IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 10 OF 2023

(Originating from Criminal Case No. 59 of 2021 of Hai District Court at Hai)

EMMANUEL ASANTERABI KWEKA .....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

31/07/2023 & 01/09/2023

SIMFUKWE, J.

In this appeal, the appellant, Emmanuel Asanterabi Kweka, is challenging the decision of the District Court of Hai in Criminal Case No. 59 of 2021 in which he was convicted with the offence of rape contrary to **section 130 (1) (2) (a) and 131 of the Penal Code, Cap 16 R.E 2019**.

The prosecution alleged that on 24th day of February, 2021 at or about 18:00 hrs at Mashua village within Hai District in Kilimanjaro region the accused had sexual intercourse with a victim a woman of 72 years without her consent.

Briefly, evidence as narrated by the prosecution before the trial court, was that on the fateful date, the victim went to fetch water. When she returned, she found her bedroom's door open. She went closer and saw the appellant standing there. The appellant told the victim that he wanted

her vagina. Suddenly, the accused grabbed the victim, took her hair scuff and inserted it into her mouth. Thereafter, the appellant pulled her down forcefully, undressed her clothes and underwear, pulled her legs apart and started raping her. All that time the victim was screaming. Among the people who responded to the victim's scream was PW2 who alleged that when she was closer to the victim's house, she saw the appellant running to the farm ditch. PW2 went to the victim's house and found her naked. Upon inquiry as to what had happened, the victim said that she was raped by the appellant. Thereafter, the matter was reported to the police station and the victim was taken to hospital. According to the examination which was done by PW3, the doctor who filled the PF3, it was alleged that the victim was penetrated by a blunt object.

In his defence, the appellant narrated how he was arrested. He denied the assertion that he raped the victim.

The trial court was satisfied that the charges against the appellant were proved beyond reasonable doubts. It convicted the appellant and sentence him to serve 30 years imprisonment. Being aggrieved by the decision of the trial court, the appellant preferred the instant appeal on five grounds of appeal:

1. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant basing on a charge which was not proved beyond reasonable doubt against the Appellant and to the required standard by the law.*
2. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that failure by the victim (PW1) to*

name the suspect at the earliest possible opportunity cannot attract the confidence of her testimony before the court of law.

3. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that the victim (PW1) was a self-confessed liar as her simony (sic) was full of embellishment than facts therefore, she gave an improbable and inconceivable evidence in ones (sic) mind which was supposed to be approached with great caution as it demonstrates a manifest intention or desire to lie in order to achieve or attain a certain end.*
4. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant basing on weak, tenuous, incredible inconsistency, contradictory and wholly unreliable prosecution evidence from prosecution witnesses.*
5. *That, the learned trial magistrate grossly erred both in law and fact by being adamant that, the Appellant's defence evidence did not raise any shadow of doubts on the prosecution's case.*

At the hearing of the appeal, the appellant was unrepresented while the respondent was represented by Mr. John Mgave, the learned State Attorney. The matter proceeded through filing written submissions.

On the first ground of appeal, the appellant said that the charge sheet which was laid against him was incurably defective as it did not cite the section providing the punishment which he would face if found guilty. He asserted that such omission occasioned injustice against him because he

did not understand the seriousness of the charged offence and was not made aware of the consequential harsh and severe punishment of thirty (30) years imprisonment. The appellant believed that he gave an uninformed defence evidence.

Expanding this ground, the appellant submitted that the trial court's judgment particularly at page 1, line 1 to 2 show that the appellant was charged with the offence of rape contrary to **sections 130 (1) (2) (a)** and **131 of the Penal Code** (supra). That, surprisingly, the trial magistrate's judgment at page 6 line 20 to 22 silently altered the charge sheet and added subsection (1) of section 131 which is the provision of the sentence of the charged offence. To support the above argument on failure to cite the section which provides for punishment, the appellant referred this court to the case of **Godfrey Simon and Another vs Republic**, **Criminal Appeal No. 296 of 2018,** in which the Court of Appeal at page 8 line 7 to 13 of its judgment held that:

> *"It is thus settled law that, the punishment/sentencing must be specified in the charge so as to enable an accused person to understand the nature of the charged offence and the requisite punishment. In the present case, the omission to state the punishment provision prejudiced the appellants who were not made aware of the serious implications of the offence charged, the gravity of the impending sentence and as such, they were unable to make an informed defence."*

