IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 61 OF 2020

(Originating from the District Court of Kilwa at Masoko in Criminal Case No. 91 of 2018)

YUSUFU ISMAIL AKANDU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20th Oct. & 15th Dec., 2021

DYANSOBERA, J.:

Yusufu Ismail Akandu, the appellant, was charged before the District Court of Kilwa with the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, [Cap. 16 R.E. 2002 now R.E. 2019]. The particulars alleged on 26th day of August, 2018 at about 0600 hours at Mtandango Village within Kilwa District in Lindi Region the appellant had carnal knowledge of one **"SHL"** or the victim, a girl of 15 years old.

When called upon to plead after the substance of the charge had been read over and explained to him, the appellant denied the charge. However, after a full trial, the trial court was satisfied that the case against him was proved beyond reasonable doubt. Thus, it meted a sentence of thirty (30) years imprisonment term. The appellant filed his appeal before this court and was heard but on 02/10/2019 my fellow learned Judge Hon. I. Arufan delivered his judgment to the effect he found that the trial court had entered an improper conviction thus he remitted back the file for the trial court to enter a proper conviction.

After compliance by the order of this court the appellant filed this appeal.

The brief facts material to this appeal, can be gleaned from the record, Hassan Ally Lukondu who testified as PW2, a victim's father testified that PW1 was born I 2003 and had eye problems for a long time. In order to rescue her situation PW2 sent her to various hospitals including Tangi and Miteja though in vain. Seeing that, PW2 decided to sent the victim to the appellant, the traditional healer and who treated a lot of people. He sent the victim to the appellant more than three times. On 25/08/2018 PW1 went to the appellant and was given some traditional medicine by the appellant. The victim was admitted at the appellant's tradition healing place but was accompanied by her fellow. On the night of the material date the appellant slept with the appellant as part of his medication. According to PW1 testified that the appellant told the victim to undress her clothing though she refuted. Seeing that, the appellant touched the victim's breasts and took off the PW1's cloth by force. Then, the appellant went on by taking off his penis and inserted it into victim's vagina. The victim felt pain though she did not scream due to the fact that she was threatened by the appellant who uttered the following words "ukipiga kelele uganga wangu wote utakwishia wewe".

Besides, the victim further testified that Omary Likuwi and his wife were in another room. Upon her return to her habitat the victim cried and told her mother about what had transpired between her and the appellant. As a result, PW2 was informed and in turn relayed the same to the VEO of Mtandango then PW1was taken to medical examination.

The evidence of PW1 was supported by the evidence of PW3 (Alfred Chinejue) a medical doctor conducted medical examination upon PW1's

complaint that she was raped. Thus, after completing his examination he filled the PF3. Also, PW4(WP 8964 Dt. Const. Zainabu) read PW1's and PW3's statements and discovered that the victim was raped and when examined by PW3 was found with the sperms at her vagina. Apart from that, the victim's complaint was supported by the evidence of E 2176 AT CPL Fadhil investigated the victim's case and took the cautioned statement (exhibit P2) of the appellant by according him all his rights.

In his defence, the appellant's defence was supported by two independent witnesses. On the part of the appellant, he completely denied to have been involved in the commission of the offence was charged with. Instead, the appellant testified that people planned to defame him due to their personal hate. He further insisted that he was not tested but it was fabricated a case against him. As to DW2 (Omari Mwachande Likachi) testified that on 23/09/2018 the appellant passed at his shop at 2100 hours and told him that he was going back to his home. But at 2200hours the appellant came and slept at his house. Also, DW3 (Mwanahamisi Halfani) testified that the appellant arrived at their house at 2100 hours and left. Though the appellant returned back at night when he found them asleep. And at the morning DW3 told the trial court that the in the morning he saw the appellant being arrested for the assertion of rape.

After a full trial, as intimated earlier the trial court was satisfied that the case against him was proved beyond reasonable doubt. Thus, it meted a sentence of thirty (30) years imprisonment term. Aggrieved, the appellant has preferred his appeal to this court by filing his petition of appeal comprising six grounds of appeal, namely: -

1. That the trial court erred in law and fact to convict and sentence the appellant basing on the evidence of prosecution side which

had a lot of reasonable doubts while the appellant pleaded not guilty to the offence charged because he did not commit it.

