IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 48 OF 2021

(Originating from Criminal Case No. 104 of 2020 of the District Court of Same at Same)

JUMA IDD YOHANA @ SITA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17/11/2021 & 31/12/2021

SIMFUKWE, J.

The appellant Juma Idd Yohana @ Sita was charged and convicted of the offence of rape contrary to **section 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap 16 R.E 2002** before the District Court of Same. He was sentenced to 30 years imprisonment.

It was alleged before the trial court that on 04th September,2020 in the morning at Ruvu Jiungeni area, the appellant herein did have carnal knowledge of one (Mwajuma d/ o Waziri Abdallah) without her consent.

The prosecution called 3 witnesses to prove the case against the appellant. PW1 the victim testified among other things that on the fateful day while walking on her way from Kwa Sita area where she had gone to

visit her son Hemed, she heard Juma (appellant herein) calling her from behind. The appellant asked the victim if he could escort her saying that the victim cannot walk alone in that shrub. The victim agreed because she knew him as the son of her brother-in-law. Thereafter, the appellant went in front of the victim and stopped her from moving. The victim asked what was wrong, the appellant replied that he wanted her vagina, the victim told him not to do that. All of the sudden, the appellant did grab the victim and choked her neck with his left hand and pushed the victim down. By using his right hand, the appellant opened his trouser and took out his penis. The victim tried to get out of him unsuccessfully. The appellant pulled her dress up, squeezed her pant, and entered his penis into her vagina.

PW1 (victim) continued to state that while the accused was still grabbing her neck, with a small voice, she asked the appellant to stop choking her so that she could give him the sex he wanted. The appellant relaxed a bit and PW1 used that chance to scream for help, the appellant became furious and told the victim that he would kill her and take her body into Ruvu river. PW1 urged the appellant not to kill her promising him for the second time that she would give him the best sex, the appellant relaxed again and the victim used that chance to scream for the second time. That, by that time the appellant was still having carnal knowledge of the victim. People heard her second scream including one Simon Samwel. Upon their arrival at the scene, they found the appellant still on top of the victim, they started beating him by using sticks and asked him to let her go. Those people pulled the appellant from the victim, tied his hands and called the militiaman by phone who went and took the appellant to Makanya Police Post via Jitengeni village office. A PF3 was issued to the

victim who went to Makanya Estate Dispensary where she was referred to Same Government Hospital for further medical examination. PW2 Simon Samwel 's testimony supported the testimony of the victim. PW3 a Clinical officer who attended the victim proved that the victim was found to have been carnally known not long ago.

In his defence before the trial court, the appellant denied to had committed the offence and alleged that all were fabricated against him by the victim because they had grudges at home over a piece of land which was left to him by his grandfather.

The trial court found the prosecution to have proved the charge of rape beyond reasonable doubts and convicted the appellant under **section 131 (1) of the Penal Code, Cap 16 R.E 2019.**

The appellant was aggrieved by both the conviction and sentence of the trial court, he preferred this appeal on five grounds:

1. *That, the learned trial Magistrate grossly erred in both law and fact in failing to note that, there was a variance between the charge sheet and evidence on record. As the charge sheet indicates that the said offence occurred at Ruvu Jiungeni village while the victim (PW1) in her evidence said that she is living at Ruvu Mferejini Village, Therefore, it cannot be said with certainty that Ruvu Jiungeni and Ruvu Mferejini are one and the same Village. Hence the said variance rendered the charge to be fatally and incurably defective.*
2. *That, the learned trial Magistrate grossly erred in both law and fact in convicting the Appellant basing on falsehood evidence given by PW1 and PW2 as it is incomprehensible for a person who is mentally*

fit as the Appellant herein, to forcefully continue having carnal knowledge to a woman beside the road despite the fact that people had already appeared at the alleged crime scene.

3. *That, the learned trial Magistrate grossly erred in both law and fact in failing to draw an adverse inference to the prosecution for failure to summon the very essential and key witnesses in the case at hand. i.e., the said chairman who is alleged that the Appellant was taken to his office after arrest, and the Police investigator who could have testified on what connection the Appellant was arrested and arraigned before the court.*
4. *That, the learned trial Magistrate grossly erred in both law and fact in convicting and sentencing the Appellant basing on weak, tenuous, inconsistency, contradictory, uncorroborated and wholly unreliable prosecution evidence from prosecution witnesses.*
5. *That, the learned trial Magistrate grossly erred in both law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt and to the required standard by the law against the Appellant.*

The appeal was ordered to be argued by way of written submissions. The Appellant was unrepresented, while Ms Lilian Kowero opposed the appeal for the Respondent Republic.

