

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA SUB REGISTRY

AT TABORA

DC. CRIMINAL APPEAL NO. 75 OF 2023

(Originating from Nzega District Court in Criminal case No. 21/2023)

EDWIN S/O MADUMBA@ WILLIAM.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Last Order: 12/02/2024

Date of Judgment: 01/03/2024

MANGO,J

In the District Court of Nzega, the Appellant 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. 2022]. It was alleged that, on the 23rd day of October 2022 at Uchama area within Nzega District, the Appellant did rape the victim a lady aged 30 years.

It was alleged before the trial Court that, on 15/10/2022 the victim of the offence was at Kahama District in Shinyanga Region searching for a business apartment. She met the appellant who introduced himself as a broker. The two exchanged their contacts and the Appellant promised to assist her in searching for a business apartment. On 22/10/2023 the Appellant called PW3 and informed her that, he found a business apartment at Kahama. The

Appellant paid for the victims' bus fare from Kibondo to Kahama. Unfortunately, they could not meet at Kahama because the Appellant traveled to Nzega. The Appellant requested the victim to travel and meet him at Nzega instead of Kahama. The victim agreed and travelled to meet the Appellant at Nzega as requested. The Appellant booked a room at guest house where they spent their night together. The victim alleged that, the two did not share a bed, the Appellant slept on a sofa which was in the room while the victim slept on the bed.

On 23/10/2022 around 19:00hours the Appellant told her to go and see the apartment. They used a motorcycle which was being drove by the Appellant. While on the way to the alleged business apartment, the Appellant stopped the motorcycle, threatened the victim with a knife and forced her to suck his penis and later raped her.

After full trial, the trial Court convicted the Appellant and sentenced him to serve 30 years imprisonment.

Aggrieved with the conviction and sentence meted by the trial Court, the Appellant preferred this appeal on the following grounds

1. That, case for the prosecutions was not proved against the appellant beyond reasonable doubt as required by law.
2. That, the learned Trial Magistrate erred in law and fact to hold conviction against the appellant basing on weak and sharky evidence of the victim (PW3) as some issues were not dealt accordingly to clear doubts as follows: -

- i. The victim failed to produce the pictures she sent to her relative in case of anything (her sister).
 - ii. The victim failed to address the court how she managed to untie the ropes.
 - iii. That neither Guest House register (Sunrise guest house) was not tendered nor Guest attendant before the trial court to testify if the victim (PW3) slept before the incident.
 - iv. The victim also failed to avail her relative whom she contacted to demand money asked by the appellant or who sent pictures.
3. That, penetration as required by **section 130(4) of the Penal Code (Cap 16 R.E 2019)** was not cogently established by **PW4 (doctor)** and **PW1** being the victim of the offence of rape allegedly committed to her by the appellant.
4. That, the defence of the appellant was not considered on merit by the Learned Trial Magistrate at the time of composing the judgment.
5. That, Trial Magistrate erred in law and fact to rely on Exhibit PE2 which was not reliable as was drawn without presence or directives from the victim instead was drawn through directives of Village Chairman who was not present during the commission of the alleged offence.
6. That, the Learned Trial Magistrate erred in law and fact to hold and find the appellant guilty without considering that the allegations against him was just fabricated and fictitious in order to incriminate him to with, PW5 he arrested and told the appellant that he was faced with the case of Murder case at Arusha. Hence arrest of the appellant had no connection with the alleged offence of rape.

7. That, **section 214(1) of the Criminal Procedure Act Cap. 20 R.E 2022** was discretionary abused by the Magistrate in charge as no sufficient reasons adduced to re assign the case.

The Appellant was represented by Mr. Kelvin Kayaga, learned Advocate while the Republic Respondent had services of Ms. Wivina Rwebangira, learned State Attorney. Hearing of the appeal proceeded by way of written submissions. Both parties dutifully filed their submissions.