2. That the trial court erred in law and fact in convicting and sentencing the appellant without considering that the whole case has not been proved beyond reasonable doubt.
3. That the trial court erred in law and fact in convicting and sentencing the appellant without being satisfied on the identity of the appellant. This is due to the fact that the alleged offence was committed during the night time hence it is trite law that when the offence is committed at night there must be a proper identification to identify who committed the offence.
4. That the trial Magistrate erred in law and fact to convict and sentence the appellant without considering that PW1 (Victim) had a sight problem. So how can she manage to identify the appellant regarding that eyes are the most important organ to which enabled a person to identify anything as a result the alleged incident occurred during night time.
5. That the trial court erred in law and fact in convicting the appellant of the offence of rape without considering that none of the prosecution witnesses saw the appellant committing the said offence rather than basing on hearsay evidence especially for these of PW2, PW4 and PW5.
6. That the trial court erred in law and fact in convicting and sentencing the appellant because the prosecution evidence were credible and unreliable regarding that PW3 medical officer does not prove the existence if the penile penetration, hence it is very necessary ingredient in order for the offence of rape to stand. Therefore, the trial court was wrong to convict the appellant while

acting under insufficient evidence of the prosecution side as it eft reasonable doubt.

At the hearing, the appellant appeared in person without being represented, whereas the respondent/Republic was represented by Mr. Kauli George Makasi, the learned Senior State Attorney. The appellant submitted that he filed six grounds and had nothing to add.

On his part, Mr. Makasi submitted that principally they decline to support the appeal. As to the first and second ground, the senior Sate Counsel submitted that the evidence of five prosecution witnesses together with exhibits leave no doubt that the appellant took advantage of being a local medical Doctor to Rape a girl of 15 years of old. He insisted that the crucial evidence implicating the appellant is that of the victim who detailed how the incident occurred and that she was taken to the appellant more than three times. Mr. Makasi stressed that on the material day the victim and the appellant slept together and thus the appellant had sexual intercourse with her and threatened her. The evidence which is reflected at pages 4 – 5 of the typed judgment. In addition, the learned Senior State Attorney argued that it is clear that the evidence on cross – examination was consistent.

Apart from that, M. Makasi argued in the light of the defence of the appellant whereby, the appellant only denied to have sexual intercourse with the victim but said nothing on his being a witch doctor. Besides, he submitted that as to the evidence of the victim was supported by PF3 (exhibit P1) which indicated that the victim was found with bruises and semen on her private parts and PW3 said that the victim was penetrated with a blunt object. Also, the learned Senior State argued that the

appellant confessed and the cautioned statement was admitted in court as an exhibit. Therefore, Mr. Makasi was of the view that the accused's denial did not create reasonable doubt.

Submitting as to the proof of penetration the learned Senior State Attorney was of the view that the evidence of PW1 and the PF3 proved penetration. He went on and argued that it is the law that even if there was no corroboration, still the lower court could convict him provided that the court believed the witness as per section 127 (6) of Evidence Act. Mr. Makasi stressed that the law on proof was well involved and the appellant was rightly sentenced.

As to the third and fourth ground the learned Senior State Attorney argued that that the identification was proper as it was done at night though the victim had eye problems. He further submitted that PW1 was clear in her evidence that it was her first time to go to the appellant for treatment, slept with him and the appellant forced the victim to have sexual intercourse with her and had threatened her. Furthermore, Mr. Makasi submitted that PW2 supported what PW1 had said since it was him who took PW1 to the appellant more than thrice and after the incident, PW1 reported immediately after she had been carnally known. He further insisted that PW1 and PW2 had no interest to serve. In the light of that submission, the learned Senior State Counsel was of the view that the appellant's identification was proper as the victim well knew the appellant beforehand and the conditions were favourable to a correct identification. Hence, he argued that these grounds are baseless.

