IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 480 OF 2020

MALIMI PETER.. APPELANT

VERSUS

THE REPUBLIC... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mgeyekwa, J.)

dated the 28th day of July, 2020

in

DC. Criminal Appeal No. 321 of 2018

JUDGMENT OF THE COURT

9th & 20th February, 2024

NGWEMBE, J.A.:

The appellant, Malimi Peter, first appeared before the District Court of Nyamagana at Mwanza Region (the trial court) on 14th March, 2011 to answer the charge of rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 R.E. 2002; now R.E. 2022 (the Penal Code). According to the charge sheet, the appellant committed the offence of rape on 2nd March, 2011. When the charge was read over to him on 14th March, 2011, he denied it. Following this denial, a preliminary hearing was conducted on 1st June, 2011 whereas, he admitted only his personal particulars.

His trial, eventually, took off on 29th June, 2011, at which the prosecution was marshalled with four (4) witnesses and one exhibit (the PF3) which was admitted and marked exhibit PE1. On the other side, the defence witness was the appellant alone with one exhibit that is the statement of the victim recorded at police station (exhibit DE1).

At the conclusion of the trial, the learned trial Resident Magistrate found the appellant guilty as charged, convicted and sentenced him to thirty (30) years in prison.

The synopsis of the prosecution case is that, on the eventful date, the victim or PW1 (name withheld to protect her dignity) aged 33 years old, a fish seller, resident at Nyamagana District in the City and Region of Mwanza, at around 12:00hours went to Nyegezi Sweya area at the shores of Lake Victoria looking for fish to purchase from the fishermen. However, at that hours the fishermen were yet to come ashore, thus, she had to wait for them. While waiting, the appellant, also a fisherman, appeared from her behind armed with a 'panga' (machete) and commenced some conversation with her suggesting to have sexual intercourse. The suggestion was turned down. As a result, the appellant grabbed her by force and proceeded to rape her for about four or five hours with four rounds.

However, the scene of crime was not far from the pedestrians' way, therefore sometimes the victim could see the passersby while she was still at the act of rape, but she failed to secure their rescue or raise an alarm for the reason that, she was threatened by the weapon.

Immediately after the event, she reported the incident to the village leaders who arrested the rapist on the same day at 21: 00 hours and they took him to police station at Igogo. The victim (PW1) was also taken to the same police station where she was issued with PF3 (exhibit PE 1) to enable her to seek treatment at Nyamagana District Hospital. The Medical Doctor (PW4) examined her and found her vulva was swollen, bruises in the vagina, but she was already showered, thus the doctor did not see sperms. PW4 formed an opinion that those bruises were caused by forced penetration of blunt object.

When put to his defence, the appellant stoutly denied the offence. He admitted the fact that, he is acquainted with the victim since 2007. That the victim was a fish retail trader, regular visitor of the lake shores for buying fish from the fishermen. He equally admitted that, he was a fisherman fishing around the lake shores at Sweya area. He did not dispute that he was at Sweya area on the material date, but he distinguished the event by the story that he left in the morning to Nyegezi and came back at around 17:00 hours. When he passed to the housed of the street chairman (PW2), he found many people who arrested him and took him to police. He proceeded to defend by using the statement recorded by PW1 (the victim) at Police station to the effect that her evidence was different from her statement she gave to the police. He successfully tendered in court and it was marked exhibit as indicated above.

The appellant insisted that, on the fateful date he was not armed and never met PW1 for about three weeks prior to the alleged date of incident. He discredited the prosecution witnesses and challenged the arresting procedure. The appellant believed that PW1 had merely made up the incident of rape in order to punish him without disclosing any reason.

As we have already alluded to, despite his defence, at the end of trial, the learned trial Magistrate, S. J. Mwajombe – RM convicted the appellant for the offence of rape and proceeded to sentence him to serve thirty (30) years in prison.

Aggrieved by the outcome of his trial, the appellant appealed to the High Court at Mwanza, grounded with four grievances; *one* that penetration was not stated in the statement recorded at police by the victim; *two* victim's evidence was not corroborated; *three* the Court failed to consider the victim's ill motive against the appellant; and *four* the victim (PW1) was not credible. Those grounds as well did not shift the scale, the conviction and sentence passed by the trial court were sustained by the first appellate court in its judgment delivered on 24/07/2020; consequently, his appeal was dismissed.

