IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTY OF ARUSHA]

AT ARUSHA

CRIMINAL APPEAL NO. 64 OF 2022

(C/F District Court of Longido at Longido, Criminal Case No. 117 of 2019)

LOY LESILA @ MBAAPA.....APPELLANT

VERUS

THE D.P.P.....RESPONDENT

JUDGEMET

06th October, 2022

KOMBA, J.

The Appellant namely Loy S/O Lesila @ Mbaapa was charged and convicted by the District Court of Longido at Longido for an offence pf Rape contrary to section 130 (1) (2) (e) and 131(1) of the Penal Code, Cap. 16. It was alleged on 15/09/2019 at 15:00 hrs at Orkejuloong'ishu village, within Longido District in Arusha Region Appellant did unlawfully have carnal knowledge of one N.M a girl aged 16 years old. After hearing of the case, the Appellant was convicted for the rape offence and was sentence by the trial Court to serve thirty (30) years imprisonment.

On material date the victim (PW1) was on her way home where the appellant emerges from the bushes with *maasai attire* and threaten her with a *bush knife* and the pulled her in the bushes and have canal knowledge of her and

thereafter robed her 18,000/ and vanished from the scene. She reported the matter to PW3 who went at the scene and captured the appellant. He took the appellant to WEO office where they met with other persons including PW1 and the appellant return the money 18,000/ to PW1.

The Appellant was aggrieved by the decision of the District Court and he filed the present appeal against the said decision. In his petition of appeal, the Appellant has raised four grounds of appeal and later on with leave of this court he filed additional grounds as provided hereunder: -

1. *That, the trial Magistrate erred in law and in fact in holding that the appellant was properly identified by PW1. The PW1's identification was questionable as she made dock identification in the absence of an identification parade.*
2. *That, the trial Magistrate erred in law and in fact in not finding that the offence of rape was not proved to the required marginal standard. The adduced evidence falls short of proving an element of penetration.*
3. *That, the trial Magistrate erred in law and in fact for finding the appellant guilty of rape and so sentenced him to 30 years imprisonment in a case where its proof was not proved beyond reasonable doubts.*
4. *That, had the trial Magistrate directed his mind properly he should held that the evidence was not watertight to make a finding of guilty warranting conviction and sentence.*

ADDITIONAL GROUNDS

1. *That, the trial Court erred in law and in fact when it convicted and sentenced the appellant by using a defective charge sheet (there was variance on location and time between charge sheet and evidence adduced). That the prosecution side contravened the mandatory provision of section 234 (1) of C.P.A. when it failed to amend the charge.*
2. *That, the trial Magistrate erred in law and in fact by convicting and sentencing the appellant on basis of unreliable and uncredible prosecution witnesses.*
3. *That, the trial Magistrate erred in law and fact when it convicted and sentenced the appellant without considers the accused's (Appellant's) defence.*

At the hearing of the appeal, the Appellant appeared in person, unrepresented, whereas the Respondent was represented by Ms. Akisa Mhando, Senior State Attorney. Before starting submission of his appeal. The appellant prays his prior additional grounds to be considered in this appeal. Respondent did not object and the additional grounds were admitted as already conveyed.

In submission in chief the appellant argued each ground separately starting with the first ground that the identification was done while he was in the dock and that there was no parade as was held in the **case of Benson**

Kibasu Nyakonda @ Koilende V R, 1998, TLR 40 that identification parade is important in investigation. Because identification parade was not done the evidence by PW1 has no weight in law as it was identification in the dock. He said the same position was held in the case of **Yosyala Nicolaus Mally and others V R Criminal Case No. 193 of 2016** at page 14, 15 and 16.

On the second ground appellant alleged that, in order to be lawful, in every identification the witness is supposed to give important features of the accused. He cements this argument by the **case of Richard Otieno @ Gulu V. R, Criminal Appeal No. 367 of 2018** (unreported), that the victim to mention type of clothes worn by the appellant was not suffice as it leaves doubts and that identification at the dock has no value unless is preceded by identification parade comprehensive conducted. He said his trial was errored as based in evidence which is doubtful when PW1 said he called Daudi and informed him of the incidence while on another scenario during cross examination she said she was knowing the accused before.

