IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 63 OF 2021

MICHAEL MARCO.....APPLELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Maswa at Maswa.]

(Hon. F.R. Lukuna SRM)

dated the 16th day of July, 2020
in
Criminal Case No. 72 of 2020

JUDGMENT

8th June & 2nd December, 2022.

S.M. KULITA, J.

This is an appeal from Maswa District Court. The appellant herein above was charged for Rape offence, contrary to the provisions of sections 130(1)(2) (b) and section 131(1) and (3) of the Penal Code [Cap 16 RE 2019]. It was alleged that on 5th May, 2020 at about 11:00 hours at

Wigelekelo Village in Maswa District within Simiyu Region, by the use of force the appellant did have sexual intercourse with one Mbuke Seni.

In a nut shell, the prosecution case as was unfolded by four witnesses and one exhibit is that, on the material date, the appellant went to the victim's residence. There he started by demanding some food. While the victim was about to give him, the appellant forcefully grabbed her neck. When the victim smelt danger, she forced her escape by running inside her bed room. The appellant followed her up to the bed room, undressed her, raped her to his satisfaction. When he finished, he took the food and ate it, after which he went away. As the victim knows the appellant, she made an alarm and reported the matter. At the Police Station the victim was given the form (PF3) for medical examination. The said PF3 having been filled by the Doctor, revealed that, someone had sexual intercourse with the victim as bruises and spermatozoa were found in the victim's vagina. Due to that, the appellant was arrested and arraigned to court for the aforementioned offence.

Though he denied to have committed the offence, the appellant was convicted and sentenced to serve 30 (thirty) years imprisonment. That decision aggrieved the appellant hence this appeal with six grounds which can be summarized as follows; **one,** the case was not proved at the

required standard, **two**, the trial court erred to convict him under the charged sections while the victim was above 10 years of age, **three**, the trial court erred to rely on the caution statement that was recorded out of prescribed time, **four,** the trial court erred for failure to note that investigation fell short and could not sustain conviction, **five**, penetration of the penis was not proved by prosecution **six,** trial court erred to rely on medical examination conducted after the lapse of 9 hours from the time when crime was alleged to have committed, **seven,** the trial court erred to admit the evidence of PW4 while the same court showed dissatisfaction on the caution statement she had recorded.

On the 08th day of June, 2022, the Appeal was scheduled for hearing. The Appellant appeared in person, whereas the Respondent, Republic had the service of Ms. Gloria Ndondi, learned State Attorney who resisted the appeal.

Submitting in support of the appeal, the appellant prayed for his grounds appeal to be adopted as the submissions for his appeal.

In reply Ms. Ndondi prayed to argue grounds number 1, 4 and 5 of the appeal collectively. She contended that the case was proved at the required standard. To expound that, she stated that the record is clear that PW1, who was the victim stated that, her age was 75 and mentioned

the appellant as the one who had gone at her resident on the material date went to her home seeking for food, but suddenly, he forcefully and without consent of the victim, had sexual intercourse with her. She added that, when the appellant failed to rape the victim in the sitting room, he followed and raped her in the bed room. Ms. Ndondi went ahead contending that, PW1 has managed to prove that, the appellant had sexual intercourse with her without her consent. Ms Ndondi asserted further that, the evidence of PW1 was not shaken at all. She added that, the appellant failed even to cross examine it. On that, Ms. Ndondi stated that, it implies that the appellant admitted what the victim was testifying. She made reliance on the case of **Nyakwama Ondare v. Republic, Criminal Appeal No. 507 of 2019, CAT at Musoma.**

Ms. Ndondi added that, as per the case of **Seleman Makumba v. Republic [2006] TLR 379** the best evidence in sexual offences comes from the victim. To her, as long as the victim testified that the appellant had sexual intercourse with her without consent, then the case was proved at the required standard.

As for the issue of penetration, Ms. Ndondi stated that, the same was proved by the Doctor who testified as PW3. She went ahead stating that, as per page 9 to 11 of the typed proceedings, in conducting medical

examination on the victim, the Doctor found bruises and spermatozoa on the victim's sexual organ. To that end, she was of the opinion that, penetration was proved.

