IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL NO. 173 OF 2021

(Originating from Criminal Case No. 58 of 2021 in the District Court of Sengerema at Sengerema by Hon. T. Barnabas, RM)

SABATO ABINEL .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

7th & 14th February 2022

ITEMBA, J.

In the District Court of Sengerema the appellant herein, Sabato Abinel was charged and convicted of rape contrary to section 130 (1)(2)(b) and 131(1) of the Penal Code [Cap 16 R.E 2019]. The charge sheet detailed that the appellant had carnal knowledge of one G.B on 6th March 2021 at Nyakaliro Village within Sengerema District in Mwanza Region, without her consent.

Upon being convicted, he was sentenced to thirty (30) years imprisonment. Now, the appellant is aggrieved and has filed the present appeal loaded with 6 grounds which I will reproduce them as follows: -

1. *That, the presiding magistrate grossly erred in law and fact to convict and sentence the accused person (appellant) without PW1'S visual identification, yet the victim failed to explain or tell to court if her room had any source of light enabled to identify the appellant, thus, cast grave doubts on the credibility of prosecution witness.*

2. *That, the Hon trial court did fail to consider that the case against appellant was fabricated such as: - PW1 testified to court of law that the accused left his shirt of a mixed colours, open shoes while in XD by PP she stated that the said exhibit P3 had different colours black, white brown and pink, whereas contradiction here is shirt yet, this inconsistence was not solved by the trial court.*

3. *That, PW2, failed to testify to court the regarding bulb light, intensity of light, distance. It cast grave doubt on the witness's credibility.*

4. *That, according to PW3 the Doctor discovered PW1had a smell of an alcohol from her mouth and her clothes, and the victim's vagina had bruises, whitish and smell of sperm. When XP by PP: on 06/03/2021 at about 19.00 hours PW1, went to Farida Yusufu for usual conversation until around 23.00 hours when went back to home. Thus,*

the trial court did not recognize from what had been said by doctor, perhaps there was intoxication, may be a victim raped by unknown rapist. For hiding this shame, she decided to lie for her fellow tenant.

5. *That, the Hon. trial court did err to overrule the raised objection by accused as to the admissibility of open shoes which were female shoes. Also PW1, PW4 and PW5 contradicted themselves on the extract colours of exhibit P4 and render to cast doubts on their credibility.*

6. *That, an exhibit D1 was not considered by trial court. Therefore, under provisional section 110 (2) of TEA Cap. 6 R.E 2019. The prosecution case was not proved beyond reasonable doubt against the accused.*

At the hearing of this appeal the appellant appeared in person while the prosecution had the service of Ms. Gisela Alex, learned state attorney.

Before hearing, the court *suo motto* invited the parties to address it on the manner the notice of appeal was drafted. The learned state attorney stated that the notice reflects two different tittles; In the High Court of Tanzania and in the District Registry of Sengerema, at Mwanza, therefore,

the appeal should be dismissed for being incompetent. The appellant on the other side, prayed for the notice to be considered as proper before the High Court. The appellant was granted leave to amend the Notice of Appeal by deleting the word Sengerema and replacing it with the word Mwanza in order for the notice to read In the High Court of Tanzania, In the District Registry of Mwanza at Mwanza, considering that the rubber stamp therein showed that the notice was admitted at the District court of Sengerema,

When the appellant was given an opportunity to argue his appeal, he had nothing much to state, he prayed for the court to adopt his grounds of appeal appearing in the petition of appeal, set aside conviction and sentence and set him free.

In reply, Ms. Gisela Alex, learned State Attorney explained that she ;upport the conviction and sentence against the appellant and that she will 'espond to the grounds of appeal as they are listed in the petition.

She argued the 1st and 3rd ground jointly by submitting that according :o the evidence in page 6 of the typed proceedings, it is true that PW1 did 1ot explain the source of light but she identified the appellant and she knew 1im even before the incidence as the appellant was her co-tenant. Ms Alex

stated that PW1's evidence was corroborated by PW2 who had arrived at the crime scene immediately and that at page 9 of the typed proceedings, PW2 explained that the source of light which enabled identification was a light bulb. The learned state attorney argued further that PW2 knew the appellant as he was a close neighbour at Nyakaliro Village and that the appellant was found *"in flagrante* delicto" therefore even if PW1 was not clear about the source of light, her evidence is backed up by PW2.

