IN THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MTWARA

AT MTWARA

CRIMINAL APPEAL NO. 82 OF 2022

(Originating from the District Court of Lindi at Lindi in Criminal Case No. 32 of 2022)

IBRAHIM AHMAD MATINDULA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 14.08.2023
Date of Judgment: 22.11.2023

Ebrahim, J.:

The trial court convicted Ibrahim Ahmad Matindula (the appellant) with the offence of rape contrary to **Sections 130 (1) (2) (a) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2022]**. The District Court of Lindi convicted and sentenced the appellant (accused) to serve thirty (30)

years imprisonment and to pay TZS. 1,000,000/= as compensation to the victim.

The prosecution alleged that Ibrahim Ahmad Matindula had carnal knowledge of MM (identity concealed) a woman without her consent.

Aggrieved by both conviction and sentence, the appellant appealed raising eight grounds of appeal and two additional grounds of appeal which climaxed to the following issues; -

1. Whether prosecution witnesses failed to comply with Section 289 of the Criminal Procedure Act [CAP 20 R.E. 2022]; and
2. Whether the prosecution proved the appellant guilty beyond reasonable doubt.

A brief background is that; the prosecution alleged that MM (identity concealed), a woman of 80 years as per the trial court proceedings. On 23.07.2022 at night while she was at her home sleeping. The appellant went to the victim's (PW1) house and raped her then he disappeared.

During the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. Mwapili, learned State Attorney represented the Republic.

The appellant briefly adopted his grounds of appeal and additional grounds of appeal and prayed for the court to consider them.

In response, Mr. Mwapili objected the appeal. On the 1st ground of appeal, the learned State Attorney contended that the prosecution proved the case beyond reasonable doubt. On the 2nd ground of appeal, he submitted that there was no contradiction on the evidence tendered by the prosecution witnesses and the appellant has not pointed out any contradiction. As to the 3rd ground of appeal on the issue that the case was planted, he argued that the court relied on the testimony of PW1 because her evidence was credible and the appellant through his cautioned statement (exhibit P1) he admitted to have rape PW1. Furthermore, the appellant neither objected on the tendering of said exhibit nor cross examine PW2 and PW3. Further to that PW1 was able to recognize the appellant as a person who raped her immediately.

Arguing on the 4th ground of appeal he contended that the trial court considered the credibility of prosecution evidence and it was observed that prosecution evidence was strong, efficient and credible to prove the offence as per page 5-13 of the trial court typed judgement. He also cited the case of **Leonard Mwanashoka vs. Republic,** Criminal Appeal No. 226/2014 CAT-Bukoba. On the 6th ground of appeal, the learned State Attorney submitted that PW1, a woman of 80 years explained how the appellant raped her. Her evidence was corroborated by the evidence of PW2, PW3 and PW4 hence prosecution evidence was justified and corroborated. He referred to the case of **William Ntungi v. R,** Criminal Appeal No. 320 of 2019 CAT-Mbeya it was observed that the evidence of a witness is cogent and credible, and the court can rely on it to amount conviction. Moreover, the appellant through his cautioned statement corroborated with the testimony of the victim who is PW1 to prove the case beyond reasonable doubt. Arguing on the 8th ground of appeal on the issue that the appellant was convicted basing on the weakness of the appellant, he submitted that the appellant was convicted on the strength of the prosecution evidence as alluded earlier.

Regarding on the 1st additional grounds of appeal the learned State Attorney submitted that Section 289 of the Criminal Procedure Act [CAP. 20 R.E. 2022] is a requirement only for the cases which undergo committal proceedings. He thus prayed this ground to be dismissed. Submitting on the 2nd additional ground of appeal he contended that PF3 is not the only document to prove penetration but corroborative evidence. He referred to the case of **Edward Nzabuga vs. R,** Criminal Appeal No. 136/2008 it was observed that penetration can be proved orally or by PF3. He thus prayed for the appeal to be dismissed.

In brief rejoinder, the appellant prayed to be set free.

I am cognizant of the fact that this is the first appellate court hence I am obliged to step into the shoes of the trial court and make evaluation and analysis of evidence in observant of the fact that I was not privileged to observe the demeanour of the witnesses as illustrated in the case of **Mzee Ally Mwinyimkuu@ Babu Seya vs Republic,** Criminal Appeal No. 499 of 2017. Having gone through the grounds of appeal, the submissions from both sides and the trial court's records, I found that there two main issues for determination which are: -

1. Whether prosecution witnesses failed to comply with Section 289 of the Criminal Procedure Act [CAP 20 R.E. 2022]; and
2. Whether the prosecution proved the appellant guilty beyond reasonable doubt.

Starting with the 1st issue Whether prosecution witnesses failed to comply with Section 289 of the Criminal Procedure Act [CAP 20 R.E. 2022].

Section 289 (1) of the Criminal Procedure Act [CAP. 20 R.E. 2022] provides that; -

> *"289. -(1) A witness whose statement or substance of evidence was not read at* ***committal proceedings*** *shall not be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."* [Emphases added]

Further, in the case of **Jumanne Mohamed & 2 Others v. The Republic,** Criminal Appeal No. 534 of 2015 (unreported), the Court held that such evidence ought to be expunged. It said:

> *"We are satisfied that PW9 was not among the prosecution witnesses whose statements were*

> *read to the appellants during* ***committal proceedings.*** *Neither could we find a notice in writing by the prosecution to have him called as an additional witness. His evidence was thus taken in contravention of section 289 (1) (2) and (3) of the Act ...In case where evidence of such person is taken as is the case herein; such evidence is liable to be expunged ...We accordingly expunge the evidence of PW9 including exhibits P6 and P7 from the record."*

The case at hand is distinguishable from the above cited case on the fact that there were no committal proceedings which was conducted, therefore the 1st additional ground of appeal is misconceived. Based on that position I am satisfied that this ground is devoid of merit hence, I hereby dismiss it.

Going to the 2nd issue whether the prosecution proved the appellant guilty beyond reasonable doubt.

Before embarking on the journey of determining the above issue, the jurisprudential position in rape cases is that the best evidence comes from the victim. This is in accordance to **Section 127 (6) of the Evidence Act [CAP 6 R.E 2022]** and the Court of Appeal decisions in a number of cases including the case of **Edward Nzabuga vs. Republic,**

Criminal Appeal No. 136 of 2008, sitting in Mbeya [unreported); and also, the case of **Selemani Makumba vs. Republic** [2006] TLR 384 in which the Court at page 379 held 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."*

The above principle notwithstanding, the victim's evidence cannot be taken whole sale. The same must pass the truthfulness and credibility test as held by the Court of Appeal in the case **of Mohamed Said vs. Republic,** Criminal Appeal No. 145 of 2017 CAT at Iringa (unreported). Therefore, it is upon this court to scrutinize the evidence adduced by the victim and decide as to whether it passes the truthfulness test. The general rule in criminal cases is that the burden of proof rests with the prosecution (the state) see **Ali Ahmed Saleh Amgara v R** [1959] EA 654. Thus, The Republic has the primary duty of proving that the accused has committed the actus reus elements of the offence charged with the mens rea required for that offence. This is reflected and found in the famous maxim that "he who alleges must prove". This means that the principal burden is on the accuser, and in

criminal cases the accuser is the prosecution. The Court of Appeal in **Christian s/o Kaale and Rwekiza s/o Bernard vs R** [1992] TLR 302 stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case. The rationale for this principle and legal position is that since the burden lies with the Republic, the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. This position was clearly clarified and underscored by the court in **Milburn v Regina** [1954] TLR 27 where the court noted that: -

> *"If is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

In the instant case, PW1 before the trial court testified that on 23.07.2022 she was raped by the appellant, she went to her grandchild PW2 and told him about the incidence. Thereafter they went to VEO then to the police station. She was also taken to the hospital for examination and it was confirmed that she was raped. Responding to cross examination questions, she said, the appellant

went to her home at night and raped her. From the victim's testimony I paused and asked myself as to why PW1 did not raise an alarm to dispute the incident in considering that no threat was registered or any force for that matter. PW2 testified before the trial court that he lives nearby his grandmother (PW1). That on that fateful day he heard clamour, when he went out, he met with PW1. PW1 told him that he was raped by the appellant and he run away. PW2 told her that they should go to VEO. They also, went to tell baba Ubaya who escorted them to the Village Executive Officer. After reaching there VEO told them to look for the appellant. After that they found the appellant and took him to VEO. PW3 (Police Officer) testified that on 23.07.2022 at around 02:00pm she was called to take statement of the appellant. She started recording the statement from 04:40pm. All in all, there is no evidence either from any prosecution witness to show PW1 did not consent to the sexual act and if there was penetration as the requirement in proving the offence of rape.

The question before this court is whether the prosecution side proved an offence of rape beyond reasonable doubt. It should be noted

however that the appellant's conviction was predicated upon his admission in the cautioned statement.

The evidence on records show that the appellant was arrested on 23.07.2022. PW2 at the trial court testified that on the same date after reporting to VEO, they were told to go and find the appellant, and they were able to find him and took him to the Village Executive Officer. However, PW3 a police officer who testified to have recorded cautioned statement of the appellant on 23.07.2022. Thus, the statement was therefore recorded out of the period of four hours as required by Section 50 (1) (a) of the Criminal Procedure Code Cap 20 R.E. 2022. The said section requires that the basic period available for interviewing a person who is in restraint in respect of an offence is four (4) hours commencing at the time he was taken under restraint/arrest in respect of the offence. It is also trite law that violation of Section 50 of the CPA is fatal. In **Ramadhani Mashaka vs Republic** (Civil Appeal 311 of 2015) [2016] TZCA 259 (15 October 2016), the Court observed that;

> *"It is now settled that a cautioned statement recorded outside the prescribed time under section 50 (1) (a) and (b) renders it to be incompetent and liable to be expunged."*

In the instant case, it is not clear at what time the appellant was arrested on 23.07.2022, while PW3 said the statement she recorded on 23.07.2022 at 04:40 hrs. which to view was recorded out of the

prescribed four hours period. The cautioned statement as alleged recorded by PW3 is liable for expunction as I hereby expunge it from the record.

What remaining is the evidence of the prosecution witnesses. Whereas from the above findings there was no truthfulness of PW1's testimony. Apart from the truthfulness of PW1, the credibility of other witnesses is also shaky as there is no coherence on their testimonies.

In proving the offence of rape, the issue of penetration, however slight is so fundamental that rape cannot be established and proved in the absence of penetration. Section 130 (4) (a) of the Penal Code [CAP. 16 R.E 2022] insist on penetration as quoted hereunder: -

> *"(4) For the purposes of proving the offence of rape-*
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence; and.."*

The Court of Appeal in the case of **Godi Kasenegala vs. R**, Criminal Appeal No. 10 of 2008 it was observed that; -

> *"..... **one essential ingredient of the offence must be proved beyond reasonable doubt This is the element of penetration i.e., the penetration, even***

> ***to the slightest degree, of the penis into the vagina***" [Emphasis added].

In the instant case PW1 told the trial court that after she was rape, they went to the police station then to the hospital but there is no any supporting evidence from the victim to prove that she was raped as far as the issue of penetration is concerned.

Also, in the case of **Samwel Stanley vs R,** Criminal Appeal No. 67/2022 High Court Morogoro Sub-registry -unreported) where this Court (Ngwembe, J.) quoted the decision of the Court of Appeal in the case of **Mbwana Hassan vs. R,** Criminal Appeal No. 98 of 2009 (CAT - Arusha), held: -

> *"It is trite law also that, for the offence of rape ..... there must be* ***unshakable evidence of penetration***"[Emphasize added].

In the absence of evidence on penetration even to the slightest degree, rape cannot be constituted.

Furthermore, after going throw the charge sheet I realized that the age of the victim who is alleged to be raped was not mentioned.

It is again trite law that in criminal law the guilt of the accused is never gauged on the weakness of his defence rather his conviction shall be based on the strength of the prosecution's case - **Christina s/o Kale and Rwekaza s/o Benard vs. Republic,** TLR [1992] at page 302 and **Marwa Wangiti Mwita and Another vs Republic 2002** TLR Page 39. The standard of proof is neither shifted nor reduced, it remains constant that the prosecution has a duty to establish the case beyond reasonable doubts.

Therefore, as alluded above I find that the evidence remained cannot suffice to prove the case beyond reasonable doubt.

In the premise, I am satisfied that the prosecution has not sufficiently discharged the burden of proof. The charge against the appellant was not proved beyond reasonable doubt. The conviction and sentence meted out against the appellant are hereby quashed and set aside. The appellant be set at liberty unless he is held for some other lawful cause.

Order accordingly.

R.A Ebrahim

JUDGE

Mtwara
22.11.2023