THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 69 of 2021
(Originated from District Court of Chunya at Chunya in Criminal Case No. 227 of 2020)

JAMILI LUGANO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 7th February & 21st April, 2022

KARAYEMAHA, J

The appellant **Jamili Lugano** was arraigned before the District Court of Chunya at Chunya, charged with the offence of Rape contrary to section 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap 16 R:E 2019.

It was alleged by the prosecution that the appellant one Jamili Lugano on or about 18th day of October 2020 at Kibaoni Village within Chunya District and Mbeya Region did have carnal knowledge of one Veronica Zawadi a woman of 40 years without her consent.

The accused pleaded not guilty to the charge. In a bid to prove its case, the prosecution paraded four (4) witnesses including Veronica

Bahati (PW1) the victim. The others are Ester Moses (PW2) and Joshua Angalile Mlambalala (PW3) and Dr. John Francis Ngungumka (PW4). The prosecution also relied on Exhibit P1, to wit, the PF3. The defence had one witness, the accused person, and tendered no exhibit.

Briefly the background as gleaned from the facts on the trial court's record are as follows; on 18th October, 2020 at midnight, when the victim was asleep, the accused stormed into her house pushing the door open. With his lavishing feelings and without the consent of the victim, he had canal knowledge of her by force. In the process he grabbed her neck and bitten it with a view of muting her voice. Unfortunately, that did not hinder the screaming voice from penetrating and get heard by neighbours including PW2 who ushered in at the scene of crime. On getting at the victim`s house, she found the accused inside the victim`s house. It was the prosecution case that PW3 the Village chairman was informed of the incident by Moses. Upon apprehending the appellant, PW3 took him along with the victim to the police station. At police station, the victim was given a PF3. She went to Chunya Hospital. PW4 examined her and found that she was penetrated but had no bruises since the lady had given birth 8 times.

On the part of the defence, the appellant who was the lone witness categorically denied the allegations facing him. He explained how he went to Kibaoni to send Money and decided to have drinks with his friend Mohamood. He explained further that after drinking and getting drunk he lost sight of his friend. After a short pause, he decided to go to the mining camp where he resided. He expounded how he lost control and decided to approach a certain house where he entered and slept. He also gave evidence that later he found himself in the midst of people who accused him of committing rape incident. He also gave evidence on the interrogations up to when he was taken to police by the chairman. At police he explained how he was drunk and went to find refuge in the house but just outside but later PW1 alleged that he raped her. Later, he was arraigned in court.

After both sides presented their cases, the trial court, on being satisfied that the prosecution had proved their case beyond reasonable doubt, found the appellant guilty as charged. Finally, he was sentenced to serve thirty (30) years imprisonment.

Dissatisfied with the decision, the appellant through the petition of appeal filed on 16/7/2021 four (4) grounds to wit;

1. That the trial Magistrate erred in law and facts for convicting the appellant while the prosecution did not discharge their duty of proving the case beyond reasonable doubt. Please see the case of ***Christian Kaale and Rwekiza Bernad vs. Republic***, [1992] TLR 302.
2. That the trial magistrate erred in law and in facts by convicting and sentencing the appellant by believing the prosecution witness including PW3 regard that no any police officer appeared before the court to support the allegation.
3. That the trial Magistrate erred in law and in fact when convicted and sentenced the appellant relying on the evidence of PW1 (victim) regard that the charge was fabricated to the appellant by the victim.
4. That the trial Magistrate erred in law and in fact by disregarding the defense evidence of the appellant regarding that the victim was adult enough.

However, after considering them they boil down to mainly two grounds. These are:

1. *The prosecution failed to prove the case beyond reasonable doubt as required by law.*
2. *The defence evidence was not considered.*

At the hearing of the appeal, the appellant appeared in person (unrepresented), while Mr. Iboru Saraji, learned Principle State Attorney (henceforth the PSA), appeared for the Republic.

The appellant preferred the learned principle state attorney to submit first and would rejoin if need arose.

Mr. Iboru prefaced his submission by resisting the appeal and argued grounds 1, 2 and 3 in a combined fashion. He argued that the prosecution managed to prove the case beyond reasonable doubt through the 4 prosecution witnesses who were procured. The learned counsel argued that PW1 explained how he was invaded in his house and forcefully raped as reflected at page 14. He submitted that apart from the appellant trying to cover her mouth, the victim's alarm was heard by PW2 who went to the scene and found, in PW1's house, the appellant. The learned Counsel argued that in rape cases the best evidence comes from the victim. The learned PSA referred me to the case of ***Seleman Makumba vs. Republic***, [2006] TLR 397. The learned PSA submitted further that the appellant did not shake PW1's evidence and that of PW2 who testified that the appellant was arrested in PW1's house. The appellant in his rejoinder stressed that the

prosecution did not prove their case beyond reasonable doubt because PW1, PW2 and PW3 were unreliable witnesses.

Starting with this ground, it is the principle that the burden of proof in criminal cases lies on the prosecution and the standard of proof is beyond reasonable doubts. Therefore, each and every ingredient or element of the offence is required to be proved beyond reasonable doubt. It is, however, a settled principle that unless otherwise provided by law, the burden of proof cannot shift to the accused person. Any doubt that is smelt in the prosecution case which goes to the root of the case must be resolved in favour of the accused person.

To have an attractive flow in this judgment, I think, it is incumbent to establish first whether PW1 was raped. I have considered the evidence of PW1 and Mr. Iboru's submission. In her evidence, PW1 testified that after the appellant who was unknown to him had entered into her house he forced himself into her. He then inserted his penis in her vagina. When she attempted to raise an alarm the accused grabbed her neck and ganged her mouth. However, her voice managed to penetrate arousing PW's and her husband's (Moses) attention. Eventually, the two found the appellant in PW1's house. From that

evidence it is pretty clear that PW1 was raped. Section 130 (4) of the PC Cap 16 R.E. 2019 provides as under:

> *"Penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence".*

See ***Juma John vs. Republic***, Criminal Appeal No. 119 of 2009 and ***Daniel Nguru & others vs. Republic***, Criminal Appeal No. 178 of 2004.

PW4 who examined PW1 corroborated her evidence. He said that on examining PW1, he noted that she was penetrated; hymen not perforated but saw some whitish discharge per labia and majora but had no bruises. He tendered the PF3 to cement her findings. Therefore, the issue whether PW1 was raped has been answered affirmatively.

The next issue is who raped her. The determination of this issue, I trust, will answer the major issue whether the prosecution case was proved beyond reasonable doubt. In relation to the issue, whether or not it was the appellant who committed the rape, there arises a need to clearly evaluate the evidence on record and establish whether it was the appellant who committed the act. I doing this I shall be conforming to the guiding principle that this being a first appeal, it is in the form of rehearing. In that regard, this Court is enjoined to re-evaluate the entire

evidence on record by reading the evidence and subjecting it to a critical analysis before making a decision of upholding the trial court's decision or arriving at its own conclusion. This fabulous principle was lucidly stated in the case of ***Napambano Michael @ Mayanga vs. Republic,*** Criminal Appeal No. 268 of 2015 (unreported) in which the Court of Appeal held:

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether."*

With that guidance let me subject the evidence on re-evaluation. It is now a common principle that true evidence on rape must be given by the victim. The rationale behind this principle, in my considered opinion, is simple to comprehend. It is that the victim of rape incident is actually the one who witnessed and knows what transpired and the one who felt what was inserted in her vagina. This principle was emphasized by the Court of Appeal in cases of ***Seleman Makumba vs. Republic*** (supra) and ***Julius John Shabani vs. Republic***, Criminal Appeal No. 53/2010 CAT, Mwanza (Unreported)

> *"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" [Emphasis is mine]

See also the case of ***Said Majaliwa vs. Republic***, Criminal Appeal No. 2 of 2020 CAT, Kigoma) (Unreported).

