IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 37 OF 2022

(Originating from Mbinga District Court in Criminal Case No. 52 of 2021)

KACHANGA OSMUND KINUNDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 13/02/2023

Date of Judgment: 20/02/2023

U. E. Madeha, J.

It is worth considering that, before the District Court of Mbinga, the Appellant that is none other than; Kachanga Osmundi Kinunda was charged and convicted with the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the *Penal Code* (Cap. 16, R.E. 2019), for the first (1st) Count. Moreover, for the second (2nd) count, he was also charged and convicted for the offence of causing grievous harm contrary to section 225 of the *Penal Code* (Cap 16 R.E. 2019).

As a matter of fact, he was sentenced to serve thirty (30) years in prison concurrently. As a result, the sentence and conviction did not amuse him. In fact, he lodged this appeal challenging both conviction and sentence. In his petition of appeal, he has five (05) grounds of complaints. For ease of reference, the grounds of appeal are as follows:

1. *That, the Trial Court erred in law and fact to convict the Appellant while the case was not proved beyond reasonable doubt. That there were contradictions in the testimony given by PW1 whose evidence of identification was not proper because she didn't state how she identified the Appellant.*
2. *That, the Trial Magistrate erred in law and facts in convicting an Appellant based on hearsay evidence of the witnesses.*
3. *That, the Trial Court didn't consider the underparts as an exhibit before the Court of law so as to satisfy that she was raped and her underpants were destructed.*
4. *That, the Trial Court erred in law and facts in procedures due to the facts that, the Appellant was sentenced without being as per section 312 (2) of the Criminal Procedures Act (Cap. 20, R.E. 2019).*
5. *That, the Trial Court convicted the Appellant on his weakness without considering the strong witness of the prosecution side.*
6. *That, the victim didn't make noise at the crime scene so that people may come for her rescue and arrest the Appellant.*

As a matter of fact, the facts of the case from the case records are as follows: a rape victim whom I identify as XYZ, which is not her real name, a girl of sixteen (16) years old, in fact, she was born in the year 2005. She stated that she was a student at Litembo Secondary School before been transfered to Nyoni Secondary School. She was transferred to Nyoni Secondary School after being raped by the Appellant in this case.

In addition, she contended that on 4th February, 2021 during morning hours she was on her way to Litembo Secondary School. When she was about to cross the small river, she met with the Appellant who robbed her neck and threatened to kill her if she made some noise or scream for help. Principally, she continued to state that the Appellant pushed her down towards the dirty water around the maize farm. The Appellant put some sand in her eyes and grass in her mouth. He had to tear her uniforms; he forcibly took out her underwear and then the Appellant removed his penis and inserted it into her vagina. Basically, she went on to state that it was the first (1st) time she had sexual intercourse so she felt some pain.

Upon raping her, the Appellant ran away. To add to, she stated that she lost her consciousness. Later on, after some time she woke up and removed the grasses from her mouth and she was bleeding in her eyes. She screamed and made some noise for help whereby a good Samaritan took her to Litembo Police Station and later on at Litembo Hospital for treatment. It is important to note that, she had bedrest at the hospital up to 10th February, 2021 when she was discharged from the hospital. Moreover, she stated that the Appellant is her neighbor and she has no conflict with him.

Furthermore, PW2 contends that she is living at Litembo whereby on 4th February, 2021 while he was at home, he heard someone crying, making noise and scream for help. These noise and scream were actually from the maize farm. Additionally, he contended that all the scream and noise was from a female person. He immediately went the crime scene and found PW1 crying, bleeding and her eyes were swelling.

Apart from that, she explained to him that someone had robbed and raped her. She named that person as Kachanga who is the Appellant. As a result, he helped the victim and took her to the nearby Police Station for more assistance.

It is worth considering the fact that, PW3 contended that he is the biological father of the victim that is XYZ, who was born in the year 2005 and at the material time she was sixteen (16) years old and she was a form two student at Litembo Secondary School.