Arguing the last ground as to the complaint that the evidence of other witnesses was hearsay. Mr. Makasi submitted that the evidence of PW5, PW2 and PW4 were informed by the victim and even if their

evidence was disregarded there was sufficient evidence against the appellant as the best evidence is of the victim and he referred this court to the case of **Selemani Makumba v. R** [2006] T.L.R p 379.To the end of his submission the learned Senior State Attorney insisted that there was proof of penetration and the sentence was deserved. In that view Mr. Makasi argued that the appeal lacks basis hence be dismissed.

In a very short rejoinder, the appellant submitted that his response is clearly found in petition of appeal thus he prayed this court to release him.

In disposing this appeal, I shall begin resolving the issue as to whether the prosecution proved the case against the appellant beyond reasonable doubt. In my endeavour to resolve this issue, I will definitely touch the issue of penetration, identification and hearsay evidence as complained by the appellant in his grounds of appeal. The appellant was charged with statutory rape which does not require the evidence on consent rather on penetration and proof of age of the victim. In view of that, penetration as we are all aware that is either proved by the victim or medical evidence or in corroboration with other evidence of the witnesses of the prosecution. In the present case the evidence of PW1, the victim, is very self-explanatory that she was penetrated by the appellant who took advantage of being her traditional healer or commonly called the witch doctor. The incident of rape in this case is unique since it happened in the process of healing the victim. The prosecution evidence shows that on 25/08/2018 the victim went to the appellant and slept there and all evil deeds occurred to her as it is reflected at page 4 and 5 of the typed proceedings of the trial court. For

the best understanding and interest of justice an excerpt of the same important and is as follows: -

> "On 25/08/2018 I went to the witch doctor and slept there with the with doctor. He told me to take off my garments but I refused. He was touching my breasts and then he forced my garments off and took off my pant. Then he took his penis and inserted it into my vagina. There I felt fall pain but I did not scream as he threatened me "ukipiga kelele uganga wote utakwishia wewe?".

Therefore, in view of the above extract it is clear that the victim was penetrated by the appellant who had admitted her for local medication at the at the house of mzee Mtotela. The victim in her testimony told the trial court that the appellant forcibly inserted his penis into her vagina though she did scream due to threat she got from the appellant. The kind of the threatening words features the work the appellant does. This shows how the victim was credible and reliable as to what she testified in court. In addition, I subscribe to what the learned Senior State Counsel argued that the evidence in exhibit P1 corroborated the evidence of the victim that she was penetrated by the hard object and hymen was still present. Besides, the evidence contained in exhibit P2 is the confession by the appellant which implicate him since he admitted to have made sexual intercourse with the victim thrice at the house of mzee Mtotela. According to evidence featured in the exhibit P2 is apparent clear that appellant slept with the victim on 20/05/20218, 25/06/2018 and 25/08/2018 at the house of mzee Mtotela. Actually, the evidence of PW1, exhibit P1 and P2 when corroborated proves that the victim was penetrated by the appellant who claimed that she is his

fiancée. In that regard, I am persuaded by the argument advanced by the learned State Attorney that the evidence of PW1 was credible enough on its self which would amount on conviction of the appellant even if was not corroborated with other types of evidence adduced by prosecution witnesses as stated under section 127 (6) of the Evidence Act, [Cap.6 R.E. 2019].

As to the complaint of the appellant that there was no proper identification since the victim had sight problem. The gathered evidence by the trial court indeed do not show the extent of eye problem of the victim rather the evidence shows that the victim had a problem with her eyes for so long and was a student at the level of form one. Also, the appellant did not establish this argument in his defence as to whether the victim underwent tradition healing at the premises, he borrowed from mzee Mtotela and the extent of the eye problem the victim had. But as per evidence of PW1 it shows that on the material date was not the first time for the victim to be there with the appellant but previously it shows that she was admitted at the appellant's premisses and was given some medicine but was accompanied by her fellow. And on 25/08/2018 the appellant forced her and made sexual intercourse. Even when the victim was re-examined, she testified that there was electric light and it was 05:00 hours. The evidence of PW2 also shows that he brought the victim to the appellant thrice for eye treatment. In addition, PW2 told the trial court that on 25/08/2018 he sent her daughter (the victim) in the evening hours and he abided to the instructions of the appellant that she was to administered some medicine at night but surprisingly the victim informed PW2 that she was raped by the appellant.

