

IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 81 OF 2019

*[Originating from Criminal Case No. 82 of 2017 at the District Court
of Tabora]*

PONSIANO NTAMABOKO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 09/07/2021

Date of Delivery: 13/08/2021

AMOUR S. KHAMIS, J.

In the District Court of Tabora, the appellant herein, Ponsiano Ntamaboko, 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 2002. After a full trial, he was convicted and sentenced to serve thirty (30) years in jail.

Dissatisfied, he appealed to this Court listing seven grounds of appeal, to wit: -

1. That, the appellant was denied a fair trial or did not receive a fair trial as at the beginning of the trial, the trial court did not read the substance of the charge to the appellant and require him to plead before it commenced to receive the evidence for the prosecution, thus renders the trial a nullity.
2. That, the trial magistrate erred when he found that the prosecution had proved its case against the appellant beyond reasonable doubt while the prosecution case left a lot to desire.
3. That, the trial court erred when convicted the appellant in the prosecution case to show and establish the source of the light and its intensity relied on to see and identify the appellant during the commission of the offence.
4. That, the cautioned statement of the appellant (Exhibit P3) was wrongly relied on and acted upon by the trial magistrate without first ascertaining their credibility.
5. That, the medical report (exhibit P2) by the victim of rape (PW1) had no evidential value as the author of the same (PW5) did not mention any scientific criteria used to arrive at its finding.

6. That, the guilty of the appellant was not proved at all.

7. That, the judgment of the trial court was fatally defective as the same bears no analysis and evaluation of the appellant's defence, but only bears rejection of the appellant's defence without any analysis and evaluation made by the trial court.

A brief background leading to this appeal as can be traced from the records goes that:

Following the death of her first daughter, Juliana Zakayo (PW1) an old woman aged 102 years, was taken by her second daughter, Dina Joshua (PW3) to reside with her in Sikonge District, Tabora Region.

Prior to the incident subject to this appeal, on 24th April, 2017 members of Christian Community including the appellant herein (Ponsiano Ntamaboko) went to pray with PW1 who was sick.

After the prayer session, the congregates departed to their homes. Later, on during night hours as PW1 was asleep, the appellant who resided in the same house with the victim (PW1) came back to her house while drunk and lousily singing to make chaos. PW3 was unable to tolerate

the situation, and thus moved out of the house to avoid the appellant's nuisance.

PW3's departure made it easy for the appellant to enter into PW1's room, while naked. The appellant forced PW1 to have sexual intercourse with him and against the order of nature.

PW1 tried to push him away but her efforts proved futile. After the act, the appellant went away. When PW3 returned, she found his mother crying and informed her that she was raped by the appellant. People were informed and the appellant was arrested.

During hearing of this appeal which was conducted with aid of a video technology, the appellant appeared in person from Uyui Central Prison whereas the Republic was represented by Mr. John Mkonyi, learned State Attorney.

The appellant adopted his grounds of appeal to form his submissions and had nothing more to add.

For the Republic, the learned State Attorney opposed the appeal and submitted on grounds nos. 1, 3, 4, 5 and 7 separately grounds 2 and 6 were consolidated.

Given the nature of this appeal, I intend to determine the grounds of appeal one after the other in reference to the parties' submissions.

In so doing, I am mindful that, this is the first appeal. Principally the first appellate Court has the powers to reevaluate the evidence on record so as to reach its own conclusion.

This position of law was emphasized by the Court of Appeal of Tanzania in the case of ***Mwajuma Mbege vs Kitwana Amani [2004] TLR 410.***

Concerning the first ground of Appeal, Mr. Mkonyi referred to the appellant's complaint of having been denied of a fair trial allegedly because the trial magistrate did not remind him the substance of a charge and require him to plea before commencement of the prosecution evidence.

Mr. Mkonyi argued that, the charge was read and explained to the appellant before trial. He contended that much as the appellant was not reminded substance of the charge, it was not fatal allegedly because he knew the nature of the charge from the first day of arraignment when it was read over to him.

To reinforce his arguments, the learned State Attorney cited the case of ***Bahati Makeja vs Republic, Criminal Appeal No. 118/2006*** CAT at Dar es salaam, it was held that.