On additional grounds which was filed earlier, ground 1. That trial Court erred in law and proceedings for convicting accused (appellant) by using defective charge which have variance on time between charge sheet and

evidence that the prosecution was contravened section 234(1) of Criminal Procedure Act for failure to amend the charge sheet. Another additional ground is that the trial court erred in law and in fact to convict appellant relying on weak evidence which contradicting of the side of prosecution. In ground 3 he was of the allegation that court contradict itself for convicting appellate without considering his defence.

On her part, the learned State Attorney object the appeal and opted to argue ground 1 separately, she will join grounds 2,3,4 of the original ground and 2 of the additional grounds and argued jointly. The ground 1 and 3 of the additional grounds will be argued separately.

On the 1st ground it was her submission that identification was done according to law and there was no need of identification parade as per S. 60(1) of CPA, CAP 20 because after arrest P3 informed the court that accused was taken to the WEO office while the PW1 was in that office so she saw the accused before he was taken to court. Page 7 and 8 of proceedings show that accused and PW1 met on the office. The appellant being identified by PW1 that act confirmed by PW2 and PW3 that the appellant is the one who did that crime so she argued there is no need to conduct the parade the accused was already identified. She argued further that dock identification

was done to prove that the person who are subject in the court is actually present in the court and not identification against arrest of the appellant.

On the combined grounds (rounds 2,3,4 of the original ground and 2 of the additional grounds) she said prosecution did prove offence beyond doubt and resulted to the appellant conviction. The proof of age was done as required as was in the **case of Leonard Sakata V D.P.P Criminal Application No, 35 OF 2019** Court of Appeal of Tanzania Mbeya (un reported) at page 8 paragraph 3 that age must be proved to the offence of statutory rape. The same case mention people cable to identify the age to include doctor. She further argued that the penetration was prove by PW4 who is a doctor at page 10 where he said he examined and discover that she was raped and the same collaborated by the evidence of PW1 at page 6 when she explained what appellant did to her including threatening her with a panga. She said evidence of the accused is the credible evidence as ruled in **the case of Leonard (Supra).** PW1 and PW4 manage to prove penetration. She further said all witness who testify in court their testimony was not denied by the court during hearing of the case as was in the case of **Shabani Rulabisa V. R, Criminal Appeal No 88 of 2018** Court of Appeal of Tanzania Shinyanga (un reported) at page 17 to the effect that

assessment of the credibility of witness is upon the court hearing the case. She prayed that the grounds are non-meritorious

Concerning the 1st ground in addition grounds about variance she said there is no doubt that the offence is committed in the village with the name of Orkejuloongishy and the evidence show the area which the appellant was arrested after the crime and taken to the village in the office. She further said appellant did not ask this question during trial, failure to ask during hearing it is regarded as after though. But the variance of places as named did not prejudice the accused as was given right to cross examine and right to defend himself.

About the third ground of additional ground Ms. Mhando directed the court at page 6 of the trial judgement while the Magistrate was analysing the alibi defense and contradictions which appellant rise against the Republic so analysis was made and this ground has less weight. She prays the appellant to be found guilty and uphold trial court conviction.

In rejoinder the appellant insisted that the identification parade was important because the PW1 once said she don't know the accused and that the he was arrested at Ngolile while PW1 said the appellant was arrested at

Parmanya. He maintained he was not arrested at the scene of crime. He concluded with believe that this court will leave him free.

After considering the submissions by both sides and the record of appeal, it is clear that the Appellant was charged for offence of rape before the District Court of Longido and was convicted by the trial Court for the offence of rape contrary to section 130(1), (2) (e) and section 131(1) of the Penal Code, Cap. 16. The Appellant has appealed against the conviction and the sentence for the rape offence. For clarity and quick reference, I wish to reproduce the sections thus:

> *S.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) (b), (c), (d)*
>
> *(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.*

S. 131.-(1) Any person who commits rape is, except in the cases provided for in the renumbered subsection (2), liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with a fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.

Issues to be analyzed by this court is the proof of offence, identification and the age of the victim.

As narrated earlier, the appellant was accused of raping the victim (PW1). The victim's evidence shows that she was on her way to home when the appellant emerges from the bushes with *maasai attire* and threaten her with a *bush knife* and the pulled her in the bushes, pulled up PW1 clothes and rape her. The accused took from her (robe) 18,000/ and vanished from the scene. PW1 reported the matter to Daudi Karerian (PW3) who went at the scene and manage to captured the appellant. PW3 took the appellant to WEO office where they met with other persons including PW1 and the appellant return the money 18,000/ to PW1. Appellant was taken to police while PW1 was taken to police station and then hospital.