Further reference was made to the case of **Meshaki Malongo @ Kitachangwa vs Republic**, **Criminal Appeal No. 302 of 2016,** at page 11 where the Court of Appeal held as follows:

> *"When an accused is charged with an offence of rape, must know under which of the descriptions under s. 130 (2) of the Penal Code the offence he faces falls, the purpose being to enable him to properly prepare his defence. In our considered view the principle equally applies to the categories of punishment under S. 131 of the Penal Code."*

The appellant urged this court to amplify the above cited authorities in resolving the aforementioned shortfalls in this case.

In respect of the second ground of appeal, the appellant condemned the victim for withholding the details of the alleged ordeal against her for quite a while and failure to name the suspect at the earliest possible opportunity. He expounded that, it is now settled that, a credible and reliable witness is expected to name the suspect at the earliest possible moment. He supported the contention with the case of **Ahmed Said vs Republic, Criminal Appeal No. 291 of 2015** which cited with approval the case of **Wangiti Mansa Mwita and Others vs Republic, Criminal Appeal No.06 of 1995** at page 14, which held that:

> *"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 appellant continued to submit that, failure on part of PW1, the victim to disclose the details of the alleged ordeal against her at the earliest

possible opportunity, taking into account that, she was an adult, cast serious doubts on her credibility as a witness. The appellant maintained that the victim's testimony is unreliable because at page 17 of the typed trial court proceedings, the victim said that after the suspect had run away, her neighbours whom she mentioned as "Mama Inno and Mama Chale" appeared for the aim of helping her, while the record is silent as to whether this key witness (PW1) named the suspect before the alleged Mama Inno and Mama Chale. The appellant was of the view that, this fact shows the naming of the suspect came to this witness (PW1) as an after thought, hence cannot make her evidence reliable.

On the 4th ground of appeal, the appellant blamed the trial magistrate for failure to note that, PW1's evidence was loaded with exaggeration than facts. That, the victim gave a very highly improbable, contradictory and inconceivable evidence. To substantiate his argument, the appellant gave an example of page 17 the 7th line of the proceedings where PW1 mentioned the appellant herein as Asanterabi Kweka while the name of the appellant herein is Emanuel Asanterabi Kweka.

Similarly, the appellant noted that at page 17 the 15th line, PW1 testified that her neighbours who came to rescue her included Mama Inno and Mama Chale while at page 18 when cross examined, PW1 changed the story and said that it was Mama Inno and Baba Inno who were the first to arrive at the scene. From the above noted inconsistences, the appellant told the court that PW1 was a self-confessed liar whose evidence was supposed to be approached with great caution by the trial magistrate.

In his conclusion, the appellant implored this first appellate court to re-evaluate the entire evidence on record, find merit in his appeal and allow

the same by quashing the conviction, set aside the sentence and set him at liberty.

Mr. John Mgave vehemently contested the above submission. Responding to the first ground of appeal on failure to prove the case beyond reasonable doubts, the learned State Attorney said that the case was proved beyond reasonable doubts. He said, in an offence of rape, the prosecution was only required to prove three elements which are penetration, consent and identity of the perpetrator of the crime. That, in proving the named elements, the record of the trial court particularly at page 17 shows that PW1/the victim testified how she met the appellant in her bedroom who immediately told her that he wanted her pussy. Thereafter, the appellant pulled her down forcefully, undressed her clothes and underwear, pulled her legs up and started raping her.

That, PW1 said that she identified the appellant and told him "*Mjukuu wangu unanifanyia hivi kweli?"* After he had finished raping her, the appellant ran away and it was not dark so the appellant was properly identified. The appellant was spotted running from the victim's house towards the farm ditch by PW2 who responded to the scream. PW2 entered the room of PW1 and found her naked and immediately, PW1 disclosed to PW2 that it was the appellant who had raped her.

Mr. Mgave went on to state that at page 24 of the proceedings, PW3 corroborated the evidence of PW1 and PW2 as he testified that upon examination of the victim, he found her to have bruises on her vagina and discovered that blunt object had penetrated her vagina. On that basis, the learned State Attorney supported the findings of the trial court that the elements of the offence were properly proved by the prosecution that led

to the appellant's conviction since the appellant was properly identified by the victim to be her grandson. Thus, there was no mistaken identification of the appellant.

