IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

(RM) CRIMINAL APPEAL NO.40 OF 2021

(Appeal arising from the decision of the Resident Magistrate Court of Njombe at Njombe in Criminal Case No. 155 of 2020 before Hon. Ng'hwelo F.E.RM).

FRANCIS KILAMLYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: *16/03/2022*
Date of Judgement: *15/06/2022*

MLYAMBINA, J.

This appeal originates from the decision of the Resident Magistrate Court of Njombe at Njombe where the Appellant herein above was charged with the offence of rape contrary to *Section 130 (1) and (2)(b) and 131 (1) of the Penal Code [Cap. 16 R. E. 2019].* It was alleged that, on the 15th day of July, 2020 at Mnange area Makambako within Njombe District in Njombe Region, the Appellant had carnal knowledge with the victim without her consent.

In proving their case, the prosecution paraded three witnesses and tendered two exhibits. The Appellant relied on his evidence to defend the charge. After a full trial, the Appellant was found guilty, convicted and sentenced to thirty years imprisonment. Being aggrieved, the Appellant has knocked at the doors of this Court on appeal seeking to challenge the decision of the trial Court.

In his Petition of Appeal, the Appellant raised six (6) grounds of grievance, namely that: *One*, the learned trial Magistrate erred in law and fact in convicting the Appellant basing on the identification of the accused during the night time as the prosecution side failed to prove on how the accused was identified. *Two,* the learned trial Magistrate erred in law and fact by convicting the Appellant basing on evidence of PW3 who failed to prove that there was penetration which is the key element of proving the case of rape as required by law. *Three*, the learned trial Magistrate erred by convicting the Appellant basing on circumstantial evidence as there is no corroborative evidence showing that the Appellant was seen with the Appellant before the fateful incident. *Four,* the learned trial Magistrate erred in law and fact by convicting the Appellant basing on the cautioned statement of the Appellant recorded by PW2 as the same was taken under

torture, threats, force and intimidation. *Five,* the learned trial Magistrate erred in law and fact by convicting the Appellant without considering the question of time barred, hence making unfair conviction. *Six,* the learned trial Magistrate erred in law and fact by convicting the Appellant basing on the evidence which does not prove the case beyond reasonable doubt as required by the law.

During hearing of the appeal before this Court, the Appellant appeared in person, whereas the Respondent, the Republic was represented by Ms. Jackline Nungu, learned State Attorney.

Regarding the first ground, the Appellant submitted that; it is alleged the offence was committed at 00:00am. It was midnight. The victim said they were on the road. But light does not illuminate on the road.

On the second ground, the Appellant argued that PW3 did not prove penetration, this is due to the fact that, PW3 testified that the victim was sexed but could not know who sexed her because she was married. The rape was alleged to be committed at 00:00 hours but she went to the hospital at 5:00am.

On the third ground, the Appellant stated that, he was convicted based on circumstantial evidence. The victim alleged that; she found him at his work. This implies that, he raped her while at work.

Concerning the fourth ground, he admitted in the cautioned statement because the Police Officers tortured him so badly. On top, they promised to release him, if he admitted so.

The Appellant could not argue the fifth ground. For the sixth ground, the Appellant submitted that; he was convicted based on the evidence of the victim and caution statement which is weak evidence. Lastly, he prayed that his appeal be allowed, the conviction and sentence be quashed and set aside.

In reply to the first ground, Ms. Jackline Nungu, contended that it is not true that the Appellant was not properly identified. The reason being the same is reflected at page 5 on the last paragraph of the proceedings. However, she conceded that the intensity of light was not enough for identification. Further, she submitted that the victim was the one who identified the accused person. She made reference to the case of **Wilson Musa @ Jumanne v. The Republic**, Criminal Appeal No. 109 of 2018 Court of Appel of Tanzania at Arusha page 12.

Responding to the second ground, she contended that penetration was proved by the victim herself at page 5. The victim's evidence was corroborated by that of the Doctor at page 16. Also, the PF3 was admitted.

Reacting to third ground, Ms. Jackline Nungu stated that the evidence of the victim was direct evidence and was not circumstantial evidence. As regard to the fourth ground, the Accused did not object the tendering of caution statement as per page 13 of the typed proceedings.

