IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL No. 85 OF 2020

(Arising from the Resident Magistrates' Court of Bukoba at Bukoba in Criminal Case No. 225 of 2019)

ALEX RWEBUGIZA ---------- APPEALLANT

Versus

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

29.06.2021 & 05.07.2021
Mtulya, J.:

Mr. Alex Rwebugisa (the Appellant) was arrested and prosecuted at the **Resident Magistrates' Court of Bukoba at Bukoba** (the court) in **Criminal Case No. 225 of 2019** (the case) for rape contrary to section 130 (1) (2) (e) and 131 (1) of the **Penal Code** [Cap. 16 R.E 2019] (the Code). After a full trial, the court found the Appellant guilty of the charged offence and sentenced him to thirty (30) years imprisonment.

The reasoning of the court in arriving the decision is found at page 6 of the decision in the following text:

General denial that this is a fabricated case against the accused because he and PW1 had conflict before as

PW1 took plants from the accused and did not pay him...I believe the evidence of the victim and she has managed to prove that the accused had sex with her and I have believed the evidence of PW1 and she has proved the age of the victim.

Both decision and reasoning of the court dissatisfied the Appellant hence preferred legal services of learned counsel Mr. Anesius Stewart to file this appeal in protest of the findings of the court. Mr. Stewart decided to draft three (3) grounds of appeal, but generally all relate to *onus* and standard of proof in criminal cases.

When the appeal was scheduled for hearing on 29th June 2021, the Appellant invited two learned counsels, the drafter of the appeal assisted with Mr. Ibrahim Muswadick to argue the appeal for him whereas the Republic marshalled learned State Attorney Mr. Joseph Mwakasege. After lengthy submissions of the learned minds for the Appellant, it came to the light that the Appellant is complaining on two issues, *viz*; first, a fabricated case against him by Happiness Mbaganyika (PW1) who had conflict with him; and second the case was not proved beyond reasonable doubt as it had several faults.

To substantiate their grounds of appeal, the dual learned counsels submitted that all evidences registered in the case were

family molded issue to end the complaints of the Appellant against PW1 on a claim of money from the sold plants. According to their opinion, the case was initiated, investigated and prosecuted by family members save for the doctor, who also registered contradictory evidences in the court. To Mr. Stewart, the proceedings before the court did not establish link between the Appellant and victim despite allegations of cell-phone communications, which were not brought before the court for examination and determination.

With evidences registered by PW1, medical doctor, Amos Chacha (PW2), Victim (PW3) and Buberwa Clavery (PW4), Mr. Stewart submitted that: PW1 is the mother of the victim, who was in conflict with the Appellant; PW3 was the victim who was set to fabricate the facts; PW4 is a brother to PW1 and uncle to the victim; and PW2 registered contradictory evidences and has registered PF.3 (P.2) which did not show penetration but absence of hymen. With the complaints on family matters, Mr. Stewart submitted that the offence of rape invites a long custodial sentence and is unsafe to leave it to the family members without involving investigation machinery of this State.

To the opinions of the learned minds, since the case against the Appellant started, it was investigated by family members and avoided

both the police and village/local leaders and if they were involved, they were not invited to testify in court which brings a lot of doubts in criminal cases where facts are to be proved beyond reasonable doubts. To bring more doubt in prosecution case, the learned minds cited page 9 to 10 of the proceedings where PW1 is displayed to have already pointing fingers to the Appellant and is silent when she reported the matter to the police authorities and whether there were any investigation conducted at the scene of the crime.

With the evidence of medical doctor and registration of P.2 in the court, Mr. Stewart submitted that it is not known which dispensary the doctor conducted his examination. In justifying his point, Mr. Stewart cited: page 11 where PW1 testified that she took the victim to Buhinda Dispensary for medical check-up; page 13 to 14 where PW2 testified to have examined the victim at Buhinda; and page 22 where the victim testified to have been examined at Kanyarwe Dispensary. Mr. Stewart submitted further that the evidence in P.2 was delayed without plausible explanations as the event is alleged to take place on 13th September 2019, but P.2 was filled by PW2 three (3) days later on 16th September 2019.

Finally, the learned minds contended that the prosecution failed to establish its case beyond reasonable doubt as per requirement of

the law in **Jonas Nkize v. Republic** [1992] TLR 213 as there are several doubts which are to be resolved in favour of the Appellant as per precedent of the Court of Appeal in **Jimmy Runangaza v. Republic,** Criminal Appeal No. 159B of 2017.

