IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 130 OF 2022

(Original Criminal Case No. 280 of 2018)

RAPHAEL ATHUMANI DAUDI ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th September & 6th October, 2022.

MWANGA, J.

The appellant above named is charged and convicted of Rape contrary to Sections 130(1) (2)(a) and 131(1) of the Penal Code, Cap 16 R. E2002; now [R.E 2019], He was sentenced to 28 years imprisonment. The appellant was dissatisfied with the decision of the District Court of Mkuranga, hence appealed to the High court on the following grounds;

1. that the learned trial magistrate erred in law and fact for not complying with Section 210 (3) of CPA, which requires magistrate to read over the evidence recorded to the accused.
2. that the learned trial magistrate did not comply with Section 231(1) of the Criminal Procedure Act.

3. that the learned trial magistrate erred in law and fact for resting his conviction against the appellant on evidence of PW1, PW2, PW3, and PW5 which were contradictory.
4. that the learned trial magistrate erred in law and fact for not giving weights the evidence of defense.
5. that the learned trial magistrate erred in law and fact for giving credit for a case that was not investigated.
6. that the learned trial magistrate erred in law and fact for grounding conviction basing on unreliable evidence of PW1(victim).
7. that the learned trial magistrate erred in law and fact on convicting the appellant by relying on visual identification on the evidence of PW1.
8. the learned trial magistrate erred in law and fact for failing to draw adverse inference against the prosecution for not calling a material witness (Tamasina) to testify to the important facts.
9. that the learned trial magistrate did not close prosecution case.
10. the learned trial magistrate erred in law and fact for failing to prove case beyond reasonable doubt.

During the hearing, the appellant adopted his grounds of appeal to form part of his submission. He stated that all grounds have legal basis for his acquittal in the criminal charges against him. He finally asked this court to quash both conviction and sentence of the trial court. On the part of the respondent, the learned State Attorney supported both conviction and sentence of the appellant.

In the first ground of appeal in respect of non-compliance with Section 210 (3) of Criminal Procedure Act, the learned State Attorney agreed that the same was not complied with. However, she insisted that the same is curable under S. 388 of the Criminal Procedure Act. She supported her arguments by referring the case of **Flano Alphonce Masalu @ Singu & 4 others V. R,** Criminal Appeal NO. 366 of 2018TZCA at page 14, where it was stated that such defect can be cured under Section 388 of the Criminal Procedure Act.

As rightly pointed out by the learned State Attorney, requirements of section 210(3) of CPA were violated. But it is not fatal, as long as the same did not occasioned a miscarriage of injustice on the part of the appellant.

As to the second ground of appeal that the trial magistrate did not comply with S. 231(1) of the CPA. The learned State Attorney correctly

submitted that at page 24 of the proceedings the magistrate recorded that the accused person was addressed pursuant to S. 231 of the CPA, and the accused responded that he would defend himself under OATH, hence the contention of the learned State Attorney is true, that the same was complied with.

With reference to the third ground of appeal, the trial magistrate erred in law and fact to convict the appellant basing on evidence of PW1, PW2, PW3, PW4 and PW5, which were contradictory. The learned state attorney submitted that PW1 explained how the act of rape was committed against her will and that the appellant went to the victim place and told her that he wanted to have sex with her. PW1 resisted but the appellant threatened to break her house. When she felt that the appellant has gone away around her house, she opened the door and got out in an attempt to escape the appellant. Unfortunately, the appellant was still around and started raping PW1. She narrated further that PW2 (village chairman) received information from PW1 about the incident of rape and it was PW3 who arrested the appellant while at his home. Further submission was to the effect that victim pant was found at the home of the appellant. PW5 received the victim and conducted medical examination and found that PW1 had bruises on her

shoulders and labia of the vaginal. She also contended that, PF3 was tendered and admitted in court as exhibit P1.

With such submission by the learned State Attorney in support of the conviction and sentence against the appellant, I do not find any contradictions of witnesses in that respect. What PW1 said was that the appellant forced her to have sexual intercourse without her will. The evidence of the victim was not contradicted at any point at the trial. After all, in sexual offences, the evidence of rape comes from the victim. See. **Selemani Makumba V. R,** [2006] TLR 380.

With regard to the fourth ground of appeal that the trial magistrate erred for not giving weights evidence of the appellant. The learned State Attorney focused at page 4-5 of the typed judgment that the trial magistrate considered evidence of the appellant during the defense case. The trial magistrate showed how the appellant defended his case and considered the evidence of both the prosecution and defence and that at page 5-6 the magistrate analyzed the evidence effectively. At page 6 of the typed judgement the trial Magistrate stated that:-

> ***'Have carefully considered the defence evidence, in which the accused person denied to have committed the offence. According to him, he did not know the victim,***

the first time to see her was before the court and that the allegations of the victim was out of suspicious. His defence that he did not know the victim is contradictory since he admitted that on 29/11/2019, he was arrested by PW3 Malesi'.

With the above observation of the trial magistrate, I am also of the view the evidence of the appellant was considered in reaching the decision against him.

