IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 46 OF 2022

(From the decision of the District Court of Rungwe at Tukuyu (Hon. A. E. Lugome, RM) in Criminal Case No. 103 of 2019)

BAKIFU KASWITI MWALYELYE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 23/05/2022
Date of Judgement: 13/06/2022

MONGELLA, J.

The appellant was arraigned in the district court of Rungwe at Tukuyu for a charge of rape contrary to section 130 (1) (2) (e) and 131 (1) (3) of the Penal Code, Cap 16 R.E. 2019. The particulars of the charge state that, on 7th August 2019 at about 19:00hrs at Suma village within Rungwe district, Mbeya region, the appellant had carnal knowledge of a girl aged 10 years (hereinafter referred to as the victim or PW2, to conceal her identity).

The facts as laid down by the prosecution during hearing have it that; on the fateful date, the appellant and the victim were in a tea farm belonging to the victim's grandmother having sexual intercourse. PW3, a

boy aged 13 years, while heading back home from washing his clothes, saw the two in the farm. According to his testimony, PW3 saw the appellant on top of the victim with his trousers lowered to the knees. The victim's dress was off as well. When the two saw him they were shocked. The appellant then followed him warning him not to spill the beans or lest he would kill him. Then he gave PW3 T.shs. 1,000/- to share with the victim. All of them left the crime scene, but on the same day PW3 told his brother who told their mother. The next day, his mother asked the victim in the presence of the victim's grandmother as to what they were doing the previous day at the tea farm. The victim told them that she was having sexual intercourse with the appellant.

When testifying, the victim explained that the appellant, who is her uncle and works for her grandmother taking care of tamed animals, found her that evening playing with her friends outside their house where there was moonlight. The appellant called her and sent her to the tea farm. At the tea farm the appellant told her to undress and lay down whereby she complied. The appellant then undressed and started penetrating her. She said that she felt pain but the appellant threatened to slaughter her if she dared to raise an alarm. She said that while continuing with the act PW3 emerged. The appellant gave them T.shs. 1,000/- and warned them not to tell anyone or else he will slaughter them with a knife. The next day she was asked by PW3's mother as to what she did with the appellant the last day. She told her that the appellant was raping her.

The victim was then taken to hospital for examination, whereby she was attended by PW4. PW4 testified that he found the victim with a raptured

hymen and had pains in her vaginal walls, which suggests that she was penetrated by a male organ. The age of the victim was proved by the victim's father who testified that she was born on 03rd October 2010, thus 11 years at the time of hearing.

Though the appellant denied the charges, the trial court was satisfied that the prosecution had proved the charge to the hilt. It therefore convicted the appellant for the offence charged and sentenced him to serve life imprisonment in accordance with section 131 (1) of the Penal Code. Aggrieved by the decision, the appellant filed the appeal at hand on ten grounds. During the hearing, he appeared in person and prayed for his grounds of appeal to be adopted as his submission. I shall therefore present the grounds of appeal as such.

On the 1st and 8th grounds, the appellant faults the trial court for convicting and sentencing him without taking into account that PW2 claimed to have been raped on 07th August 2019 and obtained a PF3 from the police, but was examined by PW4 on 18th August 2019. He challenged the delay in examination of the victim by PW4. On the same account of delay, he as well challenges the evidence of PW4 contending that is was fabricated.

On the 2nd and 5th grounds, he challenges the trial court's reliance on the testimony of PW3 who claimed to be an eye witness. He says that the trial court failed to regard that the appellant was not familiar to PW3 as he used to live in Tunduma which is very far away from PW1, PW2, and PW3's

residence. He basically challenges the visual identification by PW3 and PW2.

On the 3rd ground he challenges the trial court for relying on the testimony of PW2 and PW3 without considering that PW1 got information from one Daudi Mwapupilo, a village chairman. He further contended that the said village chairman was never called to prove if the appellant was among his citizens.

On the 4th ground he challenges the trial court for failure to consider that PW2 and PW3 never raised any alarm calling her friends who were nearby, but instead they accepted to collect T.shs. 1,000/- from him. He further challenged the court for not considering that the said T.shs. 1,000/- was not tendered in evidence in court. He was of the view that all this casts doubt on the credibility of these witnesses.

On the 6th ground, he faults the trial court for considering the PF3 tendered in court and admitted as "exhibit PE1" without regarding that the one who issued it to PW2 was not called to testify in support of the document. He was of the view that the non-calling of such witness shows that the document was prepared out of police station.

On the 7th and 10th grounds, the appellant claims that the prosecution failed to prove the charge as per the law because the village chairman, the police officer who issued the PF3 to PW2 and the police who investigated the case were not brought to court to testify. He adds (on the 10th ground) that the trial court did not consider his defence case.

Under the 9th ground, he faults the trial court for failure to address and consider the contradiction in the testimony of PW1 and PW4. He says that while PW1 told the court that PW2 was medically examined and found to be infected with sexually transmitted disease (STD), PW4 who examined the victim never supported the assertion.

