THE UNITED REPUBLIC OF TANZANIA

THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF TANZANIA

DODOMA DISTRICT REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO.31 OF 2022

(Originating From the District Court of Singida at Singida, Criminal Case No. 52/2021)

SHABAN HAMIS.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 07/10/2022

Date of Judgment: 13/10/2022

Mambi, J.

In the District Court of Singida at Singida the appellant Shaban s/o Hamis stood charged with the offence of attempted rape contrary to sections 132 (1) of the Penal Code, Cap. 16 [R.E. 2019]. The brief particulars of the offence as per the charge sheet were that on 17.09.2021 at night hrs at Mahembe Area within Singida

Municipality the accused (appellant) was alleged to have attempted to have sexual intercourse with a woman of 40 years old.

To prove charges against the appellant. The prosecution called two witnesses namely, the victim who testified as PW1, the victim's husband (PW2). The appellant was found guilty and he was convicted and sentenced to 30 years imprisonment.

Aggrieved, the accused/appellant lodged Criminal Appeal in this Court to challenge the conviction and sentence of the trial court on the following twelve related grounds:

1. That, the appellant was not guilty when the charge was read against him before the trial court.
2. That, the learned trial court magistrate erred in law and fact by proceeding with the trial using evidence which was not received in camera contrary to section 186(3) of the Criminal Procedure Act Cap. 20 (R.E 2019).
3. That, the learned trial court magistrate erred in law and fact by convicting the appellant by denying him legal assistance contrary to section 310 of the Criminal Procedure Act Cap. 20 (R.E 2019).
4. That, the trial court magistrate erred in law and fact by convicting the appellant basing on only one ingredient of crime that is the Actus Reus.
5. That, the trial court magistrate erred in law and fact by admitting contradictory statement of PW1 and PW2, that while PW1 states that at the crime scene the appellant was

undressing the victim, PW2 states the appellant was on top of PW1 chest.

6. That, the trial court magistrate erred in law and fact by accepting the evidence of PW2 without specifying how PW2 saw the appellant at the crime scene since the incident happened at night hours which associated with darkness.
7. That, the trial court magistrate erred in law and fact by admitting the testimony of PW3 the investigator, who did not indicate findings of her investigation, what steps were undertaken at the police station to accomplish investigation, how was the appellant treated at the police station, and what was the methodology used to get investigation findings.
8. That, the trial court magistrate erred inlaw and fact by convicting the appellant without tendering an exhibits (PF3) by the prosecution side.
9. That, the trial court erred in law and fact by admitting illegally obtained evidence contrary to section 196 of the Criminal Procedure Act Cap. 20 (R.E. 2019).
10. That, the trial court erred in law and fact by proceeding with the trial despite doubtful circumstance with regard to the fact that the appellant was chased by number of people.
11. That, the trial court erred in law and fact by the convicting the appellant despite the evidence of defence witness (DW1) who claimed that the appellant owed PW2 three hundred thousand Tanzania Shilings (TZ 300,000/=).

12. That, the prosecution side failed to prove its case beyond any reasonable doubt.

While the appellant appeared unrepresented the Republic was represented by the learned state attorney Mr Kidandu. The appellant briefly prayed to adopt and rely on his grounds of appeal.

In response, the prosecution through the learned State Attorney Mr Kidandu for the Republic, submitted that, all grounds of appeal by the appellant have no merit. The learned State Attorney briefly submitted that the prosecution proved the charges against the accused beyond reasonable doubt. He averred that the evidence by the prosecution witnesses such as PW1 and PW2 was clear and the trial court properly based on that evidence in convicting the appellant. He was of the view that sexual offences, the best evidence is that of the victim who mentioned the appellant before PW2. The learned state attorney submitted that if section 186 of CPA was not complied with why the appellant did not complain at the trial court? He referred the decision of the court in A. Samwel vs. R., Crim. Appeal No. 48 of 2010 page 10-12 the learned State Attorney was of the view that the appellant was not bared from using an advocate. Mr. Kidandu submitted that since the appellant was the one who escorted the victim he was responsible for the charges. He argued that since the appellant was relative of the victim, PW1 properly identified him.

The appellant briefly rejoined that the prosecution did not prove the charges against him beyond reasonable doubt. He argued that the prosecution witnesses were not telling the truth.

Having carefully gone through the proceedings and judgment of the trial court, the grounds of appeal and submissions from both parties, I find the issue before this court is whether or not the evidence by the prosecution was reliable or not. In this regard, the main issue in this case is whether the prosecution proved the case against the appellant beyond reasonable doubts or not.

