THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 79 OF 2022

(Originates from Criminal Case No. 18 of 2022 before the District Court of Mvomero)

PHILIPO FULUKO LUPOGO .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 09/3/2023

Judgement date on: 14/3/2023

NGWEMBE, J:

Philipo Fuluko Lupogo is in this court determined to challenge his conviction and sentence meted by the trial court on an offence of rape contrary to section 130 (1) (2) (a) and section 131 (1) (a) of the Penal Code Cape 16 R.E. 2019. The appellant is alleged to have committed sexual intercourse with Twihuvila Mwakyusa against her own will, thus absence of her consent.

The journey which sent the appellant to thirty (30) years imprisonment commenced on 28th day of November, 2021 at Osterbay area in Mzumbe Ward within Mvomero District in Morogoro region whereby the two young persons, of 26 years old (Appellant) and 23 years old (Victim), were friends. In the course of their friendship, in the evening of that date had sexual intercourse in the room of the appellant.

Alas, on the following morning, the girl reported the matter to police and later to Hospital, hence to the court of law and finally the boy landed to prison for thirty years.

Briefly as per the court records, the two knew each other, though the appellant was a motorist of motorcycle best known as Bodaboda, while the girl was a university student of Mzumbe University. On the eventful date, the two were together in the room of the appellant and the victim cooked food and together they eat that food. Thereafter, it seems the appellant used force to have sexual intercourse with the victim. Having so done, the appellant and the victim were together and the appellant took the victim on his bodaboda to her home place. The following morning, she reported to police and the legal machinery took appropriate action until the appellant was arraigned in court and jailed.

In prosecuting the appellant/accused, the Republic was blessed with four (4) prosecution witnesses, while the appellant/accused defended himself. At the end of trial, the trial court was satisfied with the prosecution case that a *prima facie* case was properly established and proved beyond reasonable doubt. Hence proceeded to convict him and pronounced sentence of thirty (30) years imprisonment.

Being aggrieved with such conviction and sentence, the appellant with assistance of learned advocate Kay Makame Zumo found his way to this house of justice armed with six grounds. However, in the cause of hearing the learned advocate abandoned the 1st ground of appeal and remained with five grounds to wit: -

1. The trial magistrate erred in law and fact for contravening section 234 (1) (2) (b) of Criminal Procedure Act.

2. The trial court erred in law and fact as the offence of rape was not proved beyond reasonable doubt against the appellant;
3. The trial magistrate erred in law and fact in convicting and sentencing the appellant by considering the exhibits produced before it.
4. That notwithstanding the allegations that the victim informed PW2 about being raped, and PW2 could not understand the message because it was at night. That the accused threatened to kill with a knife and apologized to PW2 for his act which could not prove what he was apologizing for and no message was tendered.
5. That the court erred in law and fact to convict accused basing on contradictory evidence between PW1 & PW2 & PW4 narrated story received from PW1 but differs on substantial issues.

On the hearing of this appeal, learned advocate for the appellant used quite long time to challenge the trial court for failure to use properly section 234 (1) and (2) (b) of the CPA to correct a defective charge which was corrected by a handwriting. Rightly insisted that the citation of enabling provision of section 130 (1) (2) (e) and later was corrected by hand writing to read (a) was wrong and rendered the whole charge defective. Proceeded to cite relevant precedents including the case of **Ally Ngaleba Vs. R, Criminal Appeal No. 91 of 2021** and the case of **Joseph Sipriano Vs. R, Criminal Appeal No. 158 of 2011.**

Rightly proceeded to argue on another relevant ground that, the alleged toned apart underpant was not identified by the owner (victim) prior to being tendered and admitted in court as an exhibit. Also, the one who tendered it was not the alleged owner but was tendered by police

officer. So, the whole tendering of that exhibit was irregular and same should be expunged from the court record.

Lastly, advocate Kay Zumo, insisted that the whole story relating to rape was fabricated contrary to the prevailing circumstances which dictates that there was no rape but the two were friends and they decided to do what they agreed. Proceeded to cite the case of **Onesmo Yohana @ Taile Vs. R, criminal appeal No. 196 of 2019**. Rested by insisting that the whole story was not established and proved as required by law. Thus, the appeal be allowed, she prayed.

