THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC. CRIMINAL APPEAL NO. 16 OF 2022

(Originating from District Court of Mufindi, at Mafinga in Criminal Case No. 62 of 2016)

EDGAR ELIAS @ SHARO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

7th September & 5th December, 2022.

UTAMWA, J:

Before the District Court of Mufindi District, at Mafinga (The trial court) the appellant was charged with the offence of rape contrary to section 130 of the Penal Code, Cap. 16 RE. 2002 (Now RE. 2022). In its judgment (The impugned judgment), the trial court convicted the appellant and sentenced him to serve thirty (30) years in prison. It was alleged by the prosecution that, on the 23rd day of February 2016, at Malingumu area

within Mufindi District, the appellant had carnal knowledge of one M d/o H without her consent. For the protection of the victim's dignity, I will refer to her as the "PW.1" or "victim" in this judgment. The appellant pleaded not guilty to the charge. A full trial was conducted, hence the conviction and sentence hinted above.

Believing that justice was not done, the appellant appealed to this court against both the conviction and sentence. The appeal was based on the following eight grounds couched in the layman's language, and which I quote verbatim for ease of reference;

1. That, the learned trial Magistrate erred in law and facts when convicted appellant relying on uncorroborated evidence of the prosecution side.
2. That, the trial magistrate erred in law and fact when convicted the appellant believing on the evidence of PW.1 while failed to mentioned the name and physical appearance of the appellant earliest which implies negative identification to the eyes of law.
3. That, the trial magistrate erred in law and fact when convicted the appellant for failure to considering the evidence of the appellant rather than prosecution to the eyes of the law.
4. That, the learned trial Magistrate erred in law and fact when convicted the appellant relying on the evidence of the PW.5 who filed the planted exhibits P.1 (PF.3), hence no any investigation done by the Police Officer and not summoned by the court to justify the allegation.

5. That, the trial court erred in law and fact when convicted the appellant while the exhibit P.1 (PF.3) was not read over before the court of law for better decision.
6. That, the trial magistrate erred in law and fact when convicted the appellant while the PW.1 evidence who seems was in business of selling her body.
7. That, the trial magistrate erred in law and fact when convicted appellant without being taken PW.1 and the accused to test STD'S and DNA to corroborate the evidence of PW.5.
8. That, the trial magistrate erred in law and fact when convicted the appellant while the evidence of PW.1 has got plentiful doubt to wit disapprove the allegation eg. She went to hospital after three days from the day of incidence.

Due to these grounds of appeal, the appellant urged this court to set aside the impugned judgment of the trial court and set him free from prison.

Before this court, Mr. Vicent Masalu, learned State Attorney argued the appeal on behalf of the respondent Republic. The appellant appeared in person and unrepresented. The appeal was argued orally.

At the hearing of the appeal, the appellant had nothing to add to his grounds of appeal. He only underscored them. On his part, the learned State Attorney supported the appeal. In doing so, he argued that, the prosecution failed to prove the case beyond reasonable doubts. This was because, the PW.1 did not identify the appellant as the one who raped her. This fact is shown in her evidence appearing at page 6 of the proceedings of the trial court. PW.1 also testified that, after reaching home she

informed her neighbour that she had been raped and that she knew the rapist who was her customer at her place of work. She further informed her neighbour that, the rapist had once seduced her for love.

The learned State Attorney further contended that, in offences of rape, the victim's evidence is very important in proving the offence. If the evidence of the victim does not mention the suspect earlier, then it creates doubts. To cement his contention he cited the case of **Elisha Edward v. Republic, Criminal Appeal No. 33 of 2018, Media Neutral Citation [2021] TZCA 397.** He argued further that, in that precedent the Court of Appeal of Tanzania (The CAT) held that, the delay in naming a suspect without reasonable explanation renders the evidence highly suspected and unreliable.

It was also the contention by the learned State Attorney for the respondent that, in the present appeal, the event occurred at night. PW.1 did not report the matter to the police until three (3) days lapsed. She also went to the hospital after three (3) days. The victim being of the age of majority ought to have reported the matter as early as possible. The delay in reporting the matter creates doubts which have to be resolved in favour of the appellant.

The learned State Attorney also submitted that, the PW.5 (The doctor who examined the victim) testified that, he received the victim with the PF.3 on 25th February 2016. That was after the lapse of three (3) days from the date of the alleged raped. PW.5 also testified generally that PW.1 had been raped because, there were discharge from her private parts and

she had abdominal pains. That evidence was thus, not in accordance with section 130(4) of the Penal Code which guides that penetration, however slight is an important ingredient. Nonetheless, the doctor did not prove any penetration. Again, the PF.3 was tendered by the prosecutor and not the witness (PW.5). The prosecutor is not a witness, this course deprived the appellant of the chance to cross-examine the PW.5. He cited the case of **Frank Massawe v. Republic, Criminal Appeal No. 302 of 2012, Media Neutral Citation [2013] TZCA 278** to support his contention. The learned State Attorney added that, such precedent guides that, a prosecutor cannot produce exhibit or document as a witness, but he can only lead the witness in tendering the exhibit. He further argued that, in the present appeal, the proceedings show that the contents of the PF.3 were also not read to the accused after being admitted. He thus, urged this court to expunge the PF.3 from the record.