On the sixth ground, she countered that the case was proved beyond reasonable doubt by the evidence of PW1, PW2 and PW3 together with the caution statement and PF3 which were admitted as exhibits. Eventually, she prayed this appeal be dismissed and that the conviction and sentence be sustained.

The Appellant had no much to rejoin. He stated that he is neither aware of the law nor the offence itself. Thus, he prayed this Court to assist him.

Having revisited the grounds and rival submissions adduced by both learned Counsel, this Court is of the settled mind that the main issue for determination likely to dispose this appeal is; *whether the prosecution side proved their case at the required standard.*

As a matter of fact, resolving the issue raised herein above, involves assessment of the evidence. The same is justified by the reason that this Court being the first appellate Court has the duty to re-evaluate the evidence adduced during the trial and come up with a prudent conclusion. Failure to do so is fatal. Reference to this fact may be made from the case of **Jongoo v. Republic** [2010] 2EA 171, **Prince Charles Junior v. The Republic**, Criminal Appeal No. 250 of 2014 Court of Appeal of Tanzania at Mbeya at page 13 and **D.R Pandya v. R** [1957] EA 336.

In this matter, the Appellant was arraigned and convicted under *section 130 (1) and (2)(a) and 131 (1) of the Penal Code (supra).* In particular, *Section 130 (2) (a)* of the same provides that;

> *not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse.*

Also, section 131(1) of the same law provides that:

> *Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in*

addition be ordered to pay compensation of an amount determined by the Court, to the person in respect of whom the offence was committed for the injuries caused to such person.

It was the Respondent argument that the case was proved on the required standard to wit beyond reasonable doubt but the Appellant claimed that the same was not proved as per the requirement of *Section 3(2)(a) of the Evidence Act, [Cap 6 R.E 2019]* which provides that:

In criminal matters, except where any statute or other law provides otherwise, the Court is satisfied by the prosecution beyond reasonable doubt that the fact exists.

Apparently, PW1 who was the victim narrated that she was raped at the area called Mnange Kijiweni. This testimony is found at page 5 of the typed trial Court proceedings. She stated that:

He started to beat me until when I became tired. He then removed my trouser "na Kuchana chupi yangu," he removed his trouser too and took his penis and inserted his penis into my vagina.

Seemingly, there is no any place in the typed proceedings which show that there was any resistance from the victim towards the act of the Appellant. This circumstance raises doubts, on whether it is true that, the

victim was raped. If there was no consent, this Court expected the victim to raise alarm for help, but the proceedings do not reflect the same.

Furthermore, the victim did not report the matter to the police station while the same is close to the named place of incident but she opted to report to her husband. This part of evidence carries doubts which should not have been left to exist. The Court is mindful of the principle that the best evidence in the sexual offence is that of the victim as enshrined in *Section 127 (6) of the Evidence Act* [Cap 6 R.E 2019] which states that:

> Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the Court shall receive the evidence, and may, after assessing the *credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict,* if for reasons to be recorded in the proceedings, the Court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth. (Emphasis is added)

The same have been echoed in several cases such as in: **Selemani Makumba v. Republic** [2006] TLR 379, **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008(Unreported), **Hans Mkumbo v. Republic,** Criminal Appeal No. 124 of 2007(Unreported), **Rashid Mtungwa v. Republic,** Criminal Appeal No. 91 of 2011 (unreported).

However, in several occasions, the Court of Appeal has attempted to caution lower Courts on the usage of that general rule. That, Courts should ensure the evidence of the victim is reliable and the witness is credible. There are several decisions to that effect including but not limited to the case of: **Abiola Mohamed @ Simba v. The Republic,** Criminal Appeal No. 291 of 2017 Court of Appeal of Tanzania (unreported), **Majaliwa Ihemo v. The Republic,** Criminal Appeal No. 197 of 2020 Court of Appeal of Tanzania (unreported), **Shabani Daudi v. R,** Criminal Appeal No. 28 of 2000 Court of Appeal of Tanzania (unreported), **Pascal Yoya Maganga v. R**, Criminal Appeal No. 248 of 2017 Court of Appeal of Tanzania (unreported). For instance, in the case of **Majaliwa Ihemo v. The Republic** *(supra)* at page 9, the Court observed that:

> *In sexual related trial s, the best evidence is that of the victim as per our decision in* ***Selemani***

***Makumba v. R**, [2006] TLR 379. We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point.*

Again, taking into account PW3 (the doctor) testified that, the victim was eight months pregnant, it is the view of this Court that, under such circumstances she ought to have reacted extremely serious to rape incident (by reporting the matter) if truly raped. This being the case, I am of the firm view that, it was very dangerous for the trial Court to convict the Appellant whilst relying on such doubtful evidence of the victim.

