IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC CRIMINAL APPEAL NO. 59 OF 2021

(Originating from Criminal Case No. 16 of 2019 of the District Court of Dodoma at Dodoma)

JACKSON MSHUYA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

07/9/2022 & 19/10/2022

KAGOMBA, J

JACKSON MSHUYA (henceforth "the appellant") is aggrieved by the decision of the District Court of Dodoma at Dodoma (henceforth "trial Court") delivered on 05/5/2020, whereby he was convicted for the offence of rape C/S 130 (1) and (2) (e), as well as 131 (1) of the Penal Code [Cap 16 R.E 2002] (now R.E 2022) (Henceforth "the Penal Code). He was sentenced to serve thirty (30) years imprisonment. The appellant now seeks this Court to allow his appeal, quash the conviction and set aside the sentence with an ultimate goal of regaining his liberty. He also prays for any other relief this Court may deem just to grant.

In his Petition of Appeal, the appellant has packed ten (10) grounds to support his appeal. The grounds of appeal are as follows:

1. That, the learned trial Magistrate erred in law and fact to rely on cooked evidence adduced by all witnesses for prosecution side.

2. That, if the learned Magistrate had carefully examined the evidence before him, he could have discovered that there was a very high possibility for the appellant to be implicated by the case.

3. That, the trial Court erred in law and in fact when acted on the evidence of the prosecution side which did not prove the offense of Rape as alleged by the prosecution.

4. That, the trial Court erred in law and in fact by not warning itself that the evidence of PW5 was weak for the reasons that;

    i. There was no evidence from the Hospital management, where the doctor was working, to prove that the said doctor was really suffering from mental disease which prevented him from appearing before the trial Court to testify.

    ii. There was no evidence that the PF3 tendered before the trial Court by the prosecution side was prepared by the doctor who later suffered from mental illness.

    iii. No any other documentary evidence from the Hospital where the victim was alleged to be hospitalized was tendered in trial

Court to show that the victim was hospitalized though the doctor who attended was suffering from mental illness.

iv. Failure of the prosecution to come up with clear evidence in respect of the doctor occasioned miscarriage of justice on the part of the appellant.

5. That, the trial Court erred in law and in fact when it received the evidence of PW2 against the procedure.

6. That, the trial Court erred in law and in fact when convicted the appellant basing on contradictory evidence of the prosecution witnesses;

i. for instance, PW1 addressed the trial Court that the assailant did run away after the act while PW2 addressed the Court that the appellant was seen naked together with the victim at the alleged scene of crime.

ii. Again, PW1 alleged that the assailant held her neck so tight that she couldn't be able to shout while PW2 addressed the Court that he heard screams for help is not possible for a person whose neck was held so tight to raise voice for help.

7. That, the trial Court erred in law and fact when convicted the appellant while there was no enough evidence evidencing that the

appellant was known prior to the incident, a reason why all the prosecution witnesses based on dock identification which was not proper as identification parade was required to remove shadow of doubts on the issue of identification.

8. That, the trial Court erred in law and fact when convicted the appellant while the prosecution evidence was not corroborated by the person alleged to arrest the appellant when they were cutting grasses after being asked to do so, and there was no reason as to why they were not summoned by the prosecution so as to support their evidence.

9. That, the trial Court erred in law and fact by not warning itself that a person can be convicted on the strength of the prosecution case and not weakness of the defense side.

10. That, the appellant was convicted basing on procedural irregularities.

Before the trial Court, it was alleged that on 22/12/2018 at Mailimbili kwa Mwatanu area, within the City of Dodoma, the appellant did have sexual intercourse with one Zainabu Hassan without her consent. Based on the evidence of the victim (PW1) and an eye witness PW2 Basili Japesi Nchimbi that the offence was committed in a broad day light at about 13:00hrs whereby the accused person was identified and apprehended on the same

date, the trial Court proceeded to convict the appellant for the offence of rape as charged and sentenced him, as it did.

On the date of hearing of the appeal, the appellant was unrepresented while Ms. Sarah Anesius, learned State Attorney, appeared for the respondent. The appellant, being a lay litigant, prayed the Court to adopt his Petition of Appeal as his submission to the Court.

Ms. Anesius, for the respondent supported the conviction and punishment pronounced by the trial Court. She however conceded existence of some shortfalls in the proceedings and addressed them before tackling the grounds of appeal.

She confessed that the evidence of PW2- Basili Japesi Nchimbi was recorded in contravention of section 26 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 by not promising to state the truth and not lies. She readily prayed the Court to expunge this testimony.