Still aggrieved, the appellant has come to this Court with a total of six (6) grounds of appeal which may be summarized into the following heads of complaints:

1) He was convicted on the bases of exhibit PE1 and the first appellate Court, despite of expunging that exhibit, yet used it to uphoid his conviction and sentence.

2) The charge was defective for non-citatlon of subsections and paragraphs of sections 130 and 131 of the Penal Code.

3) The appellant was unrepresented indigent person and was unveiled with sufficient notice to prepare and respond to the case.

4) *The appellant should not have been convicted on strength of evidence of PW1 who was not credible and unreliable person, thus, the offence of rape was not proved.*

5) *The two courts below erred in law for relying on the evidence of medical report which assumed PW1 was raped because of having a swollen private part, while she was on her menstrual period.*

6) *The judgment of the first appellate court was fatally defective for having two different dates of delivery.*

Based on the grounds above, he prays that his appeal be allowed, his conviction be quashed and the sentence of thirty (30) years imprisonment be set aside.

At the hearing of this appeal, the respondent/Republic was represented by three learned counsels, Ms. Magreth Mwaseba, learned Senior State Attorney, assisted by Ms. Jaines Kihwelo and Mr. Adam Murusuri, both learned State Attorneys. The appellant all along appeared in person unrepresented. He urged us to consider his grounds of appeal and let the Republic respond to them, but he reserved his right to respond thereafter.

With permission, the learned Senior State Attorney, commenced her submission by indicating that the Republic opposes the appeal. Also, she made an oral application to raise and argue an objection on point of law related to the validity of the notice of intention to appeal, which was lodged to the High Court, which affect the whole appeal.

Upon being permitted to raise and argue the objection, she forcefully, argued that, the appeal is incompetent because it is founded in an illegal proceedings and judgement of the High Court. The illegality was founded from the appellant's failure to comply with section 361 (1) (a) of the Criminal Procedure Act Cap 20 R.E. 2022 (the CPA), which required the aggrieved party to lodge notice of appeal within ten (10) days from the date of delivery of impugned judgement of the trial court. She supported her argument with the case of **Ramadhan Rajabu @ Kules vs. R,** Criminal Appeal No. 553 of 2023 and the case of **William Sunday vs. R**, Criminal Appeal No. 75 of 2007 (both unreported). Insisted that the notice of intention to appeal from the judgment of the trial court was lodged and stamped by the court stamp on 12th March, 2012, that is the date which should be counted as the date of lodging it in court. Since the judgment of the trial court was delivered on 28th February, 2012, the ten (10) days ended on 9th March, 2012. Thus, she invited this Court to invoke its powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 R.E 2019, to revise and set aside the whole proceedings and judgment of the first appellate court with a view to allow the appellant to start afresh his process of appeal against the trial court's judgment.

When the appellant was called on to respond on the validity of his notice of intention to appeal to the High Court, he simply submitted that, he is still serving the thirty (30) years imprisonment, but immediately after being jailed he indicated his intention to appeal against his conviction and sentence to the prison authority. Added that, it was the duty of the prison authority to file his notice of appeal timely. Thus, he concluded that his appeal to the first appellate court and in this Court are timely and proper in law.

On our part, we have perused the record of appeal and find it vividly at page 41 that, the notice of intention to appeal was thumb stamped by the appellant on 7th March, 2012, the same was certified by Butimba Prison Authority on 8th March, 2012 and was filed and stamped by the court stamp on 12th March, 2012.

Understandably, the learned Senior State Attorney referred the Court to the judgment and ruling cited above. However, upon critical review of the judgment in the case of **Ramadhan Rajab** (supra), clearly the Court did not discuss at all on the validity of notice of intention to appeal based on when was it filed in court by an inmate person. Rather at page 5 of the judgment, the Court discussed section 361 (1) (a) of the CPA. The Court concluded that, the appeal begins with issuing notice of intention to appeal within ten (10) days from the date of delivery of the impugned judgment. The Court found that the notice of appeal was filed in court timeously contrary to the findings and decision of the High Court. We therefore, find that the judgment in **Ramadhani's** case is distinguishable from the circumstances of the matter under scrutiny.

Likewise, the ruling in the case of **William Sunday** (supra), which discussed various deficiencies found in the notice of intention to appeal, contrary to the issue at hand. Therefore, the contents of the two decisions are invariably distinguishable and inapplicable to the precent subject matter.

We think, this point on when the notice of intention to appeal of an inmate is issued as per section 361 of CPA is settled in our jurisdiction. There are colossal precedents of this Court, including the case of **Godfrey Mahona vs. R,** Criminal Appeal No. 535 of 2015 (unreported), the Court was faced with a similar preliminary objection from the respondent/Republic, that the notice of intention to appeal from the decision of the district court to the High Court was filed contrary to section 361 (1) (a) of CPA, hence the decision of the High Court was nullity and so the subsequent appeal in the Court had no legs to stand on. The Court had this to say:

> *"So long as the appellant has shown his intention to appeal in writing and certified by the officer in charge of prison, that in our view suffices the requirement of s. 361 (1) (a) of the CPA. The correct date therefore is that which the appellant gave his intention to appeal i.e. 29 October 2013 and not the date of filing. Since that was the fourth day after the delivery of the decision, the appellant gave his notice of intention to appeal within the prescribed time of 10 days. The High Court did not infringe s. 361 (1) (a) of the CPA. The appeals in the High Court as well as in this Court were properly lodged".*

Similar holding was pronounced by the Court in the case of **Thomas Peter *alias* Chacha Marwa vs. R**, Criminal Appeal No. 322 of 2013 (unreported) where this Court insisted that, once the appellant issues his notice of intention to appeal and that notice is endorsed by the Officer -in- Charge of Prison, that date counts. The position was repeated in the case of **Bundala Abdallah @ Juma and Ntinginya Masanja v. R,** Criminal Appeals No. 429 & 430 of 2016 (unreported).

As is so reasoned, the appellant dully prepared and signed by putting his finger print on the notice of intention to appeal on 7th March, 2012, equal to eight (8) days from the date of delivery of the impugned judgment, and the prison officer in charge of Butimba Prison signed on 8th March 2012, equal to nine (9) days from the date of judgment, thus, the appellant was home and dry for he was not late even for a fraction of a day in giving his notice of intention to appeal.

We respectfully hold that the learned Senior Stater Attorney misconstrued the contents of section 361 (1) (a) of CPA in raising this objection. As we conclude this point, we urge all those entrusted with this noble task of dispensing justice to adhere always to this simple but salutary principle that, *in the administration of justice speed is good, but justice is better*. Thus, the notice of intention to appeal to the High Court was lodged timely and the appeal to the High Court and in this Court are valid. Consequently, the objection is unmerited and dismissed.

Having so concluded on the preliminary objection, we now turn into the merits of the appeal by considering those grounds of appeal as were raised by the appellant and responded by the respondent/Republic. On the first ground of appeal, the appellant laments that, the first appellate judge proceeded to rely on exhibit PE1 (PF3) in finding him guilty while the same was already expunged. In response, the learned Senior State Attorney, briefly submitted that, the holding of the first appellate court did not base on the contents of exhibit PE1, which same was already expunged. Rather, the High Court's conclusion was found on the evidence adduced by the prosecution witnesses including the medical doctor (PW4) as per page 74 of the record.

In deep consideration on this ground, we find the record of appeal speaks louder. At page 68 of the record of appeal, the Judge had this to say:

> *"In the trial court under scrutiny, on page 21 of the trial court proceedings, it is shown that the PF3 upon admission as exhibit PE1 was not read over to the appellant as required by the law, thus the same is a fatal irregularity. Therefore, I proceed to expunge exhibit PE1 from the court record".*

As a matter of legal principle, once an exhibit or any fact is discarded from the record, the *status quo* remains to be as if it did not exist at all. There will be no room through which a court of law may rely on that discarded piece of evidence. The simple meaning of 'expunge' is to erase or to destroy as **The Black's Law Dictionary, 9th Edition** put it.

We are aware that among the pillars of justice is for the courts of law to make decisions based on the available evidence. In this ground, the question would be whether the first appellate judge relied on the said exhibit PE1 in her judgment. Studying from the High Court judgment, it is true the Judge concluded that the victim's vagina was swollen which indicated that the victim was raped (or at least penetrated) more than once. This was on proof of penetration. However, in reaching to that conclusion, reference was made to the oral testimony of the medical doctor (PW4) who examined the victim and the evidence of PW1 (victim). It was not about the contents of the expunged exhibit PE1 rather was based on the available evidence adduced by PW1 and PW4. That being the case, there is no justification of suspecting reliance on the expunged exhibit PE1. Hence the first ground must fail for lack of merits.