The submissions registered by the dual learned counsels were protested by Mr. Mwakasege who contended that the prosecution had proved its case as per required standards of the law. According to Mr. Mwakasege: the victim stated clear facts in details which go to the root of the matter hence establish the offence beyond any doubts as per the precedent in **Selemani Makumba v. Republic** [2000] TLR 379; contradictions mentioned by the Appellant's learned counsels are minor and cured under the precedent of **Dickson Elia Nsamba Shapwata v. Republic,** Criminal Appeal No. 92 of 2007; every witness must be trusted unless there are good reasons to fault him as per decision in **Goodluck Kyando v. Republic** [2006] TLR 363; and the case is established through credible witnesses not relatives as per section 143 of the Evidence Act [Cap. 6 R.E. 2019].

In inviting the facts in proceedings to substantiate his points, Mr. Mwakasege submitted that the prosecution registered four witnesses in the court and all testified events which were in the same transactions and established the truth of their statements. With

contradictions in the dispensary, Mr. Mwakasege stated that the key fact is that the victim was found to have lost her hymen and mentioned the Appellant as the offender and in any case evidence in P.2 corroborated the testimonies of PW1, PW2 and PW3. With the alleged fabrication of evidences of the family members, Mr. Mwakasege contended that the law in Evidence Act does not restrict relatives to give evidence and is silent on every rape case to invite investigation machinery. To his opinion, it is not the person who is giving evidence, but weight of evidence which is to be put into test. With delay in reporting and recording P.2, Mr. Mwakasege submitted that the delay is explained by movement of the victim from Maruku to Kashozi area, which was initiated by the Appellant.

In brief rejoinder, the learned counsels for the Appellant submitted that the case against the Appellant was not proved beyond reasonable doubt as there were several faults in the case, such as: absence of any link established between the victim and Appellant; no evidence of penetration was tendered or any other evidences mentioned by the victim, such as clothes or cellphone or cellphone texts; the dispensary which examined the victim is not known; the evidence registered is solely from the family members; there were grudges and conflict which the court declined to consider; and the

precedent in **Mohamedi Saidi v. Republic**, Criminal Appeal No. 145 of 2017, had already stated that it was not intended that the word of the victim of sexual offence should be taken as gospel truth, but that her/his testimony should pass the test of truthfulness.

On my part, I had a thorough perusal of the record. Page 33 to 35 of the proceedings in the court conducted on 2nd July 2020, I think, is a starting point. The Appellant when testified before the court stated that:

> *I and PW1 had conflict before the said date. PW1 told me that she will put me in jail...people asked me what was going on. I told them that PW1 had hidden agenda...there was conflict between PW1 and I....PW1 wanted 20 orange plants as I am selling orange plants where by PW1 wanted 20 orange plants that she has 100,000/= and Mzee Kake told me to give PW1 the plants and accept 100,000/= and the remaining Tshs. 100,000/= PW1 would bring... after a week... But after a week, PW1 did not bring the money...I called PW1 but never picked up...I told her [PW1's mother] my claims against PW1... I told my mother and Denis, who witnessed me giving PW1 orange plants and received less money...my mother and Denis adviced me to go to file a case against PW1, but I declined...I used my tigo line sending a*

message to PW1 telling her to take my money...she told me that she has decided to take my money....we talked each other badly...after that the accusation against me before this court happened.

The testimony of the Appellant was detailed on the conflict and grudgers which were supposed to be investigated in detail before the prosecution could take its case to the court. Similarly, the evidence registered by the victim had several details which invited further investigation before initiation of the criminal case. In brief, I will quote page 18 to 22 of the proceedings conducted on 27th June 2021:

...on 13.09.2019, I sent a message to the accused phone through my grandmother's phone, telling him to call me...I went at Kazi area within Maruku and found the accused there...the accused told me to go to his house so that we could have sex...I went with the accused to his bedroom...then the accused took off my breezier, my skin tight and my pant... the accused lay on my chest took his penis and put it into my vagina...we started having sex...he told me to go to Ishozi Ward [to Datus]...Datus was not in the house, we found his wife.. Datus wife took me to Datus brother

who was the Chairman of a village within Ishozi...chairman left me at his house with his wife...

The two witnesses, PW1 and DW1 had testified two detailed departing stories which needed corroboration of third parties who have no interest in the outcome of the case. It is unfortunate that the prosecution side was fully loaded with stories from one family, which is now disputed in this court. I understand the provision of section 143 of the Evidence Act, but this is a court of justice and justice should not only be determine, but be seen to have been determined.

In the present case there is an issue of evidence of penetration which is complained by the Appellant's learned counsels distinguishing it with absence of hymen. It is unfortunate that there were no evidence registered to show that it was the Appellant who ruined the hymen of the victim either on 13th September 2019 or any other date. In any case no precedents were brought in this court which have settled the matter that absence of hymen is similar to penetration.