In turn the learned State Attorney, stood firm to support conviction and sentence meted by the trial court. Contradicted the issue of amendment as minor which did not go to the root of the matter. Added that the victim and accused were matured persons who knew the nature of the offence and the charge sheet had minor defect correctable under section 388 of CPA.

Arguing on the circumstances which led to the offence of rape, rightly admitted that the two were matured persons, friends and prior to the offence, were together in the room of the appellant, they cooked food, eat together and later after the event together travelled to the room of the victim.

Lastly, insisted that the prosecution proved the case beyond reasonable doubt specifically the testimonies of the victim (PW1). Again, on proper identification of underpants (Chupi), she admitted that same was not tendered by the owner also was not even identified prior to tendering it as an exhibit. Rested by insisting that the appeal lacks merits same

should be dismissed and this court may proceed to uphold the trial court's decision.

Having briefly summarized the rival arguments of learned counsels, I am settled in my mind that the principles constituting the offence of rape is well–settled in our jurisdiction. There are many precedents on this issue which I need not to over emphasize.

In cases of this nature, the fundamental point of determination by any court confronted by similar case is to prove whether the offence of rape was established and proved as required by law. Section 3 (2) (a) of **The Evidence Act, Cap 6 RE 2019,** provide clearly that, in criminal cases, a fact must be proved beyond reasonable doubt. The duty of proving occurrence of rape lies on the shoulders of prosecution. The prosecution must establish and prove by evidence every ingredient constituting the offence of rape beyond reasonable doubt.

As a general rule, in sexual related offences, the best evidence lies on the complainant. The reason is obvious, usually the offence of rape is committed in closed doors with only two persons that is, the accused and the complainant. In such circumstances, the complainant's evidence stands to be the best evidence. However, such evidence should not be taken wholesome as truth of the matter, nowadays courts have developed some guiding rules to test credibility and reliability of the victim's evidence. For instance, the court should satisfy on the demeanors of the complainant/witness, coherence of her statement and consistence to other witnesses in support. Similar position was alluded in the case of **Athuman Hassani Vs. R, Criminal Appeal No. 292 of 2017.**

Moreover, offence of rape in our jurisdiction is well developed and placed among the most serious offences, which upon conviction attract heavy punishment up to life imprisonment, in any event not less than thirty (30) years imprisonment. Therefore, according to its seriousness of punishment, its proof must as well be watertight leaving no reasonable doubt. Those cases, which attracts long imprisonment sentence, like sexual related offences, the prosecution has special task to perform, that is carefully, establish and prove every element constituting the offence with a view to avoid mistakes, having in mind to net only the rapist and punish them properly.

The fundamental elements of rape are both statutory and others were developed through precedents. Rape is defined simply to mean sexual intercourse, that is, a male reproductive organ (penis) penetrating into a female reproductive organ (Vagina). The penetration need not be wholesome to constitute the offence of rape, rather even slight of it may constitute rape. This position is statutory as rightly defined in section 130 (4) (a) of the Penal Code.

> **Section 130 (4)** *"Penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"*

In a similar manner, the Court of Appeal in the case of **Godi Kasenegala Vs. R, Criminal Appeal No. 271 of 2006 (CAT)** raised a valid legal question on what constitutes an offence of rape? They proceeded to answer as follows:-

> *"Under our Penal Code rape can be committed by a male person to a female in one of these ways. One, having sexual intercourse with a woman above the age of 18 years without*

her consent. Two, having sexual intercourse with a girl of the age of 18 and below with or without her consent (Statutory rape). In either case, ***one essential ingredient of the offence must be proved beyond reasonable doubt.*** *This is the* ***element of penetration*** *i.e.* ***the penetration, even to the slightest degree, of the penis into the vagina"***

In similar vein the same Court in the case of **Mbwana Hassan Vs. R, Criminal Appeal No. 98 of 2009 (CAT – Arusha)**, held: -

"It is trite law also that, for the offence of rape ...There must be unshakeable evidence of penetration"

The most essential element of rape is penetration, even if such penetration was slightly, thus constitutes rape.

