IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC DRIMINAL APPEAL NO. 25 OF 2022

(Originating from Criminal Case No 83 of 2021 Mbinga District Court at Mbinga)

BAHATI HAULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: *03/10/2022*
Date of Judgement: *07/12/2022*

MLYAMBINA, J.

The Appellant, Bahati Haule was charged through *Criminal Case No. 83 of 2021* before Mbinga District Court at Mbinga (herein after referred as the Trial Court) with the offence of rape contrary to *section 130(1), (2) (a) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2019].* Upon full trial, he was convicted and sentenced to serve thirty (30) years imprisonment in jail. Being aggrieved by such decision, he filed petition of appeal containing four grounds of appeal, namely: *One*, the Trial Court erred in law and fact to convict the Appellant without the offence been proved to the required standard. *Two*, the Trial Court erred in law and fact to convict and sentence the Appellant while the Prosecution witness

No. 4 failed to prove penetration to the required standard. *Three*, the Trial Court erred in law and in fact to convict and sentence the Appellant basing on weak evidence adduced by Prosecution witness. *Four*, the Trial Court erred in law and fact to convict and sentence the Appellant while none of the Prosecution witnesses saw him committing an offence of rape with a victim.

At the hearing date, Mr. Hebel Kihaka learned Senior State Attorney appeared for the Respondent, the Republic while the Accused person appeared in person.

The outset of the matter from the record is as follows; on 1st November, 2021 while in her farm cultivating, the victim saw a young man named Bahati Haule (the accused person) with his fellows who were grazing cows. It was around 17 hours. The rest left except the accused person. Later on, the victim went to fetch water for bath. Surprisingly, she saw the accused person behind her. When he approached her, the accused person stumbled her blouse. Out of shock, the victim asked his intent but the accused told her to keep quiet. The accused person beat and tripped her down. He went further and teared her clothes including her under pants and raped her by inserting his manhood (penis) to her vagina. The victim went to her home and revealed what happened. Her son took her to the Village Chairman. The victim knew the accused for a

long time before the incident. She also added not to have any quarrel with the accused person. During cross examination, the victim elaborated that; at the time when the accused was raping her, there was no other person than them. The accused person was arrested in the same day. During interrogation the accused person confessed to have rape the victim.

On the other hand, the accused denied to have raped the victim. He alleged that the case was fabricated by the victim to evade payment of his wage at the tune of TZs 150,000/= (One Hundred and Fifty Thousand Tanzania Shillings Only) after he worked for her in the farm.

During hearing of the appeal, the Appellant submitted in relation to the first ground of appeal that; he was convicted and sentenced on the offence of rape but the republic did not prove their case beyond reasonable doubt. The Appellant revealed that, on the fateful day when the victim was raped, he was at his home. Also, he alleged that, the Prosecution brought one witness from Luanda, named Yuvent who testified before the Court but in the file, there are four witnesses.

On the second ground, the Appellant claimed that the fourth witness, the one who examined the victim failed to prove penetration. The Appellant submitted further that; the examination was conducted three days from the date when the victim was raped. It was unknown if he was

the one who raped the victim or her husband as the victim was a married woman.

As regards the third ground of appeal, the Appellant alleged that the evidence of the Prosecution was weak on the ground that the Militia Chairman and Village Chairman were not brought to Court to testify. The Appellant explained further that; he worked to the victim using a cow plough but the victim never paid him.

On the last ground, the Appellant claimed that there was no witness who witnessed him while raping the victim. He insisted that the victim did not testify before the Court. The Appellant added that; PW1, PW2 and PW3 did not testify before the Court. He prayed his appeal be allowed.

In response, the Prosecution started by opposing the appeal, supported the conviction and sentence entered by the Trial Court against the Appellant. The Prosecution went on to reply the four grounds of appeal in unison. Thus, the Appellant was legally convicted and the case against him was proved beyond reasonable doubt. Mr. Kihaka reminded the Court that the offence in which the accused was charged is rape contrary to *section 130 (1) (2) (a) and 131 (1) of the Penal Code [Cap 16 Revised Edition 2019 now 2022].*

Mr. Kihaka argued that, in rape cases, it is upon the Prosecution to prove if true the victim was raped. He mentioned the main ingredients to

be a penetration whatever slight it is. It was Mr. Kihaka's arguments that in proving the charge, the Prosecution paraded four (4) witnesses. PW1 at page 11 of the typed proceedings testified that; it is the Appellant who raped her on 1st November, 2021 at 5pm. It was still early and good time for identification taking into consideration that they are both living in the same Village. The Prosecution assured this Court that the victim proved penetration and she is reliable witness who informed the village leaders at the earliest time. She informed PW2 and PW3 that it is the Appellant who raped her.