In fact, on 4th February, 2021 he was informed that her daughter was at Litembo Hospital. He took steps and went directly to Litembo Hospital where he met her in a critical condition. Her eyes were covered by the bandage. Similarly, she mentioned the Appellant who is familiar to them as their neighbor as the one who raped her and caused grievous harm to her.

On the other hand, in his sworn evidence PW4 stated that he is a doctor with registration number 2995 and he is working at Litembo Hospital. Similarly, he is the general practitioner. To add to it, the victim was his client on 4th February, 2021 and she complained to him that she was assaulted and raped. Notably, he examined the victim and filled out PF3, which was admitted as Exhibit P1.

PW5 in his sworn testimony stated that he is a Police Officer working at Criminal Investigation Department at the Litembo Police Station. So, he

visited the crime scene and drew a sketch map which was exhibited as Exhibit P2.

Basically, at the hearing of the appeal the Appellant had no representation that is he represented himself but the Respondent was represented by none other than Mr. Frank Chonja and Tumpale Laurence, State Attorneys who joined forces to represent the Republic/Respondent.

In that regard, the Appellant submitted that the victim was sent to the hospital whereby it was not proved that she was raped as she was in good health. On the same note, there were two (02) victims of rape surprisingly only one (01) victim of rape appeared in Court to give her evidence. He prayed that his grounds of appeal to be adopted to the parties of his submissions.

On the contrary, Mr. Frank Chonja, the State Attorney representing the Respondent stated that he did not supporting the Appellant's appeal. He stated that on the first (1st) ground of appeal, the Republic proved the case beyond reasonable doubt. The evidence given by the prosecution witnesses proved that the victim was raped and suffered grievous harm.

In that view, he stated further that the victim's evidence that is PW1, is clear that grievous harm and rape offences were committed by the Appellant. For more emphasis he cited and made reference to the case of **Selemani Makumba v. Republic** (2006) TLR 379, in which the Court stated unequivocally that the best evidence in a rape case comes from the victims.

To crown it all, he stated that there were four (04) prosecution's witnesses in this case who corroborate the victim's evidence (PW1). He averred that concerning the issue of identification in the court proceedings the victim was identified by the Appellant as the one who has raped her and caused grievous harm.

Additionally, he submitted that the offences were committed during morning hours in that case there was enough daylight to the extent that the victim was able to identify the accused. In fact, PW1 stated that the Appellant is her neighbor, something which made her easy to identify him. Also, he stated that the Appellant was identified at the Court dock with all the witnesses who testified against the Appellant.

With regard to the second (2nd) ground of appeal, he contended that the evidence of the victim is the direct evidence and that evidence was corroborated by the evidence of PW2, who heard the victim (PW1) crying. Immediately he went to the crime scene and found the victim was sleeping and his eyes were swollen and shut.

Concerning the third (3rd) ground of appeal, he submitted that ground of appeal has no merit as and he averred further that there was no need to use the victim's underwear as an exhibit in rape case. He argued that what was required was to prove penetration which was clearly proved. PW1, who is the victim testified that the Appellant took his penis and inserted into her vagina and he felt pain since it was her first time to have sexual intercourse.

As much as the fourth (4th) ground of appeal is concerned, he submitted that, section 312 (2) of the *Criminal Procedure Act*, (Cap. 20, R. E. 2019) was complied with. He averred that the Court in its judgment specified the offence and the section for which, the accused person was convicted, and the punishment entered. To crown it all, he averred that the Court stated at page 9 of the typed judgement that the Appellant was found guilty of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the

Penal Code (supra), as well as causing grievous harm contrary to section 225 of the *Penal Code* (supra). He further averred that, as he stated earlier, section 312 (2) was complied with.

On the fifth (5th) ground of appeal, he submitted that the accused's evidence was properly evaluated by the Court and found that they never raise any reasonable doubt to the prosecution evidence. Moreover, the court continued to enter the Appellant's conviction.

