IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 49 OF 2021

(Originating from Criminal Case No.91 of 2020 of the District Court of Sengerema)

JOSEPH S/O BUSUMABU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: .26.05.2021

Date of Judgment: 31.05.2021

A Z. MGEYEKWA, J

The appellant, JOSEPH S/O BUSUMABU appeared before the District Court of Sengerema at Sengerema District within Mwanza Region faced a charge of Rape contrary to sections 130 (1),(2) (e), and 131 (1) of the Penal Code Cap.16 [R.E 2019].

It is alleged that Joseph S/O Busumabu on the 15th day of May, 2020 at 09:00 hrs at Nyalwambu village within Sengerema District in Mwanza Region had carnal knowledge with Magori D/O Wigesa a girl of 13 years old and a pupil of standard three at Nyalwambu Primary School. The appellant, Joseph S/O Busumabu was arraigned before the District Court of Sengerema. After the charge was read over and explained to the appellant, he pleaded not guilty. As a result, the prosecution summoned four witnesses and tendered one exhibit; a PF3 which was admitted at the trial court and marked as exhibits P1. The appellant was found with a case to answer, he subsequently defended himself and denied the charges.

Before I go into the determination of the appeal in earnest, I find it apt to briefly narrate the relevant factual background of the instant appeal; the prosecution witness, Stanlasus Makobelo (PW1), the victim's father complained that while at the Village Executive Officer, her daughter was examined by some women and they proved that she was raped. PW2, the victim narrated how the appellant raped her in exclusion of any other person. She testified that the appellant inserted his male organ in her vagina.

The incident was reported to the Police Station, E 4536, DCP Damian (PW3) was assigned to investigate the case. He interrogated the appellant, who denied to have commit the alleged offence. The victim was examined by the Doctor (PW4), who filled in a PF3, the same was tendered in court, admitted and marked as exhibit P1. PW4's revealed that penetration took place and he saw bruises in the victim's private part.

The appellant (DW1) defended by himself. He denied the charges and claimed that the whole case was fabricated.

At the conclusion of the trial, the trial court was satisfied that the prosecution had proved the charge against the appellant to the required standard and proceeded to convict and sentence the appellant to serve thirty years imprisonment.

The appellant now seeks to impugn the decision of Segerema District Court upon a Petition of Appeal comprised of six grounds of appeal as follows:-

1. *That, both PW1 and PW2 (the parent of the victim and victim) complainant statement were neither tendered in court nor availed to the appellant during hearing, which occasioned a serious miscarriage of*

justice against the appellant to wit right of fair hearing despite, the court's order.

2. *That, the Hon. trial Magistrate erred both in facts and in laws by finding the appellant guilty relying on contradictory testimony of PW2 and PW1 and the same were uncorroborated by the only eye witness who was not summoned to testify.*
3. *That, the Hon. trial magistrate erred in fact and in law by ignoring the appellant's defence that the case was cooked up to avert his claims to deny PW1 access to hire the appellant farm who engineered everything from reporting the alleged incident to the arrest and interrogation.*
4. *That, the Hon. trial magistrate erred in facts and in law by convicting the appellant on the basis of the prosecution evidence that was skewed to favour the respondent that the same was devoid of proper analysis and evaluation altogether.*
5. *That, the Hon. trial Magistrate failed to cast doubt on the PW1 and PW2 stories on the incident occurred as the respondent failed to prove their case beyond reasonable doubt.*
6. *That the Hon. trial Magistrate erred in law to convict the appellant basing conviction on alleged age of minority of the victim which was never legally proved.*

The hearing was conducted via audio teleconference whereas the appellant and Ms. Sabina, learned State Attorney represented the respondent Republic. Both parties were remotely present.

The appellant adopted his grounds of appeal and chose for the learned State Attorney to reply to his grounds of appeal but reserved his right to rejoin if the need would arise.

Mr. Sabina began her submission by expressing her stance at the very outset that she supported the verdicts of the trial court. The learned State Attorney consolidated the fifth and sixth grounds. The first, second, third, and fourth grounds were argued separately.

The learned State Attorney started his onslaught by attacking the first ground of appeal that the complainant's statement was neither tendered in court nor availed to the appellant during hearing. Ms. Sabina argued that this ground is baseless because the appellant was in a position to request the said statement. She added that the trial court decided the case based on evidence on record and the appellant had an opportunity to cross examine the prosecution witnesses. She added that for that reason the appellant's rights were not violated.

