IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 85 OF 2021

(Originating from Criminal Case No. 195 of 2020n in the Court of Muleba at Muleba)

RUTAHAKANWA SIMEO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

29/03/2022 & 14/04/2022

NGIGWANA, J.

The appellant Rutahakanwa s/o Simeo was charged in the District Court of Muleba with the offence of Rape Contrary to Section 130 (2) (a) of the Penal Code Cap. 16 R: E 2019.

It was alleged in the trial court that on 29/10/2020 at Buganguzi village within Muleba District in Kagera Region, the appellant did unlawfully have sexual intercourse with L. R, a woman aged 70 years old.

What actually transpired is that, on 20th day of October, 2020 during night hours the victim while at home sleeping, she was invaded by a certain man who is alleged to have had carnal knowledge of her without her consent. The matter was reported at Nshamba Police Post-Muleba where PF3 was issued to the victim. The victim was taken to Rwantege Hospital for medical examination where PW2 medically examined her and found that she had no bruises on her private parts or any discharge coming out therein, also noticed

the victim was not a virgin for obvious reasons that she was an old woman of 70 years old. The appellant was apprehended on allegations that he is the one who raped the victim, and stood tried as described above.

The appellant denied the charge. After full tried at which the prosecution relied on the evidence of two witnesses and one documentary exhibit (PF3) while the appellant depended on his own evidence in defense, the trial court (**before Mwetindwa, SRM**) was satisfied that the case had been proved beyond reasonable doubt. The appellant was consequently convicted and sentenced to serve a term of thirty (30) years in jail.

Aggrieved by the decision of the trial court, the appellant appealed to this court. In his memorandum of appeal drawn and filed by his Advocate of appeal Mr. Fumbuka F. Ngotolwa, the appellant raised four (4) grounds of appeal on the basis of which he asked the court to quash the conviction and set aside the sentence. The grounds were coached as follows: -

1. *That the learned trial magistrate erred in law and fact by convicting the appellant basing on doubtful evidence of visual identification*
2. *That the trial court prejudiced the appellant's right for bail for holding the appellant in custody while he was bailed and his bail was not cancelled.*
3. *That, the trial magistrate grossly erred both in law and facts by convicting the appellant on uncorroborated testimony of PW1.*
4. *That the case was not proved beyond reasonable doubt.*

At the hearing, the appellant appeared in person and represented by Mr. Fumbuka F. Ngotolwa while Mr. Grey Uhagile, learned State Attorney appeared for the Respondent/Republic.

The grounds of appeal were served to the Respondent but the respondent decided not to file the reply thereto but to argue the appeal viva voce. The learned advocate for the appellant dropped the 2nd ground of appeal and remained with the 1st, 3rd and 4th grounds of appeal which he argued together.

Expounding on the 1st, 3rd and 4th grounds of appeal, Mr. Ngotolwa argued that PW1 who is the victim told the trial court that the incident took place during night hours (23:00hours) where the appellant entered into her house and found her sleeping. Ngotolwa further argued that, it is the evidence of PW1 that, upon entering her house, the appellant undressed himself, undressed her, and then took his penis and insert it into the victim's vagina and started having sexual intercourse with her. It is the evidence of PW1 that the appellant had a torch therefore, she identified him though torch light. Mr. Ngotolwa faulted the evidence of PW1 that being the evidence of visual identification which was very weak. The learned advocate referred this court to the case of **Waziri Amani V.R** [1980] TLR 250 to stress that the evidence of visual identification must always be water tight. That in the present case, no description given by the victim (PW1) as to how she managed to identify the appellant in terms of dressing, intensity of light and conversation before the act (if any).

Mr. Ngotolwa went on submitting that is the evidence of PW1 that right after the incident, she reported the matter to the sub-village leader, her Land Lord and to the police but none of them appeared in court to testify, and therefore, the trial court ought to have drawn and adverse inference.

Ngotolwa made referred me to the case of Boniface **Fundikiiz Tarimo versus Republic**, Criminal appeal No. 35 of 2008 CAT (unreported).

