IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 07 OF 2021

(Originating from Resident Magistrate Court of Katavi at Katavi Criminal Case No. 27 of 2019)

DESTELI JONAS @ KALINDAMUNGA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 15/07/ 2022
Date of Judgement: 13/ 09/ 2022

NDUNGURU, J.

This appeal arises from the decision of the Resident Magistrate Court of Katavi at Katavi (henceforth the trial court). The appellant Desteli Jonas @ Kalindamunga was arraigned in Criminal Case No. 27 of 2019 for the one count of rape contrary to **section 130 (1) and (2) and 131 (1)** of the Penal Code, Cap 16 RE 2019. He was found guilty, convicted and sentenced to serve thirty (30) years imprisonment.

Aggrieved by the trial court decision, the appellant lodged to this court three (3) grounds of petition of appeal. The grounds are reproduced hereunder: -

1. *That the trial court erred in law and fact when convicted the appellant relying on cautioned statement which is repudiated.*
2. *That the trial court erred in law and facts when convicting the appellant without considering the defence evidence.*
3. *That the trial court erred in law and fact when convicted the appellant relying on weak evidence which addressed by the prosecution especial on the issue of identification the offence convicted at night the intensity light not explained by prosecution, thus wrong identification of the appellant.*

However, after I read them between lines, I found basically the appellant's complainant is that the case against him was not proved beyond reasonable doubt.

At the trial court the prosecution alleged that the accused person on 6th day of March 2019 at Kabungu village within Tanganyika

District in Katavi Region did have sexual intercourse with J.L aged 64 years old without her consent.

The appellant was arrested and as earlier stated charged before Resident Magistrate Court of Katavi. After full trial he was found guilty, convicted and accordingly sentenced as hinted upon.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent ***cum*** republic had the legal service of Ms Marieta Maguta – Learned State Attorney.

Arguing in support of his appeal, the appellant prayed for the court to adopt his grounds of appeal he has lodged and the appeal be allowed.

In reply thereto, Ms Maguta learned state attorney resisted the appeal. Submitting in respect of the first count Ms Maguta submitted that the record is very clear that when the cautioned statement was tendered the appellant never objected it, thus it is not true that it was repudiated.

As regards the second count, Ms Maguta submitted that the appellant's defence was much considerd. The record on typed judgement shows very clear that the defence was considered, but was not strong to shake the prosecution evidence.

On the third ground, Ms Maguta submitted that the appellant was correctly identified. PW3 at page 13 told the court that the appellant had a torch and panga, thus she managed to identify the appellant. PW1 corroborated such evidence as when he PW1 arrested the appellant, the appellant admitted and apologized. Thus, identification was very correct did not shed any doubt. Thus, she submitted that the case was proved basing on evidence of PW3 who was the victim. She referenced the case of **Seleman Makumba vs Republic**.

Further, she submitted that the act of the victim naming the appellant at the earliest stage implies that she correctly identified the appellant. Thus, she prayed the appeal be dismissed.

In rejoinder, the appellant having heard what learned state attorney has submitted responded by insisting the court to consider his grounds of appeal.

I have keenly followed the arguments of the appellant and that of Ms Marieta Maguta for the respondent ***cum*** republic during the hearing of this appeal. I have as well read between the lines the appellant's grounds of complaint and the entire proceedings of the trial court. The question to determine is whether the appeal has merit.

The appellant herein was charged with one count of rape contrary to **section 130 (1) (2)** and **131 (1)**, of the Penal Code, R E 2019.

However, for the offence of rape, it is now a trite law that in sexual offences the most important evidence is that of the victim of crime as reflected under **section 127 (7)** of the Tanzania Evidence Act, Cap 6 RE 2019. Also, the position was reinstated in the case of **Seleman Makumba**, Criminal Appeal No. 94 of 1999, unreported. The statutory law and the case law, all insists that for the offence of rape, the best evidence has to come from the victim of crime.

Again, for the purpose of proving the offence of rape, **section 130 (4) (a)** of the Penal Code is of paramount to be considered, which reads;

(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.*** [emphasis added].