Ms. Anesius further conceded that Exhibit P1, a statement by medical doctor tendered by PW6, contravened the provision of section 34B(1)(e) of the Evidence Act [Cap 6 R.E 2022]. That, the appellant was not given a copy of the statement within ten (10) days prior to the tendering of the statement as required by the law. She prayed the exhibit be expunged too.

Replying to the first and second grounds of appeal where the appellant complains that the case and evidence against him were cooked, Ms. Anesius submitted that the conviction was heavily supported by prosecution evidence. Her central argument in this regard was that the appellant having repelled existence of any quarrels between him and any of the prosecution witnesses, his claim that the case against him was cooked is but an afterthought.

Replying to the third ground of appeal where the appellant claimed that the case against him was not proved, Ms. Anesius fronted the testimony of PW1, the victim, submitting that the victim proved penetration as per section 130(4)(a) of the Penal Code. She also referred to the case of **Seleman Mkumba V. R** (2006) T.L.R 384 to the effect that the best evidence in rape cases is that of the victim. The learned State Attorney further submitted that the testimony of PW1, the victim, was corroborated by the other witnesses including PW3 and PW4, stating that even though they did not see the act, but the appellant was seen running away.

On the fourth ground of appeal, where the appellant claims that the evidence of PW5 was weak as there was no evidence from Hospital management to prove that the doctor was suffering from mental disease, Ms. Anesius replied that lack of PF3 and failure to bring evidence from Hospital management wouldn't negate the proof of the offence, as the victim was the best witness. She argued that Doctor's evidence or PF3 was for

corroboration purpose only as the proof of penetration by the victim was sufficient.

Having prayed the Court to expunge the evidence of PW2, the learned State Attorney didn't labour on the sixth ground of appeal, regarding contradictions in the testimonies of PW1 and PW2.

On the seventh ground, where the appellant complained that his conviction was based on insufficient dock identification, Ms. Anesius replied that as long as the appellant was arrested on the same day of the incident and the witnesses saw him running from the scene of crime, his identification was more than mere dock identification and was sufficient.

Concerning the eighth ground of appeal, where the appellant complained that he was convicted without the evidence on his arrest being corroborated and without those alleged to have arrested him being called as witnesses to bolster prosecution case, Ms. Anesius clung to the argument that even if the actual person who arrested him was not called to testify, that would not make the other proof of the offence nugatory. She reckoned that under section 143 of the Evidence Act no number of witnesses is required to prove a fact, adding that the witnesses who were called did prove his arrest.

Ms. Anesius also replied to the ninth and tenth grounds of appeal whereby the appellant had complained that the trial Court didn't warn itself

that the appellant was being convicted based on the weakness of his defence and not the strength of prosecution evidence, and that there were procedural irregularities. The learned Senior State Attorney replied that the opposite was true and found that the trial Court directed itself well and therefore the conviction was proper. Having replied as above, she prayed the Court to uphold both the conviction and the sentence pronounced by the trial Court.

The appellant was given a chance to rejoin, but stated that he had nothing to add.

From the above submissions, the issue for determination by this Court is whether the case against the appellant was proved beyond reasonable doubt. This being the first appellate Court, it's the duty of this Court to subject the evidence adduced during trial to a fresh examination as stated in **Ali Abdallah Rajab V. Sada Abdallah Rajab and Others** [1994] T.L.R 132, knowing, of course, that the trial Magistrate had a better chance to assess the witnesses.

In rape cases, prosecution succeeds if there is proof of penetration in unconsented sex, when the victim is an adult. Of equal importance, the proceedings and the judgment of the trial Court must show that the offender was properly identified. I shall revert to these two pillars.

In the outset let me first consider the prayers made by Ms. Anesius, learned State Attorney, to expunge the testimony of PW2 Basili Japesi

Nchimbi as well as Exhibit P1 tendered by PW6 WP 8093 PC Zamda. The latter was recorded in contravention of the provision of section 34B(2)(e) of the Evidence Act [Cap 6 R.E 2022]. PW6 had previously adduced evidence as PW5 but was recalled to produce the said exhibit P1, a statement by Dr. Julias Kessy, the doctor who examined the victim after the alleged incident because the doctor was sick and unable to adduce evidence. Section 34B(2)(e) of the Evidence Act, provides:

> *"(2) A written or electronic statement may only be admissible under this section-*
>
> *(e) if none of the other parties,* ***within ten days from the service of the copy of the statement****, serves a notice on the party proposing or objecting to the statement being so tendered in evidence". [* ***Emphasis added****]*

As submitted by Ms. Anesius, PW6 proceeded to tender the exhibit straightaway upon being recalled without complying with the above cited provision of the law. For this reason, the law was, indeed, not contravened.

