THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 50 OF 2022

(*Originating from Criminal Case No. 115 of 2021 in the District Court of Ruangwa at Ruangwa*)

FADHILI JUMA LIWAWA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Muruke, J.

Fadhili Juma Liwawa was charged with two offences, namely rape contrary to section 130(1) 2(e) and 131(1) of the Penal Code, Cap. 16 R.E 2019, and impregnating a school girl contrary to section 60A (3) of the Education Act as amended by Miscellaneous Act No. 2 of 2016. He was sentenced to serve 30 years, jail for the first offence and acquitted in the second offence. Being dissatisfied, he filed five grounds of appeal as articulated in the petition of appeal.

On the date set for hearing, respondent was represented by Nunu Mangu State Attorney, while appellant appeared in person. Appellant prayed his grounds of appeal to be admitted as his submission in chief and reserve the right to rejoinder if any, prayer which was not objected by respondent, counsel.

In reply, respondent counsel supported conviction and sentence meted by trial court. She submitted that: evidence of the victim PW1 was water tight. PW1 explained how they started relationship with appellant by mentioning dates. Thus, there is no need of corroboration. Even a single witness (victim) evidence is enough to ground conviction as long as the witness is testifying the truth. Victim evidence was not shaken anyhow by the accused now appellant. On ground two, she submitted that, exhibit was tendered without, procedure being followed. Exhibit P1, P3 was not read in court after admission, same need to be expunged from court records. Still, victim testified and Doctor evidence was detailed. Exhibit P2 was admitted then read, ground two lacks merits insisted State Attorney. On ground three is noncompliance of section 127(7) of the Evidence Act. It is not applicable in this case because there was more witness other than the victim, PW3 and DW1 in his caution statement admitted to have sexual relation. Thus, ground three lacks merits insisted State Attorney. On ground four she submitted that, the trial court complied with section 235(1) and 312(2) of the CPA. On ground five the complaint is noncompliance of section 50(1)(a) of the Criminal Procedure Act. Appellant is raising on appeal as new issue.

In rejoinder, appellant submitted that, he did not write caution statement. Only police did so, he just put things that he did not want. Court did not consider his defence. PW3 evidence not credible, more, so, PW3 and PW2 evidence contradict each other as to who took the victim to the hospital. Exhibit P2 caution statement was not read in court after admission. So, he did not know what was written. On 05/07/2020 appellant was not at Ruangwa, he was at Mtanamo far away from Ruangwa, to her grandmother, Zainab Mussa Mkwambo, who testified as DW2, thus he could not pregnated the victim, insisted appellant.

Having heard both parties' submissions, evidence on records and grounds of appeal. There is only one issue to be determine: -

whether the prosecution proved its case to the required standard?

The burden of proof in criminal cases is on the shoulder of the prosecution, and that proof is beyond reasonable doubt. This requirement was stated in various decisions including in the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda Vs. Republic [2006] TLR 395,** whereby the Court of Appeal of Tanzania held that: -

> *"In criminal trial the burden of proof always lies on the prosecution. And the proof has to be beyond reasonable doubt."*

This court, being the first appellate court, has a duty to go through the evidence adduced at the trial court, to see if the prosecution adhered to the required principal standard of proof. I have read the trial court judgment, the conviction and sentence meted to the appellant based on the evidence of PW1 the victim. I have no doubt that, the best evidence of rape cases come from the victim, but such evidence must be taken with a great care, to avoid victimizing innocent persons from the evidence of untruth witnesses who could give evidence contrary to what real happen. In the case of **Hamis Halfan Dauda Vs. The republic, Criminal Appeal No. 231 of 2019** (unreported) held: -

> *"We are alive however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s). in such cases, therefore, the victim's evidence should be considered and treated with great care and caution."*

At page 4 of the trial court typed proceedings the evidence of PW1 victim was recorded as follows: -

> **.....between May to July 2020 after the school was closed I went to reside with my aunt at Namakonde and on April the accused person approached me and I agree and started our relationship and on 20/05/2020 I went out and found him on their door and I went there and entered his room and we had sex and I returned to my room and slept and continue with our friendship and at the time I wanted to go to school on 1/07/2020 I went again to their house and we had sex and on 2/7/2020 I went and we had sex, I wanted to go to school on 3/7/2020 but I had not go to school and later it was discovered that I am pregnant, I had sex with him several time at their house.**

