THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 68 OF 2021

(Originating from Mlele District Court at Mlele in Criminal Case No. 101/2020)

FRED SAMWEL @ KINDUMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 14th June, 2022

Date of Judgment: 26th July, 2022

NDUNGURU, J

The appellant was charged and convicted by the District Court of Mlele (Trial Court) for the offence of rape contrary to Section 130 (1) (2)(e) and 131 (1) of the Penal Code Cap 16 R.E. 2019.

It was alleged by the prosecution side that on the 14th day of August, 2020 at Utende Village within Mlele District in Katavi Region, the appellant did unlawfully have carnal knowledge of one girl aged 13 without her consent whereas the name of the girl is hidden to protect her integrity and henceforth would be referred to as the victim.

During the trial the appellant protested his innocence throughout but at the end he was found guilty and therefore was sentenced to serve 30 years imprisonment for the offence he was charged with.

Being dissatisfied by the decision and sentence of the trial court, the appellant knocked the door of this court intending to appeal against what he believed to be an unfair decision and sentence meted on him by the trial court. In doing so, the appellant had two grounds of appeal in his Petition of Appeal which are as reproduced hereunder;

1. That, the trial court erred at and fact by believing its face and working upon it the evidence by PW2 who examined PW2 without scientific instruments.
2. That, the trial court erred at law and fact by convicting and sentencing the appellant on a case which was not proved beyond reasonable doubt.

During the hearing date of this appeal, the appellant was unrepresented meaning he fended for himself meanwhile the learned Senior State Attorney Mr. Simon Peres was representing the respondent.

As he was invited to submit in support of his appeal, the appellant prayed for this court to adopt his grounds of appeal as his submission and that his appeal be allowed.

In responding to the appellant, Mr. Peres submitted that his side resists the appellant's appeal and that they support the conviction and sentence of the trial court.

Mr. Peres took off by arguing against the first ground of appeal, that the ground lacks merit. He added that the evidence available is that the medical officer examined the victim on the same date immediately after the event. That he found blood stains, bruises and the victim was complaining of pain. He insisted what was done by the medical officer was scientific examination, and that this ground is devoid of merit.

Arguing against the 2nd ground of appeal, Mr. Peres submitted that the case against the appellant was proved to the required standard that is beyond reasonable doubt. He insisted that, having gone through the proceedings, the case was proved beyond reasonable doubt. He added that, PW2 was raped on the 14/08/2020 while coming from school, and that she arrived at her home crying and reported the incident to her mother PW4. Mr. Peres submitted further that the victim told her mother that she was raped by a stranger but she would identify him if she sees him. He added that, the victim described the offender that he had pimples on his face, he wore a blue shirt with long sleeves and Sandals

(za khaki), and that she would identify the offender as he was on top of her as he raped her.

The learned Senior State Attorney continued that, on the 14/08/2020 PW2 and PW4 reported the matter to the police. That, PW2 told the police if she sees the culprit, she can identify him prescribing the same identification features. Mr. Peres proceeded that, on 05/10/2020 after two months while at Inyonga village, where there was a public rally, the appellant passed where the victim was, and after seeing him, the victim identified him and she called PW5 her aunt. As the appellant was on the same dress code as on the date of the incident, PW2 and PW5 reported the matter to the police and the appellant was arrested. As the appellant was taken to Inyonga Police Station, PW2 was insisting that he was the rapist. Mr. Peres insisted that in the nature of given circumstance, the main issue was whether identification was proper.

Mr. Peres continued to argue that this kind of identification needs not identification parade, because it was the victim who identified the appellant. Mr. Peres said, though it was a long time, the victim could not point anybody else until when she saw the appellant. He added, his side is satisfied that such kind of identification is peculiar, but the evidence is

interacting that the victim managed to identify the appellant in the midst of many people, and therefore he believes such identification can not be mistaken and therefore he submits that the case was proved beyond reasonable doubt and that he prays for this appeal to be dismissed.

In rejoinder, the appellant simply prayed for his appeal to be allowed.

In disposing of this appeal, the main issue to be determined is **Whether the case against the appellant was proved beyond the required standards of the law.**

I would firstly like to straighten out that, the two grounds of appeal as filed by the appellant could be condensed down to one that, the prosecution side did not prove their case against the appellant beyond reasonable standards required by the law.

This court being the 1st appellate court, I am in the position of re-evaluating the evidence of the trial court and make my own determination of the same, as it was held in the case of **Siza Patrice v. Republic, Criminal Appeal No. 19 of 2010** (unreported) that: -

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to

re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary."

