IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 3 OF 2022

(Originated from the Criminal Case No. 11 of 2019 before the Resident Magistrate Court of Katavi at Mpanda)

MASHAKA AMOS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

20th February, 2024 & 29th February, 2024

Mrisha, J.

In the Resident Magistrate Court of Katavi at Mpanda henceforth the trial court, **Mashaka Amos** who is currently the appellant in this case, stood charged with an offence of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002 [Now R.E 2022], the Act of Parliament hereinafter referred to as the Penal Code.

The allegations against him were that between 31st January, 2019 and 3rd February, 2019 at Lugones Village, within Tanganyika District in Katavi Region, he had sexual intercourse with one L.E.D (PW1), a girl of

17 years of age. Upon being informed of the charge against him, the appellant pleaded not guilty and after all the preliminary stages of handling a criminal case in the subordinate court were completed with the appellant maintaining his previous denial in respect of the charged offence, the matter went to a full trial.

In a bid to discharge their duty of proving that criminal case against the appellant on the standard required by the criminal law, the prosecution side marshalled seven (7) witness and successfully tendered five (5) exhibits including the clinic card of PW1 proving her age of seventeen years old, a PF3 which was intended to prove before the trial court that PW1 who was the victim of the abovementioned sexual offence had actually been raped and a cautioned statement alleged to have been made voluntarily by the appellant.

The rest of the prosecution witnesses included Selina d/o Lucas (PW2), the victim's mother, Nestory s/o Dioneze (PW3), a villager of who testified to have joined the Village Chairman and the Village Militiamen to the appellant's house on 03.02.2019 and found PW1 and the appellant being under the same roof hence arrested and matched them to Mwese Police Post.

The fourth and fifth prosecution witnesses namely Elibariki s/o Angofori and Peter s/o Nobert, a Village Chairman of Lugonesi village who

testified as PW4 and PW5 respectively, sang the same song as that of PW3. Others were No. G. 743 D/C Sabino (PW6) who testified to have recorded a cautioned statement of the appellant after informing all his rights as per the law and Shela d/o Kwikima, a Medical Officer who testified as PW7 and informed the trial court that after examining PW1, she did not see bruises or any discharge, though she observed that the hymen of PW1's private part had already been perforated.

The trial court records, especially at page 27 reveals that PW7 attended the said victim of sexual offence after a lapse of 72 hours since the commission of the alleged criminal offence and her examination results depicted there was no indication that PW1 had sexual intercourse. However, during examination by the trial court, PW7 narrated that the evidence showed that the victim had sexual intercourse with a man that is why her hymen raptured.

Apart from the above oral testimony, PW7 also implored the trial magistrate to admit the PF3 of PW1 as an exhibit, a prayer which was granted and the same marked as Exhibit P3 due to want of objection from the appellant.

Her evidence was followed by that of Yohana s/o Juma Manyanda (PW8) who testified before the trial court that PW1 was a Form III student at Mwese Secondary School where he was working as the Head Master of

that school. He also produced before that court a certified true copy of the Admission Register bearing the name of the said victim and prayed to tender it as an exhibit. Since the appellant raised no objected against such prayer, the trial court admitted that document as Exhibit P4.

On his side, the appellant strongly denied the allegations that he raped PW1 as according to him the evidence adduced by the prosecution witnesses was not true and contradictory. He also urged the trial court to take consider the evidence of PW7 and find that PW1 had not been raped since the evidence of that medical expert reveals that PW1 had no any bruises, sperms, discharge, or pregnancy; hence there was no proof of rape.

Based on the above evidence, the trial court convicted and sentenced the appellant to thirty (30) years imprisonment after being satisfied that the prosecution had managed to discharge their duty of proving the offence of rape the appellant was charged with without leaving any reasonable doubts. As that did not please him, the appellant has decided to challenge the decision of the trial court by filing with the court a Petition of Appeal which contain the following grounds of appeal: -

1. That, the trial court erred in law points and facts when it convicted and sentence the appellant on the offence which (sic) were not proved beyond all reasonable doubt.

2. That, the trial court failed to properly evaluate the evidence adduced by the (sic) prosecution evidence while mis observed that the matter was alleged to be (sic) happen on 31.01.2019, but the victim was examined on 03.02.2019 (sic) the something which bring doubt.

3. That, the trial court grossly erred in both facts and law by believing the exhibit P3 (PF3) which (sic) tendered before the court without taking into consideration that the said PF3 (sic) were admitted (sic) illegal since the victim were examined on 03.02.2019 but the said PF3 (sic) were filled on 04.02.2019 hence caused a contradiction.

