IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 28 OF 2022

(Originating from Criminal Case No. 476 of 2020 of Moshi District Moshi)

OMBENI KESSY @ MATATA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

29/8/2022 & 05/10/2022

SIMFUKWE, J.

The appellant herein was charged before the District Court of Moshi with the offence of rape contrary to **section 130(1)(2)(e) and 131(1) of the Penal Code, Cap 16 R.E 2002**. He was convicted and sentenced to thirty (30) years imprisonment. Being aggrieved with the said conviction and sentence, he appealed to this court on the following grounds:

1. *That the learned trial magistrate erred in law and fact by deciding that the prosecution proved its case against the accused-Appellant herein above (sic) beyond reasonable doubt.*
2. *That the learned magistrate erred in law and fact by convicting the accused person/Appellant without testimony of a doctor who examined the victim which was necessary in the circumstances of the case.*

3. *That the trial Magistrate erred in law and fact for convicting the Appellant on statutory Rape while there was no poof as to the age of the victim.*
4. *That the learned trial magistrate erred in law and fact by failure to evaluate properly evidence on record and as a result convicted and sentenced the appellant.*

Before the trial court, it was alleged that on diverse dates and months of 2020 at Mamba area within the District of Moshi in Kilimanjaro Region the appellant did have carnal knowledge of one Bless Moshi who is a girl of 15 years.

Briefly, the facts of the case are to the effect that the victim's mother (PW1) was called at the school where the victim was studying. The teacher told her that, her daughter arrived late at school. Upon inquiry to the victim, she explained that she used to pass at the accused's place and had sex with him. The victim also narrated the same story before the trial court. She explained how the accused occasionally raped her.

Having heard that story, the victim's mother informed the police. The victim was taken to hospital and the accused was arrested and arraigned before the court charged with the offence of rape. The trial court was satisfied with the evidence adduced by the prosecution thus convicted the accused and sentenced him to thirty years in prison. Aggrieved, the appellant preferred this appeal.

The hearing of the appeal was conducted orally, the appellant was represented by Mr. Willence Shayo while Mr. Rweyemamu, learned State Attorney appeared for the Respondent/ Republic.

Mr. Shayo for the appellant prayed to adopt the petition of appeal except the 3rd ground of appeal which he prayed to abandon.

On the first ground of appeal, the learned advocate challenged the findings of the trial court that the case was not proved beyond reasonable doubt. He challenged the prosecution evidence on two grounds. First, he stated that there were contradictions on part of prosecution's case and second, that the exhibit was not read over in court.

On the issue of contradictions, Mr. Shayo averred that evidence of PW2 contradicted with evidence of PW3. That, in examination in chief, PW2 (victim) told the court that she was never examined by the doctor while PW3 testified that she witnessed PW2 being examined by the doctor. However, the said doctor was not called to testify. Also, a PF3 which was tendered before the court by PW3 states that PW2 was examined by the doctor. It was the opinion of the learned advocate that since there was such contradiction and the doctor was not called before the court, the court should have addressed the said inconsistencies and resolved them whether they affect the case or not. He made reference to the case of Mohamed **Said Matula Vs. Republic, [1995] TLR 22** which held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and resolve whether the inconsistencies and contradictions are only minor or they go to the root of the matter."*

It was a belief of Mr. Shayo that the noted contradiction is material and goes to the root of the case because PW2 (victim) said that she had never

been medically examined. Thus, they were not sure if PW2 had ever been raped. He argued that in the judgment of the trial court, such contradiction was not addressed. Therefore, it is more serious since the doctor who is alleged to have done the examination was not called to testify.

Concerning the issue of a PF3, it was stated that the same was not read in court after being admitted, although the said exhibit was used to determine the matter. Mr. Shayo cited the case of **Mbaga Julius Vs. Republic, Criminal Appeal No. 131/2015 CAT at Mwanza (Tanzlii)** where it was insisted that where a documentary exhibit has been admitted in court, it must be read over and where it is not read, it will be improperly admitted and it should be expunged from the record.

The learned advocate commented that since exhibit P1 was not read over before the court, the same was improperly admitted as it affects the right to be heard of the appellant. That, if it had been read, it could have enabled the appellant to prepare his defence sufficiently. Mr. Shayo prayed the said exhibit P1 to be expunged from the record for being improperly admitted.

Supporting the second ground of appeal that the trial court erred by convicting the appellant without a testimony of a doctor who examined the victim, it was submitted that the testimony of the doctor was necessary in the circumstances of the case. Mr. Shayo said that he is aware that it is not compulsory for a doctor to testify. However, in this case he said that it was necessary for the doctor to testify since the said offence was alleged to have been committed on different days of 2019. Thus, there was delay in conducting the examination by the doctor.

It was stated further by Mr. Shayo that since the victim had already told the court that she was not examined by the doctor, it was necessary for the said doctor to testify so that the court could substantiate whether the victim was examined or not. He cemented his argument by the case of **Ally Patrick Sanga Vs. Republic, Criminal Appeal No. 341 of 2017**, where at page 15 of the judgment the Court of Appeal held that: -

> *"...as there was an unexplained delay to convey the victim to hospital, it was necessary for the trial court to get the evidence of the doctor who examined the victim to corroborate his story. We tend also to agree with him that failure to call the doctor who was a material witness was fatal, as such omission tainted the prosecution case. The trial court, under such circumstances was entitled to draw an adverse inference."*

On the strength of above argument Mr. Shayo submitted that in the instant case failure to call the doctor to testify draw an adverse inference against the prosecution. That, the court should have informed the accused that he had a right to request that the doctor be called as a material witness. He quoted the provision of **Section 240(3) of the Criminal Procedure Act, Cap. 20 R.E. 2022** and argued that it is obvious that the court had the onus of informing the accused of his right to request that the doctor be called as a witness. He formed an opinion that since the said right of the accused was violated, the same nullifies the decision of the trial court.

On the 4th ground of appeal that the trial court failed to properly evaluate evidence on the record, it was submitted that the trial magistrate failed

to analyse evidence on the record. That, the fact that the victim could have known the circumstances of the homestead of the appellant through the child of the appellant was not considered. Even the defence of the appellant was not considered.

He referred to the case of **Ally Patrick Sanga Vs. Republic** (supra) in which the Court of Appeal insisted that it was necessary to explain the probative value of the evidence of the defence side.

It was contended that in the instant matter nowhere did the trial Magistrate explain evidence of the accused person, which Mr. Shayo said it renders the decision of the trial court a nullity.

On the strength of the three grounds of appeal, Mr. Shayo insisted that the prosecution did not prove the offence against the appellant beyond reasonable doubts. That, failure to call a material witness and failure to analyse evidence nullifies the decision of the trial court. He prayed that conviction against the appellant be quashed and sentence be set aside.

Replying the first ground of appeal which is in respect of contradiction of evidence and that Exhibit P1 was not read over, Mr. Rweyemamu referred at page 12 of the typed proceedings of the trial court, when PW2 was testifying said that they took her to Kilema Hospital where she was checked.

Also, he referred at page 14 of the typed proceedings of the trial court where PW3 said that she took the victim to Kilema Hospital.

He thus argued that there is no inconsistency between PW2's testimony and that of PW3.

Concerning the issue of PF3 that it was not read over, Mr. Rweyemamu referred at page 19 of the typed proceedings of the trial court, and said that when a PF3 was tendered before the court, the defence counsel said that he had no objection and that there was no need to call a doctor. That, on the same page, it is indicated that a PF3 was read aloud in court. Therefore, the learned State Attorney submitted that the first ground of appeal has no merit and the cited cases are distinguishable as their facts are different from the facts of this case.

Responding to the 2nd ground of appeal which faulted the trial court for failure to call the doctor, Mr. Rweyemamu averred that it should be noted that the offence of rape in this case is a statutory rape since the victim was 15 years old. It is not a forced sexual intercourse. That, PW2 had love affairs with the appellant and they had sexual intercourse five times as indicated at page 11 of the typed proceedings. In the circumstances, Mr. Rweyemamu formed an opinion that there was no need of summoning the doctor.

The learned State Attorney continued to state that it is trite law that in sexual offences, the best evidence is from the victim, other witnesses corroborated evidence of the victim.

The learned State Attorney alleged that he was aware of the dictates of **Section 240(3) of the CPA**. However, he said that at page 19 of the proceedings, the appellant was accorded right to call a doctor but they said that there was no need to call a doctor.

On the third ground which concerns proper evaluation of evidence, Mr. Rweyemamu concurred with the learned advocate for the appellant that

there was no proper evaluation of evidence in this case. However, Mr. Rweyemamu differed with the learned counsel in respect of remedy. His opinion was that, the remedy for failure to evaluate evidence is to remit the case file to the trial court so that judgment may be composed afresh by evaluating evidence on the record. It was the belief of the learned State Attorney that there is strong evidence on record. He thus opposed the appeal to the extent explained above.

In rejoinder, the learned advocate for the appellant was of the different opinion in respect of the remedy available for failure to evaluate evidence. He was of the view that failure to evaluate evidence is fatal and the same nullifies the decision. He cited the case of **Ally Patrick Sanga** (supra) **at** page 16 and 17 and argued that the Court insisted that failure to properly analyse evidence is fatal. Mr. Shayo commented that since the learned Stated Attorney concurs that evidence was not properly analysed, he implored the court to find that conviction was not correct and the same should be quashed.

On the first ground of appeal, it was insisted that PW2 said that she was not examined although she was taken to hospital.

Concerning the issue that the appellant was accorded right to call the doctor, it was insisted that the same was not done although Mr. Shayo said he cannot argue with the proceedings. Thus, mentioning the section alone does not suffice.

After going through parties' rival submissions and trial court's record, the main issue for consideration is ***whether the case against the***

appellant was proved on the required standard. This issue will squarely answer the three raised grounds of appeal.

It is an established principle of law that the prosecution has the duty to prove the case against the accused beyond reasonable doubts. In case of any doubt, such doubt should benefit the accused. That position has been underscored in numerous decisions of this court and the Court of Appeal. In the case of **Jonas Nkize V R. [1992] TLR 213,** the late Justice Katiti, J had this to say:

> *"While the trial magistrate has to look at the whole evidence in answering the issue of guilt, such evidence must be there first -* ***including evidence against the accused, adduced by the prosecution which is supposed to prove the case beyond reasonable doubt.****" Emphasis added*

Having established the position of the law, I now turn to the grounds of appeal. The appellant raised 3 grounds and I will discuss serialism.

Under the 1st ground Mr. Shayo condemned the trial magistrate for deciding that the case was proved beyond reasonable doubts. On this ground, Mr. Shayo raised two concerns, first, he said that there was discrepancy in respect of the evidence on whether the victim was taken to hospital or not. He stated that while PW2 said that she had never been taken to hospital, PW3 said that she witnessed the victim being examined. On his side the learned State Attorney said that there was no such discrepancy.

I am aware that whenever there is discrepancy in prosecution evidence which goes to the root of the case, then the same dismantled the prosecution case. This was stated in the case of **Jeremiah Shemweta vs Republic [1985] TLR 228**.

I keenly examined the proceedings of the trial court, as rightly submitted by Mr. Rweyemamu, I did not find the alleged discrepancy in evidence. Both PW2 and PW3 testified that PW2 was taken to Kilema Hospital and she was examined. Therefore, Mr. Shayo misdirected himself by stating that there was discrepancy.

On the same ground, it has been alleged that the PF3 was not read out in court after being admitted. I am of considered opinion that Mr. Shayo misdirected himself as page 19 of the typed proceedings reveals that the said PF3 was read out aloud. Therefore, the first ground of appeal has no merit.

Under the second ground of appeal, it has been alleged that the trial magistrate erred by convicting the appellant in absence of the evidence of the doctor. It was the opinion of Mr. Shayo that it was necessary to call the doctor since there was delay in conducting examination. Thus, the trial court should have drawn adverse inference against prosecution case for failure to call the doctor. Also, it was alleged that the court should have informed the accused his right to call the doctor as prescribed under **section 240(3) of the CPA**.

