trial court rightly convicted and sentenced the appellant.

That said and done, save for the second ground, this appeal lacks merits hence it is hereby dismissed. It is so ordered.

Right of appeal fully explained.

THE HIGH COURT OF TANZANIA

A.A. Mbagwa
Judge
6/12/2021

Judgment delivered in the presence of the appellant and Davis Msanga learned State Attorney for the respondent/Republic this 6th day of December, 2021.

A.A. Mbagwa
Judge
6/12/2021