IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 118 OF 2021

(Arising from CC 86 of 2021 in the District Court of Musoma at Musoma)

FOCUS MALINDI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

2nd & 26th August, 2022

F. H. MAHIMBALI, J.

The appellant in this case was charged of rape case contrary to section **130(1), (2) (a) and 131 (1) of the Penal Code, Cap 16 R.E 2019** after by force had carnal knowledge of one old woman aged 81 years old.

It was alleged by the prosecution that on 12th day of May, 2021 at Nyakatende Village within the District of Musoma in Mara Region had carnal knowledge of PW1. When asked to plead to the charge, the appellant (then accused person) pleaded not guilty.

In efforts to establish the charge, the prosecution summoned a total of four witnesses and one exhibit (PF3). PW1 who is the victim, testified how she is familiar with the appellant and that on the date of the incident she had been on her way back home. She met the accused person who had held a panga. He attacked her, tore her clothes, and by force raped her. After he had finished, he wanted to run but ambushed her again and raped for the second time. As she felt much pain, she raised alarm for help calling one Nyabwire who then came and offered assistance to her where she was then taken to village office and later to hospital. The accused person was arrested and sent to police.

PW2 – Nyabwire Bikingi, testified how on the date of the incident (12/05/2021) while farming, she saw the victim (PW1) running being chased by the appellant. The accused person then reached the victim, hit her down where then the victim fell down. She screamed to the accused person and inquired what he wanted to do with that old woman. He then wanted to run but raised alarm for help where people came and accused person escaped. The victim then told her that she was raped by the appellant. She accompanied her to her home.

Pw3 – Hamlet Chair, testified how he arrested the accused person after he had been informed of the rape incident. The accused person

just after the incident had escaped to unknown. But in the evening, he went to his father (22.00hrs), where he reported the incident where then he woke him up and arrested him and took him to police station.

PW4 – Clinical officer, testified how on 13th May 2021 while at Nyasho Health center, she had attended PW1 on claims that she had been raped. In his examination, he established that there were bruises in the PW1's vagina. He filled PF3 (PE1 exhibit) to fill the said results.

In his defense testimony, the appellant disputed the allegations stating that there was no proof that he raped PW1. He was just arrested and taken to police who pressed him to admit the commission of the said offence. He argued, if he really torn the said clothes to perpetuate the said rape, why the said torn clothes not produced in court as exhibit in support of the said allegations.

The trial court upon digest of the evidence received found him guilty, convicted the appellant and sentenced him to a minimum sentence of 30 years jail imprisonment. The appellant has been aggrieved, thus the basis of the current appeal propped on six grounds of appeal, namely:

1. *That, the trial Magistrate erred in law and fact to convict and sentence the appellant by considering the evidence which is self-contradictory and uncorroborated by prosecution witnesses which led to the appellant's conviction.*

2. *That, the appellant was a victim of poor investigation of the case.*

3. *That the evidence of PW4 and exhibit PE1 (PF3) were not qualified to corroborate the victim's evidence as PW4 did not disclose his qualification neither experience.*

4. *That, the trial court erred in law and fact to convict and sentence the appellant basing on uncorroborated evidence of PW1 and PW4 while exhibit PE1 shown that no sperms was found in victim's private part.*

5. *That, the trial Magistrate grossly misdirected himself in law and fact to convict and sentence the appellant without considering the appellant's defense adduced before the trial court.*

6. *That, the trial court erred in law and fact to convict and sentence the appellant to serve 30 years imprisonment without prosecution side proving the case beyond all reasonable doubt.*

During the hearing of the appeal, the appellant represented himself whereas the respondent was represented by Mr. Frank Nchanilla, learned state attorney. On his part, the appellant had nothing to add but just prayed that his grounds of appeal be adopted to form part of his appeal submission. He therefore invited the Republic to make their submission.

In resisting the appeal, Mr. Frank Nchanilla, learned state attorney argued that, as per available evidence in record, the appellant's appeal lacks merit as the rape offence was proved beyond reasonable that the appellant did commit the offence charged.

