IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

DC. CRIMINAL APPEAL NO. 70 OF 2022

(Originating from the Criminal Case No. 104 of 2020 in the Resident Magistrate's Court of Njombe at Njombe)

ERICK CHANAFI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 06.03.2023

Date of Judgment: 17.03.2023

Erick Chanafi was charged and convicted by the Njombe Resident Magistrate's Court at Njombe for the offence of rape contrary to section 130 (1), (2) (b) and 132 (1) of the Penal Code Cap 16 R.E. 2019. He was sentenced to serve 30 years imprisonment. Appellant was not satisfied with the decision of the trial Court and he filed this appeal.

The petition of appeal filled by the appellant contains the following grounds of appeal:-

1. *That, the trial Court wrongly admitted the evidence adduced by prosecution witnesses without prior reminding the charge to appellant as required by the law hence making unfair trial.*

2. *That, the learned trial Magistrate erred in law by convicting the appellant based on the evidence which does not prove the case beyond reasonable doubts as required by law.*
3. *That, the prosecution side failed to prove the penetration of penis into vagina of the victim, since penetration is important element of proving the case of rape as required by law.*
4. *That, the evidence adduced by PW1 has no corroboration with the other independent evidence.*
5. *That, no cautioned statement of the appellant was taken before the police officer or justice of peace while the offence attracts severe punishment, hence it rendered a miscarriage of justice to the appellant.*

On the hearing date, the appellant appeared in person whereas the respondent was represented by Ms. Magreth Mahundi, State Attorney. The appellant prayed for the court to consider his grounds of appeal and said that after the State Attorney has replied, he will make his rejoinder submission.

In her reply, the counsel for the respondent opposed the appeal. She submitted on each ground of appeal as it is found in the petition of appeal filed by the applicant. Regarding the appellant's first ground of Appeal, the counsel said section 228(1) and (3) of the Criminal Procedure Act provides that the charge is read over to the accused person when he was brought to court. If the accused pleads not guilty to the offence the prosecution proceeds to bring witnesses to prove the offence. Page 1 of the proceedings shows

that the charge was read over to the appellant who pleaded not guilty to the offence and prosecution called its witnesses to prove the case. The preliminary hearing was conducted as seen in page 4 of typed proceedings were the charge was read over to the appellant once again and the appellant pleaded not guilty to the offence. The appellant rejected most of the facts and admitted some of the facts to be correct. Hearing of the case proceeded until both sides closed its case. Thus, the proposition that court was supposed to remind the appellant on every day when the case was coming for hearing has no merits.

The counsel submitted jointly on the 2nd and 3rd grounds of appeal that prosecution failed to prove the rape offence on the required standards. She said that in rape offence penetration of male organ into vagina is an important element which must be proved. That the utmost evidence in rape offence is that of the victim as it was stated in the case of **Joseph Leko vs. Republic**, Criminal Appeal No. 124 of 2012, Court of Appeal of Tanzania at Arusha, (unreported) at page 14 to 16. It was her submission that the typed proceedings at page 6 shows the appellant inserting his penis into victim's vagina. It is sufficient evidence to prove penetration.

On the ground that victim's testimony was not supported by other evidence, the counsel for the respondent submitted that the incident took

place in the forest where there was nobody else apart from the appellant and the victim. While on the way to the forest, they met with PW2 and the victim told PW2 that she was arrested by appellant for cutting woods in the forest without permission and when they went further ahead the appellant raped her. PW2 testimony corroborated the testimony of the victim as seen in page 8 of the typed proceedings. PW2 said that sometime, after meeting with appellant and victim, he heard appellant raped the victim. Thus, the 4 ground of appeal lacks merits.

On the last ground of appeal, the counsel for the respondent said that the appellant was interviewed by the police as per section 48(1) of Criminal Procedure Act and the said interview must be conducted within 4 hours from the time accused was arrested as per Section 50 of the Criminal Procedure Act. But, the statement was not tendered in court due to unknown facts. It is not mandatory for the accused statement to be tendered in court as evidence. The law also does not make it mandatory for the accused to be taken to justice of peace.

Further, the learned State Attorney said she has noted that the appellant defense was not considered at the trial court. Under the guidance of decision of the Court of Appeal in the case **of Prince Charles Junior vs. Republic**, Criminal Appeal No. 250 of 2014, Court of Appeal of Tanzania

sitting at Mbeya, (unreported), at page 13 of the judgment, the first appellant court is allowed to wear the shoes of the trial court, evaluate the evidence and make a decision therefrom. She prayed for the court to evaluate appellant's defense and to uphold the appeal as the said defense did not raise doubt to prosecution's case. The appeal be dismissed and the conviction and sentence of the trial court be upheld.

In his rejoinder, the appellant submitted that the evidence of the victim in page 6 of the typed proceedings show that the rape offence was committed on 09/05/2021, but she went to hospital for medical examination on 11/05/2021. Failure to go to hospital for examination on the same date raises doubt on the prosecution case. The Doctor who examined the victim said there is no proof of penetration as there was no bruises or sperm in vagina as seen at page 15 of typed proceedings. Appellant said he was arrested by the police in the presence of the victim on 15/05/2021 at Msimbazi village while working and was taken to Ilembula Police station. On 20/05/2021 the identification parade was conducted and the victim identified him in the identification parade. It was on 09/08/2021 when he was taken to court to face rape charges. He over stayed in police lockup. While in police lock up, appellant said he was not interviewed or taken to justice of peace to record

his statement. That all of this raise doubts in prosecution case. This was the end of submissions by both sides.