With regard to the sixth (6th) grounds of appeal, the learned State Attorney submitted that, the ground of appeal is unfounded since what was supposed to be proved for the offence of rape was penetration and not an alarm. He added that the prosecution proved penetration by looking the evidence of the victim. Also, the prosecution evidence is clear that the victim cried for help and PW2 went to the crime scene and served the victim (PW1).

Lastly, the learned State Attorney prayed that this appeal be dismissed. But to the contrary, in his rejoinder submission the Appellant prayed that his appeal be allowed.

Having gone through, the petition of appeal which encompasses six (06) grounds, I find that they boil down to three (03) issues; **Firstly,** whether the Appellant was properly identified by the victim. **Secondly,** whether the prosecution's side proved its cases beyond a reasonable doubt. **Thirdly,** whether the Trial Court complied with the provision of section 312 (2) of the *Criminal Procedure Act*.

On the issue of whether the Appellant was properly identified by the victim, I have gone through the Trial Court's records and the submission made by the Respondent as the Appellant did not submit anything about that particular issue. In fact, Mr. Frank Chonja argued that the Appellant was well identified by the victim as it was in the morning and there was enough light to identify the Appellant, who was actually a neighbour of the victim. Also, the victim (PW1) testified that there were some arguments between her and the Appellant, which means that there was a good chance of identifying each other.

To crown it all, the issue of identification was clearly discussed in the case of **Waziri Amani v. Republic** (1980) TLR 250, in which the Court set up standard parameters that must be met. Basically, the required parameters are; the proximity to the person being identified, the source of

light and its intensity, the length of time, the person being identified was within view, and whether the person is familiar or a stranger.

It is worth considering that, in the case at hand the incident occurred during the daytime when there was enough light, the Appellant was well-known by the victim and he was her neighbor, there were some arguments between the two (02) and they met face to face. In that regard, there is no doubt that the Appellant was clearly identified by the victim.

On the second (2nd) issue of whether the prosecution side proved its case beyond a reasonable doubt. In fact, the Appellant argued that there were two (02) victims. However, only one (01) victim appeared before the Trial Court. To add to it, he averred that the victim's underwear was not brought before the Trial court and the report from the hospital shows that the victim was in good health after being examined and there were no signs of rape.

On the contrary, the Respondent averred that there was only one (01) victim (PW1) who testified that she was raped by the Appellant, who inserted his penis in her vagina. He added that, to prove the offence of rape there is no need of bringing the victim's underwear but only to prove

that there was penetration which the prosecution side proved without reasonable doubt. Also, the doctor's testimony (PW4) clearly shows that he examined the victim's eyes and found that they were injured and the victim told him that she had been beaten and put sand in her eyes. The doctor's testimony explained properly that the victim was injured.

On the same note, the victim (PW1) testified that she met the accused on her way to school, who told her to pass, and that later the accused chocked her behind the neck by putting sand in her eyes, took her to the maize farm and began raping her whereby he took his penis and placed it in her vagina. In fact, the evidence of the victim (PW1), clearly proves that there was rape. It is important to note that, in rape cases the best evidence comes from the victim. This stance was developed by the Court of Appeal of Tanzania in the case of **Selemani Makumba v. R**, Criminal Appeal No 94 of 1999 and the case of **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008 (unreported). In the case of **Godi Kasenegala v. Republic** (supra), the Court stated that:

> *"It is now settled law that the proof of rape comes from the prosecutrix herself, other witnesses if they never*

actually witnessed the incident such as doctors may give corroborative evidences"

Also, in the case of the case of **Selemani Makumba v. R**, Criminal Appeal No 94 of 1999 the Court stated *inter alia* that:

> *"True evidence of rape has to come from the victim, that there was penetration and without consent. A medical report or evidence of the doctor may help to show that there was sexual intercourse but cannot prove that there was rape i.e. unconsented sex, even if bruises are proved in the female sexual organs".*

In this case, I find that the person who was present at the crime scene is none other than the victim himself. In that regard, the evidence that binds the Appellant is the victim's evidence.

