IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A., And MURUKE, J.A.)

CRIMINAL APPEAL NO. 178 OF 2022

MOHAMED KHARIBU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mgonya, J.)

dated the 19th day of November, 2021

in

DC. Criminal Appeal No. 60 of 2021

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JUDGMENT OF THE COURT

24th April, & 7th May, 2024

MWAMPASHI, J.A.:

The appellant, Mohamed Kharibu was charged before the District Court of Kinondoni at Kinondoni (the trial court) with the offence of rape contrary to sections 130 (1), (2)(e) and 131 (1) and (2) of the Penal Code [Cap 16 R.E. 2022] (the Penal Code). It was alleged that on diverse dates between 11.05.2019 and 13.05.2019 at Tandale kwa Tumbo area, within the District of Kinondoni in Dar es Salaam Region, the appellant had carnal knowledge of "C.T", a fourteen years old girl who, in order to conceal her identity, we shall hereinafter refer to her, simply as PW3 or the victim.

After a full trial, the trial court convicted the appellant of the offence in question and sentenced him to serve a period of 30 years in prison. His first

appeal to the High Court was unsuccessful hence the instant second appeal to this Court.

The appeal arises from the following background; It all started on 11.06.2019 when the victim's mother, one Pili Haruna (PW2), who had been informed by her best friend that, her 14 years old daughter (the victim) had been seen with a lot of money, inspected the victim and found her with Tshs. 20,000/= hidden in one of her school exercise books. The victim having refused to explain and disclose from whom she had gotten the money, PW2 decided to report and take her to the office of local militia men (Sungusungu) where when interrogated by Ramadhan Ally (PW1), in the absence of her mother, the victim opened up, and told PW1 that the money was given to her by one man (Mbaba). However, the victim did not tell why and for what purpose did the said man give her the money. Upon being given the description of the said man and his place of residence by the victim, PW1 went to the relevant residence and arrested the man who happened to be the appellant. After the arrest, the appellant was taken to Tandale Police Post where he was identified by the victim as the man who had been giving her money.

According to the victim who testified as PW3, she met the appellant for the first time on 11.05.2019 at a nearby shop where she had been sent by her mother PW2 for a soda. The appellant lured and took her to his room

where he raped and gave her Tshs. 20,000/=. The second time was on 13.05.2019 when the two met at the same shop and again the appellant took her to his room where he raped and gave her Tshs. 30,000/=. The last time was on 17.05.2019 when on her way back from school, the victim met the appellant who took her to a certain discrete narrow street and raped her. This time she was given Tshs. 10,000/=.

PW4 was Mr. Thomas Minja, an Assistant Medical Doctor from Mwananyamala Government Hospital who medically examined the victim on 12.06.2019. His examination revealed that the victim had a perforated hymen and there was no blood or bruises in her vagina. He concluded that the victim had been penetrated but not recently. A PF3 in which PW4 had posted his findings, was tendered in evidence by him and admitted as Exhibit P1.

The evidence from the last prosecution witness (PW5) WP. 7603 D/C. Meclina of Magomeni Police Station, was brief and to the effect that the case file having been assigned to her for investigation of the case on 13.05.2019, apart from recording statements from witnesses and interrogating the appellant who by then had been arrested and was in remand prison, she also visited the scenes of crime. Led by the victim, she firstly visited the appellant's room and then the discrete narrow street where the victim claimed the appellant raped her for the last time on 17.05.2019. She testified

that, despite the denial by the appellant, there was evidence from the victim which was to the effect that she was raped by the appellant.

In his affirmed defence, the appellant, though did not deny to have known the victim before, he however, maintained his denial to have raped her. He stated that he was just arrested by PW1 from his residence where he had been with his friends and when taken to Tandale Police Post, he was surprised being accused of raping the victim. In his defence, he called two witnesses, Salim Yusufu Kauzeni (DW2) and Abdalla Omary (DW3) whose evidence was to the effect that they were with the appellant when he was being arrested by PW1.

Based on the prosecution's evidence and particularly relying on the victim's evidence, the trial court believed the version of the story as given by the prosecution and, as we have alluded to earlier, convicted and sentenced the appellant to thirty (30) years' imprisonment. On appeal to the High Court, the victim's evidence was expunged from the record for being received in contravention of section 127 (2) of the Evidence Act [Cap. 6 R.E.2019; Now R.E 2022] (the Evidence Act). The victim's evidence having been expunged, the High Court accessed the remaining evidence and was satisfied that the said remaining evidence, particularly from PW4, PW5 and Exhibit P1 (PF3) was sufficient to warrant the conviction against the appellant. The appeal by the appellant was thus, dismissed in its entirety.