“Where legal requirements are omitted and where omission has not caused injustice then the court will find that trial was properly done.”

I have had the time to examine the record of this appeal which shows that the charge was read over to the appellant on the day when he was arraigned before the trial Court and also on the date of a Preliminary Hearing. In both occasions, the appellant pleaded not guilty to the charge. For that reason, the allegation on the first ground of appeal is baseless.

As to the second and sixth grounds of appeal it was alleged the prosecution case was not proved beyond reasonable doubts. Mr. Mkonyi contended that, the prosecution case was proved beyond reasonable doubt based on the Court of Appeal’s position in ***Selemani Makumba vs Republic, [2006] TLR 379***, that in rape cases the best evidence comes from the victim.

It was Mr. Mkonyi’s submission that, the victim in this case (PW1) testified on how she was raped by the

appellant on the date of the incident and that, the appellant failed to cross examine her in order to controvert her evidence.

Furthermore, Mr. Mkonyi contended that, PW1's evidence was corroborated by PW2's testimony who said that she inspected the victim's private parts which were reddish with scratches and drops of sperms.

Mr. Mkonyi asserted that the victim was also examined by a medical doctor (PW5) was satisfied that she was raped.

The proceedings of the trial court at page 9 – 10 show the victim's testimony. She stated that the appellant entered her bedroom while drunk and naked, undressed her by force and then raped her.

The victim said that she attempted to push him away unsuccessfully. Proceedings show that the victim (PW1) identified the rapist easily as they were together earlier on when a prayer was conducted at her place and lived in the same house. The evidence of PW2, PW3 and PW5 supported (corroborated) the victim's testimony.

I have also examined the appellant's defence which did not controvert the evidence laid by the prosecution

hence in line with the holding in ***Selemani Makumba's case (supra)***.

From the nature of the victim's (PW1) testimony, it is my considered view that she managed to give the best evidence as to who raped her. As earlier stated, her evidence was corroborated by that of PW2 and PW5. This evidence on record proves that the prosecution was able to prove its case beyond reasonable doubts.

Concerning the third ground of appeal, the appellant alleged that he was convicted without proof or presence of sufficient light to identify him.

The learned State Attorney observed that, PW1 did not explain if there was light on the date of the incident to help her identify the appellant.

Despite of that, Mr. Mkonyi was of the view that, according to the evidence, on record, the appellant was well known to the victim because they resided in the same house and met on daily basis.

In his defence, the appellant admitted that he was well acquainted with the victim and therefore it was easy for the victim to recognise him even on a weak source of light or by voice as testified by PW1 who stated that, the

appellant spoke some words which made her recognise him.

Admittedly, the victim said nothing on the issue of source and intensity of light which aided her to identify the appellant. However, the evidence on record shows that the appellant and the victim were familiar to each other as they lived in the same house; and that prior to the incident, the appellant was among the Christian Faithfull's who attended a special prayer conducted in the victim house.

Further to that, when the appellant arrived at the victim house that night, PW3 and PW1 were present and he caused a lot of chaos by urinating freely in the house. He even attempted to assault PW3.

Again, when the victim (PW1) testified, she referred to the appellant in his own name PONSIANO meaning that she knew him well. The collection of these facts, in circumstances of this case proves that the victim was fully aware of a person who raped her and she correctly identified that person to be the appellant.

It should be noted here that, an ability to mention a suspect at the earliest opportunity is an assurance of correct identification. See the case of **Marwa Wangiti &**

Another vs Republic 202 TLR 30. For reasons stated hereinabove, the third ground of appeal is meritless.

As to the fourth ground of appeal, the appellant complained the trial Court improperly relied on a cautioned statement. On the other hand, the learned State Attorney submitted that, the appellant was interrogated by PW6 and confessed to have committed the offence.

Although the statement was objected to upon an inquiry, the finding of the trial Court was that it was voluntarily given by the appellant and thus admitted in evidence.

Upon a close examination of the record of the trial Court, it came to my knowledge that, PW6 G.4848 D/C Ndadi interrogated the appellant who admitted to him that he committed the offence.