In his further arguments, the learned State Attorney submitted that, after expunging the PF.3 from the record, there remains no any sufficient evidence to prove the case. The appellant had no any rejoinder submissions to the arguments advanced by the learned State Attorney.

I have considered the record, grounds of appeal, submissions by the State Attorney for respondent and the law. In my settled view, the fact that the present appeal is not objected, is not the reason why this court should not test its merits. That fact is also not the sole ground for this court to allow the appeal. These views are based on the understanding that, it is a firm and trite judicial principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and

the Constitution of the United Republic of Tanzania, 1977, Cap. 2 RE. 2002 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @ Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza**, (unreported Ruling). In that precedent the CAT held, *inter alia*, that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have an additional duty of ensuring proper application of the laws by the courts below. The same principles were also underscored in **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama, Civil Appeal No. 97 of 2016, CAT at Dar es Salaam** (unreported). I will therefore, test the merits of the appeal despite the fact that the respondent supports it.

In my further settled opinion, and according to the anatomy of the petition of appeal, the major ground of appeal by the appellant is basically that, the trial court erred in convicting the appellant since the prosecution had failed to prove the charge beyond reasonable doubts. The other grounds as outlined by the appellant only supports that major ground of appeal. The main issue for determination is therefore, *whether the prosecution proved the charge against the appellant beyond reasonable doubts.* Having considered the evidence on record, I am settled in mind that, the circumstances of the case at hand call for a negative answer to the main issue as correctly proposed by both sides of the case. This is due to the following grounds: in the first place, the PW.1 who is the victim of

the offence at issue testified that on 22nd February 2016 while on her way from her workplace to home, she was stopped by the appellant who requested for sex from her. She replied that she couldn't have sex without payment. She then ran away, but ultimately the appellant caught and raped her. However, the PF.3 shows that she went to hospital on 25th February 2016 after the lapse of three days. This evidence of the victim casts doubts on the involvement of the appellant in the commission of the offence. This is because, the victim's delay in reporting the incident until after the lapse of three days remained unexplained. The delay thus, dented the prosecution case.

Furthermore, the prosecution evidence contains contradictions on when the incident occurred. PW.1 testified that, the event occurred on 22nd February 2016 around 2:00 p.m. (in the night). On the other hand, the PW.3 and PW.4 testified that the event occurred on 23rd February 2016. The PF.3 which was admitted as exhibit P.1 shows that the alleged offence was committed on 24th February 2016. The prosecution evidence therefore is contradictory on when the event occurred. The legal effect of these discrepancies is that, they negatively affect the credibility of these witnesses. They cannot thus, be believed by the court. In the case of **Mathias Bundala v. The Republic, Criminal Appeal No. 62 of 2004** (unreported) held thus;

> "Good reasons for not believing a witness include the fact that the witness had given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses."

The discrepancies pointed out above therefore, generally weakened the prosecution case.

It should be noted also that, in sexual offences like the one under discussion, the best evidence comes from the victim as stated in the cases of **Selemani Makumba v. Republic (2006) TLR 384, Charles Chimango v. Republic, Criminal Appeal No. 382 of 2016, CAT** (unreported) and **Osward Kasunga v. Republic, Criminal Appeal No. 17 of 2017, CAT at Mbeya** (unreported). Nonetheless, in the present appeal, it cannot be said that the evidence of the victim (PW.1) was the best evidence for the reasons shown above.

Another reason contributing to the negative answer to the major issue posed above is the irregularity in tendering the PF.3 during the trial as rightly argued by the learned State Attorney. The record shows that it was the prosecutor who prayed to tender the PF.3. The prosecutor was not a witness, he could not be examined or cross-examined on the PF.3 tendered. The appellant objected the admission of the document, but the proceedings does not show what transpired after the appellant's objection. The records only shows that the document was admitted and marked as exhibit P.1. In my view therefore, the exhibit P.1 was improperly admitted in evidence, hence liable to be expunged from the record as correctly submitted by the learned State Attorney for the respondent. I accordingly expunge it from the record.

Owing to the above reasons, I find no any other evidence that implicates the appellant. I also find it needless to test the rest of the

grounds of appeal. Instead, I answer the major issue posed above negatively that, the prosecution did not prove the charge against the appellant before the trial court beyond reasonable doubts. I thus, uphold the major ground of appeal mentioned above.

I consequently allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. I further order that, the appellant shall be released from prison forthwith unless lawfully held. It is so ordered.

JHK UTAMWA

JUDGE

05/12/2022

COURT: Judgment delivered in the presence of appellant in person and Ms. Masambu, learned State Attorney for the respondent Republic. Ms. Gloria Makundi (clerk) also present.

MALEWO M. A.
DEPUTY REGISTRAR
05/12/2022

Right of appeal explained.

MALEWO M. A.
DEPUTY REGISTRAR
05/12/2022