Furthermore, Mr. Kihaka insisted that the act of giving the information or report at the earliest to PW2 and PW3 proves that the victim was reliable and credible witness. The said Village Leaders testified to Court as PW2 and PW3. He supported his argument with the case of **Republic v. MT 81337 Batsin Philip Sanga,** Criminal Session No. 25 of 2022, High Court of Tanzania at Songea (unreported) and the case of **Marwa Wangiti Mwita and Another v. The Republic** (2003) TLR 39. At page 15 of the case of **Batsin Sanga** the Court observed that mentioning the accused at earliest time ensure her reliability and credibility.

Mr. Hebel went further and reminded this Court that the Appellant did not cross examine the victim well on important facts, which he think

it is the admission of the said facts. It was his observation that; on convicting the accused, the Court relied largely on the evidence of PW1 which he thinks was strong to convict him even in absence of other witnesses. He supported his assertion with *section 27 (6) of the Evidence Act [Cap 6 Revised Edition 2022]*. Mr. Kihaka insisted that; in rape cases, the best evidence is of the victim evidence as she was the one who was raped. He referred the Court to the case of **Selemen Makumba v. The Republic** (2006) TLR 379, 384.

On the second ground, the Prosecution refuted the Appellant assertion that the Court based its conviction on the evidence of PW4. It was established that the accused raped the victim through the victim herself. PW4 told the Court that the victim had *spamazoa* coming out of her vagina and it was the second day from the day she was raped. Yet, the accused did not cross examine the witness. Also, the Prosecution added that; the proceedings which is to be relied upon shows that the Prosecution paraded four witnesses. Therefore, they managed to prove their case beyond reasonable doubt. He prayed the appeal be dismissed.

In his brief rejoinder, the Appellant insisted that he was not the one who raped the victim and that the victim did not testify in his presence.

After carefully consideration of the grounds of appeal lodged by the Appellant and the submission from the parties, this Court is of the findings

that all four grounds of appeal are intended to challenge the Prosecution onus of proof. Therefore, the four grounds of appeal are condensed into one issue, namely*; whether the Prosecution proved their case to the required standard, which is beyond reasonable doubt*. The issue will be determined in consideration of the Appellant's grounds of appeal as narrated in his petition of appeal.

It is the requirement of the law that, in criminal cases, the onus of proof is upon the Prosecution side, and it has to be beyond reasonable doubt as per *Section 3 (2) (a) of the Evidence Act [Cap 6 Revised Edition 2022*]. For easy of reference, *section 3 (2) (a)* provides *inter alia* that:

> 3 (2) a fact is said to be proved when-
> (a) In criminal matter, except where any statute or other law provides otherwise, the Court is satisfied by the Prosecution beyond reasonable doubt that the facts exists.

The Court in its plethora of decisions insisted on the Prosecution to provide to Court with the tangible evidence in which the guilty of the accused will be proved without leaving a slight of doubt. To mention few, see the cases of **Ahmad Omari v. The Republic**, Criminal Appeal no. 154 of 2005, Court of Appeal of Tanzania at Mtwara (unreported), **Mohamed Haji Ali v. The Republic**, Criminal Appeal No. 225 of 2018, Court of Appeal of Tanzania at Zanzibar p. 14 (unreported), and **Godfrey**

Paulo, Frank Walioba, Nelson Mbwile v. The Republic [2018] TLR 486, where the Court has this to say:

> The burden of proof is always on the Prosecution side to prove their case beyond reasonable doubt. This means that the Prosecution is duty bound to lead strong evidence as to leave no doubt to Criminal liability of the accused person.

Prosecution witness PW1 testified to the effect that; on the fateful day before the incident she saw the accused (whom she knew) with his fellows grazing cows at her farm. She saw others leaving but the accused remained. Unexpectedly, on her way to fetch water, the accused grabbed her blouse, warn her not to shout, beat and forced her down, torn her clothes including her under wear, then he raped her by inserting his penis to her vagina. When the victim reached at her house, she disclosed the predicament that befallen to her son. They went to report to the Village Leaders, as a result the accused person was arrested.