In his written submissions, the Appellant stated among other things that the learned trial Magistrate failed to note that evidence adduced by the victim of the alleged offence (PW1) did not support the charge preferred against the appellant. That, in the charge it has been indicated that the said ordeal occurred at Ruvu Jiungeni Village while PW1 testified that she was residing at Ruvu Mferejini Village. The Appellant supported his

argument with the case of **SIMON ABONYO V. REPUBLIC, Criminal Appeal No. 144 of 2005,** CAT at Mwanza (unreported) where it was held that:

> *"The importance of proving the offence as alleged in the charge hardly needs to be over emphasized. From the charge the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be abie to marshal his defence."*

The Appellant also stated that, the provision of law cited in the charge sheet was irrelevant. He quoted **section 130 (1) (2) (b) of the Penal Code** (supra) which provides that:

> *"With her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention."*

Elaborating the quoted provision, the Appellant submitted that nowhere PW1 indicated or stated to had consented to the act after being put in any situation described under the above cited paragraph of subsection (2). That, the charge sheet ought to have cited paragraph (a) of subsection (2) instead of paragraph (b). On this the Appellant cited the case of **ABDALLAH ALLY V. REPUBLIC, Criminal Appeal No. 253 of 2013,** in which the Court of Appeal of Tanzania held that:

> *".... the wrong and/ or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the Appellant unaware that he was facing severe charge of RAPE...."*

The Appellant commented that basing on the cited case the charge that the trial court relied upon to convict the Appellant remains incurably defective.

The Appellant submitted further that; the prosecution testimony was cooked as it is impossible for the person whose neck has been tightly choked to get an opportunity to make a conversation with her rapist. That, PW1 in her story told the trial court that she was tightly strangled her neck but in a small voice she begged the Appellant and she was relaxed whereby she used that chance to scream for help. That, the victim was choked for the second time but she again flattered the attacker and got another chance to scream for help. The Appellant contended that being a lay person and unrepresented, he failed to cross examine the witness to reveal the truth before the court.

Supporting the second ground of appeal, the Appellant submitted that PW1 and PW2 gave very highly improbable and inconceivable evidence which was supposed to be approached with great caution. That, the said witnesses stated that despite the people who responded to PW1's shouting, the Appellant never stopped raping PW1 and those people started beating him with their sticks but still the Appellant never stopped until when those people forcefully pulled him from PW1's body.

The Appellant also challenged evidence of PW1 and PW2 to the effect that their evidence was contradictory in respect of how the Appellant got into their hands. That, PW1 alleged that the people at the scene phoned militiamen who went and took the Appellant to the village office. On the other hand, PW2 alleged that after pulling the Appellant from PW1's chest, they took him to Mzee Benedict, then they headed to the village office

whereby while on the way they met two militiamen, then the Appellant was handed over to them.

On the third ground of appeal, the Appellant submitted that the prosecution failed to call essential and key witnesses, thus the militiamen, who could have testified about the Appellant's apprehension, the village chairman and the police investigator. He prayed an adverse inference to be drawn to the prosecution and resolve the aforementioned shortfalls in favour of the Appellant.

The Appellant prayed this appeal to be allowed, conviction be quashed and sentence be set aside.

In her reply to ground No.1, Ms Kowero the learned State Attorney submitted inter alia that the variation between Ruvu Mferejini where the victim resides and Ruvu Jiungeni where the appellant contends the incidence to have occurred alone does not suffice to render the charge sheet defective. That, PW1 testified that the appellant raped her when she was on her way from *Kwa Sita* area where she went to visit her son to her home at Ruvu Mferejini village. That, the victim did not specifically name the place where the incidence occurred. That, there is no variance as to the place of the incident in the charge and evidence adduced in court.

Concerning the fact that the Appellant was charged under **section 130 (2) (b) of the Penal Code, Cap 16 R.E 2002,** Ms Kowero submitted that as per evidence adduced in court, evidence reflected in the charge sheet and the cited section that the Appellant was charged with is correct.

Responding to other grounds on matters of evidence, that is ground No. 2, 3, 4 and 5 which are to the effect that evidence was weak, insufficient,

contradictory and that the same could not prove the case against the Appellant beyond reasonable doubt; Ms Kowero submitted that the settled principle is that the best evidence in sexual offence cases comes from the victim. She referred to the Court of Appeal case of **SELEMANI MAKUMBA V. R. [2006] TLR 379** to support her argument. That, by looking at PW1's testimony she stated clearly what transpired to her on 4/9/2020 and how evidence of PW2 and PW3 corroborated evidence of PW1.

