IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 56 OF 2021

EMMANUEL S/O MICHAEL @ MKALALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Mlele at Mlele)

(B. M. Ahmed, RM)

Dated 11th day of May 2021

In

Criminal Case No. 127 of 2020

JUDGMENT

01/04 & 16/05/2022

NKWABI, J.:

The respondent prosecuted the appellant for rape contrary to section 130(1), (2) (e) and section 131(3) of the Penal Code R.E. 2019. In the alternative, the respondent prosecuted him for attempted rape contrary to section 132 (1), (2) (b) and (3) of the same law.

The incidence was alleged to have happened at Kalundu area – Kibaoni village within Mlele District and Katavi region. The victim, G.M is allegedly to have gone to play with her colleague at the home of the appellant. The

appellant seduced her to go to by for her preserved sweet potatoes commonly known as *matobolwa*. Instead, he took her near a stream where he got her naked and laid on her. She screamed and PW4 came to her assistance and sent her to the home of her grandfather. Thereafter she was taken to hospital for check-up and treatment where a PF3 was filled in. In the trial court the appellant defended and denied to have committed any offence and attributed his prosecution to family conflicts. He was convicted and sentenced to thirty years imprisonment for attempted rape.

Nevertheless, piqued with the conviction and sentence of the trial court, the appellant lined up two grounds of appeal in this court which have the gist that the charge was not proved beyond reasonable doubt.

During the hearing of this appeal, the appellant appeared in person, unrepresented while the Respondent was represented by Mr. John Kabengula, learned State Attorney. While the appellant insisted that the charge was not proved to the required standard and urged to court to adopt his grounds of appeal as his submissions, Mr. Kabengula argued that it was.

Mr. Kabengula was of the firm view that the offence of attempted rape was committed because there were bruises seen by PW5.

He admitted there are defects but was quick to note that they are curable under section 388 of the Criminal Procedure Act. There are sections which ought if to be mentioned only section 132 (1) of the Penal Code was enough without mentioning other, subsections (2) and (3). The appellant was not prejudiced, he stressed. He further asserted that they proved the charge as per the law. They proved the age of the victim who was below 18 years old. There are witnesses who testified as to the age of the victim.

He further submitted that the victim is a relative of the appellant so she knowns well the appellant. The appellant did not dispute that she knew him (the accused). He finally stated that they believe that they proved the charge beyond reasonable doubt let the appeal be dismissed and decision of the trial court be upheld.

In rejoinder the appellant disputed the submissions of the learned state attorney. He insisted that he stated that they had farm dispute. That is why they fabricated the case while he did not commit the offence.

I have gone through the proceedings of the trial court, I readily accept the contention of the appellant that this case was not proved beyond reasonable doubt. There is a grave contradiction in respect of how many people went to the assistance of G.M. Since this case depends on the credibility of witnesses, G.M. seems not to be a trustworthy witness as she would have not contradicted the evidence of PW4. It is trite law that an accused person is under no obligation to prove his defence, see **Elias Kigadye and Others v R. [1981] TLR 355** (C.A). Further, conviction cannot be based on the weaknesses of the defence as per **Christian s/o Kale and Rwekaza s/o Bernard v R. [1992] TLR 302** (CA). As the appellant claims that the cause of his being prosecuted is family feuds, this court is left with nothing but to accept his defence. I propose to set out the contradiction for easy of reference.

The victim gave evidence as PW3 where she said:

> *"I was crying, there were persons who came, it is when MANU took a flee, those people started to chase MANU."*

In cross- examination she replied:

"They took me to grandmother "Mkakadelema."

Her evidence is that she was assisted by more than one person, that is including PW4 Titus. The appellant escaped. PW4 Titus, in his evidence, said that he was alone when he assisted PW3. This is what he said:

"When the accused saw me, he stood and started to run away, I decided right away to chase him, but I could not catch him."

In the circumstances I do not accept the argument of Mr. Kabengula that the charge sheet was proved beyond reasonable doubt. Lest it be forgotten, it is better to release 100 guilty men than conviction one innocent person wrongly, see **Nathaniel Alphonce Mapunda & Another v Republic,** [2006] TLR 395 (CAT). What a court of law has to do when it is faced with contradiction(s) was well stated in **Mathias Timoth v. R. [1984] TLR 86** HC Lugakingira, J. Where it was held:

"In testimony of a witness, where the issue is one of false evidence, the falsehood has to be considered in weighing the evidence as a whole; and where the falsehood is glaring and fundamental its effect is utterly to destroy confidence in the

witness altogether, unless there is other independent evidence to corroborate the witness."

Consequently, I quash the conviction of the appellant and set aside the sentence. The appellant is to be set free from prison unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED at **SUMBAWANGA** this 16th day of May 2022.

J. F. NKWABI

JUDGE