IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 07 OF 2019

(Arising from Criminal Case No. 187 of 2018 of the District Court of Kahama at Kahama)

YOKI S/O JUMA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of the last Order: 15/1/2020
Date of the judgment: 23/1/2020

E.Y.MKWIZU, J.

At the District Court of Kahama at Kahama, the appellant herein stood arraigned for the offence of rape contrary to the provisions of section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16 R.E 2002 (the Penal Code). It was the case for the prosecution that, on the 14th day of May, 2018 at about 15:00 hours at Bujika Vilage within Kahama District in the Region of Shinyanga, the accused did have sextual intercourse with the

victim referred to as **"A"** by the trial court (for purposes of protecting her identity) a girl of 11years old.

When the charge was read over and explained to the appellant, he remonstrated his culpability whereupon, the prosecution paraded four witnesses and one exhibit, PF 3 (Exhibit P1) to prove their case. On his part, the appellant banked on his own avowed testimony in defense, he had no witness to call. Having heard the evidence of the prosecution witnesses as well as the appellant's own defence, the trial court found the charges established to the compulsory standards. She convicted the appellant to the charged offence andsentenced him to the mandatory jail term of thirty years and proceeded to order compensation to the victim to the tune of one million (1,000,000/=).

Dissatisfied with the conviction and sentence of the trial court, the appellant has come to this court with a petition of appeal raising four grounds of complaints which can be summarized into three major complaints that;

1. **The Appellant did notcommit the offence**

2. **The trial Court convicted the Appellant on a Hearsay evidence given by PW1, PW2, PW3 and PW4.**
3. **The trial court did not consider the defence evidence**

A brief account of the prosecution case is as follows: Appellant was PW1's employee before the incident ate, he used to work as a herds -man .On 14th day of May, 2018 the appellant went to PW1's home for purposes of collecting his identity card which he had left.PW1 left his home to Iboja leaving the appellant at his home.On coming back at around 18:00 hrs, PW1 mate many people at his house to be informed by the chairperson of the area that appellant has raped her daughter. On interrogation, appellant confessed to have raped the victim and sked for forgiveness. Appellant was then taken to Kahama Police Station and thereafter to the Court.

PW2,the victim testified that,she is in standard four at Nyandekwa Primary school. She is familiar with the appellant who used to take care of their cattle. That on 15th May,2018,while at home,appellant asked her to escort him to the bush to look for medicine. At the bush, Appellant raped her. While still at the bush, One Baba Shindi came and helped the appellant to find medicine before they found their way backhome. On return, she

explained the ordeal to her grandmother.She was then taken to the Police station and later to the hospital.

PW3 is one Lwabusilika Fumbuka, who testified on oath that while taking care of his cattle in the bush on 15th day of May,2018, children approached him looking for a missing fellow,victim who happened to be the daughter of his brother. He was informed that the missing child left home with the appellant.He caught the appellant raping the victim. On interrogation,Appellant admitted to have raped the victim and asked for forgiveness .PW3 said he pretended to have forgiven the appellant so as to comfort him for an easy arrest. On getting back home PW3 disclosed the information to the chairman of the area and other people had gathered looking for the victim.The appellant confessed to have committed the offence but asked for forgiveness.

Allan Issaya Masanja an Assistant Medical Officer at Kahama Medical Hospital testified as PW4 in this matter.He attested that while at his working station, on 15th May,2018,he attended the victim. On examination he noticed bruises, blood stains, perforation on the virginal area which was also swollen signifying existence of viginal penetration. He tendered PF3 as an exhibit P1.

In his defence, the appellant denied each and every detail of the prosecution account. He alleged that the indictment were filed because he demanded his salary from PW1.After a full trial, appellant was convicted as charged and sentenced to thirty years imprisonment as well as and ordered to pay PW2 compensation of Tshs. 1,000,000/=.

When the appeal was called on for hearing on the 15th January, 2020, the appellant entered appearance in person, unrepresented, and hence fended for himself whereas, the respondent/Republic had the services of Ms. Immaculate Mapunda learned State Attorney.

Arguing in support of the appeal,appellant adopted his earlieron filed petition of appeal and submitted briefly that the charged leveled against him were fabricated after he has demanded his salaries from PW1,the victims' father. He prayed that the appeal be allowed, conviction vacated and sentence set aside and that he be released from custody.

Ms. Mapunda State Attorney opposed the appeal.Starting with ground two of the petition of appeal she said, there was no hearsay evidence tendered before the trial court.All the prosecution's witnesses gave direct evidence which proved the offence of rape against the appellant. Expounding on the

prosecutions' evidence, Ms. Mapunda stressed that, PW1 made it clear at page 10 of the trial court's record that the appellant was interrogated in his presence and admitted to have committed the rape and prayed for forgiveness.

