IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 13 OF 2023

(Originating from Resident Magistrates' Court of Katavi at Mpanda in Criminal Case No. 71 of 2021)

UWEZO MUSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

25/05/2023 & 05/09/2023

MWENEMPAZI, J.

The appellant herein was arraigned before the Resident Magistrates' Court of Katavi at Mpanda (Trial Court) for the offence of rape contrary to Section 130(1), (2)(a) and 131(1) of the Penal Code [Cap. 16 R. E. 2019].

It was alleged by the prosecution side that, on the 12th day of July, 2021 at Kabanga Village within Tanganyika District in Katavi Region, the

appellant did have sexual intercourse with one lady (name concealed) aged 50 years, without her consent.

On the 12th day of August, 2021, he was marched to the trial court where the charge was read before him and pleaded not guilty. However, at the end of the trial, he was found guilty and he was convicted of the offence he was charged with, and thus sentenced to serve a term of thirty (30) years imprisonment and to suffer twelve strokes of cane in his buttocks and compensate the victim Tshs. One Million only. (1,000,000/=).

Aggrieved by that decision, the appellant filed a petition of appeal to this court which consists of five grounds, in which they all suggest that he has been convicted over the charge which was not proved beyond the required standards of the law.

On the 25th day of May, 2023 when this appeal was scheduled for hearing, the appellant had no legal representation while the respondent, Republic enjoyed the legal services of Ms. Marietha Maguta, learned State Attorney.

As he was invited to submit for his grounds of appeal, the appellant submitted that he prays for this Court to receive the grounds of appeal and consider them, and allow this appeal.

Responding to his submission, Ms. Maguta submitted that her side does not support this appeal. That, she prayed to submit against the five grounds of appeal basing on the fifth ground which involves all the other grounds.

She submitted that; on the fifth ground of appeal, it is argued that the prosecution did not prove the case beyond reasonable doubt. That, the prosecution side summoned five witnesses to testify for the prosecution, whereas PW1 was the victim herself and at page 9 – 10 of the trial court's proceedings, the victim has testified that the appellant went to her place where she was sleeping and forced her to have sexual intercourse. That, the event occurred at first in the kitchen and then they moved to the bedroom. That, after sex the victim fell asleep, and that was the opportunity for the victim to seek for help.

Ms. Maguta proceeded that, during the whole event the victim was being threatened by the appellant that if she screams, he will kill her. Ms. Maguta insisted further that, the best evidence is that of the victim as it

was decided in the case of **Seleman Makumba vs Republic [2006] TLR 380,** and that the evidence is supported by PW4 and PW5 at page 14 and 21 of the trial court's proceedings respectively.

The learned State Attorney proceeded further that PW5 testified that after examination he found the victim had been forcefully penetrated into the vagina (page 21 and 22 of the proceedings) and thus, the argument by the appellant that there was no caution statement is not a good argument, and that it is also not true that the doctor said there was no penetration.

Ms. Maguta submitted further that, the argument by the appellant that the trial Court failed to evaluate the evidence is not true, as it did evaluate the evidence properly and that there is no any irregularity.

In addition to that, Ms. Maguta insisted that the victim could not raise an alarm because the appellant had held her by the neck and threatening to kill her if she screams. She referred me to pages 11 (PW2) and (PW3) at page 12 and PW3 at page 21.

In conclusion, Ms. Maguta submitted that all witnesses for the prosecution were credible and reliable witnesses. That, there was no reason not to believe their story as it was held in the case of **Goodluck**

Kyando Vs. Republic [2006] TLR 363. And that, she prays this Court to upheld the decision of the trial Court as the case against the accused (appellant) was proved beyond reasonable doubt.

In his rejoinder, the appellant submitted that first, PW1 failed to show the bruises which she alleged were on the neck and knees. That, she could not show because she believed nothing of the sort had been done to her, and that the victim failed to prove the presence of the scars as alleged.

Secondly, he added that the doctor testified that he examined the victim and found she had normal disease and bruises on the neck and knee and penetration into the vagina. He negated the submission by saying it was not true as there was no penetration.

The appellant then insisted that the trial Court did not do justice to him. He therefore prays for this appeal to be allowed.

Reading the trial court's judgment, it appears that, to a large extent the appellant's conviction was based on the testimony of the victim (PW1), PW5 and the PF3 which was tendered as Exhibit and marked as **P1**. An important question that arises is **whether the testimonies of PW1,**

PW5 and the PF3 sufficiently proved the appellant's guilt before the trial court.

The appellant's complaint in his grounds of appeal as I hinted earlier is to the effect that his conviction was based on a case which was not proved to the required standard.

I am aware of the rule that usually the trial court is best placed to determine the credibility of witnesses (See **AUGUSTINO KAGANYA ETHANAS NYAMOGA AND WILLIAM MWANYENJE v REPUBLIC** (1994) TLR 16 (CA). But it is also settled law that the duty of the first appellate court such as this, is to reconsider and re-evaluate the evidence and come to its own conclusions bearing in mind that it never saw the witnesses as they testified (See **PANDYA v REPUBLIC** (1957) EA 336.

The victim had testified that it was the appellant who raped her during the night of the 12th day of July 2021, as she was asleep and the appellant forced his way through the door and held her by the neck and threatened her if she resists his sexual intercourse desires, he will kill her.

It is true that the best evidence is that of the victim as it was submitted by the learned State Attorney and she referred me to the case

of **Seleman Makumba vs Republic** (supra) in insisting on her submission.

However, words of the victim of sexual offence should not be taken as gospel truth, but her or his testimony should pass the test of truthfulness. This was the holding in the case of **Mohamed Said vs The Republic, Criminal Appeal No. 145 of 2017** CAT – Iringa.

PW1 testified that, as the appellant undressed himself, he also undressed her as she had no under pants, and he took out his penis and forcefully inserted into her vagina. That, he sexually entered her for four hours and they shifted from the kitchen to the bedroom, where he continued his activity until when he was finished then he slept as he was drunk. She testified that, she then locked the appellant inside and alarmed for help.

The only witness alleged to have reached the crime scene and summoned to testify was PW4, **MOSES JUMA CHOBARAHAYE.** He testified that on the night of the 12th day of July 2021 at around 01:00 hours as he was asleep at his house, he was awaken by a woman and a man namely Lalison Kagoma. That, the woman told him that she was raped by a man who is still at her house as she had locked him inside.

Therefore, PW4 went to the victim's house and as he entered it, he had a torch he found the appellant sleeping.

PW4 never testified on the state the appellant was by the time he found him inside the house of the victim to suggest that he was having sexual intercourse or he had raped the victim. I say so because, PW1 testified that, after the appellant had finished raping her, he slept as he was drunk. There after she locked him inside the house until when PW4 came inside the house and so the appellant sleeping, but PW4 did not state in which condition was the appellant in, was he naked or not? I believe, the appellant had no time to dress up as he was drunk and as he finished raping the victim as alleged, he passed out. This detail, to me it is very vital, because when one finds a stranger in another person's house it does not prove rape straight away, it could also suggest burglary.

Nevertheless, the appellant has not denied being found at the victim's house, only that in his defence he denied to be found inside the house but rather outside the house, as he was drunk and could not walk to his home, he decided to snooze outside the victim's house and he was awaken by a light of the torch and sounds of people who started attacking him. That, he knew of the offence he was charged with to be rape when he was taken to the office of the Village Executive Officer (PW3).

In that regard, the testimonies from PW2, PW3 and PW4 apart from being hearsay evidences, they did not in any way support PW1's testimony that she was raped by the appellant. PW1 alone remains the only witness to the incidence, and the fact that they started the intercourse at the kitchen and later on shifted to the bedroom and continued for four hours, this testimony has my eyebrows raised as I find it hard to believe. In addition to that, PW4's testimony also is too ambiguous as he did not testify what made him believe that the appellant raped the victim, was it her condition maybe she had an oozing blood or was the appellant naked as he was drunk.

As the matter of fact, the appellant complained in the second ground of appeal that the Medical Officer testified before the trial court that he found bruises on the neck and knees with no penetration which leads to unconnected crime.

Indeed, in the records of the trial court, PW5 in his testimony did testify that the cervical prolapse had dropped and the victim had told him that she had medical problem that got worsen after being raped, but he did not find any fluid, spermatozoon or bruises, but suggested that the victim was forcefully penetrated.

PW5 did fill in Exhibit P1 in which he did examine the victim and saw neck scratch marks, facial bruises and neck tenderness, but also there was normal labia majora and minora and the uterine prolapse. However, he did not see any discharges or signs of venereal infections. It was his expert suggestions that from the history and his examination that the incidence is suggestive of rape.

In my perusal, I realised that despite the fact that the victim complained of having been raped, PW5 did not see fluid, sperms bruises or blood into the victim's vagina. It is important to note as I pointed out earlier that PW4 being the only summoned witness who went to the scene of crime never testified on the condition he found the appellant in, whether it was too suggestive that, the appellant had raped the victim. Moreover, PW4 also never testified that he indeed found the victim in a situation of a person who had been forced to have sexual intercourse for four hours.

To that extent PW5's testimony did not support the prosecution's case. In view of the medical officer, it is as if the victim was not penetrated, as she had medical problems herself. **See** Exhibit P1 (PF.3).

In rape cases, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence as provided for under section 130(4) (a) of the Penal Code, Cap 16 R.E 2022. In the case of **Omary Kijuu vs The Republic, Criminal No. 39 of 2005**, Court of Appeal at Dodoma at page 8 it stated that: -

> *"But in law, for the purposes of rape, that amounted to penetration in terms of section 130 (4) (a) of the Penal Code Cap. 16 as amended by the Sexual Offences Special Provisions Act 1988 which provides:*
>
> ***For the purposes of proving the offence of rape – penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence"***
>
> [Emphasis is Mine]

Having analysed all the records of appeal before me, I am fortified that the testimonies of PW1 and PW5 and the exhibit P1 tendered were not sufficient to prove the appellant's guilt before the trial court, and I do concur with the appellant that his conviction was based on the case which was not proved beyond the required standards of the law.

not sufficient to prove the appellant's guilt before the trial court, and I do concur with the appellant that his conviction was based on the case which was not proved beyond the required standards of the law.

I therefore proceed to quash the appellant's conviction. The sentence earlier imposed upon him is hereby set aside. I then order the appellant's immediate release from custody unless he is held therein for other lawful cause.

It is so ordered.

Dated at Sumbawanga this 05th day of September, 2023.

T. M. MWENEMPAZI

JUDGE