IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 60 OF 2021

(Arising from the District Court of Geita in Criminal Case No. 316 of 2020)

MANENO MASIMBU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14/7/2022 & 5/8/2022

ROBERT, J:-

The appellant, Maneno Masimbu, stood charged before the District Court of Geita at Geita with one count of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code, Cap. 16 [RE 2019]. The prosecution alleged that on the 12th day of September, 2020 at Samina area within the District and Region of Geita, the appellant did have unlawful carnal knowledge with one N d/o M (name withheld), a girl aged 14 years. After a full trial, he was convicted as charged and sentenced to serve 30 years in prison. Aggrieved, the appellant (then accused) is before this court appealing against both conviction and sentence on the following grounds of appeal:

1. *That, the trial court Magistrate erred in law and facts when failed to consider the appellant's defence of alibi.*
2. *That, the decision of the trial court was wrong and illegal in all matter of law and facts because the allegation was not proved under all beyond reasonable doubt.*
3. *That, the decision of the trial court was not fair when accepted weak evidences from the victim to identify the appellant by suspicious without consider the surely of the accused.*
4. *That, the trial District Court erred in law and facts when failed to prove the commission of crime by using scientific method particularly testing method of sperm of both parties (victim and accused person).*
5. *That, the trial court did not consider logic and legal reasoning in making its decisions the reality is that this is hypothetical case because the appellant did not commit the said crime.*

The appellant prayed that his appeal be accepted, the conviction and sentence be set aside and he be set free. He also prayed to be present at the hearing of the appeal.

When the appeal came for hearing, the appellant appeared in person and unrepresented whereas the respondent was represented by Ms. Maryasinta Lazaro, SSA.

When called upon to make submissions in support of the appeal, the appellant simply asked this court to adopt his grounds of appeal as stated in his petition of appeal and determine the appeal. He had nothing to add.

The respondent on the other hand, through Ms. Lazaro, learned Senior State Attorney, objected the appeal. Submitting on the first ground of appeal, she stated that the same has no merit as the records show that the trial court did consider the defence of alibi by the accused person and rejected it. She urged this court to reject the ground as it lacks merit.

With regard to the second and third grounds of appeal, it was her submissions that the trial Magistrate in convicting the appellant did consider the evidence of PW1 and PW2 as well as the circumstances of the case where it was alleged that the offence was committed in the morning, the accused did talk to the victim before and when she refused, he raped her. That even the Doctor's testimony indicated that the victim was raped.

With regard to the fourth ground of appeal, she submitted that in rape cases, no examination of semen is required to prove rape. She submitted further that the PW2 did not indicate that there was semen in the victim's vagina. She insisted that what is required in proving rape is penetration which is not established by the presence of semen in the victim's private parts. It was the victim's testimony that the appellant did penetrate her.

In support of her contention, she referred this court to the authority in the case of **Omary Kijuu vs Republic**, Criminal Appeal No. 39 of 2005, where it was held by the Court of Appeal that "penetration however slight is sufficient to prove the offence of rape under section 130(4) of the Penal Code. She found the ground to have no merit either.

On the fifth and last ground of appeal, she submitted that the impugned judgment is based on the evidence which was presented in the case during the hearing and that the trial Magistrate did consider the evidence adduced to convict the appellant.

To conclude her submissions, she prayed and urged this court to consider the evidence on record and dismiss the appeal for want of merit.

The appellant's rejoinder was very brief in which he simply prayed for this honourable court to set him free.

Now, having heard submissions of both parties and examined the records of this appeal, I will pose here and deliberate on the grounds of appeal in the sequence argued by the learned counsel for the respondent.

Starting with the first ground of appeal in which the appellant has faulted the trial Magistrate for not considering his defence of *alibi*, it was the learned State Attorney's argument that the Magistrate did consider

the defence and rejected it. Going through the impugned judgment especially at page 6, it is clearly shown that the trial Court did consider the appellant's defence of *alibi* however, as rightly contended by the Counsel for the respondent, it rejected the defence and in doing so the trial Magistrate gave reasons which included that the accused failed to notify the prosecution of the intention to rely on the said defence before the closure of the prosecution case.

Further to that, the trial Court noted that the accused himself told the court that the distance between the place he claimed to have been at the time of the alleged crime is less than one hour from the place where the crime took place which could not remove the possibility of the accused person being at the crime scene at the time the crime was committed. I find this ground to have no merit. It is thus dismissed.

With respect to the second and third grounds of appeal which raise a concern that the case was not proved beyond reasonable doubt as the victim's testimony on identification was weak, it was the view by the counsel for the respondent that the same also lacks merit as the evidence was strong enough to prove the commission of offence. I too, just as the counsel for the respondent, after going through the records, find the grounds non meritorious.

Based on what was testified by PW1 who was the victim of the offence, she stated that on the fateful day, while fetching firewood with her fellows, they were approached by the accused person who told her to go with him as he had something that he wanted to tell her. Afraid, they all started to run and she accidentally fell down. She further stated that it was at that very moment that the accused person quickly undressed her and started raping her while holding a panga at her neck telling her not to shout or else he would kill her.

Her testimony was corroborated with that of PW2, a Medical Doctor, who examined PW1 and noted that her private parts were bruised and she was still bleeding. Also, the testimony of PW3 who happened to be one of the two girls who managed to run away. She told the court that she hid in the bush but from a far she could see what was happening to PW1.

That testimony, as well as the fact that the offence took place in the morning hours where there was enough light to enable identification of the culprit and the fact that according to her testimony, it was not the first time the victim had seen the culprit, all prove beyond reasonable doubt that it was indeed the accused person who committed the offence.

Even if the testimony of PW2, PW3 were removed from the records, the testimony of the victim would still be strong enough to prove the case as against the accused person under the principle that *"in sexual offences, the true evidence comes from the victim"* read **Selemani Makumba vs Republic**, (2006) TLR 379. These grounds also lack merit. They are dismissed.

On the fourth ground of appeal which raises an issue that since there was no scientific method used then the commission of offence could not be proved, I fully subscribe to the contention by the learned Senior State Attorney for the respondent that rape cases cannot necessarily be proved only by scientific examination of the semen. What is required is the proof of penetration which in this case was proved both by the testimony of the victim herself and the Medical Doctor who upon examining the victim's private parts, he noted bruises which indicated that the victim had been penetrated. This ground too lacks merits.

The fifth ground of appeal in which the appellant faults the trial Magistrate for failure to use logic as the case was a hypothetical one and the accused did not commit the offence, this has been tackled by this court when dealing with the second and third grounds of appeal in which this court came to a conclusion that the case was proved beyond

reasonable against the accused person. It is my view that the issue of the case being hypothetical cannot arise.

Having found no merit in the raised grounds of appeal, I hereby dismiss this appeal in its entirety.

It is so ordered.

K.N.ROBERT
JUDGE
5/8/2022