Another equally important element to prove rape is absence of consent. If rape is alleged to have occurred to a matured woman, that is above eighteen (18) years, an important element to prove rape is to establish absence of consent on the part of the complainant. To elaborate this element, consent or otherwise is a function of brain, mind set up, personal intent to do or not to do an act of sexual intercourse. Such intent is an internal feeling which is noticed by acts of the complainant. Also, such acts are interwoven in a cultural life of the respective woman. Therefore, to prove consent or absence of consent is always circumstantial based on the situational analysis of the prevailing environment and facts led into the alleged offence. Such as resistance, raising alarm before or during and after the act, reporting the act immediate after the event, mentioning the offender's name immediate

upon meeting with a first person after the act, and the whole behaviour of the parties before sex and after the offence (the list is not exhaustive). Those elements when they are established, one may conceive that there was rape or otherwise. In the absence of those elements, one may not notice if at all there were rape or there were consented sexual intercourse.

To elaborate those elements, it is known, the act is the same whether consent or no consent, the only difference is availability of consent. When the complainant consented to the act of sexual intercourse, the law does not recognize as an offence, save only if there is absence of consent to a woman to have sex. In the case of **Abdallah William Vs. R, Criminal Appeal No. 271 of 2006** (CAT – Tabora) the Court held:-

> *"we do not think medical evidence was necessary in the circumstances. The appellant having agreed to have slept with PW1, what would a medical doctor have said? ... Rape does not necessarily mean that force has to be used in the sexual act. Rape merely means the lack of consent in sexual intercourse"*

I fully subscribe to the above guidance, and the difficulties of proving absence of consent in certain circumstances of the offence of rape. In the case of **Abdallah Manyamba Vs. R, Criminal Appeal No. 271 of 2006,** (CAT – Mtwara), the rapist fell the complainant down by force, and threatened her with knife and raped her. She cried out for help and her brother went to the scene of crime and caught the rapist in the act. Thus, proved absence of consent and the rapist was sentenced accordingly.

The last element to prove rape is availability of unshakable evidences proving the offence of rape. This element involves credibility and reliability of witnesses called upon by the prosecution. Those witnesses must establish and prove the offence of rape beyond reasonable doubt.

I am equally aware on the use of expert opinion in proving criminality of the accused. Always medical doctors and other experts do not testify evidential facts like eye witnesses, rather they testify expert opinion after thorough examination of the matter. Therefore, their expert opinion is admissible to furnish the trial court with scientific information, which is likely to be outside the experience and knowledge of a trial judge or magistrate. All said, but the court remain independent to decide the case before it based on available evidences. But when there is a serious doubt on the testimonies of witnesses, the expert opinion would help to arrive into conclusion. This position was also considered by the Court of Appeal in the case of **Edward Nzabuga Vs. R, Criminal Appeal No. 136 of 2008** and the case of **Abdallah William (Supra).**

In respect of this appeal, I think the question of sexual intercourse between the appellant and the complainant is unquestionable, save only on whether there was consent or otherwise. This is the crux of this appeal calling for deep consideration before arriving to conclusion.

As I have already opined, penetration and or sexual intercourse in this appeal is undoubtedly not an issue for consideration, because every circumstance clarifies that the two had be sexual intercourse on that material date and time. Even the defence case during trial (page 29) of

the proceedings, did not deny to have sexual intercourse on that material date and time, but explained the environment of his room.

However, the critical question remains, whether the complainant consented or otherwise? To answer this question, I have to revisit with caution the whole evidences adduced during trial. As the first appellate court it has a statutory duty to re-evaluate the evidences before it and make its findings on both law, facts relevant to the case and precedents. The purpose of re-evaluating the trial court's records is to unearth if at all, the trial court did not make a proper analysis or at least that the evidence or law were not properly appreciated. But it is known, matters of fact and demeanour of witnesses are in the domain of trial court and thus, findings on that sphere may not be easily overturned by this court, unless there is a serious misapprehension of facts or law or where there is a miscarriage of justice. This position of law is supported by the famous case of **Pia Joseph Vs. R [1984] TLR. 161,** the Court also drew reference from the cases of **Coghlan Vs. Gumberland [1898]1 Ch. 704** and **Pandya Vs. R [1957] E.A. 336,** held *inter alia: -*

