

TANZANIA / JUDGMENT

PETRO MASONG 2222

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 4548 OF 2024 (Originating from Mbulu District
Court of Mbulu in Criminal Case No. 65 of 2023) PETRO
MASONG.....APPELLANT VERSUS
REPUBLIC..... RESPONDENT

JUDGMENT

08th April & 27th May, 2024 D.C. KAMUZORA, J. Petro Masong (the appellant herein) and Elifuraha Zakayo were jointly and together charged before Mbulu District court (the trial court) under section 134 and 35 of the Penal Code [Cap 16 R.E 2022] for the offence of abducting three girls all aged 16 years. The appellant was further charged separately for the offence of rape of one of the abducted girls under section 130(l)(2)(e) and 131(1) of the Penal Code. It was alleged that, on diverse dates between 6th and 9th October, 2023, the appellant and his fellow did unlawfully take the three girls out of custody and protection of their parents against their will. That, they transported i the girls Tlawi area to Mbulu town with view of taking them to Arusha. That, the appellant and the victims spent a night at Mbulu Garden guest house where the appellant took advantage of one of the girls (PW1) by having canal knowledge of her. That, the information leaked before they travelled and people started searching for the girls. It was further alleged by the prosecution side that, upon being arrested and interrogated, the appellant confessed to have communicated and ferried the three girls from Tlawi to Mbulu as they wanted to travel to Arusha. That, he also confessed to having sexual intercourse with one of the girls. In its judgment, the trial court found all accused persons not guilty of abduction but was satisfied that the appellant raped one of the girls hence, convicted and sentenced him to serve thirty years imprisonment. The appellant was aggrieved and he is before this court challenging the trial court's decision. When he was called to argued the appeal, the appellant prayed to adopt the grounds of appeal as he had nothing to add to the grounds of appeal. From his grounds of appeal, the appellant faulted the trial court for basing the conviction on weak prosecution evidence. The following were captured from six grounds of appeal as issues for consideration; one, that, the trial court did not consider that there was contradiction in 2 evidence over the rooms hired and how the appellant was able to rape the victim. Two, that, the prosecution evidence was weak for there was no direct evidence of rape and the ingredient of offence of rape under Sexual Offences Special Provision Act (SOSPA) was not proved as required. That, the doctor's evidence did not show if the victim

was penetrated as there were no bruises found on victim's vagina. Three, that, the evidence by PW1 was cooked and hearsay not proving the offence against the appellant. In her response, Ms. Blandina, learned state attorney supported the conviction and sentence meted against the appellant. She jointly submitted for the 1st and 2nd grounds that, the evidence from PW1, the victim and PW7 is clear proving the offence of rape. That, PW7 was the guest attendant where the offence was committed and she tendered the guests register, exhibit P3 which shows the name of the appellant as one of the guests who spent a night in that guest house. That, although the appellant raised a defence of alibi that he was not at the guest house on the material date of incident, his defence contravened section 194 (4)(5) of the Criminal Procedure Act (CPA) for failure to issue notice on the intention to rely on the defence of alibi. She therefore prayed for this court to find that the trial court was correct to convict the appellant as he was at the scene and was connected to the offence. 3 On the 3rd and 4th grounds the learned State Attorney submitted that the appellant was charged of the offence of rape under section 130 (2)(e) where consent is immaterial because the victim was below 18 years. That, what was necessary was to prove penetration and that was so proved by PW1. She referred the decision in *Selemani Makumba Vs Republic*, Criminal Appeal No 94 of 1999, [2006] TZCA, 96 where it was held that, the true evidence of rape comes from the victim. To cement that point, she also referred the case of *Tungu Ngasa @ Mwashu Tungu Vs. Republic*, Criminal Appeal No 91 of 2019 [2022], TZCA 664 where the court considered section 127 (6) of the Evidence Act, [Cap 6 R.E 2022] in concluding that the evidence of the victim is enough to prove sexual offence where the court is satisfied with such evidence. That, the trial magistrate was satisfied and believed the victim's evidence as proving the offence of rape. On the point that the victim was not found with bruises, the learned state attorney argued that the victim was sent to hospital and examined by PW6, the doctor three days after the incident. That, the doctor clearly explained that nothing could be seen as evidence from the victim in considering the time the victim was sent to hospital. That, despite such fact, the evidence of the victim was enough to prove the case. 4 On the 5th and 6th grounds, the learned state attorney submitted that Sexual Offences Special Provision Act (SOSPA) was repealed in 1998 and its provisions were incorporated in the Penal Code. That, section 130 states that, penetration however slight it may be, can prove the offence of rape. That, the trial magistrate believed the evidence from the victim thus, the argument that the victim's evidence was cooked is unfounded. That, the appellant was supposed to cross examine the victim to establish that the evidence was cooked. That, the proceedings before the lower court show that the appellant did not deny knowing the victim and being with the victim on the material date of incident and did not deny taking the victim to Mbulu garden guest house. That, the record shows that the appellant did not cross examine the victim on the incident of rape. For her, if the evidence was cooked it was expected for the appellant to cross examine the victim on the incident of rape for the court to assess if the evidence was really cooked. She referred the case of *Nyerere Nyague Vs. Republic*, Criminal Appeal No 67 of 2010 [2012] TZCA, 103 where it was held that a party who fails to cross examine a witness on certain fact is considered to have admitted the fact. That, since the appellant did not cross examine the victim on rape, it means that he admitted to penetrating the victim. 5 The learned state attorney further submitted that the appellant's cautioned statement was admitted as exhibit and the appellant confessed to have penetrated the victim. That, in