4. That, (sic) the trial magistrate Court misdirected himself by not considering the evidence of PW7 (Doctor) who testified before the court that she saw no bruise or any discharge.

5. That, the (sic) diffence evidence adduced by the appellant (sic) were not considered and indeed drawn a nully conviction for the appellant.

When the matter was called on for hearing the appellant stood alone, unrepresented whereas the respondent Republic enjoyed the legal service of Ms. Atupele Makoga, learned State Attorney.

As the rule of thumb normally requires, it was the appellant who initiated the hearing of the present appeal by making his submission in chief before the court. He briefly submitted that the Petition of Appeal he had filed with the court contain the grounds of appeal which are self-explanatory. Hence, it was his prayer that the same be adopted to form part of his submission in chief, his appeal be allowed and the court be pleased to set him free.

On her side, Ms. Atupele Makoga submitted that the prosecution side do opposes the appeal and supports both the conviction and sentence meted out to the appellant. Submitting in respect of the first ground of appeal, she contended that the evidence of PW2 who is the mother of the victim of sexual offence, proved that PW1 was 17 years old at the time the alleged offence was committed. Therefore, it was her submission that whether the said victim had consented to have sexual intercourse with the appellant, that was irrelevant because under the law once it is proved that a woman of tender age has sexual intercourse with or without consent, the offence of rape is said to be committed.

The learned counsel also submitted that in her testimony, as it is shown at page 2 of the trial court typed judgment, PW1 narrated that the appellant seduced and persuaded her to stop attending school on

promise to marry her. That the appellant also dragged her to the house of one Mzee Mbwaga where he began to undress and rape her.

According to him, the evidence of PW1 proved that she was penetrated and her evidence was corroborated by the one adduced by PW1, a medical officer whose evidence, as shown at page 27 of the trial court typed proceedings, reveals that after examining PW1, she discovered that PW1 had no hymen.

To buttress her argument, the respondent counsel cited the case of **Shani Chamwela Suleiman vs Republic**, Criminal Appeal 481 of 2021(CAT at Dar es Salaam, unreported) and the case of **Suleiman Makumba vs Republic** [1999] TLR 94. Having done so, she argued that PW1's testimony show that she narrated what had happened to her during the incident of rape, hence her evidence proved the ingredients of rape. She concluded by submitting that the first ground of appeal is without merit because the prosecution side proved the ingredients of rape which are consent and penetration.

Turning to the second ground of appeal, Ms. Atupele Makoga submitted that the same also lacks merit because the trial court made a proper evaluation of the evidence adduced by both parties. He also submitted that the trial court records reveal that the offence of rape was committed on 31.01.2019, the victim of that offence was found with the

appellant on 03.02.2019 and on the same date she was medically examined by PW7.

Also, the fact that PW1 was found with the appellant on the latter date was proved by the evidence of PW2, as it is shown at page 13 of the trial court typed proceedings which evidence was also corroborated by the evidence of PW3, as it is shown at page 14 of the trial court typed proceedings. The learned counsel also submitted that the evidence of PW2 who is a mother of PW1, reveals that she is the one who conveyed PW1 to PW7 for medical examination. Thus, based on the above submission, she urged the court to dismiss the second ground of appeal for want of merit.

Regarding the third ground of appeal, the respondent counsel submitted that she does not see any merit on it due to the fact that the evidence of PW7 shows that after examining PW1, she recorded the results on the hospital file of PW1 and proceeded to transfer them on the PW1 submitted to her on 04.02.2019. Hence, she prayed to the court to find that the third ground of appeal has no merit and proceed to dismiss it.

As for the fourth ground of appeal, it was her argument that the absence of sperms and bruises on the private part is not a proof that the victim of sexual offence who is PW1, was not raped because even slight penetration amounts to rape, as it is provided under section 134 (4) of

the Penal Code. Finally, the learned counsel submitted that the fourth ground of appeal lacks merit; hence, she prayed that the same be dismissed forthwith.

Not only that, but also her submission in respect of the fifth ground of appeal was to the effect that the same is without merit because at page 9 of the trial court typed judgment, it is shown clearly that honourable trial magistrate, as he then was, considered the appellant's evidence and found that the same failed to raise any reasonable doubt on the prosecution evidence. On that note, the respondent counsel humbly prayed that the said ground of appeal be dismissed on the same reason that it lacks merit.