> *"The law as regards the role of an appellate court in matters of credibility is settled beyond peradventure. The trial court which has seen and heard the witnesses, thereby being privileged to observe their manner and demeanour, is certainly in a better position to assess their credibility than an appellate court which has not had these advantages. It has therefore been consistently held that an appellate court will not lightly interfere in the trial court's finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the*

trial court did not address itself or address itself properly. As a rule of practice, therefore, a first appeal assumes the character of a retrial"

In similar vein the Court of Appeal in the case of **Yasin Ramadhani Chang'a Vs. R, [1996] TLR. 489** repeated on the same principle as follows: -

"The appellate court should tread with a lot of care since it is dealing with scripts while the trial court dealt with live persons revealing their demeanours. Despite of that, the appellate court can differ from the trial court if its opinion is not supported by the evidence and the right inferences."

In whatever verdict this court is going to make it with serious caution as per the above guidance.

According to the testimonies of the complainant, by the time she testified in court, she was 24 years old, studying at the University of Mzumbe. That she knew the appellant through another student called Edina, a third-year student of the same university. The important testimony was the fact that, on the eventful evening the two were together in the room of the appellant and she cooked food and ate together. They talked up to around 21:00 hours, that is when the appellant used force or threatening means to obtain sexual intercourse. After finishing it, the complainant told the appellant *"Take me back home I will not tell anyone then he took me to my place"* In cross examination, the complainant admitted that the two were used to eat

together, sometimes the appellant went to her room and she cooked and ate together *"Yet it happened once you came into my house to eat".*

The evidence of PW2 (Edina) testified on what she was told by the victim (PW1) and she took some reasonable steps to report the matter to police, then accompanied PW1 to hospital. PW3 is a medical doctor working at Mazimbu Hospital, that he examined PW1 and found her vagina having no bruises, or hymen. When he conducted laboratory test in her vagina, he found dead sperms. But she was neither pregnant nor HIV positive. What he testified in court is similar to what he wrote in exhibit P1.

Even the testimonies of PW4 were similar to PW1 and PW2 for both were told by PW1. In turn the accused/appellant defended generally by asking questions according to the prosecution witnesses, but did not deny to have friendship with the complainant and that on the eventful night were together.

From the evidences above, definitely, this appeal is centred on whether there was consent or otherwise. The evidence of PW2 indicates that she found PW1 in the following morning crying and complained pain on her private parts. Equally she testified that, she was given text message in her mobile phone in that night, but failed to respond. The fact that she was crying may be true due to bad feelings but the fact that she had pain in her private parts was not supported with the medical doctor, which indicated clearly that he found no bruises in her vagina and she had no hymen. Also, that he found dead sperms upon conducting laboratory tests, also raise serious doubts of whether a male sperm may die within shortest possible time of less than twenty-four hours?

All those proves the difficulties of establishing consent or absence of consent. I have enumerated several factors to be considered to establish and prove absence of consent. As such the environment which led into the alleged forced sexual intercourse, creates serious doubt to the extent that, they were together in the evening up to night, that they cooked and ate together in a room of the appellant and continued talking up to around 21:00, when the alleged rape occurred, and thereafter, the victim requested the appellant to take her to her house, the request was complied with and were together on the bodaboda of the appellant to her house, all that do not support absence of consent. I am sure had the trial magistrate directed her mind on this point, she would have decided otherwise.

In totality and for the reasons so stated, I am certain that this appeal has merits. Failure to establish properly lack of consent to a matured girl in rape cases, cannot constitute an offence of rape. I find the prosecution evidences did not prove absence of consent to the standard required by law. I therefore, proceed to allow this appeal, quash the conviction and set aside the sentence meted by the trial court. Consequently, order an immediate release of the appellant from prison, unless otherwise lawfully held.

I, accordingly order.

Dated at Morogoro in Chambers this 14th day of March, 2023

P.J. NGWEMBE

JUDGE

14/03/2023

Court: Judgement delivered at Morogoro in chambers this 14th day of March, 2023, **before A.W. Mmbando, DR** in the presence of the appellant and his advocate, Kay Makame Zumo and Ms. Vestina Massawe, State Attorney for the Republic/respondent.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

14/03/2023

Right to appeal to the Court of Appeal explained.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

14/03/2023

I certify that this is a true and correct copy of the original
Deputy Registrar
Date 14/3/23 Morogoro