IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CRIMINAL APPEAL NO. 000078
(Originated from District Court of Mbinga at Mbinga in Criminal Case No. 40 of 2023)

FIKIRI LINGWINDA KUMBURU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 10th & 28th June, 2024

KARAYEMAHA, J

An appeal instituted by Fikiri Lingwinda Kumburu in this Court, is against the conviction and sentence passed against him, by the District Court of Mbinga at Mbinga (hereinafter the trial court). The trial court convicted the appellant of rape offence, allegedly committed on 10/7/2023 at Luhuwiko street, Mbinga Township, within Mbinga District in Ruvuma region. In terms of the charge that was laid to his door, the appellant, in committing the rape offence contravened, section 130(1) and (2) (e) and 131 of the Penal Code [Cap. 16 R.E. 2022] (hereinafter the PC).

The offence was committed against a girl aged 13 years. To disguise her identity, I shall refer to her as "MD" or simply as PW1, the codename by which she testified at the trial or as a victim. The trial court convicted the appellant and finally sentenced him to serve a period of 30 years imprisonment.

In order to appreciate the facts of this matter, it is apposite that a brief account of the matter that bred this appeal be made. It is that: MD lived with her father (the appellant) and her mother, namely, Pendo Faustine Mbaya (PW2) under the same roof. On 10/7/2023 at 6:00hrs, it is alleged, the appellant escaped from his bed room leaving his wife alone and went into MD's room. Shortly after gaining ingress in DM's room, he raped her by inserting his penis into her vagina. According to MD, she was warned not to make noise and succumbed. She testified further that she felt serious pains.

No sooner had the appellant left the bedroom than PW2 sniffed suspicion in his movement. Despite of her pregnancy, she tracked him. Alas! She saw him leaving MD's room going to the toilet. At the same time, she saw DM with no pants and dressing up. On being questioned on the incident, the appellant apologized. From there on the appellant

escaped from his house until 20/8/2023 when he was arrested by the chairman, one Nchimbi and the police, namely, Assistant Inspector Ally (PW5) and sent to police station. He was interrogated and denied committing the offence by PW4, one, H.9325 DC Anselimo Tepeli. This witness informed the trial court that when he got information that the appellant was at home on 19/8/2023 at 19:00hrs, he led a team of police officers at 23:00hrs to arrest him but the former run away.

It was the prosecution case that after the incident was unfolded, MD was taken to police, acquired the PF3 and taken to Mbuyula Hospital. At the hospital, MD was examined by PW3, Tabita Lawrence Msuha, the Medical Doctor, on 24/7/2023 and observed that apart from having no problems on her labia majora and manora, she had no hymen. PW3 completed the PF3 which she tendered as exhibit PE1.

The appellant offered a surprisingly short defence which consisted of a denial that he did not commit the alleged rape, and a statement that on the day of the alleged rape he was away in Nyasa from 8/7/2023 to 17/8/2023. On cross – examination the appellant admitted to have no query on the issue of relationship with MD.

In convicting the appellant, the trial Resident Magistrate found credence in PW1's evidence. He desisted from accepting the appellant's defence of *alibi* on the reason that he did not comply with section 194(4), (5) and (6) of the Criminal Procedure Act, [Cap. 20 R.E. 2022]. The learned trial resident Magistrate referred to cases of **Kubezya John v. R,** Criminal Appeal No. 488 of 2015 and **Venance Nuba & another v R,** Criminal Appeal, No. 425 of 2013 to accord no weight to the defence of *alibi*. He was also satisfied that the appellant was properly identified by PW1 and PW2. Finaly, the learned trial Resident Magistrate was convinced that PW1 was an agent of truth and that her story that she was raped by the appellant was acceptable.

This verdict evoked a profound dissatisfaction from the appellant, hence his appeal to this Court. His petition of appeal has four (4) grounds which are reproduced as hereunder:

1. That, the learned honorable magistrate erred in law and fact to convict the appellant without the case being proved beyond all reasonable doubt as required by law.

2. That, the learned magistrate erred in law and fact to admit the contradictory evidence of the doctor who examined the complainant.
3. That, the learned magistrate erred in law and fact to admit the evidence PW2 which was contradictory evidence in the date of offence and the date where the victim was examined by the doctor.
4. That, the trial magistrate did give the appellant an opportunity to make his defense by summoning his witness so that he can make good defense.

At the hearing of the appeal, the appellant fended for himself, unrepresented, while Mr. Madunda Mhina, learned State Attorney, represented the respondent.

Upon inquiry by the court on whether he wished to submit first or let the learned State Attorney submit first, the appellant beseeched the latter to submit first and would re-join if need arose.

Having closely examined the grounds of appeal and facts that built the prosecution case, it is my firm view that the major questions are **one,** whether the trial Resident Magistrate erred in holding that the

prosecution managed to prove the case beyond reasonable doubts, and **two**, whether the appellant was accorded a chance to summon his witnesses. I, therefore, propose to deal with grounds one, two and three together which given their importance, I believe they are capable of answering the first issue.

I begin with the ground that alleges that the prosecution failed to prove its case to the hilt. The appellant had no useful submission on this ground. However, considering his complaints in the petition of appeal, this implies that the appellant's conviction was not based on the weak prosecution's evidence. Mr. Mhina the respondent's counsel poured cold water on this contention, arguing that the testimony of PW1, PW2 and PW3 presented a credible case and attained the level of sufficiency that can justify the decision that the trial court arrived at.

As I tackle this issue, it should not escape anybody's mind that, in criminal cases, the burden of proof is casted upon the prosecution. This imperative requirement has been underscored in a collection of decisions of this Court and the Court of Appeal. In **Joseph John Makune v. Republic** [1986] TLR 44, it was observed:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."

To gauge if the requisite threshold has been attained, the prosecution's testimony, taken in its totality, must be sufficient, cogent and credible. Crucially, credibility of the testimony from which conviction is to be grounded is measured by the coherence of the testimony of one or more of the key witnesses; and the way the same is considered in relation to the testimony of other witnesses. This position has been underscored in **Edson Mwombeki v. Republic**, CAT-Criminal Appeal No. 94 of 2016 (unreported), in which conviction of the appellant, as is the case in the instant matter, hinged on the credibility of the victim. In underscoring the importance of credibility of a witness, the superior Court made reference to its earlier position in **Shaban Daudi v. Republic**, CAT-Criminal Appeal No. 28 of 2001 (unreported), in which it was held thus:

*"... The credibility of a witness can be determined in two other ways. **One**, when assessing the coherence of the testimony of that witness, **two**, when the testimony is*

considered in relation to the evidence of other witnesses, including that of the accused person ...."

The only direct evidence to the commission of offence is of the victim PW1. However, it worth noting that it is now a settled law that in sexual offences the best evidence comes from the victim. This is because she was the one who felt what was inserted in her body. See **Selemani Makumba v The Republic** 2006 [TLR] 379 and **Paul Dioniz v the Republic,** Criminal Appeal No. 171 of 2018, CAT-DSM. Reviewing the testimony of the prosecution's witnesses, I spot facts that meet the requirements of credibility set out in the cited cases.

From the evidence of PW1 and PW2 it is crystal clear that MD is the appellant's daughter. PW2 is the appellant's wife. They know each other very well. The issue of MD's age is not debatable. It was proved beyond reasonable doubt through PW2.

The undisputed PW1's evidence reveals that the appellant gained ingress in MD's room in the morning of 10/7/2024. PW1 recognised him and properly identified him and managed to describe clothes he dressed. These facts were not seriously cross-examined to test the veracity of her credibility. Hence deemed to be accepted by the appellant

to be true facts. MD stated in no uncertain terms that the appellant the appellant inserted his penis in her vagina and she felt pains. She could not defy the appellant's warning of not making noise. The contention of penetration was supported by PW3, a doctor, who informed the trial court that on examining MD, she found to have been penetrated and had lost her virginity. I therefore, find credence in her testimony.

Back to the scene of crime, on leaving the room PW2 who was tracking dubious motions, saw the appellant leaving MD's room going to the toilet. Shortly after PW2 saw MD with no pant and struggling to dress her clothes. On interrogating her, MD mentioned the appellant as the rapist. She mentioned him at the earliest time when event was still fresh. Principally, naming the suspect at the earliest opportunity assures the liability of the victim. See **Wangiti Mwita and another v. R.** [2002] TLR 38.

It is also uncontroverted that after the incident, the appellant disappeared until on 20/8/2023 when he was arrested at his home. In addition, it is uncontroverted that when PW4 went to arrest him 19/8/2023, he run away. His disappearance and running away from the police officers who visited him were incompatible with conducts of

innocent person taking into account that he was aware that one of his family members (the victim) was raped. This conduct corroborates the prosecution case on the appellant's involvement in the commission of crime. See **Tumaini Mollel @ Walker & others vs the Republic,** Criminal Appeal No. 40 of 1999.

Availed with such strong evidence, I am ready to listen to the appellant's lament that PW2 misdated the event of MD being taken to PW3 for examination and the date of the commission of the offence. Assuming that the assertion is true, I am convinced that it does not corrode the central story of this case. Nevertheless, there is uncontroverted evidence that MD was taken to PW3 on 24/7/2023 the date mentioned by PW2 as well. This complaint, in my considered view, is baseless and is rejected.

Having discussed the first combined ground at length, I endorse the finding of the trial court and dismiss the complaint that the prosecution case was not proved beyond reasonable doubt.

The second ground calls on this court to determine whether or not the appellant was accorded a chance to summon his witnesses. Of course, parties did not get to the thick of this complaint in their

submissions. However, I was attracted by the appellant's submission that he objected admissibility of the PF3 but the court forced to admit it. That the trial court denied him a right to cross-examine the witnesses. He submitted further that when he wanted to cross-examine the doctor on the issue of inserting her finger in the victim's vagina, she (PW3) was told to leave. He lamented further that he managed to ask PW1 two questions and was told were enough even when he wanted to further interrogate her. He said this complaint in ground four of the appeal.

On my part, I have two observations. **Firstly,** this complaint is an afterthought because it is not part of the grounds of appeal even if the appellant forces it. **Secondly,** as the record clearly shows that the appellant defended himself on 30/10/2023. This is cleared by the typed proceedings at pages 23 and 24. He also addressed the court that he had no other witnesses. He thus prayed to close his defence case. It is not true therefore that he was denied a chance to call his witnesses to support his case.

For that reason, I find the second ground of appeal with no merit.

Having exhausted the examination and analysis of the appellant's grounds of appeal, I am of the considered opinion that, there is no

reason to fault the trial court's finding. In the event, I find the appeal lacking merit, hence it is hereby dismissed in its entirety.

DATED at **SONGEA** this 28th day of June, 2024

J. M. KARAYEMAHA
JUDGE