The learned State Attorney submitted that, there was no need to call the doctor since the best evidence comes from the victim and other witnesses corroborate the victim's evidence.

It is true that the doctor was not among the prosecution witnesses. However, the offence of rape can be established even in absence of medical report. This was also stated by the Court of Appeal in the case of **Salu Sosoma vs. Republic, Criminal Appeal No.4 of 2006** that:

> *".... likewise, it has been held by this court that lack of medical evidence does not necessarily in every case have to mean that rape is not established where all other evidence points to the fact that it was committed."*

The issue for determination is whether the available evidence points to the facts that the appellant committed rape. As rightly submitted by Mr. Rweyemamu, the best evidence comes from the victim. In the instant case, PW2 (the victim) narrated how she was raped with the appellant. Nowhere did the appellant challenge the credibility of the said victim. Moreover, the PF3 which was admitted without objection reveals that the victim was penetrated.

Moreover, Mr. Shayo had submitted that the court should have informed the accused of his right to call the doctor as per **section 240(3) of the CPA**. As a matter of reference, the cited provision reads:

> *"(3) Where a report referred to in this section is received in evidence the court may if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused of his right to require the person who made*

the report to be summoned in accordance with the provisions of this subsection."

The above provision suggests that the court shall inform the accused his right to require the person who made a report to be summoned for cross examination.

Looking at the typed proceedings, I don't join hands with the argument that the appellant was not informed of such right in line of the above provision. At page 19 of the typed proceedings, Mr. Shayo was quoted to have said the following:

"I have no objection. No need to call a doctor."

The above words suggest that the trial court addressed the accused in respect of the above provision. Thus, Mr. Shayo's allegations have no basis and misconceived.

On the last ground of appeal, the learned advocate faulted the trial magistrate for failure to evaluate the evidence. He also argued that the evidence of the appellant was not considered. Mr. Rweyemamu conceded that the trial magistrate did not evaluate evidence. However, he opined that the case file should be remitted to the trial magistrate for her to evaluate evidence properly.

Starting with the opinion of Mr. Rweyemamu, with due respect to him, this is not the remedy in case the trial court failed to evaluate the evidence. The remedy is for the first appellate court to re-evaluate the whole evidence on the record and come up with its own findings. This was stated in the case of **Kulwa Kabizi and Others versus Republic [1994] TLR 210** in which the Court of Appeal held that:

"Where a Trial Magistrate wrongly rejects certain evidence (as it was in this case), it is the duty of the appellate court in the circumstances of the case, to arrive at its conclusions upon consideration of the whole evidence properly admissible and available on record."

Therefore, in the instant matter, in case this court finds that the trial court did not evaluate evidence properly as submitted by learned counsels, then it is entitled to re-evaluate the evidence adduced before the trial court and come up with its own findings.

I have examined the trial court judgment and found that the trial magistrate properly evaluated the prosecution evidence as well as that of the accused. This was observed from page 7 to 8 of the typed judgment. Therefore, the allegations that evidence of the appellant was not considered is misconceived. The same was considered at page 8 of the judgment. The trial magistrate had this to say in respect of the evidence of the appellant:

"Moreover, it is a view of this court that the accused defence was not strong enough to defeat the evidence of the prosecution as the accused keep on saying that he is a disabled thus he is incapable of committing the offence of rape, the fact which this court consider to be immaterial as he did not tender any evidence to the effect that he is incapable of having sex due to his physical impairments."

Basing on the above quotation, it is the considered opinion of this court that evidence of the accused was considered. This court is of considered

view that in considering the party's evidence it is not necessary for the decision maker to repeat word after word of the party's evidence. Having established as such, I also find the last ground of appeal to have no merit.

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubts. I therefore find the appeal to have no merit. I dismiss it in its entirety. Conviction and sentence of the trial court is hereby upheld.

Dated and delivered at Moshi this 5th day of October, 2022.

S. H. SIMFUKWE

JUDGE

Right of further appeal explained.

S. H. SIMFUKWE

JUDGE