Nyarere Nyague, it was also stressed that the best evidence in criminal trial is the voluntary confession of the accused person. That, since the appellant confessed, his evidence is strong to prove the case for his statement corroborated the evidence of the victim. In concluding, the learned state attorney prayed for the appeal to be dismissed for want of merit and the appellant continue serving the sentence. I have keenly read the evidence of all witnesses who testified before the trial court, the grounds of appeal, and submissions thereto. I will jointly respond to the grounds of appeal but in considering three issues raised above. The issues are centred on contradiction in evidence, weakness in prosecution evidence and proof of the offence of rape. There is no doubt that the appellant was charged for statutory rape under section 130(1)(2)(e) of the Penal Code for having sexual intercourse with a girl below 18 years of age. Under the above provision, consent to have sexual intercourse is immaterial, what matters is a proof that there was penetration on the victim's vagina. 6 In the matter at hand, the appellant is challenging the evidence on penetration. He questioned the prosecution evidence for not showing if the victim was penetrated. PW1, is a girl allegedly raped and for clear record, I decided to evaluate her evidence. She claimed that she spent a night in one room with the appellant and another girl by the name of AB (name withheld) while the other girl by the name of NY (name withheld) slept alone in another room. She testified; "At the guest house, I, Petro and AB slept in one room while NY slept in a separate room. We found our bags at that particular guest and it is Petro Masong who sent them, and is the one who paid for the guest bill. We ate food right at the guest house, Petro Masong bought 'chips kavu' for us. In the night, Petro Masong undressed my trouser and asked me to undress my skintight and underpants. He also undressed his trouser, jacket and remained with a short and vest. We thereafter had sexual intercourse. He inserted his penis into my vagina, when I told him that I was feeling pain he stopped. The said Petro Masong tried to insert his penis two times but he didn't penetrate. He thereafter left, but later came back to sleep till next morning. At the time Petro Masong was doing all those things, AB was asleep." The above was the sole direct evidence of the victim for the offence of rape. The bolded part of evidence was quoted and referred by the trial court as evidence proving that the appellant tried to penetrate the victim 7 and that is what is referred by the respondent's counsel as evidence which convinced the trial court to find the appellant guilty of the offence of rape. The trial magistrate rated such evidence with the principle in *Seleman Makumba* (supra) that in sexual offences the truth about what happened comes from the victim. He was also convinced that the same was corroborated by the appellant's cautioned statement that was admitted as exhibit in court. The Court of Appeal in *Pascal Yoya @ Maganga Vs. the Republic*, Criminal Appeal No. 248 of 2017, [2021] TZCA 36, while referring the principle in *Selemani Makumba* (supra) agreed to the position that the evidence of the victim is the best evidence in sexual offences. It however held that; "While we agree that the above is the correct position of the law, we hasten to remark that, the same does not mean that such evidence should be taken wholesome, believed and acted upon to convict the accused person without considering other evidence and the circumstances of the case." In the spirit of the above position, I looked into other evidence and the circumstance of this case. The trial magistrate did not assess the relevance of the evidence of another witness PW2, (AB) who was allegedly in the same room with the victim and the appellant on the material date 8 of alleged incident. He did not also assess the environment under which the offence was allegedly

