IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 36 OF 2021

(Originating from Criminal Case No. 172/2020, Nkasi District Court)

(Benedict B. Nkomola, RM)

PATRICK S/O MURUTA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

21/02 & 03/03/2022

JUDGMENT

NKWABI, J.:

This criminal appeal, is based on three grounds of appeal which are: **first,** the offence of rape was not proved against the appellant, **secondly,** the trial magistrate poorly evaluated the evidence before him and **thirdly,** his defence was not taken into consideration. The appellant thus prayed I quash the conviction and sentence and set him free from prison.

In the trial court, the appellant had been charged with rape offence which is contrary to section 130(1) and (2) (e) read together with section 131(1) of the Penal Code Cap 16 R.E. 2002 which now it is Revised Edition, 2019. However, the trial court found that rape offence had not been proved as such acquitted the appellant of rape but substituted it with aiding, soliciting the victim who was a school girl not to attend school contrary to section 60(A) (4) of the Education Act (The Written Laws Miscellaneous

Amendment) (No.2) Act 2016 as in the view of the trial Resident Magistrate is a minor and cognate offence. All the same, resentful of the trial court's decision, the appellant appealed to this court.

When the matter came up for hearing, the appellant appeared in person, unrepresented while the respondent was featly represented by Ms. Marietha Maguta, learned State Attorney. The appellant invocated his reasons of appeal be adopted as his submissions on the one hand, while Ms. Maguta, learned State Attorney, locked horns with the appeal on the other.

When it was the turn of Ms. Marietha Maguta, learned State Attorney to submit, she intimated that they were bemused by the appeal hence they object it. Her remarks will, however, be apparent in the due course of my deliberation of this appeal.

I am minded to start looking into the 3rd ground of appeal whereby the appellant complained that his defence was not taken into consideration. In his submission, the appellant had nothing in substance in expounding it, understandably, he is a lay person.

On her part, Ms. Maguta readily admitted that the trial magistrate did not evaluate the defence evidence, but this, being a first appellate court,

observed Ms. Maguta, has power to evaluate the evidence. She referred me to the case of **Jafari Musa V. DPP Criminal Appeal No. 234/2019,** CAT (unreported) at page 11 for that stance. She implored this court evaluate the defence of the appellant he made in the trial court.

Beyond doubt, in **Jafari Musa v. DPP, Criminal Appeal No. 234 of 2019,** CAT (unreported) it was stated that:

> *"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."*

See also **Deemay Daati & 2 Others v, Republic, Criminal Appeal No. 80 of 1994** (CAT), (unreported):

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of evidence,*

an appellate court is entitled to look at the evidence and make its own findings of fact."

It is clear, therefore, that failure by the trial court to consider the defence of the appellant is not a fatal irregularity. This court is entitled to step into the shoes of the trial court and deliberate on the defence of the appellant. In the circumstances, the 3rd ground of appeal has nothing in substance to affect the case. As I have been asked by Ms. Maguta, I will carefully consider the defence of the appellant when I shall be discussing the 1st ground of appeal.

I now turn to consider the first ground of appeal which is *the offence of rape was not proved against the appellant.* The discussion of the 1st ground of appeal inevitably discusses the 2nd one. Again, the appellant had nothing useful in his submission.

Ms. Maguta artfully chose to submit on the 1st and 2nd grounds together to the effect that in the trial court, the case was filed under sections of the Penal Code. PW2 found the victim at the home of the aunt of the appellant. The evidence of the victim is strong evidence as per **Hassan Kamunyu V. Republic Criminal Appeal No. 279/2016,** CAT (unreported) at Arusha at page 13, she asserted.

The victim was aged 16, argued Ms. Maguta while citing **Seleman Makumba V. Republic [2006] TLR at page 379.** The evidence of the victim is very clear that the claim that the victim was not raped is incorrect. She was of the strong view that the PF3 proved that the victim had been penetrated.

She said, under section 366 (1) (a) (iii) and (b) Criminal Procedure Act, this court is empowered to revise the decision of the trial court. She also prayed the court to dismiss the appeal and find the appellant guilty of rape as well. This court is empowered to enter conviction since the appellant claimed that the respondent did not prove the case by proving penetration, Ms. Maguta avowed.

In rejoinder, the appellant advanced that it is very difficult to prove rape as semen would have been seen but no evidence that such semen were seen.

As a matter of fact, the current position of law in proving rape does not require proof of semen which were ejaculated into the vigina of the victim of rape offence. This can be gleaned from the decision of the Court of Appeal in **Hassan Kamunyu v. Republic,** Criminal Appeal No. 277 of 2016, (unreported) where it was stated:

"The current position is that in proving that there was penetration in a rape case, it is not always expected the victim will graphically describe how the penis was inserted into the victim's vagina. There is a string of cases on this point.

In view of the authorities respecting the offence of rape from which we have found it apposite to borrow a leaf, by the victim referring to a "dudu", PW1 was simply referring to the appellant's penis. By saying "anaingiza dudu lake kwenye mkundu wangu" he simply meant the appellant inserted his penis into his (PW1's) anus."

Now, is the evidence of the victim (PW1) very clear on the rape offence as Ms. Maguta tries to convince this court, which however, the appellant entertains a contrary view?

PW1 GK, the victim of the offence testified as follows:

"On the fateful date I was in lake shore taking bath with the accused person. Thereafter we went to the friend of the accused at Kilimahewa. The accused was my boyfriend. I did not attend school because I was with the accused nearby Kipili we engaged sexual intercourse there. That at Kilimahewa we engaged in sexual inter course as from the night to early in the morning, we

made sexual intercourse ... That my father come at Kisweta to arrest me but the accused person run away to unknown destination."

In the same tone, PW1 on being cross examined by the appellant, insisted that she engaged into sexual intercourse with the appellant. It is now routine law that true evidence of rape has to come from the victim, if an adult, that there was penetration and no consent, and in case of any other woman where consent is irrelevant, that there was penetration. This is the position that was taken by the Court of Appeal in **Selemani Makumba v R. [2006] TLR 379**. See also **Goodluck Kyando v Republic, [2006] TLR 363,** CAT had these to say:

> *"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing the witness. Their testimony was not challenged."*

PW2 the father of the victim traced the victim, whereas the appellant ran to unknown destination from his aunt's house. The appellant elected not to cross-examine PW2. PW3 Godwin gave evidence that PW1 GK was their student and tendered a student register book as exhibit P1. PW4 Catherine examined PW1 and tendered her PF3 as exhibit P3 whereas she testified that PW1's hymen was not intact. The evidence of PW4 and the PF3

corroborates the testimony of PW1 that she had a boyfriend, the appellant, who used to have sexual intercourse with her.

In his defence the appellant claimed that the case is framed one. He said the testimony of PW1 is not correct at all. He did not challenge the evidence of PW3 and PW4. In his evidence too he alleged that the prosecution evidence was weak.

In reaching at his decision that rape offence was not proved, the trial Resident Magistrate relied on the cases of **Ex-B 9690 SSGT Daniel Mshambala v R.,** Criminal Appeal No. 2004, CAT, at Mwanza (unreported) and **Mathayo Ngalya @ Shabani v. Republic,** Criminal Appeal No. 170 of 2006, CAT at Dodoma, (unreported) that the PF3, in the present case, does not establish penetration and the evidence of PW4 does not disclose friction.

It is clear that the trial Resident Magistrate relied on decisions of the Court of Appeal which, however, the position has changed due to the current progressive approach by the Court of Appeal.

Closely looking at the evidence of PW1, I am inclined to agree with Ms. Maguta that PW1's evidence proves the offence of rape. PW1 clearly not

only proves that the appellant was her boyfriend but also clearly proves that she used to have sexual intercourse with him. If that was not the case, the appellant did not say why did he run away when PW2 approached him with the intention to arrest the appellant. I accept that it is due to the sexual relationship that caused PW1 to skip school as testified by PW3.

The appellant wanted the trial court to believe him that the case was fabricated one against him. He did not give any elaboration why PW1 and PW2 would want to fix him? He neither cross-examined PW1 and PW2 on any bad blood between them to be the basis of framing him. I am convinced that the appellant used to have sexual intercourse with PW1 who according to the proved evidence she was at the material time 16 years old. In the circumstances consent is immaterial to prove rape against the appellant, in any way he did not try to claim otherwise.

I go along with the appellant on his 2nd ground of appeal that the trial court poorly analysed the evidence before it, however, to the extent of acquitting the appellant of rape offence while the prosecution had proved rape beyond reasonable doubt. To that end, I reach at my own conclusion which is different to that of the trial court. In the premises, under section 366 (1) (a) (iii) and (b) Criminal Procedure Act, Cap. 20 R.E. 2019 I proceed to revise the decision of the trial court.

The outcome of the above deliberation, I dismiss the appeal. I quash conviction of the appellant on the substituted offence of aiding, soliciting the victim who was a school girl not to attend school contrary to section 60(A) (4) of the Education Act (The Written Laws Miscellaneous Amendment) (No.2) Act 2016 and set aside the sentence imposed upon him. Instead, I find the appellant guilty of rape offence which is contrary to section 130(1) and (2) (e) read together with section 131(1) of the Penal Code Cap 16 R.E. 2002 which now it is Revised Edition, 2019. I convict the appellant of rape offence as he was charged in the trial court. I sentence him to 30 years imprisonment which its computation shall be done from 29th day of April 2021 when he was sentenced by the trial court.

It is so ordered.

DATED at **SUMBAWANGA** this 3rd day of March, 2022.

J. F. NKWABI

JUDGE