THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 96 OF 2022

(Originating from Mtwara District Court at Mtwara in Criminal Case No. 11 of 2022)

SAID MOHAMED NALYONA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 24.04.2023
Date of Judgment: 05.07.2023

Ebrahim, J:

Said Mohamed Nalyona, the Appellant herein was charged and convicted for the offence of **rape contrary to Section 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap 16 R.E 2019 (Now 2022)**. The particulars of the offence read that on the 3rd day of January, 2022 at Kilomba Village within the District and Region of Mtwara the Appellant

did have carnal knowledge of one ZAK (identity concealed) a woman aged forty-nine (49) years old.

As the records would reveal, prosecution evidence goes that on 03.01.2022, the victim (PW1) was at her home when the Appellant went to her house undressed and raped her. After that she was taken to Dinyechi Health Centre. PW2 testified that when she arrived at home, she found the Appellant raping PW1 and she decided to close the door so that the Appellant could not escape. She went to call her father and Mzee Mitema. After that they took the Appellant to the Village Executive Officer (VEO). From there they were given a letter to go to the police station and later they went to the health center in order for PW1 to be examined by the doctor.

Prosecution side called a total of seven witnesses and tendered two exhibits. Defence side called one witness, the Appellant himself. After hearing the evidence from both sides, the trial Magistrate found the Appellant guilty of the charged offence and convicted him as per the law. Aggrieved by the impugned judgment, the Appellant preferred the instant appeal raising six grounds of appeal as follows:

1. That, PW1 (alleged victim) was not a credible and reliable

witness whose evidence could not be relied upon to convict the Appellant;

2. That, the trial court erred in law and fact in convicting and sentencing the Appellant (30) years imprisonment, without considering that there was uncorroborated evidence between PW1 (alleged victim), PW3 (medical officer/doctor) and PW6;
3. That, the trial Magistrate erred in law and on fact by relying on a cautioned statement which was obtained involuntarily and un-procedurally tendered by PW7;
4. That the trial court erred in law and fact by convicting and sentencing the Appellant, without scrutinizing the credibility and reliability of PW1 (victim);
5. That the trial court erred in law and fact by convicting and sentencing the Appellant while the prosecution side failed to prove their offence against the Appellant beyond reasonable doubt as required by law; and
6. That the trial Magistrate erred in law and fact by convicting and sentencing the Appellant basing on the weakness defense of the Appellant.

When the case was called for hearing, the Appellant appeared in person whilst the Republic had the services of Mr. Mwapili, learned State Attorney. The Appellant briefly adopted his grounds of appeal and prayed for the court to consider them.

Responding to the grounds of appeal, Mr. Mwapili learned State Attorney contended that the six grounds of appeal mainly challenge as to whether prosecution has proved the case beyond reasonable doubt. He argued that the Appellant was charged with the offence of rape. He referred the case of **Godi Kasenegela vs. Republic,** Criminal Appeal No. 271 of 2006 CAT, which held that rape can be done on a person under 18 years. As the or over 18 years. The Appellant raped a woman of 49 years old, prosecution has a duty to prove two elements; one is penetration and second is consent.

PW1testified before the trial court that the Appellant raped her at her home, and the evidence of PW1 was supported by the evidence of PW3 (Medical doctor) who proved penetration and semen on the vagina of PW1. The Appellant also admitted that on 03.01.2022 he had sexual intercourse with PW1. The Appellant did not cross examine PW1 on the issue of consent.

He further argued that the Appellant was allowed to get inside the house of the victim. However, he had sexual intercourse with PW1without her consent. The argument that PW1 was his lover, does not prove consent. He thus said that the case was proved beyond reasonable doubt.

In brief rejoinder, the Appellant contended that he did not rape the victim (PW1). He was selling mats in the streets and PW1 welcomed him in her house and asked him to give her TZS 7,000/=. He gave PW1 TZS 5,000/= and PW1 agreed to have sex with him. He contended that there was no force used and also PW1 did not call for help. He explained further that when someone knocked, PW1 opened a back door for him. The brother-in-law of PW1 grabbed and took him to the police. He prayed to be set free.