Mr. Ngotolwa further argued that as per trial court record, the incident the appellant was arrested on 08/11/2021, that is to say; 10 days after the occurrence of the incident despite the fact that the Appellant was the victim's neighbor and no evidence that from 29/10/2021 up to 08/11/2021 the appellant was not at his home place. Ngotolwa further referred the court to the case of **Rehani Said Nyamila versus the Republic**, Civil Appeal No. 222 of 2019 CAT (unreported) where the court emphasized that in order to convict the accused with sexual offence basing on the evidence of the victim, the court must be satisfied that the witness is telling the truth.

Ngotolwa also argued that the appellant was not afforded an opportunity to make his good defense. He ended his submission in chief urging the court to allow the appeal, quash conviction, set aside the sentence of 30 years, set the appellant free.

When invited to take the floor, Mr. Grey Uhagile supported the appeal and conceded with the submission made by Mr. Ngotolwa.

Mr. Grey added that, one of the ingredients which must be proved in sexual offences (rape) is penetration, but in the matter at hand, it was not ascertained by the medical practitioner (PW2) that the victim was penetrated. That the evidence of PW1 was not corroborated by any other person while her evidence was that after the incident, she narrated the incident to other persons including her Land Lord, Sub village leader. Mr. Uhagile ended his submission urging the court to allow the appeal, quash

conviction, set aside the sentence of 30 years, and set the appellant free unless held for any other lawful cause.

Having heard submissions, by both Mr. Ngotolwa, learned advocate for the appellant, and Mr. Grey, Uhagile, learned State Attorney, and carefully gone through the grounds of appeal, the issue for determination is whether this appeal is meritorious.

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt. Section 3 (2) (a) of the Evidence Act Cap 6 R.E 2019 provides;

"A fact is said to have been proved in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists"

The High Court of Tanzania speaking through Katiti J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking."

The test applicable was well stated in the famous South African case of **DPP Versus Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she]

might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

The trial court has done its role whereas the matter is now before this court as the first appellate court. Describing the duty of the first appellate court, the court of Appeal of Kenya in the case of **David Njuguna Wairimu vs. Republic [2010]** eKLR held that;

"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision." See also **Ally Patric Sanga versus R**, Criminal Appeal No. 341 of 2017 CAT. (Unreported)

In doing so the appellate court must always bear in mind that unlike the trial court, did not have the advantage of hearing or seeing the witnesses testify, thus the guiding principle is that a finding of a fact made by the trial court shall not be interfered with unless it was based on no evidence or on a

misapprehension of the evidence or the trial court acted on wrong principles. ***See OKENO V. R [1972] EA 32.***

In the matter at hand, the appellant stood charged with the offence of Rape. The victim (PW1) told the trial court that on 29/10/2020 while sleeping, the appellant kicked her door and entered her house. She further said, the appellant covered her mouth using his hands, and then he took off his clothes, and undressed her as well. She further told the trial court that, from there, the appellant inserted his penis into her vagina and had sexual intercourse with her five times until he left her around 5:00 hours. She further told the trial court that, in the next morning she reported the matter to the Sub-Village leader namely; Lusudi, as well as to her Land Lord namely; Selestine, whereas finally, she reported the matter to the police and was issued with the PF3 and went for medical examination. As to how she managed to identify the appellant on the material night, PW1 told the trial court that she identified him through torch light.

Since the incident in the instant case occurred during night hours, the evidence on how the appellant was seen and identified is so crucial because as a matter of law, the evidence of visual identification has never been the most reliable evidence. In **Waziri Amani v, Republic** (Supra) it was held that;

"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight"

In **Raymond Francis v. Republic** [1994] TLR 100, the Court emphasized that:

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

In the instant case, PW1 alleged the appellant had a torch, thus she identified the appellant on the material night through the aid of torch light, but she did not at all explain the intensity of the light and the nature of her room. In the case of Venance **Nuba and Aonother Versus Republic,** Criminal Appeal No.425 of 2013 CAT -Tabora (Unreported) the Court held that;

"Identification through the aid of torch which is held and wielded by the alleged culprits is most unreliable."

The Court of Appeal in the case **of Anael Sambo versus the Republic,** Criminal Appeal No. 274 of 2007 CAT (Unreported), rejecting identification done during night hours through torch light had this to say;

"Under normal circumstances, it is not easy for a person towards whom a torch is flashed to identify the person flashing the torch at her/him. It was not disclosed in the evidence whether the torch light was bright enough to allow for correct identification."

