**IN THE HIGH COURT OF TANZANIA**

**(DISTRICT REGISTRY OF MTWARA)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 58 OF 2021**

*(Originating from Criminal Case No. 100 of 2020 of Lindi District Court at Lindi)*

**SALUMU RABII KULIMILE..... .....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

**Muruke, J.**

At the District Court of Lindi at Lindi, the appellant Salumu Rabii Kulimile was charged with two offences, first rape contrary to section 130(1)(2)(a) and 131(1), second unnatural offence contrary to section 154(1) both of the Penal Code, Cap 16 R.E 2019, he was convicted and sentence to thirty (30) years imprisonment for first offence and thirty (30) years for second offence, both sentences to run concurrently. Being dissatisfied. he filed present appeal raising nine grounds as indicated in the petition of appeal.

On the date set for hearing, respondent was represented by Wilbroad Ndunguru, Senior State Attorney, while the appellant was represented by Emmanuel Ngongi Advocate, who prayed appeal to be argued by way of written submission, the prayer which was not objected by counsel for the

respondent. In his written submission counsel for the appellant consolidated grounds 1,2,3,4,5,6 and 7 as they fall in one issue as whether the prosecution proved its case beyond all reasonable doubts. Advocate Ngongi submitted that testimony of PW1 and PW2 contradict on the date incident occurred, thus creates doubts. He emphasized that, PW1 were inconsistent on what has been filled in PF3. Comment of doctor in PF3 the patient has not been raped. PW2 didn't raise alarm before or during the rape. She did not tell anyone until when she went to the police and to Lutamba Clinic for medical checkup. The trial court erred in law and fact by convicting and sentencing the appellant relying on hearsay evidence from PW3 and PW4 and disregarding the defense witnesses including the evidence of DW3 the one who slept with the appellant at the fateful day.

Appellant counsel further, submitted that, the trial court erred in law and fact by convicting and sentencing the appellant without considering that the provision of the law in the charge for charging the appellant of an offense of rape do not cover the offense alleged to have been committed by the appellant as the victim is confirmed in the judgment to be an adult of 23 years old. However, appellant was convicted under section 130(1), (2) (a) and 131(1) of the Penal Code, Cap 16 R.E 2019. Thus, the charge against appellant was not proved to the required standard and the defect cannot be cured under section 388 of the Criminal Procedure Act, Cap 20 R.E 2019.

In reply, Learned State Attorney for the respondent submitted that, PW2 testified that the incident occurred in the night of 22nd November 2020. She reported the incidence to police station in the evening of 23rd November 2020. PW2 advised to return at police station in the following day because that evening would be difficult to be admitted in the hospital

for medical examination if a PF3 is issued. The following day of 23rd November would be 24th November not 24th January 2020. If the evidence of PW1, PW2 and PW3 is taken cumulatively no reasonable contradiction can be observed, that is a clerical mistake which can be rectified by section 388(1) of Criminal Procedure Act, Cap 20 R.E 2019. PW2 elaborated that she was raped and sodomized by the appellant. She reported to police on 23rd November but on 24th November PW2 was given PF3 for medical examination, for that reason there was no delay.

PW2 did not resist any how when she was being raped and sodomized by the appellant as she was in state of intoxication induced by alcohol according to the evidence. Assuming without believing, PW2 consented to have sexual intercourse with the appellant, it should be known that the consent was not free. Respondent counsel insisted that there was no contradiction in the evidence of PW1 and PW2. On defective charge respondent agree with the appellants counsel that the trial court wrongly convicted the appellant under section 131(2) (e) on the first count while charged under section 131(2)(a) both of the Penal Code, Cap 16 R.E 2019, however the defectiveness is curable under section388(1) Criminal Procedure Act, Cap 20 R.E 2019. In the interest of justice, this court being the first appellate court may step into the shoes of the trial court and properly convict the appellant, insisted learned state Attorney. In totality he requested this court to dismiss appeal.

I have ready submissions by both parties, evidence on records and grounds of appeal. The issue is whether the prosecution proved its case to the required standard beyond reasonable doubt?

It is a principle of laws that, the burden of proof in criminal cases rest on the shoulder of the prosecution, and that proof is beyond reasonable doubt. In the case of **Nathaniel Alphonce Mapunda and Benjamin**

**Alphonce Mapunda Vs. Republic [2006] TLR 395,** whereby the Court of Appeal of Tanzania adopted the principle in the case of **Mohamed Matula Vs. Republic,**where it was held that:-

> *"In criminal trial the burden of proof always lies on the prosecution. And the proof has to be beyond reasonable doubt."*

The prosecution has uncompromised duty to bring reliable and credible witnesses to testify the court in order to prove its case. This court being the first appellate court, have a duty to go through the evidence adduced at the trial court, to see if the prosecution adhered to the required principal standard of proof. In the case at hand, the appellant was charged with two offences, first is rape contrary to section 130(1)(2) (a) and 131(1), second offence is unnatural offence contrary to section 154(1)(a) both of the Penal Code. It was on the record that, the appellant alleged to have been raped and sodomized one Neema Alphonce Luhunde a woman of 23 years old. For a charge of both rape and unnatural offence for a girl above 18 years old to be proved, two ingredients must exist. First is **consent,** second is **penetration**. This principle of the law was well established by the Court of Appeal in the case of **Godi Kasenegala Vs. Republic, Criminal Appeal No. 271 of 2006 CAT** (unreported), whereby the Court provided the elements which constitutes rape in our jurisdiction. It was stated that;

> *"Under our penal code rape can be committed by a male person to a female in one of these ways.* ***One,*** *having sexual intercourse with a woman above the age of 18 years* ***without her consent. Two,*** *having sexual intercourse with a girl of the age of 18 and below with or without her consent (statutory rape). In either case, one essential ingredient of the offence must be* ***proved beyond reasonable doubt****. This is the element of* ***penetration*** *i.e. the penetration, even to the slightest degree, of the penis into the vagina."*

The offence of rape can be established in three elements, having intercourse **without consent to a female person above the age of majority** or sexual intercourse **with or without consent to a girl below** the age of majority, **penetration of male penis to female reproductive organ** and **lastly availability of evidence which proves the offence beyond** reasonable doubt. To prove its case the prosecution paraded three witnesses PW1, PW2 and PW3. At page 9 of the trial court typed proceeding PW2 the victim testified that: -

> **.....then Salum Rabii came to my room and said to me your drunk let me help you to go out to wash your face by water so as to reduce drunkenness. He took me to his room I saw him taking off his trouser and follows me where I was sitting. I was sitting in his bed. Then he took his penis his penis and enter into my vagina and then to my anus. Before he took his penis and enter into my vagina, he took off my underpants as my trouser was already taken off by chitumbi in my own room.**

PW2's evidence was corroborated by the testimony of PW1 Tadei Matias Clinical Officer from Rutamba Health Centre who examined the victim when she attended to hospital after the incident. For clarity part of his evidence at page 7 of the trial court typed proceeding is quoted: -

> **I examined her vagina I find blood and mucus fluid. I examined her anus I confirmed that there was anal fisher which concluded that she was penetrated in her anus. After I examined her vagina, I find that she was both penetrated in her vagina and anus....**

It is my settled mind that, the evidence of PW2 victim and PW1 Clinical Officer reproduced above, prove that the victim was penetrated by the appellant.

Another ingredient to be determined is whether the victim consented/ there was consent. This issue can be answered by looking on the evidence of the victim delivered at the trial court. It is a basic principle of law that, in rape cases the best evidence is from the victim. This principle of the law was established by the Court of Appeal in the celebrated case of **Selemani Makumba Vs. Republic [2003] TLR 203** when 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 penetration."*

PW2's evidence was original, clear, direct and arithmetic. She narrated all the episode on how the appellant commit both offences until he managed to fulfill his evil desire. The appellant first pretended to assist the victim washing her face to reduce the toxic of alcohol which she consumed by taking her outside her room. Surprisingly he took the victim in his room, then raped her. At page 9 of the typed trial court proceeding, the victim PW2 recorded to have said: -

> **Before he took his penis enter into my vagina, he took off my underpants as my trouser was already taken off by Chitumbi in my own room. I could not object to him as he <u>overpowered me</u> while I was drunk.**

The quoted above piece of evidence speaks louder by emphasized how, the appellant used force to rape the victim, PW2 did not consent to the act. When cross examined by the appellant, the victim responded that, **I trusted you to inter your room as we are neighbor you used force to enter me, into your room.**

Appellant complaining on the defectiveness of the charge that, the trial court convicted the appellant under section 131(2)(e) on the first count

while he was charged under section 131(2)(a) both of the Penal Code, Cap 16 R.E 2019.

It is on record that, the particulars of the offence were very clear and self-speaking, enabled the appellant to understand the nature of the offence and seriousness of the offence of rape so that he prepared his defense. Even before his defense he was able to cross examine all witness The particulars of the offence gave the appellant sufficient notice about the date when the offence was committed, the place where the offence was committed, the nature of the offence and the name of the victim. Equally so, PW2 victim at page 9 of the trial court typed proceedings explained clearly how the appellant raped the victim. It is not issue of defective charge, but the trial court convicted appellant wrongly. This court is satisfied with the offence of rape contrary to section 130(1)(2)(a) has been proved to the satisfaction. Thus, this court step into the feet of trial court. And convict the appellant under section 130(1)(2)(a) and 131(1) of the Penal Code, Cap 16 R.E 2019. In totality appeal lacks merits. It is thus dismissed.

**Z.G. Muruke**

**Judge**

**28/07/2022.**

Judgment delivered in the presence of Kauli Georgy Makasi State Attorney and Emmanuel Ngongi counsel for the appellant.

**Z.G. Muruke**

**Judge**

**28/07/2022.**