IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 113 OF 2019
(Originating from the District Court of Babati at Babati, Criminal Case No. 172 of 2018, Kobero RM)

PASCHAL MANANGU QAMSILO ..... APPELLANT
Versus
REPUBLIC ..... RESPONDENT

JUDGMENT

11th December 2020 & 29th January, 2021

Masara, J.

In the District Court of Babati (hereafter 'the trial Court'), Paschal Manangu Qamsilo ('the Appellant') stood charged with the offence of Rape, contrary to Sections 130(1) (2) (e) and 131(1) of the Penal Code, Cap. 16 [R.E 2002]. The particulars of the offence stated that on 25th March, 2018 at Endaberg Village within Babati District, Manyara Region, the Appellant did have sexual intercourse with one DJ, a girl aged 16 years. The Appellant denied the offence. After hearing of evidence from both sides, the trial Magistrate convicted the Appellant and sentenced him to serve life imprisonment. He was further condemned to pay compensation of shillings 4 Million to the victim and to suffer four strokes of the cane. The Appellant was aggrieved by both conviction and sentence prompting him to prefer this appeal on the following grounds:

a) *That, the learned trial Magistrate erred in both law and fact in convicting the Appellant without proof of the offence against him beyond all reasonable doubt as required by the law;*

b) *That, the learned trial Magistrate did not consider the fact that the Appellant was arrested seven months after the alleged offence was committed while the prosecution witness claimed that they knew him;*
c) *That, the sentence of life imprisonment meted out to the Appellant was manifestly excessive; and*
d) *That, the learned trial Magistrate erred in law and fact when he failed his legal duty to evaluate and scrutinize the evidence on record as a result he relied on his speculative ideas which influenced the judgment.*

Basing on the above grounds, the Appellant prays that the appeal be allowed and he be set at liberty. At the hearing of this appeal, the Appellant appeared in court in person unrepresented while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney. The appeal was heard orally.

At the trial it was the prosecution evidence (particularly the evidence of PW2) that DJ (PW2, the victim) was born on 23/8/2001 and at the time of the incident she was a form four student at Chief Dodo Secondary School. It was further stated that on 25/3/2018 at 10:00hrs the victim left to go to church. On the way she met the Appellant who lured her to go at his house to collect money worth 10,000/= (or 15,000/=) which belonged to her father. When she hesitated, the Appellant threatened that he would spend the money to drink liquor in the event she declined to go and take it. The victim agreed. They went to the Appellant's house where they also found the Appellant's father. The Appellant inquired the victim to enter in his house but she refused. He entered in his house while she waited for the money outside. After some time, the Appellant emerged telling her that he did not see the money. PW2 left for church. When she was crossing a trench, she met the Appellant who attacked her and pulled her down. When PW2 tried to shout

for help, the Appellant slapped her. The Appellant laid her down, held her hand tight on the victim's throat with one hand while he used his other hand to undress PW2. Having undressed her, the Appellant inserted his penis into her vagina and started raping her. After he ejaculated, he disappeared. The victim, while covered with mud on her body and her clothes moistened, went back home in pain and narrated the incident to her mother (PW1). He named the Appellant to be the person who raped her.

According to PW1, the victim's clothes were wet and full of mud. PW1 took the victim to the Village Executive Officer (PW3). PW3 issued them with a letter which directed them to the Police Station. On the same day the victim was taken to Mrara Hospital for examination. PW5, the Doctor who attended the victim, testified that in his physical examination he realized that the victim was not a first-time sex doer as no hymen was detected in PW2's female organs, and on specula examination there was nothing detected. He also conducted Hyvagina Sinia test but he found nothing and when he subjected her to pregnancy test, the results were negative. He filled in the PF3 which was admitted as exhibit P1. PW4, the Police officer who investigated the case testified that on interrogation the Appellant denied to have committed the offence. The Appellant was arrested in October, 2018 on the explanations that he had ran away from the village after the rape.

The Appellant was the sole defence witness. In his defence, he denied to have raped the victim stating that the offence against him was a cooked one because there is a day he showed police officers at PW1's house as PW1

used to sell illicit liquor (gongo). From that day, PW1 promised to revenge by doing something evil to the Appellant. He concluded that the case against him was framed by the victim's mother (PW1) as a revenge.

At the hearing, the Appellant submitted on all the grounds of appeal jointly. He contended that the offence of rape was not proved against him, as the evidence of the Doctor who examined the victim proved that the victim was normal. According to the Appellant, the fact that the Doctor did not discover anything is a proof that PW2 was not raped. Had she been raped, there would be found bruises and semen. The Appellant added that the trial Magistrate should not have disregarded the evidence of the Doctor who said the victim was not raped.

Further, the Appellant submitted that the evidence of PW1 who said that the Appellant ran away was not supported by the evidence of PW2. Also, the evidence of PW1 that she was told by PW2 about the person who raped her was not corroborated by the evidence of PW2. The Appellant further added that the trial Magistrate erred in believing that the Appellant was arrested due to warrant but such arrest warrant was not tendered as exhibit.

Contesting the appeal, Ms Tusaje contested the grounds of appeal one after the other. On the first ground of appeal, she submitted that evidence of rape against the Appellant was proved beyond doubts referring to the evidence of PW2. She cited the case of ***Selemeni Makumba Vs. Republic*** [2006] TLR 79 stating that the best evidence in sexual offences is that of the victim.

In her opinion, the evidence of PW2 was supported by that of PW5 who proved that PW2 was not a virgin. She maintained that corroboration is not necessary in sexual offences citing the case of ***Jacob Mayani Vs. Republic***, Criminal Appeal No. 558 of 2016 (unreported) to support her argument.

Submitting on the second ground of appeal, the learned State Attorney stated that the Appellant was arrested in October, 2018. PW1 in her evidence stated that after the incident the Appellant ran away to Riroda. To her, this was also canvassed in the evidence of PW4, the investigator who stated that the Appellant was arrested 7 months after the incident.

On the third ground of appeal, Ms. Tusaje conceded that the sentence of life imprisonment imposed on the Appellant is excessive. She added that the trial Magistrate did not give reasons as to why he sentenced the Appellant to life imprisonment instead of the statutory 30 years imprisonment term. Submitting on the last ground of Appeal, Ms Tusaje was of the view that the trial Magistrate properly evaluated the evidence referring to pages 4 to 6 of the typed judgment.

I have carefully gone through the trial court judgment and record, the arguments made by the Appellant as well as those of the learned State Attorney. I will start with the third ground which challenges the sentence imposed on the Appellant.

I entirely agree with both the Appellant and Ms Tusaje that the sentence handed over to the Appellant is excessive. Under section 131 of the Penal Code, Cap. 16 [R.E 2019], the provision which provides punishment on a person convicted of rape. In the offence under determination in this appeal, the minimum punishment is thirty years imprisonment with or without corporal punishment and the maximum is life imprisonment. In the instant appeal, the trial Magistrate sentenced the Appellant to serve life imprisonment with four strokes. I agree with both the Appellant and Ms. Tusaje that the sentence imposed on the Appellant is excessive considering the circumstances of the case. Rightly as fortified by Ms. Tusaje, the trial Magistrate did not give reasons why he opted to impose the maximum sentence rather than thirty years which is the minimum sentence.

The law gives powers to an appellate Court to interfere and alter the sentence where some factors are prevalent as it was held in ***Yusuph Abdalla Ally Vs. Director of Public Prosecutions***, Criminal Appeal No. 300 of 2009 (unreported). The Court identified the following factors when it stated:

> *"Indeed there is a long, unbroken chain of authorities on this subject which have shown that an appellate court may alter a sentence imposed by a trial where;*
> *a. The sentence is manifestly excessive;*
> *b. The sentence is manifestly inadequate;*
> *c. The sentence is based upon a wrong principle of sentencing/law.*
> *d. A trial court overlooked a material factor;*
> *e. The sentence is based on irrelevant factors;*
> *f. The sentence is plainly illegal;*
> *g. The sentence does not take into consideration the long period an appellant spent in remand or police custody awaiting trial."*

See also ***Helman Basekana Vs. Republic,*** Criminal Appeal No. 443 of 2016 (unreported) and ***Selemani Makumba Vs. Republic*** (supra).

As stated above, the sentence imposed on the Appellant by the trial Magistrate is manifestly excessive. There is no justification offered to lead this Court to consider maintaining it, if the evidence against the Appellant is deemed sufficient. The same applies to the sentence of corporal punishment. The trial Magistrate did not offer explanations why he opted to impose that sentence on the Appellant. I also note that the order of compensation given was not based on any facts. The Appellant was not asked about it nor was any evidence led to show that the victim suffered damages that required to be atoned. The same cannot be left to stand.

Turning to the first ground of appeal, the Appellant alleged that the offence of rape was not proved as the Doctor who examined PW2 stated that he did not see anything. On the other hand, the learned State Attorney was of the view that the offence was proved as PW5 proved that the victim was not a virgin. Whereas I do agree with the learned State Attorney that the best evidence in sexual offences is that of the victim, in sexual offences of this nature, the offence of rape cannot be proved unless penetration is proved. Rightly as stated by the Appellant, PW5 who examined the victim testified that he did not see anything adding that the victim seemed experienced in love making. The doctor did not find any bruises or sperms notwithstanding the fact that the hymen was ruptured.

A proper evaluation of the evidence on record would have led the trial Magistrate to think twice before concluding that the victim's evidence was truthful. The victim testified that she was raped and that the Appellant penetrated her vagina, she felt pain and that the Appellant ejaculated before letting her go. After the incident, she did not waste time, she went back home and narrated the whole story to her mother. She was taken to PW3 and later to the police and to the hospital. She was examined on the same day. The PF3 does not corroborate the stories given by the victim. She was found normal with no traces of sperms.

The law is settled that the ability of the victim/witness to name the accused at the earliest opportunity makes the evidence credible and the witness reliable. This was articulated by the Court of Appeal in ***Peter Abel Kirumi Vs. Republic***, Criminal Appeal No. 25 of 2016 (unreported), the Court of Appeal referred its earlier decision in ***Wangiti Mansa Mwita and Others Vs. Republic***, made the following observation:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry."*

The law is also settled that the best evidence in sexual offences is that of the victim, even where there is no proof from a Doctor or PF3, still the evidence of the victim can ground conviction. This was observed in the landmark case of ***Seleman Makumba Vs. Republic*** (supra), where it was stated:

> *"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. In the case under consideration the victim, Ayes, said the appellant inserted his male organ into her female organ. That was penetration and since she had not consented to the act,* ***that was rape notwithstanding that no doctor gave evidence and no PF3 was put in evidence.****"* (emphasis added)

Rightly as submitted by the learned State Attorney, corroboration is not necessary in sexual offences as it was stated in ***Jacob Mayani Vs. Republic*** (supra); where it was held:

> *"As for corroboration, we wish to emphasize that, it is settled law that* ***corroboration is not mandatory in cases involving sexual offences, so long as the trial court is satisfied that the witness is telling nothing but the truth.****"* (emphasis added).

The situation in this case, however appear to be different from the positions outlined in the cited decisions. In this case there are two versions. One coming from the victim suggesting that rape took place and the other coming from PW5 and Exhibit P1 suggesting that rape did not take place. These versions both come from the prosecution side. The trial Magistrate rightly concluded that he was not bound by expert evidence citing the decision of this Court in ***R Vs. Kerstin Cameroon*** [2003] TLR 84. He however did not offer reasons why he though the evidence of the Doctor or of the PF3 tendered were unworthy of belief. In my view, the PF and the evidence of PW5 dented the Prosecution evidence. There had to be strong reasons to disregard that evidence and rely only on the oral evidence of the victim. In

the case relied by the trial Magistrate, Justice Rutakangwa (as he then was) made several observations on expert evidence. These are captured as follows:

> *"(i) The duty of an expert is to furnish the Court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Court to form its own independent judgment by the application of these criteria to the facts proven in evidence;*
> *(ii) Since the evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of accuracy and objectivity are required from him. An expert should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise and should never assume the role of an advocate;*
> *(iii) When facts in question upon which an expert testified are dependent upon ordinary human powers at perception, an expert may be contradicted by lay witnesses;*
> *(iv) Special skill is not confined to knowledge acquired academically but includes also skill acquired by practical experience; ..."*

The four areas covered in the decision above are instructive. The trial Magistrate quoted the first one but did not explain why he thought the evidence from PW5 was not worth of proof. Rape is a serious offence and carries a heavy punishment. It is not sufficient to only state that the evidence of the victim is to be believed, on the expense of the other evidence that appear to be in favour of the accused. The evidence has to prove the offence beyond reasonable doubts. Whereas the victim is said to have informed her mother (PW1) about the rape, the evidence of PW1 does not reveal whether PW1 examined the victim and was satisfied that the victim was in fact raped. PW3 does not also state whether she performed any visual observation on the victim. That leaves only Exhibit P1 (PF3) and PW5 to be the relevant evidence on the issue of penetration and other elements of rape. I do not

see how this evidence can be disregarded as was done by the trial Magistrate. It is possible, as the Appellant put it, that the evidence of rape was fabricated.

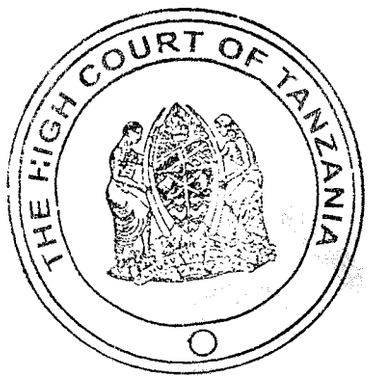
I therefore agree with the Appellant that the evidence of rape against the Appellant was not watertight. Had the rape taken place in the manner explained by the victim, the PF3 would have shown traces of semen (as the victim said that her assailant ejaculated in her) or bruises, as she said she felt pain. In my firm opinion, PW5's evidence exonerates the Appellant, as it proves that the victim was not raped. I therefore uphold the first ground of appeal.

Regarding the second ground of appeal, I find it unnecessary to dwell on it in details. Three witnesses appear to have grounded the prosecution version of the same. PW1 stated that the incident occurred on 25/3/2018 and after the incident the Appellant fled to Riroda and he was arrested in October, 2018. PW3 as well testified that after the incident was reported she made attempt to find the Appellant without success. PW4, the investigator of the case also testified that after the commission of the offence, the accused escaped and was arrested 7 months later. We are not told where the Appellant was arrested at nor did PW4 explain the reasons that delayed his arrest. We are also not informed how PW1 knew that the Appellant had gone to Riroda and when he fled. I will only leave it at that.

The last ground is a complaint that the trial magistrate did not evaluate the evidence properly. The conclusion made regarding the first ground of appeal applies to this ground as well.

For the reasons above stated, I find that the appeal has merits. I allow it accordingly. The conviction against the Appellant is hereby quashed and the sentence set aside. The Appellant is to be released from prison henceforth, unless otherwise lawfully held.

Order accordingly.



Y. B. Masara

JUDGE

29th January, 2021.