Submitting on the evidence by PW2,the learned State Attorney clarified that,PW2 is the victim, she gave evidence on how he was lured by the appellant who took him to the bush where she wasraped. PW2 gave a direct evidence which proved the charge of rape, elaborated Ms. Mapunda. She cited to the court the case of **SELEMANI MAKUMBA VR THE REPUBLIC**,CRIMINAL APPEAL NO.94 OF 1999 stating that as the best evidence in this case is that of PW1 the victim.

PW3 also gave a direct evidence, stated the learned State Attorney, Ms. Mapunda. Making reference to page 10 of the trial court's record, she said, PW3 explained in his evidence that having being informed that PW2 is missing,he participated in tracing her.He caught the appellant raping the victim in the bush where he (PW3) was grazing.Appellant admitted to have committed the offence but askedfor forgiveness.He thereafter relayed the information about the rape to the people who were gathered to look for

the missing child(victim).She made reference to the case of **WAIKI AMIRI VS THE REPUBLIC,**CRIMINAL APPEAL NO 230 OF 2006.

On the evidence of PW4,it was Ms. Mapunda's submission that the witnesses gave also direct evidence on how he received and examined the victim **PW2**. He narrated his finding and tendered PF3 as exhibit ,explained the State Attorney.

Concluding ground one, Ms. Mapunda was of the view that the prosecution witnesses gave direct evidence and managed to prove the charge against the appellant beyond reasonable doubt.

On the ground number three of the petition of appeal, where the appellant is lamenting on not given the right to be heard and the trial court's non consideration of his defence, Ms. Mapunda submitted that the trial court's record is clear at page 24 that ,the appellant was addressed interms of section 231 of the CPA and was allowed to give his defence.

On whether appellant defence was considered or not, it was Ms. Mapunda's submission that it is the duty of the prosecution to prove the case beyond reasonable doubt. The court after analyzing the evidence, it found that the prosecutions discharged their duty and that appellant's defence did not

raise any doubt on the prosecution's case.She finally urged this court to dismiss the appeal in its entirety.

After reviewing the evidence on record and the submissions by theappellant and the learned State Attorney, I am of the view that the whole appeal centres on the issue of whether or not PW2 was raped and whether it was the appellant who committed the rape. What needs to beconsidered is whether or not the evidence on record supports theallegation of rape.

Before looking into the issues raised above, I find it pertinent to consider, albeit brief, the appellant's complaints that **one,** the trial Court convicted the Appellant on a hearsay evidence given by PW1, PW2, PW3 and PW4.As rightly submitted by the learned State Attorney. All the prosecution witnesses PW1, PW2, PW3 and PW4 gave direct evidence. They narrated on what they witnessed.PW1 the father of the victim testified on how the appellant arrived into his home on 14/5/2018. He also explained on how he came to know that PW2 has been raped by the appellant and that he heard appellant admitted to have committed the offence.

PW2 is an eye witness to the commission of the offence.She re-counted on how she was taken by the appellant to the bush where she was raped.PW3 is also an eye witness,he testified on how he got information that PW2 is missing.How he found appellant raping the victim (PW2) and how he informed the villagers on the incident.PW4 is a medical doctor who examined the victim.He testified on what he did and the findings of the examination.He also tendered a PF3 as exhibit.From the narration above I find no merit on this complaint.

On whether the appellant's defence was considered or not, page 5 of the trial court's judgment tells it all. It say, Iquote:-

> *"...the accused person alleged that he is being accused simply because he demanded for his salary from the father of the victim. Unfortunately,when the victim's father came to testify in court, the accused person did not ask this witness about this allegation.It appears that the accused person's allegation is a fabrication just to hide the truth on what happened. This court finds hard to believe in his allegation..."*

Ialso agree with the learned State Attorney, that the appellant's contention that his defence was not considered by the trial magistrate is not borne out

by the records. It is evident from the above quoted passage that the trial magistrate considered the defence evidence but disbelieved it. It is not correct,therefore to say that the appellant's defence was not considered. The complaint by the appellant on this ground is baseless.

I now revert back on whether rape was committed and whether it was the appellant who committed the same. The trial court relied on the evidence ofPW2,PW3 and PW4 to establish theguilt of the appellant. PW2 gave her account of what transpired before, during and after the incident. Her testimony was supported by the testimony of PW3 who caught the appellant in theact.PW2 knew the appellant before.The appellant had worked at their home as a heds-man and therefore well known to her. PW2 and PW3 clearly identified the appellant at the scene. The incident happened during the day at around 15:00 hrs.