In his rejoinder, the appellant submitted that his grounds of appeal have merit; hence, it was his prayer that the court consider them accordingly. He went on submitting that the evidence of PW7 who is a medical officer reveals that she examined PW1 and found no hymen on her private part and went on to testify that the PF3 was brought to her on the following day after she had examined PW1 because by the time she attended PW1, the same was not handled over to her.

Apart from that, it was his submission that the evidence of PW1 contradicts with that of PW7 because in her testimony PW1 told the trial court that she arrived at the hospital 0830 hours with a PF3 and was

treated while PW7 testified that she started examining the said victim on 1300 hours and that PW1 and her mother who is PW2 approached her without a PF3.

Another contradiction pinpointed by the appellant was that whilst the respondent counsel submitted that the incident of rape happened in the house of Mzee Mbwaga, the evidence of PW1 show that the incident happened at 1600 hours at Lugonesi, Mwese centre and that no one saw them. He added that the said Mzee Mbwaga was called to testify before the trial court and confirmed that the appellant was living at his house, but he never appeared before the trial court. Based on those submissions, the appellant prayed to the court to allow his appeal and set him free so that he can join his family.

I have closely passed through the trial court records, the impugned typed judgment and the grounds of appeal which the appellant has implored me to consider and allow his appeal. I wish to say that I have considered all the five grounds of appeal as they appeal in the Petition of Appeal. The only question which will guide me in determining this appeal is whether the present appeal is meritorious.

As I have pointed above, the Petition of Appeal filed by the appeal is featured with five grounds of grievance. Hence, I have to put my hand

on each of them to see whether they support what the appellant has implored me to do.

In the first ground, the appellant has complained that the trial court convicted and sentenced on the offence which was not proved beyond reasonable doubts, an argument which the learned counsel for the respondent Republic has disputed.

The trial court records depicts that the appellant herein was arraigned before the trial court with one count of Rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. In order to be in a safe side, I find it apt to reproduce the provisions of section 130 (1) (2) (e) of the Penal Code, as hereunder:

"130. -(1) It is an offence for a male person to rape a girl or a woman.

(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),,,N/A

(b),,,N/A

(c) ,,,N/A

(d) ,,,N/A

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man"

As per the above provisions of the law, it is apparent that for the offence of rape to be proved, two elements must exist; first, that the accused person must have sexual intercourse with a girl or a woman with or without her consent; secondly, the said act of sexual intercourse must have been done by the accused person when that girl or woman is under eighteen years of age.

Therefore, the duty of the prosecution in the case before the trial court was to prove those two elements on the standard required by the law, something which the counsel for the respondent has submitted that was done by the prosecution side and I need not to make a repetition of what the said counsel has submitted; suffice it for me to say that I agree with her that the above two elements were proved by the prosecution side beyond any reasonable doubts.

I say so because, the fact that PW1 who is a victim of sexual offence, was under the age of eighteen years at the time the offence of rape was committed by the appellant, does not appear to be disputed by the

appellant. It is on record that both PW1 and PW2 told the trial court that PW1 was 17 years old at the time the alleged sexual offence was committed; that is shown at pages 11 and 12 of the trial court typed proceedings and the appellant did not dispute the admission of a clinic card which was tendered by PW2 and admitted by the trial court as Exhibit P1. If that is not enough, I have also observed that even the appellant did not question the issue of PW1's during defence hearing.

In the circumstances, I am in line with the submission of the counsel for the respondent Republic that the second ingredient of rape which is age of the victim, as far as the nature of an offence the appellant was charged with before the trial court is concerned, was sufficiently proved by the prosecution side on the required standard.

Coming to the first ingredient which is the act of having sexual intercourse with a girl or a woman with or without her consent, I wish to point out that whether the victim of sexual offence consented the act of sexual offence or not, it is immaterial where it is proved that when such act was done by the accused person, the girl or woman whom he had sexual intercourse with, was under the age of eighteen years old.

Logically, a girl or a woman who is under the age of majority which is eighteen (18) years old, is under the eyes of the law taken to be a child and because of that it is not expected that she will be able to make

rational judgement or decision because at that age it expected that that person will not be able to choose between the good and bad things, that is why the law has created an offence of rape under section 130 (1) (2) (e) of the Penal Code presumably in order to deter those men who intends to seduce and have sexual intercourse with girls or women whose ages are below eighteen years old.