On the first ground of appeal, Mr. Nchanilla submitted that as per typed proceedings (pages 7-9) it is clear how the victim was raped by the appellant. It is his considered view that between the testimony of PW1 and that of PW2 there is no inconsistence as alleged. Whereas PW1 testified how she was raped by the appellant, the testimony of PW2 clearly collaborates what PW1 stated. Thus, in his view, there is no any notable contradiction and un-collaboration as alleged.

With the second ground of appeal, the appellant's grief is mainly on poor investigation starting from the arrest. As per available evidence,

the arrest was done by people led by PW3 (hamlet chair), as he took part of the said arrest. However, arrest is not necessarily done by police. He added that, in digest of the testimony of PW1, PW2, PW3 and PW4, the offence of rape was well established.

As to the third ground of appeal, the argument that PW4 had not stated his credentials and experience, he countered it as not tenable. As per page 12 of the typed proceedings; PW4 testified where he got his education and that he had one year experience. He being clinical officer he testified well on that. Since he is clinical officer, he was qualified to do examination and adduce it in Court as done.

On the 4th ground of appeal, the appellant's grief is, there has not been traced semen into the victim's vagina. As per testimony of PW4, he attended PW1 on the next day. PW4 did not testify that there was semen. For there to be semen, suggests that there was ejaculation. In this case, there is no proof that there was ejaculation. However, he insisted that for an offence of rape to be established, ejaculation is not necessary but penetration. As there were bruises into the victim's vagina, suggests penetration which is an important ingredient of rape.

On the fifth ground of appeal it is alleged that there was no analysis of the appellant's evidence. This grief has been admitted by Mr. Frank Nchanila. However, he prayed that this court pursuant to section 366 (1) a, b and c of the CPA Cap 20 R. E. 2019 to enter into the trial court's shoes and do analysis of the appellant's evidence at the trial court and see if findings on conviction can be changed.

Lastly, on the appellant's grief that the prosecution's evidence has not established the charged offence, he differed with the appellant that as per evidence of PW1 –PW4, the evidence is ample. He then prayed that the appeal be dismissed for want of merit.

In digest to the all grounds of appeal, they all boil into one main ground of appeal whether the prosecution's case has been proved beyond reasonable doubt. For the offence of rape to stand, there must be proof of the following ingredients: that there was carnal knowledge by a man against a woman which was procured by force.

In this case, the testimony of PW1, just says she was raped by the appellant. How was she raped, there is no evidential material for that. It was expected that, there ought to have been evidence that the appellant took his manhood or penis or *"dudu"* and inserted it into her

vagina. In the absence of that statement, an offence called rape cannot be said to have been established (see **Mathayo Ngalya @ Shabani vs Republic,** Criminal Appeal No 170 of 2006 and **Akizimana Syriverster vs Republic,** Criminal Appeal No 181 of 2007 at page 10). Since it is trite law that best evidence in rape cases comes from the prosecutrix herself, in this case I can hardly find any. (see **Selemani Makumba v Republic,** [2003] TLR 203 and **Godi Kasenegala vs R,** Criminal Appeal No. 10 of 2008 (unreported)). If a woman aged 81 years cannot say how she was raped, it is hardly believable that she was actually raped. She was duty bound to tell the trial court how she was raped. This principle was well stated in **Selemani Makumba v Republic,** (supra) 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! [emphasis added].*

In this case, the victim could not tell the trial court exactly that there was any penetration which is an essential ingredient of rape. In its absence, the purported rape offence cannot stand.

That said and done, the appeal is allowed. Conviction and sentence meted out against the appellant is hereby quashed and set aside. In its place, I order immediate release of the appellant unless lawfully held by other causes.

DATED at MUSOMA this 26th day of August, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 26th day of August, 2022 in the presence of Ms. Monica Hokololo SSA for the respondent, Mr. Gidion Mugoa, RMA and respondent is being absent.

Right of appeal is explained.

F. H. Mahimbali

JUDGE