IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

DC-CRIMINAL APPEAL NO. 08 OF 2023

(Originating From Criminal Case No. 24 of 2021 of the District Court of Kigoma)

HASHIM MAJALIWA..... ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last Order: 02/08/2023

Date of Judgement: 15/09/2023

JUDGEMENT

MAGOIGA, J.

In the district court of Kigoma (trial Court), the respondent, **HASHIM MAJALIWA** was arraigned for the offence of Rape contrary to section 130(1) (2) (e) and 131 (1) of the Penal Code, [Cap 16 R.E. 2019].

After full trial, the trial court found the appellant guilty of the offence and consequently convicted him and sentenced him to life imprisonment.

Aggrieved with the conviction and sentence of the trial court, the appellant preferred this appeal to this court armed with five grounds of appeal, couched in the following language, namely:

1. *That, the trial court erred in law and in fact for convicting the appellant without regarding that the prosecution side was not proved beyond reasonable doubt;*
2. *That, the Magistrate erred in law by convicting the appellant without considering that it was a fabricated case and also, without considering the defence of alibi provided by the appellant;*
3. *That, the trial court erred in law by convicting the appellant without taking into consideration the evidence provided by the Doctor does not support the occurrence of rape did not prove beyond reasonable doubt;*
4. *That, the trial court erred in law by convicting the appellant without proper consideration of law whereby there was no caution statement from the police tendered before the court to support the allegation; and*
5. *That, the honourable court erred in law and fact in convicting the appellant without considering the cardinal principle that the appellant cannot be convicted on the weakness of his/her defence but on the strength of prosecution evidence adduced.*

On the strength of the above grounds, the appellant prayed that this appeal be allowed by quashing the conviction, set aside the sentence and set him free.

The brief facts as gathered from the charge sheet are that on the 14th day of October, 2020 at Kilimahewa area within the District and Region of Kigoma, the appellant did have canal knowledge of one **M d/o E** (pseudo name) a girl of 6 years old.

When this appeal was called on for hearing through video conference, the appellant was present in person and unrepresented while the respondent was represented by Ms. Antia Julius, learned State Attorney.

When the appellant was called on to argue his appeal, he preferred to hear the State Attorney first and will reply thereafter.

Ms. Julius opposed all the grounds of appeal by starting arguing on grounds 1 and 5 together and rest were argued separately. The learned Attorney submitted that the case against the appellant was proved beyond reasonable doubt. According to the learned Attorney, in rape cases, what is proved is age, penetration and perpetrator of the act. To buttress her position Ms. Julius cited the case of **Makende Philmon vs Republic,** Criminal Appeal No. 462 of 2017 CAT.

Therefore, Ms. Julius told the court that, all three ingredients were proved whereby the age was proved by the victim, parents and the doctor.

On penetration, Ms. Julius argued that it was as well proved by the doctor, the parents and the victim herself, and, lastly that, it was the appellant who did such penetration to the victim.

Ms. Julius further clarified that, the appellant was known to PW1 and PW2 thus the case for prosecution was proved to the required standard.

On the 2nd ground of appeal, the leaned Attorney argued that the trial court considered the appellant's evidence but which did not shake the prosecution case.

On the defence of alibi, Ms Julius admitted that it is true it was not considered, but she was quick to point out that, the court was justified not to consider because under sub section 4 of section 194 of the Criminal Procedure Cat, [Cap 20 R.E 2019] same was raised after close of the prosecution case. On top of that the learned attorney argued that the required notice was not filed and it was raised during cross examination thus the trial court was justified not to consider. Additionally, Ms. Julius pointed out that so much as the accused was identified, the defence of alibi dies a natural death. To buttress this position, Ms Julius cited the case of **Mathias Maura vs Republic**, Criminal appeal No. 136 of 2020 CAT which gave the guidance on this.

On the 3rd ground of appeal, Ms. Julius argued that the same is baseless because of what she stated that the victim was found without virgin and the doctor established that there was sexual intercourse. She referred to the case of **Seleman Makumba vs R**. [2003] TLR 384 which gives guidance relevant to this case.

On the 4th ground, Ms. Julius argued that it is baseless because no law which obligates the prosecution to tender caution statement. She thereafter prayed this ground to be dismissed as well.

On the totality of the above reasons, the learned Attorney prayed the appeal to be dismissed and the conviction and the sentence be upheld.

Arguing the appeal, the appellant told the court that he does not remember when he went to the victim's home and she did not witness rape. He pointed out that there is no extent of damage was established. The child was taken to hospital after 5 days. The appellant denied the fact that the child remained quiet for 5 days saying that at page 10 she said she returned and never took any measures. To the appellant's view, their silence proves he never did such act.

On the 2nd ground, the appellant submitted that the case was framed in order to threaten him from claiming his salary. He pointed out that he left work because he was not paid his salaries which is the cause of all fracases. The appellant denied rape, but rape case was to silence him from getting his salaries.

Arguing on the 3rd ground, the appellant stated that, the Doctor's testimony is contradictory with other evidence since no Aids was found with the victim after testing.

On ground 4 the appellant laments that he was not interviewed nor questioned on the comission of the offence. About the admission of the sketch map, the appellant argued that it did not prove the offence in this case.

As to the 5th ground, the appellant argued that PW5 did not prove rape because no bruises as such not proved. He finally prayed his appeal to be allowed and set him free.

This marked the end of hearing of this hotly contested appeal. The task of this court now is to determine the merits or otherwise of this appeal in the light of evidence on record.

While the respondent has a diametrical view that the case was proved beyond reasonable doubts as it is required in offence of rape, the appellant, however holds the view that the prosecution side did not prove the case but relied on the weakness on the part of defence. The appellant laments that no extent of damage was established and the child was taken to hospital after 5 days.

It is a trite law that in criminal proceedings the burden of proof lies on the prosecution as rightly provided for under section 110 of the evidence Act [CAP 6 R.E 2022] read together with section 3 (2) (a) of the Act. This position was also held in the case of **Jonas Nkinze Vs Republic** [1992] T.L.R 213, held:-

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution; is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"

Certainly, and as a general rule, the prosecution has a noble duty to establish a prima facie case and prove the offence against the accused beyond reasonable doubt. The same principle was repeated in the case of **Joseph John Makune Versus The Republic [1986] T.L.R 44,** held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence"

I have perused all the proceedings and judgment of the trial court to see if the prosecution proved the offence of rape as provided for under section 130 (1) (2) (e) and 131(1) of the penal code [CAP 16 R.E 2019].

Having heard the submissions by the learned State Attorney in respect of the 1st and 5th grounds of appeal which revolves around that the case for the respondent was not proved and having gone through the entire proceedings, I entirely agree with the learned State Attorney for the reasons argued that the case against the appellant was proved to the required standard i.e. beyond reasonable doubt, in criminal cases.

To prove rape is to establish penetration of a male reproductive organ to a female organ (Vagina). In the record of appeal, PW2 proved that she

was raped which evidence is supported by the evidence of PW5 a medical doctor who proved that her hymen of PW2 was perforated. At page 29 of the typed proceedings, PW5 testified that on ...../10/2020 he received the victim and performed his duty as a medical practitioner and here I quote **"I examined the victim anus and vagina, in her vagina I found that her hymen was perforated to the big extent..."** the contention that the child was taken to hospital after 5 days bears no any colour of justification because according to PW5's testimony and exhibit P1 the victim was examined after a lapse of 48 hours equal to two days. I am of considered opinion that basing on the evidence of the victim and that of the doctor, penetration was proved. I thus rest the first and fifth grounds as such by dismissing them for want of merits.

On the 2nd ground of appeal where the appellant was of the view that the case was framed in order to threaten him from claiming his salary, the respondent replied that the court considered the appellant's case which did not shake the prosecution case. On the defence of alibi, Ms. Julius admitted that it is true it was not considered but she however stated that the court was justified not to consider because under sub section 5 of section 194 of the Criminal Procedure Act, same was raised after close of the prosecution case.

As rightly submitted by the counsel for the Respondent, it is a requirement of the law that a person who intends to use the defence of alibi he must give notice, or else, his defence may not be given weight as it will be considered as an afterthought. The provision of subsection 4 of section 194 of the Criminal Procedure Act [Cap 20 R.E 2020] provides;

> *(4) Where an accused person intends to rely upon an* ***alibi*** *in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*

On top of that, the law gave the room for the person who might have failed to meet the requirement of subsection 4 by putting subsection 5 that if it happens so then the accused person may furnish the particulars of alibi before the case for prosecution is closed. Which subsection provides

> "*(5) Where an accused person does not give notice of his intention to rely on the defence of* ***alibi*** *before the hearing of the case,* ***he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed."*** [emphasis mine].

In the circumstances of the instant appeal, the appellant did neither use the legal opportunities available in law, hence, the trial court was justified not to give weight to the appellant's defence of alibi. On the foregoing reasons, I find that this ground also has to fail.

Next is the third ground of appeal which the appellant's main complaint is about the trial court to convict the appellant without taking into consideration the evidence provided by the doctor that it did not support the occurrence of rape and it was not prove beyond reasonable doubt. The appellant alleges that the doctor's testimony is contradictory with other evidence since no AIDS was found with the victim after testing. The respondent replied that the ground is baseless because of what the doctor stated was that, the victim was found without virgin and the doctor established that there was sexual intercourse. Without much ado, this ground as it has already been discussed in grounds 1 and 5 above, in rape cases what is looked upon is penetration and nothing else. Much as penetration in this appeal was proved, therefore, the prosecution proved its case.

On the foregoing reasons, the arguments by the appellant that the doctor's evidence did not support the occurrence of rape and it was not proved beyond reasonable doubt are but without any useful merits in this appeal are hereby rejected, and, dismissed.

The last ground is couched that the trial court convicted the appellant without proper consideration of law whereby there was no caution statement from the police tendered before the court to support the

allegation. The learned State Attorney reply was to the effect that no law which obligates the prosecution to tender caution statement.

With due respect to the appellant, I join hand with the learned Attorney that the law is silent on this matter, hence, difficult to adjudge that by failure to tender the caution statement amounted to disprove the case as required by the law.

On the foregoing, I find no merits in this ground too and same is equally dismissed for want of merits.

That said and done, I find this appeal devoid of any useful merits, and consequently, is hereby dismissed in its entirety

It is so ordered.

Dated at Kigoma this 15th day of September, 2023

S.M. MAGOIGA

JUDGE

15/09/2023