From submissions, the main issue for determination is whether or not the prosecution evidence proved without doubt the offence of rape against the appellant.

The charge sheet in the trial Court reveal that the appellant was charged for the offence of rape contrary to section 130 (1), (2) (b) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the charge sheet states that on 09.05.2020 at Wanging'ombe Village within Wanging'ombe district in Njombe region the appellant by using force did had carnal knowledge of one Mary Augustino without her consent. Section 130 (2) (b) of the Penal Code, Cap. 16, R.E. 2019 reads as follows:-

> *"130. - (2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
> *(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;"*

To prove the offence of rape, the prosecution was supposed to prove that the appellant penetrated the victim without her consent. The Court of Appeal in the case of **Masomi Kibusi vs. Republic**, Criminal Appeal No. 75 of 2005 (unreported), stated that the law on penetration is clear that

penetration of the penis into the vagina, however slight, is sufficient to constitute penetration. The penetration in sexual offences must be proved beyond reasonable doubt. In the case of **Kayoka Charles vs. Republic,** Criminal Appeal No. 325 of 2007, Court of Appeal of Tanzania at Tabora, (Unreported), it was held by the Court of Appeal that penetration is a key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. The victim is the one to say in her testimony that there was penetration of male sexual organ into her sexual organ.

In this case, the victim who testified as PW1 said in her testimony that the appellant arrested her for illegal cutting of firewood in the forest. He later on released and told her to run away. While PW1 was running, the appellant came after her, put her under his control, removed her skintight and underpants, took his penis and penetrated it into her vagina. This evidence by PW1 proved that there was penetration of male organ of the appellant into female organ of PW1. Also, it proved that PW1 did not consent to have sexual intercourse with the appellant.

It was submission by the learned counsel for the respondent that the best evidence in rape offence is that of the victim herself. The counsel cited the case of **Joseph Leko vs. Republic**, (supra), to support her position. I

agree with her that the principle is settled that the best evidence in the sexual offences comes from the victim. The position was stated by Court of Appeal in number of cases including the case of **Selemani Makumba vs. Republic [2006] TLR, 379,** where it held that:-

"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."

The same position was stated in the case of **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2018, Court of Appeal of Tanzania at Iringa, (unreported), where it held that:-

"It is now settled law that the proof of rape comes from the prosecutrix herself."

In order for the Court to rely on the testimony of PW1, her evidence must to be credible. It is settled principle that every witness is entitled to credence, must be believed and his/ her testimony has to be accepted unless there are good and cogent reasons not believing a witness. The position was stated by Court of appeal in **Goodluck Kyando vs. Republic [2006] TLR 363.**

In the case at hand, the victim – PW1 did not say in her testimony if she knew the appellant prior to the incident. Also, she did not provide

description of the appellant to the police or the first person she came into contact with after the incident. This raises some doubt if she was able to identify properly the appellant. According to the testimony of PW1, she was able to identify the appellant on 20.05.2020 in the identification parade conducted by PW3. This means that PW1 did not know the appellant. PW1 did not say in her testimony if she was able to identify the appellant during the incident and if she provided description of the appellant to the police or the first person she met after the incident. PW2 who testified to see PW1 in the custody of the appellant did not say that he knew the appellant. He just identified the appellant in dock as the person who apprehended the victim before he heard she was raped. Even the way appellant was arrested has a lot to be explained. There is no evidence in record showing the reason for police to arrest the appellant as the suspect for the rape offence.

The evidence of PW1 reveals that the offence was committed on 09.05.2020 and she reported to the police on the following date. As we do not know the time the offence was committed, this raises question the reason for the victim to report the incident to the police on 10.05.2020 which is the following date and not to report the incident on the date the incident occurred. The police issued a PF3 to PW1 on the same date, but PW1 went to hospital for examination on 11.05.2020.

PW1 testified further that the appellant was arrested on 11.05.2020 and she was able to identify the appellant in the identification parade conducted by PW3 on 20.05.2020. This raises doubt as to the reason of conducting identification parade on 20.05.2020 while the appellant was arrested on 11.05.2020. There is no explanation for the delay to conduct the identification parade for 9 days after arresting the appellant.

It is a settled law that the person can only be convicted on evidence of identification if the Court is satisfied that such evidence is watertight and leaves no possibility of error. This position was stated in the case of **Waziri Amani vs. Republic [1980] T.L.R. 280,** where it held that:

> *"The evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight."*

It is very important to scrutinize the evidence on the conditions favoring a correct identification before the court determine the case depending on visual identification as it was held by Court of Appeal in the case of **Raymond Francis vs. Republic [1994] T.L.R. 100.** As I have already discussed earlier herein above, there is doubt about identification of the appellant by the victim. The appellant was not properly identified by the victim and I

hesitate to assume the same. It was an error on the part of the trial court to act on weak evidence of identification of the appellant while possibilities of mistaken identity or fabrication were not eliminated. Thus, I find the prosecution case was not proved beyond reasonable doubts and it dispose of the appeal. As the issue of identification of the appellant by the victim has disposed of the appeal, there is no need to determine the remaining grounds of the appeal.

Therefore, the appeal is allowed. The conviction of the appellant for the offence of rape by the trial Resident Magistrate's Court is quashed and the sentence of thirty (30) years imprisonment is hereby set aside. Forthwith, I order for the release of the appellant from prison otherwise held for other lawful cause. It is so ordered accordingly.

A.E. MWIPOPO

JUDGE

17/03/2023