Regarding the irregularity in taking the testimony of PW2 Basili Japesi Nchimbi, having known that the witness was a child of tender age, i.e 14 years, the trial court ought to have complied with the provision of S. 127(2) of the Evidence Act, which requires a child to make a promise that he shall state the truth and not lies. For these reasons, I grant Ms. Anesius' prayers. Consequently, the two pieces of evidence, that is, the entire testimony of PW2 and exhibit P1 are hereby expunged from the trial proceedings of this

case and shall not be relied upon anymore. Having done so, the key issue now is whether the remaining evidence can sustain the conviction?

From the testimony of PW1 Zainabu Hassani, the victim, the appellant took off her under pant and managed to penetrate his manhood into her vagina. She was later hospitalized with pain and bruises at her vaginal hole. With this testimony, despite the expunging of the would be exhibit P1 which is Dr Kessy's statement, the Court could pick guidance from **Seleman Mkumba's** case to make a finding that rape was committed against the old lady (PW1). The evidence on record, particularly PW1's own testimony, which was corroborated by the evidence of PW3 Winfrida Nasoro, sufficiently proved that the offence of rape was committed.

However, as I intimated earlier on, for prosecution to succeed, they are required to prove, at the required standard, not only that PW1 Zainabu Hassani was raped but also that the perpetrator of the offence is none other than Jackson Mshuya, the appellant.

I am alive to the fact that there exists a plethora of authorities, the case of **Selemani Makumba v. Republic** (supra) being the most celebrated, consistently holding that true evidence of rape has to come from the victim. In **Godi Kasenegala v Republic,** Criminal Appeal No. 10 of 2008, for example, the Court of Appeal stated:

"It is now settled law that, the proof of rape comes from the prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give, corroborative evidence".

While, admittedly, the law is settled that the victim is the best witness in rape cases, not in every case where the victim testifies that an accused person raped her, the Court shall be bound to convict the person so accused. There exists another established legal principle that each case must be decided on its own set of facts and obtaining circumstances. (See **Athumani Rashid vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 (25 June 2012).

My scrutiny of the evidence on record reveals that the aspect of identification of the appellant, as the person who committed rape, was not proved beyond reasonable doubt. I shall demonstrate hereunder.

The only witness who testified on identification of the appellant as the perpetrator of the offence is PW1 herself and PW3 Winfrida Nassoro. However, the testimony of PW1, on the aspect of identification of the appellant, is not without doubts. Firstly, PW1 was 71years old on the date she testified before the trial Court. Her old age is very material on her ability to properly identify a person visually. She testified that, as she was picking vegetables at her garden, the appellant came and slapped her on the face

and head. She stated in her testimony that the appellant came to her, without stating how she knew it was the appellant.

PW1 further testified that neighbours were not present. However, she went further to testify that "they saw the assailant", without mentioning who the pronoun "they" was referring to. She continued to state that "they reported to the young guys who were cutting grasses" and they chased him. From this PW1's testimony, it is not specific who saw and who chased the assailant. The most doubtful piece of her evidence is where she testified that it was her first time to see the appellant. Considering her advanced age, the time taken in the commission of the offence, which appears to be a quickly done incident, one can not say, with any degree of certainty, that PW1 did identify her assailant.

Then comes another gap in the prosecution evidence. PW3 who testified that he was at her shamba when some children told her that grandmother had been raped, told the trial Court that those boys told her that the assailant was the one who was running. Based on the information she was told by those boys, who could have been eye witnesses of the rape, she decided to chase the said culprit. Her testimony is unfortunately detached. It could be worthy trusting it if the boys had also testified to that effect. Without a connecting dot from a witness who saw the assailant running from the scene of crime, the evidence of PW3 becomes nothing but hearsay. She was told by the boys about the person who was running. For

lack of bridging evidence from those boys, her description of the appellant that he was in a grey shirt and was carrying a bag, becomes immaterial.

PW4 Abrahamani (sic) Juma was not at the crime scene. He is the victim's neighbour and a community police who found the appellant, already arrested. PW5 WP 8093 DC Zamda was also involved in the later stage of the case, way after the incident had occurred. It is for these reasons I find that the appellant was not properly identified. With such doubtful identification of the appellant by the prosecution witnesses, it is very unsafe to confirm the conviction and the sentence pronounced by the trial Court.

For the above stated reasons, I find merit in the seventh ground of appeal, which is sufficient to dispose of the entire appeal. Indeed, the trial Court erred in law and fact in convicting the appellant while there was no enough evidence evidencing that the appellant was known prior to the incident. There appears to be substantial reliance on unreliable dock identification. Accordingly, I allow the appeal, quash the conviction and set aside the sentence. Consequently, the appellant is set free forthwith unless otherwise held for some other lawful cause. Order accordingly.

Dated at **Dodoma** this 19th day of October, 2022.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE