

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)**

AT MWANZA

CRIMINAL APPEAL NO. 93 OF 2021

(Appeal from the Judgment of the District Court of Chato at Chato (Kagimbo, RM) in Criminal Case No. 234 of 2019 dated 14th of June, 2021.)

PASCHAL MAYOMBYA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

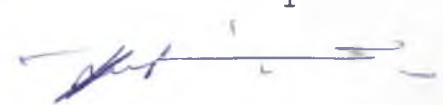
JUDGMENT

23rd August, & 16th November, 2021

ISMAIL, J.

The appellant was arraigned in the District Court of Chato at Chato, facing a single count of rape. The allegation is that on 26th November, 2019, at Kabelezo Village within Chato District, in Geita Region, the appellant raped ABC (in pseudonym), a woman of 19 years of age, contrary to the provisions of sections 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019.

Brief factual account of the case, as gathered from the testimony of the parties to the trial proceedings is that, in the fateful night ABC (the victim) who testified as PW1, was sleeping in her house. In the middle of the sleep she noticed that somebody had held her by the neck, she noticed that



the assailant was the appellant, who undressed her as he did for himself. He then took his genitalia and inserted into PW1's vagina. In terms of PW1's testimony, the appellant did another round of sex after which, and due to tiredness, he slept. She testified that the sexual act was not consented to and that she experienced some pain. PW1 further testified that she knew the appellant on account of his voice and that he saw him when he left for her mother in law's house to report the incident. Together with her in law, the victim closed the door and went to report the matter to the Hamlet Chairperson of Kabelezo (PW3). The latter joined the PW1 and her in law and went to the scene of the crime where other people were gathered. In PW3's reckoning, that was at 3.30 am, and that, when the door of the house was opened the victim was found lying in the victim's bed. The appellant was apprehended and conveyed to the police station. It also transpired that the appellant was a nephew of the PW1's husband.

Subsequent to the incident, PW1 was taken to Nyamilembe Dispensary where she was examined. PW2's findings on the examination, as found in exhibit P1 (PF3) is that, though there were no bruises found in PW1's vagina, there was a probable reason to believe that she was raped. This is because PW1 felt some pain when a finger was inserted into her vagina.



Upon completion of the investigation, the appellant was charged in court. He pleaded not guilty to the charge, adding that on the fateful night he visited the victim's house while he was drunk. He stated that on arrival, he was served food and, because of the tiredness he slept there until the following day, when he heard PW3 calling him. He protested his innocence, arguing that he and PW3 had an axe to grind due to the fact that he owed him TZS. 8,000/-, a contribution for construction of a dispensary. He stated that PW3 had promised to jail him, that is why he testified against him.

After a trial that saw four witnesses testify for the prosecution, against the appellant's sole witness, the trial court concluded that guilt of the appellant had been established. Consequently, he was convicted of rape and sentenced to imprisonment for 30 years.

The conviction and sentence have aggrieved the appellant, hence his decision to institute this appeal. The petition of appeal contains three grounds of appeal, paraphrased as follows:

- 1. That the trial court erred in law and in fact by failing to take into consideration the fact that the accused slept with the victim the whole night without raising an alarm that he was being raped.*
- 2. That the evidence of PW1 (EJ) was too weak to prove commission of rape since the accused and PW1 indulged in sexual intercourse that whole night.*

appellant. Ms. Kinabo further contended that the testimony of PW1 is to the effect that there was no consent from the victim, and that violence was also used during the sexual act. She further argued that, the fact that PW1 informed her mother in law means that there was no consent, and that page 8 of the proceedings is clear on this. Ms. Kinabo argued that there was evidence of penetration, adding that the law is clear that in rape cases, the victim's testimony is the best evidence. Counsel referred the Court to the decision of the Court of Appeal in ***Selemani Makumba v. Republic*** [2006] TLR 379. She added that the trial court was convinced that PW1 was a credible witness. She urged the Court to dismiss this ground of appeal.

With regards to ground three, the contention by Ms. Kinabo is that PW1 did not consent to the sexual intercourse and that this is evident through page 8 of the proceedings. She argued that the available evidence indicates that force was applied when the appellant slapped the victim and told her that he wanted sex and money. Ms. Kinabo submitted that there is exhibit P2, the appellant's confession, which was to the effect that the appellant went into the house through a window, meaning that he was not invited. Counsel maintained that the prosecution proved its case. She prayed that the appeal be dismissed.

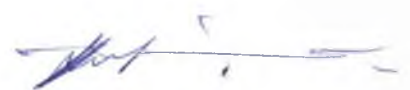


3. That the trial court erred in law and in fact by relying on weak evidence while circumstantial evidence points to the fact that the victim (PW1) consented to the sexual intercourse.

Hearing of the appeal pitted the appellant who fended for himself, unrepresented, against Ms. Georgina Kinabo, learned state attorney, for the respondent. Before the hearing got under way, the appellant prayed that the respondent submits first, while his submission would follow subsequent thereto. This prayer was acceded to by the Court.

Ms. Kinabo began by expressing her support to the conviction and sentence meted by the trial court. With respect to ground one, learned attorney's submission is that key ingredients in the offence of rape are penetration and lack of consent. She argued that the appellant's contention that the victim did not raise an alarm and that they slept until morning was hollow. Referring to page 8 of the proceedings, Ms. Kinabo contended that the proceedings are clear that, after the incident, the appellant slept while the victim went to her mother in law, after which the hamlet chair (PW3) was called. The respondent's counsel argued that failure to shout does not mean that the offence was not committed.

Submitting on ground two, Ms. Kinabo argued that the ground is baseless as commission of the offence was proved by PW1's testimony. She argued that there is also a cautioned statement (exhibit P2) recorded by the

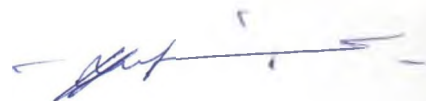


The appellant's submission was laconic. He urged the Court to accept his grounds of appeal and set him free. With respect to the confession, the appellant argued that he confessed because he wanted to be free. He prayed that his appeal be allowed.

The singular question to be resolved in this case is whether the appeal is meritorious.

Given the similarity in the grounds of the appeal, I will analyse all of them in a combined fashion. These grounds appear to suggest that, since the appellant slept with PW1 all night long, then the trial court erred when it ruled that rape had been committed while the victim raised no alarm. In that respect, the appellant's contention is that PW1's testimony was weak in proving rape. This is a contention that is valiantly contested by Ms. Kinabo, who holds the view that the testimony of PW1 proved that she was penetrated, and that she did not consent to the sexual act committed by the appellant. She also relied on the appellant's cautioned statement, exhibit P2.

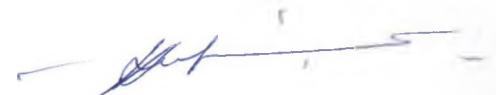
Let me begin with laying the ground by stating that, in the offence of rape, other than statutory rape, proof of its commission is predicated on the prosecution proving that the victim of the rape was carnally known i.e. she was penetrated; and that such penetration was without consent of the



victim. The question that arises is whether these two ingredients were proved.

In her testimony, PW1 has stated how the appellant jumped into the house through a window, strangled and undressed her, before he entered his manhood into PW1's genitalia. This was corroborated by the testimony of PW2, PW3 and exhibit P1. The most stunning of all was the appellant's cautioned statement, exhibit P2, in which the appellant confessed to the commission of the offence. At page 3, the appellant is quoted as saying:

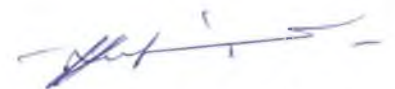
"Baada ya kuzima taa nilimfuata kitandani alipolala na kumkaba koo asipige kelele ndipo nilimvua chupi kisha na mimi nilivua nguo zangu zote na kutoa uume wangu na kumingiza kwenye uke wake Ndio nilimwaga shahawa ndani ya uke wake mara tatu. Baada ya kumaliza nilipitiwa na usingizi kwani wakati nafika hapo nilikuwa nimekunywa pombe. Ilipofika muda was aa 03:30 hrs nikiwa nimelala nilistuka baada ya kuona niko peke yangu kitandani na muda kidogo mlango wa nyumba hiyo ulifunguliwa na kuona Mwenyekiti wa eneo hilo ambaye ni Mwenyekiti wa kitongoji aitwaye SADICK s/o KAHINDI aliingia ndani na kunikamata na kunitoa nje nilichoropoka ili kukimbia ndipo wanakitongoji ambao walikuwa nje walinikimbiza na kunikamata na baada ya kunikamata waliniweka chini ya ulinzi."