In addition, Mr. Mgave submitted that the trial Magistrate was right to convict the appellant since the best evidence must come from the victim. That, since other witnesses didn't witness the commission of the offence, their evidence corroborated the evidence of the victim. Thus, identification was made properly, penetration was also corroborated by the PF3 and it was also proved that force was used as testified by PW1 at page 17 of the proceeding that there was no consent. That, all this evidence concludes that the prosecution proved their case beyond reasonable doubt that led to the appellant's conviction.

Responding to the argument that the charge was defective as it didn't contain the section establishing punishment and the alteration made by the learned trial magistrate by inserting the same in his judgment, Mr. Mgave was of the view that the alteration even if would not have been done is curable under **section 388 of the Criminal Procedure Act CAP 20 R.E 2022.** That, it is the position of the law that failure to cite the provision of the definition and punishment section or to clarify the ingredients of the charge under which the accused person is charged, will be curable under **section 388 of the Criminal Procedure Act** (supra) if the witnesses remedy the ailment in their evidence. He cemented the point with the case of **Maganga s/o Udugali V Republic** (Criminal Appeal No. 144 of 2017 (2021] TZCA 639 [Tanzlii], in which the Court of Appeal stated that in the circumstances where the omission has occurred then the same is curable under **section 388** but the prosecution witness

in their testimony should be in a position to elaborate the date, time, and place where the offence was committed and the accused should fully be made aware of the name of the victim and the nature of the offence charged.

Equating the above authority with the present case, Mr. Mgave stated that according to the testimony of PW1, PW2 and PW3 the appellant was made aware of the nature of the offence, where it was committed, to whom was it committed, time of commission of the offence and how it was committed. Thus, the appellant was not prejudiced and the citation made by the trial Magistrate was not fatal since before the judgment, the appellant was made aware of the nature of the offence by the prosecution witnesses.

Countering the second ground of appeal which concerns failure to report the matter at the earliest opportunity, it was Mr. Mgave's argument that the records are clear at page 19 of the proceedings that the victim named the appellant Asante Rabi Kweka to PW2 who went to rescue her. Also, on the same day the victim was taken to Bomang'ombe Police Station and reported the matter which was reasonably as earliest as possible. The learned State Attorney's line of argument was supported with the case of **Marwa Wangiti Mwita and Another** (supra). He insisted that in this case, the appellant was properly identified by the victim and was named by PW1 to PW2 as early as possible.

Resisting the 3rd ground of appeal, Mr. Mgave submitted that the trial Magistrate did not error believing the testimony of PW1 the victim of the crime. That, the trial court at page 4 of the judgment made it clear that in offences of rape proof must come from the victim, thus, PW1.

Moreover, the trial court went further to state that after having ample time assessing her demeanour while PW1 was testifying, the court was of the opinion that she was telling the truth and proceeded to cite the Court of Appeal case to cement the finding that she was telling the truth and that there was no reason to fault her evidence. To buttress the argument, the learned State Attorney cited the case of **Goodluck Kyando vs Republic [2006] T.L.R 367** which states that:

> *"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."*

In the matter at hand, Mr. Mgave contended that at page 4 and 5 of the judgment, the trial magistrate gave reasons as to why he believed that evidence of PW1 was credible and true. Thus, there was no need to doubt what she testified.

Responding to the 4th ground of appeal on the allegations that the trial Magistrate convicted the appellant based on weak, contradictory or inconsistent evidence, Mr. Mgave averred that the record of the trial court is not in favour of these allegations. Replying particularly on the noted discrepancy on the people who went to rescue the victim as seen at page 17, the learned State Attorney particularised that, PW1 mentioned only two people during examination in chief because the statement itself connotes that there were more people who responded to the incident. That, the word "include" meant those mentioned and others who were not mentioned and that is the reason which made PW1 when cross examined at page 18 to state that 'Mama Ino' and 'Baba Ino' were the first to arrive at the scene of crime. According to Mr. Mgave, the two

statements in examination in chief and cross examination are not the same that two were mentioned and the victim was not obliged to mention everyone who went to rescue her unless required to do so. He added that, the fact that the victim didn't mention at first place did not prejudice the appellant and if it did, the appellant never made it a point for the court to determine.