In the case of **Ryoba Mariba** @ **MungareV R,** Criminal Appeal No. 74 of2003 (unreported), court of appeal held that it was essential for the Republic tolead evidence showing that the complainant was raped. It is also a settled law that the true and best evidence of a sexual offenceis that of a victim. This was said in the case of **Selemani Makumba Vs Republic** (2006) TLR379.

As state earlier on, PW2, victim, gave account of what happened on the fateful date.She is recorded at page 13of the record to have testified that:-

> *"I know the accused person. He used to take care of our cattle.He stayed at our house for only two months. I recall on 14/05/2018,I did not go to school, I was sick. The accused came at our house. He told me that I should escort him to look for medicine at the bush. When we arrived at the bush, he ordered me to undress myself.I refused. He attacked me, tightened my neck, then he had sexual intercourse with me by force. I felt much pain..."*

It is apparent from the evidence of PW2 above that PW2 was raped and that the person who raped her was the appellant

In addition to the above, prosecution brought another piece of evidence. A medical examination report tendered by PW4,a medical expert who examined the victim. He confirmed to have noted bruises, blood stain as well as perforation on the PW2's vigina suggesting that there was penetration. Section 130 (4) as amended by the Sexual Offences Special ProvisionsAct 1998 provides: -

"penetration however slight is sufficient to constitute the sexual intercourse necessary for the offence"

See: **Omari Kijuu V Republic,** CAT, Criminal Appeal No. 178 of 2004 and **Daniel Nguru** & **Others V Republic,** CAT, Criminal Appeal No. 39 of 2005(unreported), **Mathayo Ngalya @ Shabani V R** Criminal Appeal No. 170 of 2006 (unreported) and **Hassani Amiri V R** Criminal Appeal No. 304 of 2010(unreported) are among the authorities made by the court of Appeal on this aspect.

A combination of the direct prosecution evidence by PW2, the victim and PW4, a medical doctor establishes the penetration component of rape.

It is also from clear from the prosecution evidence that the incident of rape was reported immediately, to the victim's father (PW1) and people who had gathered to look for the victim.Appellant is said to have admitted committing the offence but prayed to be forgiven. The trial court found all the three witnesses credible and relied on their testimony. The conclusion reached was that the case against the appellantwas proved beyond reasonable doubt.

From what I have state above, I am of the considered opinion that the prosecution evidence on record, sufficiently proved that the appellant committed the offence charged with in that: **Firstly,** PW2gave a comprehensible account of the incident by theappellant. **Secondly,** the record clearly shows that, at the earliest moment the incident was reported. **Thirdly,** the appellant was arrested instantly.

The appellants defence was directed essentially to the reasons why he was accused of rape. He said PW1 fabricated the matter after he had claimed for his salaries.The trial court had found this defence to have not shaken the prosecution evidence. I am conscious of the principle that courts must not convict a man on a weakness of his defence.The prosecution's case must support the conviction on its own. In the case of **Fanuel s/o Kiula. (**1967) H.C.D.369 it was stated that:-

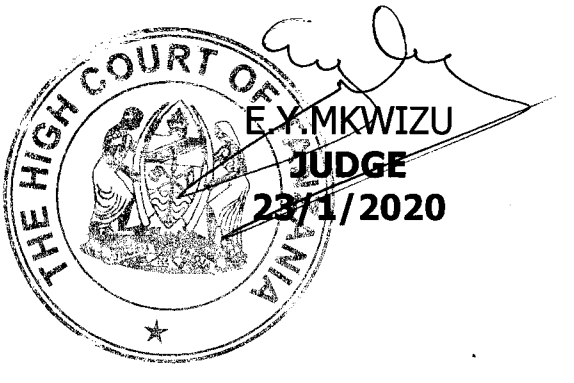
> *"It is not necessary to accept the defence of the accused in orderto find him not guilty. All that the accused need to do is to raise a reasonable doubt as to his guilt"*

(See also the case of **Moshi d/o Rajabu Vs R.** (1967) H.C.D.384.)

From the above evidence, I find no reason to fault the trial court magistrate on the issue of credibility of PW2, PW3 and PW4. Their evidence is sufficient to establish the guilt of the appellant and can therefore, be relied upon. The defence evidence did not anyhow raise doubt on the prosecution evidence. Conviction was therefore, correctly arrived at. There was sufficient evidence to warrant the appellant's conviction. I therefore dismiss the appealin its entirety.

It is so ordered

DATED at **SHINYANGA** this 23rd day of **JANUARY**, 2020.



E.Y.MKWIZU
JUDGE
23/1/2020