committed. From her testimony, the victim admitted that the appellant tried to penetrate her but did not succeed. She also admitted that she was not alone in the room because AB spent night in the same room with them. She claimed that AB was sleeping at the time the appellant tried to penetrate her and she complained of pain before the appellant decided to stop. There is no evidence of the time the appellant tried to rape the victim, except for the closed story that AB was asleep. In her testimony, AB also admitted to have slept in the same room and in the same bed with the victim and the appellant. The size of the bed was not mentioned if it could accommodate three people. It is strange that while on the same bed she never heard any of the struggle between the victim and the appellant. Such evidence leaves a lot to desire and in no way, anyone can believe that there was even an attempt. In Paschal Yoya (*supra*) there was similar circumstance under which rape was allegedly committed in the same room and the same bed where other two children were sleeping. The Court of Appeal found that there was unexplained evidence on how the offence was committed in such environment. There is yet another point noted from prosecution evidence. The victim did not give evidence if she informed her fellows of what happened to her that night. Since they were three, it was expected that when they woke up, the victim could have at least informed any of his friends of what befallen her. She gave the story upon being interrogated at the police station. In Marwa Wangiti Mwita and another Vs. Republic [2002] TLR 39, the Court stated that: "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." The fact that the victim kept quiet of what happened at night makes this court question the reliability of her story. She cannot be considered as witnesses whose testimony can be solely be reliable within the ambit of the principle in Seleman Makumba (*supra*). The prosecution evidence also shows that the rape occurred on 7th October, 2023 but the victim was sent to hospital for examination on 9th October, 2023. The doctor found the victim's hymen intact and no evidence of vaginal penetration or bruises. Apart from PW1's statement that she was penetrated by the appellant, there was no other eye witness to the incident of rape thus, her credibility is crucial in determining her truthfulness. It is unfortunate that the trial court believed that the victim was slightly penetrated based on her evidence which in my view, creates doubts. The trial court also found that such evidence was corroborated by the appellant's cautioned statement. However, the record shows that the appellant's cautioned statement was repudiated during tendering process thus, could be safely used to corroborate strong evidence from prosecution witnesses. In the matter at hand, there was no such strong evidence which could be corroborated by the appellant's confession because the only evidence of the victim is full of doubt and weak to prove the offence of rape. From the above discussion, I do not agree with the respondent's argument that there was voluntary confession of the accused person because although the cautioned statement was admitted, it was repudiated by the appellant hence, cannot be safely relied upon to conclude that the offence was proved. Apart from that statement, the prosecution side was bound to bring water tight evidence in which, even in the absence of cautioned statement, it could be relied upon in conviction. That is not the case in the matter at hand because, the evidence of the victim is not strong enough to convince this court that the offence was committed. 11 On the argument that the defence of alibi was not properly raised, this court agrees that the defence was not properly raised. However, it is

not the reason for the court to totally disregard it. Irrespective of weakness in defence, the prosecution's burden of proof is not abrogated by such weakness. The duty remains there that the prosecution have to prove the offence beyond reasonable doubts. From the above discussion, it is my conclusion that, prosecution evidence casted doubts which were to be decided in favour of the appellant. The trial court erred in basing on such evidence in convicting the appellant for the offence of rape. I therefore find merit in this appeal and allow it. I hereby quash and set aside the conviction and sentence passed by the trial court. The appellant shall be released from prison as soon as practicable unless, held for any other lawful cause. DATED at MANYARA this 27th Day of May, 2024. D.C. Ka^UZORA JUDGE 12

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