

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 4150 OF 2024

(Originating From Temeke District Court Criminal Case No 6 Of 2023

Delivered on 12th October 2023, Mbadjo- SRM)

H. 2226PC JACKSON BAHATI ZACKARIA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGEMENT

10th & 29th May 2024.

KIREKIANO, J.

The District Court of Temeke convicted the appellant herein with one count of rape c/s 130 (1) and 2 (a) and 131 of the Penal Code Cap 16 [RE 2019]. According to the charge, it was alleged that on 30/06/2022 at Yombo Reli area Temeke District, the appellant did have carnal knowledge of a woman aged 24 years without her consent. The victim's name was disclosed; however, in this judgment, I shall sufficiently refer to her as the "victim."

The appellant denied the charge. The prosecution side paraded three (3) witnesses, namely; the victim, PW2 Yusuph Bakari and PW3 Dr Sabato George. The substance of the evidence which led to the appellant's trial and conviction was that on 30/06/2022, the victim had boarded a train. She disembarked from the train around Yombo and noticed she was lost at Yombo Reli. She thus decided to follow the rail to find her way back.

On the way, there was a construction site where she met the appellant. According to the victim, the appellant told her that she had passed a restricted area; she was thus ordered to follow the appellant to an upstairs room in a building. The appellant told her that she had to pay a fine of Tshs. 50,000/= . The victim told him that she had no money. After a long discussion on this, the appellant asked for sex.

The victim was not prepared; again, after some dialogue on this subject, the appellant forcefully grabbed the victim on the floor, undressed her and had canal knowledge of her without her consent.

The incident was reported at Chang'ombe Police Station on 30/06/2022. The police requested a medical examination of the victim to find out if she was penetrated by the appellant. It is on record that the next day, on 01/07/2022, the victim was examined at Temeke Hospital

by PW3 Dr Sabato Ongayo. This is according to the testimony of the witness (PW3). On 01/07/2022, when he examined the victim, she had signs that she was penetrated due to tenderness in her genitals. This was according to his report in PF3, which was admitted as (Exhibit P1).

According to PW2, the victims' "husband" on 30.06.2022 around 13:30 hrs. He received a call from the victim, who told him that the appellant raped her after she was arrested, having passed a restricted area. According to him, after reporting the matter to the police, he accompanied the victim to a hospital on the same day and made follow-ups the next day.

On his part, the appellant, DW1 XH2226 P/C Jackson, denied committing the offence. He said he met the victim on the alleged date of 30/06/2022 around his working area. According to him, the victim said she was lost and was looking for someone who owed her Tshs. 30,000/=. He then learned that this was a lie. According to him, the charge was framed against him.

While at the police station, his senior officers ordered him to pay the victim Tshs 5,000,000/=. He could not pay even when the officer, one "Afande Anna," ordered him to pay Tshs. 1,500,000/= he ended up

in the trial court. He attacked the prosecution's case, saying that it was contradictory and that it was not known who collected the evidence.

The trial court was convinced that the charge was proved beyond reasonable doubt. Thus, it convicted the appellant and sentenced him to thirty years in jail. Aggrieved, the appellant preferred this appeal, setting forth three grounds for appeal. Without prejudice, the grounds of appeal can be reduced to one complaint that the charge was not proved to meet the required standard.

The appeal was heard by way of written submission. The appellant was unrepresented, and Miss Florida Wenceslaus, a learned state attorney, represented the respondent and informed this court that the respondent opposed this appeal.

In support of the appeal, the appellant submitted that there were contradictions in the evidence by the victim. He faulted the trial court in finding a conviction based on the sole evidence of the victim under section 127 (6) of the Tanzania Evidence Act [Cap 6 RE 2022]. Citing the decision in **Mohamed Said V. R, Criminal Appeal No. 145 of 2017, CAT** at Iringa (unreported), the appellant submitted that the victim's words should not have been taken as gospel truth without passing the test of truthfulness.

As such, he submitted that there were inconsistencies on the date of the offence, whereas the charge and evidence of PW1 depict that she was raped on 30.6.2022 at Yombo Relini; when the victim PW1 went to the hospital on the following day on 1.7.2022, she told PW3 she was raped at TAZARA, and that 10 hours before PW3 medically examined her.

According to the appellant, if the victim was raped on 30.6.2022 at 08:00 am and informed her husband around 1:30 pm, how come the medical doctor (PW3), who medically examined her on 1.7.2022, said the incident occurred 10 hours before. He argued that the credibility, reliability, consistency, and coherence of the victim's testimony should be considered. In support of this, he cited. **Shabani Daudi V.R, Criminal Appeal No. 20 Of 2001** and **Ex.G.2434 PC George V.R, Criminal Appeal No. 8 of 2018 CAT** at Moshi.

To cure this, the appellant submitted that the prosecution should have called the police officer who received the first information report, if any, to corroborate the stories of PW1 and PW2 and clarify when PF3 was issued to the victim. He cited **Azziz Abdallah V.R [1991] TLR 71, Kisinza Richard V.R [1987] TLR 143 and Criminal Appeal No. 350 of 2008 (BONIFACE KUNDAKIRA TARIMO V.R, unreported)**

to the effect that failure to call such a material witness, this court may draw adverse inference on the prosecution case.

Miss Florida, on her part, referred to the trial court proceedings pointing that the victim categorically testified how the appellant penetrated his manhood to her genitals; as such, there was corroborating evidence from the doctor who examined the victim on 01.07.2024 and found and found her in great pain. Miss Florida submitted that the appellant was ready to pay the victim money to wit, refereeing to what was mentioned in his deposition that;

"mimi JACKSON nimekubali kumlipa ndugu AMINA SAID Tshs 1,500,000/= Endapo sitafanya hivyo sheria zichukuliwe"

It was her view that although this document was not tendered, the same was served by oral evidence under **62(1) (a and b) of the Evidence Act [Cap 6 R.E 2022]**.

She said the appellant did not cross-examine the witness; instead, he conceded to have admitted to one Adande Anna. She cited decisions in **Kwiga Masa Vs. Samweli Ntubatwa [1989] TLR 103 and** in the case of **Medson Manga V.R Criminal appeal No. 259/2019 (unreported) that** to the effect that on failure to cross-examine a

witness on important matters implies acceptance of the truth of witness's evidence"

She submitted that there was evidence that the offence was reported at Chang'ombe police station. This was according to PW1, but the appellant also admitted this fact.

On summoning the officer who collected evidence or received the first information report, she argued that no specific number of witnesses could prove a fact; thus, failure to call them did not dismantle the prosecution case.

In his brief rejoinder, the appellant submitted that he should not been found guilty because his defence was not believed. He cited **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika [2002] T.L.R. 296**; the Court held that:

"A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."

He also submitted that the evidence of the doctor on the pain suffered by the victim was wanting as the examination was done a day late; thus, things could have happened overnight.

The evidence on an agreement to pay Tshs 1,500,000 is lacking because, having failed to tender, the same oral evidence could have been served by the oral evidence of the mentioned person, that is Afande Anna.

Before I determine this appeal, I wish to amplify a well-established principle that the first appellate court has the power to re-evaluate the evidence on record and come up with its own findings. See the case of **Kaimu Said v. Republic, Criminal Appeal NO 391/2019**, which cited with approval the case of **Siza Patrice v. Republic, Criminal Appeal No. 19 of 2010 (unreported)** that:

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such, the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own finding of fact, if necessary.

In charge of rape, one essential ingredient of the offence which must be proved beyond a reasonable doubt is the element of penetration, i.e. the penetration, even to the slightest degree, of the penis into the vagina: see **Masomi Kibusi V Republic, Criminal Appeal No. 75 of 2005**. As such, the victim being an adult, it must be proved that she did not consent to the intercourse.

Concerning the first element, the principle has been established that the best evidence has to come from the victim. This was elucidated in the case of Godi **Kasenegala v Republic-Criminal Appeal No. 10 of 2008**. The court of appeal stated,

"It is now settled law that the proof of rape comes from the prosecutrix herself. Other witnesses, if they never actually witnessed the incident, such as doctors, may give corroborative evidence."

I will start with the aspect of penetration. I have read the victim's testimony; I had no difficulty understanding her penetration; as submitted by Miss Florida, she meant penetration of accused manhood to her genitals. The appellant complains that the victim should not be believed just because she said she was penetrated. His line of argument is the contradiction of when the offence was committed.

It is alleged in the charge that the offence was committed on 30.06.2022. As rightly submitted by the appellant, the trial court heavily relied on the victim's evidence in finding conviction; the learned trial magistrate was convinced and held:

In my view even though the accused person denies the fact that he never had sexual intercourse with PW1 on the material date but the victim confirmed that he is the one

who had sex with her on the material date. The other thing is that the accused himself admitted to have seen the victim at his office on the material date as she said she lost way, she entered his office and that he was all alone at his office. The facts corroborate the evidence of the victim the fact that she missed the way, and he received her and took her to his office.

In the prosecution case, there is evidence of the victim, PW2, PW3, and PF3, as shown in Exhibit P1. Regarding PW2, her "husband", he gave evidence that the offence was committed on 30.6.2022, around 08:00hrs. This can also be gathered from Exhibit P1. It is clear that PW2 did not witness the commission of the offence, but his testimony was based on what he heard from the victim. It is on record that the appellant denied having intercourse with the victim. In this, it remains the victim's word and against the appellant's words.

In this state of evidence, it would follow that the victim's testimony is decisive; its credibility had to pass the test, as elucidated in **Shabani Daudi V.R** cited by the appellant. As such, in **MALODA WILLIAM AND MAHAGILA MLIMI v. R**, Criminal Appeal No. 256 of 2006 (unreported): the court of appeal held -

"... the credibility of each witness in a case ought to be dispassionately assessed by testing it not only against the

whole of his or her evidence but more compellingly against the entire evidence on record, be it testimonial or documentary.

I will start with PW1. Looking at the evidence of the victim PW1, the same suggests that she was raped on 30.06.2022, and she went hospital on the same date; the test was conducted, but the result was issued to her the next day around 11:00 hrs. As indicated above, this witness testified that after several sessions with the accused demanding sex, she was grabbed and forcefully penetrated by the accused. The appellant complains that this evidence is inconsistent with other evidence.

This takes to the other corroborating evidence in Exhibit P1 which is the PF3; the same appears to have been issued to the victim on 30.06.2022 it reads;

*Inasemekana amebakwa **leo saa mbili asubuhi tarehe 30.06.2022** achunguzwe na afanyiwe swab kwa ajili ya DNA kwani mtuhumiwa anafahamika wa sura*

Sgd

WP 3935 S. Sgnt Joyce

The report of the doctor who examined this victim appears to have been made on 01.07.2022. This piece of evidence showed a contradiction

when the victim was examined. Meanwhile, P1 and PW2 said they went to the hospital on 30.06. 2022 However, Exhibit P1 shows that the victim was reviewed on 1 July 2022. This is also depicted from the oral evidence of the doctor PW3.

The problem with this is in two areas: **one**, the relevancy of the specimen requested for examination and **two**, going by the evidence of PW3, that the examination was done on 1st July 2022, the appellant's complaint that anything could have happened overnight is valid, considering that the victim was always in the company of PW2, her "husband." See Exhibit P1.

According to Exhibit P1, no specimen was found for DNA; the doctor's opinion is based on what was stated that the victim experienced pain in her genitals.

PW3's evidence that he examined the victim on 1.7.2022 contradicts the victim's story on the material aspect of when the offence was committed. In **SIMON ABONYO VS R CR APPEAL NO. 144 OF 2005 CAT MWANZA**, the court of appeal emphasized the need to align evidence with the date of the charge.

The importance of proving the offence as alleged in the charge hardly needs to be over-emphasized. From the

charge, the accused is made aware of the case he is facing about the time of the incident and place so that he can marshal his defence.

The other problem with the date inconsistency is that if the victim went to the hospital on 1.7.2022, accompanied by PW2 Yusuph Bakari, "her boyfriend," according to exhibit P1, the appellant's complaint that anything could have happened overnight should be given its deserved weight. On this basis, I see there was a lot of sense in the police's request to the hospital for samples for DNA examination.

On the importance of scientific evidence in proving sexual offences, I can not express it more cogently than it was elucidated in an article by ***Dwight W. Rife, Scientific Evidence in Rape Cases, 31 Am. Inst. Crim. L. & Criminology 232 (1940-1941).*** Generally, DNA evidence can identify a suspect, associate a suspect with a victim, corroborate the victim's story, and disassociate others from the offence or accusation.

Unfortunately, in this case, the requested DNA test did not yield any results as not even a specimen could be found, which operated to the accused's advantage.

I have, as such, considered the alleged statement that the appellant admitted to Afande Anna that he was ready to pay the victim Tsh 1500,000. I see nothing useful in this because the same mentions nothing about rape, it was not tendered in court, and the said Afande Anna nor the investigator did not appear and testify on this. After all, why would police negotiate with a rapist to pay the victim? Considering the appellant's complaint that this case was framed, in view of **Azziz Abdallah V.R [1991] TLR 71**, the appearance of the said Afande Anna and the investigator was crucial. Failure to summon them equally draws adverse inference against the prosecution case.

In the end, for the reason stated above, I find that the charge against the appellant was not proved to the required standard. That said and done, I allow the appeal, quash the conviction, and set aside the sentence imposed against the appellant. Consequently, I order the appellant's immediate release unless held for other lawful reasons.



A J KIREKIANO

JUDGE

29.05.2024

COURT:

Judgment delivered in the presence of the appellant and Mr Clement Masua, learned State Attorney for the Republic.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

A J KIREKIANO

JUDGE

29.05.2024