Back to our case, it is on record that the evidence of PW1 shows that it incriminates the appellant as man who seduced her and persuaded her to have sexual intercourse with him on promise to marry her. She has also pointed finger towards the appellant as the man who forced to have sexual intercourse with her after arriving to the camp the appellant was living by telling her the following words, as it shown at page 11 of the trial court typed proceedings: -

> *"Unadhani nimekuleta hapa kwa nini? Vua nguo, vinginevyo nitakuchoma kisu" ("What do you think I have brought here for? Put off your clothes, otherwise I will stable you by knife")*

The above excerpt not only depicts that before having a sexual intercourse with PW1(the victim of sexual offence) the appellant forced her to put off her clothes, but also it shows that he threatened to assault her with a knife should she refuse to comply with his command. That indicates that, the appellant had formulated a guilty mind of having a

sexual intercourse with the said victim something which is prohibited by the law, as cited above.

Also, during examination, PW1 responded to the appellant's question by saying that,

> *"I did not report to any person because you threatened me"*

I am persuaded by that answer from PW1 because given the fact that she was a child and had been threatened by the appellant, PW1 could hardly be able to report the matter to other persons. I have gone through the evidence of PW3 and PW4 as they appear at pages 14 to 15 of the trial court typed proceedings and noticed that the same corroborates the evidence of PW1 due to the fact that on 03.02.2019 during night, they found the appellant with PW1 under the same roof while she was not his wife.

That indicates that indeed the appellant had sexual intercourse with PW1 because under normal circumstances, he could not just stay with her under such suspicious circumstance without having sexual intercourse with her.

Another incriminating evidence is that of PW6 who tendered the appellant's cautioned statement. The same reveals how the appellant committed the offence of rape. This is fortified by part of that statement

where the appellant was recorded to have said when they were sleeping, PW1 put off her clothes by her free consent and went on putting of his clothes, then they had sexual intercourse with the consent of that girl, *("..... Usiku tukiwa tumelala na huyo binti, alivua nguo kwa hiari yake na mimi akawa amenivua suruali ndipo tukafanya mapenzi akiwa ana hiari mwenyewe.....")*

Hence, I give credence on the evidence of those prosecution witnesses as I conclude by finding that based on the foregoing reasons, it is my finding that the first ground of appeal has not merit; the same is bound to be dismissed, as I hereby do.

Coming to the second ground, the appellant has faulted the trial court for its failure to evaluate the prosecution evidence while mis observing that the alleged sexual offence was committed on 31.01.2019 while the victim was examined on 03.02.2019.

In her response to that complaint, the respondent counsel has argued that the trial court properly evaluated the prosecution evidence because the typed records show that the victim of sexual offence was found with the appellant on 03.02.2019 and it is on that day when she was taken to the hospital by PW2 for medical examination, as it is shown at page 13 and 14 of the trial court records.

On my part, I do not find any merit on that ground because since it is undisputed that the said victim of sexual offence disappeared at her parents' home on 31.01.2019 and came to be found with the appellant on 03.02.2019, it is likely that she began to have sexual intercourse with the appellant on the former date; so, it is illogical to argue that the trial court mis observed that the offence was committed on 31.01.2019 while the victim of sexual offence was examined on 03.02.2019. The said victim of sexual offence could not be examined on former date because by that time her whereabouts were unknown. Thus, owing to the above reasons, I find that the second ground of appeal has no legs to stand and I dismiss it as prayed by the respondent counsel.

The above takes me to the third ground of appeal in which the appellant has faulted the trial court for believing exhibit P3 (PF3) by admitting it without taking into consideration that the alleged victim of sexual offence was examined on 03.02.2019 while the said document was filled on 04.02.2019.

In dealing with that ground, the respondent counsel has submitted that it is true that PW7 did not fill that document on the same date she attended PW1, but she clarified that on 03.02.2019 PW1 was brought to her without the said PF3; so, she had to transfer the details of her examination on the FF3 on the following day which was 04.02.2019.

Therefore, according to the said counsel, that ground of appeal has no merit and it is her prayer that the same be dismissed.

Before I give my position regarding the above rival arguments, I wish to say that I have passed through the records of the trial court and observed that the evidence of PW1 does not conflict with the evidence of PW7 as the appellant has trial to argue.

This is because what PW7 told the trial court is that when she attended PW1, the said PF3 was handled over to her; the same was handled to her on the following day which was 04.02.2019 that is why she decided to transfer the details of her medical examination from the hospital file regarding PW1. Also, the rest of the prosecution witnesses, including PW1 and PW2 did not tell the trial court that they handled over the said PF3 to PW7 on the 03.02.2019. In the circumstances, it is my settled view that the third ground of appeal by the appellant has no merit; it crumbles as well.