It is on the records that the appellant was charged with an attempted rape under section 132 of the Penal Code. For easy reference, that section provides that:

> *"132.-(1) Any person who attempts to commit rape commits the offence of attempted rape, and except for the cases specified in subsection (3) is liable upon conviction to imprisonment for life, and in any case shall be liable to imprisonment for not less than thirty years with or without corporal punishment. (2) A person attempts to commit rape if, with the intent to procure prohibited sexual intercourse with any girl or woman, he manifests his intention by-*
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> *(a) threatening the girl or woman for sexual purposes;*
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> *(b) being a person of authority or influence in relation to the girl or woman, applying any act of intimidation over her for sexual purposes;*

(c) making any false representations for her for the purposes of obtaining her consent;

(d) representing himself as the husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

(3) Where a person commits the offence of attempted rape by virtue of manifesting his intention in the manner specified in paragraph

(c) or

(d) he shall be liable to imprisonment for life and in any case for imprisonment of not less than ten years.

(4) Where the offence of attempted rape is committed by a person who is of the age below eighteen years, he shall- (a) if a first time offender, be sentenced to corporal punishment of five strokes; (b) if a second time offender, be sentenced to a term of six months; (c) if a third time offender or habitual offender, be sentenced to twelve months"

Reading the above provision it is clear that a person can only be charged with an attempt to commit rape, if there is an intention to procure prohibited sexual intercourse with any girl or woman, and he manifests his intention by- (a) threatening a girl or woman for sexual purposes," (Emphases added).

The question is; did the prosecution prove the charges of attempted rape against the appellant beyond reasonable doubt?

The records clearly shows that among all prosecution witnesses there was no reliable witness as their evidence seems to contradict. For

instance one would have expected the evidence of PW1 to be corroborated by PW2, but PW2 testified contradictory evidence from that of PW1.

Indeed the evidence of PW2 was crucial in corroborating the evidence of PW1. Now if the evidence of PW2 and PW3 was full of doubt the only remaining evidence would be that of the victim. The question was the testimony of PW1 and PW2 enough to convict the appellant?.

It is without a doubt that the trial court's conviction was mainly based on the evidence of PW1 and PW2 who appeared to be wife and husband.

However, it is the primary duty of prosecution to prove the criminal cases such as rape beyond reasonable doubt by proving to the court that the victim was actually raped by the accused and there was penetration. It was essential for the Republic which had charged the appellant with an attempted rape of the victim on the material date to lead evidence showing exactly that PW1 attempted to rape on that day See ***Ryoba Mariba @ Mungare v R, Criminal Appeal No. 74 of 2 003 (unreported)*** as discussed by the court of Appeal in ***ALFEO VALENTINO VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 92 OF 2006.***

Looking at the trial records and the way the prosecution witnesses testified their evidence, it appears there was contradiction between the evidence of PW1 and PW2. Looking at the testimony of PW1 at

page 7 of the proceedings and 2 of the Judgment it is clear that PW1 testified that the accused held her neck and tried to undress her while PW2 was in the same area. On the other hand PW2 testified that he saw the appellant on the top of the victim and the victim was undressed. One would ask the question that if the accused was actually seen by PW2 on top of PW1 why PW1 did not testify if the accused/appellant was actually on her chest?. One would expect that if the appellant was on top of the victim then the victim should have testified similar evidence with PW2. I am aware that in sexual offences the best evidence is that of the victim, however in some cases the evidence of the victim must be corroborated. One would have expected PW2 to corroborate the evidence of PW1 by testifying reliable and related evidence.

This contradiction show that the case against the appellant was not proved beyond reasonable doubt and the burden of proof is in the prosecution side. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. The state or prosecution has the burden of proof in criminal cases and it includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof of most of the issues in the case beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt. In my firm view, the prosecution had to establish beyond any reasonable doubt that it was the Appellant had attempted to rape PW1. This is

in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.*** In our case, it appears the case against the appellant was entirely based on the evidence of PW1.

As rightly argued by the appellant in his ground of appeal that the prosecution just relied on general statements of PW1 and PW2 to prove a case in which the trial court wrongly convicted the appellant without properly weighing the evidence and credibility of the witnesses. This is in my view was not enough to prove that case and convict the accused basing on mere general statement. This can be reflected from the case of ***MATHAYO NGALYA @SHABANI VERSUS REPUBLIC, CRIMINAL APPEAL NO. 170 OF 2006*** (unreported) where the court of Appeal held that:

> *"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 ... provides; - 'for the purpose of proving the offence of rape, penetration, however slight is sufficient to constitute the sexual intercourse necessary to 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****".* [Emphasis supplied].

It is the cardinal principle of law that the accused should not be convicted basing on his defence or evidence weakness rather on the strength of prosecution's case. It is trite law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. See ***Christina s/o Kale and Rwekaza s/o Benard vs Republic, TLR [1992]*** at p.302.

The position of the law is clear that the standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case beyond reasonable doubts. Basing on that principle I have examined the evidence on record particularly in regard to the evidence on what happened on the way when the appellant was escorting the victim and met PW2, and found that the lower court misapprehended the substance and weight of the relevant evidence from PW1 and PW2, I find that the prosecution evidence was full of doubt. In this regard, it is clear that the attempted ingredients of an offence of rape was not established to prove charges against the appellant. It is trite law that the offence of attempted rape is said to be committed when a person's intention to commit the offence of rape is frustrated before he commits it fully. see ***Joseph Paul @ Alex Makua v. Republic, Criminal Appeal No. 342 of 2019 (unreported***). Additionally, one of the essential ingredients of the offence of attempted rape and which the prosecution has a duty to prove beyond reasonable doubt is an intent to procure prohibited sexual intercourse. The intent is in most cases

manifested by some actions preceding sexual intercourses. See ***BUBAKARI MSAFIRI vs REPUBLIC CRIMINAL APPEAL NO. 378 OF 2017.*** In the instant case, an attempt to prove the intent to procure prohibited sexual intercourse came from the evidence given by PW1 and PW2 which was to the effect that after being escorted, the appellant held her neck, laid her down, before he was stopped by PW2. The question that can tax one' mind is whether, bearing in mind that the claims by PW1 and PW2 were disputed by the appellant, the trial court rightly found the claims true. In other words the question to be asked and answered is that, was the evidence by PW1 and PW2 to that effect reliable?

It is also on the records that PW2 testified that he screamed and some people came to assist him to arrest the appellant but no one among of those people who participated or witnessed the accused being arrested were called to testify and corroborate the evidence of PW1 and PW2. The appellant in his tenth ground of appeal also raised the same concern that it was why the prosecution did not call any witness among those who were alleged to have arrested him at the scene of crime. While I am mindful of the position of the law particularly **section 143 of the Evidence Act, Cap 6 [R.E. 2019]** no particular number of witnesses is required for proof of any fact, it is however, my considered view that in the circumstances of this case, some of the said people who participated in arresting the appellant at the scene could be the material witnesses for the prosecution ought to have called as a witness. Those people would

have corroborated the evidence of PW1 and PW2. The Court in ***Aziz Abdalla v. Republic [1991] T.L.R. 71*** observed as follows:

> *"The general and well known rules is that the Prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on marterial facts. In my view, where such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the Prosecution".*

See also ***BUBAKARI MSAFIRI vs REPUBLIC CRIMINAL APPEAL NO. 378 OF 2017***

My perusal from the judgment of the trial court also reveals that the trial magistrate made the decision without reasons contrary to the principles of the law. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. In this regard, the trial court ought to have properly considered the appellant's evidence and weight that evidence vis-à-vis the prosecution evidence to satisfy itself if the prosecution proved the charges against the appellant. The law is clear and it has occasionally held so by the court in various cases that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment.

The record (the Judgment) does not show the point of evaluating evidence and giving reasons on the judgment. The trial magistrate mainly summarized the evidence of the prosecution without properly

analysing such evidence in line with the defence evidence. It is trite law that very judgment must be written or reduced to writing under the personal direction of the presiding judge or magistrate in the language of the court and must contain the ***point or points for determination, the decision thereon and the reasons for the decision*** , dated and signed. The laws it is clear that the judge or magistrate must show the reasons for the decision in his judgment. This can be reflected from section 312 of CAP 20 [R.E.2019] on the mode and content of the judgment which provides as follows:

> *"(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination,*** *the decision thereon and the* ***reasons for the decision****, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*
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> *(2) In the case of conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.*
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> *(3) .....*
>
> *(4) ...."*

The record such as the Judgment does not show the point of evaluating evidence and giving reasons on the judgmentI am of the settled view that the trial court did not subject the defence evidence to any evaluation to determine its credibility and cogency. The court

in ***Jeremiah Shemweta versus Republic [1985] TLR 228,*** observed and held that:-

> *"By merely making plain references to the evidence adduced without even showing how the said evidence is acceptable as true or correct, the trial Court Magistrate failed to comply with the requirements of Section 171 (1) of the Criminal Procedure Code Section 312 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] which requires a trial court to single out in the judgment the points for determination, evaluate the evidence and make findings of fact thereon".*

Reference can also be made to the authorities from other jurisdiction. In a persuasive case of ***OGIGIE V. OBIYAN (1997) 10 NWLR (pt.524***) at page 179 among others the Nigerian court held that:

> *"It is trite that on the issue of credibility of witnesses, the trial Court has the sole duty to assess witnesses, form impressions about them and evaluate their evidence in the light of the impression which the trial Court forms of them".*

Basing on the reasons stated above I find grounds of appeal meritorious. This means that the charge against the appellant was not proved to the required standard. I consequently, allow the appeal, quash the conviction and set aside the sentence made to the appellant resulting in the immediate release of the appellant. The appeal is allowed. I order that the appellant should forthwith be released from prison unless he is otherwise being continuously held for some other lawful cause.

Right of Appeal explained.

A. J. MAMBI

JUDGE

13/10/2022

Judgment delivered in Chambers this 13th day of October, 2022 in presence of both parties.

A. J. MAMBI

JUDGE

13/10/2022