IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 30 OF 2023

(Appeal from the decision of the Resident Magistrates' Court of Manyara at Babati in Criminal Case No. 97 of 2021 dated 23/1/2023 Hon. Lusewa PRM-)

RASHID HAMADI SALUMU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

28/6/2023 & 17/8/2023

BARTHY, J.

The appellant Rashid Hamadi Salumu was tried before the Resident Magistrate's Court of Manyara at Babati (hereinafter referred as the trial court), for an offence of rape contrary to sections 130 (1) (2)(e) and 131 (1) of the Penal Code [CAP 16 R.E 2019 now R.E 2022].

It was the prosecution's evidence that on 18/1/2019 at Negamsii area within Babati District, the appellant had sexual intercourse with a girl aged 10 years old. For the purpose of protecting her identity, the girl shall be referred to as the victim or PW2.

The appellant pleaded not guilty to the offence; hence full trial ensued. In attempt to prove its case, the prosecution marched three witnesses and tendered one documentary exhibit. On the defence side, appellant was the sole witness for the defence.

Upon hearing the matter, the trial court was convinced that the case against the appellant was proved beyond reasonable doubt and proceeded to convict the appellant and sentence him to serve thirty years imprisonment.

A brief factual account underlying this appeal as gathered from the record is such that, on 18/1/2019 at 1700hrs, the appellant went to the victim's home purposely to take her to Madrassa, claiming the victim was needed by the madrassa teacher commonly referred to as Ustadhi. The victim accompanied the appellant to the Madrassa.

The record reveals that upon arriving at the madrassa the teacher was not there and the appellant locked the victim inside the classroom and ordered her to undress, but the she refused. The appellant forcefully undressed her and he undressed himself. Then he put his manhood to the victim's womanhood.

The victim claimed she felt pain and wanted to scream, but the appellant covered her mouth. Having satisfied his sexual gratification, the appellant let go of the victim and ordered her not to tell anyone. As she arrived home, the victim did not tell anyone until the following morning when she told her mother (PW1) about her ordeal.

The matter was reported to the police, the victim was issued with PF.3 and went to Mrara Hospital where she was attended by PW3. In his findings PW3 discovered that the victim had some bruises in her womanhood on labia majora and labia manora, but the hymen was intact. PW3 suggested that the bruises were caused by a blunt object which tried to penetrate her but in vain.

On the defence testimony the appellant denied to have raped the victim. He contended that on 18/1/2019 he was at Arusha, then he received a phone call complaint from his mother and Ustadhi at Babati on allegations that he raped the victim.

He further testified before the trial court that; he had a fight with the victim's mother. He also stated that, the victim's mother wanted to be paid Tsh. 5,000,000/= for the appellant to be pardoned.

The trial court was convinced that the prosecution side proved the case beyond reasonable doubt then it convicted and sentenced the appellant as shown above.

Aggrieved with the conviction and sentence meted out against him, the appellant preferred the instant appeal with six grounds of appeal which can be paraphrased as follows;

1. *That there was variance between the charge and the evidence adduced.*
2. *That there was unexplained delay from the date the alleged offence was committed to the date the appellant was arrested.*
3. *That the trial magistrate erred in not considering the evidence of PW3.*
4. *That exhibit P1 was not read over after being admitted.*
5. *That the evidence of the victim was an afterthought as she failed to report the matter earliest possible.*
6. *That the case against appellant was not proved beyond reasonable doubt.*

The appeal was disposed of by written submissions. The appellant had no legal representation while the respondent's reply submissions were drawn and filed by Ms. Kisinga and Ms. Kayumbo learned state attorneys.

The appellant in his submission he argued the first and third grounds of appeal jointly. He submitted that there was variance between the charge and the evidence adduced. He pointed out on the testimony of PW3 a doctor who examined the victim, stating that the victim's hymen/virginity was intact meaning not tempered. Also, PW3 did not know who had attempted to rape the victim as he just examined her.

The appellant further submitted that, looking at the testimony adduced by PW3 it is apparent that the victim was not raped rather there was an attempt to rape her. He submitted that; the bruises were found on the outer part of the victim's womanhood as testified by the doctor. It was his submission that the same can be caused by many objects such as fingers or sticks. He therefore urged the court to find the offence of rape was not proved against him.

On reply submission, the respondent contended that the appellant's claim on the first and third grounds of appeal are baseless. It was

submitted that the best evidence in rape cases comes from the victim as it was stated in the famous case of **Selemani Makumba v. Republic** [2006] TLR 379.

The learned state attorneys for respondent contended that, in the instant matter the victim clearly narrated on how she was raped. As she categorically stated the appellant had locked her in the room and asked her to undress her clothes and when she refused the appellant forcefully undressed her and inserted his manhood in her womanhood while closing her mouth so that she could not shout for help.

The respondent argued further that there was no variation between the charge and evidence adduced in the instant matter.

On rejoinder submission the appellant maintained that, PW3 told the trial court that there was an attempt to rape the victim. The appellant submitted that in normal circumstances, sexual intercourse can be proved by penetration. However, the hymen of the victim was intact, but she only had bruises on outer parts of the victim's womanhood.

Having gone through the submissions of the parties in respect of the first and third ground of appeal, the issue for my determination is whether there was variance between the charge and evidence adduced.

In determining these grounds, considering that this court is sitting as the first appellate court, it is enjoined to reassess the evidence on record and where possible to come up with its own findings, where there was non-direction or misdirection of the evidence by the lower court.

The appellant's arguments on the first and third grounds of appeal is that, the charge which was preferred against him was that of rape. However, the testimony of PW3's did not establish the offence of rape, rather an attempted rape. He maintained that, since the victim's hymen was found intact, then the element of penetration to prove sexual intercourse was not established as seen on Exh. P1 (PF.3).

I have visited the evidence adduced by PW3 who informed the trial court that, he examined the victim and found bruises on the outer part of the victim's womanhood implying there was the force used. PW3 narrated that he did not know who attempted to rape her as he just examined her.

Righty as submitted by the respondent, in rape cases the best evidence comes from the victim, as decided in the case of **Selemani Makumba v. Republic,** (supra) The Court of Appeal of Tanzania stated as follows:

> *"The true evidence of rape has to come from the victim if an adult that there was penetration and no consent and in the case of any other woman where consent is irrelevant that there was penetration."*

See also the case of **Paulo John v. Republic,** Criminal Appeal No. 420 of 2017, Court of Appeal of Tanzania at Mwanza (unreported).

Guided by the above authorities, I have considered the evidence of the victim who narrated on how the appellant took her to the *madrassa* and closed the door, then he undressed the victim and himself and inserted his manhood into her womanhood. The victim is quoted stating that;

> *...he put me on the floor and he took off his trousers and boxer and he inserted his uume/manhood in my womanhood. I felt pain..."*

The fact that the victim was the girl of 10 years, the prosecution side was only required to prove the element of penetration to establish the offence of rape. The appellant's argument that the hymen of the victim was found by PW3 to be intact, therefore the element of penetration was no established.

The law is also clear that, in proving the offence of rape, penetration however slightest is sufficient to establish the offence. The emission of semen or rapture of the hymen is not necessary element to prove there was partial or full penetration to amount to the offence of rape.

It is the finding of this court that the offence of rape was proved in the standards required. These grounds are therefore devoid of merit, consequently, the first and third grounds of appeal are accordingly dismissed.

The appellant also made his further submission by combining the second and fifth grounds of appeal. He argued that there are some crucial matters which were not resolved by the trial court and they raise some serious doubts.

The appellant pointed out that, the offence was committed on 18/1/2019 at Negamsi Manyara, but the victim reported the incident to her mother on 19/1/2019. However, the appellant was arrested on 20/7/2021 and was arraigned before the trial court on 11/11/2021, two years after the commission of the offence.

The appellant claimed there was no explanation as to the reason behind delaying to report the matter to the police station. Thus, the victim's evidence was doubtful. He further argued that, the reason offered by the victim for not reporting the matter timely are not watertight. He maintained that the case against him was fabricated due to the grudges with the victim's mother.

On reply submission the respondent contended that, the victim reported the matter on the next day morning; because on the fateful day there were some visitors thus, she failed to tell her mother (PW1).

As to the contention that the appellant was arrested two years after the commission of the offence, the learned state attorneys argued the issue which was not raised during the trial therefore it is was afterthought and should be disregarded.

The respondent referred to the case of **George Senga v. The Republic,** Criminal Appeal No. 108 of 2018, Court of Appeal of Tanzania at Arusha (unreported). They further contended that, a delayed arraignment cannot affect prosecution case as the accused person was accorded a fair trial. The reference was made to the case of **Maligile Maingu v. The Republic,** Criminal Appeal No. 432 of 2021, Court of Appeal of Tanzania at Kigoma (unreported).

On rejoinder submission the appellant essentially reiterated his submission in chief.

Having gone through the parties' argument in respect of the second and fifth grounds of appeal, the appellant's complaint is twofold. First, the victim delayed to report the matter and the appellant was arraigned two years after the commission of the offence.

On the issue of delay of the victim to report the incident. It is on record that, the alleged offence was committed on 18/1/2019 at around 1700hours. The victim told the trial court that after she had been raped, she returned home where she found her mother with visitors; thus, she could not tell her what had befallen her until the next morning.

It is the settled principle that, a suspect has to be named as soon as practicable. That position has been underscored in numerous decisions. In the case of **Festo Mawata v. Republic,** Criminal Appeal No. 229 of 2007 (unreported), the Court of Appeal said;

> *"Delay in naming a suspect* ***without a reasonable explanation*** *by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."* [Emphasis added].

Also, in the case of **Venance Nuba and Tegemeo Paul v. Republic,** Criminal Appeal No. 425 of 2013 (unreported), the Court of Appeal said;

> *"... this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."*

See also, **Aziz Athmani @ Buyogera v. Republic,** Criminal Appeal No, 222 of 1999, **Juma Shabani @ Juma v. Republic,** Criminal Appeal

No. 168 of 2004, **John Balagumwa and two others v. Republic,** Criminal Appeal No. 5 of 2013 (all unreported), among many others.

According to the evidence available on records, there was explanation as to why the victim was unable to disclose the incident to her mother. She said there were visitors at home: hence, she had to wait until the next day. The appellant did not cross examine the victim about this aspect which amounts to acceptance of those facts.

This position of the law has been restated in number of cases such as **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 8 of 1992 and **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (all unreported) to mention but few. In the latter case, the Court of Appeal observed as follows;

> *"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 evidence."*

On the other hand, the appellant has claimed that, there was unexplained delay in his arraignment before the trial court. It is not in

dispute that the alleged offence was committed on 18/1/2019 while the appellant was arraigned before the trial court on 11/11/2021.

Indeed, the record is silent as to why it took sometimes before the appellant was arraigned before the court. As the investigator of the case could not appear and testify. However, I find that the omission to have no explanation on delayed arraignment did not occasion any miscarriage of justice to the appellant. As the records reveal the appellant was accorded a fair trial.

Consequently, I find the second and fifth grounds of appeal to have no merits and the same are accordingly dismissed.

Lastly the appellant submitted jointly on the fourth and sixth grounds in which he faulted the trial court for convicting him without the prosecution side proving his case beyond reasonable doubt. He also submitted that, PF.3 which was admitted as exhibit P1 was not read out after its admission.

The appellant went on to argue that, the offence which he was charged with was never proved beyond reasonable doubt, he urged the

court to quash and set aside the conviction and sentence meted out against him.

On reply submission the respondent contended that once a document is admitted, the same must be read out in court. Whereas, failure to read the exhibit after its admission is fatal and it denies the accused right to know the contents of the documents. The appellant prayed for the same to be expunged from the record. He cited as his authority the case of **Mwinyi Jamal Kitalamba @ Igonzi & 4 others v. Republic**, Criminal Appeal No. 348 of 2018, Court of Appeal of Tanzania at Dodoma (unreported).

The respondent in the reply submission pointed out that, even if exhibit P1 will to be expunged from the records, still an oral account of PW3 remains and it corroborate the evidence of the victim.

Responding on the claim that the offence was not proved beyond reasonable doubt, the respondent reiterated its earlier position that, penetration however slight is sufficient to prove the offence of rape.

The appellant on his rejoinder submission he essentially reiterated his argument made in his submission in chief.

On these grounds, regarding the requirement to read out the documentary exhibit after its admission. It is the settled principle that, the document must be first cleared for admission, then it must be admitted and then must be read out. The purpose is to make the party against whom the document is tendered, to be aware of the contents of the said document.

This position has been restated in numerous decisions, to mention but few; **Walii Abdallah Kibuta and two Others v. Republic**, Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa and three Others v. Republic**, Criminal Appeal No. 132 of 2015, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. Republic**, Criminal Appeal No. 186 of 2018 (All unreported).

In the instant matter the only documentary evidence was exhibit P1 (the PF.3) which was tendered by PW3. The appellant claimed that the said exhibit was not read out after being admitted. On this ground I agree with the appellant on this aspect because the record reveals that the said exhibit was never read out by PW3 after it was admitted. Hence, Exh. P1 is expunged from the records of the trial court.

On the last aspect in which the appellant claimed that the case against the appellant was not proved beyond reasonable doubt. As pointed earlier, the best evidence in rape cases comes from the victim and there must be proof of penetration however slight.

The victim was able to narrate how the appellant took her to the madrassa and undressed her later he inserted his manhood into the victim's womanhood. The appellant and the victim knew each other since 2017, before the commission of the offence at hand to have not been able to identify the appellant.

The appellant testified that she had no grudges with the victim, therefore there was no reason whatsoever for the victim to implicate the appellant with such serious offence.

The appellant had stated on his testimony that he had grudges with the victim's mother (PW1), however he never cross examined the victim's mother (PW1) on that aspect. Therefore, his claims that there were grudges between them is just an afterthought.

The court therefore finds that the prosecution side was able to prove the case against the appellant beyond reasonable doubt. Consequently, the

second and sixth grounds of appeal lack merits and are accordingly dismissed.

In final analysis I find the appeal lacking in merits and the same is dismissed in its entirety. The conviction and sentence meted out against the appellant by the trial court are upheld.

It is so ordered.

Dated at **Babati** this 17th August 2023.

G. N. BARTHY

JUDGE

Delivered in the presence of the appellant in person and Mr. Raphael Rwezaula learned state attorney.