IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 107 OF 2019

(C/f Criminal case No.47 of 2018 at the District Court of Hanang at Katesh)

PETRO UCHED ITAGAW..... APPELANT

Vs

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 22nd November 2021

Date of judgment: 24th January 2022

B. K. PHILLIP, J

The appellant herein was convicted as charged by the District Court of Hanang at Katesh, of the offence of rape contrary to sections 130 (1) (2) (e) and 131(1) of the Penal Code. He was sentenced to thirty (30) years imprisonment. Being aggrieved by the aforesaid judgment, he lodged this appeal on the following grounds;

i) That the trial Magistrate erred in law and fact for convicting the appellant on a defective charge sheet.

ii) That the trial Magistrate erred in law and fact for failing to notice the variance between the charged sheet and evidence as regards

the place where the offence was committed, the defect which was not remedied by the trial Court by way amendment under section 234 of the Criminal Procedure Act.

iii) That the trial Court wrongly admitted exhibit P1.

iv) That the trial Magistrate erred in law and fact for neglecting the appellant's defence.

v) That the trial Magistrate erred in law and fact for convicting the appellant for an offence which was not proved by concrete evidence.

At the hearing of this appeal the appellant was unrepresented, thus he appeared in person whereas the learned State Attorney Diaz Makule appeared for the Republic.

At the lower Court, the respondent alleged that on the 24th of June 2018 at or about 8.00 am at Molamu Village within Hanang' District, in Manyara Region, the appellant did have sexual intercourse with EH (Not her true name), a girl aged thirteen (13) years. The evidence which led to the appellant's conviction was briefly as follows; PW1, the victim, who shall be referred in this judgment as "EH" testified that the appellant was their neighbor. On 24th June 2018, she was at home alone because other members of the family had gone to church. When

she was in the house, the appellant knocked the door. She opened it and invited him in the house because he knew him as he was their neighbor. The appellant entered into the house. He pulled her up to her mother's bed room. He covered her mouth with his hand and lied her on the bed. He used his second hand to undress her pants and he undressed his trousers too. Then, he inserted his penis in her vagina. She felt pains and while they were in her mother's bed room, her brother, namely Anthony (PW2) entered into the house. He called her, but she did not respond because the appellant had covered her mouth with his hand. Upon hearing PW2's voice, the appellant pushed her under the bed and gave her Tshs 1000/=. He told her not to tell anyone what he did to her. Anthony (PW2) entered into his mother's bed room. He found the appellant sitting at the corner and had not put on his trousers well. PW2 asked him what was he doing in the house. The appellant claimed that he wanted to hire drums for fetching water. Thereafter, the appellant left. When the appellant had left, EH came from her mother's bed room crying. He told her brother (PW2) that the appellant raped her. PW2 decided to follow the appellant and on his way he met his brother namely Joseph. He narrated to him what happened to their sister (EH). Joseph called their father.PW2, continued looking for the appellant. He found him at his home. He

told him what he had been informed by his sister (PW1). The appellant denied to have raped EH. PW2 went back home. Thereafter, EH was taken to the police station where she was given PF3 and taken to Endasak Dispensary .PW4, (Jeremia Fissoo), a clinical officer examined EH. He found out that EH had bruises in her vagina. Later on, the appellant was arrested and taken to the police station. PW4 tendered in Court the medical examination report (Exhibit PE2). PW3, E 2097 Detective Argent Issack, conducted the investigation of the case and drew the sketch map of the scene of the crime. Also, he recorded the appellant's caution statement. He tendered in Court the sketch map of the scene of the crime which was admitted as exhibit PE1.

In his defence the appellant denied to have raped EH. He told the Court that his wife left from their matrimonial home on 13th August 2018. She took some of his properties and hid them at his neighbor's house. He claimed that EH's father had grudges against him because they had disputes concerning boundaries. Moreover, he alleged that the PW1's testimony was inconsistence and the medical examination report (Exhibit PE2) shows that no sperms were found in the victim's vagina.

During the hearing of this appeal, the appellant submitted for all grounds of appeal conjointly. His submission was to the effect that the

trial Magistrate convicted him using a defective charge sheet and wrong provisions of the law. He told this court that the trial court convicted him under the provisions of section 130 (2) (c) of the Penal Code whereas the proper provision of the law under which a person can be convicted of the offence of rape is section 130 (2) (e) of the Penal code. He went on submitting that the Republic ignored to correct the charge sheet and his defence was not considered. He testified in Court that he quarreled with EH's father because he took his poles.

Other arguments raised by the appellant were as follows; That the evidence adduced by the Republic was not consistent and was contradictory. The neighbors at the premises where the offence of rape was alleged to have been committed were not called to testify in Court in respect of the alleged offence of rape. The exhibits tendered in Court were not read over in Court. There was no any medical report from the hospital concerning the alleged rape instead the prosecution tendered in Court a medical examination report from a dispensary which was relied upon by the trial court in its decision.He invited this Court to set aside the judgment of the lower Court.

In rebuttal, Mr Makule responded to the grounds of appeal seriatim. Starting with the first ground of appeal, he submitted as follows; That

the charge sheet was not defective and even if this Courts finds that the charge sheet was defective, that is not fatal because the defect pointed out by the appellant is curable under the provisions of section 388 of the Criminal Procedure Code ("CPA"). To cement his arguments he cited the case of **Richard Mlingwa Vs Republic , Criminal Appeal No.11 of 2016**, (unreported).