In perusing the trial court's records, the victim testified that the incident occurred at around 18:00 hours as she was coming from school heading back home, and during that time there was plenty of light which enables to see another person without any problem. She added, as the offender was committing the ordeal, they were facing each other and therefore the looks of the culprit became familiar to her, and as she was reporting the ordeal firstly to her mother, she prescribed the looks of the culprit as she did not know him prior to the incident. She prescribed his face to have pimples, and that he wore a long-sleeved blue shirt, creamed trouser and wore sandals.

I am aware that, there is always the need for testing with greatest care the evidence of a single witness in respect of identification. In the most celebrated case of **Waziri Amani v The Republic [1980] TLR 250**, it was highlighted that the evidence of visual identification is easily susceptible to error. At page 251-252 of the judgment the Court succinctly stated as under:

"The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act on

evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight."

As per the trial court's records, the key identifying witness, PW2 did advert to the guidelines enunciated by the Court of Appeal in the **Waziri Amani"s** case *supra*. She did give the descriptions of the appellant by the appearance of his face that it had pimples and she also stated what he was wearing during the moment of committing the offence which matched the descriptions of the person he saw on the rally day. PW2 also stated that there was plenty of light as the incidence occurred at around 18:00 hours, as it was enough and sufficient in identifying the appellant.

In another case of **Raymond Francis v R [1994] TLR 100** at page 103 it was stated as follows: -

"...it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance."

Taking into account the settled position of the law, I am inclined to say with certainty that the evidence of identification as given by PW2

has met the legal requirements as set forthwith by the law and has been laid out in several decisions.

That being cleared, now my concern is to the omission of the offence itself, in other words, was the victim raped. In her testimony, she told the trial court that as she was dragged to a bush, the appellant asked her, "chagua mawili, nikuchome kisu au nikubake". Thereafter, the appellant took off her clothes and underwear and did the same to himself and laid on top of her and took his penis and inserted in her vagina. She added that the appellant took a long-time making love to her. I am convinced, that this is proof of penetration.

PW2 testimony corroborated the testimony of PW1 (medical officer) who testified that PW2 was taken to where he works at Inyonga Health Centre for diagnosis as she claimed to have been raped. PW1 told the trial court that, as he diagnosed the victim, he found blood stains and bruises on her vagina meanwhile she was complaining of severe pains. In his expert suggestion was that, the damage could have been caused by a blunt object suggestively a male organ. Again, this to me is proof of penetration.

Under Section 130 (4) (a) of the Penal Code, Cap 16, R. E. 2019, states;

"130 (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.

In the circumstances pertaining in this case, the offence was allegedly committed in the bush and there were no eyewitnesses. So, the evidence of rape was that led by the victim herself. PW2 only. And as repeatedly outlined in several cases of the Court Appeal that, the best evidence of rape must come from the victim. See **Selemani Makumba vs Republic, Criminal Appeal No. 94 of 1999** where the Court of Appeal held:-

"True evidence of rape has to come from the victim if an adult, ***that there was penetration*** *and no consent, and in case of any other women where consent is irrelevant that there was no penetration. "*

(Emphasize is mine).

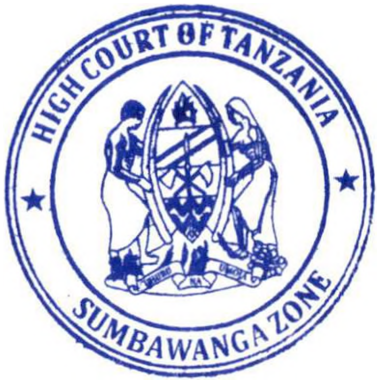
See also **Joseph Mkumbwa and Another v Republic,** Criminal Appeal No. 94 of 2007; **Sindayigaya Francis v Republic,** Criminal Appeal No. 128 of 2009, (both unreported).

However, as I have analysed above that the proof of penetration was also testified by the medical officer, PW1 who diagnosed the victim. Nevertheless, despite the fact that the victim was the only eye witness, excluding the medical officer's testimony still does not mean that the victim was not raped, whereas her testimony herself pointed at the appellant. This was insisted in the case of **Salu Sosoma vs Republic, Criminal Appeal No. 31 of 2006 CAT** (unreported)- Mwanza, where it was held that;

> *"Lack of Medical evidence does not necessarily in any case have to mean that rape is not established where all other evidence points to the fact that it was committed".*

At this juncture, I am fortified to conclude that the ingredients of the offence charged were sufficiently proved by the prosecution side to the required standards. The appellant did rape the victim.

Consequently, I dismiss this appeal for want of merits. The conviction and sentence meted out to the appellant by the trial court is hereby upheld.



D. B. NDUNGURU

JUDGE

26/07/2022