IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL CASE NO. 53 OF 2022

(Originating from Criminal Case No. 43/2022 Mbinga District Court)

YOSEPH S/O TIMOTHEUS MAPUNDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

27/02/2023 & 14/03/2023

E.B. LUVANDA, J.

The Appellant above mentioned presented four grounds of appeal in his petition to challenge the decision of the trial court. A trial for the Appellant was in respect of the offence of raping the victim who is an old lady aged eighty nine anos, without her consent, in terms of section 130 (1) and (2) (a) of the Penal Code, [Cap 16 R.E. 2019].

The trial court believed the evidence of the senior citizen and aging lady (victim) and convicted the Appellant charged and ordered the appellant to remain behind bars for thirty years. The Appellant is challenging it on that: One, the trial court erred in law and fact to convict and sentence the Appellant without the offence be proved to the required standard; Two, the trial court erred in law and fact to convict and sentence the

Appellant while the prosecution witness number five Dr. Venant Kapinga did not prove penetration to a required standard, within the meaning of section 130 (4) (a) Cap 16 (*Supra*); Three, the trial court erred in law and fact to convict and sentence the Appellant while the evidence adduced by PW5 one Dr. Vicent Kapinga clearly shows that medical examination tested no male sperm in the laboratory, so the entire allegations of rape is fabrications; Four, the trial court erred in law and fact to convict and sentence the Appellant while basing on equivocal confession of the Appellant obtained from severe beating.

At the hearing of the appeal, the Appellant submitted that he did not commit rape because he was away. That he admitted to rescue himself. He submitted that the medical officer testified that the old lady was not raped. That they took his sandals as exhibit while he did not rape.

Mr. Frank Chonja learned State Attorney opposed the appeal. On ground number one, he submitted that PW1 explained that the Appellant break her door, entered her room, undressed and pressed her, then undressed himself, took his penis and inserted into the vagina of the victim, committed sexual intercourse without consent. He cited a case of **Seleman Makumba vs. Republic,** (2006) TLR. 379, for a proposition that the best evidence in rape cases is that of the victim. The learned

State Attorney submitted that, PW1 was corroborated by PW2, PW3 and PW4 who explained that the Appellant confessed to have raped PW1(victim).

On ground number two and three, the learned State Attorney submitted that sperm is not among the elements for proving rape, what is required is penetration.

That PW1 explained that the Appellant inserted his penis into her vagina without consent. Also the medical officer PW5 tendered a PF3 which show that there was penetration into PW1's vagina, meaning she was raped.

For ground number four, the learned State Attorney submitted that the Appellant confessed before PW2, PW3 and PW4 and he did not cross examine them, which implies voluntariness. He cited **Damian Luhele vs. Republic,** Criminal Appeal No. 50/2007 C.A.T. at Mwanza, for a proposition that failure to cross examine amount to acceptance.

On rejoinder, the Appellant asked for a trial denovo, on the explanation that he don't know how he was convicted, pleaded being a layman to account him for failure to cross examine witnesses.

He dispelled meeting the old lady and raping her at 22:00 hours, on the explanation that he was to his colleague. He submitted that he never quarrelled with the victim as he used to assist her some works.

That marked the end of submissions.

As for ground number one, the condition precedent for proving an offence of rape chargeable under section 130 (2) (a) Cap 16 (supra), is sexual intercourse without consent. Herein, PW1 (the victim) explained that, the Appellant who is her grandson break and stormed into her bed room, ensured fight between PW1 and the Appellant, where the later took her member to insert into PW1's vagina, ultimately the Appellant managed to overcome and have sexual intercourse after the victim succumbed to a fight including shouting to no avail. This situation was attributed for what PW1 said her separated husband is deaf and visual impaired. Meanwhile PW2 a son of PW1, put that his brother who is living nearby there to PW1, is somehow a bit afar, unable to hear when someone is screaming for help. The totality of this factual arguments, portray, lack of consent.

Seemingly the Appellant who is 44 years old, took an advantage of the above situation to rape PW1. Therefore, the offence of rape was proved

on the standard that the Appellant had sexual intercourse with PW1 without a prior consent of the later.

The Appellant also distanced from the scene, alleging he was away and dispelled meeting PW1. However, there was an evidence PW4 (Edmund Mapunda) that he visited into the bed room of PW1 and found Appellant's sandals Nike brand black and white (exhibit P1), Also supported by PW3 who is the village executive officer. The Appellant did not challenge this fact, neither objected when exhibit P1 was tendered for admission. Therefore a proposition by the Appellant that he did not meet PW1 on the material night is un merited because a clue of his sandal exhibit P1, support a story by PW1.

Coming to ground number two and three the Appellant alleged that PW5 did not prove penetration, within the meaning of section 130(4)(a) Cap 16 (*supra*), and no sperms were found. The learned State Attorney submitted that penetration was proved by PW1 and PW5 including a PF3 (exhibit P2).

The learned State Attorney submitted that sperms is not among the element of proving rape. I assent to the position of the learned State Attorney that sperms is not a requirement for proving an offence of rape, the only thing to prove rape is penetration of a penis into the

vagina. The testimony of PW1 proved penetration of the Appellants penis inserted into her vagina, and she felt severe pain. In exhibit P2, the medical doctor (PW5) opined that he confirmed it to be a victim of rape from both physical findings and report from the laboratory biochemistry report, in that they found bruises into PW's vagina (as per cross examination) and made a conclusion that a blunt object penetrated the victim's vagina.

With all this evidence from the victim (PW1) herself and expert opinion (PW5) and exhibit P2, the argument of the Appellant that penetration was not proved on standard, or no sperms were seen, surely cannot be entertained.

It is the law that penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence of rape, see section 130 (4) (a) Cap 16 (supra).

As regard ground number four, the Appellant pleaded torture. But as rightly submitted by the learned State Attorney that the Appellant did not bother to cross examined PW2, PW3 and PW4 on these allegations or any other fact at all. The rule on this is now settled that failure to cross examine, it amount to acceptance on that fact.

In the case of **Damian Ruhele** *(supra)* at page 7, the apex Court ruled,

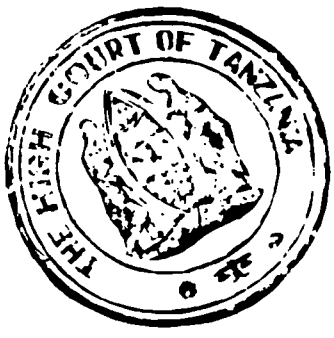
"It is trite law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence"

Herein the gist of the testimony of PW2, PW3 and PW4 was hinged on oral confession by the Appellant, but the later never asked any question. Therefore to plead torture on defence or at this stage, is obvious an afterthought.

Above all, there is a damning evidence tendered by prosecution witnesses, which prove the Appellant's guilty.

Therefore, the grounds of appeal are wanting on merit, trial court conviction and sentence upheld.

The appeal is dismissed.



E.B. LUVANDA

JUDGE

14/03/2023