IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 126 OF 2022

(C/F in the District Court of Monduli at Monduli in Criminal Case No. 25 of 2019)

WILLIAM S/O LAZARO.....1ST APPELLANT

KASONGO S/O ALLY @ NASSORO.....2ND APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

09/08/2023 & 30/10/2023

GWAE, J

Before the District Court of Monduli at Monduli, William Lazaro and Kasongo ally @ Nassoro, the 1st and 2nd appellants respectively, were charged, tried and eventually convicted of the offence of rape contrary to section 130 (1) and (2) (a) and 131 (1) of the Penal Code [Cap 16 Revised Edition, 2002].

The prosecution alleged that on 11th December 2018, at Makuyuni area within Monduli District and Region of Arusha, the appellants did have sexual intercourse to one Hidaya d/o Said aged thirty (30) years old

without her consent. The appellants demonstrably pleaded not guilty to the charge.

The background leading to this appeal is as follows. It all started when PW3, the victim of the incident was asleep in her residential house, the appellants broke open the door and entered into her house where they raped her in turns. According to her testimony, the appellants were together with another person who is not party in this appeal. After they finished raping her, they took her outside in the mud, started beating her and left her helpless until in the morning when her neighbour came and took her to the hospital.

At the Hospital, the medical doctor, PW2 at Monduli District Hospital examined her. According to the report, the victim was pregnant and that it was diagnosed that she was beaten and her vagina was full of mud. Therefore, it was his conclusion that the victim was sexually harassed. It was also stated that the victim was deaf and dumb. PW2 tendered the PF3 (PE2).

Another evidence supporting the prosecution case was that of PW1, Joseph Dominick Mabula, Officer Commanding Station (OCS)-Monduli Police Station who conducted the identification parade. According to him, PW3 was able to identify both appellants at the parade. Thereafter he

tendered the identification parade form and the same was marked as exhibit PE1.

Placed on their defence, the appellants gave sworn evidence and denied to have raped the victim. The 1st appellant testified that he was arrested at Naitolya on the allegation of theft and that he had stayed at Makayuni Police Station for 4 days before transferred to Monduli Police Station. The appellants faulted the identification parade and according to him, the victim (PW3) did not identify them.

The 2nd appellant on his part, testified that on the material date he was asleep in his house when his landlord woke him up and told him that there were many people outside his room and suddenly the policemen came and arrested him. According to him, he stayed at the Police Station for 20 days before being arraigned to the trial court. On cross-examination by the State Attorney, the appellant named the victim by her name and stated that he has never raped her.

After full trial of the case, both accused persons were found guilty of the offence as charged and they were consequently convicted and sentenced each of them to thirty years' imprisonment. The trial court further ordered each appellant to pay compensation of Tshs. 1,000,000/= to the victim (PW3).

Aggrieved by the trial court's conviction and sentence thereof, the appellants have filed this appeal raising eleven grounds of appeal coming down to the following complaints;

On the **first** ground the appellants are complaining that, the memorandum of agreed facts were not read out to them contrary to section 192 (4) of the CPA. On the **second** ground, the appellants are complaining that they were convicted while the charge against them was not proved beyond reasonable doubt.

On the **third ground**, the appellants are complaining that, they were convicted of statutory rape while there was no proof of the age of the victim. On the **fourth,** the appellants are complaining that penetration was not established and proved beyond reasonable doubt. On the **fifth and sixth** grounds of appeal, the appellants faulted the identification parade in that it was incredible, insufficient, and unreliable and below the standard. Therefore, it could not exclude mistaken identification. The appellants also alleged that the same was in contravention with the Police General Orders (PGO) specifically on rule 232 (2), (c) (d) (o) (q) and (r) of the PGO.

On the **seventh ground**, the appellants are complaining that, at the trial court the prosecution failed to call the medical doctor who

examined the victim. On the **eighth ground** of appeal, the appellants are complaining that the facts raised during PHG are completely different from the evidence adduced at the trial court. Therefore, it casts doubt on the truthiness of the case against them. **On the ninth ground**, they are complaining that the evidence of the prosecution witnesses is full of contradictions and inconsistencies. **On the tenth ground**, the appellants allege that the judgment of the trial court based on speculative ideas, which were not in the evidence of the witnesses and **lastly** the appellants complained that, their defence was not considered and the same was ignored.