Looking on the above summarized evidence, PW1 had sex with accused on 1/7/2020 and 2/7/2020, but, that is not sufficient to prove the offence of rape. For the offence of rape to be proved one important element must be proved that is ***"penetration"***. This mandatory requirement of the law is established under section 130(4)(a) of the Penal Code, Cape R: E 2022, which reads as follows: -

> *(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.*

Similar position of the law was adopted by our courts, in various decisions including in the case of **Omary Kijuu Vs. The Republic, Criminal Appeal No. 39 of 2005** (unreported) Court of Appeal at Dodoma at page 8 held;

> *"..... But in law, for the purposes of rape, that amounted to penetration in terms of section 130(4) (a) of the Penal Code Cap. 16 as amended by the sexual offences special provisions Act 1988 which provides: For the purposes of*

proving the offence of rape- penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence".

PW4(Doctor Bakari Saidi Nampeha) who attended the victim and examine her, he did not prove if the victim was penetrated. He testified that he asked only to prove whether the victim was pregnant. During cross examination at page 9 of the typed proceeding he answered that: -

You were not tested. I was asked to certify if she is pregnant or not only at the hospital, we are not conducting a test to prove paternity……

PW4 testified further that, he discovered the victim had pregnant of 1 month and 1 week, surprisingly, he never proved that the appellant was the one impregnated the victim. Moreover, the records (charge sheet) show that, the alleged offence committed between May and July 2020. But according to PW1 (victim) evidence she had sex with accused on 1/7/2020 and 2/7/2020. While PW4 (Doctor Bakari Saidi Nampeha) attended the victim on 21st July 2020. Counting from the day alleged offence committed to the date the incident reported at police on 21/7/2020 is 2 months and 21 days passed in between before the offence reported at police and the victim taken to the hospital. There is no any justifiable reason given by the prosecution as to why the victim not taken to hospital as early as possible. Failure to take the victim of rape to hospital for medical examination on the same day without giving justifiable reasons, it creates doubt to the prosecution evidence. In the case of **Johanes Kisulilo Vs. Republic, Criminal Appeal No. 315 of 2017**(unreported) at Dar es salaam, held: -

"Time had passed before the victim was examined by the doctor…….. from the evidence in record, it was not

stated as to how long did it take when the victim's mother discovered the PW1 was raped. The gap between the time when the appellant left the premise and when PW2 noticed that PW1 was raped was not established. From the above analysis it is clear that the prosecution side left a lot of questions which creates doubts as to whether the appellant is the one who committed the crime."

Not only that, but there is also another contradiction as to the victim pregnant. In his testimony PW4 Doctor said the victim had pregnant of 1 month and 1 week. Counting one month and one week backward, from the date when the victim alleging to have sex with accused on 1st July 2020 and 2nd July 2020 it is clear that PW4 examined victim before pregnancy.

Another complaint is the failure by the trial court to admit exhibits without following the required procedure. It is a settled principle of law that, once a document is intended to be relied upon in court, the contents of that document should be read over loudly in court to the extent that the accused can hear and understand the contents of that document. Failure to do so it is fatal, such document may be expunged from the court records. This position was pronounced in the case of **Mbaga Julius Vs. The republic, Criminal Appeal No. 131 of 2015** (unreported) at Bukoba, court stated that;

"Failure to read out documentary exhibit after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record."

Prosecution tendered exhibits P1and P2 as reflected at page 9 and 19 of the trial court typed proceedings. Exhibit P1(PF3), exhibit P2 caution statement of the accused. Appellant complained that, although the exhibits was admitted, but they were not read over in court to the accused. It is

true, according to the record, the said exhibits were admitted by trial court but only exhibit P2, that was read, although un properly recorded. It does not show period of time taken by PW5 to records the statement, while exhibit P1 (PF3) not read. Failure to read the contents of exhibits during admission is fatal and the remedy is to expunge the exhibits(documents) from court record. Thus, exhibits P1 and P2 is expunged from court records. Respondent counsel argued that, even if the said documents is expunged from the records still victim and Doctor evidences detailed. To my opinion, if you expunge the said exhibits from court records, the remaining oral evidence is not sufficient to prove the offence. There is no strong evidence to ground conviction. Prosecution did not prove the case beyond reasonable doubts. Appeal allowed. Conviction is quashed, sentence is set aside. Appellant to be released forthwith unless lawful held.

Z.G. Muruke

Judge

25/10/2022

Judgment is delivered in the presence of Florence Mbamba learned State Attorney for the Respondent and Appellant in the person.

Z.G. Muruke

Judge

25/10/2022