In addition, the evidence given by PW1 who is the victim is entitled to credence and must be believed and accepted unless there are good reasons for not believing. Reference is made in the case of **Goodluck Kyando v. Republic** (2006) TLR 363 in which it was stated that every witness must be believed and his testimony accepted unless good or genuine reason is given. It is true that, in this case PW1's evidence is enough to prove the fact that the offences of rape and grievous harm were

committed against the victim. Besides, the prosecution has proved an essential ingredient of the offence, the offence of rape which is penetration and the Appellant as the one who committed that offence and he was well identified as he committed that offence during the daytime.

The issue is whether the Appellant committed the offence of rape under contrary to sections 130 (1), (2) (e) and 131 of the *Penal Code* (Cap. 16, R. E 2019) and whether the Appellant committed the offence of grievous harm contrary to section 225 of the *Penal Code* (Cap. 16 R.E. 2019).

As a matter of fact, I have passed through the evidence given by PW1 (the victim) and find that the evidence is credible enough to prove that the Appellant had committed rape. The evidence shows that the Appellant had put sand in the eyes of PW1, who is the victim. Eventually, the act of putting sand in his eyes, the issue of grievous harm is proven by the prosecution for the information of PW1, PW2 and PW3.

After passing through the submission of both parties, the testimonies of the prosecution witnesses before the Trial Court and the admitted exhibits, including the victim's PF3 which was exhibited as exhibit P2 which

proves that the victim (PW1) sustained grievous, I find the prosecution side proved its case to the required standard. To add to it, the victim's evidence and the evidence given by the other four (04) witnesses that is: (PW2, PW3, PW4 & PW5) are credible and they collaborated what was testified by the victim. In that regard, I have no reason to default the findings of the Trial Court which found the Appellant guilty of the offences he was charged with.

On the other hand, the issue of whether the Trial Court complied with the provision of section 312 (2) of the *Criminal Procedure Act* (supra), the Appellant had nothing to argue on that issue. Basically, the learned State Attorney for the Respondent argued that the Trial Court adhered to that provision. Section 312 (2) of the *Criminal Procedure Act* (supra) provides as follows:

> *'In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced'.*

Going through the Trial Court's judgment, I have discovered that the in convicting the Appellant for the first (1st) count of rape, sentenced him

to thirty (30) years in prison. To add to it, the second (2nd) count the Appellant was sentenced to serve twelve (12) months in prison. Furthermore, Trial Court clearly stated the offence and provisions of the law under which the Appellant was convicted that is the rape contrary to sections 130 (1), (2) (e), and 131 of the *Penal Code*, (supra) causing grievous harm contrary to section 225 of the *Penal Code* (supra). Also, the Trial Court properly sentenced the Appellant on both counts. To crown it all, I find that this ground of appeal lacks merit.

Consequently, I find that all grounds of appeal have decided negatively and are hereby dismissed. In the upshot, I find this appeal is found to have no merit and I hereby proceed to dismissed it and I uphold the decision and orders of the Trial Court. Order accordingly.

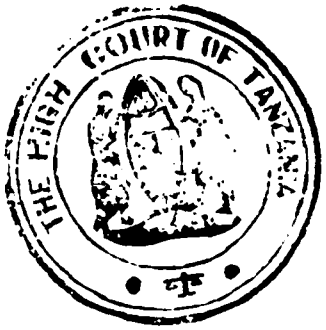
DATED and DELIVERED at **SONGEA** this 20th day of February, 2023.

U. E. MADEHA

JUDGE

20/02/2023

COURT: This judgment is read before the Appellant and Mr. Frank Chonja for the Republic and the right of appeal is explained to both parties.



U. E. MADEHA

JUDGE

20/02/2023