IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 98 OF 2023

(Appeal from the conviction and sentence of the District Court of Simanjiro in Criminal Case No. 113 of 2022 Hon. C. S. Uisso-PRM dated 24th August 2023)

LEONARD MANASI MWANGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Date of Last Order: 19/2/2024

Date of Judgment: 23/2/2024

JUDGEMENT

MAGOIGA, J.

Before Simanjiro District Court (trial court) **Leonard Manasi Mwanga** (hereinafter referred as the appellant) was arraigned for one offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code [CAP 16 RE 2022].

It was alleged that on 4/10/2022 at Kazamoyo street Mirerani area within Simanjiro District in Manyara region, the appellant had carnal knowledge with a girl aged 15 years old. For the purposes of concealing the identity of the girl, I shall refer her as **'PW2'** or simply the **'victim'.**

The appellant pleaded not guilty to the charge, hence full trial ensued in which in attempt to substantiate its case, the prosecution paraded four witnesses and tendered two exhibits. On the other hand, the appellant was the sole witness for the defence.

The prosecution case was that, on 4/10/2023, PW3 (the victim's mother) sent PW2 to buy some vegetables. PW2 went in accompany of her younger sister Mary but for unknown reason PW2 decided to send her back home. The story goes that, the money given to PW2 was not enough to purchase the vegetable, hence she decided to go to her brother to get some more money. While on the way, PW2 claimed to have met with the appellant who was sitting under the tree drinking alcohol.

The appellant called PW2 in order to send her to the shop. It is claimed that the appellant told PW2 to wait outside while he went inside his house to take some money. Later on, the appellant came and asked PW2 to get inside his house in which the latter got inside the appellant's house. While inside the house, the appellant got hold of PW2 and put her on his bed then he undressed her, pulled down the underwear and he removed his white shorts and boxer and took his manhood and inserted it inside PW2's vagina.

The record reveals that while on top of PW2, people were shouting requiring the appellant to release PW2. It was further revealed that, after getting outside the appellant's house, PW2 went to hide in the tree but later on she was taken to the police station where she was issued with PF3 and later on went to the hospital where she was attended by PW1.

In his findings, PW1 stated he that found traces of sperms and bruises in PW2's vagina. In his defence, the appellant denied to have committed the offence which he stood charged. He claimed that there were people shouting outside his house upon opening the door he found many people accompanied by police officers who arrested him.

The trial court was convinced that the case against the appellant was proved to the standard required in criminal cases, hence it convicted and sentenced him to serve 30 years imprisonment.

Aggrieved with both conviction and sentence meted out against him, the appellant preferred the instant appeal with seven grounds of appeal as follows:-

1. *That, the learned trial magistrate erred in law as he failed to analyze evidence which led him into wrong conclusion.*

2. *That the learned trial magistrate erred in law and facts because the proceedings of the trial court are tainted with irregularities and illegalities.*
3. *That the learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant to prove his innocence rather than the republic to prove the case beyond reasonable doubt.*
4. *That the learned trial magistrate erred in law and facts that the issue of rape is very serious, therefore in the absence of strong evidence led to the wrong conclusion, the evidence of PW1, PW2, PW3 and PW4 remained extremely weak to ground conviction.*
5. *That the learned trial magistrate erred in law and facts, that the evidence of PW3 was hearsay evidence, that the absence of Hamis' evidence create doubt against the appellant prove the case beyond reasonable doubt.*
6. *That the learned trial magistrate erred in law and facts to convict the appellant on count without tangible, concrete*

and sufficient evidence from the originating source of information hence based on hearsay evidence.

7. *That the purported conviction of the appellant is illegal as the case against the appellant was not proved beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person and unrepresented while the respondent was represented by Ms. Mwanaidi, Chuma learned State Attorney.

When called upon to argue his grounds of appeal, the appellant submitted generally that this court should re-evaluate the evidence on record and find that the case against him was not proved beyond reasonable doubt. The appellant pointed out while the incident happened on 4/10/2022, PW2 went for medical checkup on 5/10/2022.

He pointed out that if truly the victim was raped, she could not run away rather she should have informed the people alleged to have gathered at the appellant's house. He contended that the people who gathered at the appellant's house were never called to testify. The rape, if any, as narrated by Republic witnesses, the alleged people who gathered outside were to

arrest the appellant and the victim on the scene of crime but which was not the case.

The appellant, therefore, urged this court to allow the appeal and set him free.

In reply, Ms. Chuma opposed the appeal. The learned Attorney argued in respect of the first ground of appeal that, the trial court analyzed the evidence on record and prosecution paraded four witnesses whose evidence was strong and leaves no doubt.

In arguing the second, fourth and sixth grounds jointly, the learned Attorney argued that the appellant admitted to have been arrested and met the victim. She submitted further that the eye witness could not have been found and summons were sent to him but in vain. She readily admitted that prosecution did not tender the witness statement under section 34B of the Tanzania Evidence Act, [Cap 6 R.E. 2022].

According to the learned Attorney, the best evidence comes from the victim. To buttress her arguments, she referred the case of **Selemani Makumba v Republic** Criminal Appeal No. 94 of 2006. The learned Attorney pointed out that much as the doctor (PW1) found sperms in PW2's vagina, hence

rape was proved. The learned Attorney further argued that penetration is proved by the doctor who examined the victim. Reference was made to the case of **Elia Kundasei v Republic** Criminal Appeal No. 288 of 2015 (unreported).

In the fine, therefore, the learned Attorney urged this court to dismiss the appeal for want of merits.

In rejoinder, the appellant argued that much as the point raised and argued were not adequately answered by the learned Attorney, then his appeal has merits and should be allowed.

Having gone through parties' rival submissions, the sole issue that calls for my determination is whether the appeal has merits.

The learned trial Magistrate is being faulted for he failed to analyze the evidence on record which is the gist of the appellant's first ground of appeal. In determining this ground, I will as well consider whether there was sufficient evidence to ground the appellant's conviction.

I have keenly gone through the record, the learned trial Magistrate formulated points for determination; the first one being that whether the accused person was clearly identified as the person who committed the

crime. This was crucial issue and the learned trial Magistrate quickly jumped to the conclusion that the appellant committed the offence without addressing the issue in relation to the evidence on record.

Hence, this will be starting point. The victim claimed to have been raped by the appellant on the fateful date. But the evidence on record clearly indicates that the alleged offence was committed in the night. This is as per the evidence of PW2 and PW3. In particular PW2 stated that it was 20.00 hours when she met the appellant. While PW3 on 4/10/2022 in the night she sent the victim to the shop.

It is on record that, while responding a question from the prosecutor, PW2 admitted that on the material night there was no electricity. This fact finds support from PW3. Now since the evidence on record shows clearly the offence was committed in the night the evidence of visual identification should have been watertight.

While I fully agree with the learned State Attorney in view of the decision in **Selemani Makumba v Republic** (supra) that the best evidence in sexual offence comes from the victim, in the instant matter the evidence of PW2 is conspicuous silent on how she was able to identify the appellant on the

fateful night. The learned trial Magistrate formulated the crucial issue regarding the identification of the appellant but he never attempted to find answers in relation to the evidence on record.

The learned trial magistrate was of the view that the appellant was the perpetrator of the offence because he was mentioned by the victim. The mere fact that the victim mentioned the appellant to be the perpetrator of the offence in my settled opinion does not of itself become a conclusive proof as there should have been sufficient evidence on how the victim was able to identify the appellant.

There are allegations that the victim knew the appellant before the commission of the offence at hand. In **Boniface Siwingwa v. R**, Criminal Appeal No. 421 of 2007 and **Mabula Makoye and Another V. R**, Criminal Appeal No. 227 of 2017 (both of which are unreported);

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to*

rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of the crime as the witness might be honest but mistaken."

Hence, I am of the considered view that had the learned trial magistrate carefully analyzed the evidence on record, the first issue which was fundamental one would have been answered in negative.

I have considered the evidence on record that there was person by the name of Hamis claimed to have seen the victim called by a man and the door was locked. Unfortunately, the said Hamis was never called to testify. On the record it is claimed that there were efforts to trace him but in vain. I have gone through exhibit P2 the summons claimed to have been issued to the said person. But the record shows that the summons was issued to one Ibrahim Lazaro and not the said Hamisi. Equally it is indicated that the said person was reachable in his phone. I am of the considered view that since the key witness was reachable through the phone it was possible for him to be called to testify before the trial court.

Such failure in my respectful opinion created doubt and the trial court should have drawn an inference adverse to the prosecution. After all the said Hamis

who went to inform the victim's mother that the victim had entered the man's house, he never disclosed the identity of the man who called the victim.

Again, the learned trial magistrate was of view that the victim's evidence was corroborated by the evidence of PW1, PW3 and PW4. Starting with the evidence of PW1, first of all he attended the victim after the lapse of more than 24 hours. This delay was not accounted for taking into account the nature the offence. There were so many information which were not filled on the PF3 (exhibit P1) as readily conceded by the learned State Attorney. Hence, his evidence is doubtful. I have revisited the evidence of PW3 I could not see any evidence corroborating the victim's evidence.

As to the evidence of PW4, his evidence is hearsay as he narrated on what he was told by the victim. Hence, there was no corroboration in his evidence.

It is for the above reasons, I find the learned trial Magistrate failed to analyze the evidence on record leading to incorrect conclusion that the offence against the appellant was proved while it was not proved as shown above.

Consequently, the appeal has merits and the same is allowed. The conviction and sentence meted out against the appellant are quashed and set aside.

The appellant is to be released from the prison unless held for another lawful cause.

It is so ordered.

Dated at Babati this 23rd day of February, 2023.

S. M. MAGOIGA

JUDGE

23/2/2024