I have carefully followed the rival submissions and the grounds of appeal as adopted by the Appellant. I am cognizant of the fact that this is the first appellate court hence I am obliged to step into the shoes of the trial court and make evaluation and analysis of evidence in observant of the fact that I was not privileged to observe the demeanor of the witnesses as illustrated in the case of **Mzee Ally**

Mwinyimkuu@ Babu Seya Vs Republic, Criminal Appeal No. 499 of 2017.

Going through the grounds of appeal, the main issue is **whether the prosecution proved the charge beyond reasonable doubt.** Before embarking on the journey of determining the above issue, as correctly stated by the learned State Attorney, the jurisprudential position in rape cases is that the best evidence comes from the victim. This is in accordance to **Section 127 (6) of the Evidence Act, CAP 6 R.E 2022** and the Court of Appeal decisions in a number of cases including the case of **Edward Nzabuga v. Republic,** Criminal Appeal No. 136 of 2008, sitting in Mbeya (unreported); and also the case of **Selemani Makumba Vs Republic** [2006] TLR 384 in which the Court at page 379 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 above principle not withstanding, the victim's evidence cannot be taken whole sale. The same must pass the truthfulness and credibility test as held by the Court of Appeal in the case of

Mohamed Said v. Republic, Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported). Therefore, it is upon this court to scrutinize the evidence adduced by the victim and decide as to whether it passes the truthfulness test.

The general rule in criminal cases is that the burden of proof rests with the prosecution (the state) see **Ali Ahmed Saleh Amgara v R** [1959] EA 654). Thus, The Republic has the primary duty of proving that the accused has committed the actus reus elements of the offence charged with the mens rea required for that offence. This can is reflected and found in the famous maxim that "he who alleges must prove". This means that the principal burden is on the accuser, and in criminal cases the accuser is the prosecution. The Court of Appeal in **Christian s/o Kaale and Rwekiza s/o Bernard Vs R** [1992] TLR 302 stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case. The rationale for this principle and legal position is that since the burden lies with the Republic, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters.

This position was clearly clarified and underscored by the court in **Milburn v Regina [1954]** TLR 27 where the court noted that:

> *"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

In the instant case, **PW1** before the trial court testified that she was raped by the Appellant, thereafter she was taken to Dinyechi health Centre. Responding to cross examination questions, she said, she is mentally fit, she did not shout at the time she was raped and she also consented for the Appellant to enter inside her house. From the viction's testimony I paused and asked myself as to why PW1 did not raise an alarm to dispute the incident in considering that no threat was registered or any force for that matter. **PW5** testified before the trial court that PW1 is crippled and that the Appellant carried her inside the house but there was no evidence that PW1 shouted instead she consented to be taken inside. **PW2** testified before the trial court that when she arrived at home, she found the Appellant raping PW1 (victim), so she decided to close the door so that the Appellant could not escape. Again, the question is how did she know that PW1 was being raped while from her testimony she did not tell the court

whether PW1 was shouting for help or there was any force used at the incident. Besides, PW2 was only 13 years old who might have felt that PW1 was raped. Thus evidence distress is important.

In responding to cross examination question PW2 testified that when she arrived at home, she found that the situation was calm. She also testified that she found the Appellant raping her mother (PW1) after undressing all of her clothes. PW2 did see PW1being undressed?

PW3 (Medical doctor) testified before the court that on 03.01.2022 as per the hand written proceedings, (03.11.2022 was a typing error in the typed proceedings) he did examine PW1. He found semen or sperms in PW1's vagina. He recognized that she was raped.

PW4 testified before the court that "nilichungulia dirishani na kumuona huyo mtu" was coming from bed room "anafunga funga suruali yake". Then he left to look for the owner of the house and he did not raise alarm that PW1 was raped by the Appellant. All in all, there is no evidence either from plus or any that prosecution witness to show PW1 did not consent to the sexual act.

In ground three of the appeal, the Appellant complained that the cautioned statement was not legally admitted in evidence.

Cautioned statement is legal if it is recorded within the time prescribed by the law i.e., four hours after the accused has been taken under restraint as per **Section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E 2022**, and if it is voluntarily procured.

In the case at hand, the proceedings on the record indicates that before the trial court the Appellant did not object the admission of the cautioned statement. The Appellant was arrested on 03.01.2022 as per the caution statement. The complaint on the date as raise by the Appellant was a typing error in the typed proceedings, but the hand written proceedings from the trial court it is written 03.01.2022. the Appellant was arrested on the same date for the offence of rape and the cautioned statement was recorded on the very date from 18:00 Hours to 19:20 Hours as shown in the exhibit P1 and page 24 of the typed proceedings. I am of the view that, indeed, the cautioned statement was recorded within time limit. The complaint that it was involuntary, in my view, would have been resolved by the trial court if the inquiry was conducted but the proceedings are clear that inquiry was not conducted as the Appellant did not raise any objection against the admission of the cautioned statement; see page 24 of the

typed proceedings. In that regard, the complaint at this appellate stage by the Appellant is an afterthought since there is no evidence about the claimed involuntariness that can be re-assessed by this court. Thus, the 3rd ground of appeal lacks merits, and it is dismissed.

The question before this court is whether **the prosecution side proved an offence of rape beyond reasonable doubt.**

After going through exhibit P1 (PF3) which was tendered by PW3, Part II (iii) provider that:

> *".... (iii) No Bruises wound but visible wet materials whiten in colour."*

Part IV, B (i) provided that:

> *"(i) Dead spermatozoa seen."*

The medical practitioners' remarks was that:

> *"The patient is seen with spermatozoa in the vagina which then Laboratory specimen taken and checked microscope and confirmed Dead spermatozoa in the vaginal, done softer penetration ....."*

Now another issue comes, from the remarks given by PW3 how did he prove that PW1 was raped.

However, it is the primary duty of prosecution to prove to the court

that the victim was actually raped by the Appellant and there was penetration. Indeed, the evidence of PW1, PW2, PW3, PW4, PW5 is full of contradictions and creates more doubts if PW1 was actually raped by the Appellant.

Furthermore, from the findings above, there was no truthfulness of PWI's testimony. Apart from the truthfulness of PW1, the credibility of other witnesses is also shaky as there is no coherence on their testimonies with that of PW5.

It is again trite law that in criminal law the guilt of the accused is never gauged on the weakness of his defence rather his conviction shall be based on the strength of the prosecution's case - **Christina s/o Kale and Rwekaza s/o Benard vs Republic,** TLR [1992] at page 302 and **Marwa Wangiti Mwita and Another vs Republic** 2002 TLR Page 39. The standard of proof is neither shifted nor reduced, it remains constant that the prosecution has a duty to establish the case beyond reasonable doubts.

Another aspect which is conspicuous is that the trial court did not consider and analyze the defence evidence. The trial magistrate mainly himself to the prosecution evidence. It is a well settled principle

that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment. This has been emphasized in various authorities by this court and the Apex count of this country.

The omission in law is fatal as it occasions injustice to the other party, the defence or the Appellant in our case. I wish to refer to the decision of the Court in **Hussein Iddi and Another Versus Republic** [1986] TLR 166, where the Court of Appeal of Tanzania held that:

> *"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence"*

It is also imperative to refer to the decision of the Court in the case of **Leonard Mwanashoka vs The Rebublic,** Criminal Appeal No. 226 of 2014 CAT at Bukoba (unreported) where it was observed that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny or*

evaluation and another thing not to consider the evidence at all in the evaluation or analysis. The complaint of the appellant was that in the evaluation of the evidence, his defence case was not considered at all and this is one of his grounds of appeal before us which was conceded by Mr. Hashim Ngole, learned Senior State Attorney."

The Court in **Leonard Mwanashoka (supra)** went on by holding that:

"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. ***The appellant's defence was not considered at all by the trial court in the evaluation of the evidence*** *which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction. See, for instance, (a) LOCKHART SMITH vs. R. [1965] EA 211, (b) OKTH OKALE v UGANDA [1965] EA 555, (c) ELIAS STEVEN v. R. [1982] TLR 313....."* ***[Emphasis added]***

Being the first appellate court I would have gone further and consider the same before making my findings. However, the same would not change the over whelming position that prosecution case falls short of proof in the standard set by law as I have shown above.

In the upshot, I find the appeal to be meritorious and I allow it. His conviction is therefore quashed and the sentence of thirty years in prison is hereby set aside. Consequently, the appellant is set free forthwith unless he is held for some other lawful cause.

Ordered accordingly.

R.A Ebrahim

JUDGE

Mtwara
05.07.2023