It was Ms. Ndondi's assertion that, the proceedings show that, the crime was reported immediately to PW2. She added that, there is no mistaken identity as the crime happened during the day time. Further, the victim and appellant both live in the same village and they actually know each other. She insisted that, the early mentioning of the appellant is all an assurance that, the victim was a reliable witness. To buttress her assertion, she cited the case of **Chacha Jeremiah v. Republic, Criminal Appeal No. 551 of 2021, CAT at Mwanza.** On account of the aforesaid evidence, she concluded that, the case was proved at the required standard.

Concerning the second ground of appeal Ms. Ndondi stated that, the appellant laments to have been convicted under section 130(1)(2)(b) and 131(1)(3) of the Penal Code. She then stated that, the charge sheet provides that the accused was charged under section 130(1)(2)(b) and 131(1) of the Penal Code. She gave a considered opinion that, section 2(b) was not proper. She gave the reason that, the same is used when consent is obtained under influence of threat. She named the proper

provision being section 130(1)(2)(a) where sexual intercourse is done without the consent of the woman. On the admitted mistakes, she named it as minor error which is curable under section 388(1) of the Criminal Procedure Act. To insist it, Ms. Ndondi added that, the particulars of the offence and the testimonies of the witnesses reveal that, the appellant was charged under section 130(1)(2)(a) not 130(1)(2)(b) of the penal code. To her, the said defect is minor that has not prejudiced the appellant.

As for the third ground of appeal Ms. Ndondi made reference to page 4 of the typed judgment. She contended that, though the caution statement was admitted as exhibit P2, yet the same was not used in convicting the appellant for the reason that, the same was recorded out of prescribed time. On that account she stated that the ground is meritless.

As for the sixth ground of appeal Ms. Ndondi was of the views that, there is no law which prescribes the time limit for making medical examination to the raped person. Again, she called the disputed duration of 9 hours between the time for commission of the offence and the time that the medical examination was conducted being a reasonable time. She said that, some procedures had to be followed before medical

examinations being conducted. She mentioned them being, making report of the incident to the local government officer who was the Village Executive Officer (VEO) and to the police station before the issuance of the PF3 for the victim to be taken to hospital.

In rejoinder, the appellant just stated that, the PF3 was not properly admitted. That is the end of both parties to the case.

I have taken into consideration both parties' submissions, cited authorities as well as the available records. I am prepared to determine this appeal by dealing with the raised grounds one after the other.

On the third and seventh ground of appeal, as the counsel for the respondent has submitted, the record is clear that, the trial Magistrate admitted the appellant's caution statement as exhibit P2, but he did not use it in convicting the appellant. Page 5 of the typed judgment is vivid that, the trial Magistrate gave the reason for not relying on the caution statement. He said the reason being the fact that it was recorded out of the prescribed time limit of four hours. It should be noted that, the trial court's admission of the caution statement in itself without using it in convicting the appellant does not prejudice the appellant in anyhow. Thus, this ground of appeal also fails.

Concerning the sixth ground of appeal, there is no dispute that the victim's PF3 was filled after the lapse of 9 hours from the time that the crime was committed. The issue is whether that has prejudiced the appellant. On this issue, Ms. Ndondi was of the views that it has not prejudiced the appellant in anyhow. She said that there were prior procedural actions to be taken before the victim was taken to hospital.

On that line of argument, I concur with the defense counsel. The record is clear that the victim had first to report to the local government authorities (VEO) for the area where the crime was committed, before she went to police where she was given the PF3 then hospital for medical examination. The evidence on record reveals that situation being actually adhered. The victim could not directly go to hospital without complying the said legal requirement which includes being supplied with the PF3 by the Police department.

Furthermore, taking into consideration of other factors like the distance from where the victim was raped to the Police station, the mode of transport she had to use in going to the police station, the condition she had after being raped, the 75 years of age that the victim had and the situation at the police station when the victim arrived for reporting the incident, for all those other matters the lapse of 9 hours' time before

reaching the hospital for medical examination is possible and in fact it is not inordinate.

