IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
CRIMINAL APPEAL NO. 217 OF 2020

(Original Criminal Case No. 55 of 2020 of the District Court of Kwimba District at Ngudu)

FUMBUKA MAKULIGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 05/07/2021

Date of Judgment: 09/07/2021

F. K. MANYANDA, J.

The Appellant Fumbuka Makuliga after been distressed by a conviction of the offence of rape contrary to sections 130(2)(e) and 131(1) of the Penal Code, [Cap. 16 R. E. 2019] and sentenced to imprisonment for minimum period of 30 years has appealed to this Court under seven grounds of appeal. As the grounds of appeal are in a form of submissions citing evidence, laws and cases, the same may be summarized as follows:-

1. That, the evidence was erroneously entered basing on a defective charge.

2. That the charge was not proved for failure to call a doctor who examined the victim and filled a PF3.

3. That the trial Court erred to enter conviction basing on sole uncorroborated evidence of the victim.

4. That the trial Court erred to conviction the Appellant in absence of evidence of penetration.

5. That the trial Court misconceived, misconstrued and misinterpreted the evidence by the victim when she said she had sexual intercourse with the Appellant.

6. That the prosecution failed to prove beyond all reasonable doubts the penetration

7. That the trial Magistrate errered by stepping himself into the shoes of the victim and turn himself a witness thereby become partial, and biased as he put words into the victims mouth during composing the judgment.

The brief facts of this case is that the victim who was nicknamed by the trial Court as "XBD" who may also be referred to as "the victim" in

this judgment, was at the material time a secondary school girl at Ngudu Secondary School been aged at 15 years old. On the fateful day 14/04/2020at 13.00 hours the Appellant called the victim at his house promising to give her Tsh 3,000/= she had asked from him previously. Hearing that invitation, XBD while in company with the Appellant went to his house. When they were only two of them in the house, the Appellant took hold of her, undressed her and undressed himself and raped her. He released her after giving her Tsh 3,000/= which he had promised.

The victim remained silent for fear until she was noticed by her brother PW2 who reported the incident to the Ward Executive Officer (WEO) then to police. The Appellant was subsequently charge and convicted as explained above. Hence this appeal.

At the hearing of the appeal, the Appellant argued the appeal in person via audio teleconference where he was introduced to me by B. 2169 Ssgt William a prison Officer. The Republic was represented by Ms. Georgina Kinabo, learned State Attorney.

The Appellant been a layman did not have much to say except adopting his grounds of appeal and leave it to the Court to decide in his favour.

On her side, Ms. Kinabo submitted opposing the appeal arguing that the prosecution proved the charge of rape beyond all reasonable doubts she argued grounds 1, 2 and 3 separately and grouped grounds 4,5 and 6 and argued them together, then she argued ground 7 separately.

In respect of the complaint in ground one that the charge was defective, she conceded that the charge in the statement of offence did not cite sub section (1) to section 130 of the Penal Code. However, she quickly pointed out that the defect did not prejudice the Appellant because he plead not guilty, he knew through the trial that the type of rape was statutory as the age of the victim was 15 years. The irregularity, in her views is curable under section 388 of the Criminal Procedure Act, [Cap 20 R. E. 2019]. She cited the case of **Mohamed Clavery vs Republic,** Criminal Appeal No. 470 of 2017 (unreported).

As to ground two, where the complaint is that the prosecution's failure to call a doctor who conducted medical examination of the victim

and filled the PF3, Ms. Kinabo conceded she argued that although the evidence shows that the victim was examined by a doctor who filled a PF3, none calling of a doctor did not affect the prosecution's case. It was her views that the evidence of victim sufficed. She relied on the provisions of 127(7) of the Evidence Act, [Cap. 6 R. E. 2019] and the authority in the case of **Selemani Makumba vs Republic** [2006] TLR 376.

In regard to the complaint in ground three that there is no evidence corroborating the victim in proof of been penetrated by the Appellant again she reiterated her arguments in ground two.

Ms. Kinabo argued against the complaints in grounds four (4) five (5) and six (6) that there was sufficient proof of penetration. She referred to the testimony of victim who explained the circumstances under which rape took place. To support her position she cited the case of **Jumanne Shaban Ngendo vs Republic,** Criminal Appeal No. 282 of 2010 (unreported).

