

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**

**CRIMINAL APPEAL NO. 134 OF 2022**

*(Original Criminal Case No. 70 of 2022 of the Resident Magistrate's Court of Musoma at Musoma)*

**STEVEN S/O CHAINA @ NKOBA..... APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*17<sup>th</sup> & 19<sup>th</sup> May, 2023*

**M. L. KOMBA, J.:**

This appeal arises from the decision of the Resident Magistrates' Court of Musoma at Musoma (the trial court) in Criminal Case No. 70 of 2022. In the core, the appellant was convicted and sentenced in connection to rape offence contrary to section 130(1) (2) (e) and 131(1) of Penal Code, Cap 16 [R. E 2019].

It was alleged in the particulars of the offence placed before the trial court that on 19 July, 2021 the victim who was 16 years old and a student at Bumangi Secondary School was at appellant house which is in Masura village within Butiama District in Mara Region. She spent the whole day and in night

she had sexual intercourse. After relatives were informed of incidence, the appellant was arrested and strongly denied the allegation.

The substance of the prosecution case is fully depicted by the evidence of four prosecution witnesses; namely, the victim (PW1), Saraphina (PW2), Elizabeth Jackobo (PW3) and Doctor (PW4). It was the evidence of PW1 that the accused is her friend since August 2022. When narrating what happened in that particular day she referred the court on 19 July 2022 that she was in the house of the appellant, she spends the day there having supper and during night they slept. It was dark and there were other boys. She remembered shed had sexual intercourse in that day but she doesn't remember time and place where she slept with appellant and his fellow.

At the height of the trial, the trial Magistrate was fully satisfied that the prosecution case was proved to the required standard, hence he convicted the appellant and sentenced him to thirty years imprisonment.

Dissatisfied by the decision of the trial court, the appellant appealed to this court, armed with three (3) grounds of appeal which reads;

1. **That**, the trial court erred in law and fact by convicting and sentencing the appellant based on concocted and contradictory evidences. Copy of

the judgment is hereby attached and marked as annexure "W" to form part of this appeal.

2. **That**, the trial court erred in law and fact by convicting and sentencing the appellant, though, the prosecution failed to prove the offence beyond all reasonable doubts.
3. **That**, the memorandum of matters agreed upon during preliminary hearing was not signed by section 192 (2) of the Criminal Procedure Act, [Cap 20 RE 2022]

Hearing of this appeal proceeded while the appellant's appearance was remotely connected from Musoma Prison and was represented by Mr. Wambura Kisika, advocate while Mr. Nico Malekela and Ms. Natujwa Bakari both learned State Attorneys represented the respondent, Republic.

Mr. Wambura was the first one to make the ball rolling, he abandoned the 3<sup>rd</sup> ground and prayed to join the first and second ground jointly on proving beyond reasonable doubt. He submitted that from the judgment which was delivered in November 2022 the appellant was convicted and sentenced for the offence of rape. He went further informing this court that in the judgement the victim did not mention the appellant but another person called Emmanuel.

It was his submission that in the whole evidence the victim mentioned their relationship started August 2022 while matter was on court since July 2022. Moreover, he said there is no solid evidence that show there was intercourse in that day and that they were together on that day. Even their arrest was different. Appellant was playing pool table and the victim was arrested while on the way (njiani) and even when the victim was led by the State Attorney, she said she does not know the date they did sexual intercourse that even she did not remember the place they meet.

Mr. Wambura further submitted that even the court noted that the testimony of the victim to be not systematic. Victim said she was arrested on the road because of grudge between the appellant and the victim's sister. It was the victim sister who make sure the appellant is arrested. When she was cross examined, victim explained that they slept with two other boys and she did not mentioned the appellant as it was dark and she never said they did sexual intercourse that night and penetration was not proved.

When the victim was asked the question during cross examination court noted the credibility of the witness that her testimony was shaking, there was a need of proper identification of the accused (now appellant).

All other witnesses testified over hearsay as none of them saw the action, this was part of Mr. Wambura submission. He further notified the court to be aware that contradiction may happen but those in material case goes to the root of the case and pray this court to find that prosecution failed to prove this case beyond reasonable doubt and find the appellant to be innocent, proceedings and conviction to be nullified, sentence set aside and the appellant to be set free.

Republic who was represented by Mr. Malekela did not have much to say. In his submission Mr. Malekelela informed the court that they agree with appeal on the ground that testimony of PW1, who was the victim, a part from other things she said her lover is Emmanuel, she said on the fateful date she slept in the house of the appellant but there were other boys and that she did not say with who she had sexual intercourse. It was directives of the CAT as was in the case of **Selemeni Makumba vs. Republic**, TLR 2006 No. 384.that in sexual offence cases the testimony of the victim is the best. The victim was not ready to mention the accused and therefore he pray this court to allow the appeal and set aside decision of trial court and set the appellant free as the offence before him was not proved.

Having carefully considered the submission by both parties, I will now embark on determination of the grounds of appeal fronted by the appellant. In doing so I will combine both grounds focusing on whether the case was proved beyond reasonable doubt.

This being a first appeal, this court is allowed to re-evaluate evidence and come up with its findings. See **The Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura** Civil Appeal No. 149 of 2017, CAT at Tabora (Unreported).

In this case the victim testified as PW1 and she gave her testimony on 18/10/2022 where she informed the court that she has no grudges with the appellant but her sister has grudges with the appellant. she mentioned her boyfriend one Emanuel Machande and that she had sexual intercourse once with the Steven but she doesn't know time and place. At page 9 of the proceedings court noted;

***'Court; Assessed credibility of PW1 as failed to tell court the exactly time and place where sexual intercourse was taken and if the accused of this case was responsible for such act despite the force from prosecutor, hence her credibility shaken on identification.'***

PW1 further informed the court during examination in chief that she started to be friends with the accused on August, 2022 while the case was filed July 2022. And she informed the court that it was 19/07/2022 when she went to appellant house, they had supper and the victim decided to sleep at appellants house with other boys and that during that night she consented to have sexual inter course without mentioning the name of the person as there were more than one boy. At page 10 of the proceedings the court again noted;

*'Court; Examination (sic) PW1 and **noted that her testimony are not systematic** on pointing the accused person in relation with case, court noted that, she is hiding something in order to protect the accused from penal sanction of this case.'*

There is no doubt that in this case that the trial court basically found the appellant guilty of the offence on the basis of evidence of prosecution witnesses and particularly that of PW1 whom he found to be credible. Much is appreciated, as was rightly contended by Mr. Malekela that, the best evidence in the sexual offence case comes from the victim - See **Selemani Makumba's case** (supra), this does not mean that such evidence has to be taken wholesome, believed and acted upon to mount a conviction against

the appellant without taking into account other prevailing circumstances -  
See **Pascal Sele vs. Republic**, Criminal Appeal No 23 of 2017 (unreported).

I see the need to revisit the principles which guide credibility of witnesses in that the assessment of the credibility of witnesses particularly on the question of demeanor lies on the trial court. In the case of **Shabani Daudi vs. Republic**, Criminal Appeal No. 28 of 2000 (unreported), the Court of Appeal propounded the manner credibility of witnesses can be assessed/determined. It stated as follows:

*'Maybe we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways; **one**, when assessing the coherence of the testimony of that witness. **Two**, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.'*

See Also **Silas Sendaiyebuye Msagabago vs. The D.P.P**, Criminal Appeal No. 184 of 2017 CAT At Mbeya (Unreported).



In the appeal at hand, the trial court made a finding that the appellant was not properly identified and that PW1 was not credible. These were enough grounds to conclude that prosecution failed to prove the offence beyond required standard as the rest of witnesses are victims' sister (PW2) and victim's Mother PW3 where both of them were told of the incidence hence their testimony are worthless.

With the submission of both parties and the finding of the trial court I find this appeal has merit and I allow it. Prosecution has failed to prove the offence of rape beyond reasonable doubt as mandatorily required by the law. The conviction of the Appellant is quashed and the sentence of 30 years imprisonment is set aside. I order for immediate release of the appellant from prison unless he is held therein for other lawful cause.

Dated at **MUSOMA** this 19<sup>th</sup> Day of May, 2023



*NK*  
**M. L. KOMBA**  
**JUDGE**

Judgement Delivered in chamber while parties were remotely connected, Ms. Natujwa Mr. Nico Malekela was connected from NPS offices- Musoma while the appellant was connected form Tabora 'B' prison -Mugumu.

*NK*  
**M. L. KOMBA**  
**JUDGE**  
**19/05/2023**