On the fourth ground of appeal, the appellant has complained that the trial magistrate misdirected himself by not considering the evidence of PW7 who testified before the trial court that she saw no bruise or any discharge. The counsel for the respondent Republic has backfired that argument by arguing that absence of sperms or discharge on the

victim's private part is not a proof that the victim was not raped because even slight penetration will amount to rape.

Having gone through the rival submissions and the records of the trial court, I am inclined to go along with the counsel for the respondent Republic who has argued that the absence of sperms and hymen on the victim's private part is not necessarily a proof that PW1 was not raped. I am of that settled view on the reason that the appellant's conviction did not base solely on the medical examination report tendered by PW7 and admitted by the trial court as Exhibit P3, but the learned trial magistrate considered other incriminating prosecution evidence including the one adduced by PW1 who is a victim of that sexual offence. That court's position is fortified by the reasoning of the learned trial magistrate, as it can be reflected at page 7 of the trial court typed judgment where he wrote that,

> *"In this case the evidence of the victim (PW1) is very strong to the effect that, the accused person seduced her, then pulled her to his house via shrubs path, then promised to marry her, and therefore ended having sexual intercourse with PW1 three times, and both were found together on 3/2/2019 during night hours, arrested, and matched to police."*

The above excerpted piece of evidence by PW1 does not require any much energy to find that the evidence of that victim of sexual offence is very strong and it implicated the appellant to the greatest extent as the man who had sexual intercourse with her. Hence, with the foregoing reasons, I am unable to find any merit on the fourth ground raised by the appellant. The same is therefore, dismissed.

The last complaint is contained in the fifth ground in which the appellant has complained that his evidence was not considered by the trial magistrate which according to him, led to an illegal conviction. In responding to that ground, the respondent counsel has contended that the trial magistrate properly considered and evaluated the appellant's evidence before entering conviction against him, as it is shown at page 9 of the trial court typed judgment.

On my part, I entirely agree with the above counsel's proposition. This is because it is apparent that the trial magistrate did exactly as the learned counsel has submitted. This is can be seen at page 9 of the trial court typed judgment where the learned trial magistrate wrote as follows: -

"The accused defence that the prosecution evidence is not reliable has not at all shaked the prosecution evidence. The accused person knew that PW1 was student, but seduced her and ended having sexual intercourse with her after he promised to marry her.

The prosecution has clearly shown how the accused was arrested during night hours, and he dared to keep PW1 who is a child, and had sexual intercourse with her as per strong evidence by the prosecution side. Indeed, I am (sic) the strong view, in this case, the accused person has totally failed to raise a reasonable doubt as to his guilt."

From the above excerpt, it is apparent that the learned trial magistrate properly considered the appellant's defence. Hence, I find the appellant's complaint to be baseless and unmerited.

As I am about to windup my deliberation in respect of the instant appeal, wish to point out that I have also gone through the complaints raised by the appellant in his rejoinder submission. First, he has complained that there is contradiction on the evidence of PW1 and PW7. He is of the view that in her testimony, PW1 told the trial court that she arrived at the hospital at 0830 hours with a PF3 and he was treated while PW7 testified that she began to examine the victim at 1300 hours.

My careful perusal on the trial court typed proceedings depicts that none of the above prosecution witnesses mentioned the time in which PW1 was attended and treated by PW7; it is only the contents of Exhibit P3 which reveal that upon completion of her medical examination, PW7 wrote in that document that she filled it at 1300 hours. Hence, up to

that note, I am of the considered opinion that the appellant's complaint that there was contradiction on the evidence of those witnesses is nothing, but false.

Secondly, it is complaint that whilst the respondent counsel submitted that the charged offence was committed at the house of Mzee Mbwaga, the evidence adduced by the victim (PW1) shows that the said offence was committed at the centre of Mwese Lugonesi Village and no one saw them.

Again, I am unable to find any merit on that complaint due to the fact that it is the evidence of the victim of sexual offence which is the best one. Since much has been said by the victim of sexual offence in the present appeal on how the appellant committed such offence, I do see any merit on the appellant's complaint because the evidence of PW1 which was relied by the trial court, shows that the offence of rape was committed by the appellant at Lugonesi Village within Tanganyika District particularly in the house of the so called Mzee Mbwaga and the charge sheet reveals that it within that village where the offence of rape was committed. Hence, there is no contradiction on that respect.

The above being said and done; it is my settled view that the present appeal is not meritorious and it is bound to be dismissed on its entirety, as I hereby do.

It is so ordered.

A.A. MRISHA
JUDGE
29.02.2024

DATED at **SUMBAWANGA** this 29th day of February, 2024.

A.A. MRISHA
JUDGE
29.02.2024