THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 131 OF 2021

(Originating from the District Court of Chunya at Chunya Criminal Case No. 61 of 2021)

FURAHA LANGSON MWAMPASHI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 08/07/2022

Date of judgment: 26/07/2022

NGUNYALE, J.

FURAHA s/o LINGSON MWAMPASHI hereinafter to be referred to as the appellant preferred the present Criminal Appeal No. 131 of 2021 protesting for his innocence against conviction and sentence of thirty years imprisonment and six strokes of the cane for the offence of Rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code Cap 16 R. E 2019. Earlier, it was alleged that the appellant on 24th day of March, 2021 at Chokaa village within Chunya District and Mbeya Region, did have

carnal knowledge to the woman of 58 years old without her consent. For the purpose of hiding her proper identity the said woman will be referred to as the victim or PW1.

Upon conviction and sentence imposed the appellant raised the following four grounds of appeal to fault conviction of the trial Court; -

1. *That the trial Magistrate erred both in point of law and facts by misdirect of considering only the evidence of one side and ignoring the defence of appellant something which resulted to injustice.*
2. *That the trial court erred in law and in fact by pronouncing the judgment in favour of the respondent despite some clear doubts.*
3. *That the trial Magistrate erred in law and in fact by pronouncing the judgment and convicting the appellant while there is no any prosecution witness answer raised issues.*
4. *That the trial Magistrate erred both in points of law and fact for convicting appellants while the case was not proved beyond reasonable doubts.*

In order to understand the series of events it is important to recall the historical backgrounds which resulted to this appeal by appreciating the facts that; - the appellant was well known to the victim of the offence even before the event, they were living at the same Chokaa Village within Chunya District. On the date of event on 24th day of March 2021 at around 16:00 hours the victim was at Chokaa valley within Chunya river in search

of gold. The appellant followed her there and upon arrival he strangled her neck and forced her to fall down. Thereafter, the appellant undressed the victims's out of her consent and proceeded to remove his male organ and penetrated it to the vagina of the victim. He had sexual intercourse with her until he quenched his desire and escaped. It was alleged that the victim as the person who knew very well the appellant and that it was still broad day light, she managed to identify the appellant.

Immediately after the act she disclosed the entire event to her tenant PW4 who later called the son of the victim who was also made aware of what had happened to his mother. The incident was reported to police and the victim was issued with PF3 for treatment. On 26th day of March 2021 the appellant went to the home of the victim to seek for an apology, there he was apprehended. On 31st day of March 2021 the appellant was charged as stated hereinabove, after the trial he was convicted on 24th day of September 2021 and sentenced accordingly.

The appeal was called for hearing and by consent the parties preferred the appeal to be disposed by written submission. The timely filing of the submissions is highly commendable by the Court.

The appellant under representation of Ms. Irene Joel Mwakyusa learned Advocate submitted in respect of the first ground of appeal. It was their

submission that the defence evidence was not subjected to proper consideration through analysis and evaluation. It was the submission of the appellant Counsel that the trial Court is duty bound to analyse and weight evidence and evaluate it in order to select the grains from the chaffs. Improper evaluation of evidence leads to a wrong and biased conclusion resulting into miscarriage of justice. From that premise she stated that, it has been held that failure to consider the defence case and evaluate it is fatal and usually vitiates the conviction. She referred the Court to the case of **Abel Masikiti v. Republic,** Criminal Appeal No. 24 of 2015 Court of Appeal at Mbeya (unreported).

Ms. Mwakyusa went on to state that it is certain that the trial Magistrate to deal with the prosecution evidence on its own, and reach conclusion that it was true and credible rejecting the defence is fatal. The act of not giving the weight to the defence evidence she said it is as good as denying the right to be heard. She cited the case of **Jeremiah John & 4 Others vs. The Republic**, Criminal Appeal No. 416 of 2013, Court of Appeal at Bukoba (unreported) that failure to consider the defence case is fatal and usually leads to a conviction being quashed.