The learned state attorney while referring to the landmark case of **Waziri Amani Vs Republic** (1980) TLR 250 stated that in proving identification, all chances of mistake of identity should be eliminated especially when the incidence occurred at night. However, she argued that **Waziri Amani** (supra) is not the only case which should be considered in evidence of visual identification. Referring to the case of **Kenedy Ivan Vs Republic** Criminal Appeal no. 178/2007, she stated that each case should be decided on its own circumstances and that under the circumstances of this case, both PW1 and PW2 recognized the appellant, who was their neighbour and familiar to them. She stated that the act was done inside the

room where it is understandable that the light of a bulb in a room is sufficient for recognition of a person who is not a stranger.

Arguing the 2nd ground, the learned state attorney explained that at page 7 of typed proceedings, PW1 stated that the shirt had mixed color without stating which color and then at page 21 of typed proceedings, PW5 **D/CPL David** mentioned Black, White and brown colors, therefore there is no contradiction between the two, unless PW1 and PW5 would have mentioned different colors. Either way she added that contradiction, if any, does not go to the root of the matter because the issue before the court is whether the appellant raped the victim or not.

As regards the 4th ground, Ms Alex submitted that in rape cases, the victims' evidence is the best evidence as it was held in the case of **Selemani Makumba Vs Republic** [2006] TLR 379. Therefore, she added that PW1, being a victim, was a witness who was believed by the court and was found credible, and that the fact that the appellant ran away for 10 days after the incidence, implies that he was responsible. On the fact that PW1 was smelling alcohol, Ms Alex stated that, the doctor's duty was to examined whether the victim was raped or not of which he did and at page 12 of typed

proceedings, he testified that he noted the victim had some bruises in her private parts which means that there was evidence that the victim was penetrated regardless of whether she was drunk or not.

Ms Alex submitted that the contradiction raised in the 5th ground regarding the color of the shoes which the appellant was wearing at the incidence night, is minor and does not go to the root of the case, considering that the incidence took place at night where it might be difficult to identify colors.

In the last ground the learned state attorney argued that based on the judgment, the court considered exhibit D1 but the appellant did not comply with procedure for relying on *alibi* as a defence and as a result, the prosecution could not counter the said defence, therefore, the defence did not stand.

In rejoining, the appellant stated that apart from the victim, there were many neighbours who were co-tenants but they did not testify, rather, it was only the witness who lived far from their rented house who testified. This

situation, he argued, raises a lot of doubts. He reiterated his prayer that he should be set free based on his grounds of appeal.

I have considered the grounds of appeal and the reply herein, the main issue to be determined is whether the appeal has merit. In answering this issue, I will follow the flow of the grounds as they appear in the petition of appeal, the approach which was also opted by the learned state attorney.

The 1st and 3rd ground will be answered jointly. In both grounds, the appellant argues that the victim could not properly identify him at the scene as the incidence occurred at night. When going through the typed proceedings, page 6 reveals that PW1, while at her home at around 23:00 hours she went to the toilet outside her house. Then, she went back to the bedroom the appellant pushed the door and entered inside. She mentioned the appellant by his name Sabato Abinel as the one who raped her in her own room after pushing her on the bed and muzzled her mouth. PW1 added that she knew the appellant even before the incidence because he was a co-tenant. As regard to the source of light which enabled visual identification of the appellant, it is true that PW1 did not

explain if there was any source of light at the scene. Nevertheless, as rightly observed by the learned state attorney, PW2 explained that she responded to PW1's raised alarm by going to the scene and whilst there, through the window, she saw and identified the appellant having sexual intercourse with PW1 because there was light from the 'bulb' inside PW1's room.

An almost similar circumstances occurred in the case of **Kenedy Ivan v R** (supra), where the offence of armed robbery was committed at night and visual identification was enabled by a lamp and a moonlight. However, the prosecution witnesses did not describe the size of the room and light intensity therein. The Court of Appeal was satisfied that identification of the appellant, who was also familiar to the witnesses, was proper as the place of incidence was not in total darkness. The Court stated further that *"the guidelines in **Waziri Amani** and other subsequent decisions were never meant to be exhaustive or conclusive. At the end of the trial each case has to be decided on its own merit"*. In the same vein, I subscribe to the decision in **Kenedy Ivan** that although the intensity of light was not explained by prosecution, the light of a bulb in the victim's bedroom would enable visual

identification of the appellant who was actually a co-tenant to the victim and well known to both the victim and PW2. Thus, the 1st ground has no merit.