In respond to ground two, that the trial court erred in facts and law to convict the appellant based on the contradictory testimony of PW2 and PW1 which were uncorroborated by an eye witness. Ms. Sabina stated that there was no any contradiction between PW1 and PW2. Ms. Sabina fortified her submission by referring this court to pages 10 -15 of the trial court proceedings. She went on to state that if there is any contradiction, the same cannot vitiate the charge against the appellant. To bolster her submission she cited the case of **Elias Bariki v R**, Criminal Appeal No. 321 of 2016 (unreported), the Court of Appeal of Tanzania held that minor contradictions are likely to occur. She urged this court to find that minor contradictions do not go to the root of the case.

With respect to the third ground, Ms. Sabina admitted that the trial Magistrate in his judgment did not analyse the defence case which was contrary to the requirement stated under section 312 (1) of the Civil Procedure Act, Cap.20 [R.E 2019] which requires the trial Magistrate to state reasons for his decision based on the appellant's testimony. The learned State Attorney urged this court to step into the shoes of the trial court and evaluate the defence case.

Arguing in respect of the complaint touching on the prosecution evidence on record, the learned State Attorney stated that in rape cases the best

evidence is that of the victim herself. In support of her assertion, Ms. Sabina cited the case of **Selemani Makumba v Republic** [2006] TLR 379. Elaborating, she stated that PW2 testified that it was the appellant who raped her by inserting his penis in her vagina. Ms. Sabina added that the victim knew the appellant since he was visiting her relative one, Eva. To support her assertion, she referred this court to page 13 of the trial court proceedings. The learned State Attorney continued to state that the prosecution witnesses; PW1, PW2, PW3, and PW4 proved the case beyond reasonable doubt. She added that PW3 tendered exhibit P1. Ms. Sabina referred this court to pages 16 to 27 of the trial court proceedings. Insisting, she stated that PW1, PW2, PW3, and PW4 were credible and reliable witnesses.

The subject of the six ground regarding the age of the victim not being proved. On this ground, Ms. Sabina submitted that the age of the victim was proved. The learned State Attorney asserts that the charge sheet reveals that the victim was 13 years old. PW1, PW2, and PW4 testified to the effect that the victim was 12 years old. It was Ms. Sabina's view that the age of the victim proved to be under 18 years old. On this argument, the learned State Attorney relied on the Court of Appeal of Tanzania decision in **Kazimili Samwel v R**, Criminal Appeal No. 570 of 2016. She added that as long as

PW2 promised to state the truth the same suffice to prove that she was a minor.

Having submitted and argued as above, the learned State Attorney strenuously argued against the appeal contending that the prosecution case was strong and unshaken and the appellant's conviction was well founded. She implored this court to uphold the trial court decision and dismiss the appeal in its entirety.

In a short rejoinder, the appellant had not much to say, he reiterated his submission in chief.

I have given due consideration to the arguments by both sides on the appeal, I am now in the position to determine the grounds of appeal before me. I should state at the outset that in the course of determining this appeal, I will be guided by the canon of the criminal cases that, the onus of proof lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, the issue is *whether the prosecution case was proved beyond a reasonable doubt.*

In my determination, I will consolidate the fourth and fifth grounds because they are intertwined. Adverting to the first, second, and third grounds of appeal I will determine them one after another.

On the first ground, the appellant complained that PW1 and PW2 statements were neither tendered in court nor availed to him during hearing, he claimed that same occasioned to a serious miscarriage of justice against him. I am aware that the Magistrate was required to cause a copy of the information or statement to a person who has been named as a witness as stipulated under section 9 (3) of the Criminal Procedure Act, Cap. 20 [R.E 2019]. However, the appellant was also in position to request for a copy of prosecution witnesses' statements before or during the hearing of the case. In my view I do not believe that the appellant was prejudiced for not been furnished with the said copies. Taking to account that he had an opportunity to cross examine the prosecution witnesses and he also entered a defence. Therefore this ground is demerit.

Next for consideration is the second ground which is a complaint to the effect that the apparent contradictions in the testimonies of PW1 and PW2 and the same were uncorroborated by an eyewitness who was not summoned to testify. Minor discrepancies and contradictions do not jeopardize the credibility of witnesses but major discrepancies and contradictions do jeopardize the credibility of witnesses considerably, this was held by the Court of Appeal of Tanzania in the case of **Dickson Elia Nshamba Shapwata & Another v Republic**, Criminal Appeal No. 92 of

2007 (unreported) and in **Lusungu Duwe v Republic**, Criminal Appeal No. 76 of 2014 (Unreported).