I also examined the inquiry proceedings and ruling of the trial Court of which I found nothing to be faulted. Consequently, this ground lacks merit.

Regarding the fifth ground of appeal, the appellant alleged that PF3 was invalid as the one who filled it, failed to show how the victim was raped. On this point the learned State Attorney argued that, the Medical doctor

(PW5) testified to have found bruises and bad smell on the victim's private parts, and that such marks presupposes a rape incident.

The lower court's record show that, the medical doctor (PW5) examined the victim at the hospital, and prepared a medical report by filling in PF3 (Exhibit P2). According to the report, the victim (PW1) was raped. In that view therefore, the complaint raised, is devoid of merits.

On the last ground of appeal, the appellant complained that, the trial Court's judgement was defective as it bears no analysis and evaluation of his defence.

On this contention, Mr. Mkonyi was of the view that, the trial Court considered the appellant's evidence on record and that since it was too sketchy and brief, the evaluation conducted sufficed the purpose.

The appellant's defence is reflected in page 29 of the trial Court proceedings. It is fairly short and if I may replicate, the appellant after having been sworn in, testified that: -

"I remember on 23/04/2017 Kessi s/o Mtendaji assigned me to carry cement to his

home. Later on, I was arrested. I do agree that I stay with grandmother Juliana d/o Zakayo's house. I did not rape her."

After his defence, Juma Masanja, Senior State Attorney, cross examined him. The answer resulted therefrom was as follows: -

"I know Juliana Zakayo, we have been staying in the same campus. I never quarrelled with her she knows very much, I also know PW3, I have never quarrelled with PW2. I have no claim against the Victim or PW3"

The trial Court's Judgment spoke on the appellant's defence, at page 7 of the typed judgment, wherein the trial Magistrate stated that;

"The accused defence that he did not commit the offence has no limb to stand at all. This Court find the prosecution has discharged their duty of proving the case to the required standard"

From the above extract, I'm satisfied that the trial Court considered the appellant's defence on denial of the rape allegation he was facing.

I therefore find no merits on this ground of appeal which is overruled.

As I observed earlier on, the prosecution called six witnesses and the appellant testified without calling any other witness on his behalf.

The evidence gathered from the prosecution show that on the fateful day PW1 was raped. The testimonies of PW1, PW2, PW3 and PW5 clearly proves so. According to Exhibit P.2 the appellant confessed to have raped the victim when questioned by PW6.

In his defence, the appellant said nothing to disassociate himself from the charge. He only testified on the events performed by him on the day before the incident which in my view, have nothing to controvert the prosecution's evidence.

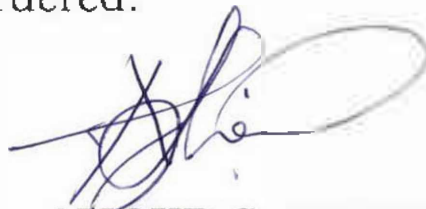
This is to say that the appellant defence did not exonerate him from the charge laid against him.

Lastly before concluding, the appellant re-joined that the case against him was framed because he was employed in the family of the victim that he was not paid his salaries.

I have considered this contention and found it as an afterthought because this was not stated in his defence during trial and wasn't listed among the grounds of appeal in this Court. It is therefore disregarded.

In the upshot, and on the basis of the reasons above, I find no merits in the appellant's appeal which is hereby dismissed. The decision of the trial Court is upheld.

It is so ordered.



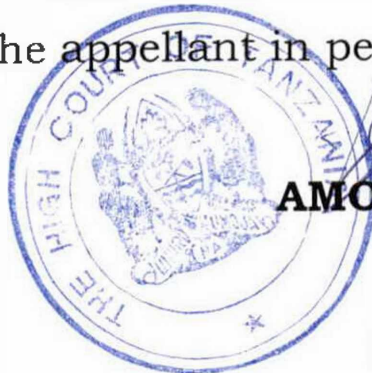
AMOUR S. KHAMIS

JUDGE

13/08/2021

ORDER:

Judgment delivered in chambers in presence of Mr. Miraji Kajiru, Senior State Attorney for the Republic and the appellant in person. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

13/08/2021