In this case at hand, the offence of rape was alleged to be committed on 6th of March 2019 at Kabungu village within Tanganyika District in Katavi Region by the appellant. The key evidence by the

prosecution was that led by the victim herself (PW3) who when was testifying in this case, she had this to tell the trial court:

> *"I am living here in Mpanda – Kaputi area. I do remember that on 6/3/2019 while asleep at 23:00hrs the accused person came at my home place, then he pushed the door and entered inside. He forced me to sleep properly. He uttered the words* ***"Lala vizuri mama, leo lazima nikutombe"*** *he repeated the words three times, the accused had a torch and machete. He threatened me, then he slapped me. From there I could not resist them he undressed himself, he come and attached my throat, then undressed me and inserted his penis into my vagina. I struggled with the accused for 15 minutes. The accused was working at my village, he came to my home prior to the incident asking for vegetables three times. The accused having completed his mission, he departed. Having regained some strength, I went to my son called Mawazo and from there we headed to the hamlet leader. Finally, I was taken to police, the pf3 was issued to me, and I was medically treated at Katavi Regional Referral Hospital.*

Looking at the quoted testimony of the victim above, I have no hesitation to say that the prosecution did prove the ingredient of the offence of rape; that is penetration and also that the victim had sexual intercourse without her consent. PW3 testified well how she became

familiar with the appellant. She told the trial court that the appellant was working at the village she resides and he used to go at her home asking for vegetables for three times. She testified that after threat and slap, then the appellant undressed himself and her and went on inserting his penis into her vagina without consent.

PW1 a militia man who arrested the appellant, PW2 who recorded appellant's cautioned statement, PW4 a son of the victim and PW5 a hamlet leader in their testimonies did not witness any incident of raping committed between the victim (PW3) and the appellant. However, PW1 and PW4 testified that the appellant testified before them that he raped the victim on that material date. PW6 who is medical officer also testified that on 8th of March 2019 at about 11:00 hrs he received a victim who had a PF3 alleged to be raped. He examined the victim and found that there was a forceful virginal penetration. Therefore, the testimony of PW6 is also capable of incriminating the appellant with the offence of rape.

In **Mathayo Ngalya @ Shaban vs Republic, Criminal Appeal No. 170 of 2006**, unreported) the Court observed: -

> *"The essence of the offence of rape is penetration of the male organ into the vagina. Sub-section (a) of section 130 (4) of the*

Penal Code Cap 16 as amended by the sexual offence (special provisions) Act, 1998 provides: - for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary for the offence. For the offence of rape, it is of utmost importance to lead evidence of penetration and not simply to give a general statement alleging that rape was committed without elaborating what actually took place. It is the duty of the prosecution and the Court to ensure that the witness gives the relevant evidence which proves the offence."

In this case at hand, the victim of the alleged rape stated that the appellant forced her to lay properly before he uttered the words ***"Lala vizuri mama, leo lazima nikutombe"***, he took underwear himself and her and went on inserting the male organ (penis) into the victim virginal.

With the above position of the law, it goes without doubt that, in the instant case the victim stated that male organ penetrated into her vagina and she never consented to sexual intercourse. She was threatened and slapped by the appellant before doing the sexual act. The evidence of PW3 above in terms of **section 130 (4) (a)** of the Penal Code (supra) and on the authority of **Seleman Makumba, Criminal Appeal No. 94 of 1999**, unreported, it is very clear that the evidence led by the prosecution did

prove the offence of rape, that is a penetration of the appellant penis into the victim vagina and without her consent. In the case of **Seleman Makumba** (supra) it was held thus;

> *"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"*

With this evidence on the part of the prosecution case, it can be said that the offence of rape against the appellant was proved to the standard required by the law.

However, the appellant came with three complaints in this appeal, I will determine each of them and see whether the case was proved at standard required by law.

Now coming to the first complaint by the appellant that the trial court relied on cautioned statement which was repudiated. PW2 is a police officer who recorded statement of the appellant and tendered the same in court as exhibit P1. During the tendering of the cautioned statement by PW2 in court the appellant never put any objection to it, that mean he

admitted to have recorded it as well its content. Reading the content of exhibit P1 the appellant admitted in his statement to have committed the offence of rape. Further, recording of exhibit P1 complied with mandatory requirement of the law, **section 58 (4), (b)** and **6 (a) and (b)** of the Criminal Procedure Act, Cap 20 RE 2019 and **section 27 (1)** of the Evidence Act, Cap 6 RE 2019, the complaint that the cautioned statement was repudiated is afterthought ground. Thus, devoid of merit.

As regards trial court failure to consider defence evidence by the appellant, this court also find that the complaint is of no merit. At page 10 of the typed copy of judgement, the trial Magistrate considered the defence evidence of the appellant. The trial Magistrate stated that "*the accused's defence that he has not committed the offence is just an attempt to exonerate himself from liability. He has not at all raised any reasonable doubt as to his guilty.*"

The last complaint by the appellant that the issue of identification of the appellant was not addressed by the trial court taking into account the offence was committed at night. The position of the law in relation to the evidence of visual identification was well laid down in a celebrated case of **Waziri Amani vs Republic**, [1980] TRL 250 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 watertight. The court listed in the said case some factors to be considered in determining whether identification of a suspect is watertight to be as follows: -

> *"The time the witness had the accused under observation, the distance at which he observed him; the conditions in which the observation occurred, if it was day or night time; whether there was good lighting at the scene; whether the witness knew or had seen the accused before or not."*

Coming to the case at hand, the victim of rape narrated at the trial court that at material date of incident the appellant entered at her home with a torch and he forced her sleep properly while uttered the words *"Lala vizuri mama, leo lazima nikutombe".* The victim narrated further that she was threatened and slapped. She could not resist. The accused undressed himself and her and inserted his penis into vagina. She struggled with the accused for 15 minutes. She further informed the court that before such incident the accused went to her home three times asking for vegetables.