The respondent was represented by Mr. Lordgurd Eliamani, learned state attorney. He opposed the appeal. Replying to the 1st ground, he first conceded that PW4 testified to have examined the victim on 18th August 2019 at evening hours. However, he countered the ground of appeal contending that the appellant was present in court when PW4 was testifying thus had the opportunity to cross examine him on the facts adduced, but never did that. He further considered the contradiction minor not going to the root of the case. He added that the incident occurred in 2019 and PW4 testified in 2022 whereby a long time had passed impairing his re-collection of events.

The 2nd and 3rd grounds were replied collectively. He argued that the issues complained of were not in dispute as during preliminary hearing the appellant admitted to be living in the same village with the victim. He added that even when evidence was being adduced, the appellant never denied to be living in the village he is now disputing and never cross examined on the same.

Regarding calling of the village chairman and other witnesses to testify, he contended that there was no necessity of calling the village chairman or any other witness to prove that the appellant lived in that village. He

sought refuge under **section 143 of the Evidence Act, Cap 6 R.E. 2019** which does not compel a specific number of witnesses to be presented to prove a certain fact. Referring to the case of ***Siaba Mswaki vs. The Republic***, Criminal Appeal No. 401 of 2019 (CAT at DSM, reported at Tanzlii), he added that the prosecution only calls witnesses it sees important in proving its case.

Further referring to the case of ***Abdul Mohamed Namwaga @ Madodo vs. The Republic***, Criminal Appeal No. 257 of 2020 (CAT at Mtwara, reported at Tanzlii) he argued that if the appellant found that the issue was in dispute he ought to have raised doubts during cross examination, but failed to do so entailing acceptance of the facts alleged. He considered the claim an afterthought being raised at this stage.

Addressing the 4th ground, he referred the Court to page 10 and 12 of the trial court proceedings whereby both PW2 and PW3 appear to have explained the reasons for not raising any alarm whereby both of them stated that they were threatened to be slaughtered by a machete and killed by the appellant. Regarding the claim of T.shs. 1,000/- not being tendered in evidence, he argued that the prosecution saw no relevance in tendering the money as exhibit in proving the offence charged.

With regard to the 5th ground, Mr. Eliamani first reiterated his submission under the 2nd and 3rd grounds. He further referred the Court to the evidence of PW2 and PW3 on the trial court proceedings, who well identified the appellant. He said that these witnesses testified to know well the appellant and they lived with him in the same village. Referring

specifically to the testimony of PW2, he added that even during cross examination, PW2 clearly stated that she knows the appellant well as she used to see him at his grandmother's house and that the appellant used to call her and lay her on his bed. That, PW3 also testified to know the appellant as they both lived in Bujesi village whereby the appellant used to go to PW2's grandmother. That, even on cross examination PW3 maintained that he used to see the appellant at PW2's grandmother in the morning, afternoon and evening whereby he used to keep cows and work in the farm. He prayed for the ground to be dismissed for lack of merit.

Replying to the 6th and 7th ground, he as well reiterated what he submitted under the 2nd and 3rd grounds. He further referred to the case of ***Abdul Mohamed Namwanga vs. The Republic*** (supra) which ruled that the best evidence in rape cases comes from the victim. On those bases, he concluded that the witnesses the appellant claims were not called to testify were not important compared to the victim whose evidence was corroborated by PW3 and PW4.

Regarding the 8th ground, Mr. Eliamani reiterated the arguments he advanced on the 1st ground. He added that PW1 and PW2 explained well the date when the incident occurred and the date they went to hospital. He maintained his argument that the contradiction is minor and the appellant never cross examined on the facts alleged. He insisted that the best evidence came from the victim.

On the 9th ground, Mr. Eliamani replied that PW1 testified that the appellant ran away after the incident and could not be found, so in the premises it was difficult to examine the appellant as well to establish whether he had the venereal diseases. He further referred the testimony of PW4 who when cross examined stated that it was not his duty to examine him unless directed by the authorities. He added that in rape cases the relevant fact to be proved is penetration and not diseases the victim is found with. That PW4 proved that the victim was penetrated and PW2 and PW3 testified that it was the appellant who penetrated the victim.

Addressing the 10th ground, he contended that the appellant's evidence was considered. He invited the Court to glance at page 4 to 7 of the judgment whereby the trial court addresses the allegation by the appellant that there were contradictions and deliberated accordingly. That in its deliberation the trial court ruled that the contradictions do not affect the rest of the evidence. He prayed for the appeal to be dismissed for lack of merit.

In rejoinder, the appellant claimed that the trial court did not do justice to him as it failed to consider that while the victim's parent testified that the victim was found with HIV, the doctor who examined her testified that he found her with no venereal disease. He prayed for the Court to do justice to him.

After considering the grounds of appeal, the arguments by the parties and gone through the trial court record, I deliberate as follows:

Concerning the 1st ground, it is true that the victim, PW2, stated that the rape incident occurred on 07th August 2019, and PW4, the medical doctor, testified to have received and examined the victim on 18th August 2019. In my view, the delay in examination does not render the examination done on the victim unworthy of consideration so long as the witnesses told the truth of what happened. PW4 testified to have found the victim penetrated by a male organ. The PF3, exhibit P1 also shows that the victim had been penetrated several times whereby the last time was 11 days ago. Though days had really passed, the examination conducted still established that the victim was penetrated. I therefore find the ground lacking merit.

On the 2nd, 3rd, and 5th grounds, I find the question of identification irrelevant on the circumstances of the offence. As much as the offence was alleged to have been committed at 19hours, the identification by PW3 was by recognition, which is considered to be more credible. See: ***Nebson Tete vs. The Republic***, Criminal Appeal No. 419 of 2013 (CAT at Mbeya, unreported); ***Jumapili Msyete v. Republic***, Criminal Appeal No. 110 of 2014, (CAT at Mbeya, unreported); and ***Jackson Kihili Ruhanda and Another v. Republic***, Criminal Appeal No. 139 of 2007 (CAT, unreported). PW3 explained how he found the appellant and the victim at the scene and had conversation with the appellant. He explained that the appellant gave him T.shs. 1,000/- to split with PW2 and threatened to kill them with a machete if they told anyone of the incident.

PW2 also corroborated what PW3 said whereby she said that while on the act PW3 found them and the appellant gave them T.shs. 1,000/- to split

between them and threatened to kill them if they told anyone. The law is settled to the effect that every witness is entitled to credence and to have his/her evidence believed by the court, unless there are cogent reasons not to believe the witness. See: ***Goodluck Kyando v. The Republic***, Criminal Appeal No. 118 of 2003 (CAT, unreported). PW2 and PW3 gave coherent and consistent evidence, which was not shaken even during cross examination. I find no reason to interfere with the trial court's assessment and consideration on such evidence. These grounds are found to lack merit and are dismissed.

I as well find the 4th ground baseless. It is not the legal or practical requirement that an alarm must be raised in rape cases. The claim that the T.shs. 1,000/- claimed to be given to the victim and PW3 was not presented in court is also baseless. In proving rape cases what is relevant is proof of penetration. The victim who is the best witness testified to have been penetrated by the appellant. Her testimony was corroborated by PW3 who caught them alive and by PW4 who upon examining the victim found she was penetrated by a male organ. Therefore the money is an irrelevant piece of evidence. The ground is dismissed as well.

Under the 6th ground, the appellant challenges the conviction against him on the ground that the police officer who issued the PF3 was not presented in court to testify. The law does not compel a particular number of witnesses to be presented to prove any fact. See: **Section 143 of the Evidence Act, Cap 6 R.E. 2019**. What is considered is the credibility of the witnesses presented by the prosecution and whether the presented witnesses proved the case beyond reasonable doubt. In the matter at

hand, even if the PF3 is expunged from the record, I find the evidence of PW1 and PW2 watertight to hold the conviction against the appellant. These findings also dispose the claims under the 7th and 10th grounds under which the appellant complains that the police officer who issued the PW3, the investigating police officer, and the village chairman were not brought to testify on court.

The claim that the offence was not proved beyond reasonable doubt and that the defence case was not considered are found to lack merit as well. Starting with the defence case, it is clear at page 7 and 8 of the trial court judgment that the same was keenly considered. The appellant's only evidence was on contradictions between the dates of the offence by PW2 and PW4 and contradiction on whether the victim was infected with sexually transmitted diseases between PW1 and PW4. With regard to the contradiction between PW2 and PW4 on the dates, I have already deliberated under the 1st ground, that there is no any contradiction. The witnesses testified what they witnessed whereby PW2 stated that the incident occurred on 07th August 2019 and PW4 stated that he received the victim on 18th August 2019. In the PF3 he as well clearly noted that he received the victim 11 days from the last incident of sexual intercourse.

With regard to the contradiction between PW1 and PW4 on the sexually transmitted diseases, I find the same not going to the root of the matter. It should be noted that PW1 has no medical expertise, but it was PW4 who examined the victim and testified as to the medical results he came up with. This finding also disposes the claims under the 9th ground of appeal.

Concerning the claim that the offence was not proved beyond reasonable doubt, I reiterate my findings that PW2 and PW3 were credible witnesses to prove the offence. PW2 as the victim provided the best evidence in the rape incident. See: ***Shabani Said Likubu vs. The Republic***, Criminal Appeal No. 228 of 2020. ***Alfeo Valentino v. Republic***, Criminal Appeal, No. 92 of 2006 (unreported) and ***Shimirimana Isaya and Another v. Republic***, Criminal Appeal, No. 459 of 2002 (unreported). PW2, like I have already pointed out, clearly narrated how the appellant called her and sent her to the tea farm and had sexual intercourse with her until they were caught by PW3. PW3 corroborated the testimony of PW2. These two witnesses never adduced contradictory evidence thus rendering their testimony credible and sufficient to hold the conviction. In the upshot, the entire appeal is found to lack merit and is dismissed. The conviction and sentence by the trial court are hereby upheld.

Dated at Mbeya on this 13th day of June 2022.

L. M. MONGELLA

JUDGE

Court: Judgment delivered at Mbeya in Chambers on this 13th day of June 2022 in the presence of the appellant appearing in person and Ms. Hannarose Kasambala, learned state attorney for the respondent.

L. M. MONGELLA

JUDGE