Lastly, reacting to the 5th ground of appeal that the trial court erred in finding that the defence evidence did not raise any shadow of doubt on the prosecution case; Mr. Mgave supported the findings of the trial court. He stated that the appellant's defence as found at page 31 of the trial court proceedings that prosecution witnesses said that they did not see who raped the victim is misleading since the victim was the one who saw the appellant and it was the testimony of the victim PW1 that it was the appellant who raped her. Also, at page 19 of the proceedings PW2 saw the appellant heading to the farm ditch and when she went inside the room, she found the victim naked whereas the victim complained to have been raped by the appellant. Therefore, the notion that no one saw him was not a good defence since the law is very clear that in sexual offences the best evidence must come from the victim. That, regardless that no one else saw the appellant inside the room raping the victim, the trial court was justified to convict the appellant as the evidence of the victim was regarded credible.

In the end, Mr. Mgave implored the court to dismiss the appeal in its entirety.

I have considered very well the above submissions of both parties and keenly gone through the trial court's records *vis a vis* the grievances raised

by the appellant in the grounds of appeal, ***the issue for consideration is whether this appeal has merit.***

On the first grounds of appeal, the appellant lamented that the charge was not proved beyond reasonable doubt since the same does not contain the section which establish the sentence/punishment. The appellant believed that he was prejudiced by such omission. This ground was disputed by the learned State Attorney.

Guided by the typed proceedings, I hasten to conclude that this ground is unfounded. At page 16 of the typed proceedings of the trial court, the prosecution prayed to the trial court to amend the charge and there was no objection from the appellant. Then, the charge was amended and read over to the appellant. According to the amended charge sheet which was filed in the trial court on 27/01/2022, the charge sheet contains the section which imposes punishment which is **section 131(1) of the Penal Code** (supra). Therefore, the first ground of appeal has no merit.

Turning to the second ground of appeal which concerns the complaints that the victim did not name the suspect at the earliest possible time, Mr. Mgave submitted to the contrary that the victim named the suspect to PW2 who responded to the screaming. Also, the ordeal was reported to the police station on the same day.

I am aware with the principle which was referred to me by the parties that the culprit should be named at the earliest possible time failure of which the court should draw adverse inference against the witness and should put a prudent court into inquiry. To add on what have been said, I believe that credibility of the witness is enhanced by the ability of such witness to name a suspect at the earliest opportunity.

Much as I am aware of the above principle, I don't agree with the argument by the appellant that he was not named by the victim at the earliest possible time. My line of reasoning is supported by the proceedings of the trial court which speak loudly that the victim named the appellant to PW2 at earliest time when the said witness responded to the incident. As a matter of reference at page 19 of the typed proceedings of the trial court, PW2 testified as follows:

> *"…. when I approached the house, I saw a person by the name of Emmanuel Asanterabi Kweka heading to the farm ditch. When I approached the door of the house of Magdalena, I found her lying on the ground naked. I asked her what was going on and she told me she was raped by Emmanuel Asanterabi Kweka."*

Apart from that, the incident was reported to the police station the same day, the victim was examined on the same day and PW3 said that the victim's vagina was penetrated by the blunt object. Therefore, the argument that the victim did not mention the appellant at the earliest possible time has no basis.

The next issue for determination is the grievance under the 3rd and 4th ground of appeal. On the third ground of appeal, the appellant complained that the trial court failed to note that PW1, the victim was a self-confessed liar as she gave an improbable and inconceivable evidence which was supposed to be approached with great caution; while on the 4th ground of appeal, it was alleged by the appellant that PW1's evidence was contradictory and inconceivable. That, at sometimes PW1 mentioned the appellant herein as Asanterabi Kweka while the name of the appellant

herein is Emanuel Asanterabi Kweka. Also, the appellant informed this court that PW1 testified that her neighbours who went to rescue her included Mama Inno and Mama Chale but when cross examined, PW1 said that it was Mama Inno and Baba Inno who were the first to arrive at the scene.