In ground seven (7) the complaints is that the trial Magistrate put words into the testimony of the victim, meaning that he used words

while composing the judgment which were not part of the testimony of the victim. Ms. Kinabo counted this complaint arguing that the trial Magistrate was just paraphrasing the gist of the testimony, but the words were what the victim actually spoke in her testimony. She prayed the appeal to be dismissed.

Having heard both sides, I will now determine this appeal in the same sequence the State Attorney has done.

Starting with ground one, issue is whether the charge was defective and if it is in affirmative, then whether the defect is curable under section 388 of the Criminal Procedure Act.

I will start with the provisions which establish the offence of rape. Section 130(10 of the Penal Code makes it an offence for a male person to rape a girl or woman. Subsection (2) of section 130 gives the circumstances under which a male person commits the offence of rape. It gives a range of five circumstances namely: -

(a) Where a woman is not married to him or married to him but separated without her consent.

(b) With her consent but the same is obtained by force or threats to her life or injuries while under his detention.

(c) With her consent while she was of unsound mind or intoxicated by the man or any other person.

(d) With her consent where the man knows that he is not her husband but she is made to believe that he is her husband.

(e) With or without consent when she is under the age of 18 years old.

There are other circumstances provided under subsection (3) of section 130 of the Penal Code which are not relevant in the circumstances of this case.

In this case the statement of offence in the charge sheet reads:-

> *"Statement of the offence, rape contrary to section **130(2)(e)** and 131(1) of the Penal Code." (emphasis added).*

Surely, as it can be gleaned, the statement of offence did not mention sub section (1) of section 130 of the Penal Code. That subsection is the one which creates the offence of rape.

The charge is bad for non citation of the law creating the offence. The State Attorney conceded to this defect. The trial Court did not see and amend this defect. The first issue is answered in affirmative.

The next issue is whether it is curable under section 388 of the Criminal Procedure Act.

The Criminal Procedure Act under section 388 saves some defects in the proceedings during trial including charges, provided, that there is no miscarriage of justice occasioned.

The State Attorney argued that the defect in this matter is among those which can be cured under that provision because no miscarriage of justice was occasioned by the defect. She gave the reasons that the particulars of offence together with the evidence produced in Court during trial made him to know that he was been charged with rape.

I have gone through the records of this matter and found that it is true, the Appellant was made aware of the offence with which he was charged. He pleaded not guilty to a charge of rape which was read to him. Moreover, the evidence adduced during the trial all tells that he was charged with rape. As a result, he managed to man his defence

against a charge of rape. I agree that, in the circumstances of this case, no miscarriage of justice was occasioned, the defect is curable under section 388 of the Criminal Procedure Act.

I am fortified by the authority in the case of Mohamed **Clavery vs Republic (supra)** where the Court of Appeal dismissed a complaint on a defective charge which cited a none existing provisions of the Penal Code but revealing an offence of rape, it said at page 10.

> *"Following the above, we are certain that the appellant, even through the charge was defective, he knew that he was charged with rape of a girl aged fifteen years. The date, time and place at which the offence was committed were also known to the appellant. He was therefore able to appreciate the charge facing him. In the premises we do not see any prejudice being occasioned on the part of the Appellant."*

The Court of Appeal also referred to its earlier decision in the case of **Jamali Ally @Salum vs Republic** Criminal Appeal No. 52 of 2017 which, just like in the instant appeal, a charge omitted to mention sub section (1) of section 130 of the Penal Code. The Court of Appeal held that such a defect was curable under section 388 of the Criminal Procedure Act in that no injustice was occasioned. See also the case of **Abasi Makono vs Republic** Criminal Appeal No. 537 of 2016 [2019]

TZCA 299 at tanzilii which followed by authority in **Jamal Ally Salum** (supra). This ground has no merit

The second ground concern a complaint on failure by the prosecution to call a doctor who allegedly examined the victim and filled a PF3. It is a concern of the Appellant that the failure lowered the prosecution evidence making it unreliable.

The State Attorney argued that the evidence of the doctor is not necessary because the evidence from the testimony of the victim sufficed to prove penetration. She relied on the provisions of section 127(7) of the Evidence Act and the authority in the case of **Selemani Makumba vs Republic** [2006] TLR 376.

This Court is in agreement with the argument of the State Attorney. In her testimony, the victim did not even state that she was examined by a doctor. It was PW2 the victims brother who said that he took her to police then to the Ward Executive Officer and later to hospital and a PF3 was filled, but the same was not tendered in evidence.

In such circumstances why should the prosecution have called a doctor. It is my views that the prosecution, after believing that the evidence they produced sufficed, were no longer constrained to summon more witnesses. After all under section 143 of Evidence Act, no particular number of witnesses in required for proving a case. The prosecution was satisfied with the testimony of the victim. Whether such evidence was sufficient is a domain of the Court and I will revert to this issue later. It suffices at this stage to say that the testimony of the alleged doctor was irrelevant because the victim whom the prosecution believed did not state that she was examined by a doctor at any point in her testimony.

This ground lacks merit.

The complaint in ground three is that there is no independent evidence to corroborate the evidence of the victim that she was raped by the Appellant on the fateful day 14/04/2020. The learned State Attorney argued reiterating her arguments in ground two. To her views the evidence of the victim was reliable and sufficed to prove the rape and that she was perpetrated by the Appellant.

As it can bee seen the arguments of the State Attorney basically are legal in nature in that her reliance is on the provisions of section 127 (7) of the Evidence Act and the authority in the case of **Selemani Makumba** (supra) Act, the Evidence Act, after suffering several amendments, section 127(7) now is section 127(6). I doubt if the law relied upon by the State Attorney does away with requirement of corroboration in rape cases. I say so because the wording of section 127(6) of the evidence does not exclude this requirement but rather requires credence of the witness section 127(6) reads:-

> *"127(6) Notwithstanding the proceeding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or a victim of the sexual offence,* ***the Court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or, as the case may be, the victim of sexual offence on its own, notwithstanding that such evidence is not corroborated proceed to convict,*** *if for reasons to be recorded in the proceedings, the Court is satisfied that the child of tender years or the victim of sexual offence is telling nothing but the truth."[Emphasis added].*

The catch words in the provisions are that "after assessing the credibility".

In my understanding is that the evidence of the victim must be first found to be credible and then the Court may convict. Credence of evidence of a witness may be established by corroborative evidence as well.

Similarly, in the case of **Selemani Makumba (supra)** the Court found the testimony of the victim as credible. A question is this, "was the evidence of the victim in the instant appeal credible?" In order to get the answer to this question one has to go through the evidence as a whole. By so doing I will also be determining grounds three (3) four (4), five (5) and six (6) of appeal.

In her testimony XBD who testified as PW1 stated that she knew the Appellant before the incident and had asked for money from him. On the incident day the Appellant went at her home and asked her to go with her to his home, which she did. Upon arriving into the Appellant's house he asked her to have sexual course. PW1 refused, as a result he grabbed and undressed her, he too undressed himself and had and sexual intercourse with her. Thereafter he gave her the Tsh 3,000/= he had promised. PW1 did not tell anyone due to fear however her brother, PW2, who suspected her movement, impeached her so that she

admitted to had have sexed with the Appellant. This PW2 is the one who aired the crime to police then to the Ward Executive Officer. PW3 is a police officer who investigated the case and found that the victim was a secondary school student at Ngudu Secondary School. PW4 is a victim's mother who testified that her daughter was 15 years old at the time the crime was perpetrated and tendered birth certificate which was admitted as Exhibit P1.

In his defence, the Appellant simply denied involvement in the crime though admitted to know the victim as his neighbor.

That was the evidence of both sides in summary. It can be gleaned that the conviction of the Appellant basically based on the testimony of the victim.

As summarized her evidence points the Appellant as a person who had sexual intercourse in the house of the Appellant. PW1 gave the detail of how they conducted the sexual intercourse in detailed facts how the Appellant picking her from her home, taking her into his room and ultimately having sexual intercourse with her. A prior promise for money which trapped her, as well as ultimately giving her the same Tsh 3,000/= after sexing.

