

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO.190 OF 2023

(Originating from the court of Resident Magistrate of Mbeya at Mbeya Criminal Case No.32 of 2018)

SUNDIATA ZAMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 15th April, 2024

Date of Judgment: 14th May, 2024

KAWISHE, J.:

The appellant, Sundiata Zambzi stood charged with the offence of rape contrary to section 130 (1), (2)(a) and 131 (1) of the Penal Code, Cap 16 R.E 2019 (now R.E 2022), before the Resident Magistrate's Court of Mbeya at Mbeya. At the conclusion of the trial, he was convicted and sentenced to serve thirty years imprisonment with twelve strokes of cane.

It was alleged that on the 5th day of February, 2018 at Apoloto Sisimba area, within the City and Region of Mbeya, the appellant did have carnal knowledge of the victim without her consent. During the hearing of the case before the trial court, the prosecution case was built on the testimonies of four witnesses with two exhibits. On the defence side there was only one witness, the appellant. Having heard both parties, the trial court was satisfied that the prosecution proved their case beyond reasonable doubt. The appellant was convicted for rape and sentenced to serve 30 years imprisonment, and to undergo 12 strokes of the cane. Aggrieved with the said decision, the appellant approached this court challenging the said decision with three grounds of appeal reproduced hereunder:

- 1. That the trial court erred in law when convicted and sentenced the appellant relying on the evidence of PW1 and PW2 the family members out of the leaders and neighbours of such place who assisted PW2 to find PW1.*
- 2. That the trial court erred in law when convicted and sentenced the appellant without taking into account that the examination done by PW3 is doubtful and unreliable since there was no use of machine to examine PW1.*
- 3. That the trial court erred in law when convicted and sentenced the appellant without evaluating deeply the evidence of PW1, PW2, PW3 and PW4 and the defence of the appellant ended to convict the appellant unlawful.*

During the hearing of this appeal which was conducted orally, the appellant appeared in person unrepresented whilst, the respondent was represented by Ms. Julieth Katararo, learned State Attorney.

Being a layperson, the appellant adopted his grounds of appeal. He had nothing to add. In reply the respondent's counsel submitted on the grounds of appeal, starting with the third ground of appeal. She submitted that the ground is baseless, on the reason that the prosecution had a total of four witnesses PW1 to PW4. Therefore, in proving the offence of rape the prosecution has the duty to prove the offence beyond reasonable doubt, by proving the elements of rape. She cited section 130(4) of the Penal Code which requires a proof of penetration in proving rape.

The learned State Attorney referred the evidence adduced by PW1 at page 4 of the typed proceedings of the trial court which prove that there was penetration. Where, the victim stated that the appellant inserted his manhood into her female organ. Also, the counsel cited the case of **Selemani Makumba vs. R**, Criminal Appeal No. 94 of 1999 to cement the position that the best evidence in rape has to come from the victim. On the issue of identification, the learned State Attorney argued that the

victim was familiar with the appellant therefore, there is no challenge in that aspect. Thus, the victim evidence was credible.

She further argued that the evidence of PW2 corroborated what was stated by the victim (PW1) at page 9 of the typed proceedings of the trial court which proves that there was penetration. The evidence of PW3 also after examination proved that there was penetration. In the typed proceedings of the trial court at page 14, PW3 testified that when examined the victim he discovered that the hymen was broken, with bruises to show that there was perforation. The learned State Attorney insisted that the evidence of PW4 corroborates the testimonies of PW1 and PW2 that the appellant met the victim in the bush as recorded at page 15 of the trial court's proceedings.

The third ground on the claim that the evidence of the appellant was not analysed, the learned State Attorney referred the court to page 6 of the trial court's judgment where the court analysed the defence made by the appellant. Therefore, she prayed to the court that, the third ground be dismissed because the evidence adduced by the witnesses was well analysed.

Replying to the second ground of appeal, she argued that PW3 as a medical doctor testified as an expert, referring the court to page 13 of

the trial court's typed proceedings. That according to section 130(4) of the Penal Code, PW3 was required to prove penetration through his expertise, and not to use a device in the examination. She added that PW3 stated that he used his hands and eyes to examine the victim. Hence, he discovered that the victim had no hymen with bruises as shown at page 13-14 of the trial court's typed proceedings. Thus, she prayed that the second ground to be dismissed.