The holding on this ground resolves one of the complaints in ground 5 as well, whereas the appellant lamented that, the two courts below upheld the conviction on the offence of rape on strength of the medical report, which as seen, was not the case. We agree with the argument advanced by Ms. Mwaseba that the conviction of the appellant was based on court's evaluation of the prosecution evidence without any reliance to the medical report (PF3), which was already expunged. Equally, ground five must fail for lack of merit.

Considering the contents of ground 2 which is related in many aspects with ground 3 whereas the appellant is complaining on the Judge's conclusion on the respondent's failure to cite properly the enabling provisions of law and insufficient particulars of the offence. Also, he complained on the failure of the Judge to explain to him on those sections bearing in mind that, he is an indigent and unrepresented. In response therein, Ms. Mwaseba strongly resisted the complaint by stressing that, the Judge was right to decide as she did because those irregularities found in the charge sheet were curable under section 388 of CPA as well as the decision in the case of **Jamali Ally @ Salum Vs. R**, Criminal Appeal No. 52 of 2017 (unreported). She rested by insisting that, the appellant was not prejudiced.

On our part, we agree with the appellant that in the charge sheet, is vividly clear, that the only cited sections are 130 and 131 of **the Penal Code** without specifying the available subsections and paragraphs therein. Section 130 provides for different types and circumstances of rape and section 131 likewise. Subsections and paragraphs were important to be cited in the charge in order to properly inform the appellant on the offence he was facing. This position was discussed in detail in the case of **Mathayo Kingu vs. R,** (Criminal Appeal 589 of 2015) [2016] TZCA 332. However, currently this Court has interpreted none citation of subsections and paragraphs with the test of prejudice to the appellant. In the case of **Jamali Ally @ Salum (supra)** the Court applied the following tests:

> *"The first issue relates to the failure by the prosecution, to cite section 130 (1), (2) (e) and 131 (2) of the Penal Code. That is, whether this defect arising from wrong citation and citation of inapplicable provisions; prevented the appellant from understanding the nature and seriousness of the offence of rape and prevented him from entering his proper defence thereby occasioning him injustice... It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA."*

We are obliged to go along with the first appellate Judge that such defect is curable under section 388 of the CPA. For clarity we find imperative to quote the section verbatim hereunder:

> *"Subject to the provisions of section 387, no finding, sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."*

It is our finding that, failure of the prosecution to cite properly the sections, subsections and paragraphs and or explain the same to the appellant were not prejudicial to the appellant for the particulars of the offence and evidence adduced by PW1 were clear like a day followed by night and the appellant got an opportunity to defend his case.

Moreover, the complaint of the appellant that he was an indigent and unrepresented, so he would not be able to prepare and respond to the points of law. In our fair treatment of this complaint, we find it unmerited because the appellant is the one who raised those grounds of appeal which he termed them as points of law. What the court had to do was to decide the contentious issues raised by the appellant. Therefore, we are not moved at any rate to think that the appellant who prepares his grounds of appeal and files them in court can be presumed to be ignorant of his own case. As such, after the respondent has already responded to the said grounds there would be no need to give the appellant some explanation on those grounds he presented. We therefore, find this complaint unmerited as well. Having so reasoned, we proceed to dismiss both grounds 2 and 3 altogether.

Before we can consider and determine on ground 4, we find it important to dispose of the last ground (6) of this appeal where the appellant alleges that, the judgment of the first appellate court was defective for containing different dates of delivery. On this ground we agree with the appellant that it is true the judgment of the High court has two different dates of delivery that is on 24/07/2020 and 28/07/2020. However, it is our considered view that this ground does not deserve any lengthy discussion. As was rightly argued by Ms. Mwaseba, the error is minor with trivial defect whose remedy was not to file an appeal, rather was to seek correction from the same court. Thus, the ground is insignificant and is devoid of merit, same is dismissed forthwith.

Now we turn to determine on ground 4 of the appeal where the appellant laments that, the evidence of PW1 was not reliable and the first appellate Judge as well as the trial court were required to cast doubt, on the claim that, the appellant raped her continuously from 12:00 hours to 17:00 hours (PW1 at page 10) without raising an alarm or attempting to flee herself. In this ground, the appellant suggests that, the victim was not a credible witness as the appellant could not be able to rape for 4 or 5 hours continuously with four rounds, but she failed to raise alarm or flee from the appellant's grip. Equally the appellant is questioning the proof of his case that same was not proved to the required standard of beyond reasonable doubt.