In fact, the sole evidence of the victim of rape may be sufficient to ground a conviction provided that the court is satisfied that the victim only speaks the truth. I understand, the offence of rape may easily be doctored and its proof is, sometimes, difficulty because the court is sometimes forced to believe the testimony of the victim. In our criminal jurisprudence, the best evidence of rape always comes from the victim. See, the cases of **Shani Chamwela Suleiman vs Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022; **Mohamed Said v. The Republic**, Criminal Appeal No, 145 of 2017, CAT at Iringa (unreported)

Despite all the complications involved in proving rape cases, there is still a need to believe the evidence of a person who was the victim of the circumstance. In rape cases, if court reaches a point of not trusting the victim's testimony, then rapists will walk far from the criminal justice. It is known phenomena that rape incidents are always committed in secret and in most cases, the witnesses may only be the victim and the rapist. For that matter, the evidence of the victim if not mixed with lies, should be given the priority of credence. In doing so the collaboration is important. From the current appeal as narrated by State Attorney, I read the proceedings of the trial court and found that the evidence of PW1 when she said appellant pull

her in bush, undress and did canal knowledge of her was collaborated by one the PW4 when he testifies in the court that he examining PW1 and found bruises on both labia and posterior fotchet area. The evidence of PW4 was recorded to Exhibit P1 and appellant did not object its admission. See the case of **Bayo Paschal @ Banga @ Bayo Sambiye V. Republic** (Criminal Appeal 113 of 2020) [2021] TZHC 7061 (03 November 2021); This evidence is credential. The question now is who raped PW1.

Among the issue raise by appellant is the identification parade. It was argued by the State Attorney that prosecution did not conduct identification parade because PW1 saw and identify appellant immediately after his arrest by PW3 and when he was sent to WEO office. Let us read provision of law regarding identification parade. This is guided CPA that-

> *S. 60 (1) Any police officer in charge of a police station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining whether a witness can identify a person suspected of the commission of an offence.*

From the quotation above, identification parade can be conducted only to determine if the victim can identify the suspect and this done to facilitate

arrest. In the appeal at hand, appellant was taken to WEO office where they met with PW1, at this point the both see each other. The assembly and surrender of appellant and PW1 to police station was organized by the WEO office so it was easy for PW 1 to identify appellant in the office and during the interrogation at police Station. I agree with the findings **in Richard Otieno case** but circumstances differ from the case at hand, PW1 and appellant met at the WEO's office so appellant was known from that day. In this circumstance I agree with Republic that there was no need of conducting identification parade as appellant was known and thus this ground in non-meritorious.

Another interesting issue but very important in identifying that the appellant is the one who did that is the fact that when he was arrested appellant return the 18,000/ to PW1. This show that it is the appellant who raped the PW1.

Another ground which Appellant raise is variance of place of his arrest. According to him there is confusion of names of villages or places where he was arrested. I agree with him that names of places where prosecutor claim to arrest him varies. Regardless of this variance, the fact that he did crime to a girl on her way to home and he was actually apprehended by PW3 suffice to prove that he did commit the offence. After all the name of village

did not prejudice the appellant in any way. Therefore, I found no merit in this ground.

The last issue argued by the appellant in his appeal was the age of the victim that the age was not proved by DNA nor testified by her parents. Of the resent days the Court of appeal of Tanzania in **Shani Chamwela Suleiman V. Republic** (Criminal Appeal 481 of 2021) [2022] TZCA 592 (28 September 2022) it was said the age of the victim in court of law can be proved by a parent, victim, relative, medical practitioner or where available by production of birth certificate. In this appeal the victim was attended by PW4 a medical doctor who fill the Exhibit P1 which is Police Form No. 3 therein in he fills the age of a victim and that under the above cited case PW4 did prove the age of a victim. That means the 3rd ground is worthless.

In conclusion, the evidence of the victim which was coupled with the testimony of PW4 and other prosecution witnesses proves that the victim was raped by the appellant. The appellant on his part failed to discharge his duty of shading doubts on the prosecution case. I find no merit in the grounds advanced by the appellant. I hereby dismiss the appeal. Appellant to serve the sentence as pronounced in trial court.

Dated in Arusha this 06th Day of October 2022.

M.L. KOMBA

JUDGE

06/10/2022

Judgment delivered this 6th day of October, 2022 in the presence of parties.

Right of appeal explained.

M.L. KOMBA

JUDGE

06/10/2022