Replying to the first ground of appeal that the neighbours and leaders were not called to testify, the learned State Attorney referred the court to page 5 of the typed proceedings where, during cross examination the victim replied that, we were in the bush, and there was no any other person at the scene of crime. The learned State Attorney insisted that, the law requires the Republic to prove the elements of rape. That, in this case the evidence of PW1 and PW2 proved rape. To bolster her argument, she referred to the case of **Mosi Chacha and Another vs. R**, Criminal Application No. 508 of 2019. The learned State Attorney submitted that the Republic supports the conviction and sentence of the trial court hence, the appeal to be dismissed.

In his rejoinder the appellant reiterated his prayer to adopt his grounds and insisted on the ground that, the leaders were not called to testify before the trial court.

Having gone through the appellants' grounds of appeal as prayed for, and having heard the submission of the learned State Attorney, the grounds of appeal will be addressed as raised by the appellant. Considering the grounds of appeal raised, I found out that they may be deliberated from one main issue: whether the prosecution proved the offence of rape beyond reasonable doubt.

In the first ground that the trial court convicted the accused relying on the evidence of the of PW1 and PW2 who are family members, while there were leaders and neighbours who assisted PW2 to find PW1. In this ground the issue to be determined is whether it was necessary for the leaders and neighbours to testify before the trial court. This being a sexual offences case, only two persons are usually involved when it is committed. Therefore, the most credible evidence to be relied upon is that of the victim. This was so held in the case of **Abdul Mohamed Namwanga@ Madodo vs. Republic**, Criminal Appeal No. 257 of 2020, Court of Appeal at Mwanza, the Court held that:

*"...we are alert that in view of the inherent nature of the offence of rape or any other sexual offence where only two persons are usually involved when it is committed, **the testimony of the complainant is mostly crucial** and must be examined and judged cautiously". [Emphasis mine]*

Following the decision of the Court of Appeal in this excerpt, comparing with the case at hand, as argued by the learned State Attorney who referred the court to page 5 of the typed proceedings, where during cross examination, the victim replied that, they were in the bush, no other person was present. The victim further stated that the people were far cultivating, that she cried for help but got no assistance. Thus, this means that there were no eye witnesses who witnessed the appellant raping the victim. The trial court relied on the evidence of the victim in convicting the appellant. Therefore, the only thing the trial court considered is whether the victim was a credible witness.

It is a settled law that in rape cases the best evidence is that of the victim. This was so held in the case of **Selemani Makumba** (supra), as cited above by the respondent's counsel, where it was said 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".

Having perused the trial court's records it seems that the victim is of unsound mind as recorded at page 2 on the matters not in dispute and the testimony of PW2 at page 9 of the trial court's proceedings. Section 127(1) of the Evidence Act, provides among other things that a person with a disease whether of body or mind shall be competent to testify. Therefore, as per section 127(6) of the same Act provides that in criminal proceedings involving sexual offences the only independent evidence is that of the victim of the sexual offence, the court shall receive the evidence and after assessing the credibility of the evidence, the court may proceed to convict, if for the reasons recorded in the proceedings the court is satisfied the victim of the sexual offence is telling nothing but the truth. This was stated in the case of **Abdul Mohamed Namwanga@ Madodo** (supra) that:

"The evidence of the complainant, if believable, persuasive and consistent with human nature as well as the normal cause of things, can be acted upon as the sole basis of conviction".

Therefore, the trial court convicted the appellant basing on the evidence of the victim as per requirement of the law. With this reasoning the first ground of appeal has no merit.

In the second ground of appeal that the examination done by the doctor (PW3) is doubtful and unreliable because there is no use of

machine to examine PW1. The counsel for the respondent cited section 130(4) of the Penal Code when arguing this ground. The said section provides that, for the purposes of proving the offence of rape, penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence. Therefore, the important ingredient to be proved in the offence of rape is penetration. The aim of the doctor to testify before the court was to prove that there was penetration or sexual intercourse. This was held in the case of **Selemani Makumba** (supra):

"A medical report or the evidence of a doctor may help to show that there was sexual intercourse but it does not prove that there was rape, that is unconsented sex even if bruises are observed in the female sexual organ".

In this case at hand the doctor proved that there was penetration, he examined the victim through physical examination by using hands and eyes when examining the private parts of the victim. PW3 testified before the trial court that the victim had no hymen, had minor bruises to show that there was penetration and friction. In such circumstances the claim by the appellant, that the doctor did not use a machine to examine the appellant has no basis. There is no legal requirement for the doctor to use a machine during examining a victim of rape.