Being guided by the herein above Court of Appeal decisions, and considering the circumstances of the case at hand, it cannot be concluded that the appellant was undoubtedly identified, thus he was entitled to enjoy the benefit of doubt. In that regard, I agree with both Mr. Ngotolwa, Advocate

and Mr. Uhagile, learned State Attorney that the evidence of visual identification was very weak to ground conviction.

However, it is trite law that in sexual offences, the best evidence comes from the victim. See the case **Selemani Mkumba versus R [2006] TLR 379**. The decision of the Court of Appeal in the case of **Makumba** (Supra) is very clear that true evidence in sexual offences comes from the victim but currently, the Court of Appeal while addressing the evidence of the victim in sexual cases in the case of **Mohamed Said versus Republic, Criminal Appeal No. 145 of 2017 (Unreported**) stated that,

"We think that it was never intended that the word ***of the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness....."***

Furthermore, the learned Justice Professor Lilian Tibatemwa Ekirikubinza of the Supreme Court of Uganda, in the **persuasive case** of **NTAMBALA FRED V. UGANDA Criminal Appeal No. 34 of 2015** referring what Lord Justice Salmon stated in **R V. Henry Maning** (1969) 53 Criminal Appeal Rep 150,153 observed that;

"In cases of alleged sexual offences, it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these cases, girls and women do sometimes tell an entire false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not enumerate, and sometimes for no reason at all."

The emphasis here is that, in order to convict an accused person basing on the evidence of the victim, the trial court must be satisfied that what the

victim has testified is nothing but the truth, because what matters in evidence is not the number of witnesses testified but the quality of the evidence presented before the court.

In the case at hand, reading the evidence available on record, it cannot be said with certainty that what was testified by PW1 was nothing but the truth. The same was not even corroborated by the evidence of PW2 as penetration was not ascertained.

Furthermore, it is not known as to why persons whom the victim narrated to them the whole incident at the earliest possible time were not called to testify what the victim narrated to them and whether PW1 named the appellant to them as the person who raped her, and why the appellant was arrested ten days after the incident. It was held in the case of **Boniface Kundikra Tarimo** (Supra) that,

"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, mis not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."

While in the case of **Venance Nuba** (Supra), it was held that,

"Failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of the witness highly suspect and unreliable."

The appellant in his defence denied the allegations, but also raised the defence of Alibi but the same was never considered by the trial court, and that was wrong. With no doubt the trial court had the duty to address the defence of alibi raised by the appellant during defence stage, and may in its

discretion, accord no weight of any kind to the defence. See section 194 (6) of the CPA. In the case of **Venance Nuba (**Supra), it was held that,

"The court is not exempted from the requirement to consider the defense of alibi, where such defense has not been disclosed by an accused person before the prosecution closes its case. An accused's person defense has to be considered as of necessity, even if in the end result, would have been rejected. The principle is elementary but, nonetheless, fundamental to the extent that failure to consider any defense put by the accused person will vitiate the conviction."

In the final analysis, I agree with both the learned advocate for the appellant, and the State Attorney that, at any rate, the prosecution side did not discharge their duty of proving the case beyond reasonable doubt. Had the trial court as the temple of justice directed its mind to the law, the evidence adduced and the standard of proof required in criminal cases, it would not have convicted and sentenced the appellant. In the event, I find merit in this appeal and I allow it, quash the conviction and set aside the sentence of thirty (30) years meted out against the appellant. Furthermore, I order the immediate release of the appellant Rutahakanwa Simeo from prison unless he is held there for other lawful purpose. It is so ordered.

E.L. NGIGWANA

JUDGE

14/04/2022

Judgment delivered this 14th day April, 2022 in the presence of the appellant in person by Virtual Court while at Kwitanga Prison, Mr. Grey Uhagile, learned

State Attorney for the Respondent/ Republic, Mr. E. M. Kamaleki, Judges' Law Assistant and Ms. Tumain Hamidu, B/C.

E.L. NGIGWANA

JUDGE

14/04/2022