The mere assertion that the victim had eye problem does not connate that she had a sight problem and could not see anything. The evidence of PW1 and PW2 is very clear that before 25/08/2018 the appellant instructed PW2 to bring PW1 for medication at night. As the matter of compliance PW2 handled the victim to the appellant. Therefore, in the process of procuring the medicine to the victim the appellant forced the victim to remove her clothing and underpants and finally inserted his penis in her vagina. The evidence of PW1 shows that in the room in which the incident occurred there was electric light. Besides, the evidence featured in exhibit P2 shows that the appellant admitted to have carnally known the victim on 20/05/2018,25/06/2018 and 25/08/2018.According to what the appellant admitted told that and I quote as follows: -

> "...na mara ya mwisho ni tarehe 25/08/2018 nyumbani hapohapo na nililala na nalifanya naye mapenzi mara mbili.Mara zote hizo uwa naletewa na wazazi wake wote wawili na wanamleta kwa lengo la kuja kulala nae na sio kwa jambo jengine lolote"

In view of the above corroborated evidence of PW1, PW2, exhibit P1 and P2 I am of the settled view that the appellant was properly identified by the victim. Also, in light of the act of the victim reporting the incident to her parents and mentioning the appellant immediate after the commission of the incident assures her credibility and reliability on the evidence, she adduced in the trial court. This position was well elaborated by the Court of Appeal in the case of **Marwa Wangiti & Another v. R** [2002] TLR 39 the Court observed: -

> "The ability of a witness to name a suspect at the earliest

opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".

Apart from that, the appellant complained that the evidence of PW2, PW4 and PW5 was hearsay evidence. I would say that the evidence of PW4 was purely hearsay which needed to be corroborated with another evidence. As to the evidence of PW2 was significance since it shows how the relationship between the victim and the appellant emerged and how he made follow-ups of the incident of rape. Though, it is real that PW2 was informed by the victim about the incident of rape. Therefore, the evidence of PW2 is very important as explained above. Also, as to the evidence of PW5 is so important since it proved how the appellant admitted to have committed the offence. The evidence of PW5 proved what the appellant told him about his involvement in the commission of the offence of rape. In view of that, the appellant's complaint is to the extent explained is baseless and is dismissed.

Before I pen off, upon my perusal I noted one variance between the charge and the evidence. The variance is on the date the incident occurred contained in the charge and the date referred by PW1 and PW2. The charge shows that the incident took place on 26/08.2018 06:00 hours while PW1 and PW2 testified that the incident occurred on 25/08/2018 at 0500 hours. Surely, this is an anomaly which is minor one and does not go to the root of the matter. I am saying so because even the appellant in his defence did not tell the trial court when he was arrested but via exhibit P2 he told PW5 that he was arrested on 26/08/2018 at 1400 hours. Besides, the evidence of PW3 shows that he

received and treated PW1 on 26/08/2018.According to that observation I am of the settled view that the victim was very right to what she testified and inclined with the settled principle that in rape cases the evidence of the victim is the best evidence as it was stated in **Selemani Makumba v. Republic** [2006] TLR 379. Also, I have said that the variance on the date of the commission of the offence is minor and it does not go to the root of the case since it did not affect the defence of the appellant as have stated earlier.

In the event, I hold that there was strong and compelling evidence which proved beyond reasonable doubt that the appellant committed the offence. I find no material to fault the findings of the trial court.

In the result, the appeal fails and is dismissed in its entirety. The conviction and sentence are endorsed.

It is so ordered.

W.P. Dyansobera

Judge

15.12.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 15th day of December, 2021 in the presence of the appellant who has appeared in person and unrepresented and Mr. Lugano Mwasubila, the learned State Attorney for the respondent.

W.P. Dyansobera

Judge