THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

CRIMINAL APPEAL NO. 66 OF 2021

(Originating from Katavi Resident Magistrates' Court in Criminal Case No. 36/2020)

JAPHARI MASOUD @ MSONGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 12TH July, 2022

Date of Judgment: 8th September, 2022

NDUNGURU, J

Before the Resident Magistrates' Court of Katavi at Mpanda, the appellant was arraigned for the offence of rape contrary to Section 130(1) (2) (e) and 131 (1) of the Penal Code. It is the prosecution case that, on the 27/02/2021 at Majalila area within the District of Tanganyika in Katavi Region, the appellant had sexual intercourse with the victim (Her name has been concealed to hide her identity) aged 14 years old.

Despite protesting his innocence when the charge was read over to him, at the end of the trial, the appellant was found guilty, convicted and sentenced to be jailed for thirty years.

Being dissatisfied with both, conviction and sentence, the appellant preferred the present appeal consisting of two grounds of appeal which are as extracted herein;

1. That the trial Court erred at law and fact by convicting and sentencing the appellant without taking into consideration that the evidence of PW4, medical officer who examined the victim PW1 and found that there was no hymen, no bruises detected and no blood as required by ingredients of rape.
2. That the trial Court erred at law and fact by convicting and sentencing the appellant on a case which was not proved beyond reasonable doubt.

As this appeal was scheduled for hearing, the appellant had no legal representation which means he represented himself while the respondent was represented by Mr. John Kabengula, learned State Attorney.

In support of his appeal, the appellant submitted that he has filed two grounds of appeal and prays for this honorable court to adopt them and proceed to allow this appeal.

Mr. Kabengula in his response, firstly he resisted the appeal and supported the conviction and sentence handed down against the appellant, insisting that the main ground raised by the appellant is that prosecution case was not proved beyond reasonable doubt.

Mr. Kabengula submitted that the victim was below 18 years of age as she was 14 years old, and that the offence was statutory rape. He added that the mother of the victim testified on the age of the victim and she furtherly tendered an affidavit proving the victim's age and it was not objected by the appellant.

The learned State Attorney submitted further that, the offence being a statutory rape, the presence of consent is immaterial, and that only penetration has to be proved. On this, Mr. Kabengula submitted that the victim testified on how she was raped by the appellant and how she reported the episode to his close people, including her teacher. He added that, the evidence of the victim is paramount and he referred this Court to the famous case of **Seleman Makumba vs Republic [2006]**

TLR 379 and furtherly insisted that it is the stance of Section 127 of the Tanzania Evidence Act, Cap. 6 [R.E. 2019]

Mr. Kabengula concluded that, the fact the trial Court was satisfied as far as credibility of the victim, they submit that the case against the appellant was proved. He thus prays for this appeal to be dismissed.

In rejoinder, the appellant submitted that if the statement of the victim could be taken for granted and that it is credible, then there would be no need for a medical examination. He added that, the victim had told the trial court that she had had sexual intercourse only once with Juma and not Japhari, the appellant.

He winded up by submitting that, all the witnesses who appeared in the trial court testified on an event they were told about (hearsay), and to that, the appellant humbly prays for this appeal to be allowed as he had not committed the charged offence.

After reading keenly the submissions from both sides, I realized that the two grounds of appeal could be condensed into one ground of appeal that, the **prosecution case was not proved beyond reasonable doubts.** In dealing with the condensed ground, herein are determinative issues which would suffice the disposing of this appeal. The issues are;

- **Whether the Prosecution witnesses were Credible, and**
- **Whether the prosecution case was proved to the required standard of the law.**

To start with, this court being the first appellate court has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it a critical scrutiny and if warranted arrive to its own conclusion of facts. See **D. R. Pandya vs Republic [1957] EA 336.**

In the first raised issue, the issue on credibility of the witness was well discussed in a number of decisions. In the case of Shabani Daudi vs Republic, Criminal Appeal No. 28 of 2001 (Unreported) it was held that;