In the second ground, the appellant is challenging the prosecution evidence to be contradictory. He refers the court to the colors of the shirt which was seized at the scene and which is alleged to belong to him. I do not see any contradiction because at page 7 of typed proceedings, PW1 stated that the appellant was wearing a 'T-shirt' of mixed colors while at page 21 of typed proceedings the investigator tendered a shirt and described that it has different colors; black, brown and pink, I find no inconsistence between a cloth with "mixed colors" and the one with "black, brown and pink colors" rather the latter is just an explanation of the former. And as rightly stated by the learned State Attorney there would be contradiction if PW1 would have mentioned different colors from PW5. Thus, this the second ground lacks merit.

As regard to the 4th ground, it is evidence that the Medical Doctor (PW3) mentioned in his evidence that when she examined PW1, she was smelling alcohol. However, that fact cannot conclusively explain that PW1 was drunk to the extent of failing to identify the appellant. Further, the charge sheet

and evidence in support thereof shows that the incidence took place on 6/3/2021 and PW3 stated that he examined PW1 on 8/3/2021 which is 2 days after the incidence; therefore, there is no evidence that on the incidence day PW1 was drunk a state which might have affected her identification. PW3's duty was to examine if there were any signs of forced sexual intercourse and in that, PW3 stated that he noted bruises in PW1's vagina which prove that there was penetration. Thus, this ground carries no weight.

As regards the 5th ground, I have noted the contradictions between PW1, PW4 and PW5 concerning the color of 'open shoes' alleged to have been left by the appellant at the crime scene. However, I agree with the learned state attorney that the said contradictions are minor and does not go to the root of the case. In the decision of **Majaliwa Ihemo vs. Republic,** Criminal Appeal No. 197 of 2020 (Unreported) it was decided that the in rape cases best evidence is that of the victim and for such evidence to be relied upon, it must be credible and reliable. At page 9 of the said case, the Court of Appeal qualified their decision in ***Selemani Makumba vs. R,*** *[2006] TLR 379 and stated that:*

> "...*In* ***sexual related trials, the best evidence is that of the victim*** ..... ***We however hasten to add that, that position of law is just general, it is not to be taken wholesale without considering other important points like credibility of the prosecution witnesses, reliability of their evidence and the circumstances relevant to the case in point...***" [Emphasis supplied]

I do not see any reason to question the credibility or reliability of PW1 and PW2. PW1 was the victim and PW2 who was an eye witness whose evidence was correctly relied to establish the offence of rape against the appellant. This ground has no merit as well.

Concerning the last ground, I have revisited the judgment and it is clear that the trial magistrate considered exhibit D1 which was the bus ticket tendered by the appellant to establish that he was not at scene on the incidence day. However, the trial magistrate was of the opinion that rules regarding the defence of *alibi* were not observed. I agree with the trial magistrate because section 194(4) of CPA which requires a person who intends to raise the defence *alibi,* to serve a notice to the opponent party before hearing, a procedure which was omitted by the appellant. In the case

of **Kubezya John v R** Criminal Appeal No. 488 of 2015 it was held inter alia that:-

> *"We wish to interject here that we are alive to the position of the law that an accused person is under no legal duty to prove his innocence. But* ***in situations where, like here, the accused person is depending on the defence of alibi, it is his duty to demonstrate his alibi*** *albeit on a balance of probabilities." (emphasis supplied)*

The appellant was supposed to either issue a notice of his intention to rely on the defence of alibi or to furnish the prosecutions with the particulars of the said alibi before the close of prosecution case as per section 194 (4) and (5) of the CPA. Upon failure to do that, the trial magistrate was justified not to accord any weight to the appellant defence as she has that discretion according to section 194(6) of the CPA.

Having considered all the appellant's ground of appeal, as explained above, I find that there is no ground which is solid enough to challenge the prosecution evidence. Thus, the issue is answered in the negative.

For that reason, I accordingly dismiss the appeal in its entirety. It is so ordered.

L. J. ITEMBA
JUDGE
14/2/2022