Ms Kowero averred that minor contradictions that the Appellant raised in his submission do not go to the root of the prosecution case, hence should not be given any weight by this honourable court. She said, in any trial minor contradictions and inconsistences are bound to happen, the court should only look at the contradictions that go to the root of the case as it was held in the case of **MARAMO SLAA HOFU AND THREE OTHERS VS. REPUBLIC, CRIMINAL APPEALS NO. 246 OF 2008,** that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

Regarding prosecution witnesses who were not called, Ms Kowero submitted that the law requires no specific number of witnesses to be called in order for the prosecution to prove their case. That, the testimonies of PW1, PW2 and PW3 were enough to prove the case against the Appellant beyond reasonable doubts. That, the Appellant was caught red handed by PW2 when he was raping PW1. PW2 had to pull out the Appellant from PW1. Ms Kowero insisted that evidence of PW1 was credible and reliable not only because it was corroborated by other

witnesses, but also because there was coherence in her testimony in court. There was no reason to make the court believe that she fabricated the case against the Appellant. Ms Kowero stated further that, the Appellant contended in his defence that the case had been fabricated against him due to family grudges but when PW1 testified, the Appellant did not cross examine the witness on that. She was of the view that the same was an afterthought and therefore it should not be given weight.

Ms Kowero prayed that this appeal should be dismissed for lack of merit.

In rejoinder, the appellant reiterated what has submitted in submission in chief. However, on the 1st ground he added that the charge sheet alleged the offence to have occurred at Ruvu Jiungeni, PW1 stated the place is Ruvu Mferejini and further she narrated that the incident occurred on her way home from *Kwa Sita* area. The appellant stated that it is not certain as to which place the incident occurred between these three places. He also argued that the rape incidence is unacceptable, painful, shameful and unforgettable to one who experienced it and so it was not convincing for the adult person like the victim to have failed to name the exact place where the said ordeal occurred. The appellant was of the view that the case against him is framed up. The appellant also kept on insisting that there was wrong citation of the provisions of the laws in the charge sheet.

It was further stated that PW1's evidence was incredible and unreliable for the reason that it was impossible for a person whose neck had been tightly chocked and strangled to get opportunity to make conversation. He insisted that it was not possible for a mentally fit person to continue forcefully having carnal knowledge with someone besides the road despite people having responded at the alleged scene of crime. He faulted the

respondent for failure to reply on the matter. He was of the view that, the respondent conceded with his arguments.

I have given due consideration to the submissions made by the appellant, the response advanced by the learned State Attorney for the respondent and the rejoinder thereto. Having examined the trial court's record, the issue for determination is one, ***Whether the prosecution case was proved beyond reasonable doubts as required by the law.*** In the due cause of answering this issue, I will tackle all the grounds of appeal as raised in the memorandum of appeal and submitted by the parties.

It is a trite law that, the prosecution must prove its case beyond reasonable doubts and the accused is required to cast doubts in prosecution's case. See the case of **Pascal Yoya @ Maganda vs Republic, Criminal Appeal No.248 of 2017.**

In the first ground of appeal, the appellant claimed that there is variance between the charge sheet and the evidence on record in respect of the place where the offence is alleged to have occurred. Ms. Kowero replied that there is no such variance since Ruvu Mferejini is the place where the victim resides and Ruvu Jiungeni is where the appellant contends the incidence to have occurred.

I have resorted to the proceedings to ascertain whether the appellant's claim hold water. As per the charge sheet, the offence occurred at Ruvu Jiungeni. At page 7 of the typed proceedings, the victim stated that she lives at Ruvu Mferejini and that on that particular date, she was on her way home from *Kwa Sita* then the incident occurred. At page 8 last paragraph it was testified that the accused was taken to Jitengeni village office after being arrested. This suggests that the incident occurred at

Jiungeni. Even if we assume as a matter of argument that there is variance, still the same does not exist since in PW1's evidence she just stated that the incident occurred on the way home. Basing on this argument, I am of considered view that there was no material and effectual variance between the charge and the evidence as complained by the appellant to render the charge defective. Thus, the first ground of appeal lacks merit.

Concerning the 2nd ground of appeal, the appellant condemned the trial magistrate for convicting him basing on falsehood evidence of PW1 and PW2. He tried to raise the logic argument that it was impossible for a person who is fit mentally to continue having carnal knowledge with a woman despite appearance of the people at the scene of crime. The learned State Attorney on her side argued this point jointly with the 3rd,4th and 5th ground of appeal that the best evidence comes from the victim and so the victim's evidence stated clearly that she was raped by appellant and her testimony was corroborated by PW2 and PW3.