With regard to the 2nd ground of Appeal, Mr Makule submitted that the Court's proceedings shows that the appellant and the victim were residents of Endagaw area whereas the charge sheet mentions Molam Village as the place where the offence of rape was committed. Mr Makule argued that the appellant did not cross examine the prosecution witnesses on the place indicated in the charge sheet where the alleged offence of rape was committed vis-a-vis the prosecution witnesses' place of residence as per their testimony. He contended that the difference in the name of the place where the offence of rape was alleged to have been committed and the prosecution witnesses' place of residence does not negate the fact that the victim in this matter (PW1) was raped by the appellant.

With regard to the 3rd ground of appeal Mr Makule submitted that the law requires exhibits to be read over in Court. Relying on the case of

Anania Clavery Beteta Vs Republic, Criminal Appeal No.355 of 2017, Mr Makule contended that even if the exhibit is not read over in Court as required by the law, the testimony of the witness tendering the exhibit is enough to prove the offence against the accused person. He was of the view that in this case the testimony of the Doctor who examined the victim is enough to prove the offence of rape against the appellant

With regard to the 4th ground of appeal, Mr Makule submitted that the appellant's defence was considered. He referred this Court to page No. 4 of the copy of the typed judgment.

With regard to the 5th ground of appeal, Mr Makule was of a strong view that the prosecution proved the case against the appellant to the standard required by the law. He submitted that the testimonies of PW1 and PW2 proved that the appellant entered into the house where EH was alone and raped her. EH invited the appellant in the house because she knew him since he was their neighbor and used to visit them. The appellant was found in the scene of the crime by PW2.

As regards the appellant's concern that neighbors were not summoned to give evidence in Court, Mr Makule's response was that it is the Republic which decides the witnesses for its case. The fact that

neighbors were not brought in Court to testify did not shake the prosecution case.

In rejoinder the appellant insisted that the victim (EH) did not mention the area where the offence of rape was committed and the PW4 who examined the victim failed to prove that the bruises found in the victim's vagina were caused by the appellant.

Having dispassionately analyzed the arguments raise by the parties in this matter as well as perused the Court's records, I am inclined to agree with Mr Makule that this appeal has no merits as I will demonstrate soon hereunder.

Starting with the issue concerning the provisions of the law indicated in the charge sheet. The Court's records reveal that the appellant was charged of rape under the provisions of 130 (1) (2) (e) and 131 (1) of the Penal Code and was found guilty of the offence he was charged with. The above provisions of the law are correct provisions of the law for a charge of rape. Thus, the appellant's concern on the provisions of the law indicated in the charge sheet is baseless.

Upon perusing the court's records, have noted that the appellant's concern on the procedure adopted by the trial Court in admitting the exhibits has merits because the Court's record does not show

anywhere that exhibits PE1 and PE2 were read over in Court as per the dictates of the law. The position of the law is very clear that failure to read over the exhibit admitted in evidence is fatal [see the case of **Frank John Libanga@ Lampard and another Vs The Republic, Criminal Appeal No.55 of 2019,**(unreported)].Therefore, under the circumstances I hereby expunge exhibit PE1 and PE2 from the Court's records.

Coming to the appellant's concern on the place where the offence of rape is alleged to have been committed, the charge sheet shows that the offence was committed at Molam Village within Hanang' District. The facts of the case read over in court show that the offence was committed at Molam Village, within Hanang District and evidence adduced refers to the same area, only that in their testimonies, the prosecution witnesses testified that they are residents of Endagaw. However, it is undisputed fact that Endagaw is a ward and Molam Village is within that ward. In short the appellant's concern on this ground of appeal is misconceived. The prosecution witnesses told the trial Court that they are residents of Endagaw Ward, since Molam Village is within Endagaw ward. Also, in his defence the appellant admitted that he is a neighbor of the victim's family.

I do not see any legal problem on the fact that the Medical Examination report was obtained from a dispensary because that is where the victim was taken for Medical examination. However, since I have expunged the same from the court's record that concern has been rendered redundant. It has to be noted that despite expunging the PE2, the testimony of PW4, remains intact. PW4 told the court that there were bruises in the victim's vagina.

In addition, it has to be noted that, there is a plethora of authorities from this Court and the highest Court of the Land which state that the best evidence in rape cases is the evidence of the victim herself. [See the case of **Mohamed Said Vs The Republic, Criminal Appeal No.145 of 2017** (unreported)]. In this case, PW1's testimony leaves no doubt that the appellant raped her.PW1's testimony is collaborated with the testimony of PW2 who saw the appellant in the bed room where PW1 claimed that she was raped by the appellant and the appellant had not yet finished putting on his trousers well. This is a clear evidence that the appellant had undressed his trousers as testified by PW1 and raped her. Not only that the appellant admitted that he was the neighbor of the victim's family. It is a finding of this court that the evidence adduced by the prosecution witnesses was

consistent and proved the offence of rape against the appellant beyond reasonable doubts.

Was it necessary for the neighbors to testify in Court as witnesses in this case? I am inclined to agree with Mr Makule that it was not necessary for the neighbors to testify in Court. After all, the narrations on how the offence was committed does not mention and/or involve neighbors at all.

Also, I have considered the appellant's defence, but the same is a sham. The appellant tried to put up multiple excuses and explanations to make up his defence, but all of them were not convincing and did not shake the prosecution case at all, instead created a strong message that the appellant did commit the offence of rape. The appellant's allegations that he had a dispute with EH's father over boundaries was not substantiated.

From the foregoing, it is the finding of this Court that this appeal has no merits and I hereby dismiss it.

Date this 24th day of January 2022

B. K. PHILLIP

JUDGE