With that piece of evidence from the victim, it is my firm consideration that the victim knew the appellant as she stated in her testimony that before the incident the appellant visited her three times asking for the vegetables. Also, she stated that for almost 15 minutes she was struggling with the appellant means that she had ample time to observe the appellant. That the distance between the two was not far. They live in one village. In the case of **Scapu John vs Republic**, Criminal Appeal No. 197 of 2008 CAT DSM, unreported it was stated that when the court is dealing with the issue of watertight evidence of visual identification which entails exclusion of all possibility of mistaken identity it should take into consideration the following factors;

- ✓ *How long the witness had the accused under observation.*
- ✓ *What was the estimated distance between the two?*
- ✓ ***If the offence took place at night which kind of light did exist and what was its intensity.***
- ✓ *Whether the accused was known to the witness before the incident*

- ✓ *Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the letters concentration [emphasis added].*

The bolded part of the above quoted holding shows that, the victim was supposed to state clearly the kind of light she used to identify the appellant and its intensity. Though, it may be true that the appellant was known to the victim (PW3), yet the visual identification during night in a total darkness and the circumstances of threat is of weakest kind of evidence and most unreliable. The victim (PW3) in her testimony failed to describe the intensity of light of torch. She did not say other kind of light she had in her home apart from the light of torch which the appellant was holding and controlling the torchlight. The question of intensity and sufficiency of light for purposes of visual identification and recognition is fundamental and were discussed in length in the two above cases I referred.

When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the victim of crime was reasonably bright to enable the witness to see

and positively identify the accused (appellant). thus, clear evidence of the sources of light, and its intensity is of paramount importance.

However, as hinted above, it is my firm consideration that the victim and the appellant know each other. PW3 (the victim) testified that she knows the appellant as they reside in one village and the appellant used to visit her home for several times. The witness (victim) knew the suspect before the fateful date. PW3 managed to name the appellant at earliest possible time as her assailant to PW4 and PW5 which lead to his arrest by PW1. In the case of **Marwa Wangiti and Another vs Republic** [2002] TLR 39 the Court stated that;

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

It is finding of this court that despite that the victim's failure to describe what kind of light she had at her home and description as regards the intensity and sufficiency of a torch of the appellant to enable her to identify properly the appellant, was able to identify the appellant as she managed to name the appellant at earliest possible time as a person who

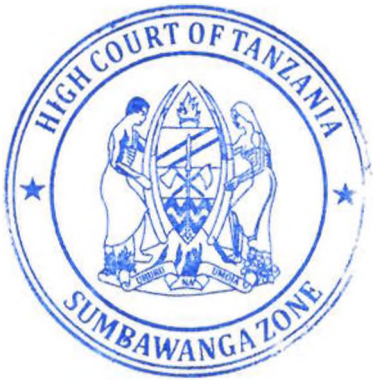
raped her. The victim testified that the appellant used to visit her at her home for several times. That means they had even conversation to each other. PW3 even testified the words uttered by the appellant in the course of raping her that ***"Lala vizuri mama, leo lazima nikutombe".*** Even in his cautioned statement (exhibit P1) the appellant stated that before forcedly raped the victim he asked for love making but was denied. Thus, in such circumstances the victim properly identified the appellant.

I have been warned myself and be very cautious as regards factors to be considered in cases based on visual identification. However, with the peculiar circumstances of this case at hand as I have discussed above, I fully subscribe to the position taken in the case of **Marwa Wangiti and Another vs Republic** (supra) relied as well by the trial court in its decision. That the victim named the appellant at earliest possible time after incident to PW4. The appellant also admitted to PW1 and PW4 to have raped the victim when interrogated. The appellant as well in his unobjected cautioned statement admitted to have raped the victim.

In fine, there is no gainsaying the appellant was properly identified by the victim.

For the foregoing reasons, I find the prosecution evidence has managed to prove that the appellant committed the offence of rape as alleged by the victim, thus I find no merit in the appeal. It is dismissed.

It is so ordered.



D. B. NDUNGURU

JUDGE

13. 09. 2022