IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

CRIMINAL APPEAL NO. 59 OF 2020

(Originating from the decision of the Mufindi District Court at Mafinga in Criminal Case No.78 of 2018).

ZUBERI MPONZI..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGEMENT

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

MLYAMBINA, J.

The Appellant named herein above was charged in the District Court of Mufindi at Mafinga with the offence of rape contrary to *section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap 16 R. E. 2019].* In brief, the prosecution case was that: On 4th January, 2018 at Ibwanzi Village within Mufindi District, Iringa Region, the Appellant had carnal knowledge of a girl aged 17 years. (For the purposes of protecting her identity, I shall refer her as the victim or PW1). At the end of the trial, the Appellant was found guilty and sentenced to thirty (30) years of imprisonment. Being aggrieved by that decision, he lodged this appeal with five (5) grounds of appeal challenging

the conviction and sentence. The said grounds can be paraphrased as follows:

1. *That, the Trial Court erred in fact and in law for believing and deciding that PW1 was 17 years of age when she was allegedly raped on 4th January, 2018 without any tangible proof to that effect.*
2. *That, the Trial Court erred in fact and in law for finding that the Appellant raped PW1 without any good proof.*
3. *That, the Trial Court erred in law and in fact by deciding for prosecution despite the fact that it had failed to conduct DNA test of the newly born baby in order to prove that the Appellant had committed the offence charged.*
4. *That, the Trial Court erred in law and in fact by deciding against the Appellant relying on medical test which was conducted 14 weeks after the alleged rape event.*
5. *That, the Trial Court erred in fact and in law for relying on prosecution evidence albeit the same was scant and at disarray.*

By consensus, this appeal was disposed by way of written submissions. The Appellant was unrepresented, whereas the Respondent was represented by Ms. Jackline Nungu learned State Attorney.

The Appellant argued all grounds of appeal jointly. He stated that the trial Court erred when it convicted him with the offence of rape while the case

was not proved beyond reasonable doubt as required under *section 3 (2) (a) of the Evidence Act [Cap. 6 R. E. 2019].*

The Appellant submitted that he is aware with our jurisdiction. Further, the best evidence in sexual offence comes from the victim. A conviction for a sexual offence may be grounded solely on the uncorroborated evidence of the victim as per *section 127 (7) of Evidence Act (supra).* Moreover, he argued that such evidence of the victim should be put to scrutiny in order for Courts to be satisfied what the victim states contains nothing but the truth as per *section 127(7) of Evidence Act.* He invited this Court to the go through the cases of **Mohamed Said v. The Republic**, Criminal Appeal No. 154 of 2017, Court of Appeal of Tanzania at Iringa (unreported) at page 14 and **Robert Kalibara v. The Republic**, Criminal Appeal No. 38 of 2020, High Court of Tanzania at Bukoba District Registry (unreported) at pp 11-14.

The Appellant urged this Court to take a great consideration on whether the testimony of PW1 as relied by the trial Court is credible, convincing and consistent with human nature and the normal course of things. On his opinion, the answer to the above posed question is in negative contrary to the position given at page 10 lines 7-12 of the trial Court judgement. He insisted that the evidence of PW1 was not credible, not convincing and

consistent. He reasoned that PW1 was not a resident of the Ibwanzi Village. Therefore, it was not correct for the trial Court to rely on her evidence to convict him as seen on page 5 last paragraph lines 2-3 and page 6 of the trial Court proceedings.

The Appellant added that the evidence of PW1 contain a serious doubt in comparison with the evidence of PW4 (PW1's step mother). The doubt is that PW4 at page 10 paragraph 2 lines 3-4 of the trial Court proceedings, stated that PW1 saw her menstrual period at last on April 2018. The question is; if PW1 was raped on 04.01.2018 and as a result she got pregnancy, how comes PW1 to undergo menstrual period for almost four months?

Furthermore, he submitted that their evidence creates reasonable doubt on; whether PW1 was raped by the Appellant on 04.01.2018 and became impregnated. PW1 was medically examined by PW5 on 08.04.2018. PW5 who examined her stated that; when he examined her on 08.04.2018, he discovered that PW1 had a pregnancy of 14 weeks and 2 days. If PW1 was raped on 04.01.2018 by the Appellant, how comes on 08.04.2018 PW1 was discovered with a pregnancy of 14 weeks and 2 days? Counting from 04.01.2018 up to 08.04.2018, the correct mathematic according to him tells

that, PW1 was required to have a pregnancy of 13 weeks and 4 days. Thus, the claims of being raped by the him lacks justification.

He concluded by submitting that the only evidence to clear the doubts on the issue of rape was the evidence of DNA test which would have linked forensically the Appellant with PW1's pregnancy to prove that she was raped by him on 04.01.2018. To support his submission, the Appellant invited this Court to go through the case of **Christopher_Candidius @ Albino v. The Republic,** Criminal Appeal No. 394 of 2015, Court of Appeal of Tanzania (unreported) from pages 11-14 which emphasized the need of adducing the evidence of DNA test in the absence of any other evidence linking the accused with rape offence. Thus, he prayed for this appeal be allowed.

In reply, Ms. Jackline Nungu submitted that the trial Court was justified to believe and rely on the evidence of PW1 to convict the Appellant. It is trite law that every witness is entitled to credence and must be believed and his testimony is accepted unless there are good and cogent reasons not believing a witness. She cited the decision in the case of **Goodluck Kyando v. Republic** [2006] TLR 363. This being the stance, she argued that the trial Court was right to believe PW1 who was the victim of the incidence and there was no good and cogent reason not to believe his testimony.

Responding to the issue of failure by PW1 to report the incidence on time, she submitted that it cannot be a good and cogent reason not to believe PW1 due to the following factors: *First*, PW1 testified that, after the incidence on the next day she returned to school at Mafinga in other words she left Ibwanzi Village as per page 5 of the typed proceedings. Also, the Appellant threatened her not to tell anyone otherwise the Appellant would have killed her.

Moreover, Ms. Nungu submitted that the testimony of PW1 was corroborated by that of PW2 who is the young sister of the victim as per page 7 of the typed trial Court proceedings. Therefore, the trial Court was correct to convict the Appellant. She invited this Court to go through the case of **Shiku Salehe v. Republic** [1987] TLR 198 whereby this Court held that:

> *In sexual offences the Court should warn itself of the dangers of acting on uncorroborated testimony of the complainant and having done so the Court may convict, if it is satisfied that the victim's evidence is true.*

Ms. Nungu went on to submit that under the situation, the trial Court believed the testimony of PW1 to convict the Appellant. Apart from that there was the testimony of PW2 who corroborated victim's testimony.

Regarding the issue of identification, Ms. Jackline Nungu submitted that the Appellant was properly identified because PW1 managed to identify the Appellant properly as per the evidence on records. PW1 testified that she managed to identify the Appellant because it was not the first time to see him as per page 8 of the typed proceedings. Apart from that he managed to identify him through natural light and the incidence took sometimes.

Never the less, the learned counsel submitted that PW2 in her testimony managed to identify the Appellant who was their relative as per page 7 of the typed proceedings. To cement her argunment, she cited the landmark case of **Waziri Aman v. Republic** [1980] TLR 250, in which the Court of Appeal of Tanzania laid some conditions for a proper identification of a suspect by the complainant. Some of those conditions are:

> *1) The time the witness had the Accused under observation 2) the distance at which he observed him 3) The Conditions in which the observation occurred i.e day or night time 4) whether the witness knew or had seen the accused before the act 5) whether there was a good or poor lighting at the scene.*

She contended that the conditions for proper identification set out in the above cited case has been met in the case at hand. Hence, she argued that the Appellant was properly identified as stated above. It was her further

submission that on the issue of contradiction of evidence of PW1 and PW4, the testimony of PW4 is hearsay evidence in respect of what she was told by PW1 and the trial Court was justified to rely heavily on the testimony of PW1 herself and in that situation there is no contradiction.