The totality of this testimony proves that the appellant had a carnal knowledge of the victim (PW1) and that such act was unlawful as the use of force clearly indicates that the victim did not consent to the sexual intercourse. This negates the appellant's narrative in his grounds of appeal that the victim consented to the sex.

The appellant has questioned the victim's failure to raise an alarm. In his view, that is an indication that the victim consented to the sexual indulgence by him. This assertion is quite bizarre and failing to resonate. How would he expect the victim whose throat had been strangled to shout and raise an alarm? The fact that the victim reported the incident to her mother in law proves that the sexual intercourse was not a mutually pre-meditated affair from which consent would be inferred.

In my considered view, PW1's testimony, even without any corroboration, was sufficient to constitute the basis for conviction, taking cognizance of the trite position that in offences of this nature, evidence of the victim is crucial and of a decisive effect on which a conviction may be grounded, without any need for corroboration. This is consistent with numerous court decisions. In ***Bakari Hamisi v. Republic***, CAT-Criminal Appeal No. 172 of 2005 (unreported), the Court of Appeal of Tanzania held as follows:



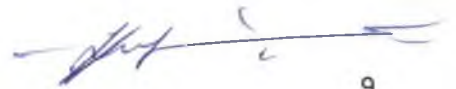
"... Conviction may be founded on the evidence of the victim of rape if the Court believes for the reasons to be recorded that the victim witness is telling nothing but the truth."

The foregoing stance was a restatement of the upper Bench's earlier position in ***Godi Kasenegala v. Republic***, CAT-Criminal Appeal No. 10 of 2008 (unreported), in which it was restated:

"It is now settled law that the proof of rape comes from prosecutrix herself. Other witnesses if they never actually witnessed the incident, such as doctors, may give corroborative evidence."

See also: ***Kalebi Elisamehe v. The D.P.P.***, CAT-Criminal Appeal No. 315 of 2009(unreported); ***Selemani Makunge v. Republic***, CAT-Criminal Appeal No. 94 of 1999 (unreported); and ***Ramadhani Samo v. Republic***, CAT-Criminal Appeal No. 17 of 2008 (unreported).

The appellant stated in his defence testimony that he had a bone to pick with the PW3, the hamlet chairman, arising from the appellant's failure to make good his contribution, and that the said witness vowed to fix him. This defence was given a wide berth by the trial magistrate, rightly so because it drew no relevancy to the case, noting that the complaint was lodged by PW1, the appellant's relative, and based on the offence whose

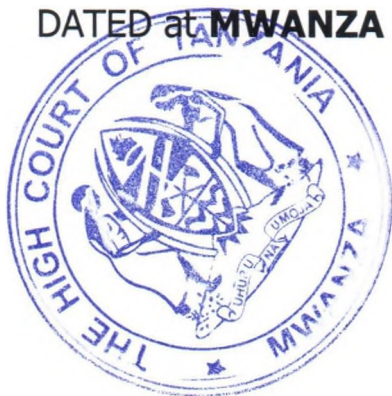


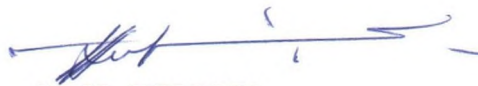
commission was confessed to in exhibit P2. I take the view that the bad blood, if any, would not have the impact in a case whose proof was largely dependent on what PW1 testified in court. I hold that this defence lacked the potency or cutting edge that would be required to perforate or dislodge the prosecution's case, and blur what appears to me as an impeccable account of how the appellant was involved in the commission of the offence, in respect of which he was convicted and sentenced. Consequently, I hold that these grounds of appeal are hollow and I dismiss them.

In view of the foregoing, I take the view that the appellant's conviction and the eventual custodial sentence were based on a solid foundation, and I uphold them. Accordingly, I find the appeal barren of fruits and I dismiss it.

Order accordingly.

DATED at **MWANZA** this 16th day of November, 2021.




M.K. ISMAIL
JUDGE

Date: 16/11/2021

Coram: Hon. C. M. Tengwa, DR

Appellant: Absent


Respondent: Ms. Kinabo Georgina, State Attorne

B/C: P. Alphonce

Court:

Judgment delivered today in the presence of the State Attorney and in the absence of the appellant.




C. M. Tengwa
DR