Responding on this ground, the learned Senior State Attorney referred this Court to the evidence adduced by PW1 (pages 8 to 10), that the rapist threatened her with machete when he was raping her. She proceeded to suggest that, the case against the appellant was established and proved beyond reasonable doubt. Referred this Court to the case of **Patrick Omary Richard v. DPP**, Criminal Appeal No. 236

of 2019 (unreported). Also, she stressed that PW1 was credible witness because immediately after the incident she reported to the street leader (PW2), which evidence was supported by the medical doctor (PW4) who proved rape. Moreso, the victim and the appellant knew each other. She rested by a prayer that this appeal be dismissed forthwith.

We appreciate the well-conceived arguments by the learned Senior State Attorney on this important ground of appeal. However, we want to sound just briefly on the nature of the offence of rape and lay out some guiding principles thereon. Tracing from 17th century, the English jurist *Sir Mathew Hale* wrote the following:

> *"Rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, that never so innocent"*

That caution was applied by Judge Mapigano (as he then was) in the case of **R vs. Hasani Saidi** [1984] T.L.R. 226, after quoting the above principle he proceeded to provide its rational related to the difficulty of disproving a false accusation and the possible damage to a man's reputation. Reasoned that, for a multitude of reasons women may accuse men of sexual assaults to extort money, force marriage, satisfy a childish desire for notoriety, attain personal revenge or obviate a sense of shame after consenting to unseemly intercourse.

The warning of Justice Hale and the rationale pronounced by Judge Mapigano are yard stick to be aware of, in cases of this nature where the complainant is a matured woman and the alleged rapist likewise. The record in this appeal, indicates that the alleged rape involved 33 years old woman (PW1 or victim) and 28 years oid man.

In that type of rape, the prosecution had to prove the essential ingredients that, there was sexual intercourse (penetration), that the sexual intercourse was unconsented from the woman, and that the appellant is the one who penetrated the victim. In the cases of **Kirundila Bangilana v. R**, Criminal Appeal No. 313 of 2007 and **July Joseph v. R**, Criminal Appeal No. 226 of 2021 (both unreported) the Court held *inter alia* that:

> *"Since the victim of the alleged rape was an adult, **the prosecution had a duty to prove sexual intercourse, lack of consent and that the appellant was the perpetrator"** (Emphasis is ours*).

It is incumbent upon the prosecution to produce strong evidence on each and every allegation to establish the ingredients of rape as per the charge sheet. The burden of proof and standard of proof in criminal cases has been a serious concern in the criminal justice. It requires to be addressed seriously by courts, owing to the nature of the offence itself (rape), the evidence must be treated with due care because rape is commonly committed in closet. In most cases there may be no other witness apart from the victim and the perpetrator. Before the court, the trial magistrate or judge is tasked to choose which one between the two is telling the truth, especially on the offence related to sexual offences which is very easy to allege and is hard to prove and much harder for the accused to defend himself. This Court gave this caution in the case of **Tito Paulo Kuchungura v. R,** (Criminal Appeal No. 570 of 2020) [2023] TZCA 17992.

This is the basis why, despite the rule that the victim's evidence is the best as was held in the case of **Selemani Makumba vs. R** [2006] T.L.R. 379 yet, such evidence should not be taken as a biblical version to be believed wholesome, rather credibility of the victim must be tested and proved. The court must be satisfied that, what the victim testified in court is nothing but only the truth of what happened to her. In the case of **Mohamed Said vs. R,** (Criminal Appeal 145 of 2017) [2019] TZCA 252, this Court observed as follows:

> *"We think that it was never intended that the word of the victim of sexual offence should be*

taken as gospel truth but that her or his testimony should pass the test of truthfulness".

Having alluded to those guiding principles, the crux of the matter for determination is whether PW1 was a credible witness who would be believed on her testimony that the appellant raped her. This is what the appellant laments in ground 4. We are aware that this being a second appeal, interference with the concurrent findings of the courts below is restricted unless there is misapprehension of facts. In this ground we find imperative to depart from the rule by revisiting the evidence adduced during trial with a view to provide an informed answer to this important complaint of the appellant.

Perusing the trial court's proceedings, it is clear that PW1 adduced her evidence before the trial court on 29th June, 2011. The same had significant variation from her statement she recorded before the police station soon after the alleged incident (2nd March, 2011). We do not suggest that the testimony must have been perfectly similar and exact, but the variation is significant.

Before the court, PW1 exhibited that she had some conversation with the appellant prior to the alleged offence. That conversation sounded evil from the beginning. She states that, the appellant having requested her to offer him sex, she refused and the appellant grabbed her. In her further testimony she stated that in denying, she told the rapist that he would not have sex because she was in her menstrual cycle so it would not be done while she was in that state. PW2 a local leader who is said to have visited the crime scene, claimed to have seen blood on the grasses. This witness (PW2) says the blood belonged to the victim. However, no investigator ever visited the crime scene, let alone observing or dealing with the blood in any manner.

Equally the evidence of PW2 brought serious contradiction against the evidence of PW1, in the sense that, while PW1 testified that the event occurred from 12: 00 hours continuously to 17:00 hours, PW2 under oath at page 15, testified as we quote it hereto:

> *"On 2nd March, 2011 at noon time I was at the city council, I was phoned by someone Shimiu informing me of the rape incident. I took an excuse from the city Director to go to my area. I met this woman who was claiming to have been raped. She informed me the rapist is the Malimi. She her self got the name of rapist from Shimiu"*

Such piece of evidence imposes more questions than answers. For instance, one may think the two were testifying on two different events because, the victim alleged the rape occurred for four to five hours continuously from 12:00 hours to 17:00 hours, while PW2 testifies that he received the complaint on that event at noon and he met with the victim that noon time.

Second, the reporter of the event is said to be one Shimiu. The question is, who is that Shimiu, how could he report the incident of rape while the two were still in the act of sexual intercourse? We ask as to whether Shimiu was not a key witness on the prosecution side?

On evaluation of evidence of PW2, it seems the victim did not know the name of the rapist instead his name was disclosed to both PW1 and PW2 by Shimiu, contrary to the evidence of PW1 who testified that, the two (PW1 and appellant) knew each other prior to the event. That fact was supported by the appellant in his defence that the two knew each other since 2007.

In the circumstance, the only viable conclusion is that the evidence of PW2 did not corroborate the alleged offence of rape, rather contradicted it. We therefore, conclude that PW2 was not a credible witness and his testimony did not corroborate the incident of rape as testified by PW1.

Above all, the offence is said to have been committed on 2nd March, 2011, the victim's statement before the police was recorded on the same day at 22:10 hours just about four (4) hours after the alleged incident. We have preferred a relevant part of her statement to the police as recorded in exhibit DE1:

> *"Alipofika alikuwa ameshika panga mkononi akanambia wewe na rafiki yako mama...hamna hawala huku inaonekana waume zenu wamewazuia siyo? Sasa leo lazima utombwe. Akanikamata miguu akanikalisha chini ya uiinzi wake, baadae akanikaba shingoni na mimi nikamshika uchi wake akaniachia, wakati nakimbia akanikata ngwaia nikaanguka akanikaba akaanza kunipiga akaniziba mdomo na pua akanikaba sana ikafika wakati nikaishiwa nguvu akanibeba mpaka kichakani akanivua nguo akaanza kunilala pale kwa kuwa nilikuwa nimechoka sana hata nguvu za kujiokoa sikuwa nazo, Ukizingatia aiikuwa na panga alinifanya anavyotaka alinitomba mara nne tokea saa 12:30 hrs mpaka saa 16:40 akaniachia akaondoka nikanyanyuka kwenda kwa Mwenyekiti wa mtaa."*

The above statement was given soon after the commission of the offence. There is a presumption that what she stated to police would be from a fresh memory of what happened to her, more genuine and authentic, and that the offence of rape was committed at the same crime scene. When she was grabbed, she was taken to the thicket, then the victim stripped her naked, and raped her. That, the victim failed to raise an alarm because she was tired from strangulation and other physical assault by the appellant. That, the appellant had a machete so she was worried, no word is stated to have been pronounced by the appellant on whether he would use that panga against her. Further, she was raped by four rounds no anal sex is named. That, soon after finishing, the appellant left the place, the victim stood up and went straight to the local leaders, but the issue of menstrual cycle or discharge is not mentioned.