I find that such pieces of evidence were uncontradicted. The victim revealed the incident before her brother. Leading to the Appellant's arrest.

Failure of production of a PF3 and calling of the doctor, in my view did not shake the prosecution's case.

After all medical evidence does not prove rape, the best evidence that there was penetration is the credible evidence of a victim. The Court of Appeal has trumpeted that position of the law in many cases starting with the famous case of **Selemani Makumba (supra),** the case of **Edson Simon Mwombeki vs Republic** Criminal Appeal No. 94 of 2016 and **Jumanne Ngondo vs Republic,** Criminal Appeal No. 282 of 2010 the case of **Ally Ngozi vs Republic,** Criminal Appeal No. 216 of 2018. (all unreported).

In the last case, the Court of Appeal said:-

> *"Lastly, since it is settled law that medical evidence does not prove rape, the best evidence is the credible evidence of the victim who is better placed to explain how she was raped and the person responsible" (emphasis added).*

In this appeal, the trial Court found the victim (PW1) a credible witness. I have gone through the evidence of the said PW1 and found no reason or ground to differ with the trial Court. Her evidence is credible and worthy of been believed.

In the circumstances, I agree with the arguments of the State Attorney that the offence of rape against the Appellant was proved. I also reserved the decision whether the evidence of the victim suffices to prove rape when concluding determination of ground two (2), now I say it in affirmative, that the offence of rape was proved by the prosecution beyond all reasonable doubts, that is, the victim who was a girl of 15 years old at the time of commission of offence she was raped by the Appellant on the fateful day 14/04/2020.

In the result I find the appeal in grounds three, four, five and six as having no merit.

In respect of ground seven (7), the complaint is that the trial Magistrate put some words into the mouth of the victim. He pointed out paragraphs 3 at page 6 of the judgment, and page 3 to 4 of the proceedings.

I have visited paragraph 3 on page 6 of the judgment, this what the trial Magistrate wrote.

"PW1 a girl of 15 years of age she (sic) managed to tell the whole story concerning to (sic) the offence of rape since the accused person approached her and told to follow (him) to his house thereafter, accused he (sic) undressed her and had sexual intercourse after that he gave her Tshs 3,000/=. According to PW1 evidence, she told the Court she had sexual intercourse with accused (penetration) also she told the Court who is responsible for that offence"

The State Attorney argued that in paragraph 3 of page 6 of the judgment the trial Magistrate was just paraphrasing what the witness said in the proceedings.

I have also summarized the same testimony of PW1 above, which in my opinion the summary of the trial Magistrate is, just as I did myself, a summary of what PW1 said. A summary of evidence cannot be in the same wording as in the proceedings. The proceedings reflect what actually was recorded in Court. A summary is however expected to contain the substance of the evidence recorded. It is the Court record which is always presumed to be accurate and representing what transpired in Court and summary is deducted there from.

I am following a holding of the Court of Appeal in the case of **Alex Ndendya vs Republic,** Criminal Appeal No. 207 of 2018 (unreported) where the said Court stated:-

> *"It is settled law in this jurisdiction that a Court record is always presumed to accurately represent what actually transpired in Court This is what is referred to in legal parlance as the sanctity of the Court record".*

This case followed the authorities in the cases of **Halfani Sudi vs Abiexa Chichil** [1998] TLR 527, **Shabir F. A. Jessa vs Rajkumar Deogra,** Civil Reference No. 12 of 1994 where the Court of Appeal said

> *"A Court record is a serious document; it should not be lightly impeached."*

In those decisions the Court of Appeal subscribed to the authority in the old case of **Paulo Osinya vs Republic** [1959] EA 353 where the defunct East Africa Court said:-

> *"There is always presumption that a Court record accurately represents what happened."*

From that thread of authorities, I am of a firmly settled views that the trial Magistrate did record what PW1 stated in Court; and that the same on paragraph 3 of page 6 of the judgment is a summary of the testimony of PW1. There is no new words from what PW1 said. Ground seven (7) also has no merit.

In the result, for reasons given above, this Court finds the appeal as of no merit. Consequently, I do hereby dismiss the appeal in its entirety.

F. K. MANYANDA
JUDGE
09/07/2021