In regard to ground number two and four they were argued together for having similar contents. She said that the trial Court convicted the

appellant in the circumstance where there are many doubts in the prosecution evidence. Among the doubt that raised that there was no proper identification because PW1 could not describe the appellant and she never stated for how long she was with the appellant. She cited the case of **Kasim Said and 2 Others vs. The Republic**, Criminal Appeal No. 208 of 2013, Court of Appeal at Arusha (unreported) at page 11, the Court held inter alia that; -

> *"In recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence on source of light, and its intensity is of paramount importance. This is because even in recognition cases mistakes are often made. The fact that a witness knew a suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident, say by his distinctive clothing, hight, and voice"*

The other doubt as raised in the appellant's submission is that the victim never raised alarm to the act which occurred at 16:00 hours where people work around and obviously people would have observed such horrible act. The evidence of PW1 say nothing about raising alarm. It has not been mentioned how far is from the scene of crime to her home where she revealed the story. It was the view of the appellant's that all these leaves a lot to be desired in the evidence of PW1 and the guilty of the appellant. In the other doubt they said that PW1 in her evidence said that in the evening of 24th March 2021 she went to hospital but the doctor PW3 said

that on 26th day of March 2021 he received PF3, he examined the victim and filled it. It was the argument of the appellants that the contradiction goes to the root of the case PW1 could also be carnally known by any other person apart from the appellant. The case of **Chrizant John v. The Republic**, Criminal Appeal No. 313 of 2015, CAT at Bukoba (unreported) at page 20, it was held that; -

> *"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"*

She stated further that when the prosecution witness gives conflicting evidence, it is a duty of the court to resolve the contradictions arising out of the conflicting evidence. See the case of **Mohamed Said Matula v. Republic** (1995) TLR 3.

On the third complaint per petition of appeal is that there was no any prosecution witness who answered the raised issues in affirmative. It is a settled law that in rape cases, the best evidence is that of the victim as it was held in the case of **Edward Nzabuga vs. The Republic**, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (Unreported). But in the instant case the evidence of PW1 is comprised of doubts and inconsistencies as alluded herein above. As the testimony of

PW1 is doubtful and could not compel conviction the other evidence from other witnesses cannot ground conviction. At the end, they prayed the Court to overturn the lower Court decision.

The respondent was represented by Hannarose Kasambala learned State Attorney. From the outset, she declared her stance that she do not support the appeal because the appellant was charged with the offence of rape c/s 130 (1) (2) (a)v and 131 (1) of the Penal Code Cap 16 R. E 2019 which was proved beyond all reasonable doubt. The prosecution was to prove that the victim was raped without her consent by none other but the appellant. In the case at hand the evidence shows that the victim (PW1) her vagina was penetrated without her consent as she testified that when at the river area the appellant appeared and strangled her neck lied her on the ground. After lying her on the ground he ripped her cloths and inserted his penis inside the vagina of the victim and had sexual intercourse with her till ejaculation. Moreover, the victim PW1 felt a lot of pain because she was on menopause. This shows that the appellant did not obtain any consent from the victim.

The appellants Counsel allege that the appellant was not well identified at the scene which is not the case in this matter. He was clearly identified at the scene of crime since it was broad daylight, she knew the appellant

even before the incident. PW1 was able to identify the appellant because of close contact during sexual intercourse because enough time was involved in the event till the appellant ejaculated. However, the appellant never controverted during the trial as he did not cross examine the victim on that aspect of identification. The learned State Attorney referred the case of **HASHIM AMASHA VS REPUBLIC**, Criminal Appeal No. 28 of 2017 Court of Appeal of Tanzania at Mbeya at page 9 the Court held that since the victim was familiar with the assailant and had close contact during sexual intercourse it was enough time to identify the assailant but also since the appellant did not controvert the victim on the aspect of identification implies the acceptance by the appellant that he was well identified. The victim mentioned the appellant to PW2, PW4 and PW5 at the earlier opportunity as the person who raped her.

The respondents in their further submission cited the case of **Emmanuel Mathias vs. Republic**, Criminal Appeal No. 132 of 2020 Court of Appeal of Tanzania at Musoma (Unreported) to bolster the argument that identification and mentioning the assailant at the earliest opportunity proves identification to be proper. In the very case it was observed that;

> *"It is settled that the ability of a witness to mention a suspect at the earliest opportunity is of utmost importance"*

It is also settled that in cases of sexual nature, the best evidence is that of the victim herself. This was decided in the case of **Seleman Makumba vs Republic** [2006] TLR 384 that true evidence of rape has to come from the victim. The victim of the offence was seen to be a credible witness by the trial Court. In the case of **Goodluck Kyando vs Republic** [2006] TLR 367 the Court held that every witness is entitled to credence and must be believed therefore his testimony should be accepted unless there are good and cogent reasons for not believing a witness. The appellate Court cannot fault the findings of fact of the trial Court as it was ruled in the case of **Dickson Elia Nsamba Shapwata& another vs The Republic**, Criminal Appeal No. 92 of 2007 Court of Appeal at Mbeya (Unreported). It was the view of the learned State Attorney that there is no cogent reason to fault the findings of the trial Court. PW3 the Medical Doctor tendered PF3 exhibit No. PE1 in which the doctor detected bruises which suggested penetration. His evidence corroborated the testimony of PW1.

The respondents submitted further that the appellant also did confess before PW1, PW2, PW4 and PW5 seeking forgiveness for what he did to the victim. The respondents stated that it is settled law that oral confession on open-air is sufficient to ground a conviction against an

accused person. The principle has been discussed in several cases including the case of **Chamuriho Kirenge @ Chamuriho Julia vs Republic**, Criminal Appeal No. 597 of 2017 Court of Appeal at Mwanza. The appellant did not cross examine PW1 on the aspect of his confession before her, PW2, PW4 and PW5. It is settled that failure to cross examine a witness on a certain matter is deemed to have accepted the matter to be truth see **Martin Misara vs. Republic,** Criminal Appeal No. 428 of 2016 Court of Appeal at Mbeya.

The State Attorney dismissed the complaints of contradiction, she submitted that there was no contradiction as to that effect thus the appellant could not cross examine PW1 on that aspect. Not every contradiction will make the prosecution case to flop see **Athumani Rashid vs Republic,** Criminal Appeal No. 264 of 2016 Court of Appeal of Tanzania at Tanga (unreported).

In finalising her submission, she stated that the trial Court did evaluate the defence evidence properly and analysed it leading to the conviction of the appellant. However, she submitted that in case the Court finds that evaluation was not done still the first appellate Court has legal authority to re-evaluate the whole evidence and reach its own conclusion. She

referred the Court to the case of **Prince Charles Junior vs. Republic,** Criminal Appeal No. 250 of 2014 Court of Appeal at Mbeya (unreported).

Having heard the submissions by the contending parties and gone through the records before the trial Court in view of the grounds of appeal, I am of the view that this should not take much of the precious time of the Court. Admittedly, the rival submissions have made the work of the Court easier than it was expected. I will consider the grounds of appeal in seriatim as hereinunder; -

In the first ground of appeal the appellant complains that the trial Court erred by considering only the evidence of one side and ignoring the defence case something which resulted to injustice. The learned State Attorney urged the Court to disregard this complaint arguing that the trial Court considered evidence of both sides. Ms. Mwakyusa was of the view that the none evaluation of evidence of both sides is a fatal defect which vitiates conviction. The appellant was denied a right to be heard when the Court grounded conviction with one sided evidence.

In order to answer to the complaint, I had time to consider the judgment of the trial Court and noted that the trial Court did two important things; **one**, it summarised the evidence of both sides from page 2 to page 5 of the typed judgment, **two**, it subjected the whole evidence into scrutiny

in the course of determine the end results. At page 7 and 8 of the typed judgment the Court stated; -

> *"DW1 did not contested to have been at PW1 home for the apology purpose, he also didn't contradict that the neighbours intended to beat him for his act during cross examination. During his defence DW1 raised his trivial allegations that he went at PW1 house to ascertain whether the victim could have been able to identify him. At a defence stage, DW1 vigorously denounced not have been at PW1 resident for an apology.*
>
> *This court do finds DW1's defence to be very unpopular upon the facts that it could have been very unusual and strange for someone to approach his/her victim for the purpose of being identified. That was impossible mission for anyone to resort to. No any creature on the face of our motherly earth could have dared attempt doing what DW1 contended to have done. The bottom line is that, his claim does not even align in common sense. The only possible scenario which is reasonable to get in alignment with is that, DW1 went thereafter been hunted by his guilty conscious pertaining to what he did to PW1"*

As can be discerned from the above excerpt, undoubtedly, the defence of the appellants was considered and analysed by the trial court and found to be wanting, hence being rejected. I subscribe to the holding of the trial court since I have not discerned any misapprehension of evidence or misdirection in the analysis. The trial Court found that the defence case had nothing to raise a reasonable doubt to the prosecution case. The prosecution case was formed by PW1 and other witnesses who received the information immediately after the act from PW1 that she was raped

by the appellant. The testimony of PW1 was very direct and clear that she was raped by the appellant takes into account that she was raped on the day time. Therefore, the analysis and evaluation of the trial Magistrate was correct and balanced. The first ground of appeal is worth of being dismissed as I hereby do.

The second ground of appeal the appellant complains that besides several doubts the trial Court entered conviction. I am aware that the accused person is not required to prove that his defence is true what is required from him is to raise reasonable doubt to the prosecution case. In this complaint the appellants submitted that the appellant was not properly identified and the witness did not describe the appellant, time she spent with the appellant was not stated. The learned State Attorney on her part was of the firm view that the complaints of the appellant have no merit because the appellant was correctly identified during day light when he was in close contact with the appellant during rape and identification had no possibility of mistake because PW1 was very familiar with the appellant before the event and they are living at the same village. The fact that PW1 identified very well the appellant is corroborated by the fact that she mentioned him to other witnesses at the earlies opportunity after the act. The learned State Attorney argued that the trial courts did analyse the

evidence related to the unfavourable conditions for identification pertaining to the scene of the crime and were satisfied that in view of the available evidence visual identification of the appellant by PW1 cannot be faulted.

The trial Court considered at length the circumstance of identification of the appellant and it was satisfied the visual identification of the appellant at the scene of crime was clear and proper as it happened during day time with broad light. In resolving the issue of identification, the trial Magistrate stated at page 6 of the typed judgment; -

> *"Substantially, the adduced evidence by PW1 speak vividly that she was familiar with the accused person, she unfolded that she knew him way back before the happening of incidence. In that sense, taking into account that the crime occurred in a broad day light there was no any possibility of mistaken identity. Apparently, PW1 gave a very detailed description on what happened. She unambiguously pointed that after the accused toned her underneath cloths, he felt her down and accused was able to pone up his trouser zip proceeded to insert his penis into PW1's vagina. Her claims gains more root as after she arrived at home, she disclosed the entire ordeal to her tenant (PW4) that she was raped by one Mwamunyange"*

The above analysis made as made at length by the trial Magistrate means the trial Court correctly settled the issue of identification as correctly submitted by the learned State Attorney. The arguments of the appellants are an afterthought and without merit. The doubts alleged by the appellants waters down because the trial Court was satisfied that the

appellant was correctly identified, the lamentations about the victim could not raise alarm and time of PF3 are irrelevant. Therefore, PW1 was a credible witness who clearly proved that she was raped by the appellant and nobody else. Under the authority of **Suleman Makumbas case** (supra) the true evidence of rape comes from the victim, so, the appellant was correctly identified and convicted.

The trial Magistrate was of the view that the identification of the appellants was proper basing on the evidence of PW1 who narrated what transpired at the scene of the crime on a material day, her intervals, and proximity with the appellant. He also considered the fact that the appellant appeared before her with other people to confess. The issue of oral confession has been well submitted by the learned State Attorney relying on the case of **Chamuriho Kirenge @ Chamuriho Julia** (supra). In the end result the second ground of appeal has no merit it is worth of being dismissed. In the course of answering the second ground of appeal the third ground likewise has been delt, it also deserve to be dismissed.

In the last ground of appeal, the appellant's complaint allege that the offence was not proved beyond all reasonable doubt. It is a principle in criminal justice that an offence ought to be proved beyond all reasonable doubt. It has been established herein above that the offence of rape was

proved beyond all reasonable doubt. PW1 testified clearly that she was raped on 24th day of March 2021, the fact that she was raped was corroborated by PW3. PW1 and PW3 proved that there was penetration, PW1 went further to prove that penetration of the male organ was done by the appellant and nobody else. It is settled in sexual offences that true evidence of rape comes from the victim as it happened to this case.

Taking all the circumstances into consideration together with the evidence concerned with proof of the offence charged against the appellant I am of the view that: **One**, the evidence of PW1 proved that the appellant had sexual intercourse with her out of consent and according to **Selemani Makumba Vs Republic [2006]** T.L.R 379, her evidence as a victim is the best evidence to prove the same. PW1's evidence proved that there was penetration, evidence which is corroborated by the evidence of PW3 and exhibit PE1 PF3. **Two**, it was the appellants who committed the offence established by the findings above in determining the first and second grounds of appeal, that PW1 properly identified the appellants as the culprits together with the circumstantial evidence that she reported the incident immediately after it occurred to PW2 and PW4, evidence which was corroborated by oral confession of the appellant himself before PW1, PW2 and PW4.

In the end, all the grounds of appeal melts into nothing, the appeal is devoid of merit. It is accordingly dismissed in its entirety.

DATED at Mbeya this 26th day of July, 2022.

D. P. Ngunyale
Judge