IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 135 OF 2021

(Appeal from the Resident Magistrates Court of Arusha at Arusha

Criminal Case No 452 of 2019)

KENNEDY ELIREHEMA @ URIO .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

17/08/2022 & 19/10/2022

KAMUZORA, J.

The Appellant herein is challenging the conviction and sentence of 30 years imprisonment imposed to him by the Resident Magistrates Court of Arusha at Arusha (the trial Court). The Appellant was aligned for the offence of Rape Contrary to section 130 (1) (2) (e) and 131 (2) of the Penal Code Cap 16 R.E 2002. On 12th day of November, 2019 at CDTI area within Arumeru District in Arusha Region, the Appellant was arrested following an allegation that he raped a girl aged 11 years. In this appeal, girl will be referred as LA or victim to hide her identity. The trial court found the Appellant guilty of the offence and convicted him to

serve custodial sentence as above stated. Being aggrieved, the Appellant brought the present appeal and raised 13 grounds appeal which will not be reproduced hereunder for the reasons that will be stated later.

When the matter was called for hearing of this appeal which proceeded by way of written submission, the Appellant was ably represented by Mr. Said Amiri, learned advocate while Ms. Riziki Mahanyu, learned State Attorney appeared for the Respondent, the Republic. The counsel opted to argue the appeal by way of written submissions and complied to the submission schedule save for the Appellants rejoinder submission.

In his submission in support of appeal the Appellant abandoned grounds 2, 3, 5, 6, 7, 8, 9, 11 and 13 of the appeal and for that reason I see no reason to reproduce the same in this judgment. He argued jointly grounds 1 and 4 ground which are to the effect that the case was not proved beyond reasonable doubt as there was failure to call material witnesses. He also argued jointly grounds 10 and 12 which were to the effect that the trial court failed to consider defence evidence.

Submitting for grounds 1 and 4, the counsel for the Appellant argued that, the offence charged was not proved by the prosecution beyond reasonable doubt against the Appellant as the prosecution

evidence was weak and some of the witnesses were not called to testify in court. That, the evidence of PW1 and PW3 at page 8 and 20 of the typed proceeding reveals that there was unknown man who took PW1 to school after she was raped but, the said man was not paraded as a witness before the trial court. He added that, before the commencement of the case the prosecution listed one witness F.2667 D/C Henry who partly participated in the investigation but, the said witness never appeared to testify in court. He insisted that, that man and the police officer were material witnesses to prove the alleged facts. To cement on this issue the counsel cited the case of **Aziz Abdallah Vs. the Republic** [1982] TLR 71, **Masimba Dotto @ Lukubanja Vs. the Republic,** Criminal Appeal No. 317/2013 CAT at Arusha (unreported).

Submitting on grounds 10 and 12 the counsel for the Appellant argued that, the trial court failed to consider the credible evidence by the Appellant and his witness which is to the effect that PW1 and the Appellant are relatives. That, the Appellant had quarrel with the mother of PW1 and due to hostility relationship between Appellant and PW1's mother, the Appellant was wrongly accused of this case. He was of the view that, the court had duty to evaluate evidence tendered before it as it was held in the case of **Materu Leison and J. Foya Vs. R.**

Sospeter [1988] TLR 102. He insisted that, this court being appellate court have powers to go through the evidence and make a finding of the facts or evidence omitted or misconstrued by the trial court.

Responding to the appeal, Ms. Riziki Mahanyu supported the trial court's findings on grounds 1 and 4 that, the charge was proved beyond reasonable doubt. She argued that, in establishing the charge was preferred under section 130(1) (2) and 131 of the Penal code, the prosecution needs to prove that the victim was under age and there was penetration. She pointed out that, PW1 who is the victim at page 8 stated that, she was raped by the Appellant as the Appellant inserted his penis into her vagina. That, such evidence was supported by PW2 at page 11 of the proceedings who testified that, she found the victim with bruises in her vagina, bleeding and her hymen was not intact. That, also observed discharge from the victim's which was smelling and that she was not walking well. She maintained that, PW1 and PW2 managed to prove the offence of rape against the Appellant.