In the current case, the victim PW1 testified categorically that midnight while asleep a certain person broke into her house. After gaining ingress therein, he grabbed her neck and forced her to have sexual intercourse. Upon undressing her, he inserted his penis into her vagina. Her screams were heard by neighbours who ushered in at the scene of crime. In PW1's house, was found the appellant by PW2 who PW1 said raped her. PW3 was emphatic that he took the appellant who was found in PW1's house and the PW1 to Police Station. From the totality of the evidence, I have no doubt that the appellant was found in PW1's house. He also said so in his defence. I am also strengthened by the evidence of PW1 that it was the appellant who gained an illegal ingress into her house who raped her. I am therefore agreeing with Mr. Iboru that the ingredient of rape most importantly, penetration, was proved beyond reasonable doubt. The evidence of rape came directly from the victim of rape who saw the person grabbing her neck, undressing her and felt the penis inserted into her vagina. Eventually, it turned out that it was the appellant because he was arrested at the

scene of the crime. That discerned from the evidence, I am comfortable to hold that the person who raped PW1 was the appellant. So the issue as to who raped the victim is as well answered in affirmative.

The findings above, gives answers to the complaint aired up by the appellant that the prosecution failed to prove the case beyond reasonable doubt.

On this area the cardinal principal is that the prosecution is duty bound to prove two important elements in discharging its duty of proving the case beyond reasonable doubt as was observed by the Court of Appeal in the case of ***Maliki George Ngendakumana vs. Republic,*** Criminal Appeal No. 353 of 2014 (Bukoba) (Unreported) that:

> *"... it is the principle of law that in criminal cases the duty of the prosecution is two folds, one, to prove that the offence was committed and two, that it was the accused who committed it".*

In the instant case cogent evidence was led demonstrating that the offence of rape was committed and the rapist was none other than the appellant. From the above findings, I find the first ground of appeal with no merits. It is henceforth rejected.

With respect to ground two, in which the complaint is that the defence evidence was disregarded, Mr. Iboru was very brief. Referring to page 3 and 6 of the judgment the learned PSA addressed the Court that the trial Court considered the appellant's defence of drunkenness and found it having no spine to disturb the prosecution case. The appellant insisted that it was only the prosecution evidence which was considered.

Principles governing the consideration of evidence from either part are well established. As a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives at the conclusion of the case for and against issues framed for determination. Failure to consider the defence is fatal to the trial or proceedings as per the case of ***James Bulolo & another vs. Republic*** [1981] T.L.R 283. It stated further that:

> *"It is the duty o f the court first to collate, analyse and assess the evidence and see how far, if at all, it touches upon every accused person as an individual. The court is not to lump the accused persons together and wrap them up generally in the blanket of the prosecution evidence."*

Similar position was stated in the cases of ***Fikiri Katunge vs. Republic***, Criminal Appeal No. 552 of 2016 ***Jonas Bulai vs. Republic***,

Criminal Appeal No.49 of 2006 (unreported) and a score of other decisions have long settled the position in this area. Underscoring further, the Court of Appeal of Tanzania in ***Jonas Bulai case*** (supra) insisted that it is an imperative duty of a trial judge to evaluate the entire evidence as a whole before reaching at a verdict of guilty or not guilty.

In the present case, the record particularly the judgment answers the question whether the defence evidence was considered or not. I have found in the judgment that the defence evidence was considered at page 6 of the judgment. However, the trial Court accorded no weight to it on the reason that did not shake the strong rooted prosecution evidence. The trial Court therefore, complied with the rule that evidence of either part should be evaluated and accorded weight.

In conclusion, I find this appeal unmeritorious. Owing to the above findings, I dismiss the appeal; uphold the decision, conviction and sentence of the trial court.

It is so ordered.

DATED at **MBEYA** this **21st** day of **April, 2022**

J. M. KARAYEMAHA
JUDGE