Aggrieved by the dismissal of his first appeal by the High Court, the appellant has preferred the instant second appeal on the following two grounds:

1. *That, the learned first appellate Judge grossly erred in law and facts in wrongly upholding the appellant's conviction relying on the testimonies of PW4, PW5 and Exhibit P1 (PF3) without considering that after PW3's evidence having been expunged from the record, the remaining evidence could not stand alone and establish the offence of rape.*
2. *That, the learned first appellate Judge grossly erred in law and facts in upholding the appellant's conviction without considering that the prosecution failed to prove its case beyond reasonable doubt against the appellant.*

Before us, at the hearing of the appeal, was the appellant who appeared in person without representation. On the other hand, the respondent/Republic enjoyed the services of Mr. Ramadhani Kalinga, learned Senior State Attorney and Mr. Cathbert Mbilingi, learned State Attorney.

When invited to argue his grounds of appeal, the appellant prayed for his two grounds of appeal to be considered by the Court in line with his written submission and list of authorities he had earlier filed which were adopted by him to form part of his submission in support of the appeal. He thus, beseeched us to allow the appeal.

In his written submission on the first ground of appeal, it is being argued that having expunged the evidence from the victim (PW3), the High Court erred in concluding that the remaining evidence, particularly from PW4, Exhibit P1 and from PW5 was sufficient to prove the case against the appellant to the required standard. It is submitted that the remaining evidence upon which the High Court relied in sustaining the conviction was hearsay evidence and too weak to support the conviction. It was further argued that the evidence from PW4 and Exhibit P1 only established that the victim had been penetrated and not that it was the appellant who penetrated her. In the appellant's written submission, it was also complained that while in her evidence, PW5 never stated that she collected any victim's pants from the scene of crime, the High Court, in its judgement, is on record that PW5 collected the victim's pants at the scene of crime hence coming to the conclusion that the fact that rape was committed was proved. In concretizing his ground that the remaining evidence could not support the conviction, the appellant referred us to our decisions in **Hassan Yusuph Ally v. Republic**, Criminal Appeal No. 462 of 2019, **Seiph Athumani Kibinda and Two Others v. Republic,** Criminal Appeal No. 532 of 2020 and **John Mkorongo James v. Republic,** Criminal Appeal No. 498 of 2020 (all unreported).

In regard to the second ground of complaint, it was simply submitted by the appellant that the case against him was not proven beyond reasonable

doubt because the prosecution failed to even tender in evidence as exhibit, Tshs. 20,000/= allegedly found in one of the victim's exercise books by PW2.

On his part, Mr. Kalinga readily supported the appeal. He argued that, as submitted by the appellant, the High Court erred in concluding that, after the evidence from the victim had been expunged from the record, the remaining evidence could support the conviction. He submitted that the evidence from PW4, PW5 and from Exhibit P1 on which the High Court based in finding that the case against the appellant had been proved, was weak and insufficient. Citing sections 3 (2) (a) and 110 of the Evidence Act, Mr. Kalinga insisted that the prosecution did not perform its duty to prove the case against the appellant beyond reasonable doubt.

Citing the cases of **Selemani Makumba v. Republic** [2006] T.L.R. 379 and **Godi Kasengala v. Republic**, Criminal Appeal No. 10 of 2008 (unreported), Mr. Kalinga submitted further that, as it was also rightly submitted by the appellant, the evidence from PW4 and Exhibit P1 only proved that the victim had been penetrated and not that it was the appellant who had penetrated her. As for the evidence from the case investigation officer PW5, it was submitted by Mr. Kalinga most of her evidence was hearsay and her piece of evidence that she visited the appellant's room in the absence of the appellant leaves a lot to be desired as it cannot be

certainly said that the room she visited is the room in which the appellant used to reside.

Finally, it was submitted by Mr. Kalinga that the case against the appellant was not proved to the hilt and that the appeal should thus, be allowed by quashing the conviction and setting aside the sentence.

In his brief rejoinder, the appellant happily agreed with what had been submitted by Mr. Kalinga and reiterated his prayer for the appeal to be allowed and for him to be set free.

At this juncture, we find it apt to reproduce a relevant part of the High Court judgment by which it was found by the High Court that even in the absence of the evidence from the victim (PW3), there was still evidence to warrant the conviction against the appellant. At page 9 of its judgment, the High Court observed that:

> *"This court finds that the evidence of PW3 has to be expunged from the record. However, expunging the said evidence, the remaining evidence of the witnesses that testified for the prosecution still carries weight to support the case against the appellant. Together with consideration of the ingredients of the offence charged, I find the testimonies of PW4 a Doctor that examined PW3 and discovered she had no hymen and that from absence of hymen it is his suggestion there was penetration, PW5 the*

investigator who states to have found the victim's pant at the crime scene all supporting the case that the victim was raped. It is from the above that I find the evidence remaining holds water hence this ground lacks merits"