Further, during the trial in the trial court, the appellant did not cross-examine PW3 in this aspect, accordingly, raising this issue at this stage it is an afterthought which does not help him in any way. It is a settled law in this jurisdiction that failure to cross-examine a witness on a relevant matter ordinarily connotes acceptance, and the appellant will be estopped from asking the trial court to disbelieve what the witness said. This principle has been reflected in a plethora of cases. See **Damian Ruhele vs. Republic**, Criminal Appeal No. 501 of 2007 and **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010. For that reason, the issue is an extraneous matter which was not raised before the trial court for deliberation. That being the case, since the trial court had no opportunity to deliberate on the same, and given the fact that an appeal is on matters where either party is not satisfied by the decision of the trial court, and no decision was made on it, in that I will not dwell on it.

Having a thorough perusal on the trial court's proceedings, I noted that the PF3 which was tendered and admitted as exhibit "PE1" was not read loudly before the parties. The law is very specific in this ground, that even if the document is tendered in court without any objection from the accused, the same has to be read loudly to the parties. In this

case at page 14 of the trial court's proceedings, exhibit PE1 was tendered without objection but the same was not read over to the accused person. Thus, the legal effect of it is to expunge the admitted document from the record.

It is well known that, where a document is expunged, it does not automatically follow that the evidence of the witness who tendered it must as well collapse or diminish in value. Expunging the document cannot affect the recorded evidence. Therefore, the PF3 has been expunged and remains with the oral evidence of the witness who tendered it. The same was held in the case of **Robinson Mwanjisi and 3 Others vs. R**, [2003] TLR 2018. Subsequently, the sketch map has to be expunged from the records, because the same was not read loudly before the parties.

After the documents have been expunged, the remaining oral evidence of the witnesses has value and still corroborates what has been testified by the victim.

On the 3rd ground of appeal that the trial court did not evaluate the evidence of PW1, PW2, PW3, PW4, and the defence evidence, hence ended in convicting the appellant unlawfully. It is the position of the law that, generally, failure or improper evaluation of the evidence leads to

wrong conclusions resulting into a miscarriage of justice. Thus, failure to consider evidence of both parties is fatal and usually vitiates the conviction.

The trial court's conviction is rested at page 4 to 6 of the trial court's typed judgement. In my view, the trial court analysed and evaluated the evidence of both parties. The trial court assessed the probative value, credibility and weight of the evidence adduced by the defence as against that of the prosecution in determining whether there were any reasonable doubts in the prosecution case. In the case of **Leonard Mwanashoka vs. R**, Criminal Appeal No. 226 of 2014, it was stated that:

"About summarising the evidence, it is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after a proper scrutiny and evaluation and another thing not to consider the evidence at all in the evaluation or analysis".

The Court insists on the importance of evaluating the evidence of both parties. In the issue of evaluation, it is well settled that the first appellate court may re-evaluate the evidence of the trial court in order to reach its own findings. In the case of **Yusuph Amani vs. R**, Criminal Appeal No. 255 of 2014, CAT at Mbeya, stated that:

"At page 70 of the record the first appellate court treated the appellant complaint as follows.... In ground 8 of the appellant is impeaching the trial court decision for not considering his defence. This ground is baseless. As it can be appreciated at page 50 of the trial court judgement, the trial court properly evaluated the appellant defence.....

This was indeed not a fair treatment to the appellant who has in this appeal maintained that his defence was not considered. Thus, the omission was not remedied by the first appellate court which was duty bound to re-evaluate the entire evidence and an opportunity to have defence evidence considered."

Therefore, this court as the first appellate court is duty bound to re-evaluate the evidence of both parties. Starting with the prosecution evidence paraded a total of four witnesses. The victim, PW1 proved all the ingredients of the offence that she was raped by the appellant on 5/2/2018 in the bush. PW1 named the appellant by the name of Nzelende. That the appellant seduced her when they were in the bush, the appellant lifted her gown up, tear her underpants and clothes and penetrated his manhood into the victim's female organ. She further testified that she felt strong pain. She could not manage to run rather had to sleep there until the next day. PW1's evidence was corroborated with the evidence of PW2 who testified to have found the victim in the bush on the next day. The victim told PW2 (her young sister) what has happened to her and that the appellant is the one who raped her. PW1 knew the appellant as he is their neighbour and he is staying with his

wife by the name of Ilongo. The evidence of PW1 was corroborated by the evidence of PW2 and there were no any contradictions.

The evidence of PW3, the medical doctor proved that the victim was penetrated, after physical examination of the victim's female organs by using hands and eyes. He noted that the victim had no hymen, had minor bruises to show there was penetration and friction. Also, the evidence of PW4 investigator testified that the appellant admitted meeting the victim in the bush. The victim was collecting firewood and the appellant was collecting shards (mabanzi). PW2 testified she went to the scene of crime and found the grass laying down showing that people slept there, and it was under a tree.

The issue is whether the appellant defence did raise any doubt in the prosecution case. The appellant in his defence claim that they had a quarrel with the complainants' family. He seized cows belonging to the complainants. Therefore, they had a meeting, and PW1 was told to say that the appellant raped her. Then he was arrested.

In my opinion the appellant's defence did not raise any reasonable doubt in the prosecution's case. All that the appellant is said on his defence that, he had a quarrel with the complainant's family which is an afterthought. He did not cross examine the victim and PW2 when

testifying before the trial court. This defence did not raise any doubt on the prosecution's evidence.

The appellant raised remote and fanciful possibilities which were incapable of denting the prosecution's evidence. Therefore, after re-evaluating the evidence of the appellant there is no any doubt which shook the prosecution's evidence. Thus, the trial court was right to find the appellant guilty of the offence he was charged with. As a result, I am inclined to what was submitted by the respondent's counsel that, the trial court analysed the evidence of both parties and considered the credibility of the witnesses.

Basing on the above evidence, the offence of rape was proved. It was proved that there was penetration and there was no consent on the side of the victim, because the victim is an adult. In the case of **Kirundila Bangilana vs. Republic**, Criminal Appeal No. 313 of 2007 it was held:

"Rape is proved (in case of adults) when a male organ penetrates the victim's female organ without her consent."

As discussed in the first ground of this appeal that the true evidence of rape comes from the victim, and this is subject to the witness being found to be credible, truthful and believable. In this case PW1 is

credible, truthful and believable witness and her evidence is reliable and I see there is no justification to interfere with the finding of the trial court. Even though, she is of unsound mind, but when she testified, she was competent, consistent and was coherent on what she told the trial court on what happened to her on the scene of crime. Her credibility was not shaken by the cross examination and she narrated the incident to PW2 who is her young sister immediately and named the appellant as the rapist. In the case of **Goodluck Kyando vs. R**, [2006] TLR 367, it was stated that:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Therefore, the evidence of PW1 has to be believed as it proved all the relevant facts in the offence which the appellant was charged with. Her evidence was corroborated by the evidence of PW2, PW3, and PW4 though, they were not eye witnesses but they testified what were informed by the victim. In their evidence, their evidence was coherent and no reason to disbelieve it. PW2 testified what she was informed by the PW1 that she was raped and the appellant was the one who raped her. PW3 who was a medical doctor testified that after he examined the

victim, found that she had no hymen, had minor bruises to show there was penetration and friction.

From the re-evaluation of the evidence, the results are in line with the finding of the trial court. Since, the trial court which had an opportunity to observe the demeanour of the victim, PW1 who was the key witness, trusted her evidence, and as it was held in the case of **Omary Mohamed vs. Republic** [1983] TLR 52, that:

"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances which call for reassessment of their credibility."

Since the appellant has not managed to show any discrepancy in the evidence adduce as to the credibility of the witnesses, I see no fault in the conviction and sentence meted on the appellant by the trial court.

With the analysis and reasoning made, this court is of the firm view that, non calling of leaders did not prejudice the appellant as the evidence of the family members sufficed and they are not barred by the law to testify in court, and there is no legal requirement on medical doctors to use devices in examining a victim of rape. In that, the prosecution case was proved beyond reasonable doubt and the appellant was lawfully convicted by the trial court.

Consequently, the appeal lacks merit and is hereby dismissed. The conviction and sentence of the trial court are upheld and confirmed.

It is so ordered.

Right of appeal explained to any aggrieved party.

Dated and Delivered at **MBEYA** this 14th day of May, 2024.



A handwritten signature in blue ink, appearing to read "E. L. Kawishe", written over a horizontal line.

E. L. KAWISHE
JUDGE

Judgment delivered this 14th day of May, 2024 in the presence of the appellant in person and in the presence of Augustino Magessa State Attorney for the Respondent/Republic.



A handwritten signature in blue ink, appearing to read "E. L. Kawishe", written over a horizontal line.

E.L. KAWISHE
JUDGE
14/5/2024