Referring the case of **Seleman Makumba Vs. Republic** [2006] TLR 380 Ms. Riziki insisted that, true evidence in sexual offences comes from the victim. That, based on section 143 of the Evidence Act Cap 6 R.E 2019 there is no specific number of witnesses required to prove a

fact. She was of the view that, the claim that unknown man who took PW1 to school did not testify is baseless.

Responding to grounds 10 and 12 the counsel for the Respondent conceded to the argument that the defence evidence was not considered by the trial court in its decision. She was of the view that, the trial court ought to have considered such evidence even if it was weak or it did not relate to the fact in issue. She urged this court to step into the shoes of the trial court and evaluate the defence evidence. She supported her position with the case of **Athumani Musa Vs. Republic,** Criminal Appeal No 4 of 2020 CAT at Kigoma (Unreported). She however maintained her position that the case was proved beyond reasonable doubt and prayed for the appeal to be dismissed for lack of merit.

I have clearly considered the grounds of appeal and the submissions by the parties. There is no doubt that grounds 10 and 12 should succeed as both parties agree that the defence evidence was not taken into consideration in a five paged judgment of the trial court. On other two grounds, the Appellant's claim is based on the argument that the prosecution side did not call all material witnesses to prove the offence and that the available evidence did not prove the case beyond reasonable doubt. These grounds entail the second scrutiny of the

evidence to see if the trial court was correct to conclude that the offence of rape was proved beyond reasonable doubt.

From prosecution evidence, the victim is a girl aged 11 years and at the time of the alleged incident she was a primary school pupil at Tengeru primary School. She testified that, on the date of incident, 12/11/2019 at morning hours she was going to school when she met the accused/Appellant herein who dragged her to the narrow street and covered her mouth. That, the Appellant undressed her clothes and his clothes as well, and raped the victim while covering her mouth with his hand. After the ordeal, the Appellant fled away and the victim screamed for help, one man appeared and did take her to school to teacher Mafole. The teacher PW3 sent her to the police station and after being issued with PF3, the teacher took the victim to her mother who then sent the victim to hospital where she was examined and given medication. The victim claims that, the Appellant threated to kill her if she discloses the matter to anyone but the victim told everything to her teacher Mafole, PW3 and they went together at the scene. She also claimed that, she mentioned the Appellant at the police station as she knew him even before the incident as he usually passes near her home.

PW2 is a doctor who examined the victim on the same date. His evidence and medical report reveal that the victim was penetrated and he categorically made a conclusion that she was penetrated by a man as he observed bruises in her vagina, the hymen was not intact and she had smelling discharges. He also observed that, the victim's clothes were dirty with dusts suggesting that she was forced to lie down. On being cross examined he added that, the victim was also bleeding.

PW3 Mary Elisifa Mfole, is a teacher at Tengeru Primary school where the victim was studying. She was at school on the date of incident when a motorcycle rider took the victim to her claiming that she was raped. PW3 did take the victim to the office of the assistant head teacher who in turn directed PW3 to take the victim to Hospital after reporting to the police station. They were issued with PF3 at Tengeru police and PW3 took the victim to her parents and went back to school. PW3 observed the victim walking in pain and her clothes were dirty. She also testified that, the victim informed her that she was raped by a boy whom she could identify if shown to her.

PW4 is the victim's father and his evidence was only on proof of the victim's age. Upon being cross examined, he added that, the victim

mentioned the Appellant as the person who raped her and he was together with another person who was later released.

In his defence, the accused/Appellant herein testified that, he works as a mason and on the material date of the alleged incident, he was at work at the house site. The victim's father went there asking for the person who raped his daughter. All people who were there were asked to sit down for the victim to identify the person who raped her but she was unable to identify anyone. On the next day the victim's father went there again with a militiaman and sent the Appellant to the police station. On being cross examined the Appellant claimed that, they were four masons but he was the only mason arrested because PW4's wife had a conflict with the Appellant's mother.