It is our observation from the above extract from the High Court's judgment that, having expunged the evidence from the victim (PW3), the High Court found the remaining evidence for the prosecution, that is, from PW1, PW2, PW4, PW5 and from Exhibit P1, sufficient to prove the case against the appellant. The remaining evidence found sufficient to warrant the conviction was not only that from PW4, PW5 and Exhibit P1 as it has been put by the appellant and supported by Mr. Kalinga. It was the evidence given by the prosecution as a whole with the exception of the evidence from the victim that was found sufficient to warrant the conviction against the appellant. It is also clear, from the above extract that, the evidence from PW4, PW5 and Exhibit P1 was found by the High Court to support one of the ingredients of the offence of rape, that is, the fact that the victim was raped and not that it supported the case that it was the appellant who had committed the rape in question. We, however, also note that, as rightly complained by the appellant, the fact that PW5 found the victim's pants at the crime scene as put by the High Court, is not borne out by the evidence of PW5 on record. Our observation is therefore that, the High Court's

conclusion was that the prosecution evidence against the appellant as a whole in exclusion of the evidence from the victim (PW3), was sufficient to warrant the conviction against the appellant. In other words, the High Court was satisfied that the remaining evidence proved the case against the appellant beyond reasonable doubt.

Based on the above observations and having considered the grounds of appeal, the evidence on record and the submissions from both sides, we are of a considered view that the determination of this appeal turns out to a simple and narrow issue on whether upon the evidence from the victim being expunged from the record, the remaining evidence, could warrant the conviction against the appellant as found by the High Court. In other words, a compelling issue for our determination is whether the High Court erred in concluding that, the evidence from the victim (PW3) having been discounted, the remaining evidence from other prosecution witnesses connected the appellant with the commission of the charged offence of rape.

We have dispassionately examined the remaining evidence as led by the prosecution against the appellant in exclusion of the evidence from the victim (PW3), that is, the evidence from PW1, PW2, PW4, PW5 and from Exhibit P1 (PF3) and without beating around the bushes, we find and agree with the appellant and Mr. Kalinga that the said remaining evidence could not have warranted the conviction against the appellant. Since in sexual

offences the best evidence is that which comes from the victim, See - **Seleman Makumba** (supra), **Julius Kandonga v. Republic**, Criminal Appeal No. 77 of 2017 and **Amir Rashid v. Republic**, Criminal Appeal No. 187 of 2018 (both unreported), then in the absence of the evidence from the victim (PW3), the remaining evidence, particularly on the issue of who penetrated or raped the victim, was nothing but hearsay evidence.

In the absence of the evidence from the victim (PW3) there was no cogent evidence connecting the appellant or proving that it was him who penetrated or raped the victim. As rightly argued by the appellant and supported by Mr. Kalinga, the evidence from PW4 and Exhibit P1 only proved that the victim had been penetrated. Such evidence was not on who penetrated the victim and it did not connect the appellant as the one who had penetrated the victim. The evidence from PW1 and PW2 was just on how the victim was found with Tshs. 20,000/= and how the appellant was arrested after being named by the victim that he was the one who had been giving money to her. These two witnesses did not see the appellant raping the victim. Further, the evidence from the case investigation officer, PW5, was totally hearsay. It was based on what she was told by the victim.

Cases on sexual offences, like the case at hand, where after expunging the victim's evidence, there had been no remaining evidence connecting an accused as the one who had committed the offence against a victim, are

many. Some of the said cases are **John Mkorongo James** and **Hassan Yusuph Ally** (supra) as well as **Masoud Mgosi v. Republic,** Criminal Appeal No. 195 of 2018 (unreported). In the latter case the Court observed that:

> *"Having expunged PW1's evidence, the remaining evidence from PW2, PW3, PW4, PW5 and PW6 is wholly hearsay. It was incapable of incriminating the appellant of the charged offence. On the other hand, PW7's evidence is no better. It was only capable of proving that PW1's vagina was penetrated but, as rightly submitted by Mr. Aboud, there will be no evidence proving that it is the appellant who had unlawful carnal knowledge of BM on the material date. This is so because nine of the witnesses who testified during the trial saw the appellant committing the alleged offence".*

It is on the above reasons that we find that, having expunged the evidence from the victim (PW3), the remaining evidence from PW1, PW2, PW4, PW5 and from Exhibit P1 (PF3) was insufficient and incapable of proving that the appellant had committed the charged offence. It was therefore an error on the part of the High Court to conclude that the remaining evidence was sufficient to warrant the conviction against the appellant. Our finding that the remaining evidence was incapable to support the conviction against the appellant also answers the second ground of

complaint that the case against the appellant was not proved beyond reasonable doubt as the law requires.

All said and done, we allow the appeal by quashing the conviction and setting aside the sentence imposed on the appellant. Accordingly, we order an immediate release of the appellant from the prison unless he is being held for some other lawful cause.

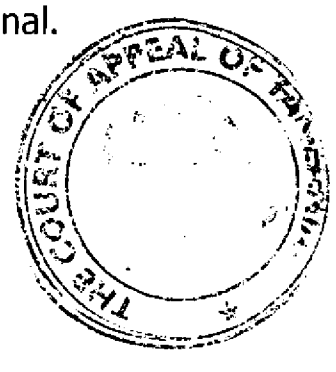
DATED at **DAR ES SALAAM** this 2nd day of May, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered on this 7th day of May, 2024 in the presence of the appellant in person and Ms. Pancrasia Protas, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL