IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 114 OF 2021

(*Arising from the District Court of Bunda at Bunda in Criminal Case No. 128 of 2020)*

PHILIMON JOSEPH @ CHONGERA ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

02.05.2022 & 19.05.2022

Mtulya, J.:

The appellant, Mr. Philimon Joseph @ Chongera was arrested and arraigned before the **District Court of Bunda at Bunda** (the district court) in **Criminal Case No. 128 of 2020** (the case) on 17th June 2021 to reply an allegation of rape contrary to section 130 (1) (2) (e) and 131 (3) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code) allegedly occurred on 12th June 2020 at Kihumbu Village within Bunda District in Mara Region. After full hearing of the case, the district court convicted the appellant of the offence of rape and sentenced him to serve life imprisonment as per section 131 (3) of the Code.

The decision of the district court aggrieved the appellant and approached this court complaining that the case against him was fabricated and the prosecution failed to prove its case beyond reasonable doubt. In filing specific reasons of appeal, the appellants

listed ten (10) grounds of appeal in his petition. However, reading the grounds of appeal and submissions of the parties during hearing of the appeal in this court, this court noted that the appellant is basically complaining on three issues, *viz*: first, absence of ingredients of the offence of rape; second, evidence of medical doctor which claimed no rape had occurred to the victim; and finally, decline of the district court to consider his defence.

The appeal was scheduled for hearing on 2nd May 2022 through teleconference placed at Butimba Prison in Mwanza Region and offices of the Director of Public Prosecutions, Musoma in Mara Region and the appellant, who had no legal representation, briefly explained his complaints that there was no evidence tendered in court which showed penetration, bruises or semen on side of the victim and a medical doctor who was marshalled by the prosecution in the case to testify the offence of rape against the accused person stated that there was no penetration or semen were found in the victim's private party.

The appellant complained further that the district court declined to consider his defence as he raised the issue of ten (10) sacks of beans and conflict originated from the sacks between the appellant and Sugwa Lubiso (PW2). The submission of the appellant was protested by Ms. Agma Haule, learned State Attorney, who appeared for the Republic, contending that the offence against the appellant

was not fabricated and the prosecution proved its case beyond reasonable doubt.

In justifying his protest, Ms. Haule submitted that the offence of rape was proved beyond reasonable doubt and the complaint related to penetration, bruises or hymen has no merit as even slight penetration amounts to rape and the victim as stated all in her evidence at page 7 and 8 of the proceedings in the district court.

In order to bolster her argument, Ms. Haule cited two authorities related to the appellant's complaint, *viz*: first, section 130 (4) (a) of the Code contending that penetration, however slight is sufficient to constitute sexual intercourse necessary to prove the offence of rape; and second, precedent of the Court of Appeal in **Selemani Makumba v. Republic** [2006] TLR 376, arguing that the best evidence in rape cases is that of the victim.

With regard to the evidence of medical doctor, Tambwe Almas (PW3), Ms. Haule submitted that the evidence tendered by PW3 is just expert opinion that does not bind this court and the court may decide to disregard the same as the witness PW3 was not present at the scene of the crime when the offence was committed by the appellant.

Ms. Haule submitted further that the issue of consideration of the defence case and complaints on ten (10) sacks of beans was decided by the district court. In strengthening her argument, she stated that the judgment of the district court in the case at page 4

and 5 had invited the defence case and considered the raised issues, and in any case the case of sacks of beans and present case are two (2) distinct cases and each has its own procedure. To her opinion, Ms. Haule, submitted that the issue of beans was brought in the present appeal as an afterthought. According to Ms. Haule, the appellant did not cross examine PW1 and PW2 during the hearing of the case at the district court and cannot raise the same at this stage. In support of her submission Ms. Haule cited the precedent of the Court of Appeal in **Martin Misar v. Republic**, Criminal Appeal No. 428 of 2016.

I have perused the record of this appeal. Record shows that on 8th February 2021, the appellant was summoned in the district court to produce his defence in the case. His defence was registered at page 19 & 20 of the proceedings to display the following:

> *I remember [in] June, Friday in the morning, we did cultivation with mother of PW1 and* ***we agreed that I will take 10 sacks of beans****. 20 sacks of beans, the mother of PW1 will get it. I went to centre (Kihumbi). Then mother of PW1 came and said that I raped her daughter. I said I didn't rape her. Even the mother of PW1 is not sure that I raped PW1.* ***Rape is a serious offence, but she failed to produce witnesses****. I pray to this court to acquit me because the charge was fabricated by the mother of PW1.* ***Even the doctor confirm that there were no penetration, no blood,***

***no semen**. She was walking properly. **The problem is my ten sacks of beans**...conflict started two days before the incident.*

(Emphasis supplied).

A reply of the defence is found at page 5 of the district court judgment. The text of consideration was drafted in the following text:

Regarding accused defence, this court is of the view that if it was true that the allegation was fabricated by PW2 regarding the beans harvest, then he could have raised that doubt during PW2 cross examination, but he did not do so... prosecution side was able to prove their case beyond reasonable doubt, and leave no question to this court that PW1 was raped and it was the accused person who raped her.

The evidence of PW1, PW2 and PW3 shows in brief that: the victim was alleged to have been raped in morning hours, around 08:00 hours on 12th June 2020. The evidence of PW1 depicted that the appellant penetrated his private part to her private part and she felt pain and started bleeding. A bit later she went home and informed her mother and the victim was ferried to hospital, where she was examined. The evidence of PW2, her mother, shows that on the same day she inspected the victim at her private part and found blood and sperms and rushed to Mgeta Police Station for Police Form No. 3

(PF.3) and finally rushed the victim to hospital for medical examination.

The medical examination was conducted by PW3 on the same day, 12th June 2020, and he found out that PW1 had a *reddish labia majora* without any blood, sperms or penetration and her hymen was intact. PW3 finally tendered the PF.3 which was duly filled by him and was admitted in the case as exhibit P.1. The exhibit shows that the offence was alleged to have occurred on 12th June 2020 at 08:20 hours and reported to the police station on the same day at 09:40 hours and examined thereafter. The results of both physical and laboratory tests were recorded on the same day and produced at 04:28 hours.

The only question this courts asks itself is whether it was possible for the victim (PW1) to be raped at around 08:00 hours and claim to have been bleeding and feeling a lot of pains, and few hours later on the same day PW2 saw blood in her private part, and thereafter on the same day before 04:28 hours, both physical and laboratory tests revealed that there is no any blood, sperms, penetration or breach of hymen. It is unfortunate that the record is silent on precise time when the examination was conducted and no inquiry was conducted by the parties or the district court. Similarly, the parties and the district court were mute in questioning the meaning of the words: *reddish labia majora*.

I understand during her submission, Ms. Haule stated that penetration, however slight is sufficient to constitute sexual intercourse necessary to prove the offence of rape. To bolster her argument, she cited the authority in section 130 (4) (a) of the Code. The position is correct and has received several support of precedents resolved in our superior court (see: **Sospeter John v. Republic**, Criminal Appeal No. 237 of 2020; and **Godi Kasenegala v. Republic**, Criminal Appeal No. 271 of 2006). However, the record does not support her submission. There is no-where on the record which shows evidence of slight penetration. What is shown on the record is un-interpreted words of *reddish labia majora*, without any penetration or blood, contrary to the evidence of PW1 and PW2.

I am well aware of the precedent of the Court of Appeal in **Selemani Makumba v. Republic** (supra) which resolved that the best evidence in rape cases is that of the victim. The practice has already been established since 1969 and currently there is huge bundle of precedents on the subject (see: **Mawazo Anyonyile Makwaja v. Director of Public Prosecutions**, Criminal Appeal No. 455 of 2017; **Bashiri John v. The Republic,** Criminal Appeal No. 486 of 2016; **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; **Yohana Msigwa v. Republic** [1990] TLR 148 **Abasi Ramadhani v. Republic** (1969) HCD 226).

However, there is qualification clause from the same court that the words of victims of sexual offences cannot be taken as gospel truth, but their testimonies should pass the test of truthfulness (see: **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017). The qualification was considered by this court in the precedents of **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020 and **Marwa Daniel @ Omary Daniel @ Omi v. Republic**, Criminal Appeal Case No. 136 of 2021. In the present appeal, I do not think, in my considered opinion, that the victim and PW2 have passed the test of truthfulness.

I am also aware that no particular number of witnesses is required for proof of any fact in criminal cases as per interpretation of section 143 of the **Evidence Act** [Cap. 6 R.E. 2022] and from the precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials and evidences tendered in court to substantiate the prosecution case. However, in the circumstances where the appellant from the beginning of the case at the district court is complaining on evidence of PW2, lack of evidence on penetration, absence of independent witness or calling witness from an investigation machinery of police, all that increase the shadow of doubts in prosecution case.

I am well aware that the evidence of expert or expert opinion is persuasive in cases like the present one (see: **Marwa Daniel @**

Omary Daniel @ Omi v. Republic (supra); **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008; and **Agnes Doris Liundi v. Republic** [1980] TLR 46) Ms. Haule during appeal hearing prayed this court to disregard expert opinion as PW3 was not present at the scene of the crime when the offence was committed by the appellant. This is a good advice to this court from an officer of the court, but taking the advice depends on other materials on record. The materials registered by PW1 and PW2, not only contradicted the evidence of PW3 recorded on the same day in a span of eight (8) hours, but also lacked truthfulness hence breached the principle of reliability and credibility of the witnesses.

Reading the defence evidence, three (3) complaints were registered to test prosecution case, though not well articulated by the appellant in legal language. The issues, which were supposed to be resolved by the district court in the case, namely; first, ten (1) sacks of beans; second, independent witness; and finally, lack of penetration. The same matters were raised in this appeal save for an independent witness.

In the district court, the learned magistrate replied the issue of defence case in one sentence as depicted at page 5 of the decision and the complaint on penetration in one paragraph of page 4 of the decision and finally shifted the blame on interpretation of the words *reddish labia majora* to PW3 and concluded that there was slight penetration, without any evidence on record. It is unfortunate that

the learned magistrate was silent on his role as a court in questioning PW3 during proceedings on the meaning of the words: *reddish labia majora.*

I remember Ms. Haule during the appeal hearing submitted that the complaints on ten (10) sacks of beans was decided by the district court and in any case it was out of site with present dispute and that he registered the complaint as an afterthought and justified by his decline to cross-examine PW2 on the subject during the proceedings. In support of her contention, Ms. Haule cited the precedent of the Court of Appeal in **Martin Misar v. Republic** (supra).

I agree with Ms. Haule that failure to cross-examine witnesses on important materials entitle courts to draw inferences that the opposite parties agree to what was said by witnesses in relation to the relevant fact in issue. There is a bunch of decisions on the subject (see: **Hatari Masharubu @ Babu Ayubu v. Republic**, Criminal Appeal No. 590 of 2017, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2009 **Cyprian Athanas Kibogo v. Republic**, Criminal Appeal No. 88 of 1992, **Sebatian Michael & Another vs. the Director of Public Prosecutions**, Criminal Appeal No. 145 of 2018; **Masatu Webiro @ Nyamtenge Kitongoti v. Republic**, Criminal Appeal No. 123 of 2021 and **Mateso Juma v. Republic**, Criminal Appeal No. 12 of 2021).

However, in a situation where the appellant raised three (3) doubts and was not questioned by the prosecution on the two (2) doubts of penetration and independent witness and the district court replied only one (1) issue leaving the issues of independent witness and penetration, and noting the faults in PW1 and PW2, I decline to say the defence case was properly considered by the district court.

The available practice in our superior court with regard to non-consideration of the defence evidence shows that the decision emanated from such an irregularity is fatal and vitiates the conviction (see: **Daniel Severine and Two (2) Others v. Republic**, Criminal Appeal No. 431 of 2018; **Yusuph Amani v. Republic**, Criminal Appeal No. 255; and **Marwa Daniel @ Omary Daniel @ Omi v. Republic** (supra).

The reason in favour of the practice is obvious, that there is no balance in weighing evidences of both sides, the prosecution and defence cases in order for the court to fully satisfy itself that the prosecution proved its case beyond reasonable doubt. In our present case, I do not think if the appellant was availed a fair trial, considering he is a village man without any legal representation. Thus the conviction against him was not safe and it cannot be sustained.

Having said so, I think, the present appeal was brought in this court with good reasons hence allowed. It is obvious from the record that the offence of rape against the appellant was not proved

beyond reasonable doubt by the prosecution in the district court. I have therefore decided to quash the conviction and set aside the sentence of life imprisonment meted to the appellant, and further order immediate release of the appellant from prison unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

19.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Yese Temba and in the presence of the appellant, Mr. Philimon Joseph @ Chongera through teleconference placed at Butimba Prison in Mwanza Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F.H. Mtulya

Judge

19.05.2022