When the matter was called on for hearing before me on , the 1st appellant appeared in person unrepresented however the 2nd appellant's side the court was informed that he had passed away and the same position was confirmed by a prison officer with Force Number D. 3735 SSGT Amiry. Therefore, the appeal against the 2nd appellant abated in terms of section 317A of the Criminal Procedure Act, Cap 20, Revised Edition, 2002 (CPA). On the other hand, Miss. Alice Mtenga**,** the learned State Attorney represented the respondent. With leave of the court, the appeal was disposed of by way of written submission, which I shall consider while disposing this judgment.

Having carefully considered the grounds of appeal, the submissions made by the parties and the record before this court, the main issue for my determination is whether the appellants' conviction was based on strong prosecution case.

It is on record that, in convicting the appellants, the trial court relied heavily on the evidence of PW3 the victim of the incident. It was the finding of the trial court that, the victim was able to tell the court on how she was able to identify the appellants as the 2nd appellant was her neighbour while the 1st appellant was the friend of the 2nd appellant, and that prior to the commission of the offence the appellants uttered abusive words to her.

More so, the trial court in furtherance of its finding relied on the evidence of PW2, medical practitioner whose evidence established that the victim's vagina was full of mud and had some bruises thus PW2 could not establish what the source of the appellant's bruises was. Hence, the trial court was left with no evidence other than that of the victim who is under section 127 (7) of the Evidence Act Cap 6 R.E 2019 believed that she was telling the truth. Nevertheless, the trial court went on to state that through the physical looking PW3 was pregnant and that she was disabled.

While I agree that, the evidence of the victim is the best evidence in cases of this nature. I however hasten to remark that, the same does not mean that such evidence should be taken wholesome, believed and acted upon to convict the accused persons without considering other pieces of evidence adduced before the trial court and the circumstances of the case. See the decision of the Court of Appeal of Tanzania in the case of **Shabani Daudi vs. Republic,** Criminal Appeal No. 28 of 2000 (Reported Tanzlii).

In the case at hand, and as already demonstrated above, it is with no doubt that, the trial court relied on the evidence of the victim together with that of doctor. However, my careful scrutiny of the evidence given especially in PE2, PF3 tendered by PW2 where it is plainly indicative that, the victim is deaf and dumb, but to my surprise the proceedings of the trial court do not indicate that the victim suffered from any abnormalities explained in the PE2. I have further examined the testimony adduced by the victim before the trial court and found that it is recorded that she gave her evidence like any other ordinary person.

Similarly, having scanned the record of appeal, I agree with the 1st appellant that the trial court did not properly consider and evaluate the defence evidence as a whole. In its judgement, the trial court, apart from

briefly summarizing the appellants' evidence, it neither considered nor analyzed that part of the evidence. It is a cardinal principle of criminal law in our jurisdiction that, in criminal cases such as the one at hand, the prosecution has a burden of proving its case beyond reasonable doubt. The burden never shifts to the accused persons. An accused is only required to raise some reasonable doubt on the prosecution case and he needs not prove his innocence. This position of law Hs been consistently emphasized by our court for example in **Republic vs. Johnson**, [1961] 3 All E.R. 969 and **Leonard Aniseth vs. the Republic**, [1963] E.A. 206 just to mention the few.

Correspondingly, in the case at hand, the 1st appellant was not required to prove that his defence was true. He was only supposed to raise a reasonable doubt, which to my view he did.

I have also paused a question as to the essence of the parade of identification prepared conducted by the police, PW1 since the victim seems to be familiar with both deceased and the 1st appellant. If at all the victim was familiar with the 1st appellant who was her co-tenant, it follows therefore there was no need to conduct identification parade. So question that is inevitably paused is, what instigated investigation team to conduct the parade of identification in the situation where the witness alleges that

he or she is familiar with the suspect. In such situation, the same would serve no meaningful purpose except apprehension of doubts on the part of the prosecution evidence (See the case of **Mbaruku Deogratias vs. the Republic,** Criminal Appeal No. 279 of 2019 (unreported-CAT). In our instant criminal case, the testimony of the victim is very clear that the appellants are her neighbors.

Moreover, I have also observed that the offence of rape is thus questionable due to what was diagnosed by the medical practitioner and the victim's testimony, which is to the effect that, the appellants and another person not apprehended and charged started assaulting her from daytime.

Having said the foregoing, I am satisfied that there is no sufficient evidence to warrant the appellants' conviction. Consequently, this appeal is allowed, I therefore quash the conviction and set aside the sentence meted on the 1st appellant. I accordingly, order that the appellant be set at liberty forthwith unless he is held therein for some other lawful cause.

It is so ordered.

DATED at **ARUSHA** this 30th October 2023

MOHAMED R. GWAE
JUDGE
30/10/2023