> *"Credibility of a witness is a monopoly of the trial court but only in so far as the demeanor is concerned. The credibility of a witness can be determined in two 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. In those two occasions, the credibility if a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

In the present appeal, the evidence of the victim shows that, on the day of the incident, she was with the appellant near a river receiving traditional medical treatment as she was the appellant's patient being healed of her severe headache. However, no any other witness had testified that indeed the victim was suffering from sever headache and there is no any other witness who testified that either, the appellant is a traditional medical doctor nor did they know that the victim had gone to the appellant to get traditional medical treatment for her severe headache.

However, at page 7 of the typed proceedings of the trial Court, the victim when cross examined, she conceded that she had sexual intercourse before with a person known as Juma, who was not in Court, meaning, before she was allegedly raped by the appellant, she already had sexual relationship with another person known as Juma. In addition to that, the expected corroborative evidence of the medical expert (PW4) did not support the testimony of the victim that she has been forcefully penetrated by the appellant. The evidence of PW4 was that in his examining the victim, he noticed that the victim's vagina outer part was intact, there was no sperm present, no injuries or bruises but that she had already lost her hymen and that her cervix was also intact. In

his testimony, PW4 testified that the loss of hymen could be caused by either extreme exercises, penetration of a penis, blunt object or venereal diseases.

At this juncture, I am left in a dilemma that was the victim really raped by the appellant? 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. See the case of **Goodluck Kyando v. Republic, Criminal Appeal No. 118 of 2003** (CAT, unreported). In this appeal, there is a good and cogent reason for not believing the testimony of the victim that she was raped by the appellant, as she herself testified she already had sexual intercourse with another person.

In Mohamed Said vs Republic, Criminal Appeal No. 145 0f 2017 CAT, Iringa it was held that;

> *"Words of the victim of sexual offence should not be taken as a gospel truth, but her/his testimony should pass the test of truthfulness."*

In this appeal, the fact that the victim was with the appellant at the area of the incident needs further evidence as far as rape cases are

concerned. I am fortified by the holding made by Lord Denning in the case of **Miller vs Minister of Pension (1937) All. ER** that;

> *".....if at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion, one or the other, then the man must be given the benefit of doubt. This means the case must be decided in favor of the accused if the evidence created doubts....."*

Therefore, in answering the first raised issue, the victim herself was not a credible witness as the evidence she adduced before the trial court was not sufficient to mount conviction of the appellant.

Coming to the second raised issue, it is a settled principle of law that the onus of proof in criminal proceedings lies on the prosecution and such proof must be beyond reasonable doubt as elucidated in the case of **Jonas Nkize v. Republic [1992] TLR** page 216. In that, there is no conviction that shall be entered on a weak defence but upon proof of the case beyond reasonable doubts.

Furthermore, the relevant message from Sarkar's Laws of Evidence 18th Edition M.C, Sarkar, S.C and P.C Sarkar, Published by Lexis Nexis, at page 1896, states as follows below;

> *"The burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reasons until such burden is discharged the other party is not required to be called upon to prove his case. The court has to examine to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of the weakness of the other party..."*

In this appeal, the records reveal that the evidence adduced before the trial court by the victim required corroboration, this means her evidence was insufficient to prove the charges against the appellant beyond reasonable doubts. Therefore, in the second raised issue I am satisfied that the prosecution side did not prove their case against the appellant to the required standards in criminal cases.

For the foregoing reasons, I find this appeal to be meritious and that I proceed to allow it. Indeed, the charge against appellant was not proved beyond reasonable doubts. I thus quash the appellant's conviction in respect of the offence of rape with which he was charged and convicted before the trial court. The earlier imposed sentence is set aside. I proceed to order immediate release of the appellant from custody unless he is held therein for other lawful causes.

It is so ordered.

D. B. NDUNGURU

JUDGE

08/09/2022