Mr. Mgave disputed the argument under the third ground on the reason that the trial magistrate believed the victim since the best evidence comes from the victim. He said that there was no reason for not believing the said witness. Concerning contradiction and inconsistent evidence, the learned State Attorney said that PW1 mentioned two people only during examination in chief. He was of the view that the word "include" meant those mentioned and others who were not mentioned. Mr. Mgave contended further that during cross examination, PW1 said that it was 'Mama Ino' and 'Baba Ino' who arrived at scene of crime first. Thus, the two statements given during examination in chief and cross examination are not the same.

Starting with the 3rd ground of appeal, the appellant did not tell this court the reason for saying that the victim was self-confessed liar. It is established principle of law that every witness must be believed unless cogent reasons are established for not believing him/her. At page 5 of the judgment, the trial magistrate gave reasons for believing the victim as rightly submitted by the learned State Attorney.

Turning to the 4th ground of appeal in respect of the noted discrepancies and inconsistences, I am aware that the contradictions in witnesses' testimonies dismantle the prosecution case if and only if the same touches the root of the case. In the present case, I wish to state that the noted

self-contradictions in respect of the name of the appellant as mentioned by the victim is not material discrepancy since it does not take away the fact that the victim was raped and that the appellant was properly identified. This is due to the fact that apart from naming the appellant as Asanterabi Kweka and omit his first name of Emanuel, there is other evidence which show that the appellant was properly identified; ***first,*** PW2 saw the appellant running from the victim's house to the farm; ***second,*** the appellant was identified in court to be the culprit; ***third,*** during the incidence, the victim identified the appellant and told him "*Mjukuu wangu unanifanyia hivi kweli?"* ***Lastly***, the victim and the appellant knew each other even before the incident. Therefore, failure to mention the victim's first name cannot be termed as contradiction which negatively affect the prosecution case.

Regarding the contradiction on the people who responded to the screaming after the incident as noted by the appellant, the learned State Attorney said it all. I resort to the line of thinking by Mr. Mgave that the word *'includes'* if plainly interpreted, it means that the said Mama Inno and Mama Chale were among the people who responded to the screaming of the victim while the said Mama Inno and Baba Inno as mentioned during cross examination, were the first people who arrived at scene of crime. Therefore, the appellant misinterpreted the two statements and termed it as inconsistences.

On the last ground of appeal, the appellant faulted the trial magistrate for deciding that the Appellant's defence did not raise any shadow of doubts on the prosecution's case.

On his side, Mr. Mgave criticized the defence evidence and supported the findings that the same did not raise any doubt.

It is pertinent to note that the duty of the accused person in criminal cases is to raise reasonable doubts on prosecution evidence and not to prove his innocence. In the case of **Joseph John Makune vs R [1986] TLR 44** the Court of Appeal held that:

> *"This cardinal principle of our criminal law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence..."*

In the instant case, according to the defence evidence, the appellant said that no witness saw him raping the victim. Also, the appellant alleged that the doctor who examined the victim said that he did not see any symptom of the victim being raped. The trial magistrate considered his defence, analysed it properly from page 5 to 6 of his judgment and came to the conclusion that the same did not raise doubt on part of prosecution.

I support the findings of the trial court that the defence evidence that no one saw the appellant raping the victim did not raise any shadow of doubt. ***First,*** the best evidence in sexual offences comes to the victim and in this case the victim testified that it was the appellant who raped her. ***Two,*** the victim's evidence was supported by the evidence of PW2 who saw the appellant running from the victim's house. Moreover, PW3 the doctor who examined the victim and tendered a PF3, proved that the victim was penetrated by a blunt object. With due respect to the appellant, the contention that the doctor found the victim with fungus and UTI and that he did not see the symptoms of the victim being raped as testified at page

31 of the proceedings is unsubstantiated since at page 24 of the proceedings PW3 the doctor testified as follows:

> *"…but on her vagina Orpheus, there were bruises surrounding it with little blood and on top of it…*
>
> *Due to those bruises, I discover that there was a blunt object penetrated on her vagina…"*

Based on the findings above, cumulatively, all the grievances raised by the appellant in his memorandum of appeal are without merit. As a first appellate court, I am satisfied that the prosecution case was proved beyond reasonable doubt and hence, I find no reason to fault the decision of the trial court. In the event, this appeal is dismissed in its entirety.

Order accordingly.

Dated and delivered at Moshi this 1st day of September 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

01/09/2023