Lastly, Ms. Nungu submitted that the argument raised by the Appellant regarding the DNA test has no merit. The reason being that in proving rape case DNA is not an essential element in proving the offence. To cement her argunment, she cited the case of **Julius Kandonga v. The Republic**, Criminal Appeal No. 77 of 2017 Court of Appeal of Tanzania (unreported) in which the Court observed that:

> *In proving the offence of rape, the crucial element is that' of penetration as provided under section 130(4) of the Penal Code [Cap 16 R.E 2002] and not DNA.*

In light of such guidance she argued that the trial Court was right to convict the Appellant without need of DNA. Finally, she submitted that, the point regarding that there was grudge between the Appellant and PW3 (the victim's mother) is an afterthought. According to the testimony of PW3, there was no existing previous conflict as it can be seen at page 9 of the

proceedings and that the Appellant took iron bars of PW3 and it was settled. Therefore, she submitted that this appeal has no merit.

After having carefully gone through the proceedings and judgement of the trial Court the grounds of appeal and submissions from both parties, I find that the key issue for determination in this appeal is; *whether the prosecution side proved their case at the required standard.*

Besides, this Court is mindful of the renowned principle that being the first appellate Court it has a duty to wear the shoes of the trial Court and re-evaluate the evidence adduced so as to make prudent decision which shall render the justice to all parties. Reference can be made to 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 (unreported) at Mbeya at page 13**, Edgar Kayumba v. DPP**, Criminal Appeal No. 498 of 2017(unreported), **Ndorosi Kudekei v. Republic,** Criminal Appeal No. 318 of 2016(unreported), **Vuyo Jack v. DPP**, Criminal Appeal No. 334 of 2016(unreported)**, Fatai Said Mtanda v. Republic**, Criminal Appeal No. 249 of 2014 (unreported) just to mention few of them. Failure by the first appellate Court to do so is not acceptable as it was said

in the case of **D.R Pandya v. Republic** [1957] EA 336, the Court had the view that:

> *On the first appeal the evidence must be treated as a whole to a fresh and exhaustive scrutiny and that failure to do is on error of law.*

While attempting to resolve the key issue above, this Court had to visit the law which creates the offence upon which the Appellant was arraigned and convicted for, particularly *Section 130 (2)(e) of the Penal Code (supra).* The named provision provides that:

> *A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions (e) with or without her consent when she is under Eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.*

From the wordings of the above law provision, the prosecution side is duty bound to prove the following ingredients of the offence of rape, to wit: *One*, there was penetration; *Two*, there was lack of consent: and *three*, it was the Appellant who committed the act.

Reverting to the facts comprising the appeal at hand, to begin with the issue of identification, this Court has a settled mind that, the Appellant was properly identified by PW1 and even PW2. This is due to various reasons: *One,* he is their uncle, thus he was not a stranger to the victim. *Two,* there was enough time for the observation from when he came home. *Third,* no doubt, that there was short distance between them so as to enable easy observation. That being the case, this Court is of a firm view that the conditions for proper visual identification of the accused, now the Appellant as celebrated in the landmark case of **Waziri Aman v. Republic** *(supra)* has been observed in the case at hand.

Moreover, in proving that it was the Appellant who committed the offence, PW1 narrated how she was raped by the Appellant. This can be observed under page 5, 6 and 7 of the typed proceedings of the trial Court. The evidence of PW1 was corroborated by PW2 (her younger sister) who witnessed the Appellant going out with her sister PW1 and she was told by the Appellant to sleep as it can be observed at page 6,7 and 8 of the trial Court typed proceedings.

Whilst, this Court is cautious on the trite law that the true and best evidence in the sexual offence is that of the victim. This has been well

emphasized in several decisions such as the cases of **Selemani Makumba v. Republic** [2006] TLR 379 and **Charles Chimango v. Republic,** Criminal Appeal No. 382 of 2016 (unreported). The same is a recap *of section 127 of the Evidence Act, (supra).*

Regarding the element of penetration, the law clearly states that it is an important ingredient in proving the offence of rape as per *section 130(4) of the Penal Code (supra)* which provides:

> *(4) For the purposes of proving the offence of rape-*
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence...*

This above requirement of the law has been reinforced by the Court especially on instances involving a child. Thus, the crucial issue to be proved in rape case is penetration however slight. The same point was underscored in the cases of **Said Majaliwa v. Republic,** Criminal Appeal No. 2 of 2020 Court of Appeal Tanzania at Kigoma at page 7 and 14 and **Peter Sagadege Kashuma v. Republic,** Criminal Appeal No. 219 of 2019, Court of Appeal of Tanzania at Dar es-Salaam at page 10 (both unreported). Hence, unquestionably, in any rape case, especially of the child (which means the

girl under the age of 18 years), the prosecution side is duty bound to prove penetration.

In this case, the evidence of rape to PW1 was corroborated by PW5 (the medical doctor) who proved that there was penetration in the victim's vagina. PW5 testified that there was no hymen and PW1 was found to be pregnant as seen at page 12 of the typed trial Court proceedings document. In my considered view the evidence of PW1, PW2 and PW5 proved that the PW1 was raped by the Appellant.

Under the circumstances and in alternative to the above, even if there was no such corroboration, this Court see no reason of not believing the evidence of the victim herein (PW1). In the case of **Hassan Juma Kanenyera & Others v. Republic** [1992] TLR 106 it was held that:

> *It is a rule of practice, not of law that corroboration is required of the evidence of a single witness of identification of the accused made under unfavorable conditions, but the rule does not preclude a conviction of the evidence of a single witness if the Court is fully satisfied that the witness is telling the truth.*

Thus, in the present case this Court is fully satisfied that the victim herein was telling nothing but the truth. Additionally, I agree with the argument of the Respondent Counsel that the DNA test has never been stated to be evidence to prove the offence of rape. Ostensibly, in this case there was no need for DNA test. To that effect, one may go through the case of **Julius Kandonga v. The Republic**, *(supra).* The reasons are: *First,* the offence of rape was proved to the satisfaction of the law as it has been explained herein above. *Second,* the Appellant was properly identified by the victim and PW2. *Third,* and needless to say, the Appellant was stubborn to the trial Court by jumping bail which shows that he was aware with what he had done and what he would likely face. He tried to escape from the hand of justice.

Above all the afore arguments, the current position of the law as it has been occasionally stated by the Court is that, "the Court can convict the accused on uncorroborated evidence of a single witness. The victim being a child of tender years or any victim of the sexual offence, provided that the victim of the sexual offence is telling nothing but the truth. Certainly, this is now the criterion used in criminal proceedings on matters relating to sexual

offence in order to determine the credibility of the witness and in particular the victim of the sexual offence.

In view of prevailing circumstances of this case as I have reasoned above, I am satisfied that the trial Magistrate was entitled to reach a finding that the case against the Appellant had been conclusively proved beyond reasonable doubt and the Appellant was properly identified. I have no reason to fault the findings of trial Magistrate, who in my considered view, correctly found the Appellant guilty, convicted and sentenced him accordingly.

In the event, and for all the reasons stated, I am satisfied that this appeal lacks merits. Consequently, the conviction and sentence thereof imposed to the Appellant by the trial Court is hereby sustained. The appeal is dismissed in its totality. Order accordingly.

Y. J. MLYAMBINA

JUDGE

15/06/2022

Judgement pronounced through virtual Court and dated this 15th day of June 2022 at 09: 50 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 explained.

Y. J. MLYAMBINA

JUDGE

15/06/2022