In his submission in support of the appeal, Mr. Kelvin consolidated the first second and third grounds of appeal to one ground of appeal which reads, *the Prosecution did not prove the case against the Appellant beyond reasonable doubts.* The learned counsel then proceeded to highlight weaknesses in the prosecution's case. He challenged credibility of the victim of the offence who testified as PW3 for her failure to name the Appellant at the earliest possible opportunity. In this he argued that, apart from the testimony of PW3 there is no any piece of evidence which discloses the identity of the Appellant. He pointed out that, the victim did not mention the name or identity of the assailant to PW1 and PW2 to whom she reported the matter for the first time. He is of the view that, such failure to mention the name or identity of the Appellant at the earliest possible opportunity creates doubts on the credibility of her testimony. To cement his arguments in this issue, the learned counsel referred the Court the decision of the Court of Appeal in the case of **Issa Mfaume vs Republic** (Criminal Appeal 128 of 2017) [2019] TZCA 31 (23 February 2019) and the case of **Marwa Wangiti Mwita and another v Republic** [2002] TLR 39.

The learned counsel also challenged the prosecution case for failure to summon potential witnesses who perhaps would have corroborated PW3's testimony. He mentioned persons he considers to be potential witnesses in this case to include attendants of the guest house in which the Appellant and the victim spent their night. He is of the view that, testimony from the attendants would have assisted to clear doubts as to whether the Appellant and the victim met at Nzega as alleged by the victim.

He also submitted on the missing pieces of evidence, that is, the conversation between the Appellant and the victim and proof of transactions alleged to have been effected by the victim while under the Appellant's threat. He is of the opinion that, the allegations that a victim made transactions in favour of the Appellant without proof creates doubts in the prosecution's case. He referred to the case of **Boniface Kundakira Tarimo v R, Criminal Appeal No. 351/2008 (unreported)** which was quoted with approval in **Raphael Mhando v R, Criminal Appeal No. 54/2017 (unreported)** to the effect that where a witness who is in better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party. It was his contention that there was no proof that it is the appellant who raped the victim and actually the victim was not raped.

On the fourth and sixth grounds of appeal Mr. Kayaga faulted the judgement of the trial court for failure to evaluate and consider the Appellant's defence. The Appellant defence was to the effect that, the Appellant did not meet with PW3 nor did he rape her. He argued that, the Court ought to have considered the Appellant's defence especially in circumstances of this case

where the prosecution did not produce any other evidence to prove that, the Appellant and the victim were together in Kahama and in Nzega. He faulted the general statement by the court that the Appellant made a general denial on the ground that, the Appellant's defence does not amount to a general denial but rather it was a very specific defence on fact in issue. He cited the case of **Yasini Mwakapala versus Republic** Criminal Appeal No. 604 of 2015 Court of Appeal of Tanzania at Mbeya, where the Court of appeal insisted on the necessity of evaluating evidence tendered before the Court.

On the fifth and Seventh grounds of appeal, the learned counsel reiterated his challenges regarding credibility of the Prosecution witnesses especially PW3, the victim of the offence.

In her reply submission, Ms. Wivina Rwebangira, learned State Attorney, supported conviction and sentence meted against the Appellant by the trial Court. She highlighted the basic elements that need to be proved in the offence of rape contrary to section 130(1)(2)(a) of the Penal Code, [Cap 16 R.E 2019]. She mention two basic elements of the offence as having sexual intercourse and lack of consent from the victim.

Submitting in response to the first ground of appeal, she argued that, prosecution case was proved beyond reasonable doubts by PW3 who testified that the Appellant used knife to threaten her, forced her to suck his penis and finally raped her. She submitted further that, the Appellant also stole the money from the victim and left her. She refered the Court to the testimony of PW3 which appears at page 9 of the proceedings of the trial Court.

The learned State Attorney referred the Court to testimony of PW4 as another piece of evidence that she considers to have proved the prosecution's case on the required standard. She asserted that PW4, a doctor who examine the victim testified that there were bruises on the victim's labia manora due to forceful penetration and the PF3 which was admitted by the court as exhibit PE1. She also mentioned testimonies of PW1, PW2 and PW6 as evidence that proved that the incident happened. She stated that the important ingredient to prove was penetration and it was clearly proved by PW4 a doctor and the victim. To support her submission, she cited the case of **Athanas Ngomai vs Republic** (Criminal Appeal 57 of 2018) [2020] TZCA 260 (22 April 2020) where the Court of Appeal observed that penetration however slight is sufficient penetration.

The learned State Attorney also addressed issues pointed out by the Appellant counsel as weaknesses in the prosecution's case. In this she addressed the court on the alleged failure to summon material witnesses. She argued that, the prosecution did not call the guest house attendant, victim's relatives who were contacted to send money and the sister to whom Appellant's photos were sent because they were not material witnesses in this case. She cited the case of **Thomas Sylvester Amas vs Republic** (Criminal Appeal 44 of 2022) [2022] TZHC 14792 (16 November 2022) in which this court held that there is no particular number of witnesses required for the proof of any fact.

On the alleged failure of the trial court to consider defence case, she submitted that, the Appellant's defence was considered by the court but it was found to be very weak. She referred the Court to page 3 to 8 of the

judgment in which consideration of the defence case was made by the trial Court.

I have considered submissions from both parties together with Court records. I will start with the first ground of appeal in which it is alleged that, the prosecution case was not proved beyond reasonable doubt. I agree with the learned state Attorney that, the main elements that need to be proved in the offence of rape is proof that the victim and the accused had sexual intercourse and where the age of the victim is above 18 years, the prosecution should also prove lack of consent on the part of the victim.

In the appeal at hand, such evidence comes from the victim of the offence who testified as PW3 and PW4, Tamimu Felician Saidi, the doctor who examined the victim. The victim explained well what the Appellant did to her. She expressly stated that, the Appellant had sexual intercourse with her without her consent. She stated further that, the Appellant threatened her with a knife, thus she had nothing to do than obeying the Appellant's orders. She stated that the Appellant ordered her to suck penis and later he forcefully had sexual intercourse with her. The doctor who examined the victim stated that the victim had sexual intercourse and he indicated in the PF3 which was tendered as exhibit PE1 that he found tiny bruises in the victim's vaginal surface which is technically referred to as labia minora.

I agree with the learned State Attorney that generally such evidence would have been enough to sustain conviction against the Appellant. However, each case need to be decided on its own circumstances. Circumstances in this case are very peculiar as they appear in the first paragraphs of this

judgement. The victim stated clearly that she travelled from Kibondo to Kahama at the Appellant's costs. The purpose of the journey was to check a business apartment that the Appellant found for the victim at Kahama. Despite such purpose, the victim travelled again from Kahama to Nzega where she allegedly met the Appellant. The two spent their night together in a single room. And the incident of rape occurred the following day at the bush. Many questions can be posed without proper response. The most relevant question to me is why the Appellant did not rape the victim in a guest house where the two spent their night. The quick response that click in my head is perhaps the alleged rape was not for Appellant pleasure, but financial benefit because the victim stated that, the Appellant forced her to effect transactions including bank transactions in his favour. Unfortunately the prosecution did not produce any evidence that establishes transaction made by the victim on the incident day. Such gap in the prosecution's case, raises doubts as to whether the victim, PW3 is credible enough for her testimony to be relied upon in upholding conviction against the Appellant.

This attracted the Court to assess the manner the Appellant was identified. In this I agree with the counsel for the Appellant that the victim did not mention the Appellant at the earliest possible opportunity. Court record indicates that the victim did not mention the name of the Appellant even before the police officer who received her at the police gender desk. This is evident from the testimony of PW6 WP 10360 D/C Rebecca. PW6 did not testify on anything in respect of the identity of the person who raped the victim. Although PW5, PF 23206 Ass. Inspector Shomari stated to have traced the Appellant via his picture and phone number, it is not clear where

the OC CID did obtained the Appellant's photo and phone number. The victim did not testify to have mentioned the name of the Appellant to any of the police officers leave aside the issue of the Appellant photo and phone number. All these creates doubts on the credibility of PW3's testimony and the prosecution's case. Although in sexual offences victim's evidence is considered to be the best evidence to prove the offence, such evidence must pass credibility and truthful test. See the decision of the Court of Appeal of Tanzania in the case of **Mohamed Said vs Republic** (Criminal Appeal 145 of 2017) [2019] TZCA 252 (22 August 2019)

My thorough consideration of the testimony of PW3 and circumstances of this case establishes that, PW3's testimony does not contain the truth only thus, not credible enough to be relied in sustaining conviction against the Appellant. Given the fact that, the entire prosecution case rested on the testimony of PW3, it can't be said that the case against the Appellant was proved beyond reasonable doubts. Findings regarding the first ground of appeal disposes the entire appeal, thus I will not determine the remaining grounds.

In upshot, I allow the appeal, quash the conviction and set aside the sentence meted against the appellant. I further order for immediate release of the Appellant unless held for other lawful reasons.

Dated at Tabora this 1st day of March 2024




Z.D. MANGO
JUDGE

Right of further appeal explained