As rightly submitted by learned State Attorney, the best evidence in sexual offences comes from the victim and in this case the victim is PW1. In the case of **Salehe Ramadhani Othman @ Salehe Bejja vs the Republic, Criminal Appeal No. 532 of 2019** the Court of Appeal at Dar es Salaam at page 24 stated that:

> *"In the circumstances, we wish to restate the well-established principle by this court that the best evidence in sexual offences, like the one at hand, comes from the victim as is the one to express the sufferings during the incident."*

The victim's testimony must pass the test of truthfulness for the same to be believed. This was also stated in the case of **Mohamed Said vs Republic, Criminal Appeal No. 145 of 2017(unreported)** in which the Court of Appeal stated that:

> *"It was never intended that the word o f the victim of sexual offence should be taken as a gospel truth but that her or his testimony should pass the test of truthfulness."*

Having established the principles of law, I took time to go through the judgment of the trial court, at page 7 of the typed judgment it was stated that:

> *"...with what was testified by PW2 on that material date is when he came to know the accused with testimony no one can think that PW2 was fabricating stories against the accused as he never knew him before that date so no reason of lying against her and this court does not see why it should not believe him (PW2).*
>
> *In the case of **GOODLUCK KYANDO Vs. R. Crm. Appeal no. 118/2003** (unreported) it was held; "It is a trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good cogent reasons for not believing a witness..."*
>
> *Putting aside the case of KYANDO still in the case of **SELEMANI MAKUMBA v. R (2006) T.L.R 379**, insisted that true evidence of rape comes from the victim..."*

Basing on the above trial court's findings, the appellant was convicted basing on victim's evidence which was corroborated with PW2 and PW3 evidence. However, though the evidence was corroborated the trial magistrate gave reasons accompanied with authorities for relying on the victim's evidence and PW2's evidence. These reasons are enough to hold the 2nd ground of appeal in a negative.

Under the 3rd ground of appeal, the appellant blamed the prosecution for failure to bring the chairman and the police Investigator as witnesses. The prosecution through Ms. Kowero responded that no specific number of witnesses is required for the prosecution to prove their case. Thus, evidence of PW1, PW2 and PW3 was enough to prove the offence charged.

I am aware with the established principle that failure to call material witness draw adverse inference on prosecution case. However, in this case as rightly submitted by Ms. Kowero, no number of witnesses was required to prove the case. This is also provided for under **section 143 of Tanzania Evidence Act, Cap 6 R.E 2019**. The prosecution was bound to call witnesses whom they wished to prove their case. What was required is to prove the case beyond reasonable doubts. In the case of **Halfan Nduhashe vs Republic, Criminal appeal No. 493 of 2017**, the Court of Appeal at Tabora stated that:

> *"It should also be reminded that what matters is not the number of witnesses but the quality and relevancy of the evidence the witnesses give"*

As I have stated under the 2nd ground of appeal, the case has been proved basing on the victim's evidence which was corroborated by the evidence of PW2 and PW3.

The appellant also complained that the charge was defective for the reason that there was wrong citation of the provision of the law; instead of **Section 130(1) (2) (a) of the Penal Code** he was charged under section **130(1) (2) (b).** The learned State Attorney disputed the fact by arguing that considering the circumstances of the case, then the proper section was section **130 (1) (2) (b).**

For ease reference I hereby quote paragraph (a) and (b) of section 130 (2). It reads:

> *(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:*
>
> (a) *not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;*
>
> (b) *with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;*

As rightly submitted by the learned State Attorney, the circumstances and kind of rape falls squarely under paragraph (b) since there was the use of

force considering the fact that the victim testified to have promised the appellant to give him the sex so that she could get the chance to shout for help.

The appellant also raised another doubt on prosecution evidence to the effect that there was contradiction on PW1 and PW2 evidence in respect of how the appellant got into the legal hands. Ms. Kowero was of the view that the contradiction does not go to the root of the case.

There is an established principle that the contradiction which does not touch the root of the case is minor contradiction. In the case of **Abiola Mohamed @Simba vs Republic, Criminal Appeal No.291 of 2017** (CAT) at Arusha it was stated that:

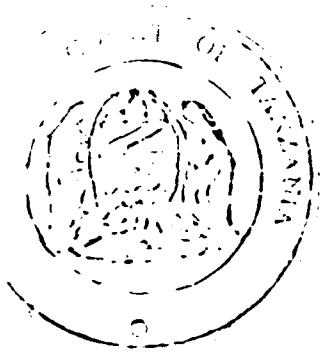
> *"...Two, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

Having this authority in mind, as far as the noted discrepancy is concerned, I am of considered view that the noted discrepancy does not touch the root of the case since the same does not negate the fact that the appellant raped the victim and the discrepancy does not fall within the gist of the evidence.

On the 5th ground of appeal the appellant condemned the trial magistrate for convicting him despite the fact that the charge against him was not proved beyond reasonable doubt. This ground will not detain my energy since the same has been dealt with in other grounds of appeal.

From the foregoing analysis, I am satisfied that the prosecution case was proved beyond reasonable doubts. I find the appeal to have no merit and I dismiss it entirely.

Dated and signed at Moshi this 31st day of December,2021.



S. H. SIMFUKWE

JUDGE

31/12/2021