However, lapse of a long time before the medical examination is conducted, if happens, it has bad effect on the prosecution side and not the Accused. But as long as, inspite of such lapse of 9 hours' time still the Doctor managed to observe bruises and spermatozoa, the prosecution's case on that issue has not been destroyed. This ground too fails.

Concerning the second ground of appeal, in her understanding to it, the counsel for the respondent was of views that, the charge being cited **section 130(1)(2)(b)** instead of section **130(1)(2)(a) of the Penal Code** is very minor and the same is curable through section 388(1) of the Criminal Procedure Act and the overriding objective principle. Actually the deference between the two is just the issue of ***victim's consent*** of which according to the testimonies it was not there at all. In the former provision, section 130(1)(2)(b), it is for rape with consent obtained under the influence of threats while the latter, section 130(1)(2)(a) involves forcefully rape without consent of the woman. This later provision is the one which was supposed to be cited for this matter. However, the State Attorney named that defect a minor error. She gave the reason that, the particulars of offence in the charge sheet and the testimonies reveal that

the appellant was wrong under section 130(1)(2)(a) of the Penal Code. Having known that, the counsel for the respondent formed an opinion that, the same did not prejudice the appellant in anyhow.

I concur with this stand by the counsel for the respondent on that. The same issue had its day in the Court of Appeal case namely **Festo Dominician v. Republic, Criminal Appeal No. 447 of 2016.** The Court of Appeal had the same holding that, so long as the particulars of offence reveal that the appellant was charged under the proper section not mentioned in the statement of the offence, that was held to be a minor error that does not cause any prejudice to the appellant. With that stand, this ground of appeal is found meritless.

As for the first, fourth and fifth grounds of appeal, it is not in dispute that the best evidence in sexual cases comes from the victim. This is according to the cited case of **Seleman Makumba** (supra). In this case, the victim testified as PW1. She had a chance to tell the court on how the victim went to her house and started to demand for food from her. But before she provided it to him, the victim grabbed her neck with a need to rape her. The record transpires that, the victim ran inside her bed room to rescue herself but the appellant followed her and forcefully had sexual intercourse with her without her consent.

That testimony was corroborated by the testimony of the Doctor, PW3 who observed the victim's vagina with bruises and spermatozoa. This testimony cemented that someone had sexual intercourse with the victim.

I agree that, as the incident happened during the day time, and as long as there is no dispute that the victim and the appellant know each other even before the incident as they live at the same village, thus the issue of mistaken identity does not stand and in fact it had never been raised.

The record is clear that, the victim's testimony was not shaken at all. This is because the appellant never cross examined the victim when she testified as PW1 which means that all material facts which the victim testified on, were not disputed by the appellant. This should be taken as admission by implication as per **Emmanuel Sang'uda @ Sulukuka and Another v. Republic Criminal Appeal No. 422B of 2013, CAT (unreported) in which** it was held;

> *"failure to cross examine at all or on a particular point is tantamount to an acceptance of the evidence as accurate, unless testimony of the witness is incredible or there has been clear prior notice of intention to impeach the relevant testimony - See also the case of*

Hussein Bakari Kadogoo v. Republic, Criminal Appeal No. 54 of 2006, CAT *(unreported)"*

On account of the aforestated reasons which have been cemented with the fact that the appellant impliedly admitted to what the victim (PW1) has testified during trial, I am settled in mind that, the prosecution case at the trial court was proved at the required standard. Hence, these grounds of appeal fail.

All said and done, as long as all the appellant's grounds of appeal have failed, I hereby declare that this appeal is unmeritorious. I therefore proceed to dismiss the same. The trial court's decision and the 30 (thirty) years' sentence are hereby confirmed.

S.M. KULITA
JUDGE
02/12/2022

DATED at **SHINYANGA** this 2nd day of December, 2022.

THE HIGH COURT OF TANZANIA

S.M. KULITA
JUDGE
02/12/2022