Moreover, the Appellant herein has raised the issue of identification which this Court has given it substantial consideration. From the landmark case of **Waziri Amani v. Republic** (1980) TLR 250, it can be divulged that certain ingredients must exist to enable proper identification of the Accused. The Court of Appeal at page 252 observed that:

...we would for example expect to find on records questions as the following posed and resolved by him: the time the witness had the accused under observation, the distance at which he observed him, the

condition in which such observation occurred. For instance, whether it was day or night time, whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity...

Reverting to the case at hand, the victim narrated that, she was raped at about 2300hours in the night and there was no enough light. Yet, she never knew the accused person before (as per page 4 and 5 of the trial Court proceedings). Under this premise, it can be noted that it was not easy for her to identify the accused (now the Appellant). Even though it was on the road, there is no evidence which shows that there were traffic lights on that particular road. Hence, by all necessary implications this Court agrees with the Appellant that the victim did not identify him properly.

Stressing once more, in this case, thorough identification of the Appellant was certainly vital for the trial Court prior to convicting and sentencing the Appellant. The trial Magistrate was duty bound to warn herself on the conditions for identification. To underscore this point, one may go through the case of **Raymond Francis v. Republic** [1994] TLR 100,

Flano Alphonce Masalu @ Singu & 4 Others v. The Republic, Criminal Appeal No. 366 of 2018. For instance, in the case of **Raymond Francis** *(supra),* the Court observed that:

> *It is elementary that, a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost important.*

Up to this juncture, I find that the prosecution side in this case has not proved their case to the required standard for the following reasons: *First,* the evidence of the victim herself is flawed to the extent clarified in the herein above texts. *Second,* the victim evidence leading to identification of the accused is too feeble and the trial Court failed to comprehend the same.

Scuffling, the Respondent claimed that the Appellant did not object the evidence presented by the prosecution side during the trial. Needless to say, this Court is of the settled view that it is not the duty of the accused to prove his innocence, rather the prosecution side should prove their case to the required standard. There are countless Court's decisions which articulates the same point. One among them is the decision in the case of **Saasita**

Mwanamaganga v. Republic, Criminal Appeal No. 65 of 2005, Court of Appeal at Mtwara (unreported) whereby the Court pronounced that:

> *In criminal case, the burden is always on prosecution to prove the case against the Appellant beyond reasonable doubt. The burden never shifts.*

Basing on the above reasons, I am of the firm view that the guilt of the Appellant was not proved beyond reasonable doubt. In other words, the prosecution failed to establish the guilt of the Appellant beyond all reasonable doubt. Their evidence was not strong enough to convict the Appellant.

In the event, this appeal is hereby allowed. In effect, the conviction, judgement and sentence meted against the Appellant by the Resident Magistrate Court of Njombe are all reversed, quashed and set aside respectively. The Appellant should forthwith be released from prison unless he is otherwise being held for some other lawful cause.

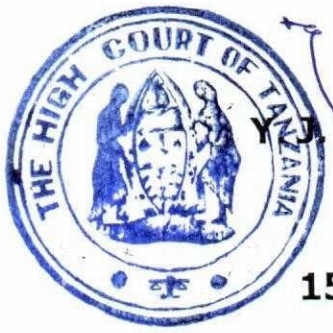
It is so ordered.

Y. J. MLYAMBINA

JUDGE

15/06/2022

Judgement pronounced through virtual Court and dated this 15th day of June 2022 at 09: 37 am in the presence of the Appellant in person and Senior Learned State Attorney Ms. Blandina Manyanda for the Respondent. Both parties were stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.



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