Reading of the proceedings show that there were several items mentioned by witnesses before, during and after the event of the alleged rape, such as clothes or cellphone and cellphone texts. However, neither the prosecution nor witnesses sought of registering them in the court. Science and technology of today was supposed to

be employed to answer some of the questions of clothes, cellphone and cellphone text. That is why the point comes in why the investigation department of the police was not employed to clear these issues which go to the root of transactions of communications between the Appellant and the victim. Therefore, if there are complaints that there was previous quarrels leading to the allegation of rape that cannot be taken as a minor issue (see: **Deogratias Peter @ Uhalala v. Republic,** Criminal Appeal No. 13 of 2021).

I understand stand Mr. Mwakasege had stated that the victim testified details of the events which go to the root of the offence rape and contradictions mentioned by the Appellant's learned counsels are just minor cured under the precedent in **Dickson Elia Nsamba Shapwata v. Republic** (supra). To that effect he persuaded this court to believe that every witness must be trusted unless there are good reasons to fault him as per decision in **Goodluck Kyando v. Republic** (supra).

I must state that I am persuaded by Mr. Mwakasege. However, in the present appeal there are good reasons to doubt the witnesses. They were from the same family and had interest on the outcome of the case as proved by the loan advanced to PW1 by DW1. The Dispensary which attended the victim is not clear from PW1, PW2 and

PW3 who were the key witnesses. The witnesses also mentioned several other person outside their family, but no one was marshalled to add value in the evidences registered by the family. As I said, I understand the provisions in section 143 of the Evidence Act, but when you have witnesses from one family it brings some doubts, especially in grave offences like rape.

I know of the existing precedents which hold that position that: *the evidence of the victim herself is regarded as the best evidence to prove sexual offences* (see: **Abasi Ramadhani v. Republic** (1969) HCD 226; **Tatizo Juma v. Republic**, Criminal Appeal No. 10 of 2013; and **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015). However, for the sake of justice to be seen to be done and avoidance of fabricated cases, the position has been qualified in the precedent of **Mohamedi Saidi v. Republic**, (supra) which stated that the position was not intended that the word of the victim of sexual offences should be taken as gospel truth, but that her/his testimony should pass the test of truthfulness.

In the present appeal there are question which any prudent man would have asked himself. I have mentioned those questions. To put it is legal term, doubts. The counsels for the Appellant's have already

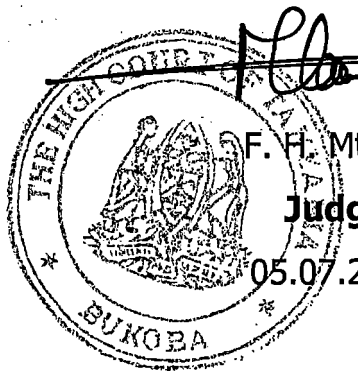
cited the decision of **Jimmy Runangaza v. Republic** (supra) which held that doubts are to be resolved in favour of the Appellant.

To my opinion, I think, it is elementary rule of law that the burden of proof in criminal cases is on the prosecution side and the standard is beyond reasonable doubt as per section 3 (2) (a) of the Act and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic,** Criminal Appeal No. 50 of 2005. It is not the duty of the Appellant to prove its innocence. That is why the Court in **Mohamed Matula v. Republic** (supra), stated that: *In a criminal case the burden of proof is always on the prosecution. It never shifts and no duty is cast on the appellant to establish his innocence.* I think, to my opinion, the reasoning of the court cited in this judgment required the Appellant to establish his innocence. That is not the position of the law in criminal matters.

Noting the background leading to the present appeal, and considering that it is unsafe to solely base family evidences to render conviction in grave offence of rape and recognising uncertainties in exhibit P.2, and recognising the absence of plausible explanation on the part of the prosecution on the cited delay of days of examination to the victim and the dispensary which examined her, I find merit in

this appeal. I therefore quash the conviction, set aside the sentence of thirty years (30) imprisonment imposed against the Appellant and further order for an immediate release of the Appellant from jail unless otherwise held for some other lawful reasons.

It is accordingly ordered.

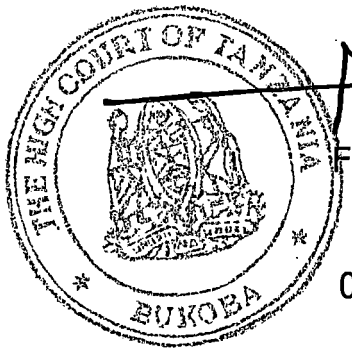


F. H. Mtulya

Judge

05.07.2021

This judgment was delivered in Chambers under the seal of this court in the presence of the Appellant, Mr. Alex Rwebugiza and his two learned counsels, Mr. Anesius Stewart and Mr. Ibrahim Muswadick.



F. H. Mtulya

Judge

05.07.2021