The Appellant's evidence was supported by DW2 who claimed that he was the supervisor at the site where the Appellant was working. He testified that, he was present when one man went at the site with the teacher from Tengeru Primary school claiming that a student was raped and they wanted the people at that area to come out for identification. He asked all masons to come out but the child was unable to identify a person who raped her. That, two days later the Appellant was arrested and sent to the police station.

I am mindful of the principle discussed in the case of **Seleman Makumba** (supra) cited by the learned State Attorney that, the true evidence of rape or any sexual offence comes from the victim. From the above evidence, there is no doubt that the victim knew the Appellant even before the incident. In the circumstance where the victim knows the culprit, it is expected for the victim to mention his name immediately after being rescued. What brings doubt in this matter is the way the victim claims to disclose the Appellant's involvement to the offence. The victim claimed that, she mentioned the appellant at the police station, it is unfortunate that no evidence was brought to collaborate the victim's story. In the matter at hand, the evidence shows that the victim before being sent to the police station she was rescued by the motorcyclist but no evidence if she disclosed to him the person who raped her. She was then sent to school and met PW3 but she told him that she could identify the boy who raped her but did not mention to her the name of the culprit. She was then sent to her parents and then to the police station where she claims that she mentioned the person who raped her. In my view, if the victim knew the Appellant, it was expected for her to immediately mention the Appellant's name to the man who rescued her or the teacher who attended her soon after the incident. I hesitate to

believe that she disclosed the name to the police station while no one appeared to corroborate her story. The victim's father only mentioned on cross examination that the victim identified the Appellant without stating the circumstances of identification.

There is adverse story from the defence side that the victim went at the site with her father and the teacher trying to identify the man who raped her and she was unable to identify anyone. The Appellant also claims that, he was not arrested on the date of incident and such fact was not disputed by the prosecution side. The prosecution did not bring evidence on how the Appellant was arrested and the basis of his arrest. In fact, there is uncorroborated evidence suggesting that, the Appellant raised a reasonable defence and the prosecution side was under obligation to prove the case beyond reasonable doubt.

I understand that there is no specific number of witnesses required to prove certain facts, read section 143 of the Evidence Act Cap 6 R.E 2019. However, it is the principle of the law that, material witnesses who can prove material facts must be paraded in court for evidence. In my view, even if the attendance of the motorcycle rider could not be procured, it was necessary for the police officer who investigated the case to testify in court and collaborate the victim's story and the

evidence that led to the arrest of the Appellant. At page 4 of the trial court's judgment the trial magistrate stated that, the offence was proved beyond reasonable doubt based on the evidence of the victim and the doctor. The trial court also acknowledged the fact that the victim knew the Appellant even before the incident.

The Magistrate however did not ask herself why the victim did not mention the Appellant's name to the man who rescued her or to the teacher who attended her when she was sent to school. The trial magistrate did not also ask herself as to whether the victim's story on disclosing the Appellant's name at the police station was collaborated. Being raped is one thing, but being able to identify the person responsible for rape was a very important aspect in this case. In my view, there is weakness in the prosecution evidence regarding the person responsible to the ordeal suffered by the victim. It is a settled principle that where there is doubt the same need be resolved in favour of the accused.

With that evidence in record, the doubts discovered are resolved in favour of the Appellant and I hereby find that, the prosecution side failed to prove the offence of rape against the Appellant beyond all reasonable doubts as required by the law. I therefore quash and set

aside the judgment, conviction and sentence of the trial court. This court order the Appellant to be released from custody unless held for other lawful cause.

Appeal allowed.

DATED at **ARUSHA**, this 19th day of October, 2022

D.C. KAMUZORA

JUDGE