In the fifth ground of appeal that the trial magistrate erred for giving credit to the prosecution while the case was not investigated properly against the appellant, the leaned State Attorney submitted that, the case was investigated properly and that is why the appellant was charged under S. 130(1) (2) and S. 131 (1) of Penal Code Cap. 16 R.E 2019. He added that, as a result of the investigation, there were witnesses who appeared and testified in Court i.e PW1(victim), PW5 (a Medical Doctor), Exhibit P1 (PF3) and the evidence of PW3 and PW4 (investigator who interrogated the appellant. Finally, that such investigation was the basis of the charge of rape against the appellant.

It is my considered view that, in order to know whether the case was investigated or not, one has to see how the prosecution aligned its witnesses

in the proof of the case against the accused person. As rightly stated by the learned State Attorney, the appellant was charged of rape under the penal code, and for the prosecution to proof this offence one has to establish the necessary ingredient of penetration. Such ingredient can only be proved by the victim herself and a medical doctor. I therefore credit the prosecution that presence of such witnesses is a clear indication that, the case was investigated properly.

Coming to the sixth ground of appeal, that the trial magistrate error in law and fact to convicts the appellant by relying on the evidence of PW1.The learned State Attorney responded that PW1 was a victim in this case, and that she elaborated on how the incident of rape occurred on 28/11/2018. She made reference to page 6 of the typed proceedings that PW1 explained on how the act of rape was committed without her will. She quoted part of the victim testimony in the trial court, that:-

> ***'He did undress my underwear and skintight. He also threatened to kill me. Then he pressed me down and 'akachukua mboo yake na kuniingiza ukeni'. After finishing then he repeated in the second time by inserting his penis on my vagina. He was having sex with me without my consent. He took me into his house (aliniburuza). He did rape me again in the third time'.***

As rightly held in **Selemani Makumba V. R,** [2006] TLR 380 and **Godi Kesenegala V. R,** Criminal Appeal No. 10 of 2018, proof of rape comes from the victim (PW1) herself. Hence, I do not find any embellishments on the testimony of PW1. The medical examination report (PF3) indicated that, there were bruises in her labia of the vagina, and bruises occurred on the shoulders as a result of being dragged by the appellant.

In respect of the seventh ground of appeal, that conviction relied on visual identification of PW1. The learned State Attorney submitted that, PW1 had enough time to identify the appellant depending on the time spent and that they were neighbor's. Apart from that, the appellant went to the house of PW1 and they exchanged some words(voice). With such observations I take note that there were no issues with regard to identification of the appellant. The appellant was identified by the PW1 at the scene of crime as the person who did such brutal raped the victim

In the eighth ground of appeal, that the trial magistrate failed to draw adverse inference basing on the fact that called one Tamasina who accompanied the victim to report the matter was not called on to testify. The learned State Attorney submitted that, the prosecution side is not bound to

call all witness to testify in a case. She added that, the witnesses on the prosecution side were able to prove the case beyond reasonable doubts. She added that, PW1 evidence was also corroborated by the evidence of PW2, PW3, PW4 and PW5, and specifically PW5 who was a medical doctor examined the victim (PW1) and found out that PW1 had bruises in her body. As long as the chairman whom the incident was reported to by the PW1 and the said Tamasina had testified in court, I do not see why absence of the testimony of Tamasina becomes an issue.

In the nineth ground of appeal, that the trial magistrate did not close prosecution case, the learned State Attorney submitted at page 24 of the typed proceedings that the trial magistrate closed prosecution case and it was the same page where the trial magistrate stated that the accused person has been addressed according to Section 231 of CPA. At the same page, the trial magistrate stated that the prosecution case has managed to establish a prima facie case against the accused person; hence the accused person had a case to answer. As correctly observed by the learned state attorney, this ground of appeal is not meritorious.

On the tenth and last ground of appeal, that the prosecution did not prove the case beyond reasonable doubt, the learned State Attorney

defended her position that there was enough evidence on the prosecution side. She referred specifically, the evidence of PW1(victim), Exhibit P1 which was PF'3 tendered by PW5. On the other hand, the appellant rejoined that the medical doctor (PW5) did not take his DNA to establish that he was the one who raped PW1.

In the circumstances, this is not a case which requires DNA test. I also revise the decision of imposed from 28 to 30 years imprisonment as the sentence start to run when the accused person is convicted and not on account of time spent in custody. **See. Mwiteka Godfrey Mwandemele V. R,** Criminal Appeal No. 388 of 2022. The case was proved beyond reasonable doubt; hence this appeal deserves to suffer defeat. The Appeal is hereby dismissed. Conviction and sentence of the trial court upheld.

It is so ordered.

THE HIGH COURT OF TANZANIA

H. R. MWANGA

JUDGE

06/10/2022

ORDER:

Judgement delivered in Chambers this 6th day of October, 2022 in the presence of the appellant and absence of the Respondent.

H.R. MWANGA

JUDGE

06/10/2022