Her evidence was corroborated with the evidence of PW4, a Medical Practitioner who examined the victim the next day after the rape incidence. Though it was a day after she was raped, PW4 saw some discharge in her genitalia which contained dead sperm. That means, she contacted sexual intercourse as it was depicted in exhibit P1. This Court shares view with Mr. Kihaka that, in rape cases, save for the statutory

rape, the main ingredient is penetration and absence of consent. Also, in case of any other woman where consent is irrelevant that there was penetration. The position is reflected in the inter alia cases of **Seleman Makumba v. The Republic** [2006] TLR 379 and **Mathayo Ngalya @ Shabani v. The Republic**, Criminal Appeal No. 170 of 2006, Court of Appeal of Tanzania at Dodoma (unreported), where the Court stated 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 (supra) provides*; for the purpose of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence.

From the record, PW4 told this Court that in conclusion the victim seemed to have been involved in sexual intercourse as it was alleged by the victim, that means, there was a penetration. Therefore, the ingredient of rape was proved.

The questioned to ask after being satisfied by the Prosecution that the victim was raped is; who raped the victim? The answer to that question can be deducted from the following important evidences: *One*, it is in the record that the victim narrated to her son, then to the Village Leader that the Appellant herein raped her on the way to fetch water for bath. *Two*, she narrated further that there was no one except the

Appellant and her. *Three*, the Appellant warned her not to make an alarm. It was at 5 hours, which was still early and there was a sun light. *Four*, it is in evidence that the victim and accused saw each other few times before the incident. *Five*, the accused person and the victim knew each other as they lived in the same Village. *Six*, the distance between the accused person (Appellant) and the victim was too close. Therefore, there was no mistaken of identification. All feature provided in the case of **Waziri Amani v. The Republic** [1980] TLR 250 and in the case of **Said Chaly Scania v. The Republic,** Criminal Appeal No. 69 of 2005, Court of Appeal of Tanzania at Mwanza, were met.

The Appellant alleged that the trial Court based its conviction on the evidence of PW4 alone. That was not true. I went through the decision of the trial Court and noted that the trial Court relied on the evidence of the victim inclusive of other witnesses' evidence. It is the cardinal rule that the best evidence in rape cases is the evidence of the victim herself, as per the case of **Selemen Makumba v. The Republic** *(supra).* The victim is the one who exclusively knows precisely what transpired when she was raped. The accused allegation that the victim manufactured this case in order to evade her responsibility to pay his wage is an afterthought and it has no leg to stand. Equally, the Appellant assertion that no one testified to have seen him raping the victim is immaterial.

Apart from the above argument, the victim mentioned the Appellant to be a perpetrator at the earliest time, immediately after she reached at her house, the victim disclosed to her son what happened to her and the person who raped her. This shows that the victim is a reliable witness. This was the position in the cases of **Salum Seif Mkandambuli v. The Republic**, Criminal Appeal No. 128 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported) and **Phinias Alexander and Two Others v. The Republic**, Criminal Appeal No. 276 of 2019, Court of Appeal of Tanzania at Bukoba (unreported). In the case at hand, the earliest time was when the victim reached at home as there was no any person on her way to whom she could have disclosed her pain but her son at home was the earliest person to meet.

Needless, in African culture alike all civilized cultures, an adult person would always feel nervous to disclose rape incidence to every person. The victim could not tell such story to every person (if any) she met on her way. Though not stated, by all proper thinking, it was not easy to disclose to her son serve for a help in order to capture the culprit.

The accused told this Court that it was only PW4 who testified before the Court while the proceedings shows four witnesses who testified. But the accused has no any evidence to cast doubt on the available Court records. I went through the proceedings of the Trial Court and found, as

rightly as submitted by the counsel for the republic, four witnesses were paraded to Court including the Village Leaders, the victim and her son. It is the cardinal rule that the Court record shows what happened before the Court unless he who alleges has tangible evidence to prove to the contrary. In the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527, the Court has this to say:

> There is always presumption that a Court record accurately represents what happened in Court.

In the end result, from the arguments argued above it is the finding of this Court that the Prosecution proved their case not only that the victim was raped but also a person who raped her is the Appellant herein. Therefore, the conviction and sentence entered by the Trial Court was legal. I have no any good reason to fault the Trial Court decision. The appeal is therefore hereby dismissed for want of merits. The conviction and sentence are hereby sustained.

Order accordingly.

Y. J. MLYAMBINA

JUDGE

07/12/2022

Judgement pronounced and dated 7th day of December, 2023 in the presence of the Appellant and Senior Learned State Attorney Tulibake Juntwa for the Respondent. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

07/12/2022