IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBWAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 112 OF 2022

(Appeal from the Judgement of the District Court of Sumbawanga at Sumbawanga (Hon. G. William SRM) in Criminal Case No. 68 of 2022)

JOHN S/O EDWARD @ BABU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

16/10/2023, 29/11/2023

JUDGMENT

MWENEMPAZI, J:

The appellant was arraigned in the District Court of Sumbawanga at Sumbawanga, herein after referred to as the trial Court, and charged with the offence of Rape contrary to section 130(1) and (2) and section 131(1) of the Penal Code, [Cap. 16 R.E. 2019]. In the trial court, it was alleged by the prosecution that the appellant (accused in the trial court) on the 6th August, 2022 at Muze Village within Sumbawanga Municipality in Rukwa Region did have unlawful sexual intercourse with one RAHABU D/O CHARLES @ MWIMANZI.

When the charge was read over and explained to the accused (the appellant herein) he denied to have committed the offence. That position was also maintained when the preliminary hearing facts were read over and explained to him.

The trial was launched full-fledged and the prosecution called three witnesses to prove their case while the defendant called two witnesses including himself. At the conclusion of the trial the trial Magistrate found the appellant guilty of the offence he was charged with and convicted him with the offence rape contrary to section 130(1) and (2) (a) of the Penal Code, [Cap. 16 R.E. 2019]. The trial magistrate and sentenced him to serve a term of 30 years imprisonment in jail. The appellant being aggrieve has filed this appeal and raised four grounds of appeal, which are contained in the amended Petition of Appeal filed pursuant to the court order dated the 12/06/2023, namely:

1. The trial court erred in law and fact by convicting and sentencing the accused person while the case was not proved to the required standard.

2. That the trial court erred in law and fact by convicting and sentencing the accused person while the victim denied to have sexed with the appellant.
3. That the trial court erred in law and fact by convicting and sentencing the accused person based on defective charge sheet.
4. That the trial court erred in law and fact by convicting and sentencing the accused person based on evidence of PW1 who was not a credible witness.

At the hearing the appellant was being represented by Mr. Peter Kamyalile, Advocate and the respondent Mr. Jerinus Mzanila, learned State Attorney. Parties prayed to submit on their case by way of written submission. This Court granted leave and they duly complied to the scheduling order.

The appellant commenced with grounds 1, 2 and 4 which were submitted together. In the first point of an attack the counsel has submitted that the trial magistrate convicted the appellant using the evidence which was not tendered in Court. He argued that the position of law is that Court decisions must base on the evidence presented before it. In this case, at page 2 of the trial Court judgment the trial Court considered matters which were not

testified and or adduced by witnesses such matters is that the accused *"pushed her on the bed accused person undress her and also undressed himself and did have sex".*

According to the record the witness PW1 testified that *"he forced me then we came out...he take me and undress me, he pulled me to the head then undressed me,...he sex with me".,* (refer page 7 of typed proceedings of the trial Court).

The counsel for the appellant has then submitted that the anomaly is fatal and it vitiated the proceedings and its judgment. He cited the case of **Athanas Julius Versus The Republic,** Criminal Appeal No. 498 of 2015, Court of Appeal of Tanzania at Mbeya (unreported) at page 11 – 12 whereby it was held that such an anomaly vitiates the proceedings.

The counsel for the appellant also submitted that in rape cases the important elements to be proved are consent and penetration, and where rape involve an adult, further explanation on how and at what point in time she was penetrated ought to have been given by her. It is expected of her to explain whether she had slept naked and that the accused encountered no hurdles in penetrating her or if she was not, how the appellate managed to penetrate

her. He cited the case of **Selemani Makumba Versus The Republic [2006] T.L.R 379** where the Court of Appeal observed 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".*

As to the element of penetration, it was not proved on the required standard. PW1 testified that on examination in chief that "I had the light he sex with me for a short period of time" but on cross examination she testified that "I had never sexed with you" since both statements are made on oath and is inconsistent the credibility of that witness is completely destroyed and her evidence should not be relied upon. For the argument the counsel for the appellant has cited the case of **Kibwana Salehe Versus Republic [1968] H.C.D No. 391** where it was held that: -

> *"Whenever the witness is proved to have made a statement on oath inconsistent with a statement previously made by him, the credibility of that witness is completely destroyed, unless he can give an acceptable*

explanation for the inconsistency. The witness gave no such explanation, and neither his testimony nor previous statement should have been relied upon".

The counsel submitted that even in the testimony of PW2 Veronica, did not prove the essential element of penetration. PW2 testified that presence of sperms it means rape which is not true. Also, it is settled law that medical evidence do not prove rape. This was laid in the case of **Republic Versus Salim Abidallah [1970] H.C.D No. 38** and **Seleman Makumba Versus Republic [2006] T.L.R 379** where it was held: -

"The evidence that was adduced did not show that there was penetration".

According to the counsel the witness PW1 gave improbable evidence on occurrence of the incidence. That is a good reason of not believing her testimony. Her evidence is not convincing and consistent with natural course of events it is impossible to have sex with her outside while the light is on. He cited the case of **Elisha Edward Versus the Republic,** Criminal Appeal No. 33 of 2018, the Court of Appeal of Tanzania at Shinyanga (unreported) at page 11 where the Court held that: -

"...Good reasons for not believing a witness include the fact that the witness has given improbable evidence".

The counsel submitted that even if this Court will find that the prosecution proved the element of penetration, still the prosecution failed to prove that there was no consent. DW1 proved that there was consent. The situation changed after the victim demanded to be given Tshs. 50,000/= and the appellant gave her Tshs. 20,000/= that is when she alleged to have raped.

It is the opinion of the counsel for the appellant that the victim consented to have sex and in fact she invited the appellant into the act. The defendant's evidence was not contradicted.

The counsel for the appellant also faulted the charging provision that since the allegations are that the victim was forced, then the proper law should have been section 130(2) (b) and not section 130(2) (a) of the Penal Code, [Cap 16 R.E 2022]. Thus, the charge was defective.

The appellant prays that the appeal be allowed, judgment and conviction be quashed and the sentence set aside and the appellant be released.

In reply to the submission in chief Mr. Jackson Komba, learned State Attorney drafted the submission on behalf of the Respondent. He has submitted that he has read the appellant's submission and understood the arguments raised. He has announced the position by the respondent that the appeal is devoid of merit. It should be dismissed entirely.

He argued the 1st, 2nd and 4th ground of appeal together that their main concern is the offence was not proved beyond reasonable doubt. The grounds are baseless since there was sufficient evidence to connect the appellant with the offence he was charged with and subsequently convicted.

The counsel for the respondent took off by citing the case of **Msanyiwa Masolwa Versus Republic,** Criminal Appeal No. 280 of 2018, Court of Appeal of Tanzania at Shinyanga. In that case it was held that the elements to be proved are penetration of the erect male sexual organ to a female sexual organ and that there was no consent to the sexual act.

It was argued by the counsel for the respondent that PW1 proved that on the material date the appellant had sexual intercourse with the victim without her consent. She said the appellant undressed her clothes and raped

her (page 7 of the trial Court's proceedings). He has argued that PW2, a medical doctor testified and showed that the victim was penetrated.

The results in the PF3 tendered as exhibit P1 established that the victim was examined and found with sperms in the labia minora and labia majora. The presence of sperms means there was sexual intercourse between the victim and the appellant. The counsel argued that the trial Court was justified to convict the appellant based on the evidence of PW1 because as in the case of **Denis Joseph @ Saa moja Versus Republic,** Criminal Appeal No. 121 od 2021, Court of Appeal of Tanzania at Dar es Salaam. The best evidence comes from the victim.

The counsel implored this Court to put credence on her testimony unless there are good and cogent reasons for not believing her as was held in the case of **Adam Angetile Versus Republic,** Criminal Appeal No. 402 of 2020 TZCA at Mbeya at page 7 – 8. He has argued that with that case and the admission by the appellant at page 13 that he had sexual intercourse with the victim, the victim should be found credible.

Credibility of PW1 can be assessed at page 7 of the proceedings for her prompt effort in reporting the matter at the police station within a shorter

period after being raped and naming the appellant as the responsible person. He invited this Court to refer the case of **Marwa Wangili Mwita and Another Versus Republic [2002] T.L.R 319.** On the ability of the witness to name the suspect in the earliest opportune time as a yard stick of ensuring her reliability. The act of reporting the matter again was justifiable proof that PW1 did not consent to have sexual intercourse with the appellant.

On the third ground of appeal it is the respondent's submission that the ground lacks merit since the charge against the appellant was proper and connected with the facts in issue. Further, the appellant was not prejudiced since the statement of the offence and particulars contained in the charge enabled him in understanding the case against him and prepare a proper defence.

The counsel concluded by submitting that they are opposing the appeal the grounds raised by the counsel for the appellant are baseless and lacks merit. The same should be dismissed and the trial Court's conviction and sentence be upheld.

In rejoinder the counsel or the appellant reiterated the submission in chief and emphasized that the respondent has disputed the facts that the trial

Court in its judgment at page 2 considered matters which were not testified by the witnesses or added extraneous matters which did not feature in the evidence adduced by witnesses.

The counsel has insisted that this is a fatal irregularity which vitiated the whole proceedings and the judgment thereof. The rationale behind it is that it denied the parties the right to impeach that piece of evidence added. This position was emphasized by the Court of Appeal of Tanzania in the case of **Richard Otieno @ Gullo Versus the Republic,** Criminal Appeal No. 367 of 2018, Court of Appeal of Tanzania at Dar es Salaam where it was held: -

> *"The law is clear and settled that the Court decisions must be based on the evidence presented before it. In the case of* ***Athanas Julias Versus Republic,*** *Criminal Appeal No. 498 of 2015 (unreported) where in its judgment the trial Court considered matters which were not testified by the witnesses, the court stated thus:*
>
> *"The second anomaly noted, is the act of the trial resident magistrate to include in his judgment, facts which are not reflected in the recorded evidence in the proceedings... we*

are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity was fatal and did vitiate the entire proceedings of the trial Court"

Besides, the appellant was denied the right to impeach that piece of evidence".

In the referred case the Court allowed the appeal and the counsel has also urged this Court and prayed that it follows the footsteps of the higher Court. He therefore prayed the appeal be allowed, judgment of the trial Court and conviction be quashed and sentence be set aside.

I have read the trial Court proceedings and the judgment. I have as well read the submission by counsels for both sides. The issue for determination is whether the appeal has merit and therefore deserve to be allowed. In order to respond to the issue I find it pertinent to check and answer the question as to whether the offence the appellant was charged with was proved to the required standard or not.

The appellant herein named was charged with the offence of rape. In order to prove the offence, the prosecution was duty bound to prove that there

was penetration of the male sexual organ to the female victim's sexual organ and that as the victim was an adult, there was no consent. In the case of **Masanyiwa Masolwa Versus The Republic**, Criminal Appeal No. 280 of 2018, Court of Appeal of Tanzania at Shinyanga it was held at page 16 that:

> *"Admittedly, for the offence of rape of any kind to be established, the prosecution or whoever is seeking the trial Court to believe his or her version of the facts on trial must positively prove that a sexual organ of a male human being penetrated that f a female victim of the sexual offence, and if the victim is an adult of over 18 years of age, a further condition is needed; proof that the victim did not consent to the sexual act".*

In this case, it would appear that the complaint is that the offence was not proved, as such and in particular lack of consent which comes by way an alternative to the main complaint that there was no proof of rape at all. I find the case to be peculiar in that while the victim complains to have been raped, the appellant allege that he was invited by the victim and they had sex together. Things fell apart when he failed to meet the demands of the

victim to be given Tshs. 50,000/=. He had only Tshs. 20,000/=. However, for conviction to hold, the prosecution carry the burden to prove the charge.

This Court being the 1st appellant Court has power and duty to re-evaluate the evidence and come up with its own findings. However, it must be cautious that it had no advantage of observing witnesses while testifying to assess their credibility.

The victim in this case is aged 19 years old an adult capable of exercising her volition in matters of sexual acts. In the evidence she testified in Court it is recorded thus: -

> *"On the 06/08/2022 I was at my house with Leola around 2:00pm Babu the accused person came at home. At the time we were with my sister and then remain alone and the arrived. I told the accused to left (sic) the place, he taken my arm and tired it then I did comply he take another arm and forced me then we came out; I did shout. I did not obtain any help as there is no any person. He take me and undressed me. He pulled me to the head then he undressed me, I had the light he sex with me for*

a short period of time. I was crying I did report the matter to the police, I did not consented. The accused person is not my fiance, when I was reporting the issue I was crying then I was given police form number three I went to the hospital".

At the hospital it is testified by Veronica Charles (PW2) that she examined the victim. She testified that the victim "had sperms in the labia minora and labia majoras, *presence of sperms it means rape".* Here it is noteworthy to observe that the witness either did not know what to examine as per law or she relied on what she was told. Presence of sperms does not mean she had been penetrated and or raped. I say so, it is possible that the two had a play which resulted into released of ejaculate which was then smeared to the vagina by the victim to implicate the appellant for whatever reason. But, again the testimony leaves doubts on its implications so far as coitus is concerned. It is therefore remains unclear if penetration was effected for an act of critus or not. What made her conclude that there was rape.

On the other note, the above quoted part of evidence by PW1 who is the only witness who was at the scene, is ambiguous as to the timing. In my

understanding of the east African at all seasonal setting in particular Tanzania at 2pm there is enough light, there is always light from the sun. How was it that the victim had the lighting did the event take place during the right? If so, why didn't she report at least to a nearest neighbor for quick assistance. Generally, I see many doubts cropping up to her testimony.

Finally, the complaint to the judgment of the trial Court. Indeed, page 2 of the judgement contains extraneous matters which are not in the recorded evidence as complained by the counsel for the appellant. In the judgment it is recorded:

> *"According to the victim she told the accused to leave the house but he couldn't and instead he took her arms and tied her and pushed her on the bed the accused person undressed her and also undressed himself and did have sex with her and left"*

I have taken note that the trial magistrate presided over the hearing of the case, recorded the evidence and composed the judgment. Under the circumstances he could not have mistaken in what the record reads. In the

light of the holding in the referred case of **Richard Otieno @ Gullo Versus The Republic** (supra) the addition of extraneous facts is fatal.

For the reasons and explanations given herein above I find the appeal has merit. The judgment and conviction are quashed, sentence set aside and the appellant is order to be released forthwith immediately unless otherwise he is being held for another lawful cause.

It is ordered accordingly.

Dated and signed at **Sumbawanga** this 29th day of November, 2023.

T.M. MWENEMPAZI
JUDGE

Judgment delivered in judge's chamber this 29th day of November, 2023 in the presence of appellant in person and appellant's advocate Mr. Peter Kamyalile and Mr. Jackson Komba and Scolastica Mwacha, learned State Attorneys for the Respondent.

THE HIGH COURT OF TANZANIA

T.M. MWENEMPAZI
JUDGE
29/11/2023