It is trite law that, where there are contradictions in evidence the court is duty-bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major ones that go to the root of the matter as observed in the case of **Mohamed Said Matula v Republic** [1995] TLR 3, the Court held *inter alia* thus:-

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them if possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

I will subject the facts in the instant case to the foregoing sound principles succinctly enunciated in the above-cited cases in considering the issue of contradictions in the prosecution evidence to find out whether there were major contradictions that affected the case at hand.

In the present case, the record reveals that PW1 testified that on 15th May, 2020, he took her daughter to the hamlet Chairperson accompanied by Nice and Mama Maamudu. He went on to state that while at the Village

Executive Office, Msome some women examined PW1' private part, and proved that she was raped. On her part, PW2 testified that their neighbour one, Tabu Melagila (teenager) examined her in her private part and proved that she was raped. PW2 went on to state that her father took her to the hospital and then to the Police Station.

PW1 asserts that they went to the Village Executive Office and PW2 did not mention the involved of the Village Executive Officer. However, during re-examination, she testified that when the appellant was arrested she was at the Village Executive Office. Another contradiction is when PW2 testified that some women examined the victim while PW1 said that Tabu is the one who examined her. I have also considered that PW2 was a teenager and at the same time a victim, therefore, she might have left out some information. In my considered view, the contradictions are minor the same does not go to the root of the case and does not diminish the credibility of PW1 and PW2 evidence. Therefore, this ground disregarded.

On the sixth ground, the appellant complained that the trial court convicted the appellant while the victim's age was not legally been proved. I have revisted section 130 (1), (2), (e) of the Penal Code Cap.20 [R.E 2019], one of the ingredients of rape offense ought to be proved beyond the shadow

of doubts is the age of the victim of rape. Section 130 (2) (e) of the Penal Code provides as follows:

> *"130 (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: (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. (Emphasis is mine)."*

The issue of proof of age was well-articulated in the case of **Solomoni Mazala v The Republic**, Criminal Appeal No. 136 of 2012, Court of Appeal of Tanzania Dodoma (unreported) held that:-

> *" The cited provision of the law makes it mandatory that before a conviction is grounded in terms of Section 130 (2) (e), above, there must be tangible proof that the age of the victim was under eighteen years at the time of the commission of the alleged offence. Once the age of the victim is established to be below 18 years, it negates consent of the victim, if any."*

Based on the above provision of law and the cited authority, I will scrutinize the facts on record to prove that at the material date, she was under eighteen years of age or not. In the instant case, without a fleck of

doubt, it is evident that the victim's father (PW1) was able to prove the age of the victim the same is reflected on page 11 of the typed court proceedings. PW1, who is the victim's father stated that the victim was 12 years old. It is settled principle that a parent of the victim is in a better position to known the age of her/his child as it was observed in the case of **Salu Sosoma v R Criminal** Appeal No.31 of 2006, the Court of Appeal of Tanzania observed that:-

"... a parent is better positioned to know the age of his child."

Applying the above authority, the issue of age is not in dispute, the victim's father was in a position to prove her daughter's age and he proved that she was 12 years old.

I have noted that the charge sheet stated that the victim was 13 years old. There are Court of Appeal of Tanzania decisions which state that the citation in a charge sheet relating to the age of an accused is not evidence and even the citation of the victim before giving evidence is no evidence. See the case of ***Andrea Francis v Republic***, Criminal Appeal No. 173 of 2014. However, in a recent case of **Kazimili Samwel** (supra) [TANZLII 26th August, 2020], the Court of Appeal of Tanzania went further to discuss the situation where there was no proof of age and hold that:-

"... the age mentioned in a charge sheet and ***the introduction*** *of the victim in the witness box suffice to prove that the appellant was of the age of tender year."* [Emphasis added].

Applying the above authority to the instant appeal, it is clear that apart from PW1 evidence that her daughter was 12 years old, the particulars mentioned in the charge sheet and victim's evidence shows that she was a pupil of standard three at Nyalwambu Primary School, the same suffice to prove that PW1 was of the age of tender age. Therefore this ground is demerit.

With respect to the fourth and fifth grounds, the contention is that the prosecution failed to prove that the trial Magistrate erred in law and facts by convicting the appellant based on weak prosecution evidence. The appellant further complaint that the prosecution based on PW1 and PW2 evidence as a result they failed to prove their case beyond reasonable doubt. I have perused the court record and found that the victim (PW2) testified to the effect that it was the appellant in exclusion any other person who raped her. It is trite law that in the "offence of rape there must be unshakeable evidence of penetration. PW2 was able to narrate how penetration took place by saying that the appellant inserted his penis in her vagina and she feels pain. The law is settled that the best evidence the victim. In the case of **Selemani**

Makumba v R, 2006) TLR 379, the Court of Appeal of Tanzania considered whether or not the complainant had been raped by the appellant and observed that: -

> *" True evidence of rape has to come from the victim, of an adult, that there was penetration and no consent, and* ***in the case of any other woman where consent is irrelevant, that there was penetration****..." [Emphasis added].*

The court records reveal that the victim (PW1) evidence was unshakeable Therefore, I am satisfied that penetration was proved to the hilt. The evidence was watertight to convict the appellant for the offence charged.

Nonetheless, PW2 evidence was corroborated by PW1, PW3 and PW4 evidence. PW1 testified that her daughter was examined in her private part and one Magoli Wagesa and the Doctor (PW4) verified that PW2 was raped. PW3, the Police Officer also testified to the effect that PW2 informed him that Joseph Busumabu raped her. PW4, the medical Doctor testified that on 15th May, 2020, he examined the victim and verified that there was penetration and bruises in the victim's private part and she lost her hymen. PW4 filled in the PF3 forms and the same was tendered at the trial court and admitted as exhibit P1. After its admission, the same was read over. The prosecution complied with the procedure of admitting a document in court.

With the aforesaid findings, I am in position to hold that there was no need for the prosecution to summon Tabu and Magoli Wigesa to testify at the trial court. I am saying so because the prosecution witnesses' evidence suffice to prove the prosecution case to the hilt. PW1 was a credible and reliable witness. Therefore, there is no doubt that the prosecution proved its case beyond reasonable doubt. These grounds are disregarded.

With regard to the third ground, that the defence case was not considered. Upon perusing the court record and having revisited the District Court judgment, I am in accord with the State Attorney that the trial court did not analyse the defence evidence in his judgment. Thus, the appellant (original accused) was deprived of having his defence properly considered by the trial Magistrate. In the case of **Yusuph Amani v Republic**, Criminal Appeal No. 255 of 2015 the Court of Appeal of Tanzania held that:-

> *" It is the position of the law generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting in miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction."*

In the instant case, the learned Magistrate summarized the evidence of both prosecution and defence case. However, in evaluating the same he did

not at all touch on the defence case. His evaluation was based entirely on what was stated by the prosecution witnesses. When it comes to case analysis to summarize the evidence of both sides is one thing and evaluating the evidence is another thing. The Court of Appeal of Tanzania quoted with approval the decision in the case of **Leonard Mwanashoka v Republic**, Criminal Appeal No. 226 of 2014 (unreported) where it was stated that:-

> *" It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation, and another thing not to consider the evidence at all in the evaluation and analysis."*

I am alive of the law that being the first appellate court, I am allowed to re-evaluate, re-analyze, consider the defence case and treat the evidence as a fresh and reach into just conclusion. As it was stated in the case of **Armand Gueh v Republic**, Criminal Appeal No. 242 of 2010, the Court of Appeal of Tanzania (unreported). The trial Magistrate erred in law for not considering the defence evidence on record and reach a fair decision. It is for the foregoing reasons, I find that for the trial Magistrate to rely on the

prosecution's evidence alone was a serious misdirection that rendered the conviction entered unsafe and untenable.

In that regard, in accordance with section 312 of the Criminal Procedure Act, Cap. 20 [R.E 2021] I proceed to analyse the defence as follows:-

The defendant (DW1) dissociated himself with the accusations levelled against him. In his defence at the trial he claimed that the whole case was fabricated. He had a different version of the story. He claimed that he had a land dispute with the victim's father. In his view, the victim's father and the victim fabricated the case. The defendant defence is not supported by any other evidence to prove that there was a land dispute between him and the victim's father. The appellant is totally silent on where he was on 15th day of May, 2020 when the victim was raped.

All in all, I am satisfied that the entire defence evidence did not manage to introduce any reasonable doubt going to affect the cogency of PW2's evidence. To the contrary as demonstrated herein earlier, PW2 was a credible witness. In the light of the foregoing discussion, I am satisfied that the defendant acts were sufficiently established to justify the finding that he indeed raped the victim.

Having found and held above that all the grounds of appeal are without merit, it follows that the case was proved to the required standard; beyond reasonable doubt. The above said and done, I find the entire appeal without any scintilla of merit and dismiss it entirely.

Order accordingly.

DATED at Mwanza this 31st May, 2021.

A.Z.MGEYEKWA

JUDGE

31.05.2021

Judgment delivered on 31st May, 2021 in the presence of Ms. Sabina, learned Senior State Attorney for the respondent and the appellant.

A.Z.MGEYEKWA

JUDGE

31.05.2021

Right to appeal fully explained.