However, in her evidence during trial under oath, she testified that, the appellant removed her all the clothes before taking her to the thicket beside the container. He was armed with a machete and knife. Apart from raping her, the appellant attempted to sodomize her, but she begged him not to do that. After finishing the rape, the appellant asked her to go and pick the appellant's shirt and slippers left at the shore where the appellant undressed her. Her actual words at page 9 are quoted:

> *"I know Malimi he is the fisherman but we never do business together, he had his clients and I had mine. Later on, he told me to go and take*

> *his shirt, slippers which he left at the lake shore where I was seated and where he undressed me"*

The contents of those words sound as if there was no rape, rather there was consented sexual intercourse between the two matured persons who knew each other for years.

Equally important, is the timing between the incident of rape and reporting to the street leader and later to police then to hospital. The testimony of PW1 sounds as if there was no lapse of time between the event of rape and reporting the incident. At page 9, of the record, she testified:

> *"I left and reported to the village leaders, straight forward. They arrested him on the same date at 21:00 hours he admitted to the village leaders hence he was straight away taken at police station Igogo, I was given a police form 3".*

However, when PW4 examined her, he observed that she had no sperms because she had already taken bath. It is not clear at what time the victim did took bath, as she said from the scene, she went straight to PW2, then to the police and thereafter to the Hospital.

Another aspect is on where exactly did the appellant undress her, it is unknown because at one time she said it happened at the shore, the first place where she met the appellant, but in her statement before the police, she recorded that she was undressed at the container, where the appellant carried her from the shore to the container. Even the fact that she was asked to go and pick the appellant's belongings from where the appellant undressed her, raise serious questions. No clear reason is given for her failure to raise alarm, considering her statement that there was time the appellant did not have the machete and clearly testified that people were passing near the crime scene. At the same time, she alleged that she failed to raise alarm because she was weak upon the appellant's assaulting her physically.

Further, the victim's theory that the appellant strangled her neck, covered her mouth, yet he managed to undress her, while holding a machete and a knife at the same time he managed to rape her for the whole period of four or five hours consecutively, sound awkward. Even by assumption that her testimony in court was the true reflection of what transpired, yet the conversation she narrated to have occurred between her and the appellant was not stated at the police where she recorded her statement.

In police she recorded that when the appellant grabbed her, she responded by grabbing his manhood then the appellant released his grip. This fact was never testified during trial, otherwise, this would be one of the chances for her to flee or make an alarm for help from the passersby. In short, coherence of events adduced during trial is different from her statement she recorded at police.

The above analysis, brings serious doubt on credibility of the victim. Although she claims to have had no prior sexual relationship with the appellant, there is no clear reason why she entertained the conversation and make no attempt to raise alarm for help from the passersby. It is settled in our jurisdiction that coherence is among the test for credibility of a witness. In the case of **Shaban Daud vs. R,** Criminal Appeal No. 28 of 2000 (unreported), this Court held:

> *"The credibility of a witness can also be determined in two ways; **One**, when assessing the coherence of the testimony of that witness; **Two**, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused person"*

In this appeal, neither the testimonies of PW1 nor PW2 passed the test set out in the case cited above. Therefore, we find serious risk to believe such witnesses and rely on their evidence in convicting the appellant.

From the above analysis, the prosecution evidence had inconsistences and contradictions. Those contradictions and inconsistences, raise serious doubts on whether there was rape at all, the follow up question is whether there was no consent albeit what is testified by PW1 and PW2. Usually, the principle of law is well developed that when there are reasonable doubts, same should be resolved in favour of the accused. The rationale was sounded by Lord Justice **Benjamin Franklin** of England who wrote:

> *"It is better one hundred (100) guilty persons should escape than that one innocent person should suffer".*

The same principle was improved by a Jewish jurist ***Maimonides*** when he wrote *"It is better and more satisfactory to acquit a thousand (1000) guilty persons than to put a single innocent one to death".* The sacred principle behind those rules is that, protection of the innocent is much significant for mankind than punishing the guilty. The above do not justify to release a true rapist, rather confirms the principle that when there is reasonable doubt, the accused should benefit.

Considering the contradictions found in the evidence during the trial, we hold that the case against the appellant was not proved beyond reasonable doubt.

We therefore, proceed to quash the conviction and set aside the sentence awarded to the appellant, and order his immediate release from prison unless lawfully held.

DATED at **MWANZA** this 19th day of February, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2024 in the presence of the appellant in person and Mr. Deogratias Rumanyika, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL